



(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised
TDM 25/08/2026

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JS 725/18

In the matter between:

**ASSOCIATION OF MINEWORKERS AND
CONSTRUCTION UNION (AMCU) obo KHOZA
AND 130 OTHERS**

Applicant

and

JUST COAL (PTY) LTD

First Respondent

BURBANK TRADING 656 (PTY) LTD

Second Respondent

Heard: 14 August 2026

Delivered: 25 August 2026

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be 25 August 2026.

JUDGMENT

PRINSLOO, J

Background facts

- [1] Around March 2018 the First Respondent (Just Coal) was issued with a notice in terms of section 54 of the Mine Health and Safety Act¹, in terms of which Just Coal was ordered to cease all operations immediately until the Department of Mineral Resources and Energy was satisfied that all safety requirements were satisfied and that the mine was safe to conduct operations. Operations at Just Coal were suspended until 5 June 2018.
- [2] On 18 April 2018, a bundle of documents was delivered to the Applicant's (AMCU) offices, comprising 98 notices of dismissal in respect of certain of the individual applicants and 33 notices of non-renewal of contracts.
- [3] The 98 notices of dismissal stated that the individual applicants were dismissed for gross misconduct, namely for participating in an illegal strike and for committing acts of misconduct during the said strike action.
- [4] The 33 notices of non-renewal recorded that:
- ‘You are informed that Burbank Trading 656 (Pty) Ltd hereby notifies you that the contract of employment that you signed with the company has come to an end on 31 March 2018. Based on the employer's needs and other related reasons, we regret to inform you that the company will not be renewing your employment contract on 1st April 2018 and you are not expected to report for duty from the date of this notice.’
- [5] On 24 April 2018 AMCU, on behalf of the individual applicants, referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The dispute was referred in respect of Just Coal as the employer.
- [6] On 18 May 2018, the CCMA issued a certificate of outcome indicating that the unfair dismissal relating to misconduct, as between AMCU, on behalf of Khoza and 130 others, and Just Coal, remained unresolved and could be referred to arbitration. The dispute was subsequently referred to arbitration, but at the arbitration the CCMA's jurisdiction was called into question. On 10 July 2018 the presiding commissioner issued a jurisdictional ruling in which she found

¹ Act 29 of 1996.

that the CCMA lacked jurisdiction and that the matter should be referred to the Labour Court for adjudication.

- [7] On 28 September 2018 AMCU filed a statement of claim and sought relief against Just Coal. The late filing of the statement of claim was condoned on 20 May 2022.
- [8] On 12 July 2022, Just Coal delivered a statement of response. Just Coal pleaded that it was not the employer of all the individual applicants, as the 33 individuals whose contracts of employment were not renewed were in fact employed by the Second Respondent (Burbank). As there was no conciliation referral against Burbank, the 33 individuals were not properly before the Court, and the Court lacks jurisdiction to adjudicate their claim.
- [9] On 26 January 2023 AMCU, on behalf of the 33 individuals, referred a dispute to the CCMA against Burbank. The referral was accompanied by an application for condonation, as the dispute was referred late. AMCU explained that it was only when Just Coal filed a statement of response that it was alleged for the first time that it was not the employer of the 33 individuals, but that they were instead employed by Burbank.
- [10] In AMCU's condonation application, it was explained that the dispute referred on behalf of the 33 individuals was an unfair dismissal dispute in terms of section 186(2) of the Labour Relations Act (LRA)², or alternatively, one in terms of section 198B of the LRA.
- [11] On 14 February 2023 Burbank opposed the condonation application filed with the CCMA and submitted that condonation should be refused *inter alia* because AMCU had no prospects of success. Burbank stated that the claim has become prescribed because more than three years had elapsed since the 33 individuals' contracts of employment terminated by effluxion of time. Furthermore, at the time of their termination of service, the 33 individuals were notified that their employment contracts with the company ended on 31 March 2018.

² Act 66 of 1995, as amended.

- [12] On 16 February 2023, AMCU withdrew the referral, which was made on behalf of the 33 individuals to the CCMA.
- [13] On 24 May 2024 AMCU filed an application in terms of Rule 22 of the Rules of the Labour Court³ to join Burbank as the second respondent in case number JS 725/18. Burbank opposed the application.

