



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JR 1956/15

In the matter between

PSA obo S JHUPSEE

Applicant

and

COMMISSIONER PM NGAKO N.O

First Respondent

**GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL (PRETORIA)**

Second Respondent

DEPARTMENT OF ENVIRONMENTAL AFFAIRS

Third Respondent

Heard: 18 May 2017 Supplementary Heads: 06 JUNE 2017

Delivered: 24 November 2017

Summary: [Review application of contempt ruling, section 158(1)(g) of the LRA- Non-joinder of a party who has legal interests in a matter- Application to strike out in terms of Rule 6(15) of the Uniform Ruls-Section 158(1B), and 142 of the LRA]

JUDGMENT

MABASO AJ

Introduction

[1] The applicant is Shamilla Nunkumar Jhupsee (the applicant), the first respondent is the General Public Service Sectorial Bargaining Council (the Bargaining Council), the second respondent is Commissioner PM Ngako (the arbitrator), and the third respondent is the Department of Environmental Affairs (the respondent). The respondent is the only party that is opposing this application.

[2] In October 2015, after the respondent had closed its case (in January 2015) in an unfair dismissal dispute before the Bargaining Council,¹ the applicant approached this Court,² seeking an order in terms of section 158(1)(g)³ of the Labour Relations Act⁴ (the LRA), in the following terms:

"1. An order in terms of which the ruling, of the first respondent, Commissioner PM Ngako N.O.(other than the finding of contempt in respect of the KPMG report on the performance of the Chief Directorate: Transfrontier Conservation and Protected Areas), under case number G PBC 838/2013, dated 21 August 2015,(the Ruling) to the effect that the third respondent's chief director, Ms Skumsa

¹ Application to strike out: supporting affidavit, page 167 at para 6.2

² Argued before me on 18 May 2017,in the normal motion roll.

³ "subject to section 145, review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law"

⁴ Act 66 of 1995 as amended.

Mancotywa⁵ acting in her official capacity, and/or⁶ the Third Respondent are not in contempt of the second respondent and or the ruling of the second respondent dated 2 April 2015 (the discovery ruling) as contemplated in terms of the provisions of section 142 (9) of the Labour relations Act number 55 of 1995 (as amended) for refusing to provide to the applicant the documents set out in items 1b,1c,1d,4,5,6,7,9,10,11,12,13,14,15,16, and 17 of the annexure to the Subpoena dated 17 March 2015(the Subpoena) is reviewed, set aside and substituted with the following order:

The Third respondent's chief director, Ms Skumsa Mancotywa acting in her official capacity, and /or the third respondent are in contempt of the second Respondent and/ or the Ruling of the Second Respondent dated 2 April 2015 as contemplated in terms of the provisions of section 142(9) of the Labour relations Act number 55 of 1995 (as amended)... For refusing to provide to the applicant the documents set out in items 1b,1c,1d,4,5,6,7,9,10,11,12,13,14,15,16, and 17 of the annexure to the Subpoena dated 17 March 2015...

- 2 An order in terms of which the arbitration process before the second respondent, pending the outcome of the rules of this review application, he states the end of suspended as provided for in section 158(1)(a) of the Act, read with section 8(1)(e) of PAJA
..."

- [3] The applicant brought another application wherein she asked this Court to strike out certain paragraphs of the respondent's answering affidavit.⁷

Issues for consideration

- [4] The following preliminary issues are under consideration, before the review application may be entertained:

⁵ Hereinafter referred to as Ms Mancotywa

⁶ Own emphasis.

⁷ Pages 161 to 187.

- 4.1 The non-joinder of Ms Mancotywa, the Chief Director of the respondent.⁸
- 4.2 Has the applicant presented a proper case for the application to strike out?
- 4.3 Is there any exceptional circumstances, which justify that the review application be heard, in terms of the provisions of subsection 158(1B) of the LRA?

