



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D 8336/2022

In the matter between:-

MINISTER OF POLICE

APPLICANT

and

ESHWALALL BABOORAM

FIRST RESPONDENT

FREEDA NAICKER

SECOND RESPONDENT

SAFETY AND SECURITY

SECTORAL BARGAINING COUNCIL

THIRD RESPONDENT

JUDGMENT

ANNANDALE, AJ

[1] The Minister of Police seeks mandatory and prohibitory interdicts aimed at bringing to an end what the Minister regards as persistent referrals of the same dispute to the third respondent (the Bargaining Council).

[2] Although cited as the third respondent, the Bargaining Council has taken no role in these proceedings. I consequently refer to the first and second respondents as the respondents unless differentiation between the two of them is required by the context, and to the third respondent as the Bargaining Council

[3] The dispute in question relates to the Minister's decisions not to promote the respondents to the rank of captain in the South African Police Services. The respondents regarded this as an unfair labour practice and referred the matter to the Bargaining Council. That referral was found to have been out of time, which in the Minister's view brought matters to an end. The respondents however referred the same dispute again, and the Minister now seeks interdicts barring them from instituting further claims and directing them to withdraw the referrals presently pending.

[4] The interdicts sought are final in nature and effect. The Minister is therefore required to establish a clear right, an injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy.¹ The *Plascon-Evans* rule applies to disputes of fact.

[5] This case bears significant similarities to *Maphanga*² in which similar relief³ was sought in terms of section 2(1)(b) of the Vexatious Proceedings Act 3 of 1956⁴ (the Act), alternatively the common law. Here however, the Minister

¹ *Setlogelo v Setlogelo* 1914 AD 221 at 227.

² *MEC for the Department of Co-Operative Governance and Traditional Affairs v Maphanga* 2021 (4) SA 131 (SCA).

³ *Maphanga* para 6.

⁴ Which reads: 'If, on an application made by any person against whom legal proceedings have been instituted by any other person, or who has reason to believe that the institution of legal proceedings against him is contemplated by any other person, the court is satisfied that the said person has persistently and without any reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons, the court may, after hearing that other person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or any inferior court without the leave of that court, or any judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or Judge or the inferior court, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is *prima facie* ground for the proceedings.'

relies only on the common law because a Bargaining Council is not a court to which the Act applies.⁵

The facts

[6] The decisions not to promote the first and second respondents were taken in 2000 and 2002 respectively but the dispute was first referred to the Bargaining Council in October 2016 (the first referral). The respondents explain that the reason for this substantial delay was because they only became aware in around August 2016 that an internal panel had recommended their promotion but that recommendation was not implemented.

[7] Be that as it may, there is no dispute that the first referral was out of time and the respondents consequently required condonation. The condonation application was refused by Commissioner Booysen on 3 April 2018 (the condonation decision).

[8] Despite this, in December 2018 the same underlying dispute was referred to the Bargaining Council for the second time (the second referral). The Minister raised a point in *limine* that the matter was *res judicata* by virtue of the condonation decision which precluded the Bargaining Council from entertaining the dispute. The special plea thus amounted to a jurisdictional objection.

[9] The Minister's plea *in limine* was upheld on 8 March 2019 by Commissioner Lyster who ruled that until the condonation decision had been reviewed and set aside, it stood and the Bargaining Council lacked jurisdiction to deal with the dispute.

[10] Commissioner Lyster reached this decision without having regard to the respondents' submissions as they had not been placed before him by the Bargaining Council. On 15 May 2019 he consequently granted an application to rescind his order upholding the Minister's special plea (the Lyster recission) which the Minister did not oppose.

⁵ Maphanga paras 18-19.

[11] The respondents' submissions of which Commissioner Lyster only had sight when dealing with the recission application, were to the following effect. The first referral was premature because the respondents had not exhausted the internal remedies which are a prerequisite to a valid referral in terms of clause 3.5 of the Bargaining Council's constitution. The constitution describes a 5 step pre-referral process and the respondents had stopped short of the final step of mediation. As the first referral was premature, Commissioner Booysen had no jurisdiction to entertain it. After the condonation decision, the respondents completed the outstanding steps before initiating the second referral.

[12] Commissioner Lyster correctly did not decide whether those arguments were correct, but found that the submissions made out at least a *prima facie* case in respect of the point in *limine*.

[13] There is some contestation on the papers as to whether the second referral was thereafter set down for consideration on the merits, or whether the respondents initiated a third referral under the same case number and on the same papers as the second referral. The applicant contends for a third referral. The respondents on the other hand state categorically in their answering affidavits that there was no third referral, but that the second referral was set down for a hearing on the merits following the Lyster recission. The applicant does not deal with these assertions in reply.

