



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: 2025 - 177099

In the matter between:

MENZI TSWAI

Applicants

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

TIYANI MAKHUBELE N.O.

Second Respondent

AIR CHEFS SOC LTD

Third Respondent

Heard: 07 October 2025

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website and SAFLII. The date for the hand-down is deemed to be on 08 October 2025

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] The objective behind section 158(1B) of the Labour Relations Act¹ is to reinforce the promotion of effective resolution of labour disputes as

¹ Act 66 of 1995 which provides;

'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

contemplated in section 1(d)(iv) of the LRA, and to enable commissioners to conduct arbitration proceedings in a manner that they consider appropriate in determining substantial merits of those disputes fairly, quickly, and with the minimum of legal formalities as contemplated in section 138(1) of the LRA.

- [2] It is within the powers of this Court to ensure that the above objectives are met, hence the stringent test the Court has to apply where a party seeks to put a halt to arbitration proceedings before they are finalised. It has been repeatedly stated in this Court that such interference will only be in extremely exceptional circumstances, with due consideration of the principles of fairness and equity. To buttress the point, it was reiterated in *Ngobeni v PRASA CRES and others*² that there are at least two reasons why the Court should be slow in intervening in on-going arbitration proceedings. The first was a policy related reason in that routine interventions would undermine the informal nature of the system of dispute resolution established by the (LRA. The second reason was that to permit reviews on a piece-meal basis would frustrate the expeditious resolution of labour disputes. It was further held that justice would be advanced rather than frustrated by permitting CCMA arbitration proceedings to run the course without intervention by this Court³.
- [3] It might as well be said that it is unusual for employees as litigants to seek intervention of their arbitration proceedings *medias res*, as this is clearly not in their interests for the dispute to be prolonged. Any such application clearly hampers a speedy resolution of a dispute, and it is therefore inconceivable as to the reason any employee would bring such an application, unless any conduct of an arbitrator complained of is so egregious that it meets the stringent test of exceptionality necessitating the intervention of this Court, let alone on an urgent basis.
- [4] In this opposed application, the applicant seeks on an urgent basis, an order staying the arbitration proceedings before the First Respondent, the Commission, Mediation and Arbitration (CCMA), pending the final

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.'

² [2016] 8 BLLR 799 (LC).

³ At para [13].

determination of a review application instituted under case 2025/104623, to review and set aside a ruling issued by the Second Respondent (Commissioner) on 09 June 2025.

Background:

- [5] The background material leading to this application is largely common cause. The applicant was employed by Third Respondent (Air Chefs), in the position of Human Resource Manager. His services were terminated on 30 December 2024 on account of various allegations of misconduct.
- [6] The applicant had referred a dispute to the CCMA in January 2025, and when conciliation failed, the dispute came before the Arbitrator for arbitration. The Applicant had secured the services of an attorney (Mr Mbatha of Mbatha Attorneys), who had appeared on his behalf at the arbitration proceedings held on 27 May 2025.
- [7] It is common cause that at the commencement of the arbitration proceedings the parties had consented to legal representation, which the Commissioner had endorsed in a form of a ruling. It however appears that notwithstanding consent, the Applicant through his legal representative then objected to the *locus standi* of Air Chefs' representative (Mr Ngwenya), and Employee Relations Specialist employed by South African Airways (SAA). Ngwenya is not a legal practitioner. The basis of the challenge to his *locus standi* was that he was not employed by Air Chefs.
- [8] Air Chefs had however confirmed that Ngwenya was employed at SAA, and that Air Chefs' Human Resource function was on a shared services model within the SAA Group. It was explained that the Applicant's position at the time of his dismissal, like that of Ngwenya, fell within the broader Human Resources of the SAA Group, and therefore there was no basis to challenge Ngwenya's *locus standi*.
- [9] When the objection was raised, Ngwenya had then retracted his consent to legal representation which was made an order by the Commissioner. The latter had then rescinded that ruling and required the parties to make

submissions on the issue of legal representation. Thereafter the Commissioner issued the ruling on 9 June 2025 and denied the Applicant legal representation.

- [10] The basis of Air Chefs' opposition in this application is that it lacked urgency, and that the requirements of the relief sought were not met.

Urgency and whether the requirements for relief sought were met:

- [11] The Court may at its discretion under Rule 38 of the Rules of this Court, relax or shorten the strict formal rules relating to time for service, and treat an application as urgent. Various authorities⁴ on the subject of urgency have consistently pointed out that in such applications, the applicant is required to first, set forth explicitly in the founding papers, the circumstances which it avers renders the matter urgent, and second, to explicitly advance the reasons why it claims that it could not be afforded substantial redress if the matter was brought to Court by way of an ordinary non-urgent procedure.
- [12] Whether the applicant will be able to obtain substantial redress in due course is dependent on the facts and particular circumstances of each. As stated in *East Rock*,

"The import of this is that the test for urgency begins and ends with whether the applicant can obtain substantial redress in due course. It means that a matter will be urgent if the applicant can demonstrate, with facts, that the applicant requires immediate assistance from the court, and that if his application is not heard on an urgent basis that any order that he might later

⁴ See *East Rock Trading 7 (Pty) Limited and another v Eagle Valley Granite (Pty) Limited and others (East Rock)* (2012) JOL 28244 (GSJ) at para 6 and 7; See also *Export Development Canada and Another v Westdawn Investments Proprietary and Others* [2018] ZAGPJHC 60; [2018] 2 All SA 783 (GJ) at para 11; and *Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo and others* (2014) JOL 32103 (GP) at para 63 – 64, where it was held;

"It seems to me that when urgency is an issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent.

Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): Whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondent's and the administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. This last factor is often called, usually by counsel acting for respondents, self-created urgency."

be granted will by then no longer be capable of providing him with the legal protection he requires.”⁵

- [13] Of equal importance is that urgent relief may be refused in circumstances where the matter has become urgent owing to dilatoriness on the part of the applicant. This is so in that the primary objective of approaching a Court on an urgent basis is to prevent any form of harm or prejudice from occurring⁶. Equally so, urgent relief will be refused where on the facts, it is apparent that the urgency claimed is self-created. Thus, even if urgency can be established, it will not be indulged where such urgency is self-created. The consequence of self-created urgency is fatal⁷

Evaluation:

- [14] Against the above principles, the invariable conclusion to be reached in this case based on the pleadings is that the background to this application points to a classic case of self-created urgency. I say so for the following reasons;

14.1 The commissioner’s ruling on legal representation was issued on 9 June 2025, whilst this urgent application was launched on 30 September 2025. This represents a delay of more than three months. It is trite that urgency is triggered upon the alleged harm having arisen and does not arise at the leisure of a litigant. The concept of self-created urgency arises from a failure to act immediately to prevent a harm and in circumstances where a litigant had been supine, and only to take any action to purportedly vindicate a right at its leisure.

14.2 If ever there was any inclination on the part of the applicant to approach this court immediately after the ruling, this is debunked by his own averments from the founding affidavit. Thus, all that he did after receipt of the ruling was to approach his erstwhile attorneys of record, not to launch

⁵ At para 7

⁶ See *Golding v HCl Managerial Services (Pty) Ltd and others* [2015] 1 BLLR 91 (LC) at para 24; *Ntozini and Others v African National Congress and Others* (18798/2018) [2018] ZAGPJHC 415 (25 June 2018) at para 11.

⁷ See *Public Servants Association of SA and Another v Minister of Home Affairs and Others* [2016] ZALCJHB 439 at paras 12 to 18; 28 *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 (6) SA 279 (CC) at paras 24 and 25

this application, but to institute a review application to set aside the ruling. Any explanation regarding the tardiness of the attorneys as advanced by the applicant in respect of the review application does not take his case any further, as at no point at that stage was there an intention to seek urgent relief. Even then, to the extent that the Applicant sought to explain his inaction as being attributable to his erstwhile attorneys, it is trite that he cannot absolve himself from the tardiness of his own attorneys⁸

14.3 According to the Applicant, it was only on 16 September 2025 that he had instructed the present attorneys of record. This was some three months after the ruling was issued. Even then, the instruction was merely to pursue a review application, not to launch this application despite the urgency which is now claimed. At that point when new attorneys were instructed, the CCMA had on 15 September 2025, issued a notice of set-down of the arbitration, enrolling the matter for 9 October 2025. Still, nothing had occurred to the Applicant or his attorneys, that the matter was urgent. Instead, the focus remained on the review application, which was launched on 23 September 2025, some three months later since the ruling was issued. That application was accompanied by an application for condonation.

14.4 The suggestion therefore that urgency arose from the issuing of the notice of set-down is disingenuous, in that if it were so, the urgent application would have been launched on or around 15 September 2025, and not some 15 days after the notice. Needless to say, the urgency, if any however arose from the date of the ruling on 9 July 2025.

14.5 As to when the new attorneys had advised the Applicant that the review application was not sufficient and that this urgent application was required is not clear from the founding affidavit. The urgent application was however launched on 30 September 2025.

14.6 Curious with the Applicant's basis in seeking urgent relief is that he relies on the provisions of section 35(3)(f) of the Constitution in alleging that the

⁸ *Saloojee v Minister of Community Development* 1965 (2) SA 135 (A).

ruling sought to be reviewed denied him a 'cogent, constitutional right' to be legally represented. Reliance on these provisions within the context of the dispute between the parties before the CCMA is not only impermissible but misplaced. This is so in that section 35(3)(f) of the Constitution is in reference to '*Every accused person having a right to a fair trial, which includes the right to choose, and be represented by, a legal practitioner, and to be informed of this right promptly*'. For the purposes of an unfair dismissal dispute at the CCMA, the Applicant is not an 'accused person'. Furthermore, Commissioners only rely on the provisions of Rule 25(1)(c) of the CCMA Rules when determining the issue of legal representation. Effectively, because the applicant was dismissed for misconduct, he does not enjoy an automatic right of legal representation.

