THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case no: C 700 / 16

In the matter between:

REVON ADAMS **Applicant**

and

NATIONAL BARGAINING COUNCIL FOR

THE ROAD FRIEGHT AND LOGISTICS

INDUSTRY **First Respondent**

ANGELA ANDREWS N.O. **Second Respondent**

ABIES TRANSPORT SERVICES CC **Third Respondent**

Heard: **4 September 2018**

Delivered: **7 September 2018**

Summary: Bargaining Council arbitration proceedings – review of arbitration ruling – jurisdictional ruling – test for review considered – right or wrong approach to be adopted

Referral documents – signature of referral documents – entitlement of attorney to sign referrals – principles considered

Bargaining Council Rules – rules relating to right to represent – rules applied – attorney has no right to represent in dismissal proceedings relating to misconduct / incapacity – no right to sign referral document

Referral document – consequence of defective referral – constitutes irregular process – referral null and void

Bargaining Council arbitration proceedings – consequence of earlier conciliation proceedings considered – such prior proceedings no obstacle to raising defective referral as preliminary objection at arbitration

Review application – proper case not made out for review – application dismissed

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JUDGMENT

SNYMAN, AJ

Introduction

[1] The application in this instance illustrates the importance of properly following prescribed procedures when pursuing a dismissal dispute in terms of the dispute resolution processes under the Labour Relations Act ('LRA') [1]. The fact is that these processes have been simplified, and compliance with it is not hard. It has to follow that non-compliance in this context is not simply something that can be glossed over, and consequences must follow. I will address in this judgment what these consequences are.

[2] At stake in this matter is a review application brought by the applicant to review and set aside a jurisdictional ruling issued by the second respondent in her capacity as appointed arbitrator of the National Bargaining Council for the Road Freight and Logistics Industry ('NBCRFLI'), the first respondent. The application has been brought in terms of Section 145 as read with Section 158(1)(g) of the LRA. In terms of this jurisdictional ruling, the second respondent determined that the NBCRFLI had no jurisdiction to entertain the

[1] Act 66 of 1995.

matter, because of the applicant's defective dispute referrals when pursuing his unfair dismissal dispute to the NBCRFLI.

[3] Arbitration proceedings were convened before the second respondent on 24 August 2016. At the commencement of the proceedings, the third respondent's representative raised a jurisdictional objection, which be dealt with further below. The second respondent then handed down a jurisdictional ruling on 5 September 2016, in which the third respondent's jurisdictional objection was upheld. The review application was filed on 17 October 2016, which is within the 6(six) weeks' time limit as contemplated by Section 145(1) of the LRA. The review application is accordingly properly before this Court for determination. I will now proceed to consider the applicant's review application, starting with the setting out of the relevant factual background.

The relevant background

[4] The issue at hand in this instance has nothing to do with the merits of the dismissal of the applicant. It only concerns the manner in which the dispute was prosecuted by the applicant to and in the NBCRFLI. The factual matrix in this respect is simple, and uncontested.

[5] The applicant was dismissed on 10 May 2016 for misconduct in the form of abscontion. The applicant referred an unfair dismissal dispute based on misconduct to the NBCRFLI on 2 June 2016. The dispute referral document was signed by one Henry Rossouw ('Rossouw'), the attorney for the applicant.

[6] The dispute was set down for conciliation on 4 July 2016. There is no indication in the record whether the third respondent attended at the conciliation. In the founding affidavit the applicant only stated that he personally attended at the conciliation. In the end, the dispute remained unresolved, and a certificate of failure to settle was issued on that date.

[7] The dispute was then referred to arbitration on 22 July 2016. The referral document specifically refers to the dispute being one of an unfair dismissal based on misconduct. It is again signed by Rossouw, as attorney for the applicant.

[8] As touched on above, arbitration proceedings were convened on 24 August 2016. The applicant attended in person, without his attorney. The third respondent was represented by one Casper Geustyn ('Geustyn'), an employers' organization official. From the outset, Guestyn raised a preliminary objection. He contended that the NBCRFLI did not have jurisdiction to entertain the matter, as the referral documents were signed by someone else other than the employee, who did not have authority to represent the employee. As such, he contended, the referral was fatally defective. The applicant made no submissions to the second respondent in this regard, and only made submissions on the merits of his dismissal dispute.