Joinder: general principles

- [14] Rule 22 of the previous Rules of this Court provided for joinder as follows:

- ‘(1) The court may join any number of persons, whether jointly, jointly and severally, separately, or in the alternative, as parties in proceedings, if the right to relief depends on the determination of substantially the same question of law or facts.
- (2) (a) The court may, of its own motion or on application and on notice to every other party, make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of the proceedings.
- (b) When making an order in terms of paragraph (a), the court may give such directions as to the further procedure in the proceedings as it deems fit, and may make an order as to costs.’

- [15] It is trite that for parties to be joined to particular proceedings, they must have a direct and substantial legal interest in the matter such as to make them necessary parties to the proceedings. Only parties that would be directly affected by the court’s order, or where the order cannot be sustained or carried into effect without prejudicing such a party, are necessary parties to the proceedings.

³ Repealed and replaced with the Rules Regulating the Conduct of the Proceedings of the Labour Court. Published 3 May 2024 (GN 50608). Effective 17 July 2024.

[16] The Court may join parties where the right to relief depends on the determination of substantially the same question of law or facts.

[17] In regard to joinder, the Constitutional Court held in *Snyders and Others v De Jager*⁴ that:

‘A person has a direct and substantial interest in an order that is sought in proceedings if the order would directly affect such a person’s rights or interests. In that case the person should be joined in the proceedings. If the person is not joined in circumstances in which his or her rights or interests will be prejudicially affected by the ultimate judgment that may result from the proceedings, then that will mean that a judgment affecting that person’s rights or interests has been given without affording that person an opportunity to be heard. That goes against one of the most fundamental principles of our legal system. That is that, as a general rule, no court may make an order against anyone without giving that person the opportunity to be heard.’

[18] *In casu*, it is common cause that the 98 individual applicants were dismissed on 10 April 2018 and that the 33 individuals were issued with a notice of non-renewal of contract, dated 29 March 2018. All the aforesaid termination notices were issued on a Joe Singh Group (Pty) Ltd letterhead, the holding company of which Just Coal and Burbank are part, and they were delivered to the offices of AMCU on 18 April 2018. It is also common cause that Just Coal and Burbank have a close commercial relationship.

[19] Generally, for convenience, and in the interests of expedition and the administration of justice, the joinder of a necessary party is permitted. However, considering the facts and circumstances of this case, the determination of the joinder application is not merely dependent on what is convenient.

AMCU's joinder application

[20] Central to the determination of any dispute before this Court is the issue of jurisdiction.

⁴ (2017 (5) BCLR 604 (CC) at para 9.

- [21] In accordance with the provisions of section 191(1) of the LRA, a dismissed employee must refer a dispute to the CCMA or relevant bargaining council within prescribed time frames. Upon a certificate of outcome having been issued, in accordance with the provisions of section 191(5)(b)(iii) of the LRA, the dispute may then be referred to this Court for adjudication. Under the provisions of section 157(4) of the LRA, this Court '*may refuse to determine any dispute*' if the Court is not satisfied '*that an attempt has been made to resolve the dispute through conciliation.*'
- [22] *In casu* it is common cause that when the unfair dismissal dispute was referred to the CCMA, Burbank was not a party to that dispute, it was not a party to the conciliation proceedings and, by necessary implication, the jurisdictional requirement under section 191(1)(a) of the LRA was not satisfied.
- [23] AMCU's case, however, is that although Burbank was not cited as a party and was not a party to the conciliation, it does not preclude its joinder. Reliance is placed on the operation of section 200B of the LRA and AMCU seeks to hold both respondents liable for the unfair dismissal of the 33 individuals.
- [24] The gist of the Applicant's case is that Burbank should be joined as a respondent in the main proceedings, as it has a direct and substantial interest in the subject matter of the proceedings and, in the main, that it was not necessary to refer a dispute against Burbank to conciliation in the first place.
- [25] This proposition calls for a proper consideration of the legal position.
- [26] Section 200B of the LRA provides that:
- '(1) For the purposes of *this Act* and any other *employment law*, "employer" includes one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of their doing so is or has been to directly or indirectly defeat the purposes of *this Act* or any other *employment law*.
- (2) If more than one person is held to be the employer of an *employee* in terms of subsection (1), those persons are jointly and severally liable for any failure to comply with the obligations of the employer in terms of *this Act* or any other *employment law*.'

