



THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: **2025 – 159888**

In the matter between:

ETHEKWINI MUNICIPALITY

Applicant

and

PHUMELELA AUBREY MTHETHWA

First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Second Respondent

E.T. MHLONGO N.O

Third Respondent

S MADIKIZELA N.O

Fourth Respondent

SBONELO MCHUNU

Fifth Respondent

Heard: 23 October 2025

Delivered: 6 November 2025

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The time for hand-down is deemed to be 6 November 2025

Summary: Review application – review of jurisdictional ruling – when appropriate to consider review *in medias res* – s 158(1B) of LRA considered –

meaning of just and equitable considered – jurisdiction and material error of law at stake – review application competent and properly brought

Interdict arbitration proceedings – interdict pending review application – should however only be exercised in truly exceptional circumstances – requires grave injustice and irremediable prejudice – exceptional circumstances not shown

Ruling – nature of ruling by arbitrator considered – ruling on jurisdiction not a final ruling – bargaining council cannot finally decide own jurisdiction – only constitutes ruling for convenience – ruling may be revisited once evidence is considered

Alternative remedy – applicant has proper prescribed alternative remedy available – no reason or basis for interference at this stage in Court

No basis for urgent intervention in this instance – application dismissed with costs

JUDGMENT: REASONS

SNYMAN, AJ

Introduction

[1] The current application is yet again another case of intervention by this Court being sought by an applicant in the case of incomplete dispute resolution proceedings under the Labour Relations Act (LRA)¹. This is despite this Court regularly lamenting this kind of behaviour, as this kind of conduct compromises the fundamental principle of the expeditious resolution of employment disputes under the LRA. As pertinently said in *Food and Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd*²:

¹ Act 66 of 1995 (as amended).

² (2018) 39 ILJ 1213 (CC) at para 187. See also *National Education Health and Allied Workers Union v University of Cape Town and Others* (2003) 24 ILJ 95 (CC) at para 31.

‘... Our courts have, on occasion, pronounced on the importance of labour disputes to be conducted with expedition. For example, in *National Research Foundation* the Labour Court held:

‘[15] It is now trite that there exists a particular requirement of expedition where it comes to the prosecution of employment law disputes. ...’

- [2] *In casu*, the applicant has crafted the relief sought in its notice of motion as being that the arbitration proceedings scheduled for 14 November 2025 be interdicted and that any further conducting of the arbitration proceeding also be interdicted / suspended, pending the finalization of a review application that has been brought by the applicant in this Court under case number 2025 – 157754. This review application has just been brought, and is pending.
- [3] The applicant’s review application under case number 2025 – 157754 is thus brought *in medias res*, in terms of which the applicant seeks to review and set aside a jurisdictional ruling made by the third respondent in his capacity as arbitrator of the second respondent (SALGBC). The jurisdictional ruling was given as a result of a point *in limine* raised by the applicant at the commencement of the arbitration, to the effect that the first respondent’s referral of an unfair labour practice dispute to the SALGBC was out of time, and thus the SALGBC has no jurisdiction to entertain the same. The third respondent, being the appointed arbitrator, considered the point and dismissed it, finding that the referral had been made in time, and he then directed that the dispute proceed to arbitration on the merits. Needless to say, the applicant was dissatisfied with this outcome, leading to the said review.
- [4] However, this application does not concern deciding the review, other than perhaps conducting a cursory assessment of its merits, as will be dealt with later in this judgment. Instead, what the applicant wants in this application is to effectively interdict any further arbitration proceedings at the SALGBC until such time as the applicant review application brought *in medias res* has been finally decided. Although this seems on face value to be interim relief, what

the applicant for all intents and purposes is seeking is final relief,³ especially considering the undetermined time (likely years) it would take for review proceedings to be concluded, as there is simply no legal basis for the review application to be decided urgently. The current application is opposed by the first respondent.

[5] The application came before me for argument on 23 October 2025. After hearing argument by both parties, and considering the affidavits and heads of argument filed by the parties, I granted the following order:

- ‘1. The applicant’s application is dismissed.
2. The applicant is ordered to pay the first respondent’s costs on the party and party scale B.
3. Written reasons for this order will be provided on 5 November 2025.’

[6] This judgment now constitutes the written reasons in terms of paragraph 3 of the above order, starting with an exposition of the relevant background facts.

The relevant background

[7] Fortunately, and where it comes to the background facts in this matter, these facts are straight forward and mostly undisputed.

