



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2494/16

In the matter between:

NUPSAW OBO NOLUTHANDO LENG

Applicant

and

**GENERAL SECRETARY OF THE GENERAL PUBLIC
SERVICE SECTORAL BARGAINING COUNCIL**

First Respondent

**GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL**

Second Respondent

**MINISTER OF JUSTICE & CORRECTIONAL
SERVICES**

Third Respondent

Heard: 1 September 2017

Delivered: 1 February 2018

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

- [1] The applicant, National Union of Public Service and Allied Workers (NUPSAW) acting on behalf of its member, Ms Noluthando Lengs (Lengs) approached the Court for an order compelling the first respondent (the General Secretary of the General Public Service Sectoral Bargaining) and the

third respondent (GPSSBC), to enrol the unfair dismissal dispute referred under case number GPBC 3273/2012 for arbitration.

- [2] The first and second respondent in their answering affidavit merely indicated that they would abide by the Court's decision in respect of the primary relief. They only oppose the costs order sought against them by the applicants.
- [3] The third respondent, (the Department) did not file papers opposing the application. Counsel for the third respondent however, made oral submissions from the bar for the purpose of assisting this Court.

Background:

- [4] The facts of this matter are to a large extent common cause. Lengs was employed by the Department of Justice. On the applicants' version, Lengs was dismissed in July 2009. The third respondent's contention was that she was dismissed in February 2010.
- [5] On 27 July 2012, some two (2) years and three (months) after the dismissal, and clearly outside the timeframes as prescribed by the Labour Relations Act (LRA)¹, Lengs with the assistance NUPSAW referred an unfair dismissal dispute to the second respondent.
- [6] The referral was accompanied by an application for condonation, which came before Commissioner Mello. On 6 November 2012, a ruling (the first ruling) was issued in terms of which the application for condonation for the late referral of the unfair dismissal dispute was granted.
- [7] The dispute was thereafter scheduled for conciliation on 3 December 2012 before Commissioner T. Nhliziyo. At the conciliation proceedings, the Department raised a point *in limine*, contending that the Council lacked jurisdiction to conciliate the matter on grounds that the dispute was referred late. Commissioner Nhliziyo issued a ruling (the second ruling) in the following terms:

“...

¹ Act 66 of 1995, as amended

2.1 In view of the *point in limine* raised by the [Department of Justice] on jurisdiction, the condonation application needs to be dealt with again and the [Department of Justice] must be afforded the opportunity to respond to the said application.

2.2 Council is directed to write a letter to the department requesting them to respond to the application for condonation."

[8] As a consequence of the second ruling, the Department filed an affidavit opposing Lengs' application for condonation. The re-determination of the application for condonation came before Commissioner P. Pundu who issued a ruling in terms of which condonation was refused on 15 April 2013 (the third ruling).

[9] NUPSAW aggrieved by the third ruling, on 3 June 2013, filed an application under case number JR 1160/13 to review and set it aside. The matter came before Mosime AJ on 14 December 2015, who had dismissed the review application.

[10] NUPSAW avers that it obtained legal advice, which contended that it was not necessary to review and set aside the ruling by [Commissioner P Pundu] as the first ruling by Commissioner Mello was enforceable and binding as it was neither rescinded nor set aside. On 10 February 2016, NUPSAW petitioned the first and second respondent to schedule the dispute for arbitration in view of the first ruling issued by Commissioner Mello.

[11] On 16 April 2016, the parties convened a preliminary hearing before Commissioner Nhliziyo. In that hearing, NUPSAW sought a ruling referring the matter for arbitration. The allegations are that there Commissioner Nhliziyo did not issued any ruling in respect of the preliminary hearing and that the Commissioner was ultimately dismissed from the employ of the second respondent without having issued any ruling in respect of the enrolment of the dispute.

[12] On 22 August 2016, the parties convened a meeting to discuss progress with the matter. In that meeting, NUPSAW alleges that the first and second respondents were of the view that the first ruling was rescinded by the second

ruling of Commissioner Nhliziyo and therefore they (the first and second respondent) were not competent to enrol the dispute for arbitration.