[27] In *Masoga and Another v Pick n Pay Retailers (Pty) Ltd and Others*⁵ the LAC dealt with the scope and the effect of section 200B of the LRA. The LAC found that section 200B does not postulate a general test for determining whether a particular person or entity is the true employer of a particular employee. It was held that:

‘The effect of section 200B, while crucial, is merely to fix or extend the liability that would ordinarily be that of the employer, as per the traditional tests, to another or others, who carry on as an associated or related activity or business by or through an employer. They are regarded as employers for the purposes of liability. But it is only if they are in an associated or related business with the employer which is intended to defeat, or has the effect of defeating, the purposes of the LRA or any other employment law, either directly or indirectly, that they would be treated as the employer. The purpose for this is clear from section 200B(2). They are regarded or treated as such for the purposes of liability – they are held jointly and severally liable for a failure to comply with the obligations of an employer in terms of the LRA or any other employment law. In other words, section 200B(1) defines “employer” for a very specific purpose and that purpose is found in section 200B(1) read with section 200B(2). The section cannot be utilised generally for making persons or entities the employer(s) of others.

That section 200B was not intended as a general test is further borne out by the wording of that section. It, effectively, contains a deeming provision. While it contemplates that a single person may be the employer, it does not provide criteria for determining what makes that one person the employer, other than for the purposes of liability in a situation where that one person is party to a simulated arrangement or sham, the true intent, or effect of which is to defeat the purposes of the LRA, or any other employment law; and there is a failure by that person to comply with the obligations of an employer (i.e. in terms of those provisions). Any other person or entity which is complicit in this subterfuge is treated as an employer for the purposes of liability. She, he, or it is jointly and severally liable with anyone else held to be an employer, in terms of the section, and in respect of the employer’s obligations under the LRA and /or those laws.

⁵ (2019) 40 ILJ 2707 (LAC) at paras 47-50.

The rationale for section 200B is set out in the memorandum of objects that accompanied the 2014 LRA Amendment Bill. The purpose of the section is said to be: “to prevent simulated arrangements or corporate structures that are intended to defeat the purposes of the LRA or any other employment law, and to provide for joint and several liability on the part of persons found to be employers under this section for any failures to comply with an employer’s obligations under the LRA or any employment law. This is particularly important in the context of subcontracting and outsourcing arrangements if these arrangements are subterfuges to disguise the identity of the true owner.”

Because of its breadth, section 200B could be used to scrutinise any conceivable relationship or arrangement for purposes of liability, provided that a case for such scrutiny has been made out, and it is done fairly. It is one of a suite of provisions whereby the Legislator seeks to stop complex contractual and other schemes used by true employers to avoid their obligations under the Labour legislation. It is conceivable that it may not be easy to determine who the true employer, or owner, is for the purposes of liability arising from a failure to comply with the obligations in terms of the LRA, or other employment laws. This may be due to the complexity of the stratagems, or devices used by those wanting to avoid their obligations.’

[28] It is evident from the LAC’s dicta that section 200B is not a standalone test to label someone or any entity ‘employer’. It must be established and proved that, first, separate entities carry on related or interconnected businesses or activities; second, that the structure or operation is a sham or simulated reality; and third, that the primary intent or effect is to defeat the purposes of the LRA or any other employment law. Evidence must be presented to show that the corporate structure, subcontracting, outsourcing, or whatever other deal is a disguised sham designed to avoid legal obligations and to defeat protection afforded to employees under the LRA or other employment laws.

[29] Section 200B does not find application where there is no proof that the business operation or structure is a sham, and where it is in fact no more than a close association, ordinary group-company relationship between businesses or entities or a genuine, *bona fide* commercial arrangement.

[30] *In casu* the Applicant’s case is that Just Coal and Burbank should be held liable for the unfair dismissal of the 33 individuals, by operation of section

200B, because there is a close commercial relationship between them. The Applicant mentioned specific facts to show that there is indeed a close commercial relationship, *inter alia* that they are both part of the Joe Singh Group of companies, they share the same registered address, postal address and email address and that the employees reported to Just Coal for service.