[9] The second respondent, in coming to grips with the matter, *mero motu* considered that it was possible for legal representation to be permitted at arbitration, in respect of disputes relating to unfair dismissal for misconduct. The second respondent found that considering that the applicant came to arbitration without a representative and did not even apply to be legally represented, this indicated that he adopted the view that legal representation was not necessary. The second respondent also had some regard to the merits of the matter, and determined that it was simple and straightforward matter that would not necessitate the granting of legal representation.

[10] The second respondent then concluded that the referral documents signed by Rossouw were irregular, and as a result, the NBCRFLI did not have jurisdiction. These findings led to the current review application. Significantly however, the second respondent did not finally dispose of the matter, but held that:

> 'The employee is at liberty to refer the matter again, in a procedurally complaint manner, to the Bargaining Council and to argue for condonation should he wish to proceed further with the dispute.'

[11] I will now proceed to decide this review application by first setting out the test for review.

<u>The test for review</u>

[12] This review concerns, as said, a matter of jurisdiction. This being the case, and on review, the standard review test as enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[2] would not apply. As was said in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[3]:

> '…. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise. Also, if the CCMA made a decision that exceeds its powers in the sense that it is ultra vires its powers, the reasonableness or otherwise of its decision cannot arise.'

[13] When deciding a review application where the issue concerns the jurisdiction of the bargaining council to determine the dispute, the proper review test, where the existence of the requisite jurisdictional fact is objectively justiciable in court, would be whether the determination of the arbitrator was right or wrong. The Court had the opportunity to deal with this kind of review test in *Trio Glass t/a The Glass Group v Molapo NO and Others*[4] and said:

> 'The Labour Court thus, in what can be labelled a 'jurisdictional' review of CCMA proceedings, is in fact entitled, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court is not limited only to the accepted test of review, but can in fact determine the issue de novo in order to decide whether the determination by the commissioner is right or wrong.'

[14] The Court in *SA Local Government Bargaining Council v Ally NO and Another*[5] dealt with a case where an arbitrator decided that a bargaining council did not have jurisdiction to enforce costs owing to it under the provisions of its main collective agreement, which is a similar kind of jurisdictional ruling to the

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[2] (2007) 28 *ILJ* 2405 (CC).
[3] (2008) 29 *ILJ* 964 (LAC) at para 101.
[4] (2013) 34 *ILJ* 2662 (LC) at para 22. See also *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others* (2008) 29 *ILJ* 2218 (LAC) at paras 39 – 40; *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others* (2012) 33 *ILJ* 363 (LC) at para 23; *Hickman v Tsatsimpe NO and Others* (2012) 33 *ILJ* 1179 (LC) at para 10; *Protect a Partner (Pty) Ltd v Machaba-Abiodun and Others* (2013) 34 *ILJ* 392 (LC) at paras 5–6; *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others* (2012) 33 *ILJ* 1171 (LC) at para 14; *Stars Away International Airlines (Pty) Ltd t/a Stars Away Aviation v Thee NO and Others* (2013) 34 *ILJ* 1272 (LC) at para 21.
[5] (2016) 37 ILJ 223 (LC).

matter *in casu*, The Court then held, with reference to the general jurisdictional review test discussed above, as follows:[6]

> 'There is no reason why this same approach cannot be applied to bargaining council arbitrations, and where the issue on review concerns the jurisdiction of a bargaining council arbitrator to have entertained a particular dispute. I will therefore decide whether the determination of the first respondent was right or wrong, by way of a *de novo* consideration of the justiciable facts on record, being the applicable review test.'

[15] As against the above principles and test, I will now turn to deciding the merits of the applicant's review application.