- [13] At the commencement of these proceedings, the respondents handed up an advisory ruling issued by Commissioner D.P van Tonder on 1 August 2016. The ruling in its nature is advisory and not binding on the parties. However for the sake of completeness, the advisory ruling records *inter alia* the following:

“...

- [41] ... As I have explained earlier in this ruling, even though the ruling of Mr Pundu may technically be invalid, our Courts have held that even invalid decisions can remain valid until set aside by a Court of law, and that Courts have a discretion to refuse to set aside such “invalid” decisions notwithstanding the existence of substantive grounds for setting it aside. The existence of this Court order, which applicant has not referred the GPSSBC to, is further reason why the issue is not straightforward as suggested by applicant’s representative.

...

In the premises, I make the following **advisory, non-binding** ruling:

1. Neither I, nor any panellist of the GPSSBC has jurisdiction to make a binding ruling, determining which of the conflicting condonation ruling issued in this matter must be followed and relied on by the General Secretary of the GPSSBC.
2. Neither I, nor any panellist of the GPSSBC has the jurisdiction to determine whether the General Secretary of the GPSSBC must to set this matter down for arbitration.
3. Assuming that the first condonation ruling issued on 6 November 2012 (granting condonation) was never rescinded or varied, the GPSSBC had no authority to issue a second condonation ruling on 15 April 2013, in which condonation was refused.
4. In applying her mind as to whether or not she may ignore the condonation ruling of Mr Pundu, dated 15 April 2013 (in which condonation is refused)

and set the matter down for arbitration, the General Secretary is advised to take into account that:

- 4.1 In *Master of the High Court v Motale N.O*² the SCA held that judicial decisions made by Judges without jurisdiction to do so are nullities that a later Court may refuse to enforce in contempt proceedings (without the need for a formal setting-aside by a court of equal standing).
- 4.2 There are cases in which the High Court has held that the Motale principle is not confined to Courts of law and that others (such as administrative bodies) may also ignore invalid decisions.
- 4.3 In terms of the *Oudekraal*, which has been endorsed by the Constitutional Court, the Supreme Court of Appeal has held that invalid administrative action may not be simply ignored, but may be valid and effectual, and may continue to have consequences, until set aside by a court of law."

The submissions by the parties:

[14] NUPSAW contends that the first ruling by Commissioner Mello is enforceable, valid and binding until it is rescinded and/ or set aside by a competent authority. NUPSAW substantiate its contention in the following manner:

- 14.1. The first ruling by Commissioner Mello was neither rescinded nor set aside. The only act that occurred was that the second ruling was an addition to the first ruling, and the third ruling contradicted the first ruling.
- 14.2. The second and third rulings were not only legally incompetent but they were also null and void *ab initio*.
- 14.3. It is trite that a Commissioner may not set aside the decision of another Commissioner. An earlier decision may only be reversed through an application for rescission and the provisions of section 144 of the LRA determine the form and manner of an application for

² 2012 (3) 325 (SCA)

rescission. There is no evidence of any rescission application having been brought.

- [15] The first and second respondent do not provide a substantive opposition to the application to compel, however they hold the view that the third ruling is valid, enforceable and binding. They say so because in their view, the second ruling by Commissioner Nhliziyo rescinded the first ruling by Commissioner Mello. They further contend that even if NUPSAW is correct in their assertion that the third ruling is invalid, such invalidity must be confirmed by an order of Court.

Evaluation:

- [16] The parties were in agreement agreed that the CCMA or Bargaining Councils performed administrative action when issuing arbitration awards and/or rulings.³ They further agreed that an administrative decision remained binding, even if on the face of it, it appeared invalid, and may only be set aside by an order of court.⁴
- [17] Notwithstanding the above common understanding, NUPSAW contends that because the first ruling was not rescinded or set aside it remains valid and enforceable. The respondents on the other hand contends that the second ruling rescinded the first condonation ruling and therefore the third ruling is valid and binding unless set aside on review. The issues therefore are:
- 17.1. Does the second ruling have the effect of rescinding the first condonation ruling?
 - 17.2. If the second ruling does not constitute a rescission ruling, which condonation ruling is valid and enforceable?
 - 17.3. If either the first or the third ruling is valid, is this Court competent to issue an order directing the first and second respondent to enrol the dispute for arbitration?

