THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2114 / 21

In the matter between:

DAWN LTD AND 2 OTHERS **Applicants**

and

PATRICK MOLEFE **First Respondent**

STEPHEN LUCKY MTHETHWA *N.O.* **Second Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Third Respondent**

Heard: **4 October 2023**

Delivered: **4 March 2024**

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 4 March 2024

Summary: Review – matter concerns issue of jurisdiction – principles considered – test for review – s 145 of LRA 1995 – reasonable outcome test does not apply – review considered on the basis of a *de novo* determination of whether award is right or wrong

Jurisdiction – joinder of parties to unfair dismissal dispute – joinder not competent where there is no prior referral to conciliation against party –

arbitrator has no jurisdiction to grant relief against party not properly before him

Employment relationship – identity of employer in dispute – principles relating to determination of identity of employer considered – must be actual employment relationship on the facts – no relief competent against party that is not the employer

Corporate personae – separate corporate personae must be respected – cannot disregard such separate personae because it may be just and equitable – must establish a case of piercing corporate veil – no such case pleaded or proven – arbitrator has no jurisdiction to make award against holding company that is not the employer

Dismissal dispute – reason for dismissal considered – issue in dispute concerns dismissal for operational requirements as contemplated by s 189 / 189A of LRA – s 191(12) not applicable – CCMA has no arbitration jurisdiction

Dismissal dispute – employee referring dispute classified as dismissal for reasons unknown – despite dispute description arbitrator obliged to determine true nature of dispute – true nature of dispute dismissal for operational requirements – arbitrator erred by failing to conclude that he had no jurisdiction – only Labour Court has jurisdiction to adjudicate dispute

Review of award – finding by arbitrator wrong – review application granted – award substituted with determination that arbitrator had no jurisdiction

JUDGMENT

SNYMAN, AJ

Introduction

[1] This judgment concerns an application brought by the applicants in terms of section 145 as read with section 158(1)(g) of the Labour Relations Act (LRA),[1] to review and set aside an arbitration award handed down by the second respondent, in his capacity as an arbitrator of the Commission for Conciliation, Mediation and Arbitration (CCMA), being the third respondent.

[2] In this matter, the first respondent had pursued an unfair dismissal dispute to the CCMA, on the basis of a dismissal for '*reasons unknown*'. This unfair dismissal dispute ultimately ended up before the second respondent for arbitration. The applicants, as the cited employer parties in the proceedings, opposed the matter, and raised two preliminary issues. The first issue related to a contention that the dispute concerned one of a dismissal for operational requirements, and thus the CCMA had no jurisdiction to arbitrate the same. The second issue related to whom the employer of the first respondent actually was.

[3] In an arbitration award dated 15 September 2021, the second respondent held that the first respondent was dismissed in terms of section 191 of the LRA, and not in terms of section 189. He then proceeded to find that the dismissal of the first respondent by '*Dawn Management Services*' and '*Polanofield (Pty) Ltd*' was substantively and procedurally unfair, and he ordered that the '*Respondent*' pay compensation to the first respondent in the sum of R659 792.00, being an amount equivalent to 10(ten) months' salary.

[4] The arbitration award was received by the applicants on 15 September 2021. On 19 October 2021, the applicants' review application was filed, in which the applicants sought to review and set aside the arbitration award of the second respondent. The review application has therefore been filed within the time limit as contemplated section 145(1) of the LRA and is properly before Court.

[5] For the reasons to follow, it is my view that this is a case that can be disposed of based on the preliminary issues raised by the applicants. There is no need to decide the fairness of the first respondent's dismissal. I will therefore only set out the background facts relevant to these questions, below.

[1] Act 66 of 1995 (as amended).

The relevant background

[6] From the outset, there were three employer parties ultimately brought into the arbitration proceedings by the first respondent, as it came before the second respondent. These were Dawn Ltd (Dawn), Polanofield (Pty) Ltd (Polanofield) and Saffer Plumbing and Hardware (Pty) Ltd (Saffer). In his arbitration award, and unfortunately, the second respondent only refers to the '*Respondent*' when evaluating and deciding the case, without indicating to which of these three parties the reference to '*Respondent*' relates to. It was common cause that all three these parties were distinct, separate and independent corporate entities and personae.

[7] Of relevance to the case *in casu*, the first respondent was employed as a Human Resource Manager – Private Clients, at Dawn HR Solutions (Pty) Ltd with registration number 1998/020686/07, as from 26 March 2012. Dawn HR Solutions was a wholly owned subsidiary of Dawn. He was seconded to Dawn Logistics, which was a trading division of Wholesale Housing Supplies (Pty) Ltd (which was also a wholly owned subsidiary of Dawn), as from 2 July 2013, but remained employed by Dawn HR Solutions. On 1 February 2016, the first respondent was promoted to Group Employee Relations Manager, still employed by Dawn HR Solutions. Dawn HR Solutions is not a party to these proceedings.

[8] In April 2017, the first respondent was transferred to Dawn Management Services (DMS). DMS was not a distinct and separate legal corporate entity. DMS was actually also a trading division of Wholesale Housing Supplies (Pty) Ltd, with registration number 1997/000615/07. The transfer was confirmed in a letter in April 2017, in terms of which the first respondent was afforded an increase, and in which it was confirmed, in those specific words, that the legal entity that was his employer was DMS which was a trading division of Wholesale Housing Supplies (Pty) Ltd.

[9] Wholesale Housing Supplies (Pty) Ltd had a name change approved by the CIPC, to Saffer Plumbing and Hardware (Pty) Ltd, on 3 April 2019, being Saffer referred to above. It however remained the same corporate entity and persona, with the same registration number. It follows that the first respondent

was employed by Saffer as from April 2017. This reality was confirmed further by an increase letter issued to the first respondent by Saffer on 19 October 2019, the first respondent's pay slips in 2019 which were all the name of '*Dawn Management Services*', and his IRP5s and UI19 forms, which were in the name of Saffer.