[8] On 9 December 2022, the applicant advertised a vacancy for the position of Head: Metropolitan Police. The closing date for applications was 13 January 2023. The first respondent duly submitted his application for the post. The first respondent however was, despite having been previously considered for

³ See *Zondo and Another v Uthukela District Municipality and Another* (2015) 36 ILJ 502 (LC) at para 4, where the Court held: ‘... what the applicants were actually seeking is that the disciplinary proceedings against the applicants be interdicted from in any way proceeding until the applicants’ review application in respect of the legal representation ruling has been finally determined. This is clearly not interim relief, but final relief. In effect, the disciplinary proceedings would be permanently stayed until the event of the outcome of the legal representation review application. As matters stand, this is indefinitely ...’. See also *BHT Water Treatment (Pty) Ltd v Leslie and Another* 1993 (1) SA 47 (W) at 55D-F.

the position which still had similar essential requirements, not even shortlisted for being interviewed for the position.

- [9] On 1 March 2024, and following the shortlisting and interview process, the fifth respondent, being the successful candidate, duly assumed his duties. On 4 March 2024, the first respondent delivered a WhatsApp message to the fifth respondent to congratulate him on his appointment.
- [10] However, and on 10 June 2024, the first respondent sent an email to Ms K Makhathini, being the Deputy City Manager at the applicant, regarding his application for the post, confirming that he had not been shortlisted and subsequently receiving a letter from Human Capital stating that he was unsuccessful. The first respondent expressed his dissatisfaction and requested that he be provided with reasons for him not being shortlisted. There is no indication that such reasons were ever forthcoming.
- [11] On 27 January 2025, a bulletin was circulated to all staff at the applicant notifying the staff of appointments to various posts within the applicant, with effective date of such appointments, including the appointment of the fifth respondent to the post of Head: Metropolitan Police. The first respondent also received this bulletin.
- [12] According to the first respondent, this bulletin circulated to all staff on 27 January 2025 marked the actual end of the recruitment and selection process as envisaged in the applicant's Standard Operating Procedure (SOP) number 36 on Recruitment and Selection of Staff. Therefore, and in the view of the first respondent, the recruitment and placement process for the position of Head: Metropolitan Police for which he applied, was only finally concluded on that date.
- [13] When the first respondent became aware of the appointment bulletin confirming the appointment of the fifth respondent, he decided to refer a dispute to the SALGBC in terms of section 186(2) of the LRA, as an unfair labour practice relating to promotion. This referral was made on 25 March

2025. The fifth respondent was joined as the second respondent to that dispute, being the successful incumbent to the post.

- [14] On 3 April 2024, the matter was unsuccessfully conciliated, and a certificate of failure to settle was issued confirming that the dispute remained unresolved. The dispute was then referred to arbitration by the first respondent.
- [15] In May 2025, the applicant delivered a written objection *in limine* to the SALGBC, in terms of which it was contended that the first respondent's referral of the dispute to the SALGBC was out of time, as the dispute actually arose on 1 March 2024 when the fifth respondent assumed his duties. According to the applicant, this meant the referral was outside the prescribed 90 days' time limit, however the first respondent never applied for condonation. As far as the applicant was concerned, this meant the SALGBC had no jurisdiction to arbitrate.
- [16] The first respondent opposed this objection *in limine* and filed an answering affidavit on 27 May 2025. In this answering affidavit, he affirmed his view that the appropriate time to refer his dispute was only when the recruitment and selection process was finally completed, by way of the circular of 27 January 2025, and this meant his referral on 25 March 2025 was in time.
- [17] The objection *in limine* came before the third respondent for argument on 17 July 2025, based on the process filed earlier by the parties. In a ruling handed down on 8 August 2025, the third respondent dismissed the objection *in limine*. He reasoned that he had the duty to determine when the first respondent became aware of the appointment of the fifth respondent to the position. Whilst the third respondent accepted that the applicant resolved on 28 February 2024 to appoint the fifth respondent to the position and employees became aware of this at around this time, the circular of 27 January 2025 was the actual and formal notification to employees of the appointment of the fifth respondent. According to the third respondent, it is this notification of 27 January 2025 that made the applicant aware of the appointment for the purposes of the unfair labour practice jurisdiction, and

thus his referral on 25 March 2025 was not late. The third respondent also directed that the SALGBC set the matter down for arbitration within 30 days. The SALGBC, pursuant to this ruling, then issued a notice of set down on 14 August 2025, setting down the matter for arbitration for on 14 November 2025. In this notice of set down, the parties were advised of the appointment of the fourth respondent as the arbitrator assigned to conduct the arbitration hearing.