³ See *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC),

⁴ See *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA)

Purported rescission:

[18] Commissioners are empowered to rescind and/ or vary award or rulings under certain limited circumstances and only in terms of the grounds provided for in section 144 of the LRA.⁵ The provisions of section 144(a) are a procedural step intended to expeditiously correct an obviously wrong decision.

[19] In *PT Operational Services (Pty) Ltd v RAWU obo Ngwetsana*⁶ the Labour Appeal Court in determining whether the *functus officio* doctrine was applicable applied to the CCMA held that:

“... In my view, the Court *a quo* was correct in its conclusion that the *functus officio* doctrine applies to the CCMA commissioners. They may therefore only revisit their decisions to the extent that it is permitted by the provisions of section 144 of the LRA. They may not do so whenever they like but also do so if the jurisdictional facts in section 144 are present. They may also do so, as I will show presently, when they have performed an allied function but not yet performed the power or duty bestowed on them by the legislation.”⁷

[20] From the record, it is apparent that when the matter came before Commissioner Nhliziyo after it had been set down for conciliation, the Department had not formally sought to rescind the first ruling in terms of which condonation was granted. That ruling remained legal and binding until such time that it was either rescinded or set aside by a court order.

[21] It is apparent from the record that the issue of rescission was raised from the bar by the Department at the conciliation proceedings. There is clearly everything irregular with the conduct of Commissioner Nhliziyo insofar as she

⁵ Section 144: **Variation and rescission of arbitration awards and rulings:**

Any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the director for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling-

- (a) erroneously sought or erroneously made in the absence of any party affected by that award;
- (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission;
- (c) granted as a result of a mistake common to the parties to the proceedings; or
- (d) made in the absence of any party, on good cause shown.

⁶ [2012] ZALAC 34; [2013] 3 BLLR 225 (LAC); (2013) 34 ILJ 1138 (LAC) at para [28]

⁷ At para 28

had purported to issue the second ruling. Rule 30 and 31 of Resolution 4 of 2004 govern the conduct of proceedings of the bargaining council in respect of rescission applications⁸. At most, to the extent that the Department was aggrieved by the first condonation ruling on the basis that it was not afforded an opportunity to oppose the application in that regard as Commissioner Nhliziyo had established, she ought to simply have postponed the matter, and afforded the Department to file a proper application for rescission. She instead chose to effectively 'rescind' the first ruling when there was no proper application before her and when clearly she had no jurisdiction to do so. The third respondent was thus *functus officio* in respect of the condonation application and ruling unless formally rescinded. It therefore cannot be said that Commissioner Nhliziyo exercised her discretion in terms of the provisions of section 144(a) in essentially 'rescinding' the first ruling.

[22] The issue however in this case is not whether Commissioner Nhliziyo's ruling should be set aside. That is not the relief that the applicants seek. They merely seek an order compelling the second and third respondents to set the matter down for arbitration, in circumstances where there are two standing rulings, *albeit* Commissioner Nhliziyo's ruling was issued in irregular circumstances. It is acknowledged that it might be argued that the thirty days

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30. HOW TO BRING AN APPLICATION:

1. This rule applies to any:
 - a) application for condonation, joinder, substitution, variation or rescission;
 - b) application in a jurisdictional dispute;
2. An application must be brought on notice to all persons who have an interest in the application
4. The application must be supported by an affidavit. The affidavit must clearly and concisely set out-

31. HOW TO APPLY TO VARY OR RESCIND ARBITRATION AWARD OR RULINGS:

1. An application for variation or rescission of an arbitration or ruling must be made within fourteen days of the date of which the applicant became aware of-
 - a) the arbitration award or ruling; or
 - b) mistake common to the parties to the proceedings
2. A ruling made by the panellist, which has the effect of a final order will be regarded as a ruling for the purpose of this rule.

period had long lapsed and therefore the third respondent ought to set the matter down for arbitration if there is a request⁹. This however is not the issue.