Relevant background

- [5] In March 2013, the applicant was dismissed by the respondent after being found guilty of misconduct. Following her dismissal, she referred an unfair dismissal dispute to the Bargaining Council for determination of the fairness thereof. On 08 November 2013, the date of the arbitration hearing, Commissioner Mthukwane postponed the arbitration as the applicant had not received documents that she had asked the respondent to discover, and further directed that the applicant be given an opportunity to peruse all the documents which are regarded as relevant to the case and make copies by no later than 25 November 2013, and that parties must hold a pre-arbitration conference by no later than 13 December 2013.⁹
- [6] By 25 November 2013, both parties had not reached an agreement in respect of inspection of the documents, as according to the applicant some documents were not provided to her.¹⁰ As a result, on "13 November 2014" a subpoena was issued against Ms Mancotywa in terms of which she was directed to appear before the Bargaining Council on 19 November 2014 and "to produce any book, document or object in terms of section 142(1)(b)".¹¹ On the latter

⁸ As I requested the parties to submit supplementary heads of argument to deal with this aspect.

⁹ Supporting affidavit, page 9, pages 46 and 47.

¹⁰ Ibid, para 6.4.

¹¹ Ibid, para 6.5, and page 48.

date, the arbitration could not proceed because "certain documents previously requested remained outstanding."¹²

[7] On 17 March 2015, another subpoena was issued against Ms Mancotywa directing her to appear before the arbitrator on 01 April 2015 and to produce specific information.¹³ On 31 March 2015, the respondent delivered some of the documents to the applicant. However, on 01 April 2015, the arbitration was postponed and the arbitrator made a ruling that the applicant be allowed access to the documents that she had identified as relevant to her case.¹⁴ On 23 April 2015, the applicant attended at the offices of the respondent, and was provided with some of the documents and further advised by *"An official [of the respondent that] indicated to [her] that the documents files are scattered with different officials, and it could only find few files on the Programme."*¹⁵

[8] Later that day, on 23 April 2015, the applicant was given a box by the respondent containing some of the documents to inspect. Thereafter, she was directed to Ms Koena Cholo (Ms Cholo), another official of the respondent, who indicated to her that,

"no physical files were available with regard to the Kids and Parks, People Parks and Land claims Programmes but that the information they have has been scattered onto her computer. I then perused the folders on the computer, and retrieve some documents, but the folders made available did not contain the history of the programmes from the start to the date of my dismissal. [Ms Cholo] indicated that this is all the information that the department has and no further information is available. The statement of Ms Cholo cannot be correct as the respondent is, alternatively should be, in possession of all the information relating to the aforementioned programmes".¹⁶

¹² Ibid, page 10 at para 6.6.

¹³ Ibid, page 11 at para 6.12, and page 58.

¹⁴ Ibid, page 11, and page 63.

¹⁵ Ibid, page 13 at para 6.20. Contempt ruling page 42.

¹⁶ Ibid, page 13 at para 6.21.

- [9] The respondent's response to the applicant's assertion to the above paragraph reads as follows:

*"It is denied that the statement provided by [Ms Cholo] was incorrect. no evidence has been provided to support the conclusion that the statement by [her] is incorrect or false. [The respondent] provided documents it had in its possession. The conduct of [the respondent] is not contemptuous and [the arbitrator] correctly and reasonably found that [the respondent] is not in contempt. "*¹⁷

- [10] On 8 May 2015, the applicant brought a substantial application for contempt against Ms Mancotywa and/or the respondent in that they were in contempt of the Bargaining Council and/ or the ruling dated 2 April 2015 (the Ruling), in terms of section 142(9) of the LRA. The arbitrator proceeded to rule that Ms Mancotywa, and/or the respondent are in contempt of the Bargaining Council and/or the Ruling. However, the arbitrator did not find Ms Mancotywa nor the respondent in contempt of failure to provide certain information and held that,

*"...This documents it has been confirmed a spread among other different employees of the respondent in this documents can still be provided if one person can be assigned the responsibility of collating outstanding documents. I agree the respondent took steps and measures to provide the requested documents with the exception of item 7 of the annexure of the Supoena being the KPMG report on the Chief Directorate:..."*¹⁸