[10] Dawn was never an employer of staff, but was the listed holding company of a group of companies comprising the Dawn group. Dawn however delisted from the JSE with effect from 26 February 2019 as part of a scheme of arrangement, and ceased trading. Its entire interests were then transferred to Polanofield in 2019, the latter then becoming the holding company of what can be described as the Dawn group of companies. This would include Saffer. Polanofield itself is also a holding entity, with no employees. There was never a working relationship between the first respondent and Polanofield.

[11] It was common cause that the Dawn group of businesses ran into financial difficulties in the course of 2020. Saffer itself was placed under business rescue, which commenced on 23 July 2020. The business rescue plan was published on 14 September 2020, in terms of which the assets of Saffer were to be sold off to settle creditors, and Saffer would then be wound up. Also in terms of the approved business rescue plan, all the employees of Saffer would be retrenched.

[12] Pursuant to the business rescue plan, a section 189A retrenchment process was then initiated. The first respondent was responsible for drawing and then issuing the section 189(3) notices to all Saffer employees. It would appear that he never issued a section 189(3) notice to himself.

[13] The consultation process itself was conducted by way of CCMA facilitation, with commissioner Magmood Fadal being the appointed facilitator. The first respondent was directly involved in the CCMA facilitation, and in fact was part of the representation of Saffer in that process. The facilitated consultations resulted in a retrenchment agreement being concluded between SACCAWU and NUMSA (on behalf of their members employed at Saffer), all the non-unionised employees of Saffer, and the business rescue practitioner, on 23 October 2020. The first respondent himself was a part of negotiating this agreement and was a signatory to such agreement, as a witness. In terms of

clause 3 of that agreement, is it recorded that: '*The parties agree that the services of all employees of Saffer nationally, will be terminated as a consequence of section 189A of the LRA …*' (emphasis added), with the date of termination being 30 November 2020. It was undisputed that the employment of all the employees of Saffer was terminated pursuant to this agreement.

[14] The first respondent received a termination letter on 10 November 2020 from Saffer terminating his employment due to retrenchment. It was undisputed that pursuant to his employment being terminated, the first respondent was paid severance pay.

[15] The first respondent referred an unfair dismissal dispute only against Dawn to the CCMA. In this referral, the first respondent indicated that he had been dismissed for reasons unknown. The dispute was set down for con/arb on 8 December 2020, by way of a set down notice dated 19 November 2020. This notice was only sent to Dawn and the first respondent, by the CCMA.

[16] The dispute first came before commissioner Menzi Mabunda on 8 December 2020. In those proceedings, an issue was raised by Dawn that the first respondent's employer was not before the CCMA, as the first respondent was not employed by Dawn. After argument on this issue by the parties, the first respondent applied, in the hearing, that Saffer and Polanofield be joined to the proceedings. In a written ruling dated 21 December 2020, commissioner Mabunda did not decide who the actual employer of the first respondent was. Instead, he ruled that Saffer and Polanofield had an interest in the matter, considering the arguments raised by the parties, and therefore should be joined to the proceedings. The commissioner also directed that the matter should proceed to arbitration on request of the first respondent.

[17] It is in terms of the ruling of commissioner Mabunda that Saffer and Polanofield came into the matter. The fact however remains that no dispute was ever referred to conciliation by the first respondent against Saffer or Polanofield. These parties were also not invited to the proceedings by way of the notice of set down of 19 November 2020. There was also no joinder application filed by the first respondent beforehand.

[18] On 22 December 2020, and based on the ruling of commissioner Mabunda, the first respondent referred an unfair dismissal dispute against Dawn, Polanofield and Saffer to arbitration. It remained a dispute, according to the first respondent, for reasons unknown. The matter ultimately came before the second respondent for arbitration on 15 June, 21 July and 25 August 2021.

[19] In the arbitration, Luis Baeta (Baeta), the former CEO of Saffer, testified that the first respondent was employed by Saffer and that he was retrenched along with the 563 other employees of Saffer. This testimony was confirmed by Erna Volschenk (Volschenk), the former payroll and benefit manager of Saffer. Sandra Robbins (Robbins), the former group HR executive, also testified that the first respondent was retrenched by Saffer, along with all the other employees of Saffer.

[20] The first respondent, in presenting his case in the arbitration, did not dispute that he was directly involved in the retrenchment exercise relating to all the Saffer employees. He also conceded these employees were retrenched. However, and according to the first respondent, he was not affected by this exercise, because a section 189(3) notice had not been issued to him, and he was never consulted and advised by management about any retrenchment that may affect him. The first respondent also contended that he was not consulted in the course of the retrenchment process that had been conducted. In short, the first respondent was of the view that because he was conducting the retrenchment exercise on behalf of the employer, he could not have been part of it.

[21] The applicants argued in the arbitration that any proceedings against Dawn was not competent, as it was a holding company with no employees, and had in any event delisted in 2019. The applicants further argued that Polanofield had no interest in this matter, as it was also a holding company with no employees, and had simply taken over the holding interest from Dawn following a scheme of arrangement and Dawn's subsequent delisting, also in 2019. And finally where it came to Saffer, the applicants conceded and accepted that Saffer was the employer of the first respondent and had been dismissed by Saffer, however they pertinently raised the issue that the first respondent was dismissed for operational requirements along with all its other

employees, resulting from business rescue proceedings, and the CCMA therefore had no jurisdiction to entertain the dispute, which needed to be referred to the Labour Court for adjudication.

