IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NUMBER: JR963/2005

In the matter between:

HANS MERENSKY HOLDINGS (PTY) LIMITED

t/a NORTHERN TIMBERS APPLICANT

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION FIRST RESPONDENT

CCMA COMMISSIONER M M RAMOTSHELA SECOND RESPONDENT

BUILDING CONSTRUCTION AND ALLIED

WORKERS UNION THIRD RESPONDENT

JUDGMENT

NEL, A J:

1. This is an application in terms of section 158(1)(g) of the Labour Relations Act ("the LRA") where the applicant, in the first instance, seeks the setting aside of the ruling by the second respondent that the third respondent had properly referred the dismissal dispute to the first respondent.

2. Secondly, the applicant seeks the setting aside of the condonation granted by the second respondent of the late referral of a dismissal

dispute by the third respondent.

3. Thirdly, I am asked to set aside the certificate of outcome of dispute referred to conciliation issued by the second respondent in this matter.

4.It is perhaps necessary right at the outset to record the relevant rules applicable herein, namely Rules 4 and 10 of the CCMA rules:

> "4. **Who must sign documents**
>
> (1) A document that a party must sign in terms of the Act or these rules may be signed by the party or by a person entitled in terms of the Act or these rules to represent that party in the proceedings.
>
> (2) If proceedings are jointly instituted or opposed by more than one employee, documents may be signed by an employee who is mandated by the other employees to sign documents. A list in writing, of the employees who have mandated the employee to sign on their behalf must be attached to the referral document."

> "10. **How to refer a dispute to the Commission for Conciliation**
>
> (1) A party must refer a dispute to the Commission for conciliation by delivering a completed LRA form 7.11 ('the referral document').
>
> (2) The referring party must -
>
> (a) sign the referral document in accordance with rule 4;

(b) attach to the referral document written proof, in accordance with rule 6, that the referral document was served on the other parties to the dispute;

(c) if the referral document is filed out of time, attach an application for condonation in accordance with rule 9.

(3) The Commission must refuse to accept the referral document until subrule (2) has been complied with."

3. On 25 November 2004, the applicant dismissed 68 employees. On 9 December 2004, within the prescribed time period, the third respondent referred a dispute on behalf of its members to the CCMA about the alleged unfair dismissal of their members.

4. The first complaint the applicant levels at this referral is that it does not comply with Rule 4(2) of the CCMA rules, in that it was not signed by all the individual employees. I believe this contention is misconceived. I am of the view that Rule 4(2) regulates a situation where a group of individual employees refer a dispute to the CCMA. In short, where a union purports to act on behalf of its members, as is the case herein, Rule 4(1) of the CCMA, in my view, applies. The union is entitled in terms Section 200 of the Labour Relations Act to act on behalf of its members. It follows that a union is a "party ..... entitled in terms of the Act or these rules to represent that party in the proceedings" and it is therefor in terms of Rule 4(1) entitled to sign the referral on behalf of all its members who it may represent. This is what happened herein. This complaint of the applicant is accordingly misdirected.

5. The second attack by the applicant is in my view founded on the wrong premise on which the applicant attacked the referral in

the first place [namely that it did not comply with Rule 4(2)].

6. The complaint by the applicant is that the referral did not mention:

"(i) The names of the members on whose behalf the first respondent was acting;

(ii) The number of members on whose behalf it was acting;

10 (iii) The employment and other particulars required in Part B of LRA form 7.11."

7. Having regard to the requirements of Rules 4 and 10, as well as the particulars required in Part B of LRA form 7.11, I do not believe that the absence of the afore-mentioned information renders the referral fatally defective. On LRA Form 7.11, in the column next to where the details, and more particularly the name of the referring party, is to be filled in, one sees that it says *"If there is more than one employee to the dispute and the referring party is not a trade union, then each employee must supply their personal details and signature on a separate page which must be attached to this form."* That complaint of the applicant is accordingly without substance. Nowhere does one see from the LRA Form 7.11 that the number of employees on whose behalf the union was acting had to be stated. Whilst it may be prudent, even necessary, to provide these details at some stage of the dispute, I do not believe there is any statutory requirement to be gleaned from the form itself, or from any other statutory source, to my knowledge, that compels a union, when referring a dispute to the CCMA, to provide such numbers and names of the employees it purports to represent. Lastly, with reference to the complaint that the employment and other