- [11] The applicant is asking this Court to supplant the contempt ruling of the arbitrator with an order that the respondent and/or Ms Mancotywa are in contempt of the Bargaining Council or "the ruling" as mentioned in paragraph 2 above. The standard procedure in respect of the contempt of the Bargaining Council is as follows: once an arbitrator has found that a party is in contempt, then such ruling may be referred to the Labour Court, by the commissioner, for

¹⁷ Answering affidavit, page 104 at para 75.

¹⁸ Ibid, page 42. Record's:page 215.

it to either “confirm, vary¹⁹, or set aside the finding”. However, in this case, the applicant approached this Court by way of a review application. Meaning that this Court is urged to substitute the ruling with an order that the respondent and /or Ms Mancotywa are in contempt of the Bargaining Council and/ or the Ruling.

Non-joinder

[12] All three sets of affidavits²⁰ herein did not assist this Court in demonstrating as to what role Ms Mancotywa played in this matter except indicating that she was a Chief Director, a public official position, who was served with subpoenas via email. For example, these affidavits do not disclose as to whether she was in possession of this document either directly or indirectly in order to establish an element of willfulness, taking into account that the requirements for contempt are that (i) the ruling was issued, (ii) such a ruling must have been brought to the attention of the party who is accused of failing to comply, (iii) and that the non-compliance must have been wilful and *mala fide*.²¹

[13] It is apposite to observe the following principle, regarding non-joinder that will guide this Court towards its finding. There is a judicial curb that courts may not raise issues which are not pleaded by the parties before such court. However, there may be instances where such court may raise issues, if they emerge from the affidavits and will be necessary for the decision of the case,²² as parties stand or fall with their respective papers, meaning that the *mero motu* principle is only applicable to certain circumstances. Courts would be guided by the nature and the impact of the issues, such as the interests of a third party relating to the matter before it.

¹⁹ To change/modify(Oxford dictionary).

²⁰ Founding, supplementary, and replying affidavits.

²¹ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA)

²² See *Barkhuizen v Napier* 2007(5) SA 323 (CC), at para 39.

- [14] Recently, *Binns-Ward J*, rehearsed the old principle in respect of non-joinder of a party who has an interest in a matter, in *Economic Freedom Fighters and others v Speaker of the National Assembly and others*²³ said:

“it is a fundamental principle of law that the court should not at the instance of any party grant an order whereby any other party’s interests may be directly affected without formal judicial notice of the proceedings having first been giving to such other party. This is so that is substantially and directly interested parties may be heard before the order is given, which is a matter of fairness...It is thus mandatory for a party that institutes proceedings to join every other party that has what is called “the direct and substantial interest” in the relief sought. If the parties do not themselves raise a point of none joinder when it is indicated, the court shall do so *mero motu*.” (Own emphasis)

- [15] The issue of non-joinder of Ms Mancotywa, as a party whom this Court has been asked to find guilty, was *mero motu* raised by this Court, and parties were given an opportunity to deliver supplementary heads of argument. As any finding in favour of the applicant herein against Ms Mancotywa will without any doubt have an impact on her status because she will be in contempt of failure to deliver documents mentioned in prayer one of the notice of motion, paragraph 2 above.

- [16] In respect of the joinder of a party who might have an interest in the matter, the Constitutional Court, where it had to decide as to whether the municipal manager and its mayor should be joined where the issue relates to the business of the municipality, in the matter of *Pheko and Others v Ekurhuleni Metropolitan Municipality (Socio-Economic Rights Institute of South Africa as amicus curiae)*²⁴ held that,

“the test for joinder requires that a litigant has a direct and substantial interest in the subject matter of the litigation, that is, a legal interest in the subject matter of the litigation which may be affected by the

²³ [2016] 1 All SA 520 (WCC)

