



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR130/2024

In the matter between:

**DEPARTMENT OF AGRICULTURE, LAND REFORM
AND RURAL DEVELOPMENT**

Applicant

and

KELVIN KAYSTER N.O.

First Respondent

PSA obo ABIE OLYN & DAISY MONGWAI

Second Respondent

**PUBLIC SERVICE COORDINATING AND BARGAINING
COUNCIL (PSCBC)**

Third Respondent

Heard: 30 January 2025

Delivered: 11 February 2025

Summary: review of a preliminary ruling – review test and principles considered – not just and equitable for the Labour Court to review the ruling before the issue in dispute has been finally determined – application dismissed.

JUDGMENT

PHAKEDI, AJ**Introduction**

[1] This is an unopposed application to review and set aside the preliminary ruling dated 17 January 2024 issued by the first respondent under case number PSCBC 564-23/24 under the auspices of the PSCBC. The applicant is seeking an order in the following terms:

- ‘a That the arbitration proceedings be interdicted until the finalisation of this review application;
- b. That the preliminary ruling of the first respondent be reviewed and set aside;
- c. Alternatively, that the matter be remitted to the PSCBC to be adjudicated by an Arbitrator other than the first respondent;
- d. Costs in the event of opposition; and
- e. Further and alternative relief.’

[2] The review application was filed on 01 February 2024 within the prescribed period set out in section 145 of the Labour Relations Act¹ (LRA). I will therefore proceed to determine the merits of this application.

Background facts

[3] On or during October 2012, the two employees, Abie Olyn and Daisy Mongwai, while employed by the applicant in the positions of Assistant Director: Bids Management and Admin Officer, awarded a tender to XB Connection trading as Lesego Promotions without following the processes and policies of the applicant.

¹ Act 66 of 1995, as amended.

[4] A certain V Pienaar requested an investigation into the allegations and the applicant's internal forensic investigative directorate (FID) issued a report with a recommendation that the matter be referred to Labour Relations for appropriate action to be taken against Mr Olyn and Ms Mongwai for their negligence/failure to adhere to policies in the appointment of service providers.

[5] The two employees were then charged and issued with notices to attend a disciplinary hearing on or during January and April 2023. At the disciplinary hearing, both employees, represented by the Public Servants Association of South Africa (PSA), raised points *in limine* pointing out that the applicant waived its prerogative to charge them due to excessive delays in instituting disciplinary proceedings and further objected to the employer's use of legal representatives contrary to the provisions of Resolution 1 of 2003.

[6] On 14 September 2023, the chairperson of the disciplinary hearing, M.B. Matlejoane dealt with one of the two points *in limine* and ruled that the use of external legal practitioners is allowed. On 12 October 2023, the second respondent, aggrieved by the ruling, referred a dispute of application and/or interpretation to the PSCBC for adjudication. On 20 October 2023, the parties held a pre-arbitration meeting where they agreed to shorten the proceedings by means of pleadings.

Arbitration proceedings and the preliminary ruling

[7] The arbitration hearing was scheduled to proceed virtually on 16 November 2023. The parties confirmed that they have adopted a hybrid arbitration and their agreement was recorded in the pre-arbitration minute. Before the commissioner, the parties agreed that the PSA would file a stated case on 23 November 2023, the applicant would file its response on 30 November and the PSA would have a right of reply by 7 December 2023. However, the PSA failed to submit a stated case as agreed, instead, it filed a replying affidavit to the submissions filed by the applicant's legal representatives.

[8] The applicant was represented by Advocate S Mahlangu and Advocate B Mahlangu instructed by JR Attorneys Inc. and the second respondent was

represented by Mr Joel Ntwampe, a PSA official. The arbitrator issued a preliminary ruling dated 17 January 2024 and the ruling is the subject of these review proceedings.

[9] The applicant was aggrieved that, since the second respondent failed to submit the stated case, the arbitrator ought to have found in its favour because its version was not opposed. The second respondent contended that the parties had agreed to shorten the proceedings through written heads of argument, stated case and/or affidavits.

