REPUBLIC OF SOUTH AFRICA

LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: D673/09

In the matter between:

SOUTH AFRICAN POLICE SERVICE Applicant

And

ROGANI NAIDOO First respondent

A DEYZEL N.O Second respondent

SAFETY AND SECURITY SECTORAL

BARGAINING COUNCIL Third respondent

Heard: 19 December 2013

Delivered: 26 June 2015

Summary: Application to review and set aside arbitration award. Award issued subsequent to a ruling by the Arbitrator barring applicant from defending the dismissal dispute. Ruling of bar based on application of SSSBC dispute procedure collective agreement and on interpretations of various prior rulings. Application of amendments to laws regulating dispute resolution procedures to pending disputes considered. Procedural amendments to SSSBC dispute procedure collective agreement applicable from effective date amendments came into force, even if dispute referred prior to effective date. Arbitrator applied provisions of incorrect dispute procedure collective agreement. Applicable dispute procedure collective agreement did not require the applicant to file a statement of defence. Arbitrator lacked power to issue a ruling barring the applicant from defending the matter. No prior ruling was made denying applicant condonation for the late filing of its statement of defence. Arbitrator applied incorrect collective agreement, exceeded powers emanating from the applicable collective agreement by barring the applicant from defending the matter, misinterpreted prior rulings and the effect of prior rulings on the applicant's status to defend the matter. Arbitration award reviewed and set aside and remitted to the

third respondent to be determined on the merits *de novo*.

JUDGMENT

M NAIDOO, AJ

Introduction

[1] This is an opposed application to review and set aside an Award issued by the second respondent, dated 12 July 2009 under case number PSSS 209-03/04. The relief sought by the applicant is for the award to be reviewed and set aside and for the matter be remitted to the third respondent for determination on the merits *de novo,* before a commissioner other than the second respondent.

Background

[2] On 14 November 2003 the first respondent referred an alleged unfair dismissal dispute to the third respondent. The applicant's referral was accompanied by an application for condonation.[1]

[3] On 23 January 2004 the applicant delivered a statement of defence together with an application for condonation for the late delivery of its statement of defence.[2]

[4] The dispute procedure collective agreement of the third respondent is incorporated in its Constitution and is amended from time to time.

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[1] Pleadings, Volume 1 pages 80-92
[2] Record, Bundle A - Volume 5 pages 441-449

[5] The first respondent's dispute was referred on or about 15 November 2003. At that time, the dispute procedure that applied was concluded under Collective Agreement 02/2001 dated 13 February 2001 which provided the following at clause 3.5 (e):

> 'Within *10 working days of receipt of the referral the respondent party to the dispute must serve an answer on all parties to the dispute and on the Council. The answer must state the respondent's defense to the referral.'*

[6] Clause 6 of Collective Agreement 02/2001 provided that in the event of non-compliance with any time period provided for in the dispute resolution procedure, an application for condonation was necessary.

[7] The applicant delivered a statement of defence 18 days late. Contemporaneously the applicant applied for condonation for the late delivery of its statement of defence.

[8] The first respondent opposed the applicant's application for condonation for the late delivery of its statement of defence. The applicant did not deliver any answering affidavit in opposition to the first respondent's application for condonation.

[9] In summary, the first respondent's application for condonation for the late referral of the dispute was unopposed and the applicant's application for condonation for the late filing of the statement of defence was opposed.

[10] A trilogy of rulings were issued by Commissioner Maepe in relation to condonation. These rulings gave rise to a dispute over which condonation application Commissioner Maepe dealt with, the interpretation of the various rulings and the effect of the rulings on the applicant's capacity to put up a defence on the merits of the dismissal dispute at arbitration. A summary of the rulings issued by Commissioner Maepe are dealt with below:

a) On 16 April 2004 a ruling was issued refusing condonation.[3] Based on the reasons issued it is apparent that Commissioner Maepe was dealing with the first respondent's application for condonation however was under the mistaken impression that the applicant made an application seeking condonation to oppose the first respondent's application for condonation. It is common cause that the applicant did not make such an application but rather applied for condonation for the late filing of its statement of defence. It was also common cause that the opposing affidavit delivered by the first respondent was made in response to the applicant's application for condonation for the late delivery of the applicant's statement of defence.[4]

b) On 9 May 2004, Commissioner Maepe issued a variation ruling denying the applicant condonation and granting the first respondent's application for condonation. Once again, based on the reasons issued, it is evident that Commissioner Maepe remained under the impression that he had to determine whether the applicant's late delivery of opposing papers to the first respondent's application for condonation ought to be condoned. If not, then the first respondent's application for condonation would be approached as unopposed.