- [18] Having received this ruling, the applicant instructed its attorneys of record to challenge the same. Pursuant to this instruction, a consultation with its attorneys and counsel took place on 21 August 2025, and the applicant was advised that the appropriate process was to pursue a review application to challenge the ruling. Therefore, and on 1 September 2025, the applicant's attorneys delivered a letter to the SALGBC informing it of the applicant's intention to institute an application to review and set aside the ruling, by the end of that week, and a request was made that the arbitration hearing scheduled for 14 November 2025 be cancelled pending the finalization of the review application, failing which urgent proceedings would be instituted to stay the arbitration hearing. The second respondent answered on the same date (1 September 2025) that it was unable to remove the arbitration from the roll, and the applicant would have to approach the Court. This application then followed on 9 September 2025.

Urgency

- [19] I intend to first deal with the issue of urgency. The applicant received the jurisdictional ruling of the third respondent on 8 August 2025. The application, as said, was brought on 9 September 2025, which is not the epitome of expedition, and it is true that the applicant could have acted more promptly. I do however consider that the applicant had to first complete and file its review application, and then it attempted to get agreement from the SALGBC on 1 September 2025 to cancel the arbitration, but this was not successful. If this was agreed to, it would have avoided litigation. When this intervention was not successful, the application followed within a week after that, which I consider

to be sufficiently expeditious. The first respondent was afforded sufficient opportunity to oppose the application. And when the matter was argued, urgency was not really placed in issue. In line with the principles set out in *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another*⁴, I will accept that the applicant took sufficiently prompt and urgent action, satisfies the requirement that the application was in effect brought at the earliest appropriate opportunity, and that this is not a case of self-created urgency. It is in any event in my view important that this matter be disposed of on the merits, considering that the arbitration is scheduled to proceed on 14 November 2025. I will thus finally decide this application as one of urgency.

Analysis

[20] I will first consider whether the applicant has established the existence of a clear right to the relief sought.⁵ In this context, it must be decided whether the applicant's review application, brought *in medias res*, constitutes proper cause for the interdicting of the arbitration proceedings to follow, until such time as that review has been decided. This would necessitate a decision whether it was competent and proper to have brought the review application at this stage, prior to the final completion of the arbitration proceedings.

[21] This Court and the Labour Appeal Court has made it clear that as a matter of principle, review applications *in medias res* must be strongly discouraged. The following *dictum* from the judgment in *Jiba v Minister: Department of Justice and Constitutional Development and Others*⁶ is apposite:

‘... Urgent applications to review and set aside preliminary rulings made during the course of a disciplinary enquiry or to challenge the validity of the

⁴ (2016) 37 ILJ 2840 (LC) at paras 21 – 26. See also *Jiba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 ILJ 112 (LC) at para 18; *Transport and Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd and Others* (2015) 36 ILJ 2148 (LC) at para 11.

⁵ As the applicant seeks a final interdict, the applicant must establish: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy – see *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Masstores (Pty) Ltd v Pick ‘n Pay Retailers (Pty) Ltd* 2017 (1) SA 613 (CC) at para 8; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter and Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) at para 20.

⁶ (2010) 31 ILJ 112 (LC) at para 17.

institution of the proceedings ought to be discouraged. These are matters best dealt with in arbitration proceedings consequent on any allegation of unfair dismissal ...'

- [22] There are a number of reasons for this sentiment expressed above, which can hardly be better described than by way of reference to the following *dictum* in *Trustees for the time being of the National Bioinformatics Network Trust v Jacobson and Others*⁷, where the Court held:

'There are at least two reasons why the limited basis for intervention in criminal and civil proceedings ought to extend to uncompleted arbitration proceedings conducted under the auspices of the CCMA, and why this court ought to be slow to intervene in those proceedings. The first is a policy related reason — for this court routinely to intervene in uncompleted arbitration proceedings would undermine the informal nature of the system of dispute resolution established by the Act. The second (related) reason is that to permit applications for review on a piecemeal basis would frustrate the expeditious resolution of labour disputes. In other words, in general terms, justice would be advanced rather than frustrated by permitting CCMA arbitration proceedings to run their course without intervention by this court.'

- [23] The reasoning in *Jacobson supra* has recently once again been endorsed by the LAC in *South African Cabin Crew Association obo Members v South African Airways (Soc) Ltd and Others*⁸ where the Court had the following to say:

'Although the Labour Court may review interlocutory rulings made by commissioners under section 158(1)(g) of the LRA, sound reasons underpin the Labour Court's reluctance to intervene in incomplete arbitrations. The first reason is policy-related: such intervention in medias res would undermine the informal nature of the dispute resolution process. The second reason is that piecemeal reviews would hinder the prompt resolution of labour disputes. This

⁷ (2009) 30 ILJ 2513 (LC) at para 4. See also *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 937 (LC) at para 16; *Ntombela and Others v United National Transport Union and Others* (2019) 40 ILJ 874 (LC) at para 41.

