

jurisdiction of the labour court, the constitutional court, as indicated above, in *NUMSA v Intervolve (Pty) Ltd and Others*,⁵¹ held, in effect, that such application has to be brought before the parties' participation in the conciliation proceedings on the basis that such proceedings constitute an absolute precondition for the establishment of the jurisdiction of the labour court. As indicated above, the viewpoint is held that there is no rationale for not following the same approach in respect of arbitration proceedings before the CCMA and bargaining councils.

3.4 Procedure for substitution of a party

Rule 26(4) of the CCMA rules requires that an application in terms of rule 26 must be made in accordance with the provisions of rule 31, i.e. on notice to all parties supported by affidavit and in terms of rule 26(7), to be accompanied by copies of all the documents previously delivered, unless the person to be substituted or such person's representative is already in possession of the documents.

3.5 Additional powers of the CCMA when granting an order for substitution

In terms of rule 26(6) of the CCMA rules, on granting an order for substitution in the circumstances envisaged, a commissioner is empowered to give appropriate directions as to the further procedure in the proceedings. Unlike rule 26(5)(b) of the CCMA rules dealing with the joinder of a person with a substantial interest in the dispute, no provision is made for an order of costs. In terms of rule 26(8) of the CCMA rules, subject to the said order or directions, the substitution does not affect any steps already taken in the proceedings.

C. REFERENCE TO SIMILAR PROVISIONS APPLICABLE IN COURTS OF LAW

Labour court

Rule 22 of the labour court rules deals with joinder of parties, intervention as applicant or respondent, amendment of citation and also substitution of parties.

Consolidated Agencies (Pty) Ltd (1994) 5 (8) *SALLR* 184 (IC); [1994] 10 *BLLR* 58 (IC); *McKenzie v Econ Systems and Konfig CC* (1995) 6 (3) *SALLR* 42 (IC); [1995] 1 *BLLR* 64 (IC)

⁵¹ [2015] 3 *BLLR* 205 (CC)

In terms of rule 22(1) of the labour court rules, the labour court may join any number of persons, whether jointly, jointly and severally, separately or in the alternative, as parties in proceedings, if the right to relief depends on the determination of substantially the same question of law or facts. In terms of rule 22(2)(a) of the labour court rules, the labour court may, on its own motion or on application and on notice to every other party, make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of the proceedings.⁵² In terms of rule 22(2)(b) of the labour court rules, when making an order relating to joinder, the labour court may give directions as to the further procedure in the proceedings as it deems fit and also make an order as to costs.

In terms of rule 22(3) of the labour court rules, any person entitled to join as a party in any proceedings may, on notice to all the parties, at any stage of the proceedings, apply for leave to intervene as a party and the labour court may make an order, including any order as to costs, or give such directions as to the further procedure in the proceedings, as it deems fit.

In respect of the issue of joinder, as envisaged in rule 22 of the labour court rules, the following considerations are, *inter alia*, of relevance:

- (a) the constitutional court in *NUMSA v Intervolve (Pty) Ltd and Others*,⁵³ in its majority decision, held that the discretion to join parties cannot trump the jurisdictional requirements contained in the LRA. The court further held that the labour court lacked jurisdiction to entertain a dismissal dispute if the dispute had not been referred to conciliation and, therefore, regarded the referral of a dispute to conciliation as one of the absolute preconditions to the labour court's jurisdiction. Consequently, under the circumstances where a dispute concerning the party requesting to be joined had not processed through conciliation, such joinder is not permitted to establish the jurisdiction of the labour court;⁵⁴

⁵² Failure to join a party with a substantial interest in the dispute may form the basis of a point *in limine* to be taken and, if successful, the dismissal of the proceedings - *Mathoae en 'n Ander v BS Auto Service t/a Kwaggasrand Motors* (1992) 13 ILJ 976 (LAC); *Dlala v Commissioner for CCMA and Another* [1999] 7 BLLR 670 (LC); *Halgang Properties CC v Western Cape Workers Association* [2002] 10 BLLR 919 (LAC); *PSA v Department of Justice and Others* [2004] 2 BLLR 118 (LAC); *Gordon v Department of Health: KwaZulu-Natal* (*supra*); *Zikhethale Trade (Pty) Ltd v COSAWU obo Members and Others* (*supra*)