- [31] Burbank did not dispute that there is a close commercial relationship with Just Coal, but disputed that they share the same principal place of business or email address. They are both part of the Joe Singh Group of companies, but they are separate entities and businesses, operating in different business spheres. Burbank explained that the 33 individuals signed fixed-term contracts with Burbank but performed duties at Just Coal's premises as part of the services Burbank provided to Just Coal. The fact that Burbank is part of the Joe Singh Group of companies does not presuppose that the 33 individuals were employed by the same entities.
- [32] AMCU has to show, *prima facie* at least, not only that Just Coal and Burbank carry on related or interconnected businesses or activities, but also that the structure or operation is a sham with the primary intent or effect of defeating the purposes of the LRA.
- [33] The close business relationship is undisputed. In the application for joinder AMCU merely stated that it would seek to demonstrate, at the trial, that Just Coal carried on an associated or related activity or business by or through Burbank and *vice versa*, and that the intent or effect has been to directly or indirectly defeat the purpose of the LRA and Basic Conditions of Employment Act (BCEA).⁶
- [34] This is disputed by Burbank, whose version is that the 33 individuals were employed by Burbank and some of the signed fixed-term contracts were attached. Burbank's version is that it rendered services to the greater Joe Singh Group of companies and as such, provided labour services at Just Coal, which is not in breach of the LRA or the BCEA.
- [35] In my view there are several difficulties with the Applicant's joinder application.

⁶ Act 75 of 1997.

- [36] First, the requirements of section 200B have not been met. The Applicant has not presented any evidence to show that the close business relationship between Just Coal and Burbank was indeed a sham or simulation with the primary intent or effect to defeat the purposes of the LRA or the BCEA. Evidence must be presented to show that the corporate relationship is a disguised sham designed to circumvent the LRA or the BCEA and to escape legal liabilities.
- [37] Burbank presented fixed term contracts signed by certain of the 33 individual employees. It is evident from the contracts that they were entered into between an individual and Burbank Trading as the employer, with a termination date of 31 March 2018.
- [38] There was not a single credible, substantiated averment that Just Coal and Burbank engaged in subterfuge when Burbank employed the 33 individuals on fixed-term contracts and they rendered services at Just Coal as part of a service rendered by Burbank, or that it was a sham to avoid legal obligations toward the employees, or that it had that effect.
- [39] It is trite that there is no general, free-floating discretion available to a court to disregard a corporate entity's separate juristic personality. This was confirmed in *Cape Pacific Limited v Lubner Controlling Investments (Pty) Ltd and others*⁷ (citing *dicta* from *Dadoo Ltd and others v Krugersdorp Municipal Council* 1920 AD 530) where it was held that:
- 'Whatever the position, it is probably fair to say that a court has no general discretion simply to disregard a company's separate legal personality whenever it considers it just to do so.'
- [40] It was also held that where fraud, dishonesty or other improper conduct are found to be present, other considerations will come into play. The need to preserve the separate corporate identity would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil.

⁷ 1995 (4) SA 790 (AD) at para 29.

- [41] The existence or genuineness of the written, signed employment contracts entered into between the individuals and Burbank was not disputed, and there is no evidence presented to doubt the veracity of the explanation tendered by Burbank or to find that the fixed-term contracts had the effect, or were intended to be utilised by the employer to avoid its obligations under the LRA, or other labour laws.
- [42] Second, the issue of referral for conciliation remains.
- [43] In *National Union of Metalworkers of SA on behalf of members and others v Bell Equipment Co SA (Pty) Ltd*⁸ and *National Union of Metalworkers of SA v Intervolve (Pty) Ltd and others*⁹ (*Intervolve*), it was confirmed that referral for conciliation is indispensable and that it is a precondition to the Labour Court's jurisdiction over unfair dismissal disputes. The Constitutional Court considered the issue of conciliation in *Intervolve* and held that:
- ‘Section 191(5) stipulates one of two preconditions before the dispute can be referred to the Labour Court for adjudication: there must be a certificate of non-resolution, or 30 days must have passed. If neither condition is fulfilled, the statute provides no avenue through which the employee may bring the dispute to the Labour Court for adjudication. As Zondo J shows in his judgment, with which I concur, this requirement has been deeply rooted in South African labour law history for nearly a century. We should not tamper with it now.’
- [44] The Applicant, however, argued that there are two key judgments which are dispositive of the fact that Burbank was not a party to conciliation and which support its position that it does not preclude Burbank's joinder. The first is *Temba Big Save CC v Kunyuza and others (Temba Big Save CC)*,¹⁰ wherein the LAC considered a situation in which the Labour Court had permitted the joinder of Temba Big Save CC as a respondent in an unfair dismissal dispute, despite the fact that Temba Big Save CC had not been a party to the dispute referred to conciliation. The LAC referred to *Intervolve* and framed the issue as follows:

⁸ (2011) 32 ILJ 382 (LC).

⁹ (2015) 36 ILJ 363 (CC) at para 32.

¹⁰ (2016) 37 ILJ 2633 (LAC) at para 29.

'Having said that a referral for conciliation is indispensable and a precondition to Commissioner's or the Labour Court's jurisdiction over unfair dismissal disputes means that if a party is not part of the conciliation proceedings it cannot be joined at a later stage. The question that arises however is whether the general principle is applicable in a case where a dismissed employee, having referred his/her employer to conciliation for an unfair dismissal dispute, later discovers that his/her employer has changed because the business in which they were employed has changed hands.'

- [45] The LAC referred to its earlier judgment in *Intervalve* (where reference had been made to *Mokoena*,¹¹ a Labour Court judgment which permitted the joinder of a party not cited at conciliation, where that party was jointly and severally liable in terms of section 197(9) of the LRA), and held as follows:

'This quote illustrates that, in the event of a party invoking the provision of section 197 of the LRA, there is no need to refer the old and the new employer to conciliation. Any one of the parties will suffice because in terms of the section, the new employer takes the place of the old employer in all material respects, including but not limited to contracts of employment and any pending litigations. Hence, where the old employer was taken to conciliation there is no need to also take the new employer because one is not dealing with two employers but only one. Clearly, the appellant wrongly interpreted the *Intervalve* judgments.

In this matter, the employees allege that the appellant has taken over the business of the former employer and for that reason they sought to join the appellant. Since the appellant is alleged to have stepped into the shoes of the old employer it may be joined to the proceedings. I therefore agree with the court a quo's conclusion that in the context of an alleged s197 transfer, a successful applicant would have to hold the transferee accountable because not only has that transferee an interest in the outcome of the dispute, it may be held liable to satisfy the relief, if any, that is granted against the old employer.¹²

- [46] The Applicant's argument is that this matter is analogous to that in *Temba Big Save CC*. It was submitted that a 'new employer' in terms of section 197 (which may be held liable jointly and severally with the 'old employer' in terms

¹¹ *Mokoena and Others v Motor Component Industry (Pty) Ltd and Others* (2005) 26 ILJ 277 (LC).

¹² Id fn 10 at paras 31 and 32.

of section 197(9)) need not be cited at the conciliation stage, and is liable to be joined as a respondent at Labour Court stage without having been cited as a party to conciliation. Similarly, an employer which may be held jointly and severally liable in terms of section 200B(2) of the LRA, need not be cited at the conciliation stage, and is liable to be joined as a respondent at Labour Court stage.

- [47] The second judgment is *Association of Mineworkers and Construction Union and others v Prestprops 1315 CC (Prestprops)*,¹³ which the Applicant submitted is on all fours with this case. The Applicant referred to the following *dicta* of the Court:

‘The applicants sought to rely on Themba Big Save (supra) and argued that as they got to know after they had filed their statement of claim that Augusta was their employer as envisaged in section 200 B of the LRA there was no need to refer their dispute against Augusta to conciliation. It was argued on behalf of Augusta that the need to refer the dispute could not be dispensed with. It was further argued that the applicants’ reliance on Themba Big Save was misplaced as in the matter at hand the business did not change hands.

I am not convinced that the decision in Themba Big Save (supra) can only be relied on in cases where a business has changed hands. I am of the view that it acknowledges that there are exceptions to the general rule laid down in Intervale (supra). The purpose of section 200B of the LRA is to protect the right of employees when there is more than one employer who can be held responsible for the violation their rights.’