⁸ [2025] 10 BLLR 1048 (LAC) at para 26.

legislative policy was confirmed in *Trustees for the time being of the National Bioinformatics Network Trust v Jacobson & others* as follows.

“In other words, in general terms, justice would be advanced rather than frustrated by permitting CCMA arbitration proceedings to run their course without intervention by this court.”

Section 158(1B) of the LRA gives effect to the policy consideration that judicial intervention would generally be deferred until the issue in dispute had been finally determined. To this end, this section provides that the Labour Court may not review any decision or ruling made during consideration or arbitration proceedings before final determination of the issue in dispute by the CCMA, except if the Labour Court is of the opinion that it is just and equitable to review the decision or ruling. The court in *South African Broadcasting Corporation (SOC) Limited v Commission for Conciliation, Mediation and Arbitration and Others* noted that “[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”.

[24] Therefore, it is clear that the aforesaid considerations are the very reason for the adopting of section 158(1B) of the LRA, which reads:

‘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.’

[25] So, the point of departure is that review applications *in medias res* are not allowed, unless it can be shown by the applicant that it is just and equitable to

do so. But what does just and equitable mean? In *Ntombela and Others v United National Transport Union and Others*⁹ this was dealt with as follows:

'I will start with the question whether the intervention sought by the applicant, pending the review, is appropriate and justified. In this regard, and as touched on above, s 158(1B) provides some answer. It in effect prohibits a review application in the case of CCMA arbitration proceedings that have not yet been completed, unless an applicant shows it is just and equitable to do so. In other words, the applicants need to show proper cause why such a review should be allowed. I can find no trace in the application that the applicants ever did this. It is incumbent on a review applicant to make out a proper case in the founding affidavit in such a review application as to why this court should exercise its discretion in entertaining the review application on the basis that it is just and equitable to do so. Ordinarily, this failure by the applicants would render the pending review application to be incompetent, because no case is made out to provide a justified basis upon which this court can decide whether the preliminary review application is competent, which in itself must dispose of the review based on the provisions of s 158(1B).'

[26] The applicant has contended that it would be just and equitable to allow the review *in medias res* in this instance because it concerns an issue of jurisdiction, which issue has been determined by the third respondent in a manner that is fundamentally in error. A substantial portion of the applicant's founding affidavit is devoted to a discussion of the review application, indicating in what manner the third respondent erred and why his findings of jurisdiction would be unsustainable not only on the facts, but also on the law. In summary, the applicant argues that it is just and equitable that it be allowed to challenge a jurisdictional ruling up front, when such ruling is based on a material error of law.

[27] I do accept that institutions such as the bargaining councils and the CCMA cannot finally determine their own jurisdiction. In *SA Rugby Players*

⁹ (2019) 40 ILJ 874 (LC) at para 40.

*Association and Others v SA Rugby (Pty) Ltd and Others*¹⁰ it was held that: ‘... The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience ...’. The Court in *Ntombela supra* adopted the same view, where the Court said: ‘... it had to be emphasised that jurisdictional rulings by CCMA arbitrators, other than condonation rulings, are not final rulings. It is trite that jurisdictional rulings of CCMA arbitrators are rulings of convenience. ...’¹¹.

- [28] As touched on shortly above, the applicant has argued that the decision of the third respondent that the SALGBC has jurisdiction constitutes a material error of law, in that the third respondent failed to appreciate the actual date when the dispute arose. The time limit imposed by section 191(1)(b)(ii)¹² within which an unfair labour practice dispute must be referred to conciliation constitutes a jurisdictional fact, and the failure to adhere to the same means, effectively, that the proceedings that would follow must be seen to be irregular, and thus null and void. Where an arbitrator determines that this jurisdictional requirement has been complied with, then it is a ruling for convenience, and would enable the arbitration to continue, subject of course to the caveat that the issue of jurisdiction can only finally be determined by the Labour Court. This consideration, in my view, substantiates a review application *in medias res*, especially where it is said this ruling by the arbitrator is founded on an error of law. This appears to be clear from the following *dictum* in *South African Cabin Crew Association supra*, where the Court held:¹³

‘Judicial intervention is all the more justified where a review is instituted *in medias res* to challenge and set aside a ruling premised on a material error of law. Because section 33(1) of the Constitution affords everyone the right to

¹⁰ (2008) 29 ILJ 2218 (LAC) at para 40. See also *Qibe v Joy Global Africa (Pty) Ltd: In re Joy Global Africa (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 1283 (LAC) at para 5; *Universal Church of the Kingdom of God v Myeni and Others* (2015) 36 ILJ 2832 (LAC) at para 27.