- [23] In regard to the status of the third ruling by Commissioner Pundu, it has already been stated that the applicants' review application in that regard was dismissed. It would therefore not be necessary to dwell much into that ruling. This therefore brings me to the question of whether the second and third respondents can be compelled to set the matter down for arbitration in the face of Commissioner Nhliziyo's ruling.
- [24] Awards and rulings issued the CCMA and the Bargaining Councils constitute administrative actions. It is trite that a purported invalid administrative action remains enforceable until and unless set aside by an order of court.¹⁰ Commissioner Nhliziyo's ruling, or whatever one may call it, remains on record, irrespective of the problems with it as highlighted in this judgment. The same ought to be said of the first condonation ruling issued.
- [25] NUPSAW sought to compel the first and second respondent to enrol the unfair dismissal dispute. The application is brought in terms of the provisions of section 158(1)(a)(iii)¹¹, read with section 158(1)(b)¹². This Court is

⁹ See the provisions of section 191

¹⁰ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others supra* at para [26] it was held:

... In our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.

¹¹ Section 158: **Powers of Labour Court**

(1) The Labour Court may -

(a) make any appropriate order, including -

...

(iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act.

¹² Subsection (b) order compliance with any provision of this Act or any employment law;

empowered in terms of these provisions to intervene in cases where the CCMA or bargaining council refuses or fails to exercise the powers bestowed upon it by the LRA.¹³ Be that as it may, the Court will only invoke the provisions of section 158(1)(a)(iii) in circumstances where it has jurisdiction to interfere with the function of the CCMA and/ or where it is called upon to correct wrongful conduct pending the finalisation of processes within the CCMA or Bargaining Council.¹⁴

- [26] In the present case, there is no basis for this Court under the provisions of section 158(1)(a)(iii) of the LRA to order the second respondent to enrol the dispute for arbitration, particularly in circumstances where there are two standing conflicting administrative decisions. Even if the second and third respondents are sitting on the fence in this matter, it is not for the applicants to make a choice for them, and neither will this court make a choice for them. In short, NUPSAW has not laid basis for the order that it seeks, and the court's hands are tied in the absence of an application to review and set aside Commissioner Nhliziyo's ruling.

Costs:

¹³ *Mimmo's Franchising CC & others v Spiro & others* [2000] 11 BLLR 1312 (LC) at para [16] See also

¹⁴ *Reddi v University of Kwazulu-Natal* [2015] 6 BLLR 625 (LC) at para 30 -32, it was held:

[30] The exercise by the court of power granted to it in section 158(1)(a)(iii) does not arise in this matter, on the view that I take regarding the challenge to the court's jurisdiction. Section 158(1)(a)(iii) does not confer jurisdiction on the court. It sets out part of the power of the court. Such power can be exercised only if the court has jurisdiction.

[31] The court must have regard to the pleadings when dealing with the challenge to its jurisdiction. The court, in motion proceedings, will consider the notice of motion and the affidavits in determining the issue of jurisdiction. This matter is concerned with the dismissal of the applicant. This is so despite the applicant's averments that the issue is about a breach of his statutory and contractual right to a fair disciplinary hearing. Both parties agree that the applicant is dismissed. The applicant complains that his dismissal was unfair, both procedurally and substantively. Section 191 of the Labour Relations Act prescribes how the applicant must pursue his complaint.

[32] The cause as pleaded by the applicant does not provide scope for the court to intervene and to make an order sought by the applicant. The "contractual right" being asserted by the applicant, on the pleadings, does not grant the applicant an entitlement beyond what the law grants any other employee. Any other employee would, on the case pleaded by the applicant, assert a "contractual right to a fair disciplinary hearing" entitling such an employee to approach the court for relief to, among others, set aside a dismissal without such an employee having to follow the statutory scheme governing dismissals.

[27] I have had regard to the requirements of law and fairness in respect of the issue of costs. Taking into account the conclusions reached above, I am of the view that a costs order is not warranted in this case.

Order:

[28] In the premises, the following order is made:

1. The Applicants' application to compel the First and Second Respondents to enrol the unfair dismissal dispute under case number GPBC 3273/2012 for arbitration is dismissed;
2. There is no order as to costs.

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Adv. D.Z Kela

Instructed by:

Ndumiso Voyi Incorporated

For the 1st and 2nd Respondent:

Mr P Moll of Edward Nathan
Sonnenbergs Incorporated

For The Third Respondent:

Adv. Bothma

Instructed by:

State Attorney: Pretoria