Analysis

[16] Dispute resolution in the NBCRFLI is governed by a set of Rules, which Rules to a large extent virtually mirrors the CCMA Rules. The current version of the NBCRFLI Rules applicable to the current dispute was promulgated on 22 January 2015, and appeared to coincide with the amendment to the CCMA Rules at about the same time. These Rules specifically prescribe how disputes must be referred to the NBCRFLI.

[17] Rule 6.1 prescribes who must sign documents that are served and filed in terms of the Rules, and provides:

> 'A document that a party must sign in terms of the Act or these rules must 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.'

[18] The documents at stake in this instance are the referrals of the applicant's unfair dismissal dispute to the NBCRFLI for conciliation, as well as the referral for arbitration. The Rules specifically prescribe who must sign these documents. In Rule 12.1, which deals with referrals for conciliation, it is provided as follows:

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[6] Id at para 28.

> 'A party must refer a dispute to the Council for conciliation by delivering a properly completed Form 7:11 ("the referral document").'

Rule 12.2 then in turn provides:

> 'The referring party must - (a) sign the referral document in accordance with rule 6 …'

[19] The Rules similarly deal with referrals to arbitration. Rule 20.1 provides:

> 'A party may request the Council to arbitrate a dispute by delivering a document in the form of Form LRA7:13 ("the referral document").'

Rule 20.2 provides:

> 'The referring party must - (a) sign the referral document in accordance with rule 6 …'

[20] Finally, the Rules also deal with persons entitled to represent parties in conciliation and arbitration proceedings, in Rule 27. Firstly, and dealing with conciliation proceedings, Rule 27.1(a) provides as follows:

> 'In conciliation proceedings, a party to the dispute may appear in person or be represented only by- … (ii) any member, office bearer or official of that party's registered trade union …'

Turning then to arbitration proceedings, this is dealt with in Rule 27.1(b), which Rule provides:

> 'Subject to paragraph (c), in any arbitration proceedings a party to the dispute may appear in person or be represented only by - (i) a legal practitioner; or (ii) an individual entitled to represent the party at conciliation proceedings in terms of sub-rule (1)(a).'

Rule 27(1)(c) in turn reads:

> 'If the dispute being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, a party is not entitled to be represented by a legal practitioner in the proceedings unless - … (ii) the Commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering - (a) the nature of the questions of law raised by the dispute ; (b) the complexity of the dispute; (c) the public interest; and (d) the comparative ability of the opposing parties or their representatives to deal with the dispute.'

[21] What is clear from the above dispensation is that the applicant, as an employee party to the dispute resolution process, is not entitled to be represented by an attorney in any conciliation proceedings. Then, and considering that this is a dismissal dispute based on alleged misconduct, the applicant as employee party is not entitled to represented by an attorney in arbitration proceedings, unless it is applied for by the employee and the arbitrator exercises a discretion in terms of Rule 27.1(c) to allow it. In *Commission for Conciliation, Mediation and Arbitration and Others v Law Society of the Northern Provinces (Incorporated as the Law Society of the Transvaal)*[7] the Court, in dealing with Rule 25 of the CCMA Rules, which as I have said is virtually identical to the NBCRFLI Rules, said the following:[8]

> 'The effect of these provisions is that in conciliation proceedings legal representation is not allowed at all. The reason is obvious: conciliation is not coercive. In arbitration proceedings, however, legal representation is permitted on an unqualified basis except where the dispute is concerned with the fairness of dismissals for misconduct or incapacity. But legal representation (as opposed to representation by other representatives such as trade union officials) is not excluded in the latter cases altogether and it is permitted in the circumstances set out in rule 25(1)(c)(1) and (2) …'

[7] (2013) 34 ILJ 2779 (SCA).
[8] Id at para 4.

[22] It must also be remembered that the NBCRFLI dispute resolution centre is an administrative tribunal, and as such, as a matter of general principle, there is simply no right to legal representation in such a forum.[9]

[23] It follows that, applying the above considerations, and conducting a textual, logical and common sense reading of the NBCRFLI Rules,[10] the applicant's attorney, Rossouw, was not 'entitled' to represent the applicant in either of the conciliation and arbitration proceedings.