[14] That lack of contestation, together with the fact that even on the applicant's case the papers in what is styled as the third referral were identical to those in the second, means that there is no basis upon which the respondents' version in this regard can be rejected.

[15] I consequently decide this application on the basis that there have been only two referrals of the dispute.

[16] Following the Lyster recission, the second referral came before Commissioner Mbuli in January 2021. He ordered the Minister to file an affidavit in respect of the point *in limine*. This led to the Minister apparently filing extensive submissions on the special plea.

[17] The respondents again made submissions in answer, but these were yet again not placed before Commissioner Mbuli when he upheld the special plea on 30 June 2021 as if it were unopposed. In his award, Commissioner Mbuli expressly confirmed that the condonation decision stood.

[18] When the respondents became aware of this decision, they immediately brought it to Commissioner Mbuli's attention that they had indeed filed submissions and asked him *mero motu* to rescind his decision upholding the special plea. Commissioner Mbuli declined this invitation, but on 6 October 2021 granted an application to rescind his order upholding the plea of *res judicata* and requested the Bargaining Council to set the matter down for hearing afresh before another Commissioner (the Mbuli recission).

[19] Both the Lyster and Mbuli recission orders envisaged that the special plea and the respondents' premature referral defence to it would be dealt with on their merits. That has yet to happen.

[20] A virtual hearing set down for 8 April 2022 did not proceed because the Bargaining Council did not send a link. The next hearing, originally scheduled for 19 July 2022, was postponed at the second respondent's request because the Bargaining Council had double-booked her legal representative with another part-heard case on the same day. Some three weeks later, on 10 August 2022, the present application was launched. The referrals to the Bargaining Council have not progressed since, and remain pending.

[21] The central predicate of the Minister's case is that the condonation stands as a valid decision which precludes subsequent referrals of the same dispute unless and until it is set aside on review. Consequently, so the Minister's argument runs, the recission decisions setting aside the orders upholding the Minister's jurisdictional objections are of no moment and he is entitled to orders directing the respondents to withdraw the pending proceedings and interdicting them from pursuing any further referral, unless and until the condonation decision is set aside.

The legal requirements

[22] The clear right relied on by the Minister is the right to not have to defend himself repeatedly against a dispute that has already been determined and where there is thus no just cause to resuscitate the same complaint. Essentially then, the Minister seeks to achieve under the common law what he is unable to achieve in terms of the Act.

[23] The insurmountable hurdle which lies in his way is that the Supreme Court of Appeal in *Maphanga*⁶ has explained that a superior court's common law power to stop frivolous and vexatious proceedings, as dealt with in cases such as *Corderoy*,⁷ stems from its inherent power to regulate its own process. The court's common law power thus relates solely to proceedings before that court and does not extend to proceedings in inferior courts or other courts or tribunals. Indeed, the Act was promulgated specifically to address these limitations, but it did not change the common law principles and its reach did not extend to proceedings before bargaining councils as already discussed.

[24] The Minister relies on the dictum in *Hudson v Hudson and another*,⁸ approved by the SCA in *Beinash v Wixley*⁹ that when "the court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the court to prevent such abuse." The Minister submits that is as authority for the proposition that the court's powers can equally apply to abuses of the processes of bargaining councils because they forms part of that machinery.

[25] That proposition is unsustainable for two reasons.

[26] First, *Beinash v Wixley* concerned an application to set aside a subpoena issued out of the court concerned. The focus of the judgment was thus the court's

⁶ Paras 25 to 28.

⁷ *Corderoy v United Government (Minister of Finance)* 1918 AD 512 at 519.

⁸ 1927 AD 259 at 268.

⁹ 1997 (3) SA 721 (SCA) p 734 E – F.

powers to regulate its *own* processes and the *dictum* relied on by the Minister must be read in that context.

[27] That the dictum is limited to court process is also clear from what is said immediately before and after the quoted *dictum* on which the Minister relies. Before quoting *Hudson v Hudson*, the judgment records that¹⁰: “There can be no doubt that every Court is entitled to protect itself and others against an abuse of its processes.” Shortly thereafter, when describing the concept of abuse of process the court held¹¹:-

“There can be no all-encompassing definition of the concept of abuse of process. It can be said in general terms, however, the abusive process takes place with the procedures permitted by the rules of the court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective”.¹²

[28] Second, and more fundamentally, the proposition is inconsistent with the rejection of a similar line of argument in *Maphanga*.¹³ There, counsel for the MEC had had argued that *Corderoy* did not limit the kinds of orders which could be granted in the exercise of the court’s inherent powers and did not exclude orders in respect of other forms of persistent or vexatious conduct which resulted in extra curial as opposed to judicial proceedings.

[29] It follows that the applicant is not entitled to relief.