²⁴ (No 2)2015 (6) BCLR 711 (CC)

decision of the court. This view of what constituted directing the substantial interest has been explained and endorsed in a number of decisions by our court.”²⁵(Own emphasis)

[17] In the *EFF*²⁶ matter, in emphasizing what a direct and substantial interest the Court held that:

“[T]he criterion is the realistic possibility, not the certainty, that the interests of the parties might be substantially and directly affected; hence the stress placed in the applicants division judgement on the effect of the weight “may” in the context...I think, that the phrase “the interests of the third parties “denoted the rights of such parties”.²⁷

[18] This is a review application, as it was held by *Khampepe ADJP* (as she then was) in *Member of the Executive Council, Department of Education Eastern Cape v Gqebe's matter*²⁸ that,

“Failure to join interested parties to the proceedings

In review applications, it is necessary to cite [interested party]....the Labour Court should have afforded [interested parties] an opportunity to make representations on the issue relating to whether the award fell to be set aside or not ”.²⁹

[19] As indicated above, I raised the two issues namely, whether the subpoenas were properly served on Ms Mancotywa, and her non-joinder, in this review application. In respect of the latter question, the applicant in her

²⁵ Ibid at para 56.

²⁶ Fn 21 *supra*.

²⁷ Ibid, para 35.

²⁸ (2009) 30 ILJ 2388 (LAC at para 33.

²⁹ Ibid, para 34. Cases cited therein are “(*Public Service Association v Department v of Justice 2004* (2) BLLR 118 (LAC). *Diala v Commissioner for CCMA and another* [1999] 7 BLLR 670 (LC) at para [19]; *Johnson v CCMA and Others* [2005] 8 BLLR 796 (LC) at para [6]; *Duda v MEC for Gauteng Department of Education and Others* (2001) 22 ILJ 1637 (LC) at para [23]; *De Beers Consolidated Mines Ltd v CCMA and Others* [2009] 9 BLLR 995 (LAC) at para [15]; see also *Cloete v Evander Gold Mines Ltd* [2001] 4 BLLR 433 (LC) at para [36]”.

supplementary heads of argument submitted that it would “... *not be necessary and appropriate to join a party at a review application stage was not the party before the second respondent*”.

[20] It is my view that, as Ms Mancotywa was found to be in contempt of the Bargaining Council “*and/or*” the Ruling, and apparently the arbitrator’s finding which suggests that she contemptuously refused to comply with the terms of the subpoena. And the applicant approached this Court seeking an order that the same ruling be reviewed and set aside and that Ms Mancotywa be held in contempt “*For refusing to provide to the applicant the documents*”, it was necessary for her to be cited in this review application.

[21] In the matter of *Pheko*³⁰, in respect of contempt proceedings and who should be a party to a contempt application, the Constitutional Court held that,

“When a Court Order is disobeyed, not only the person named or party to the suit but all those who, with the knowledge of the order, aid and abet the disobedience or willfully are party to the disobedience are liable. The reason for the extending the ambit of contempt proceedings in this manner is to prevent any attempt to defeat and obstruct the due process of justice and safeguard its administration. Differently put, the purpose is to ensure that no one may, with impunity, wilfully get in the way of, or otherwise interfere with, the due course of justice of bringing the administration of justice into disrepute.”³¹

[22] Contempt proceedings are between an alleged contemptuous party and a forum (such as the CCMA and the Bargaining Councils).³² In this case, the contempt was between Ms Mancotywa (and/or the Respondent) and the Bargaining Council. The applicant was just a complainant, therefore, it was necessary for Ms Mancotywa to be joined in this review application, and

³⁰ Ibid.

³¹ Ibid.

³² I say this because subsection 142(8) provides that, “**contempt of the Commission**”, not of a complainant or a party involved in an arbitration.

without her being a party to this review application in order to give her an opportunity to respond, is a serious defect. I say this based on the fact that the subpoenas were issued against Ms Mancotywa. And that she should have an opportunity to say whether or not this court should make an order against her because if this Court were to make an order as prayed for it would inevitably affect her persona.