- [48] In *Association of Mineworkers and Construction Union and Others v Buffalo Coal Dundee (Pty) Ltd and Another*¹⁴ the court stated the purpose of section 200B as follows:

‘Section 200B was enacted to prevent collusion by two or more persons involved in an associated or related business by or through an employer in order to undermine the provisions of the Act or any employment law.’

- [49] The argument on behalf of Augusta of the absence of collusion does not exclude Augusta from being an employer as envisaged in section 200B. Augusta pleaded to

¹³ Unreported judgment under case no: JS 809/16 delivered on 29 March 2018 at paras 6 and 7.

¹⁴ (2016) 37 ILJ 2035 (LAC) at para 26.

the applicant's statement of claim and explained its role in the relationship between the applicants' and the respondents as that of an employer within the meaning of section 200B. The applicants could not reasonably have known that the second respondent owned Augusta and that since 2014 the second respondent was incorporated into Augusta. The respondent also pleaded that the second respondent ought to have been Augusta.

- [50] The applicants got to know after they had filed their statement of claim that Augusta should have been the second respondent and given the nature of the relationship between the respondents and Augusta, the applicants were not required to refer their unfair dismissal dispute against Augusta to conciliation before this application for joinder was launched.
- [51] The Applicant submitted that this construction accords with the underlying purpose of section 200B of the LRA, which is to avoid the purposes of labour legislation being defeated through the use of complex corporate structures.
- [52] The 33 individuals had no insight into the complex inner workings of the respondents' corporate structure and could not have known these details, which were only uncovered when their attorneys investigated the issue as a result of Just Coal's response to the statement of claim.
- [53] In my view the authorities referred to *supra* do not assist the Applicant.
- [54] In *Temba Big Save CC*, it was reiterated that a referral for conciliation is indispensable and a precondition to a commissioner's or the Labour Court's jurisdiction over unfair dismissal disputes, which means that if a party is not part of the conciliation proceedings it cannot be joined at a later stage.¹⁵
- [55] *Temba Big Save CC* specifically addressed a matter in which the provisions of section 197 of the LRA were invoked. The LAC confirmed that there was no need to refer the old and new employers to conciliation, as either party would suffice, since the new employer takes the place of the old. In effect, one is not dealing with two employers, but only one.
- [56] The effect of section 197 is that the old employer is substituted by the new employer from the outset, and this happens by operation of law.

¹⁵ At para 29; See also *Id* fn 9 at paras 40 and 108.

[57] *In casu* the Applicant's case is not premised on the provisions of section 197 of the LRA, nor is there any allegation that a transfer of business took place and that the provisions of section 197 were triggered. *Temba Big Save CC* is certainly not an authority permitting joinder on the facts before this Court.

[58] In *Prestprops* the applicant applied for joinder and also placed reliance on section 200 B of the LRA. The Court held that:

‘I am not convinced that the decision in *Themba Big Save* (supra) can only be relied on in cases where a business has changed hands. I am of the view that it acknowledges that there are exceptions to the general rule laid down in *Intervolve* (supra). The purpose of section 200B of the LRA is to protect the right of employees when there is more than one employer who can be held responsible for the violation their rights.’¹⁶

[59] Augusta was joined to the proceedings after the Court found that the applicants could not reasonably have known that the second respondent owned Augusta and that since 2014 the second respondent was incorporated into Augusta. The respondent also pleaded that the second respondent ought to have been Augusta. The applicants learned after they had filed their statement of claim that August should have been the second respondent, and, given the nature of the relationship between the respondents and Augusta, the Court held that the applicants were not required to refer their unfair dismissal dispute against Augusta to conciliation before the application for joinder was launched.

[60] *Prestprops* too does not assist the Applicant *in casu*. It is evident that the facts are distinguishable from the facts before this Court. *In casu*, Burbank was not incorporated into Just Coal; there is no pleaded case by any respondent to the effect that Burbank ought to have been a respondent; and there is no relationship between Just Coal and Burbank which renders a referral for conciliation in respect of Burbank unnecessary.