¹¹ *Id* at para 54.

¹² The section prescribes that a referral must be made within: ‘... 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence ...’.

¹³ *Id* at para 28.

administrative action that is lawful, reasonable and procedurally fair, the courts are empowered to review errors of law, as long as such errors are material in nature. An error of law arises from questions of law and generally relates to a misinterpretation or misapplication of a legal principle or section in legislation.'

A similar approach was adopted in *Ntombela supra*, where the Court said:¹⁴

'... it is still necessary to consider the nature of and reason for the review challenge, as this is certainly a relevant consideration in deciding whether justice will be best served by allowing the matter to proceed. In the review application at stake in this instance, it concerns a simple point of law. Was it permissible for the third respondent to issue a ruling on 11 July 2018 finding that the CCMA does have jurisdiction to decide the unfair labour practice dispute by UNTU, when he had issued a ruling on 6 March 2018 deciding that the CCMA does not have this jurisdiction? According to the applicants, this is not permissible, and the third respondent was functus officio. In my view, this is the kind of legal question that would justify the bringing of a review application despite the arbitration proceedings at the CCMA not being concluded. The simple reason for this is that it is the kind of issue that causes uncertainty, and involves a legal issue that would in fact dispose of a matter on the merits thereof if successful, no matter what may happen if the dispute is ultimately arbitrated. This is what is contemplated by 'just and equitable' in s 158(1B) ...'

[29] Therefore, I do believe that the applicant's review application, despite the arbitration proceedings not being complete, is permissible and competent. The applicant has satisfied the requirements of 'just and equitable' under section 158(1B), in order to bring the review application at this point. It follows that the pending review application could legitimately serve as a foundation for the relief sought by the applicant. It must be said that if the applicant failed in convincing this Court that bringing the review application at this juncture was just and equitable, then this would have been the end of the applicant's

¹⁴ Id at para 42.

application *in casu*, as it would have no foundation for the relief sought. So, and at least, the applicant successfully cleared this first hurdle.

- [30] However, and unfortunately for the applicant, this is not where the enquiry ends.¹⁵ This is because the existence of a proper and competent review application is not *per se* determinative of the applicant's entitlement to interdictory relief. It is simply a possible basis for it. But more is needed to justify urgent intervention to interdict / stay pending arbitration proceedings. In this context, the determination moves beyond the consideration of what is just and equitable, and into the realm of what is truly exceptional circumstances. Or differently put, the applicant must also prove that there exists truly expectational circumstances that justify the suspension of the pending arbitration proceeding until the review is decided, which is more than the just and equitable consideration. Having due regard to several of the primary objectives of the LRA, especially those relating to a simplified dispute resolution process and the imperative of expeditious dispute resolution, this is a hefty burden to discharge. As made clear in *South African Cabin Crew Association supra*:¹⁶

'Exceptional circumstances justifying judicial intervention in incomplete proceedings have been found to exist where such intervention was necessary to prevent illegality, to prevent grave injustice, or where justice could not otherwise be achieved.'

- [31] In *Spar Group Ltd t/a Spar South Rand Distribution Centre v CCMA and Others*¹⁷ the Court expressed the following concerns where it comes to what the Court described as a 'worrying trend' of litigants seeking to review interlocutory rulings by arbitrators and then pursuing an interdict to suspend arbitration pending the determination of such a review:

¹⁵ See *Ntombela (supra)* at para 44.

¹⁶ *Id* at para 27. See also *Ntombela (supra)* at para 31; *Workforce Group (Pty) Ltd v National Textile Bargaining Council and Another* (2011) 32 ILJ 3042 (LC) at para 18.

¹⁷ [2010] JOL 26397 (LC) at para 8.

‘A worrying trend has developed where parties who are not happy with rulings made by commissioners or arbitrators in uncompleted matters would want to interdict the uncompleted proceedings. This Court may in exceptional cases where a grave injustice might otherwise result or where justice might not by other means be attained, interdict uncompleted proceedings. I share the views and sentiments expressed by Van Niekerk J in *Trustees for the time being of the National Bioinformatics Network Trust v Jacobson & others* ...’