[24] The dictionary definition of 'entitled' is 'having the right or permission to do something', or the 'enforceable right to claim something'.[11] Synonyms for the word in this context are 'qualified' or 'authorized'. Considering these definitions, the applicant does not have the enforceable right to be represented by Rossouw, who in turn would not be authorized to represent the applicant. Simply put, Rossouw is not entitled to represent the applicant, and as such cannot sign the dispute referral forms.

[25] In terms of Rule 6.1, the dispute referral forms for conciliation and arbitration 'must' be signed by a party entitled to represent the applicant, or the applicant personally. It is prescriptive in this regard. It must also be considered that these referrals are not just matters of insignificant process, and in fact have the same consequence as pleadings in other litigation.[12] In *Food and Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd*[13] the Court held:

> '… The scheme of the LRA makes a referral to conciliation a mandatory first step in the process that may ultimately lead to adjudication. While conciliation may not be adjudicative in nature, it is a necessary and mandatory part of the dispute-resolution process that the LRA creates and it occurs within the operations of the CCMA, which is an independent and impartial forum. It is not

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[9] See *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others* (2002) 23 ILJ 1531 (SCA) para 5; *MEC: Department of Finance, Economic Affairs and Tourism, Northern Province v Mahumani* (2004) 25 *ILJ* 2311 (SCA) at para 11; *Law Society of the Northern Provinces* (*supra*) at para 19; *Zondo and Another v Uthukela District Municipality and Another* (2015) 36 ILJ 502 (LC) at para 27.

[10] See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para 12.

[11] See Collins English Dictionary; Merriam-Webster Dictionary; Vocabulary.com Dictionary.

[12] See *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 30.

[13] (2018) 39 ILJ 1213 (CC) at para 199.

> possible to activate the adjudicative features of the CCMA without first resorting to conciliation. It is also so inextricably linked to the arbitration process that the LRA envisages, as part of a continuum as well as in terms of the connectivity in the subject-matter of the two processes. I believe it does an injustice to the architecture of the LRA and the CCMA to see and characterise conciliation as anything other than the commencement of legal proceedings in an independent and impartial forum. For those reasons, I would conclude on this aspect that the referral of disputes to the CCMA for conciliation constitutes the service of a process commencing legal proceedings.'

Clearly, this *dictum* would equally apply to referrals in dispute resolution proceedings conducted in bargaining councils, such as the NBCRFLI.

[26] Because of the important legal status of these kind of referral documents, proper compliance with the Rules regulating what constitutes a valid referral, is important. The failure to comply with such Rules would make the referral irregular, and following on, the referral would be invalid. In dealing with the issue of the service of a referral,[14] which is also one of the pre-requisites of a valid referral in the very same Rule prescribing the signature of the referral, the Court in *National Union of Metalworkers of SA v Intervalve (Pty) Ltd and Others*[15] said:

> '… The focal question narrows to the purpose of the service requirement in s 191(3). The objective cannot be just to let the employer know that a dispute, related to the dispute that affects it, is being conciliated. It must be to put each employer party individually on notice that it may be liable to legal consequences if the dispute involving it is not effectively conciliated. Those consequences may be severe. They may include enterprise-threatening implications: trial proceedings, reinstatement orders, backpay and costs orders. So the notice must be directly targeted.
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> This emerges from the provision, which explicitly names the beneficiary of the service requirement: 'the employer'. This makes clear that a referral citing one employer does not embrace another, uncited, employer. The fact that the uncited employer has informal notice of the referral cannot make a difference.

[14] The CCMA and NBCRFLI Rules simply reflect what is contained in Section 191(3) of the LRA in this regard.
[15] (2015) 36 ILJ 363 (CC) at paras 52 – 53.

> The objectives of service are both substantial and formal. Formal service puts the recipient on notice that it is liable to the consequences of enmeshment in the ensuing legal process. This demands the directness of an arrow. One cannot receive notice of liability to legal process through oblique or informal acquaintance with it.'