[61] I do not understand *Prestprops* to constitute blanket permission to join parties as employers where there was no conciliation, save for when a section 197 transfer took place or where a party is regarded as an employer on the

¹⁶ Id fn 12 at para 7.

grounds envisaged in section 200B of the LRA. To the extent that *Prestprops* purports to allow joinder without conciliation outside the limited scope referred to, I cannot agree with it, and I am not inclined to follow it.

[62] In the statement of case, filed in September 2028, the Applicant pleaded that 33 notices of non-renewal of contract were issued, in which it was stated that the employees were informed by Burbank that the contracts of employment they had signed with Burbank, would come to an end on 31 March 2018. It cannot be that this would not have raised awareness, or at least suspicion, that Burbank might have been the employer of the 33 individuals. It was stated clearly that the reason for the dismissal of the 33 individuals was different from the 98 other employees, who were dismissed for strike-related conduct.

[63] The statement of response indeed prompted AMCU to refer an unfair dismissal dispute to the CCMA, with an application for condonation, against Burbank. Unfortunately for the 33 individuals, the referral was withdrawn and the dispute was never conciliated.

[64] In my view, this is fatal to this application for joinder. I have to emphasise that this Court has no discretion to condone non-compliance with the statutory conciliation requirement.

[65] In *Dawn Limited and 2 Others v P Molefe and Others*,¹⁷ the Court had occasion to deal with the principles relating to joinder, also confirming that separate corporate *personae* must be respected. It was confirmed that:

‘Because of this jurisdictional pre-requisite as articulated in *Intervalve*, it is simply not competent to join further parties to the CCMA proceedings after the referral to conciliation, where the referral has also not been directly and actually made against those parties as well. In short, the pre-requisite of a prior referral in terms of section 191(1) against an actual and individual employer, which referral is also served directly on that employer, cannot be circumvented by a subsequent joinder.’

[66] This is a matter in which AMCU should have referred a dispute against Burbank for conciliation, but failed to pursue such referral, and the statutory requirement of conciliation cannot be circumvented by a subsequent joinder

¹⁷ Unreported judgment under case no: JR2114/202 delivered on 4 March 2024 at para 45.

application. This is to use the joinder process for a purpose it was not intended for.

- [67] The last main difficulty is that in the joinder application the Applicant stated that the dismissal of the 33 individuals was unfair *inter alia* for reasons related to sections 186(1) and 198B(5) of the LRA.
- [68] The Applicant's statement that the dismissal of the 33 individuals was unfair for reasons related to section 186(1) of the LRA is problematic. Section 186(1) of the LRA does no more than provide a definition of the meaning of dismissal. It does not confer any rights or protection on employees. Section 186(1)(b) extends the definition of dismissal to include the non-renewal of a fixed-term contract or the non-retention of an employee when there was a reasonable expectation that the employer would do so. The application of section 186(1)(b) means no more than that an employee whose contract has not been renewed may assert the existence of a dismissal where he or she reasonably harboured an expectation of renewal or indefinite employment.
- [69] To the extent that the 33 individuals contend that their dismissals were unfair, this Court is empowered to adjudicate unfair dismissal claims only in those circumstances contemplated by section 191(5)(b), and then only after the dispute has been referred to the relevant statutory body for conciliation.
- [70] Any dispute under section 198B must be referred to the CCMA or a bargaining council for conciliation, and, if it is not resolved, to arbitration. This is clear from the provisions of section 198D. It is not a dispute this Court has jurisdiction to adjudicate.
- [71] Burbank's case is that it was indeed the employer of the 33 individuals and that their fixed-term contracts ended by effluxion of time. The existence of dismissal is in dispute, the nature of the disputes alluded to fall outside of the Court's jurisdiction, and Burbank has no interest in proceedings concerning the dismissal of employees for reasons related to unprotected strike action.
- [72] Considering all the aforesaid, the Applicant failed to make out a case for joinder.
- [73] In the premises I make the following order:

Order

1. The application for joinder is dismissed;
2. There is no order as to costs

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For The Applicant:	Advocate S Saunders
Instructed by:	Larry Dave Inc Attorneys
For the Second Respondent:	Advocate W Bekker SC
Instructed by:	Ranamane Attorneys