[32] I accept the proposition that should it ultimately be found that the third respondent committed a material error of law in finding that the second respondent had jurisdiction, this could lead to an outcome that the entire arbitration proceedings that followed would be effectively vitiated without more, with all the time and expense wasted as a result of such outcome. It is indeed a factor to consider. However, I do not believe this would constitute a grave injustice or illegality necessary to establish exceptional circumstances. The point always remains that the jurisdictional ruling stands until set aside, and any consequences flowing from it will remain valid and binding if not set aside.¹⁸

[33] What happened in this case is not an open and shut jurisdictional issue, so to speak. The finding of the third respondent is effectively a decision based on factual findings, namely when the first respondent was aware, for the purposes of section 191(1)(b)(ii), of the alleged unfair labour practice. This kind of decision can really only be properly made after considering the evidence by the first respondent about the events in 2024, and why he believes that the circular of 27 January 2025 is the trigger for him pursuing an unfair labour practice. There may well be substance in his argument in this regard, which the third respondent at least on a *prima facie* basis, considering what was before him at that time, accepted. But all the third respondent had was that which was placed before him by the parties in a process akin to motion proceedings. I do not believe this can lead to a final determination of

¹⁸ See *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at para 26; *Manok Family Trust v Blue Horizon Investments 10 (Pty) Ltd and Others* 2014 (5) SA 503 (SCA) at para 17; *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* 2014 (3) SA 481 (CC) at paras 88 – 89 and 103; *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) at para 62;

jurisdiction in the context of the issue at stake in this matter. It would be far more appropriate to allow the arbitration to proceed so that evidence about this can be properly ventilated.¹⁹ There are certainly no exceptional circumstances to justify why this should not be allowed.

[34] The point I make is simply this. If the arbitrator conducting the unfair labour practice arbitration on the merits, after considering the evidence of the first respondent, together with the proper challenging of that evidence, concludes that the first respondent was in fact aware, as contemplated by section 191(1)(b)(ii), of the alleged unfair labour practice already on 1 March 2024 as contended by the applicant to be the case, then it would still be well within the purview of such arbitrator to decide that the SALGBC has no jurisdiction, because the dispute was referred late without condonation, and then dispose of the matter on that basis. Or in other words, the applicant's ability to still raise this, once all the evidence is in, is not compromised. If this happens, it may well render the current review application moot, thus removing the need to wait for years to have this issue decided in this Court, as it could be disposed of right here and now in immanent arbitration. A similar state of affairs was considered in *Ntombela supra*, and the Court decided as follows:²⁰

'All said, the subject-matter of the jurisdictional ruling of the third respondent did not finally dispose of the merits of the case. It only was a determination as to the nature of the dispute that was placed before the CCMA for arbitration. In making this ruling, the actual merits of the matter need not be considered or decided. Ultimately, the true or real nature of the actual dispute may only be determined once all the evidence was in, at arbitration, and even at that point it would be competent for the third respondent to decline jurisdiction. In simple terms, the third respondent had not yet discharged all the duties and functions bestowed upon him by the LRA in finally bringing this matter to an end.'

¹⁹ As held in *EOH Abantu (Pty) Ltd v CCMA and Others* (2010) 31 ILJ 937 (LC) at para 29: 'Where the jurisdictional issue in question requires the resolution of factual dispute, the leading of oral evidence and a determination of difficult questions of mixed law and fact, on matters that are intimately bound up with the substantive merits of the dispute may legitimately be deferred to the arbitration stage of the proceedings ...'.

²⁰ *Id* at para 56.

The Court in *Mlambo v Safety and Security Sectoral Bargaining Council and Others*²¹ similarly decided, finding as follows:

‘Where, having assumed jurisdiction, it later transpires that those facts do not satisfy jurisdictional requirements, nothing in my view prevents an arbitrator from changing his mind provided that the initial ruling is not one of those referred to as being irrevocable. It might be argued that this approach could encourage vacillation by arbitrators when issuing provisional rulings, thus resulting in parties sitting in arbitration proceedings that B might as well turn out to be an expensive academic exercise. Inasmuch as there might be merit in these arguments, one would rather be sitting with a final outcome that is valid, fair, legally sound, competent and enforceable than one that is a nullity.’

[35] It also cannot be ignored that if the case of the first respondent is so poor on the merits, as the applicant actually submits it is, then once again the entire pending review process could be short circuited by the applicant’s participation in the arbitration process and defeating the first respondent’s case on the merits. This approach will not compromise the applicant’s current pending review at all. If the applicant is ultimately unsuccessful in the arbitration, it can still pursue the current review, even together with a review application challenging any finding on the merits of the dispute. These are considerations that detract from the existence of any exceptional circumstances justifying a need to intervene, as it provides for other options to attain justice. As decided in *Ntombela supra*:²²

‘But there is a further consideration that works against the applicants being entitled to the relief they ask for. This is the consideration of an alternative remedy, which is similar to the issue of substantial redress being available in due course discussed under the heading of urgency above. The arbitration proceedings have not even been set down. The applicants have never actually engaged with the third respondent by way of a proper postponement application before him, in terms of which he could then exercise his own discretion as to whether the matter should be postponed pending the review

²¹ (2012) 33 ILJ 2427 (LC) at para 55.