[27] In my view, a proper and authorized signature on a referral document must be subject to the same kind of considerations as set out in *Intervalve* relating to service of that very same document. It is significant that it is found in the same part of the Rules dealing with service as well. The actual signature by the party making the referral signifies and signals the authorization of the bringing of the process, and then the participation in the proceedings by such referring party. It is like a proper mandate to sue. There can be no doubt that signatures on such kind of documents have a critical role to play. In *Librapac CC v Moletsane NO and Others*[16] the Court held:

> 'The applicant has submitted further that, of those 16, only one has signed the referral and that he was therefore the only employee who was properly part of the conciliation and properly part of the subsequent arbitration. There is considerable force in that submission. To have certainty about parties to a dispute resolution mechanism, which begins with conciliation and which may potentially end in the Labour Appeal Court, is a necessary part of the process. It does not impose an overly technical or legalistic obstacle. All that is required is a clear schedule containing each person's full names, his or her address, and a signature to record that person's wish to be party to the steps being taken. …'

[28] The signature of a referral document by any person not entitled to do so, is just the same as no signature at all. Such a defective signature, which is for all intents and purposes invalid, has no legal consequence or significance. It is trite that unsigned pleadings are invalid.[17]

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[16] (1998) 19 ILJ 1159 (LC) at para 55. See also *Candy and Others v Coca Cola Fortune (Pty) Ltd* (2015) 36 ILJ 677 (LC) at paras 33 – 35.

[17] Compare *Chasen v Ritter* 1992 (4) SA 323 (SE); *Padayachee v Naidu and Others* [2014] JOL 31575 (KZD); *ABSA Bank Ltd NO (in its capacity as the Trustee for the Fountainhead Property Trust) v Barinor New Business Venture (Pty) Ltd* [2011] JOL 27800 (WCC).

[29] This Court has dealt with situations where referral documents have been signed by labour consultants, who would clearly not be entitled to represent parties before the CCMA and bargaining councils. In *National Union of Metalworkers of SA v Commission for Conciliation, Mediation and Arbitration and Others*[18], the Court held as follows:

> '… In the case of arbitration the same right to be represented applies. In addition, a legal practitioner, as defined, may represent the employee. See s 138(4) of the LRA. However, there is no right permitting a legal practitioner to appear before the CCMA when it arbitrates dismissals arising from conduct and capacity. But on application the commissioner may permit a legal practitioner to represent an employee. See s 140(1) of the LRA.
>
> It is clear that a labour consultant, who has no right of audience before a CCMA commissioner, may not sign form LRA7.11 nor form LRA7.13 on behalf of a dismissed employee.'

[30] In *Vac Air Technology (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others*[19] the Court dealt with a situation where a labour consultant signed pleadings in the Labour Court, and said:

> '…. papers before the Labour Court signed by a person who does not fall within the permitted category are null and void, and proceedings relating thereto are also null and void.'

The Court concluded:[20]

> 'A labour consultant is not permitted to represent parties in terms of the Act. It follows that any affidavits he deposed to or any correspondence he wrote, in the capacity of a labour consultant representing a party, are null and void. The proceedings are also null and void.'

[31] Even though the Court in *Vac Air* was dealing with pleadings under the Labour Court Rules, there is in my view no reason why these same consequences

[18] (2000) 21 ILJ 1634 (LC) at paras 19 – 20. The Court was dealing with the former Sections 138(4) and 140(1) of the LRA, the predecessors of the current Rule 25 of the CCMA Rules.
[19] (2006) 27 ILJ 1733 (LC) at para 14.
[20] Id at para 16.

should not equally apply to invalidly signed CCMA or bargaining council referral documents, thus rendering the same null and void. This was recognized in *Danone Southern Africa (Pty) Ltd and Another v Commission for Conciliation, Mediation and Arbitration and Others*[21], where the Court held:

> '… Representation in the context of Rule 25 does not just include appearing at the CCMA. It includes all facets of representation, which would include the bringing of legal process such as the filing of applications. A defect in this regard renders the proceedings so brought, to be nothing else but an irregular step.'