Commissioner Maepe's concluding reasons prior to recording the ruling were as follows:

> *'Under the circumstances the applicant's application for condonation for late referral of his dispute stands unopposed and accordingly the following rulings are made.*
>
> Ruling
>
> *The respondent's application for condonation is denied*

[3] Pleadings, Volume 1 page 17
[4] Record, Bundle A-Volume 5 pages 436-439

The applicant's application for condonation is granted'[5]

(c) On 3 December 2004 the condonation ruling issued on 9 May 2004 was rescinded by the Commissioner Maepe. The relevant extracts of the reasons and ruling made is recorded below:

> *'On the 12 November the applicant's attorneys of record raised certain concerns with regards to my ruling on condonation dated 9 May 2004 in the same matter, that there is some ambiguity to the ruling….It is indeed correct that the unopposed application for condonation should be heard by the arbitrator chosen to preside over the case and it is on these grounds that the condonation ruling of 9 May 2004 is rescind to enable the process to be taken further..*
>
> Ruling
>
> *Condonation ruling of 9 May 2004 is accordingly rescind'*[6] *(sic)*

[11] The concerns referred to above by Commissioner Maepe were brought to his attention by the first respondent's attorneys in a letter dated 12 November 2004. The first respondent's attorneys raised the following:

(a) The notice of application and affidavit filed by the applicant was unambiguous in that it is clear that the applicant sought condonation for the late delivery of its statement of defence and therefore that the first respondent's application for condonation was not opposed.

(b) The above was confirmed by the applicant's representative at arbitration proceedings scheduled for 1 November 2004.

(c) In terms of clause 6.5 of the dispute resolution procedure only opposed applications for condonation may be considered separately by an arbitrator.

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[5] Pleadings, Volume 1 page 20
[6] Pleadings, Volume 1 page 21

(d) In terms of clause 6.4 unopposed applications for condonation need to be dealt with by the Commissioner appointed to arbitrate the dispute. Accordingly, Commissioner Maepe ought not to have ruled on the first respondent's application for condonation as it was clearly unopposed.

(e) '*In the unlikely event that the Honourable A E Maepe did misunderstand the nature of the application for condonation and dealt with it as a reply to the applicant's previous application for condonation, it will follow that the respondent's application for condonation for the late filing of the statement of defence has not been adjudicated upon'*[7]

(f) In conclusion, the commissioner was requested to clarify his ruling and/or to hear oral argument if there was further confusion.

[12] In response to the above communication, Commissioner Maepe issued the rescission ruling dated 3 December 2004.

[13] Prior to Comissioner Maepe issuing the ruling rescinding the condonation ruling which he had issued on 9 May 2004, the matter was enrolled for a con-arb hearing on 12 August 2004.[8] The hearing was postponed due to the first respondent's attorney been indisposed due to medical reasons.[9] The parties agreed to proceed with the matter on 29 September 2004. It is unclear what occurred on 29 September 2004.

[14] The hearing was set down again on 1 November 2004 before Commissioner Narini Hiralall. On that occasion the matter could not proceed due to a point being raised by the first respondent's representative that the effect of the ruling dated 9 May 2004 was that the applicant was not entitled to lead evidence in defence at arbitration. The applicant disagreed with the first respondent's interpretation of Commissioner Maepe's rulings. Due to this, Commissioner Narini Hiralall

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[7] Record, Bundle A -Volume 4 pages 376-380
[8] Record, Bundle A-Volume 4 page 407
[9] Record, Bundle A-Volume 6 pages 531-532

did not proceed with the hearing and allowed the parties time to obtain clarification from Commissioner Maepe regarding the ambiguity that had been raised by the first respondent.[10]

[15] Following the above events, the communication dated 12 November 2004, was authored by the first respondent's attorneys and sent to Commissioner Maepe. As stated above, this led to Commissioner Maepe issuing a ruling in terms of which the condonation ruling dated 9 May 2004 was rescinded.

[16] The matter was enrolled as a con-arb hearing for 16 February 2007 before Commissioner Narini Hiralall but did not proceed on account of the first respondent's counsel being unavailable until April 2007.[11]

[17] It appears from the record that the matter was enrolled for a con-arb thereafter on 16 July 2007 but did not proceed for unknown reasons.