[22] In his arbitration award of 15 September 2021, the second respondent recognised that he had to decide who the '*true employer*' of the first respondent was, and whether the first respondent had been dismissed for operational requirements. He referred to the evidence by the applicants showing that Saffer was the employer of the first respondent. He also considered the concession by the applicants that Saffer was the employer of the first respondent. However, and despite this, the second respondent held that the first respondent was not employed by Saffer. His reasons for so finding will be dealt with later in this judgment.

[23] Next, and with regard to whether the first respondent was dismissed for operational requirements, the second respondent in effect bought directly into the argument of the first respondent. The second respondent accepted that despite the whole retrenchment exercise, the first respondent was representing the employer, and as such, he could not be an affected employee. He held that '*… a bogus retrenchment was contrived to justify the Applicant's dismissal without a valid reason'*, and then concluded: '*I find that the dismissal of the Applicant was not based on section 189 but on section 191 of the LRA …*' (whatever this may mean).

[24] The second respondent then proceeded to find that the dismissal of the first respondent by the '*Respondent*' was unfair, and that the '*Respondent*' was ordered to pay the first respondent compensation in the sum of R659 792, being a sum equivalent to 10 months' salary. As what the second respondent may have had in mind when referring to '*Respondent*', is found in the paragraph headed '*Award*' in the arbitration award, where the second respondent records: '*The dismissal of the Applicant, Mr Patrick Molefe by the Respondent Dawn Management Services and Polanofield (Pty) Ltd, the Holding Group, was procedurally and substantively unfair*'.

[25] The applicants were clearly not satisfied with this outcome, which led to the current review application now before me.

Test for review

[26] As will be dealt with more fully below, the only real question to be decided in this case was whether the CCMA, and thus consequently also the second respondent, had the necessary jurisdiction to arbitrate the unfair dismissal dispute brought by the first respondent to the CCMA, based not only on the reason for dismissal, but also on the basis of whether the parties against whom relief was awarded by the second respondent was competently before the CCMA and / or were the employer(s) of the first respondent.

[27] In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[2] the Court considered the well-known review test postulated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[3] and said:

> '… Nothing said in Sidumo means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in section 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise …' (emphasis added)

[28] The aforesaid means that where the issue to be considered on review is about the jurisdiction of the CCMA, it is not about a reasonable outcome. What happens is that the Labour Court is entitled to, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court determines the issue *de novo* in order to decide whether the determination by the arbitrator is right or wrong.[4] In *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others,*[5] the Court articulated the enquiry as follows:

> The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a

[2] (2008) 29 ILJ 964 (LAC) at para 101.
[3] (2007) 28 ILJ 2405 (CC).
[4] See *Trio Glass t/a The Glass Group v Molapo NO and Others* (2013) 34 *ILJ* 2662 (LC) at para 22.
[5] (2008) 29 *ILJ* 2218 (LAC) at para 40.

ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court …'

[29] Finally in this respect, and in the context of a dispute concerning whether an employment relationship exists, the Court in *Universal Church of the Kingdom of God v Myeni and Others*[6] held as follows:

'… It is said that the value judgment of the commissioner in a jurisdictional ruling has no legal consequence and that it is only a ruling for convenience. Therefore, the applicable test is simply whether, at the time of termination of his relationship with the church, there existed facts which objectively established that Mr Myeni was indeed the employee of the church. If, from an objective perspective, such jurisdictional facts did not exist, the CCMA did not possess the requisite jurisdiction to entertain the dispute, regardless of what the commissioner may have determined. …'

[30] Accordingly, and in this instance, I shall proceed to decide this matter *de novo* on the basis of determining whether the second respondent was right or wrong in making the findings that then clothed the CCMA, according to him, with the necessary jurisdiction to determine this matter and to grant substantive relief against the applicants in favour of the first respondent.

Analysis

[31] It is perhaps appropriate to start with determining who the true employer of the first respondent was. In my view, and in this regard, the second respondent got it completely wrong, for the reasons to follow.

[32] From the outset, the second respondent completely misconstrued the issue of the onus. The approach adopted by the second respondent was that the duty was on the applicants to prove that Saffer was the employer of the first respondent. That is simply not correct. In CCMA arbitration proceedings, where employment is in dispute, the onus is on the employee party to prove

[6] (2015) 36 ILJ 2832 (LAC) at para 27.

employment. It follows that the first respondent had to prove who his true employer was, and consequently, since the employer parties conceded Saffer was the employer, that it was not Saffer.[7] This error in approach by the second respondent unfortunately tainted his entire reasoning, rendering it irregular.

[33] Turning to the facts relating to who the employer of the first respondent may be, Polanofield could never be the employer of the first respondent. It only came into the picture in 2019, long after the first respondent had commenced employment. There is no evidence of any employment contract being concluded or any employment relationship being established between the first respondent and Polanofield. There is not a single shred of evidence of the first respondent doing any work for Polanofield, being paid by it or even dealing with it. The undisputed evidence was that Polanofield was a holding entity, having no employees, which in essence held the shareholding in those remaining subsidiary entities in what was known as the Dawn group, one of which was Saffer. As said in *Myeni supra*[8]:

> 'Indeed, it appears to me that, by its very nature, an employment relationship presupposes a working arrangement of a contractual nature between two or more persons, in circumstances where the rights, duties and obligations inter partes are legally enforceable. Therefore, in the present instance, even if Mr Myeni had not relied on s 200A, I would still find that there was no legally enforceable agreement between him and the church and that, for that reason, no employer and employee relationship existed between them. There was simply no contract that could be classified as an employment contract on the evidence.'