⁵³ [2015] 3 BLLR 205 (CC)

⁵⁴ The constitutional court, in essence, followed the approach adopted by the labour appeal court in *NUMSA obo Members v Steinmuller SA (Pty) Ltd and Others* [2012] 7 BLLR 773 (LAC) and *NUMSA v Driveline Technologies (Pty) Ltd* [2000] 1 BLLR 20 (LAC)

- (b) with reference to s191(5) of the LRA,⁵⁵ the constitutional court further held that two preconditions had to be met before a referral to the labour court was valid, namely, a certificate of non-resolution had to be issued or the 30-day conciliation period (or further agreed-upon period between the parties) have lapsed;
- (c) on the other hand, the minority decision of the said constitutional court judgment expressed the view that the LRA should be purposively construed and an over-technical approach, as taken in the majority decision, should not be applied in labour proceedings as it results in avoiding dealing with the true merits of the dispute. Taking into account the objectives of the LRA, the investigation should be to determine whether or not there has been substantial compliance with the LRA which, according to the minority decision, there had been *in casu*. The minority decision, thus, was of the viewpoint that the approach adopted in the majority decision of the constitutional court in this matter had a chilling effect on the objectives of the LRA and the right of access to the courts in terms of the Constitution,⁵⁶ and
- (d) the labour court, subsequently, in *Kunyuzo and Another v Ace Wholesalers (Pty) Ltd and Others*,⁵⁷ held that the principles

⁵⁵ Section 191(5) of the LRA reads as follows:

- (5) If a council or a commission has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved -
- (a) the council or the Commission must arbitrate the dispute at the request of the employer if -
- (i) ...;
 - (ii) ...;
 - (iii) ...; or
 - (iv) ...; or
- (b) the employee may refer the dispute to the labour court for adjudication if the employee has alleged that the reason for the dismissal is -
- (i) ...;
 - (ii) ...;
 - (iii) ...; or
 - (iv) ...'

⁵⁶ The real effect of the majority decision of the constitutional court, in *NUMSA v Intervolve (Pty) Ltd and Others (supra)*, is that conciliation is a prerequisite to establish the jurisdiction of the labour court and a party who is not cited at the very early conciliation phase cannot be joined subsequently at a later stage of the proceedings. For example, an employer who was not cited as a respondent at the early conciliation phase cannot be joined as a respondent at a later stage of the proceedings and this would entail that the entire procedure will be required to be 'redone' (thus covering all employers) or, alternatively, that a separate dispute will be required to be referred against the employer who was not initially so cited and who initially did not participate in the conciliation proceedings. Inevitably, in both the above circumstances, the referral would be out of time and condonation will have to be applied for. Inherent in the conciliation application process is obviously the risk that same will not be granted. Taking the above into account, the real issue to be considered is whether, in the light of the approach adopted by the constitutional court, rule 22 of the labour court rules serves any purpose

⁵⁷ [2015] 7 BLLR 683 (LC)

established by the constitutional court in the aforesaid judgment were not applicable to the facts *in casu*⁵⁸ and, therefore, *in casu* adopted the viewpoint that the requirement of conciliation is not applicable to a new employer in a s197 transfer scenario.⁵⁹

In terms of rule 22(4) of the labour court rules, if a party to any proceedings has been incorrectly or defectively cited, the court may, on application and on notice to the party concerned, correct the error or defect and may make an order as to costs. In respect of the issue of the correction of a party so cited, in terms of rule 22(4) of the labour court rules, the following principles are of relevance:

- (a) the error or defect is required to be corrected on application and notice to the party concerned;⁶⁰
- (b) it appears that the labour court is entitled to entertain an application to correct a defective citation at any stage, including an appeal, until the matter in dispute is finally disposed of;⁶¹ and
- (c) the jurisdiction of the labour court to rectify a citation is based on rule 11(4) of the labour court rules which reads as follows:

‘11(4) In the exercise of its powers and in the performance of its functions, or in any incidental matter, the court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act.’⁶²

In terms of rule 22(5) of the labour court rules, if in any proceedings it becomes necessary to substitute a person for an existing party, any parties to such proceedings may, on application and on notice to every other party, apply to the court for an order substituting that party for an existing party and the court may make such order, including an order as to costs, or

⁵⁸ The labour court extensively referred to *NUMSA v Intervolve (Pty) Ltd* (2015) 36 *ILJ* 363 (CC); [2015] 3 *BLLR* 205 (CC); *Halgang Properties CC v Western Cape Workers' Association* [2002] 10 *BLLR* 919 (LAC); *Western Cape Workers Association v Halgang Properties* [2004] 3 *BCLR* 237 (CC); *Anglo Office Supplies (Pty) Ltd v Lotz* (2008) 29 *ILJ* 953 (LAC); *Mokoena and Others v Motor Component Industry (Pty) Ltd and Others* (2005) 26 *ILJ* 277 (LC)

⁵⁹ The labour court thus held that the third respondent, as the new employer, had a substantial interest in the outcome of the dispute and, despite the fact that it had not been party to the conciliation process, its joinder was granted

⁶⁰ *Ntanzu and Others v Affirmative Blasting* [2006] 12 *BLLR* 1182 (LC)

⁶¹ *PPWAWU and Others v SEBBA t/a Republic Brushware* [2001] 7 *BLLR* 726 (LAC)

⁶² *Lambrecht v Pienaar Brothers (Pty) Ltd* [1998] 6 *BLLR* 628 (LC)

give such directions as to the further procedure in the proceedings as it deems fit.⁶³

Rule 22(6) of the labour court rules corresponds with the content of rule 26(7) of the CCMA rules. Rule 22(7) of the labour court rules also corresponds with the content of rule 26(8) of the CCMA rules.

Labour appeal court

In terms of rule 12(1) of the labour appeal court rules, such court may, for sufficient cause shown, excuse the parties from compliance with any of the said rules of the labour appeal court.⁶⁴

In terms of rule 12(2) of the labour appeal court rules, the judge president, or any judge acting on his authority, has the power to give any directions in matters of practice and procedure that are considered just and expedient.

High court

Rule 10(1) of the uniform rules of court⁶⁵ provides for the joinder of plaintiffs where the right to relief of such plaintiffs is dependent upon the determination of substantially the same question of law or fact. In terms of rule 10(2) of the uniform rules of court, a plaintiff may join several causes of action in the same action.

Rule 10(3) of the uniform rules of court reads as follows:

‘Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action.’

⁶³ Substitution is, for instance, required where an employer is liquidated, where its status or capacity changes or where the employer is deceased - *CEPPWAWU obo Gumede v Republican Press (Pty) Ltd* [2006] 6 BLLR 537 (LC)

⁶⁴ Rule 12(1) of the labour appeal court rules provides the general powers of condonation - *Gauteng Provinsiale Administrasie v Scheepers and Others* [2000] 7 BLLR 756 (LAC); *Peach and Hatton Heritage (Pty) Ltd v Neethling and Others* [2001] 5 BLLR 528 (LAC)

⁶⁵ Rule 10(1) of the uniform rules of court reads as follows:

‘(1) Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant proposing to join as plaintiffs would, if he brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on each action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing.’