The Court then specifically referred to the judgment in *Vac Air* and concluded:[22]

> '… Whilst the judgment in *Vac Air* dealt with the Labour Court Rules, I can see no reason why these same considerations should not equally apply to the CCMA Rules.'

[32] *In casu*, it was not hard for the applicant to have simply complied with the Rules. There was no indication or plea on his part that he had some or other difficulty or obstacle causing him to be unable to sign the referral forms. There was no feasible reason for his attorney signing the forms instead of him. All he needed to do was just append his signature to the referral forms. His failure to do so rendered the referrals to conciliation and arbitration invalid, and thus null and void. The consequence of this failure was aptly described in *Oosthuizen v Imperial Logistics CC and Others*[23] as follows:

> 'In a line of decisions starting with *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others*, this court (and following it the CCMA) has found that the failure by the referring party personally to sign a referral to conciliation constitutes a material defect which deprives the CCMA (and a bargaining council) of the jurisdiction to hear the dispute. The personal signature of a referral form is thus a jurisdictional fact which must be

[21] [2017] ZALCJHB 252 (30 June 2017) at para 39.

[22] Id at para 40.
[23] (2013) 34 ILJ 683 (LC) at para 14.

established before the CCMA or a bargaining council can exercise its jurisdiction over the dispute.'

[33] The applicant, in argument, placed emphasis on the judgment of the Labour Appeal Court in *ABC Telesales v Pasmans*[24]. In that case, the conciliation referral form was completed attorneys acting on behalf of the employee party, and an articled clerk in the employ of the firm signed the form. The Court accepted that this constituted non-compliance with the Rule relating to signature, but the Court however also then considered the fact that after the referral had been made, the employer and employee parties participated in the conciliation process and, thereafter, both also participated in the arbitration proceedings only on the merits of the matter.[25] The Court held as follows:[26]

'…There is no difficulty in discerning the intention of the words in rule 5.1 at the stage when Form 7.11 is handed to the CCMA. At that stage the intention is clearly to provide for the CCMA to reject the form by reason of it not having been signed by the referring party. In this way the possibility of an unauthorised referral is avoided. However, the referring party's participation in the conciliation process without objection renders the requirement of her signature redundant at that stage. It follows that the rule-maker could not have intended the rule to apply once such participation had occurred and with it, the ratification of the referral. …'

[34] But what is important to consider is that the judgment in *ABC Telesales* was to a large extent founded on the application of the judgment of the Labour Appeal Court in *Fidelity Guards Holdings (Pty) Ltd v Epstein NO and Others*[27]. In *Fidelity Guards*, the Court held that it was impermissible to raise any issues about the validity of a referral to conciliation or the conciliation proceedings, once a certificate of failure to settle was issued. On the basis of this *ratio*, the Court in *ABC Telesales* held:[28]

'It follows that with respect the Labour Court in *Rustenburg Platinum Mines Limited (Rustenburg Section) v CCMA and others* [1997] 11 BLLR 1475 (LC)

[24] **[2001] 4 BLLR 385 (LAC)**
[25] Id at para 5.
[26] Id at para 6.
[27] (2000) 21 *ILJ* 2382 (LAC).
[28] Id at para 7.

erred in deciding in effect at 1479H–I that a referral which was not signed by the referring party himself remained invalid beyond the stage of conciliation.'

[35] There have been developments in the applicable jurisprudence since the judgment in *Fidelity Guards*. More recently, and in *SA Municipal Workers Union on behalf of Manentza v Ngwathe Local Municipality and Others*[29] the Labour Appeal Court again considered the *ratio* in *Fidelity Guards*, but this time held as follows:

> '… the issue of a certificate of non-resolution does not found the right of referral to arbitration or adjudication under s 191(5) of the LRA, as the subsection confers this right upon the lapsing of the 30-day period contemplated in the subsection regardless of whether conciliation actually takes place or a certificate of non-resolution is issued by the CCMA or the bargaining council concerned. It follows that neither the holding of an actual conciliation nor the issue of a certificate of non-resolution by the CCMA or the bargaining council concerned, is a prerequisite for purposes of referring an unfair dismissal or unfair labour practice dispute to arbitration or adjudication in terms of s 191(5)*(a)* and *(b)* of the LRA, where there has been a lapse of 30 days from the date on which the CCMA or bargaining council received the referral and the dispute remains unresolved.'