[34] Turning then to Dawn, the undisputed evidence was that it was also a holding entity having no employees. It was the original holding entity of the Dawn group of companies, comprising quite a few subsidiaries. Dawn was a listed entity on the Johannesburg Stock Exchange (JSE). It was common cause that it was delisted from the JSE in 2019 and ceased operations accordingly. It was

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[7] *Myeni* (*supra*) at para 52; *Schoeman v IT Management Advisory Services (Pty) Ltd* (2002) 23 ILJ 1074 (LC) at para 12; *Naude v Member of the Executive Council, Department of Health, Mpumalanga* (2009) 30 ILJ 910 (LC) at para 58.
[8] Id at para 51.

in effect superseded by Polanofield as holding entity of four remaining former Dawn subsidiaries. Dawn thus never could be the employer of the first respondent when he was dismissed in November 2020, and certainly, the first respondent was never dismissed by Dawn.

[35] It is true that the employment of the first respondent, in the past, moved through the Dawn operating entities, however he was always fulfilling group HR activities at a group support level, to individual operating entities. He started at Dawn HR Solutions, but ended up at DMS, which, as said, was an operating division of Saffer. The first respondent remained employed at DMS until his termination of employment in November 2020. In the arbitration, the applicants accepted and conceded that the first respondent was employed by Saffer.

[36] According to the second respondent, there was no '*credible evidence*' that the first respondent was employed by Saffer. The reason for this finding is that according to the second respondent, the first respondent could not have been issued with the transfer letter in April 2017 to DMS, because he was not in Gauteng when it was issued, because at the time he was executing HR duties in Mpumalanga and Kwa-Zulu Natal. The second respondent also rejected the IRP5 and UI19 of the first respondent presented by the applicants in evidence, because, according to him, it was generated after the fact.

[37] I must say that I have considerable difficulty with the reasoning of the second respondent. First and foremost, it does not explain the first respondent's signature on the transfer letter together with a date of 19 April 2017. Further, the second respondent does not even consider the increase letter issued to the first respondent by Saffer in October 2019 as well as a pay slip of the first respondent in 2019 reflecting Saffer as his employer. It is entirely irrational for the second respondent to simply reject the IRP5 and UI19 on the basis that they are issued after the fact. The second respondent does not appear to understand that such documents, and especially an IRP5, are issued based on existing payroll records, or in other words, are extracted from past information. For the second respondent to reject these documents, he implied that they were fraudulently generated, when there was no evidence of this, and it is in my view highly unlikely that the applicants would fraudulently

generate these kind of documents with all the legal implications associated with such conduct, just to serve as some kind of proof that the first respondent was employed by Saffer. It just makes no sense. The second respondent, in view, got it completely wrong.

[38] But even stranger, in my view, is that if Saffer was not the employer of the first respondent, then who was? It could not be Dawn, as it turned out to be common cause that Dawn had delisted and ceased operating in 2019. That left only Polanofield, and as discussed above, it could also not be the employer of the first respondent. Ironically, the second respondent never found that Polanofield was the employer of the first respondent, and himself quickly discarded Dawn as employer because it effectively no longer existed. The second respondent held Polanofield liable for a different reason, discussed later in this judgment. As these were the only three parties before the second respondent, then it could only follow that the first respondent's true employer, if it was not Saffer, was not before the CCMA nor before the second respondent, and that had to be the end of the matter, based on the second respondent's own reasoning.

[39] Another ironical twist is found in the fact that the second respondent then determines that '*Dawn Management Services*' dismissed the first respondent. That of course is true. For '*Dawn Management Services*' to have dismissed the first respondent, it had to be his employer. But the second respondent clearly does not understand what Dawn Management Services actually is. On the evidence, there can be no doubt that there is no legal persona or corporate entity called Dawn Management Services. It is clear that Dawn Management Services, or DMS, is an operating division of Saffer and part and parcel of Saffer. Once that is so, the second respondent thus finds on the one hand that the first respondent was not employed by Saffer, but on the other hand finds he was dismissed by Saffer. This is clearly an unsustainable approach and finding.

[40] But even accepting Dawn Management Services was somehow a separate legal persona and corporate entity, then the problem is that such entity was never before the CCMA and the second respondent, and no unfair dismissal dispute was ever referred against such entity to the CCMA by the first

respondent. As such, the second respondent would have no jurisdiction to make any finding against such entity, nor afford any relief against it in favour of the first respondent.

[41] Considering that the applicants concede that Saffer is the employer of the first respondent, and in the absence of any real and acceptable evidence to the contrary, it must be true that Saffer is the employer of the first respondent. However, the first respondent never referred an unfair dismissal dispute against Saffer to the CCMA for conciliation. The dispute was only referred against Dawn. Saffer was also not given notice on 19 November 2020 of the con / arb proceedings on 8 December 2019. There was no prior application by the first respondent to join Saffer to the proceedings. The only reason why Saffer was before the second respondent in the arbitration is because commissioner Mabunda joined it to the proceedings by way of his ruling of 20 December 2020.

[42] But was it even competent to join Saffer to the proceedings in a such manner? In my view, the answer must be no. Whilst I accept that the ruling of commissioner Mabunda was not sought to be reviewed, answering this question concerns a matter of jurisdiction, and this Court is always entitled to consider the same because it directly impacts on the competence of the CCMA to grant relief. *In casu*, and as said, the first respondent never referred his unfair dismissal dispute under section 191 of the LRA to the CCMA for conciliation, against Saffer. Because such a referral is a pre-requisite jurisdictional fact which would enable the CCMA to arbitrate an unfair dismissal dispute against Saffer, it must follow that in the absence of such a referral to conciliation, the CCMA simply has no jurisdiction to arbitrate such a dispute against Saffer. In *National Union of Metalworkers of SA v Intervalve (Pty) Ltd and Others*[9] it was held as follows:

> 'Referral for conciliation is indispensable. It is a precondition to the Labour Court's jurisdiction over unfair dismissal disputes …'

[9] (2015) 36 ILJ 363 (CC) 40. See also *September and Others v CMI Business Enterprise CC* (2018) 39 ILJ 987 (CC) at para 46; *Malinga and Others v KwaZulu-Natal Provincial Department of Education and Others* (2020) 41 ILJ 228 (LC) at para 10.