[18] The next con-arb date was scheduled for 17 September 2007 but also did not proceed due to a miscommunication over the date of hearing with the appointed Arbitrator.[12]

[19] The matter was next set down as a con-arb hearing on 18 October 2008 before Commissioner Lisa Williams-De Beer. The matter did not proceed on the merits as the first respondent sought a ruling to be issued concerning the status of the applicant, in particular, that the applicant was barred from defending the matter. The same point taken before Commissioner Narini Hiralall in 2004 which resulted in the matter not proceeding.

[20] Commissioner Lisa Williams-De Beer issued a ruling upholding the first respondent's point. The ruling made was that the applicant was barred

[10] Record, Bundle A-Volume 4 page 396
[11] Record, Bundle A, Volume 4 at page 311
[12] Record, Bundle A, Volume 4 at page 323

from defending the matter and that the dispute is to be treated as an unopposed matter.[13]

[21] The applicant brought an application to rescind the above ruling on the grounds of a "mistake common to the parties"[14]. The first respondent opposed the application though the application was dealt with on an unopposed basis as Commissioner Lisa Williams-De Beer found that the first respondent did not deliver an opposing affidavit timeously. The applicant's grounds for the application were the following:

(a) the dispute resolution procedure had been superseded;

(b) the mistake common to the parties is that the first respondent had not been granted condonation for the late referral of her dispute;

(c) Until such time that the first respondent is granted condonation for the late referral of her dispute, the first respondent lacks *locus standi* to seek a ruling barring the applicant from defending the matter and from proceeding with conciliation/arbitration proceedings.

[22] On 12 January 2009, Commissioner Lisa Williams-De Beer granted the application for rescission. The following ruling was issued:

> *'1. The ruling dated 1 November 2008 is hereby rescinded.*
>
> *2. The respondent's unopposed application for condonation must be considered prior to proceeding with this matter.*
>
> *3. In the event that such application succeeds, the question of the status of the Applicant in relation to the defence of such claim shall be considered afresh.'*

[23] On 23 February 2009, Commissioner F J Van Der Merwe was appointed to consider the first respondent's unopposed application for condonation. On 25 February 2009, the following ruling was issued:

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[13] Pleadings, Bundle A-Volume 1 pages 96-100
[14] Pleadings, Bundle A-Volume 2 pages 110-146

'14. The applicant's referral was not late and condonation is not required.

15. Should I be wrong in the aforementioned conclusion, condonation of the late referral is granted.'

[24] There is no record of a certificate of outcome being issued and no record of what process the matter was set down for on the next occasion. The matter came before the second respondent on 29 June 2009. On the same day, after hearing argument, the second respondent issued an *ex tempore* ruling as follows:

(a) the applicant was barred from defending the matter;

(b) even if the applicant was not barred from defending the matter an adjournment would not be granted.

[25] On the same day, the arbitration proceeded on an unopposed basis on account of the above ruling. It appears from the record that when the arbitration commenced that the applicant's representative was no longer present.

[26] On 12 July 2009 the Award under review was issued which included the second respondent's reasons for issuing the ruling barring the applicant from defending the matter. The second respondent found that the first respondent's dismissal was unfair and ordered retrospective reinstatement with effect from a date two years and ten months prior to the issuing of the award.

<u>Grounds for review and opposition</u>

[27] The second respondent committed a gross irregularity and/or acted unreasonably in finding that the applicant was barred from defending the matter. In support of this ground of review the applicant submitted that:

(a) This finding was premised on the erroneous belief that 'the ruling refusing condonation of the late filing of its statement of case was however not rescinded'. A ruling on the applicant's application for

condonation for the late delivery of its defence was not made. In any event, even if such a ruling was made, erroneous or not, Commissioner Maepe rescinded all prior rulings issued on 3 December 2004;

(b) The second respondent expressed concerns about Commissioner Maepe's ruling but nevertheless considered himself bound to enforce an interpretation of the ruling;

(c) By stating that 'he had no choice but to approach the matter on the basis that Commissioner Maepe had refused to condone the late filing of the statement of defence', the second respondent is perpetuating an irregularity which had the effect of tainting his entire award;

(d) In the event that the second respondent's award was misguided and erroneous, then the entire basis for the first finding is irregular and falls to be set aside;

(e) The second respondent committed a gross irregularity in the manner in which he approached and evaluated Commissioner Maepe's ruling;

(f) Had the second respondent conducted a proper assessment of Commissioner Maepe's rulings he would have found that the applicant's application for condonation had not been determined and accordingly the applicant was not barred from defending the matter.