²² *Id* at para 67.

before this court being decided. Or the applicants could have simply participated in the arbitration, and if they were not satisfied with the outcome, then take all the determinations made in the proceedings on review to this court.'

- [36] The Court in *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*²³ made the same point, deciding as follows:

'As I have stated above, the applicant could have attended the part-heard arbitration in order to finalize the matter and, had it been dissatisfied, taken it on review. Alternatively, it could have applied to the arbitrator already hearing the matter to postpone the hearing pending the outcome of a review against his jurisdictional ruling. Had the arbitrator refused, the CCMA would have been functus officio. The applicant could then have applied to the Labour Court to review and set aside the arbitrator's refusal to postpone. Instead, the applicant launched an urgent application in this court - and sought costs against the CCMA - in circumstances where it had not followed the procedure prescribed by the CCMA Rules. ...'

- [37] Another concern I have, which I in fact raised with the applicant's counsel when this matter was argued, is why the applicant did not bring an actual application for postponement to the arbitrator, making out a case that the matter needs to be postponed so that the review could first be decided. In that application, the applicant could place a case of possible undue prejudice it would suffer if arbitration proceeds before the arbitrator, so that the arbitrator could exercise his or her discretion in this regard. The applicant could also place the review application itself before the arbitrator, so he or she could assess its prospects of success, as part of exercising a discretion. In my view, the applicant's failure to even have attempted this must count against it. In *Workforce Group (Pty) Ltd v National Textile Bargaining Council and Another*²⁴ the Court held:

²³ (2011) 32 ILJ 2756 (LC) at para 38.

²⁴ (2011) 32 ILJ 3042 (LC) at para 16.

'The applicant has a clear alternative remedy, namely, to apply for a postponement at the CCMA pending the finalisation of the review application. In terms of CCMA rule 23, an arbitration may be postponed by agreement between the parties; or by application and on notice to the other parties. In this case, the applicant has made no effort to apply for a postponement at the CCMA. There is nothing in the CCMA rules preventing the arbitrator from postponing the continuation of the arbitration pending the finalisation of the review application.'

[38] One also cannot ignore the prejudice to the first respondent. The fact is that he would have to wait for years for the review to be heard. In the meantime, the fifth respondent would remain in the position and become entrenched in it, which would be a formidable obstacle in the way of the first respondent obtaining the relief of being considered for the position should he ultimately establish that he was unfairly treated in not being shortlisted for the position. The point is that this is an issue that must be resolved with expedition, and the only way to achieve this is to allow the arbitration to proceed. Again, it must be emphasised, in the context of the prejudice consideration, that the applicant always retains the backup of the right to challenge of any finding on the merits on review, without even compromising the current review application. I believe there is little prejudice to the applicant to just proceed with the arbitration. In *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*²⁵ the Court held:

'(2) The applicant will suffer no prejudice should the matter proceed to arbitration. It will be able to raise the jurisdictional issue it would like to, and a commissioner will be able to weigh evidence on the issue (after hearing all the evidence as this is an issue which is linked to the merits) and give a binding award. At that stage, would any party be dissatisfied, it will be able to seek to review the award in accordance with the LRA. This will mean the Labour Court will have the benefit of the CCMA's decision and will not become involved prematurely in matters. This will prevent a flood of similar applications.'

²⁵ (2010) 31 ILJ 937 (LC) at para 16.

(3) The third respondent and the first respondent however do suffer prejudice. The third respondent's dispute has been delayed due to these applications despite having the right in terms of the LRA to refer the matter to the first respondent for arbitration. Should this precedent be confirmed then the first respondent's efficient resolution of disputes will be compromised.'

[39] The applicant has simply not made out any case of exceptional circumstances in line with all the principles discussed above. There will no illegality or grave injustice if the arbitration is allowed to continue. There are many other options available to the applicant to secure its rights. In fact, if the contents of the applicant's founding affidavit are properly considered, what the applicant is actually saying is because its review application has substantial prospects of success, the third respondent committed a material error of law, and the issue at stake is one of jurisdiction, these factors constitute exceptional circumstances *per se*. In my view, the applicant is conflating what is 'just and equitable' with 'exceptional circumstances'. Just and equitable substantiates a review *in medias res* being permissible. Exceptional circumstances justify interference in arbitration proceedings that are incomplete, by interdicting it. These are different cases. In sum, the applicant made out a case for the former, but not the latter. As such, the applicant has made out no case for intervention.