Rule 10 of the uniform rules of court, therefore, differs from rule 26 of the CCMA rules in three main respects:

- (a) there is no need for an order of court and the rule authorises plaintiffs to jointly, jointly and severally, separately or in the alternative, join as plaintiffs in one action;
- (b) several defendants may be sued in one action if the question arising between them, or any of them and the plaintiff or plaintiffs, depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action; and
- (c) in any action in which parties have been joined, the court may at the conclusion of the trial make a just order as to costs taking into account specific considerations, but without limiting the discretion of the court in any way, which considerations are:⁶⁶
 - (i) an unsuccessful plaintiff may be held liable for the costs occasioned by a party who has been joined by the plaintiff;⁶⁷
 - (ii) if judgment is given in favour of a defendant, the plaintiff may be ordered to pay the defendant's costs;⁶⁸
 - (iii) if judgment is given in favour of a defendant, the unsuccessful defendants may be ordered to pay the costs of the successful defendant, jointly and severally, the one paying the other to be absolved;⁶⁹ and
 - (iv) if judgment is given in favour of a plaintiff against more than one of the defendants, those defendants may be ordered to pay the plaintiff's costs, jointly and severally, the one paying the other to be absolved.⁷⁰

The court has similar powers as the CCMA to order, *mero motu* or on application, the joinder of parties where the party to be joined has a direct and substantial interest in the subject matter of the dispute and whose rights may be affected by the judgment.⁷¹

⁶⁶ Rule 10(4) of the uniform rules of court

⁶⁷ Rule 10(4)(a) of the uniform rules of court

⁶⁸ Rule 10(4)(b)(i) of the uniform rules of court

⁶⁹ Rule 10(4)(b)(ii) of the uniform rules of court

⁷⁰ Rule 10(4)(c) of the uniform rules of court

⁷¹ *Toekies Butchery (Edms) Bpk v Stassen* 1974 (4) SA 771 (T) at 774G-H; *Ngcawashe v Terblanche* 1977 (3) SA 796 (A) at 806H; *Aramugam Johannesburg City Council* 1979 (1) SA 972 (W) at 974D;

 RULE 26

A defendant may also be joined on grounds of convenience, equity, the saving of costs and the avoidance of multiplicity of actions. The powers are, however, not provided by a rule of court but under the common law, and exercised in terms of the inherent powers of the high court.

Intervention of persons as plaintiffs or defendants is dealt with in rule 12 of the uniform rules of court, which reads as follows:

‘Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all the parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant. The court may upon such application make such order, including any order as to costs, and give such directions as to the further procedure in the action as to it may seem meet.’

Substitution of parties is regulated by rule 15 of the uniform rules of court.⁷² Unlike the corresponding rule of the CCMA, in the case of a change of status of any party by reason of death, marriage, insolvency, attainment of majority or other change of status, an application to court is not required and the alteration is effected by notice, subject to the rights of any other party who is affected by the substitution to apply to court for relief. Where no change of

Esquire Electronics Ltd v Executive Video 1986 (2) SA 576 (A) at 590J-591C; *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA (A) at 39I-40B

⁷² Rule 15 of the uniform rules of court reads as follows:

- (1) No proceedings shall terminate solely by reason of the death, marriage or other change of status of any party thereto unless the cause of such proceedings is thereby extinguished.
- (2) Whenever by reason of an event referred to in sub-rule (1) it becomes necessary or proper to introduce a further person as a party in such proceedings (whether in addition to or in substitution for the party to whom such proceedings relate) any party thereto may forthwith by notice to such further person, to every other party and to the registrar, add or substitute such further persons as a party thereto, and subject to any order made under sub-rule (4) hereof such proceedings shall thereupon continue in respect of the person thus added or substituted as if he had been a party from the commencement thereof and all steps validly taken before such addition or substitution shall continue of full force and effect: Provided that save with the leave of the court granted on such terms (as to adjournment or otherwise) as to it may seem meet, no such notice shall be given after the commencement of the hearing of any opposed matter; and provided further that the copy of the notice service on any person joined thereby as a party to the proceedings shall (unless such party is represented by an attorney who is already in possession thereof) be accompanied in application proceedings by copies of all notices, affidavits and material documents previously delivered, and in trial matters by copies of all pleadings and like documents already filed of record. Such notice, other than a notice to the registrar, shall be served by the sheriff.
- (3) Whenever a party to any proceedings dies or ceases to be capable of acting as such, his executor, curator, trustee or similar legal representative, may by notice to all other parties and to the registrar intimate that he desires in his capacity as such thereby to be substituted for such party, and unless the court otherwise orders, he shall thereafter for all purposes be deemed to have been so substituted.
- (4) The court may upon notice of application delivered by any party within 20 days of service of notice in terms of sub-rules (2) or (3) set aside or vary any addition or substitution of a party thus effected or may dismiss such application or confirm such addition or substitution, on such terms, if any, as to delivery of any affidavits or pleadings, or as to postponement or adjournment, or as to costs or otherwise, as to it may seem meet.’