- [23] Also taking into account that the Supreme Court of Appeal in expanding on wilfulness of a public official, in the matter of *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality*³³, held that

“it is necessary immediately that there is no basis in our lawful orders or contempt of court to be made against officials of public bodies, nominated or deployed for that purpose, were not themselves personally responsible for the wilful default in complying with the court order that lies at the heart of contempt proceedings.”³⁴

- [24] I, therefore, conclude that Ms Mancotywa has a legal interest in this matter and without her being a party to this application is an incurable defect, as this Court was asked to review and set aside the ruling of the arbitrator and replace it with an order that Ms Mancotywa is in contempt for failing to deliver certain documents as previously directed by the arbitrator, without her being a party to these proceedings, it will be incompetent to do so.
- [25] It is also important to mention that the applicant in her replying affidavit asserted that the respondent delivered its answering affidavit out of the 10-day period as required by the rules of this court and that such answering affidavit is not accompanied by a condonation application. Clause 11.4.2 of the practice manual provides that it is not necessary for a party in delivering an answering affidavit or replying affidavit out of time to deliver condonation application, the only time whereby it is necessary to do so is whereby the

³³ 2015 (2) SA 415 (SCA).

³⁴ Ibid at para 20.

other party is objecting to such late delivery.³⁵ *In casu*, the applicant did not object to the late delivery thereof, therefore, it was not necessary for condonation application be delivered.

Application to strike out

[26] The rules of this Court do not expressly deal with an application to strike out, however, it is a common practice that if the rules of this Court do not cover a specific procedural aspect, then the Uniform Rules will automatically apply. In this case, the applicant has asked this Court to strike out paragraphs 18 to 36, 39, part of 72, 73, 102 and the first sentence of paragraph 104 of the respondent's answering affidavit.

[27] Rule 6 (15) of the Uniform Rules, is the provision which governs an application to strike out and reads thus,

“The court may on application order to be struck out **from any** affidavit any matter which is **scandalous, vexatious or irrelevant**, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted”. (Own emphasis)

[28] The words such as scandalous, vexatious or irrelevant are not defined in the Rules. However, *Jajhbay J in Tshabalala-Msimang and another v Makhanya and Others*³⁶ held that,

³⁵ “Where the respondent or the applicant has filed its opposing or replying affidavits outside the time period set out in the rules, there is no need to apply for condonation for the late filing of such affidavits unless the party upon whom the affidavits are served files and serves a Notice of Objection to the late filing of the affidavits. The Notice of Objection must be served and filed within 10 days of the receipt of the affidavits after which time the right to object shall lapse”.

³⁶ 2008 (3) BCLR 338 (W), and cited with approval in *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC) at [27]. See also the LAC's judgment (*Public Servants Association of South Africa v Minister of Department of Home Affairs and Others* [2012] ZALAC 35; [2013] 3 BLLR 237 (LAC). The Constitutional Court in the matter of *Lawyers for Human Rights v Minister in the Presidency and Others* 2017 (4) BCLR 445 (CC) held that,

“[19] What is “vexatious”? In *Bisset* the Court said this was litigation that was “frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant”. And a frivolous complaint? That is one with no serious purpose or value. Vexatious litigation is initiated without probable cause by one who is not acting in good

“Irrelevant” with regard to the contents of an affidavit refers to allegations which do not apply to the matter in hand and do not contribute one way or another to a decision of such matter. “Vexatious” in respect of an affidavit refers to allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy. “Scandalous matter” is allegations or matters which may or may not be relevant but which are so worded as to be abusive or defamatory”.