particulars required in Part B of LRA form 7.11 were not properly provided, this is the highwatermark of the applicant's case. Whilst these details are clearly required to be filled in, if they are not, or are filled in inadequately, I do not believe that in and by itself renders the whole referral a nullity. I am of the view that as long as a dispute referral complies reasonable with the requirements as they appear on the LRA Form 7.11 itself, the CCMA is entitled to accept that there has been a proper referral. The CCMA is also in my view entitled to allow the correction and amplification or the curing of defects which it may believe exist in a particular dispute referral. All these complaints of the applicant in my view falls to be rejected as there was in my opinion substantial compliance by the third respondent on the one hand in referring the dispute and the first and second respondent did not in my view perpetrate any reviewable irregularity in accepting the dispute referral as having been properly made.

8. The applicant then attacks the Commissioner's conduct on the basis that it alleges that Rule 10(2)(a) of the CCMA rules requires that a referring party must sign the referral document (which it did), but the applicant complains further that the form must show the mandate by the members of the third respondent. That contention, I believe, is again misconceived by reason of the applicant's starting point, namely that there was not compliance with Rule 4(2). This attack is also misconceived and to be rejected.

9. The applicant, represented by an official of the employer

organisation, argued before me that the third respondent ought to have provided the second respondent with proof of the membership of the individual employees whom it purported to be acting for. I do not believe that this is what is required of the second respondent at the dispute referral or conciliation stage of a dispute resolution process. If the employer party raises the point at any time after a union has referred a dispute that it disputes the union's right to do so, on whatever lawful grounds it may do so, then that may have to be dealt with at the appropriate time, but that mere allegation does not in and by itself render the dispute referral itself irregular. Far more will be necessary to successfully attack the legality of a dispute referral form than what the applicant herein has so far complained about before me.

10. The first respondent did request the third respondent to furnish the CCMA with a list of employees. This is as I said within the first respondent's domain to seek rectification or curing of defects it believes may exist in the referral LRA Form 7.11. In doing this, the third respondent filed a fresh referral coupled with a condonation application. In my view a fresh referral was not necessary. All that the third respondent was required to do by the first respondent was to furnish a list of employees. The first respondent did not require, or request, that the third respondent should file a fresh referral of the dispute on behalf of its members. The second respondent correctly accordingly granted condonation, to the extent that it was even necessary to do so. Likewise the second respondent in my view correctly held that the failure by the third respondent to attach a list of

members did not render the referral form incurably defective, requiring a fresh referral form. This ground of review should also accordingly fail.

11. This Court has repeatedly indicated that, as a court of equity, substance rather than form should be considered. I believe the approach of the applicant herein has been highly technical. Mr Botha, appearing for the applicant, conceded before me that, if I were persuaded that the initial referral was defective in one or more respects, which as it turned out I am not, all these defects which the applicant relied on in its application to review and set aside the referral, are capable of being easily cured, either by the third respondent providing proof of the membership of the individual employees it purports to represent, or alternatively, it is open to the individual employees to simply refer the dispute in their individual names.

12. The third respondent did not serve or file a notice of its intention to oppose the application. However, on the matter being called, Mr Van der Merwe advised me that he was instructed to represent the third respondent. He conceded that the third respondent in effect was not properly before me, but when the applicant's representative indicated that he had no objections to the third respondent's argument being heard by me, the parties fully and properly ventilated their arguments before me.

13. Had the third respondent properly brought itself before this Court by having filed a notice of intention to oppose, the applicant would obviously have been favoured in the opposing

papers with the points of argument presented to me in court by the third respondent and may have been persuaded not to pursue this application. The irregular manner in which the third respondent came before me only has the result that I am disinclined to award the third respondent costs in light of the ruling which I intend making.

14. In the result I am unpersuaded that any reviewable irregularity or misconduct was perpetrated by either the first or the second respondent and I accordingly dismiss the application, but make no order as to costs.

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NEL, A J