[43] In *Association of Mineworkers and Construction Union and Others v Ngululu Bulk Carriers (Pty) Ltd (In Liquidation) and Others*[10] the Court described the requirement of first referring an unfair dismissal despite to conciliation as '*deferring*' the jurisdiction to determine such a dispute, until this happened. The following *dictum* by Jafta J is instructive:[11]

> 'Although unfair dismissal disputes such as the ones we are concerned with here fall within the jurisdiction of the Labour Court, the exercise of that jurisdiction is deferred until a dispute has been conciliated. The LRA is structured in a manner that obliges parties to disputes to first make use of non-litigation dispute-resolution mechanisms, before approaching courts. Of importance in this regard is s 191, which requires dismissed employees to refer disputes about the 'fairness of a dismissal to conciliation' …'

Of course, and in this case, there was a referral to arbitration under the auspices of the CCMA, but this makes no difference, and the same principles apply.

[44] But can it be said that the referral against Dawn could encompass a referral against Saffer as well, considering the close relationship between the parties and the fact that the one is / was a subsidiary of the other? Once again, the answer must be in the negative. The reason for this is once again found in *Intervalve supra*. In that case, there were three corporate entities, called Steinmuller, Intervalve and BHR. The referral was against Steinmuller only, It was common cause that the three companies were closely related, shared a central corporate service, and were all aware of the referral and the set down for conciliation. The Court articulated the question as being: '*… can we conclude from these facts that the Steinmüller conciliation referral encompassed also Intervalve and BHR? …*'[12]. The Court held:[13]

[10] (2020) 41 ILJ 1837 (CC).
[11] Id at para 16. See also *Premier FMCG (Pty) Ltd t/a Blue Ribbon Bakery v Food and Allied Workers Union on Behalf of Members and Others* (2022) 43 ILJ 2584 (LC) at para 10; *Smith and Another v Office of the Chief Justice and Others* (2018) 39 ILJ 1357 (LC) at para 30.

[12] Id at para 44.
[13] Id at para 46.

> ‘So whether the referral embraced Intervalve and BHR depends on the provision's purpose. The purpose of s 191 is to ensure that, before parties to a dismissal or unfair labour practice dispute resort to legal action, a prompt attempt is made to bring them together and resolve the issues between them. Resolving the issues early has benefits not only for the parties, who avoid conflict and cost, but also for the broader public, which is served by the productive outputs of peaceable employment relationships …’

The Court concluded:[14]

> ‘… 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. 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.

[14] Id at paras 52 – 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. …'

[45] 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. This was made clear in *Prinsloo v Expidor 163 CC t/a the League of Gentlemen and Another*[15] where it was held:

> 'The approach of our courts has been that a party may not be joined to proceedings if that party had not been a party to the conciliation process, and further that a joinder may not take place after judgment has been handed down. The reasoning behind this approach is that any party should be afforded an opportunity to be heard in a matter where it has a direct and substantial interest. A further important factor is that a party sought to be joined is entitled to be heard on the specific question of the relief.'

[46] In *Temba Big Save CC v Kunyuza and Others*[16] the Court adopted a similar view, and had the following to say:

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[15] (2019) 40 ILJ 2113 (LC) at para 11. Although this judgment was overturned in *Wilson v Prinsloo: In re Prinsloo v Expidor 163 CC t/a the League of Gentlemen and Another* (2021) 42 ILJ 1714 (LAC), the judgment of the LAC only related to the issue of the Labour Court deciding to lift the corporate veil, and hold the individual member of the Close Corporation employer liable, which the LAC considered to be in error.

[16] (2016) 37 ILJ 2633 (LAC) at para 29.

> '… Having said that a referral for conciliation is indispensable and a precondition to a 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 Court however did add that this principle would not apply in the case of the joinder of a new employer where there has been a transfer of a business in terms of section 197 of the LRA, because in such a case, the effect of section 197 was that the old employer is substituted by the new employer from the outset, as if it was always the employer.[17] The matter *in casu* is not such an instance, and there never reliance placed on section 197 by the first respondent.

[47] Considering the facts *in casu* that Saffer was never served with a dispute referral to conciliation and the notice of set down for con / arb, was at the time under business rescue without the business rescue practitioner being brought into the proceedings, and was in essence *mero motu* joined by commissioner Mabunda just because the first respondent asked for joinder and without even giving Saffer the option to be heard, the following *dictum* in *G-Ways CMT Manufacturing (Pty) Ltd v National Bargaining Council for the Clothing Manufacturing Industry (Western Cape Sub-Chamber) and Others*[18] is quite apposite, where the Court stated:

> '… The proceedings in the bargaining council, however, gave rise to a few material irregularities. The second respondent conducted the arbitration without notice to Greenways which had been placed first in provisional and then final liquidation. It was necessary to substitute the liquidator for the CC. The second respondent mero motu joined G-Ways to the award that he made without any notice to G-Ways that he intended to do so. This overlooked the audi alteram partem rule. Lastly, the second respondent made G-Ways jointly liable with Greenways. …'

[48] It follows from all of the above that Saffer was not even properly or lawfully part of and party to the arbitration proceedings before the second respondent.

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[17] See para 31 of the judgment.
[18] (2017) 38 ILJ 571 (LAC) at para 15.