[29] An applicant has to chronicle in her affidavit that at least one of these requirements (scandalous, vexatious or irrelevant) is present, and in addition that she will be prejudiced if the application to strike out is not granted.³⁷

[30] The paragraphs that have been referred to in the answering affidavit deal among other things with the reason for the dismissal of the applicant, what has transpired thus far in the arbitration, most importantly that the respondent has closed its case in the arbitration, it led evidence of three witnesses, and that “no version was put to (these witnesses)”.³⁸ As it would emerge below, I am of the view that the applicant has not satisfied this Court about the application to strike out, as none of the aforementioned requirements are present in the application to strike out.

Exceptional circumstances

[31] The Labour Court has powers to review and set aside any decision that has been made during arbitration proceedings, or by any commissioner executing his duties in terms of the provisions of the LRA, however, there is an exception to this law, which is subsection 158(1B) of the LRA, as the applicant

faith and is doing so for the purpose of annoying or embarrassing an opponent. Legal action that is not likely to lead to any procedural result is vexatious”(footnoted omitted)

³⁷ Ibid.

³⁸ Page 91 at para 36.

correctly referred to this subsection in her founding affidavit, which provides that,

“The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the Commission or any bargaining council in terms of the provisions of this Act before the issue in dispute has been finally determined by the Commission or the bargaining council, as the case may be, except if the Labour Court is of the opinion that it is **just and equitable** to review the decision or ruling made before the issue in dispute has been finally determined”.³⁹(Own emphasis)

- [32] It is important to underscore that this subsection was introduced in order to curb delays in finalising disputes before dispute resolution forums established in terms of the provisions of LRA. And that a presiding officer in order to determine what is just and equitable has to take into account the purpose of the LRA, which is to resolve disputes speedily and with minimum legal formalities.
- [33] The explanatory memorandum which accompanied this subsection provides that review should be allowed only in exceptional circumstances. The purpose is to limit the use of piece-meal approach in review applications during arbitration proceedings.⁴⁰ Section 158(1) (g) of the LRA, as much as it gives this Court powers to review “any ruling” made by a dispute resolution forum. This section should not be read in isolation as new developments and amendments in the same Act must be visited, e.g. both provisions of subsection 158(1B) and section 142. It is my view that in order to determine what is just and equitable under this provision one has to look *inter alia* as to whether an applicant will suffer any prejudice if the review application is not entertained, and the stage of the arbitration.

³⁹. MEMORANDUM OF OBJECTS LABOUR RELATIONS AMENDMENT BILL, 2012: “Clause 26 of the Bill seeks to amend section 158 of the Act to provide that only in **exceptional circumstances** the Labour Court may deal with review applications against decisions or rulings of the Commission before a matter has been finalised by the Commission”(own emphasis)

[34] I propose to quote the relevant provisions of contempt under section 142 of the LRA, as I do below,

“(8) A person commits contempt of the Commission—

- (a) if, after having been subpoenaed to appear before the commissioner, the person without good cause does not attend at the time and place stated in the subpoena;
- (b) if, after having appeared in response to a subpoena, that person fails to remain in attendance until excused by the commissioner;
- (c) by refusing to take the oath or to make an affirmation as a witness when a commissioner so requires;
- (d) by refusing to answer any question fully and to the best of that person's knowledge and belief subject to subsection (6);
- (e) **if the person, without good cause, fails to produce any book, document or object specified in a subpoena to a commissioner;**
- (f) if the person wilfully hinders a commissioner in performing any function conferred by or in terms of this Act;
- (g) if the person insults, disparages or belittles a commissioner, or prejudices or improperly influences the proceedings or improperly anticipates the commissioner's award;
- (h) by wilfully interrupting the conciliation or arbitration proceedings or misbehaving in any other manner during those proceedings;
- (i) by doing anything else in relation to the Commission which, if done in relation to a court of law, would have been contempt of court.

(9)(a) A commissioner may make a finding that a party is in contempt of the Commission for any of the reasons set out in subsection (8).

(b) **The commissioner may refer the finding, together with the record of the proceedings, to the Labour Court for its decision in terms of subsection (11).**

(10) **Before making a decision in terms of subsection (11), the Labour Court—**

- (a) **must subpoena any person found in contempt to appear before it on a date determined by the Court;**
- (b) may subpoena any other person to appear before it on a date determined by the Court;

...