Interdictory relief

[30] Even if this court did have the power to grant interdictory relief in respect of proceedings in other *fora*, the Minister has failed to meet the threshold for the grant of that relief. I deal with each of the requirements briefly to the extent that

¹⁰ *Ibid* p 734 D-E.

¹¹ *Ibid* p 734 F-G.

¹² Cited with approval by the Constitutional Court in *Lawyers for Human Rights v Minister in the Presidency* 2017 (1) SA 645 (CC) para 20.

¹³ *Maphanga* para 27

my reading of *Maphanga* may be viewed as incorrect, although the judgment is in my view clear as is the manner in which it has been construed.¹⁴

[31] The Minister relies on the alleged right not to have to defend himself repeatedly against a dispute that has already been determined and where there is thus no just cause to resuscitate the same complaint. This formulation of the Minister's case required a showing equivalent to what is required in proceedings under the Act, namely that a person has brought legal proceedings "persistently and without just grounds".¹⁵

[32] Persistence in this context means recurring, constantly repeated or continuous.¹⁶ As is apparent from the earlier exposition of the facts which I must accept for present purposes, there have only been two referrals, the first which occurred prematurely, and the second which occurred after all the mandatory dispute resolution steps had been completed.

[33] It can also not be found that such referrals as have already occurred are without just grounds. To meet that threshold, the Minister would have to demonstrate that the respondents' claims are obviously unsustainable as a matter of certainty, and not merely on a preponderance of probability.¹⁷

[34] The Minister's case in this regard rests squarely on the proposition that the condonation decision remains extant unless and until it is set aside on review as it cannot be altered by another Commissioner.

[35] The respondents sought to meet this difficulty by relying on *Avgold*.¹⁸ which held that if a referral is premature, the council does not have jurisdiction to hear it. The result is that a commissioner dealing with a premature referral acts *ultra vires* and any award made would be susceptible to review.

¹⁴ The manner in which *Maphanga* has been construed by the Constitutional Court in *Mineral Sands Resources (Pty) Ltd and others v Reddell and others (Centre for Applied Legal Studies and another as amicus curiae)* 2023 (7) BCLR 779 (CC) paras 56 – 59, and most recently by the Electoral Court *Umkhonto Wesizwe Political Party v The Electoral Commission of South Africa and Others* [2024] ZACC 26 (25 October 2024) paras 19 to 23 is consonant with my reading of the case.

¹⁵ *Maphanga* para 28

¹⁶ *Maphanga* para 20.

¹⁷ *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 565 D- E

¹⁸ *Avgold-Target Division v CCMA* [2010] 2 BLLR 159 (LC) para 46.

[36] At a level of principle this is not contentious. The issue here is whether another commissioner could entertain a subsequent referral which was no longer premature, absent a review of the decision made in the premature referral.

[37] The respondents submit that commissioners are empowered by CCMA rule 22 and its counterpart in article 3.5.1(k) of the Bargaining Council's constitution to deal with the second referral even though the condonation decision has not be reviewed and set aside. CCMA Rule 22 provides that "if during the arbitration proceedings it appears that a jurisdictional issue has not been determined, the panellist must require the parties to prove that the Council has jurisdiction to arbitrate the dispute."¹⁹

[38] In *Avgold*, relying on CCMA rule 22, an arbitrating commissioner considered a new jurisdictional objection not raised previously.²⁰ The respondents argue that subsequent commissioners have jurisdiction to deal with the second referral because the prematurity of the first referral, which is a matter that bears on jurisdiction, was not raised before Commissioner Booysen.

[39] Counsel for the applicant however correctly pointed out that CCMA rule 22 is concerned with a very different situation to that which pertains here. *DETAWU on behalf of Tshwili v Bidvest Services (Pty) Ltd*²¹ explains that CCMA rule 22 extends only to the duty of an arbitrating commissioner to determine the jurisdiction to conciliate afresh in arbitration proceedings if new arguments regarding conciliation jurisdiction are raised. Commissioner Booysen was sitting as an arbitrating commissioner subsequent to a certificate being issued in the conciliation proceedings.

[40] However that does not mean that the respondents were obliged to seek review relief from the Labour Court. This is because section 144 of the Labour Relations Act 1995 provides that a decision may be rescinded by the commissioner who made it or by another commissioner.

¹⁹ *Ibid* paras 43 and 44.

²⁰ *Ibid* paras 43 and 44.

²¹ C 725/2021 2023 ZALCCT 42 paras 5 – 8.

[41] If the first referral was indeed premature, the condonation decision would be susceptible to rescission as it was erroneously sought or made as a result of all parties to the proceedings mistakenly believing that the Bargaining Council had jurisdiction to deal with the referral whereas the prescribed internal procedures had not been exhausted as required by clause 3.1 and 3.2 of the Bargaining Council's constitution.