[10] The arbitrator then concluded that, although the parties concluded a pre-arbitration agreement, the averment that the case can be presented through written heads of argument, stated case or affidavit is problematic. He appreciated that it is trite that a commissioner who permits the parties to arbitrate a matter without leading oral evidence in the absence of a written and signed stated case commits an irregularity. With reference to *Department of Agriculture & Rural Development, Limpopo v Phooko N.O. & Others*², the arbitrator issued a ruling that the third respondent must reschedule the matter for arbitration.

Applicant's grounds for review

[11] The Applicant is challenging the preliminary ruling on the grounds that the first respondent committed a gross irregularity within the meaning of section 145(2)(a)(ii) of the LRA in that he failed to consider the fact that the case raised by the applicant in its answering affidavit remained unchallenged, considering the second respondent's failure to file its written stated case within the timeframes agreed upon.

[12] The applicant avers further that by remitting the matter to arbitration for a hearing *de novo*, the first respondent was affording the second respondent another bite of the cherry after having failed to make a case the first time and this constitutes an irregularity.

² (JR2007/17) [2019] ZALCJHB 190 (2 August 2019).

[13] The applicant also avers that the decision of the arbitrator is wrong and/or incorrect in that the applicant raised several factors which necessitated the need to employ the services of external legal representation in the internal disciplinary hearing. The second respondent failed to demonstrate any prejudice they would suffer if the applicant made use of external legal practitioners to preside over the matter and to initiate and prosecute the matter on its behalf and the first respondent did not consider such submissions.

[14] The applicant further states that the preliminary ruling is unreasonable and liable to be set aside because the first respondent was aware that the second respondent failed to file their written stated facts and yet did not rule in the applicant's favour. Lastly, the applicant concluded that the first respondent's decision is unreasonable on the basis of the evidence and issues placed before him and is susceptible to be reviewed and set aside.

Evaluation

[15] The Labour Court is a creature of statute and may only perform functions which are specifically within its powers and mandate as outlined in the Constitution and the LRA. This principle was echoed by Van Niekerk J (as he then was)³ as follows:

'This Court is a creature of statute. In terms of s 157(1), subject to the Constitution and s 173, and except where the LRA provides otherwise, the court has exclusive jurisdiction in respect of all matters that elsewhere in terms of the LRA or any other law are to be determined by the court. In other words, a party referring a dispute to this court for adjudication must necessarily point to a provision of the LRA or some other law that provides for that dispute to be determined by this court. It is incumbent on an applicant referring a matter to this court for adjudication to identify the provision in the LRA, or any other law, which confers jurisdiction on this court to entertain the claim. Jurisdiction is to be determined strictly on the basis of the applicant's pleadings, the merits of the claim are not material at this point. What is

³ *Phahlane v SA Police Service and Others (Phahlane)* (2021) 42 ILJ 569 (LC) at para 6.

required is a determination of the legal basis for the claim, and then an assessment of whether the court has jurisdiction over it (see *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) at para 155, *Gcaba v Minister of Safety and Security* (2010) 1 SA 238 (CC) para 75).’

[16] In *PSA obo Members v Minister of Health and Others*⁴, the court had an occasion to examine the provisions of sections 157 and 158 of the LRA, and held that the distinction between jurisdiction and powers as they are drawn by both provisions is not necessarily cast in Manichean terms and that it remains for the court to determine whether the statutory provision on which an applicant relies to found jurisdiction is indeed one that confers jurisdiction, or whether it is no more than the expression of a power that may be exercised once jurisdiction has been established.⁵

[17] The Labour Appeal Court in *Moolman v Commission for Conciliation, Mediation and Arbitration and Others*⁶ (*Moolman*) held that:

‘The test for determining whether it is just and equitable to intervene and review an interlocutory arbitration ruling of a commissioner by the Labour Court differs from that of review in general. The test to apply once the Labour Court has formed an opinion to intervene earlier before the completion of the proceedings is whether the commissioner, in issuing the ruling, committed a material irregularity. In other words, the reasonable test to determine whether a commissioner's ruling is reviewable, as envisaged in *Sidumo and Another v Rustenburg Platinum Mines Ltd*⁷ does not apply. The threshold in matters of this nature is for the applicant first to show that the commissioner committed a gross irregularity arising from a material error of law. To sustain a complaint about the error in law, an applicant has to show that the error in law was material.’