- (4) **The Labour Court may confirm, vary, or set aside the finding of a Commissioner.**”(Own emphasis)

[35] Without making any pronouncement herein- taking into account my conclusion below, paragraphs 38 and 39, it is prudent to carefully study the provisions of section 142(9) of the LRA which give a commissioner a right to refer a contempt finding to the Labour Court in order for his/her decision to be looked at by a judge. Therefore, I wonder if it was the intention of the legislature that a contempt finding, specifically under ss 142(8)(e) of the LRA, by a commissioner can be reviewed and replaced with any order under ss 158(1)(g) of the LRA if an arbitration proceedings has not been finalised, taking into account that the Labour Court if called upon to decide on the contempt finding “must subpoena” any person found in contempt and has powers to “vary” such finding. Taking into account that if the Labour Court were to review and set aside a contempt ruling by a commissioner appointed in terms of the LRA, before an arbitration could be finalised, it would have decided the ruling without subpoenaing such person, and such ruling will now not be a ruling from such forum but a court order issued by a Labour Court judge. Therefore, the question is, once the contempt finding becomes a court order, will a commissioner still have discretion in terms of section 142(9)(b) of the LRA to refer the same contempt finding/court order to the same Labour Court to “confirm, vary, or set aside.”⁴¹

[36] Back *in casu*, the respondent in opposing this application, has asserted that the applicant is delaying the finalisation of the arbitration as the documents in question are not relevant as she failed to put any version to its witnesses relating to the documents, and has dealt with the background to this matter as to what has been presented before the arbitrator, therefore, for this Court to be in a position to decide whether there is “*just and equitable*” grounds to

⁴¹ LABOUR RELATIONS AMENDMENT BILL, 2000 EXPLANATORY MEMORANDUM: “The proposed amendment gives a Commissioner power to make a finding of contempt. The Commissioner would then refer the findings and the relevant record of proceedings to the Labour Court for its consideration. The Labour Court will have the power, after an appropriate hearing, to confirm, set aside or vary the finding and to impose appropriate sanction for contempt”.

decide the review, it was necessary to understand the background to this application.

[37] The respondent asserted that at the time when this application was delivered, evidence had already been tendered on its behalf, and it had already closed its case as a party which has onus of proof in a dismissal dispute,⁴² and that there was no version that was put to its witnesses in disputing the allegations against the applicant.

[38] Taking into account the purpose of the LRA which requires speedy resolution of disputes, the arbitration is part-heard, and it is more than four years after the dismissal of the applicant. However, the fairness thereof has not been decided and when she approached this Court, she did not do so on an urgent basis. I conclude that to deal with a review application would defeat the purpose of the LRA. No exceptional circumstances that have been placed before me and the applicant has failed to show the just and equitable grounds as required by section 158(1B) of the LRA.

[39] I also hold the view that the applicant will not suffer any prejudice if the review application is not entertained, as stated by the respondent that there was no version that was put to its witnesses regarding the documents and the arbitration has cascaded to the close of its case, therefore, I conclude that there are no just and equitable grounds before me to deal with the review application, as required by section 158(1B) of the Act.

[40] The issue of subpoenas was to be relevant if I were to deal with the merits of the review application, therefore, I deem unnecessary to deliberate on this issue.

[41] I, therefore, make the following order.

⁴² *Engen Petroleum Ltd v CCMA & Others* [2007] 8 BLLR 707 (LAC), para 123.

Order

1. The application to stay the proceedings under the Second Respondent's case number G PBC 838/2013 is not granted.
2. The application to strike out part of the respondent's answering affidavit fails.
3. The review application is struck off the roll.
4. There is no order as to costs.

S. Mabaso
Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr De Bryn
Instructed by: Deon De Bryn Attorneys

For the Respondent: Advocate Matsholo
Instructed by: Tshiqi Zebediela Inc.

LABOUR COURT