

REPUBLIC OF SOUTH AFRICA



Reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Case no: J 1186 / 11

In the matter between:

WORKFORCE GROUP (PTY) LTD

Applicant

and

NATIONAL TEXTILE BARGAINING COUNCIL

First respondent

CCMA

Second respondent

Heard: 6 July 2011

Delivered: 7 July 2011

JUDGMENT

STEENKAMP J

Introduction

1]This is an urgent application brought during the July court recess to stay arbitration proceedings under the auspices of the CCMA (the second respondent) due to continue on 13 July 2011.

Background

2]The first respondent, the National Textile Bargaining Council, applied to the CCMA in terms of s 62 of the Labour Relations Act¹ on 9 February 2011 to determine a demarcation dispute. It sought a demarcation that the whole or part of the Workforce Group (Pty) Ltd falls within the textile sector; and, to the extent that it does, that it is obliged to give effect to the Main Collective Agreement governing that sector.

3]The Workforce Group (the applicant in these proceedings) is a temporary employment service as defined in s 198 of the LRA. It supplies labour to a number of entities in the textile sector.

4]The matter was set down for arbitration in Ladysmith, KwaZulu-Natal on 9 May 2011. The applicant raised two points in limine: one pertaining to the CCMA's jurisdiction to hear the dispute; and the other raising an exception, alleging that the application for demarcation was vague and embarrassing. The jurisdictional point was based on an argument that the dispute first had to be conciliated and that the CCMA did not have jurisdiction to arbitrate absent conciliation.

5]Although he did not give written reasons for his ruling, the arbitrator dismissed both points in limine on the same day, ie 9 May 2011.

6]The deponent to the founding affidavit, Rian Ferreira (the applicant's Group Legal Director) says, somewhat coyly, that "subsequent to the proceedings in Ladysmith on 9 May 2011," the applicant launched an application in this Court to review and set aside the arbitrator's ruling. What he does not say, is that the

¹ Act 66 of 1995 ("the LRA")

review application was only launched on 15 June 2011; and that this application to stay the continuation of the arbitration proceedings, pending the review application, was only delivered on 29 June 2011.

Urgency

7]The ruling that forms the subject matter of the review application was made on 9 May 2011. It is now almost two months later. Yet the applicant wishes this application to be dealt with on an urgent basis outside of the court term.

8]The applicant submits that the matter is urgent because it advised the Council's attorneys on 1 June 2011 that it was "in the process of applying for review" and that, if no agreement could be reached, it would apply for the arbitration to be stayed pending the outcome of the review application. In the same letter of 1 June 2011, though, the applicant says that it and its counsel are available from 13-15 July 2011, should the CCMA "...still wish to have the matter set down for arbitration."

9]The applicant did nothing further, other than delivering the review application on 15 June 2011 – ie two days short of the prescribed six-week time limit – until 23 June 2011. On that day, its attorneys sent a letter marked "urgent" to the Council's attorneys, asking them to advise it by the next day "...whether your client would be amenable to postpone the arbitration set down at the National Textile Bargaining Council, Durban, on 13 July 2011, pending the outcome of our client's review application."

10]The council's attorneys responded the next day, declining an agreement to postpone; alleging that the applicant was merely seeking to delay the demarcation proceedings, and bringing the applicant's attention to the fact that this Court is opposed to Bargaining Council and CCMA rulings being challenged *in media res*, as set out in *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & others*.²

2 (2010) 31 ILJ 371 (LC) at 380.

11]On 29 June 2011 the applicant delivered this urgent application.

12]The applicant indicated to the Council's attorneys on 27 May 2011 that it was "in the process of applying for review"; yet the review application was delivered in the nick of time, despite the generous six week period allowed for in s 145(1) of the LRA; and the urgent application to stay the arbitration proceedings was delivered more than seven weeks after the arbitrator made his ruling, and almost a month after the applicant indicated its and its counsel's availability to continue with the arbitration on 13 July 2011.

13]This is a prime example of self-created urgency. The applicant did not act with any expedition – in fact, even the review application which underlies the basis of bringing this application was dealt with in a fairly leisurely fashion, and the application – comprising an affidavit of nine pages – was barely delivered in time. The applicant then sought to have this matter heard out of term time on an urgent basis. It has not established sufficient grounds for urgency.³ The matter should be struck off the roll for this reason alone.

14]But aside from my view on urgency, I would not have been inclined to grant the relief sought on the merits. I will provide brief reasons for my views in this regard as well.

The merits

15]In order to obtain the relief sought, the applicant has to fulfil the requirements for interim relief, i.e. a prima facie right; the absence of an adequate alternative remedy; the apprehension of irreparable harm; and an indication that the balance of convenience favours it.

Alternative remedy

16]The applicant has a clear alternative remedy, namely to apply for a postponement at the CCMA pending the finalisation of the review application. In terms of CCMA rule 23, an arbitration may be postponed by agreement

³ For this court's approach to urgency, see, for example, *Chiloane v Nhluvuto Agricultural Project & others* [2000] 4 BLLR 392 (LC).

between the parties; or by application and on notice to the other parties. In this case, the applicant has made no effort to apply for a postponement at the CCMA. There is nothing in the CCMA rules preventing the arbitrator from postponing the continuation of the arbitration pending the finalisation of the review application.