⁴ [2018] ZALCJHB 345; [2019] 1 BLLR 71 (LC); (2019) 40 ILJ 193 (LC)

⁵ *Ibid* at para 13.

⁶ (JA98/22) [2024] ZALCJHB 339 (22 August 2024) at para 49.

⁷ [2007] 12 BLLR 1097 (CC)

[18] In the present application, I am not convinced that the applicant has succeeded in identifying the provision of the LRA or any other law which confers this Court with jurisdiction to entertain this review application. The applicant's founding affidavit clearly indicates that the preliminary ruling is being reviewed on grounds of gross irregularity and/or unreasonableness in terms of section 145(2)(a)(ii) of the LRA. The ruling in this matter cannot be reviewed and set aside on any of the grounds listed by the applicant including incorrectness. The decision to reschedule the matter for arbitration in the absence of a written and signed stated case did not prejudice the applicant in any manner except that the interpretation dispute could have been finalised by now. This application was filed solely to frustrate the second respondent's right to an expedited resolution of the pending disciplinary process. For the applicant to succeed with its application to review, it ought to have relied on section 158(1B) of the LRA which empowers this court to interfere with incomplete arbitration proceedings.

[19] Section 138(1) of the LRA requires commissioners to arbitrate disputes in a manner they consider appropriate in order to determine them fairly and quickly with the minimum of legal formalities. In terms of clause 6 of the CCMA guidelines published in line with section 115(2)(g) of the LRA, *"the CCMA and all its Commissioners are obliged to interpret and apply the Labour Relations Act and other legislation in accordance with judicial decisions of courts that are binding on it. These include the decisions of the Constitutional Court, the Supreme Court of Appeal, Labour Appeal Court, High Court and Labour Court"*. Had the applicant and its legal representatives taken a moment to study the case upon which the Commissioner based his decision, this application would not have been brought to court.

[20] The powers of the Labour Court to interfere in incomplete arbitration proceedings have been deliberately limited by the legislature in order to give effect to the objects of the LRA, which is to promote the effective resolution of labour disputes.⁸ On 1 January 2015, the legislature introduced an amendment to the LRA by enacting section 158(1B) which provides that:

⁸ Section 1(d)(iv) of the LRA.

'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.'

[21] Makhura J in *Passenger Rail Agency of South Africa (Pty) Ltd v Sphiwe Mathobela*⁹ dealt with the provisions of section 158(1B) and expressed his concerns regarding the fact that more than ten years since the promulgation of this section, the Labour Court is still burdened with applications to review preliminary rulings when the legal principles are so obvious and restated. The learned justice went further and stated that:

'[7] The intention of [section 158(1B)] is clear. It aims to discourage litigants from bringing review applications against interlocutory rulings before the main issue in dispute is determined. This is the default position. The proviso, of course, is that such interlocutory rulings may be reviewed if it is just and equitable to do so. PRASA must show in its review papers that it is just and equitable for this Court to intervene in the uncompleted arbitration proceedings. PRASA has not demonstrated in these urgent proceedings that it has a *prima facie* case to succeed in its review application. In fact, its papers are silent on this issue. This, in my view, is fatal to this application. In any event, I have serious doubt, having considered the ruling, that PRASA would succeed.

[8] The threshold to show that it is just and equitable for this Court to intervene in an uncompleted arbitration proceedings is a stringent one, as is apparent in the most recent LAC judgment in *[Moolman]*¹⁰. Dealing with an appeal in a matter where, after the commissioner granted an employee an application for disclosure of information, this Court intervened and reviewed and set aside that ruling, the LAC considered the purpose of enacting section

⁹ (2024/127351) [2024] ZALCJHB 446 (13 November 2024) at paras 7 – 9.