14.7 The Applicant also seeks to rely on his rights under section 145 of the Labour Relations Act⁹, and 'Rule 7A of the Rules of this Court', to seek a review of the Commissioner's ruling. Reference to 'Rule 7A of the Rules of this Court' by the Applicant might be in reference to the now repealed Rules. Rule 35 under the new Rules is applicable to any application. However, to the extent that the applicant relies on his right under section 145 of the LRA to bring a review application, that right remains intact, which can be exercised in due course. However, as correctly pointed out on behalf of Air Chefs, an exercise of that right is clearly pre-mature, as the arbitration proceedings have not even commenced in earnest. Thus, reliance by the Applicant on section 145 of the LRA does not advance urgency.

14.8 Of course, if urgency is not granted, it would imply that the arbitration proceedings must commence as scheduled on 9 October 2055. In any event, to the extent that the applicant claims that he will be deprived of his right to pursue the review, which is incorrect, that very same review application cannot even be said to be properly before the Court in the absence of condonation having been granted. It is therefore not correct

⁹ Act 66 of 1995

that there would be any infringement of the Applicant's rights to bring a review application.

14.9 Other than the clearly self-created nature of the urgency claimed, the Applicant has not demonstrated the basis upon which it should be concluded that he will not obtain substantial redress in due course. He has not demonstrated the facts that makes him to require immediate assistance from the court, other than incorrectly relying on the provisions of section 145 of the LRA.

14.10 It can further not be correct that if urgent relief is not granted, any order that he might later be granted will by then no longer be capable of providing him with the legal protection he requires. In the end, the legal protection he requires at the CCMA (being legal representation), is not guaranteed under its Rules, and in any event, if in the end the Commissioner issues an unfavourable award, his rights under section 145 and the concomitant remedies under section 193 and 194 of the LRA remains available.

14.11 Effectively, the Applicant has not in the founding papers set out the circumstances which renders this application urgent, and the cogent reasons why he contends that he would not be afforded substantial redress at a hearing in due course.

[15] In addition to the above, the importance of the provisions of section 158(1B) of the LRA was alluded to somewhere in this judgment. That provision in my view is a further important consideration when the Court's urgent intervention is sought in incomplete arbitration proceedings. Effectively, as was with the ordinary requirements of urgency as above, the Applicant failed to demonstrate any just and equitable circumstances necessitating intervention at this stage of the arbitration proceedings, nor is the basis upon which urgent intervention sought exceptional. Commissioners in the performance of their functions routinely issue rulings which might aggrieve parties, but this does not imply that this Court must equally be routinely approached for its intervention in the absence of exceptional circumstances being pleaded.

- [16] In the light of the urgency in this case being clearly self-created, combined with the failures to explain why substantial redress cannot be obtained in due course, let alone to demonstrate any exceptional circumstances warranting the Court's interference in the arbitration proceedings, it follows that the application ought to be struck off the roll.
- [17] What remains in this matter is the issue of costs. Air Chefs had sought a cost order on the basis that the application was *mala fide*, unreasonable and frivolous. It was submitted that the Applicant was not a layperson and had been legally represented throughout. It was further submitted that they failed to have regard to Air Chefs' answering papers and reflect on the need for this application.
- [18] I agree that the Applicant and his attorneys of record ought to have reflected prior to approaching the urgent court. The application was clearly ill-conceived, and it is not clear on what basis it would have been assumed that urgent relief was obtainable when the basis thereof could not be explained. Air Chefs was equally burdened with having to mount a defence against this ill-conceived application and had in the process, incurred unnecessary legal costs.
- [19] It was submitted on behalf of the Applicant that a cost order was unwarranted as he had a right to approach the Court to vindicate his rights, and that any such costs would discourage litigants from exercising their rights. I have already made conclusions about the rights claimed by the Applicant. In *Member of the Executive Council for Finance, Kwa Zulu Natal v Dorkin NO*¹⁰, the Constitutional Court said that in making decisions on costs orders, a fair balance should be struck between not to unduly discourage workers, employers, unions and employers organizations from approaching the Labour Court to have their disputes dealt with, and being burdened with frivolous cases that should not have been brought in the first place.
- [20] A consideration of the requirements of law and fairness indicates that this was not a case where the Applicant had sought vindication of his rights. It was

¹⁰ 2008 (29) ILJ 1707 (CC)

indeed an abuse of court process. It is not correct that a costs order would ordinarily dissuade litigants from approaching Courts to seek protection. A cost order, where warranted such as in this case, is a show of displeasure in bringing unmeritorious applications, especially on the overburdened urgent roll. It is equally a measure of relieving the impact of costs unnecessarily incurred by the other party. Against these principles and conclusions, it is concluded that the Applicant should be burdened with the costs of this application.

[21] Accordingly, the following order is made;

Order:

1. The applicant's urgent application is struck off the roll.
2. The Applicant is ordered to pay the costs of this application.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv. J Malapane,
instructed by Maminzi
Attorneys INC

For the Third Respondent:

Adv. J Hlongwane,
instructed by Cliffe Dekker
Hofmeyr INC.

LABOUR COURT