It follows that the second respondent never had any jurisdiction to entertain any claim against Saffer, and could not grant any relief against it. Therefore, and insofar as any award made by the second respondent may be considered to have been made against Saffer, that award was not competently made, was irregular, and must be reviewed and set aside.

[49] This brings me to the relief against Polanofield. I have already dealt with the fact that it could not have been the employer of the first respondent. So how could the second respondent have granted relief against it? It seems to me that the second respondent did this because Polanofield was the '*holding company*' of Dawn Management Services. In short, and according to the second respondent, Polanofield can he held liable for the award against its subsidiary if it is fair to do so. This approach is completely erroneous and at odds with the law. The second respondent fails to appreciate the trite principle of all corporate entities being distinct legal personae, just like natural persons. In *Dadoo Ltd and Others v Krugersdorp Municipal Council*[19] it was said: '*… A registered company is a legal persona distinct from the members who compose it….*'. That being so, it simply cannot be disregarded, unless a proper case is made out with regard to what is commonly known as '*piercing the corporate veil*'. However, and in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd*[20] it was held that '*… a court has no general discretion simply to disregard a company's separate legal personality whenever it considers it just to do so …*'. And in *The Shipping Corporation of India Ltd v Evdomon Corporation and Another*[21] the Court decided as follows:

> '… It seems to me that, generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances justify 'piercing' or 'lifting' the corporate veil. And in this regard it should not make any difference whether the shares be held by a holding company or by a Government.

[19] 1920 AD 530 at 550-1.
[20] 1995 (4) SA 790 (A) at 803A.
[21] 1994 (1) SA 550 (A) at 566C-F.

> I do not find it necessary to consider, or attempt to define, the circumstances under which the Court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs. In this connection the words 'device', 'stratagem', 'cloak' and 'sham' have been used …'

[50] It follows that it was not competent nor permissible for the second respondent to extend the relief he awarded to Polanofield because he may have considered it just and equitable to do so, and because he believed it as a group holding company should be liable for the debts of its subsidiaries. The reasons for this simply are that there was no case made out to justify the piercing of the corporate veil. In fact, that was not even asked for. Secondly, and in terms of the LRA in the case of unfair dismissal disputes, relief can only be made against an employer. There is no such thing as a fictional employer, or an employer in equity, which is what the approach of the second respondent would have to contemplate, as Polanofield was never the actual employer of the first respondent.[22] As held in *Group 6 Security Services (Pty) Ltd and Another v Moletsane NO and Another*[23]:

> 'Mr Masters was never made a party before the arbitrator. He was present as a witness for the company and not in his personal capacity. The award cannot be made against a person simply because it is just to do so. There has to be some fault on the part of the directors or shareholders to make them jointly liable with the company. No such evidence of fault was led …'

[51] A final appropriate comparator to the case *in casu* can be found in *Jamie and Another v Ellis Park Stadium (Pty) Ltd and Another*[24], where the Court had the following to say:

> '… What is lacking in this case by contrast is an analogous factual basis for contending that EPWOS was a mere sham to conceal the actions

[22] See *Buffalo Signs Co Ltd and Others v De Castro and Another* (1999) 20 *ILJ* 1501 (LAC) at paras 13 and 16.
[23] (2005) 26 ILJ 1693 (LC) at para 58.
[24] (2020) 41 ILJ 2465 (LC) at para 21.

and interests of EPS and/or alternatively GLRU. The mere fact that the three entities acted in a closely collaborative way under the direction of De Klerk is not sufficient to lay a foundation of abuse of corporate personality. …'

[52] In sum, any relief against Polanofield is not competent, and the award of compensation by the second respondent as against Polanofied is thus irregular, and unsustainable on review. It falls to be reviewed and set aside.

[53] This leaves the last issue of jurisdiction. Accepting that Saffer was properly before the CCMA, the first respondent was employed by Saffer, and that Saffer dismissed him, then why was he dismissed? It is trite that if the first respondent was dismissed for operational requirements, then the CCMA would have no arbitration jurisdiction.[25] This is because, on the common cause facts, more than 500 employees were dismissed for operational requirements by Saffer, and accordingly section 191(12) would not apply.[26] It is therefore critical for the second respondent, as arbitrator, to have determined the true reason for the first respondent's dismissal, no matter how the first respondent may have labelled his dismissal. In *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another*[27] the Court held:

'… It is the duty of a court to ascertain the true nature of the dispute between the parties. In ascertaining the real dispute a court must look at the substance of the dispute and not at the form in which it is presented. The label given to a dispute by a party is not necessarily conclusive. …'

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[25] Section 191(5)(b)(ii) reads: '*If a council or a commissioner has certified that the dispute remains unresolved … the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is … based on the employer's operational requirements …'*

[26] Section 191(12) reads: '*An employee who is dismissed by reason of the employer's operational requirements may elect to refer the dispute either to arbitration or to the Labour Court if- (a) the employer followed a consultation procedure that applied to that employee only, irrespective of whether that procedure complied with section 189; (b) the employer's operational requirements lead to the dismissal of that employee only; or (c) the employer employs less than ten employees, irrespective of the number of employees who are dismissed'*.

[27] (2003) 34 *ILJ* 305 (CC) at para 52.

[54] In my view, the facts relating to the dismissal of the first respondent was straight forward. Saffer was in financial trouble, went into business rescue, and the outcome of this business rescue process was that its assets be sold off and that it be wound down. This resulted in all its employees being retrenched, without exception. The retrenchment was conducted by way of facilitated CCMA consultations in terms of section 189A of the LRA. The first respondent was intimately involved in this process, issued the section 189(3) notices of intention to retrench, and was party to the consultations. The consultations led to a retrenchment agreement being concluded between all parties, which applied to all employees, and which specifically recorded that all employees would be retrenched by 30 November 2020. All the employees were then indeed retrenched, and were paid severance pay. In the end, there was nothing left in Saffer, and certainly no work for the first respondent to, as he rendered HR services and how can one provide HR services to a non-existent workforce.