[40] In the end, it is my view that the fundamental requirement of the expeditious resolution of employment disputes must carry the day. The arbitration proceedings must be allowed to continue. It will not compromise the applicant's right to review. There is nothing unique or exceptional about this case which cries out for immediate and urgent intervention. I also believe that there are no compelling considerations of injustice that will result if the arbitration proceedings are allowed to continue. There is a forum for the applicant to air all its complaints, and that forum is not this Court at this stage. There is simply no valid cause or reason for it to involve this Court in the incomplete arbitration proceedings.

Conclusion

[41] As a result of all of the above, it is my view that the applicant has failed to demonstrate a clear right to the relief sought, and in any event has suitable alternative remedies available to it. The application thus falls to be dismissed on the basis of the applicant's failure to satisfy two of the essential requirements that need to be satisfied in order to obtain the interdictory relief it seeks. On this basis, I decide that the applicant's application must be dismissed.

Costs

[42] In terms of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. That being said, I believe this is a case where a costs order against the applicant is justified. One can hardly describe the situation *in casu* any better than referring to the following *dictum* in *Ngobeni v Passenger Rail Agency of SA Corporate Real Estate Solutions and Others*²⁶ where it was said:

'The urgent roll in this court has become increasingly and regrettably populated by applications in which intervention is sought, in one way or another, in workplace disciplinary hearings. The present application is a prime example ... All of this is indicative of an attempt to use this court and its processes to frustrate the workplace proceedings already underway. The abuse goes further — what the applicant effectively seeks to do is to bypass the statutory dispute-resolution structures in the form of the CCMA and bargaining councils. One of the primary functions of these structures is to determine the substantive and procedural fairness of unfair dismissal disputes. Applicants who move applications on an urgent basis in this court for orders that effectively constitute findings of procedural unfairness, bypass and undermine the statutory dispute-resolution system. The court's proper role is one of supervision over the statutory dispute-resolution bodies; it is not a court of first instance in respect of the conduct of a disciplinary hearing, nor is its function to micromanage discipline in workplaces. ...'

²⁶ (2016) 37 ILJ 1704 (LC) at para 14.

Although the judgment in *Ngobeni* dealt with intervention in incomplete disciplinary proceedings, the same considerations would apply to urgent intervention being sought in incomplete arbitration proceedings.

[43] The applicant was legally assisted throughout these proceedings. The applicant should thus have known, from the outset, that its application was doomed to fail. This Court has made it patently clear, on a number occasions, how attempts to intervene in incomplete arbitration proceedings are perceived by this Court, and that is that it should not be entertained save for the gravest of circumstances. This kind of behaviour as perpetrated by the applicant is not conducive to the fundamental requirement of the expeditious resolution of employment disputes, and should be frowned upon.²⁷ There was nothing standing in the way of the applicant simply participating in the arbitration, where it was were free to raise all the defences it wanted, including once again raising the issue of jurisdiction once all the evidence was in.

[44] And finally, the continuous failure by litigants to heed the numerous warnings by this Court where it comes to these kinds of applications must be visited with adverse consequences.²⁸ I fully align myself with the following *dictum* in *Mokoena v Merafong Municipality and Others*:²⁹

‘In casu, the applicant brought a meritless application to this court and fairness dictates that the respondents cannot be expected to endure enormous costs defending litigation where more thought and consideration had to be put in before approaching this court on an urgent basis. ...’

[45] I thus conclude that this is an appropriate case where an exercise of my discretion under section 162(1) of the LRA must lead to the applicant being ordered to pay the costs of the application, on the scale as between party and party, scale B.

²⁷ *Ntombela (supra)* at para 70.

²⁸ See, for example, *Uthukela District Municipality (supra)* at para 47; *Magoda v Director-General of Rural Development and Land Reform and Another* [2017] JOL 38772 (LC) at para 20; *Botes v City of Joburg Property Company SOC Ltd and Another* (J 937/20) [2020] ZALCJHB 200 (28 September 2020) at para 50.

²⁹ (2020) 41 ILJ 234 (LC) at para 36

Order

[46] It is for all the reasons set out above that I made the order that I did, as reflected in paragraph 5 of this judgment, *supra*.

S Snyman

Acting Judge of the Labour Court of South Africa

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