REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Not Reportable
C385/2019

In the matter between:

JUSTINE SERFONTEIN	Applicant
and	
KHONOLOGY (PTY) LTD	First Respondent
FT RECRUITMENT (PTY) LTD **t/a OPTIM SOLUTIONS**	Second Respondent

Date heard: May 18 2022
Delivered: J received on 21 July 20 2022 by email; deemed received 21 July 2022 at 10.00hr

JUDGMENT

RABKIN-NAICKER J

[1] The applicant seeks to join the first respondent in a referral to this Court under the above case number. The first respondent (Khonology) was not a party to the conciliation process of the dispute. The Order sought is that:

> "Khonology (Pty) Ltd is joined as additional Respondent in the matter that was conciliated between the Applicant and Optim Solutions (Pty) Ltd."

[2] The application was necessitated by a special plea of misjoinder raised by the first respondent, pointing out that it was not part of the CCMA process of conciliation of the dispute involving an alleged unfair dismissal for operational requirements. The applicant referred the dispute to the CCMA under case number WECT4603-19 against second respondent only.

[3] The applicant avers in her founding affidavit that she has now ascertained through the assistance of her legal representatives that Khonology was her employer and/or that it, and second respondent, were so enmeshed that they were dual employers. She submits that her employment contract shows Khonology as her employer, her work experience led her to believe that second respondent and Khonology were the same company, and that she indicated by means of her referral to the CCMA that she believed that two interchangeable entities were her employer.

[4] I am unable to find any evidence that she indicated through her referral that two interchangeable entities were her employer. She wrote on her referral form that "OPTIM Solutions/OPTIM (PTY) LTD" was her employer and this was reflected on the Certificate of non-resolution issued after conciliation. Indeed her notice of motion in the application before me, as quoted above, makes clear that she accepts that the first respondent was not joined at the stage of the conciliation process.

[5] In **National Union of Metalworkers of SA v Intervalve (Pty) Ltd & others**[1] , the Constitutional Court per Cameron J stated 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."

[1] (2015) 36 ILJ 363 (CC)

[7] As submitted by Mr Ackermann for the respondents, the Constitutional Court in that matter considered whether it was necessary to cite all the employers at conciliation. The Court found that the object of section 191(3) which requires service "on the employer", is to enable an employer to participate in the conciliation proceedings and to prepare, if necessary, for future legal proceedings.[2] It was submitted on behalf of the applicant that the two legal entities *in casu* shared directors and a CEO, as well as legal representatives. But as the Court in *Intervalve* stated referring to section 191 (3) and the facts before it:

> "[53] ……..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. 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.
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> [54] The separate legal personality of the three employers — Steinmüller, Intervalve and BHR — cannot be willed away because there was some overlap in their corporate operations. They had overlapping boards of directors and interconnected shareholdings, and a joint holding company. But this does not help NUMSA. NUMSA's argument depends on the proposition that knowledge held by an officer or employee of one corporation may be imputed to other corporations with which she is associated. That approach has long been alien to our law. Our law has also rightly rejected the suggestion that serving on several corporate boards makes knowledge pertaining to one company admissible against the other."

[8] In view of the above, the legal position could not be clearer. The Labour Court does not have jurisdiction to join the Khonology to the proceedings. There is no need for this Court to engage with the application before it any further. I note that Mr

[2] Intervalve supra at para 47

Ackermann also argued that this Court should make a finding that the referral had been archived and no retrieval application had been made and this Court thus had no jurisdiction to deal with the joinder. Intellectually stimulating as this issue may be, it was not raised in the special plea contained in the respondent's Statement of Response, and I decline to consider it. I therefore make the following Order:

Order

1. The joinder application is dismissed.

2. Costs to be costs in the referral.

H. Rabkin-Naicker
Judge of the Labour Court of South Africa

Appearances
Applicant: L Myburgh instructed by Greenburgh and Associates
Second Respondent: L Ackermann instructed by Guy and Associates