[55] Despite acknowledging all the above, the first respondent's position was that none of this applied to him. In essence, he said that he cannot consult with himself, and needed to be consulted separately by management. He also did not issue himself with a section 189(3) notice. He did admit that he received a retrenchment letter terminating his employment and was paid severance pay.

[56] In my view, none of the contentions advanced by the first respondent detracts from the material facts that establish that ultimately, he was retrenched. Once it is true that he was employed by Saffer, which he was, then the undisputed evidence was that there exists a retrenchment agreement that applies to all Saffer employees, without exception, and which records that all employees would be retrenched by 30 November 2020. This undoubtedly applies to the first respondent as Saffer employee. In any event, on the undisputed facts, Saffer was effectively closed down by virtue of the business rescue plan, and its assets sold off to pay creditors. So where was the first respondent, as well as all the other employees, going to work going forward. This is why they all

lost their jobs, and it can only be a dismissal for operation requirements as defined in section 213 of the LRA.[28]

[57] I need not go into the question whether the first respondent was properly consulted about the retrenchment. This is because this is an issue concerning the fairness of the retrenchment, and has nothing to do with whether a retrenchment existed. What the first respondent actually said was because he was not consulted by management about retrenchment, he was not retrenched. This is a clearly a nonsense. Ironically, the second respondent finds that the retrenchment was '*bogus*'. This finding however does not change the fact that there was a retrenchment. A '*bogus*' retrenchment is still a retrenchment, but being '*bogus*' would impact on the reason for retrenchment, rendering it unfair. In simple terms, a '*bogus*' retrenchment does not make a retrenchment not to be a retrenchment. Rather, it is a retrenchment without a valid reason, which makes it unfair. But that question the CCMA, and the second respondent, had no jurisdiction to answer, and only the Labour Court could adjudicate the same.

[58] I have little hesitation in concluding that the true and / or real reason for the dismissal of the first respondent could only be one related to the operational requirements of Saffer, his employer. Even though the LRA allows for the referral of a dispute to the CCMA for arbitration where the employee '*does not know*' the reason for dismissal,[29] it would always be subject to an arbitrator determining the true or real reason for dismissal. It is trite that jurisdiction is determined on the case as pleaded,[30] but in the context of dispute resolution in the CCMA, where there are no true pleadings to speak of, it is not unusual that the true or real reason for the dismissal of an employee may only emerge once evidence is presented in the arbitration.[31]

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[28] The definition reads: '*operational requirements' means requirements based on the economic, technological, structural or similar needs of an employer.*'.
[29] See section 191(5)(a)(iii) of the LRA.
[30] See *Gcaba v Minister for Safety and Security and Others* (2010) 31 *ILJ* 296 (CC) at para 75; *Mbatha v University of Zululand* (2014) 35 *ILJ* 349 (CC) at para 157; *Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union on behalf of Members* (2015) 36 *ILJ* 624 (LAC) at para 21; *Moodley v Department of National Treasury and Others* (2017) 38 *ILJ* 1098 (LAC) at para 37.
[31] See *Commercial Workers Union of SA v Tao Ying Metal Industries and Others* (2008) 29 *ILJ* 2461 (CC) at para 65; *Hotbake Systems (Pty) Ltd t/a the Rich Corporation of SA v Commission for Conciliation, Mediation and Arbitration and Others* (2019) 40 ILJ 1516 (LAC) at para 21. See also *Health and Other Services Personnel Trade Union of SA on behalf of Tshambi v Department of Health, Kwazulu-Natal* (2016) 37 ILJ 1839 (LAC) at para 16; *National Union of Metalworkers of SA on*

[59] It is trite that once it is undisputed that an employee has been dismissed, the onus would be on the employer to prove that dismissal is fair.[32] The employer is however only able to prove a fair dismissal based on one of three reasons, being misconduct, incapacity or operational requirements.[33] It follows that in arbitration proceedings placed before an arbitrator by an employee on the basis of reasons unknown, the true issue in dispute will emerge from the basis on which the employer seeks to establish that the dismissal it is fair. In *September and Others v CMI Business Enterprise CC*[34] it was said that: '*In my view, the commissioner is not bound by a party's categorisation of the nature of the dispute. Rule 15 clearly intended the commissioner to have the right and power to investigate and identify the true nature of the dispute.*' Having so said, the Court then concluded:[35]

> '… The general rule is that the referral form and certificate of outcome constitute prima facie evidence of the nature of the dispute conciliated. However, if it is alleged that the nature of the dispute is in fact different from that reflected on such documents, the parties may adduce evidence as to the nature of the dispute.'

[60] To illustrate the point by example, the employer summarily dismisses the employee without giving the employee any reason for the dismissal. The employee pursues an unfair dismissal dispute to the CCMA on the basis of reasons unknown. In the arbitration, the employer presents evidence that it summarily dismissed the employee because he stole. That would be a dismissal for misconduct. The fact that the employer did not have a disciplinary hearing or provide reasons for dismissal at the time of dismissal would mean that the dismissal could be unfair, but that does not change that the reason for the dismissal was misconduct. If the arbitrator does not accept

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behalf of Sinuko v Powertech Transformers (DPM) and Others (2014) 35 ILJ 954 (LAC) at para 17; *Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members and Others* (2014) 35 *ILJ* 983 (LAC) at para 47.

[32] See section 192(2) of the LRA.