status is involved, application to court must be made for substitution involving the introduction of a new *persona*, the procedure of which application accords with the procedure provided for in rule 26 of the CCMA rules.

Magistrate's court

Section 41 of the Magistrates' Courts Act⁷³ provides for the joinder of plaintiffs, where the right to relief of such plaintiffs is dependent upon the determination of substantially the same question of law or fact.⁷⁴ It differs from rule 26 of the CCMA rules in two respects, namely:

- (a) there is no need for an order of court and the rule authorises plaintiffs, in the circumstances envisaged, to join as plaintiffs in one action;⁷⁵ and
- (b) the court may, at the conclusion of the trial,⁷⁶ make a just order as to costs taking into account specific considerations, which are:
 - (i) if all the plaintiffs fail in the action, the court may make an order as to costs as it may deem just;
 - (ii) the court may order the plaintiffs to pay the costs of the defendant jointly and severally, the one paying the other to be absolved; and
 - (iii) if one plaintiff pays more than his *pro rata* share of the costs of the defendant, the court may make an order entitling him to recover from the other plaintiffs their *pro rata* share of such excess.

Rule 28(1) of the magistrates' courts rules⁷⁷ provides for the joinder and intervention of persons in any proceedings, which provisions accord with rule 26 of the CCMA rules.

⁷³ 32 of 1944

⁷⁴ Section 41(1) of the Magistrates' Courts Act 32 of 1944 reads as follows:

'(1) Any number of persons, each of whom has a separate claim against the same defendant, may join as plaintiffs in one action if their right to relief depends upon the determination of some question of law or fact which if separate actions were instituted would arise in each action: Provided that if such joint action be instituted the defendant may apply to court for an order directing that separate trials be held and the court in its discretion may make such order as it deems just and expedient.'

⁷⁵ Section 41(1) of the Magistrates' Courts Act 32 of 1944

⁷⁶ Section 41(3) of the Magistrates' Courts Act 32 of 1944

⁷⁷ Rule 28 of the magistrates' courts rules reads as follows:

RULE 26

Rule 25(4) of the magistrates' courts rules deals with parties undergoing a change in status and provides that where an executor, trustee, guardian or other competent person has been appointed, the court may on application order that such person so appointed be substituted in the place of the party who has died or became incompetent.

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- (1) The court may, on application by a person desiring to intervene in any proceedings and having an interest therein, grant leave to such person to intervene on such terms as it may deem fit.
- (2) The court may, on application by any party to any proceedings, order that another person shall be added either as a plaintiff or applicant or as defendant or respondent on such terms as it may deem fit.
- (3) A plaintiff may join several causes of action in the same action and the court may at the conclusion of the proceedings make such order as to costs as it deems fit.
- (4) Where there has been a joinder of causes of action or of parties, the court may on the application of a defendant at any time order that separate trials be held either in respect of some or all the causes of action or some or all the parties; and the court may on such application make such order as it deems just and expedient.
- (5) Where separate actions have been instituted and it appears to the court convenient to do so, it may upon the application of any party thereto and after notice to all interested parties, make an order consolidating such actions, whereupon –
- (a) the said actions shall proceed as one action;
 - (b) the provisions of this rule shall *mutatis mutandis* apply with regard to the action so consolidated; and
 - (c) the court may make any order which it deems fit with regard to the further procedure, and may give one judgment disposing of all matters in dispute in the said actions.'