Having so held, the Court then reasoned:[30]

> 'The appellant also relies on the decision of this court in *Fidelity Guards* in support of its interpretation of s 191(5) of the LRA. I am of the view that such reliance is equally misplaced because, as will be illustrated below, the decision is wrong. *Fidelity Guards* concerned an appeal against a dismissal of a review application in which one of the grounds of contention was that the arbitrator lacked jurisdiction to hear the dispute as the conciliation proceedings were invalid due to the employee's failure to apply for condonation for the late referral of the dispute for conciliation outside the statutory period of 30 days for an unfair dismissal dispute in terms of s 191(1)*(b)*(i) of the LRA. The court held that the fact that a dispute is referred to the CCMA or a bargaining council for conciliation outside the statutory period of 30 days, and no

[29] (2015) 36 ILJ 2581 (LAC) at para 38.
[30] Id at paras 42 – 43.

application for condonation is made or one is made but no decision on it is made, would not affect the jurisdiction of the CCMA or the bargaining council concerned to arbitrate the dispute, provided the certificate of outcome has not been set aside. It is the setting aside of the certificate of the outcome, the court held, that would render the CCMA or the bargaining council concerned to be without jurisdiction to arbitrate.

In arriving at this conclusion, the court appears to have impermissibly grafted the provisions of s 135 and s 136(1)*(a)* and *(b)* of the LRA onto the referral, by an employee, of his unfair dismissal dispute to the CCMA for conciliation and arbitration which, as demonstrated above, is regulated exclusively by s 191 of the LRA. Having gone astray in this respect, the court then, erroneously, proceeded to link the setting aside of the certificate of outcome to the jurisdiction of the CCMA or bargaining council to arbitrate an unfair dismissal dispute. As alluded to above, the jurisdiction of the CCMA or bargaining council to arbitrate an unfair dismissal or unfair labour practice dispute is not conditional upon the issue of a certificate of outcome, as an employee's right of referral to arbitration accrues on the lapse of 30 days from the date on which the CCMA or bargaining council received the referral, and the dispute remains unresolved.'

The Court ultimately concluded:[31]

'… Since the issue of a certificate of non-resolution by the CCMA or a bargaining council concerned is not a prerequisite for a referral to arbitration in terms of s 191(5)*(a)* of the LRA, it cannot, in my view, cure the lack of jurisdiction of the CCMA or a bargaining council to arbitrate an unresolved unfair dismissal or unfair labour practice dispute, where such certificate is issued after the elapse of 30 days from the date on which the CCMA or bargaining council received the referral, and the employee has not sought condonation for his or her non-observance of that timeframe.'

[36] Considering that the Labour Appeal Court in *ABC Telesales* squarely based its decision in not upholding a preliminary objection relating to the invalidly signed referral on the *ratio* in *Fidelity Guards*, it follows that the judgment in *Ngwathe Local Municipality* applies to this judgment of the Labour Appeal Court as well.

[31] Id at para 44.

The original invalid referral of the dispute to the NBCRFLI by the applicant, because of the invalid signature, cannot be cured by the fact that conciliation proceedings were convened and a certificate of failure to settle was issued.[32] It still remains an invalid referral, open to challenge. The judgment in *ABC Telesales* thus cannot assist the applicant.

[37] In any event, the judgment in *ABC Telesales* is distinguishable, on the facts, from the matter *in casu*. In *ABC Telesales*, the employer party fully participated in the conciliation proceedings and in the arbitration proceedings, without ever raising an objection about the invalidly signed referral. Only when the arbitrator found against the employer on the merits of the matter, did the employer raise this issue as a challenge to the employee seeking to make the arbitration award an order of Court (after the employer had withdrawn a review application it had also brought). One has understanding why there would be an extreme reluctance to come to the aid of an employer party in these kind of circumstances, which smacks of being an afterthought created by some clever lawyering only when a case had been lost on the merits. But the matter *in casu* is not such a case. The third respondent was not at conciliation. When the third respondent attended at arbitration, and before even engaging on the merits of the matter, it raised a challenge concerning the invalid referrals, leading to the ruling by the bargaining council arbitrator herself. This is simply not the factual scenario contemplated in *ABC Telesales*.