[42] This means that I cannot find as a matter of certainty that the second referral is obviously unsustainable, or that the condonation decision can only be set aside in review proceedings.

[43] Even if the second referral was doomed to failure, the Minister has the alternative remedy of finishing what he started in the Bargaining Council.

[44] There is no dispute that the Bargaining Council has jurisdiction to deal with the special plea. Both rescission orders envisaged the Minister's *res judicata* plea and the respondents' defence to it would be dealt with on their merits in a subsequent hearing before the Bargaining Council. If the special plea is upheld, that will be the end of the matter.

[45] Pursuing to finality the course of action the Minister deemed appropriate at the outset, is an entirely adequate means of addressing the Minister's complaint. Moreover it is a remedy which does not impinge on any party's rights, in terms of section 34 of the Constitution, to have their disputes ventilated before a public and independent forum.

[46] In the circumstances, even if it were legally competent for this court to grant interdictory relief in respect of the conduct complained of, the requisites for the grant of such relief have not been established.

Respondents' points *in limine*

[47] This conclusion makes it unnecessary to deal with the four points *in limine* raised by the respondents, each said to warrant dismissal of the application, other than *en passant*.

[48] The first and fourth points in *limine* are inter-related. Both are to the effect that this court lacks jurisdiction. They rest on the mischaracterisation of the present proceedings as a review of decisions of the Bargaining Council, over which the Labour Court enjoys exclusive jurisdiction.

[49] The second point *in limine* relates to the alleged fatal non-joinder of the National Commissioner of Police. The respondents assert that it is the Commissioner and not the Minister who employs the police and so the Commissioner has a direct and substantial interest in the proceedings.

[50] Even if the contentions were factually correct, the legal conclusion fails. The orders sought were directed at the respondents alone and had no effect on their employer. If granted, the orders could be given effect to without in any way affecting the employer's interests and his joinder was therefore not necessary.

[51] In argument, counsel for the respondent explained that the objection was actually that the applicant did not have *locus standi* because he was not the employer, but that was not the case pleaded.

[52] The third point in *limine* of *lis pendens* is based on the assertion that the litigation pending before the Bargaining Council was between the same parties, based on the same cause of action and respect and in respect of the same subject matter. Quite apart from the fact that upholding a plea of *lis pendens* would stay the present proceedings rather than bring them to an end the relief sought in the two sets of proceedings is entirely different, as is the cause of action.

Costs

[53] It remains only for me to consider the question of costs. It is entirely appropriate for costs to follow the result as is usual, but the respondents seek costs against the minister *de bonis propriis* and on the scale as between attorney and client.

[54] Such a drastic order is said to be appropriate because the Minister has repeatedly raised the same point *in limine* before the Bargaining Council and instituted the present proceedings as a means of circumventing the effect of the

recission decisions. This, so the respondents argue, renders the institution of these proceedings an abuse of process. In addition, the respondents accuse the Minister of raising “minor technicalities” in opposition to their Bargaining Council referrals, which they assert also amounts to an abuse of process.

[55] I have some difficulty with the notion that the manner in which the Minister conducted himself in the proceedings before the Bargaining Council is a matter to which I may properly have regard in determining the costs of this application. Moreso when the full records of those proceedings are not before me.

[56] To the extent however that the respondents’ contentions should be understood as suggesting that the manner in which the Minister has conducted the present proceedings is an extension of an earlier abuse of process, the respondents’ complaints are not borne out by the evidence.

[57] The *res judicata* plea was mounted twice because the first decision upholding it was rescinded and Commissioner Mbuli directed the filing of submissions on it following the second recission. That special plea has yet to be determined on its merits. It raises issues of substance and cannot be said to be a minor technicality. Similarly, the Minister’s submissions on the late referral were substantive and were dealt with cogently and comprehensively in the condonation decision.

[58] The central tenet of the Minister’s case reveals that he did not believe it was necessary to review the recission decisions because he regarded them as being of no moment since the condonation decision had not been set aside. That stance lost sight of the fact that whilst the second referral did not, in terms, seek a recission of that decision, it did so in substance. But the Minister could not have applied to review and set aside the recission decisions when he had, quite correctly, not opposed either of them because the decisions against which they lay had been taken in ignorance of the respondents’ submissions.

[59] I consequently find that there is no basis for a punitive costs award.

Order

[60] In the result, I make the following order:

The application is dismissed with costs.


ANNANDALE, AJ

JUDGMENT RESERVED:

22 OCTOBER 2024

JUDGMENT HANDED DOWN:

4 NOVEMBER 2024

Appearances

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No appearance for third respondent.