[33] Section 188(1) of the LRA reads: '*A dismissal that is not automatically unfair, is unfair if the employer fails to prove- (a) that the reason for dismissal is a fair reason- (i) related to the employee's conduct or capacity; or (ii) based on the employer's operational requirements; and (b) that the dismissal was effected in accordance with a fair procedure'*.

[34] (2018) 39 *ILJ* 987 (CC) at para 43.

[35] Id at para 52.

the evidence that the employee stole, it simply means that the employer was unable to substantiate its case that the dismissal of the employee for misconduct was fair, however this would equally not change the nature of the dispute as being one of a dismissal for misconduct.

[61] So, and in short, any characterization of the dispute by the first respondent in his referral documents *in casu* is simply a *prima facie* basis of placing the dispute before an arbitrator of the CCMA to arbitrate. The true nature of the reason for dismissal is determined on the basis of the facts placed before the first respondent. As clearly said in *Commercial Workers Union of SA v Tao Ying Metal Industries and Others*[36]: *'… The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.*'.

[62] Using once again illustration by example, the facts of this case itself serves as an example of how the true reason for dismissal is established. Accepting for the moment that the first respondent was not retrenched, then what possibly could he have been dismissed for? Certainly, he committed no misconduct. There was also no issue of incapacity being raised by any of the parties. But it is undeniable that he was dismissed. This would mean that the applicants had to prove this dismissal was fair based on operational requirements. And in doing so, it would present the case that the first respondent was part of all of the employees of Saffer that were retrenched under the circumstances summarised above, and that is why he was dismissed. In contradiction to this case, the first respondent would say he does not know why he was dismissed, but he would have nothing to gainsay the reason provided by the applicants. This all being so, and in order for the second respondent to decide if the dismissal of the first respondent was fair on the basis put forward by the applicants, he would have to assess whether the reasons provided to him by the applicants for the dismissal of the first respondent was proven and fair, and whether the process followed in arriving at dismissal as fair, which is something he simply had no jurisdiction to determine, as it is undoubtedly an issue relating to operational requirements. It follows that he should have to

[36] (2008) 29 *ILJ* 2461 (CC) at para 66.

declined jurisdiction, and direct that the matter be placed before the Labour Court.

[63] I wish to conclude with one last issue. The second respondent finds that the first respondent was not dismissed in terms of section 189, but was dismissed in terms of section 191. What does this even mean? Section 191 is the section dealing with the dispute resolution process of all unfair dismissals. This would include a dismissal for operational requirements. Section 191 does not exclude the application of section 189, but is actually the process in terms of which a section 189 dismissal dispute is prosecuted. The second respondent appears to misconstrue the provisions of the LRA, which is symptomatic of the manner in which he decided this case.

[64] In summary, it must follow from the above that the second respondent's conclusion that the first respondent was not employed by Saffer is clearly wrong. The second respondent in any event materially erred in entertaining any claim against Saffer and / or Polanofield, as such parties could not be joined to the proceedings after the fact in the absence of specific referrals to conciliation against them. The second respondent further erred in making Polanofield liable for an award against Saffer, because Polanofield was not the employer of the first respondent. And finally, even if the second respondent could entertain a dispute against Saffer, it is clear from the evidence that the first respondent was dismissed by Saffer for operational requirements, and the CCMA and the second respondent had no jurisdiction to entertain such a claim, as it could only be adjudicated by the Labour Court. The second respondent's award therefore constituted a gross and reviewable irregularity, and falls to be reviewed and set aside, on the basis of a want of jurisdiction.

Conclusion

[65] For all the reasons as set out above, the second respondent's arbitration award cannot stand. The second respondent simply did not have jurisdiction to entertain the dispute and / or make the award that he had made. The second respondent should have dismissed the matter for want of jurisdiction. It follows that the arbitration award that he had made, falls to be reviewed and set aside.

[66] With the second respondent's arbitration award having been reviewed and set aside, where to now? As stated above, it is up to this Court to finally determine the matter, not only because of the jurisdictional issue, but also on the issues of law at stake. The facts in this matter are in essence largely uncontested and straight forward, and it is not even necessary to resolve the factual disputes that do exist, in deciding this matter. There is simply no need to go through arbitration all over again, especially considering that the CCMA in any event would have no jurisdiction, no matter what. For all the reasons elaborated on above, I am satisfied that the second respondent should have disposed of the dispute on the basis of a lack of jurisdiction. Accordingly, the arbitration award of the second respondent must be substituted with an award to the effect that the CCMA and the second respondent had no jurisdiction to entertain the dispute.

Costs

[67] This then only leaves the issue of costs. In terms of section 162 of the LRA, I have a wide discretion where it comes to the issue of costs. Even though the applicants were successful, this was certainly an arguable case which had some novelty attached to it. I do not think any of the parties acted unreasonably in seeking to pursue this matter to finality, and in any event, it is an issue that called for final determination by this Court. I also consider the *dictum* of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[37] where it comes to costs awards in employment disputes before this Court, and in this case there certainly exists no reason to depart from the principle set out therein. Therefore, I consider it to be in the interest of fairness that no costs order should be made.

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

Order

1. The applicant's review application is granted.

[37] (2018) 39 ILJ 523 (CC) at para 25.

2. The arbitration award of the second respondent, arbitrator Stephen Lucky Mthethwa, dated 15 September 2021, and issued under case number GAJB 23221 – 20, is reviewed and set aside.

3. The arbitration award is substituted with a determination that the CCMA has no jurisdiction to entertain the dispute, and the dispute is dismissed on such basis.

4. There is no order as to costs.

S Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Advocate L Pillay

Instructed by: Yusuf Nagdee Attorneys

For the First Respondent: Mr K Letsholo of Letsholo Manasoe Inc Attorneys