17]I have recently expressed the opinion that, in uncompleted proceedings, such as the current one, the applicant should have attended the part heard arbitration in order to finalise the matter. Had it still being dissatisfied, it could have taken the arbitration award on review. Alternatively, it could have applied to the arbitrator already hearing the matter to postpone the hearing pending the outcome of the review application of his jurisdictional ruling. Had the arbitrator refused, the CCMA would have been *functus officio*. The applicant could then have applied to the Labour Court to review and set aside the arbitrator's refusal to postpone.⁴

Prospects of success on review.

18]In order to establish a prima facie right for the urgent interim relief sought, the applicant has to show that this is one of those exceptional circumstances where the court should intervene in uncompleted arbitration proceedings. The numerous cases dealing with the stay of a writ of execution pending the review proceedings to which Mr *Jackson*, for the applicant referred, are not helpful in cases such as these where the applicant seeks to stay the continuation of arbitration proceedings.

19]Mr *Jackson* referred me in his oral argument to the case of *EOH Abantu (Pty) Ltd v CCMA & another*.⁵ He did so in order to show that this court has jurisdiction to review a jurisdictional ruling; and that, in that case, the court granted an urgent application to stay a further arbitration proceedings before the CCMA pending the outcome of a review application. What he did not refer me to, is the subsequent judgement of Cele J involving the same parties where the

⁴ See *Southern Sun Hotel Interests (Pty) Ltd i.r.o. Southern Sun Waterfront Hotel v CCMA & others* (C255/09; C 362/09; unreported, 21 June 2011).

⁵ (2008) 29 *ILJ* 2588 (LC).

earlier judgement was not followed.⁶ In the 2010 judgment, Cele J had the following to say⁷, and I agree with him:

"[E]ven if the court finds that the decision of the [CCMA] is one which could be reviewed, the appropriate remedy is to discharge the interdict against the [CCMA], because:

- (1) The expeditious resolution of labour disputes is not served by a piecemeal approach such as the one adopted by the applicant in this matter. Had the issue of jurisdiction properly been considered by the arbitrator after the benefit of hearing oral evidence on both the merits and the jurisdictional issue, then the Labour Court would have been saved [*sic*] on two occasions...
- (2) The applicant will suffer no prejudice should the matter proceed to arbitration. It will be able to raise the jurisdictional issues. It would like to, and the Commissioner will be able to weigh evidence on the issue (after hearing all the evidence as this is an issue which is linked to the merits) and give a binding award. At that stage, would any party be dissatisfied, it will be able to seek to review the award in accordance with the LRA. This will mean the Labour Court will have the benefit of the CCMA's decision and will not become involved prematurely in matters. This will prevent a flood of similar applications."

20]In the *Southern Sun* case⁸, I aligned myself with the sentiments expressed by Van Niekerk J in *Trustees for the time being of the National Bioinformatics Network Trust v Jacobson and Others*⁹ regarding the practice of seeking the court to intervene in part heard CCMA proceedings by way of interdict:

"There are at least two reasons why the limited basis for intervention in criminal and civil proceedings ought to extend to uncompleted arbitration proceedings conducted under the auspices of the CCMA, and why this court ought to be slow

6 *EOH Abantu (Pty) Ltd v CCMA & others* (2010) 31 ILJ 937 (LC).

7 At 942H – 943C in para [16].

8 *Supra* footnote 4.

9 (2009) 30 ILJ 2513 (LC) at paras 3 and 4.

to intervene in those proceedings. The first is a policy related reason – for this court routinely to intervene in uncompleted arbitration proceedings would undermine the informal nature of the system of dispute resolution established by the Act. The second (related) reason is that to permit applications for review on a piecemeal basis would frustrate expeditious resolution of labour disputes. In other words, in general terms, justice would be advanced rather than frustrated by permitting CCMA arbitration proceedings to run the course without intervention by this court.”

21]As the court pointed out in *Bioinformatics*, this conclusion was recently underscored by the Constitutional Court in *Commercial Workers Union of SA v Tao Ying Metal Industries and Others*.¹⁰

22]Similarly, in *Jiba v Minister of Justice and Constitutional Development*¹¹, this Court stated:

“Exceptional circumstances aside, it is undesirable for this court to entertain applications to review and set aside rulings made in uncompleted proceedings.”

23]For this reason also, I would have dismissed the application for interim relief pending the review application.

24]Furthermore, the allegation that the applicant did not know what case to meet appears to be baseless. The demarcation dispute is clearly set out in the application to determine the dispute in the prescribed form LR 3.23. On this ground also, the applicant’s prospects of success are slim and it has not made out a prima facie right.

Costs

25]Mr *Euijen*, for the Council, submitted that this application was brought merely

¹⁰ (2008) 29 ILJ 2461 (CC) at paras 62-5 (per Ngcobo J).

¹¹ [2009] 10 BLLR 989 (LC) para [11].

to delay the demarcation dispute further; that it was part of a pattern of delaying tactics; and that costs should be awarded on a punitive scale.

26]Although the application is, in my view, without merit and did not warrant an urgent application during the recess, there is not enough evidence on the papers before me to bear out the contention that the application forms part of a pattern of delaying tactics. In law and fairness, costs should follow the result; however, I do not agree that it warrants a punitive costs order.

Ruling.

27]The application is struck from the roll due to lack of urgency. The applicant is ordered to pay the first respondent's costs.

Anton Steenkamp
Judge

APPEARANCES

APPLICANT:	Bruce Jackson Instructed by Hunts (inc Borkums), Parktown.
FIRST RESPONDENT:	Mark Euijen Instructed by Cheadle Thompson & Haysom, Johannesburg.