[38] Applying the above principles and considerations to the ruling of the second respondent, I remain unconvinced that the ruling is wrong. The second respondent properly considered the applicable NBCRFLI Rules, and concluded that in terms of these Rules, Rossouw was not entitled to represent the applicant and was thus not entitled to sign the referral forms, rendering the referrals 'procedurally irregular' (as she called it). There can be no fault with this reasoning.

[39] But the second respondent went even further. She considered that she had a discretion in terms of Rule 27.1(c) to permit legal representation at arbitration

[32] See *Eskom Holdings SOC Ltd v National Union of Mineworkers obo Kyaya and Others* [2017] 8 BLLR 797 (LC) at paras 64 – 65; *Cinqplast Plastop (Pty) Ltd v Dunn N.O. and Others* [2016] ZALCJHB 78 (25 January 2016) at paras 16 – 17.

considering that this was an alleged unfair dismissal for misconduct. Despite there not even being an application to allow legal representation before her, the second respondent considered how she would have exercised this discretion based on the facts in this matter. She found that the matter was not complex and therefore in any event, this would not be a case where legal representation would be allowed. In my view, this exercise was not even necessary, but it shows that the second respondent went beyond what she needed to do to properly decide this matter.

[40] The second respondent also considered that despite the applicant's attorney signing the referrals, the applicant attended at the arbitration alone, and did not even seek to be legally represented. Certainly, and as said, there was no application for legal representation to be allowed. This is in my view a very relevant consideration. It cements the default position that the applicant would not be entitled to legal representation at arbitration. Surely an arbitrator can only exercise a discretion if actually called upon to do so. The second respondent's reasoning in this regard is unassailable.

[41] In sum, and firstly, the conciliation referral in this instance was invalid, because it was not signed by the applicant, but by his attorney, Rossouw, who was not entitled to represent him at conciliation. Secondly, the arbitration referral was equally invalid, because once again it was not signed by the applicant personally but by Rossouw, who would not be entitled to represent the applicant at arbitration. These referral documents were thus null and void. The third respondent properly raised these issues before engaging on the merits of the matter. The second respondent was thus well within her rights to decide the objection on the basis that she did.

[42] Accordingly, the second respondent's conclusion that the NBCRFLI had no jurisdiction to entertain this matter because of the invalid referrals is a correct conclusion. It is unassailable on review, and the review application falls to be dismissed.

[43] I feel compelled to make some closing remarks. In the concluding part of her award, the second respondent dispenses, despite it not even being necessary, some sound advice. She records that the applicant could, despite the ruling, refer the matter to the NBCRFLI afresh in a 'procedurally compliant manner',

and apply for condonation for the late referral. This was advice that should have been heeded. It was certainly competent for the applicant to have simply done this, and in my view, he would have had a proper case for the granting of condonation. It would have removed the necessity to approach this Court on review, with all the delays associated with the same, and was the best manner in which to have his dispute dealt with on the merits. This is an instance where unfortunately common sense and the heeding of some good advice did not prevail, unfortunately to the detriment of the applicant himself.

Conclusion

[44] Therefore, and having regard to what I have set out above with regard to the merits of the applicant's review application, and based on the application of the review test as I have also set out above, I conclude that the second respondent's jurisdictional ruling is unassailable. The second respondent's ruling, therefore, must be upheld. The result is that the applicant's review application falls to be dismissed.

[45] In dealing with the issue of costs, the matter is unopposed, and the issue of costs therefore does not arise.

Order

[46] In the premises, I make the following order:

1. The applicant's review application is dismissed.

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S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Mr H Rossouw of ENS Africa
For the Third Respondent:	No appearance