¹⁰ *Ibid* fn 6.

158(1B) and the correct approach this Court should adopt when confronted with review application of these rulings:

“[42] When section 158 (1B) of the LRA was introduced in 2014, the legislative policy considered was to regulate and avoid piecemeal processing of arbitration and mediation proceedings through reviews of interlocutory rulings made by commissioners during those proceedings. This section guides litigants to delay their challenges to interlocutory rulings pending the finalisation of the hearing. In other words, review applications are not encouraged until the award is issued and the arbitration proceedings are finalised. This consideration bears significant weight when the Labour Court considers the exercise of discretion to intervene in uncompleted proceedings.

[43] It should be noted that the legislature did not introduce a total prohibition on reviews of interlocutory rulings in arbitration and mediation proceedings but rather allowed for an exception to the general rule. As a matter of principle, interference in uncompleted arbitration proceedings through review is only permissible in exceptional circumstances. The requirement to intervene in exceptional circumstances is underpinned by the legislative policy requiring speedy finalisation of labour disputes, which dictates that the court should not interfere with incomplete proceedings but allow a hearing to run its course. This underscores the importance of the Court's role in ensuring a fair and just resolution, which should strike a balance between the interests of all parties involved. The correct approach to adopt in this regard was set out in *South African Broadcasting Corporation (SOC) Limited v Commission for Conciliation Mediation and Arbitration and Others*¹¹ as follows:

‘A case must be truly exceptional to warrant a departure from the norm that a review is appropriate only once the dispute has been finally determined in a completed arbitration hearing. This is consistent with the statutory purpose of expeditious dispute resolution, which the LRA seeks to achieve’.”

[22] This case is a classic example of what the legislature was avoiding when it limited the right to legal representation in misconduct cases. The second respondent

¹¹ (2020) 41 ILJ 493 (LC) at para 14.

(Olyn and Mongwai) are expected to answer to allegations of misconduct which they allegedly committed in or during 2012. They only received notices to attend disciplinary hearings on or during 2023. Despite these delays in charging them, their employer opted to utilize external legal representatives in the capacity of presiding officer and initiator/prosecutor. Not happy with their employer's preference to be legally represented, the employees referred the dispute to the PSCBC for application and/or interpretation of Resolution 1 of 2003. A year has passed since the preliminary ruling was issued and the disciplinary hearing has not yet started because the Bargaining Council is yet to pronounce on the application and/or interpretation dispute.

[23] The applicant opted to delay this matter further by bringing this hopeless application when the legal position is clear that the Labour Court may not review interlocutory rulings except if it is just and equitable to do so. The application before me does not even plead any exceptional circumstances which could allow this court to exercise its discretion to review and set aside the preliminary ruling dated 17 January 2024.

[24] The application is not opposed as such the issue of costs does not arise. However, I must express my displeasure at the manner in which state-owned entities abuse the taxpayers by pursuing hopeless cases. In *South African Broadcasting Corporation (SOC) Limited v CCMA and Others*¹², the Court, faced with a similar hopeless case as the present, held that:

'This is not to say that an employer ought not to discipline its employees where this is warranted, or that it is not entitled robustly to defend any action that is taken. But there is a difference between the robust defence or advancement of one's interests, and a conscious strategy to deny an employee access to justice by resorting to the superior resources and funds that an employer inevitably has at its disposal. Indeed, the employee avers that the present application is an element of a broader tactic to deprive her of the right to have the matter expeditiously finalised.'

¹² (J2055/19) [2019] ZALCJHB 318 at para 16.

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

Order

1. The application is dismissed with no order as to costs.
2. The second respondent is ordered to enrol the dispute under case number PSCBC 564-23/24 for arbitration.
3. The Registrar is ordered to serve a copy of this judgment on the second respondent.

GC Phakedi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv S Mahlangu with Adv B Maphosa

Instructed by: JR Attorneys Inc

For the Respondent: No appearance