[28] The second respondent committed a gross irregularity and/or acted unreasonably in refusing the applicant's application for an adjournment. In support of this ground of review the applicant submitted that:

(a) This finding was merely included in order to justify the outcome in circumstances where the first finding was unsustainable.

(b) It was not unreasonable for the applicant to require a determination on whether it was entitled to defend the matter given that on each occasion since Commissioner Maepe issued the ruling rescinding the condonation ruling dated 9 May 2004, the first respondent took the same point repeatedly. There was accordingly no certainty on whether the respondent could present a defence or not.

(c) Extra-ordinary circumstances did exist for the adjournment though these were not taken into account as the second respondent's mind was already tainted by the first finding under review.

(d) The main consideration for declining the adjournment was the period of time that had lapsed in the matter though the second respondent acknowledged in his reasons that both parties were responsible for delays and not solely the applicant.

[29] The first respondent raised a *point in limine* during argument that the application falls to be dismissed purely on the basis of the delay in prosecuting the application for review. No substantive application to dismiss was brought. In my view, this is an extra-ordinary remedy, particularly given the history of this matter that is required to be brought on substantive application and on notice. The first respondent's *point in limine* is dismissed on the grounds that:

(a) it has not been raised properly before this Court; and

(b) based on the papers, the applicant has provided a satisfactory explanation for the delay in filing the record.

[30] In response to the grounds of review the first respondent submitted that:

(a) The second respondent's ruling barring the applicant was based on the correct interpretation of Commissioner Maepe's rulings;

(b) Even if the second respondent's interpretation of Commissioner Maepe's ruling was incorrect (which the first respondent disputes) the ruling made by the second respondent was reasonable.

(c) The second respondent's grounds for refusing to entertain an application for adjournment were sound based on the delays that plagued the matter and accordingly reasonable.

[31] Both parties submitted supplementary heads of argument to address an issue of law raised by the Court. The question concerned which dispute procedure collective agreement applied at the time that the second respondent determined the matter? In my view, despite the fact that this was not raised directly as an issue by either party, it is material to take into account to determine the merits of the application for review. Neither party was in a position to address the question fully during argument. I accordingly allowed the parties to file supplementary heads of argument on the point.

[32] The applicant submitted that the applicable dispute resolution agreement that applied to the matter at the time that the matter came before the second respondent's was Collective Agreement 1 of 2008.

[33] In terms of Collective Agreements 1 of 2008, the requirement for the applicant to deliver a statement of defence within a stipulated period no longer existed.

[34] The 2008 amendments constituted an amendment to the procedure and did not remove any substantive rights of a party. In those circumstances, the parties were bound by the dispute resolution procedure as amended with effect from April 2008. In support, Counsel for the applicant cited the matter of *Van Schalkwyk v Spoornet*[15]

[35] The first respondent's application for condonation was only considered on 25 February 2009 during the operation of Collective Agreement 1 of 2008.

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[15] (2000) 21 ILJ 1976 (LC).

It follows that the referral was only a valid and proper referral with effect from the date that the first respondent's application for condonation was determined.

[36] When Commissioner Maepe ostensibly refused condonation for the late delivery of the statement of defence there was no valid referral and accordingly any ruling in relation to the applicant's statement of defence is invalid and *pro non scripto*.

[37] Had the second respondent properly considered the provisions of the collective agreement that applied at the time being Collective Agreement 1 of 2008, as a reasonable arbitrator is required to do, he would have found that he was not bound by Commissioner Maepe's ruling. In those circumstances there was no basis for barring the applicant.

[38] The first respondent submitted that the point raised by the Court was never raised in the pleadings and not ventilated prior to the hearing of the matter and therefore the Court was precluded from raising this issue when the applicant itself has not relied on it.

[39] The cause of action arose whilst Collective Agreement 02/2001 was in force. Collective Agreement 02/2001 required the applicant to file a statement of defence within a stipulated period failing which an application for condonation was necessary.

[40] Collective Agreement 02/2001 applied to the dispute at the time the matter came before the second respondent for determination because the parties were bound by the dispute resolution procedures that applied at the time that the dispute was referred.

The review test applicable

[41] The Labour Appeal Court in *Jonsson Uniform Solutions (Pty) Ltd vs Lynette Brown and Others*[16] clarified the position in relation to the different tests applicable to factual and jurisdictional findings as follows:

> *'[35] The issues in dispute will determine whether the one or the other of the review tests is harnessed in order to resolve the dispute. In matters where the factual finding of an arbitrator is challenged on review, the reasonable decision-maker standard should be applied. Where the legal or jurisdictional findings of an arbitrator are challenged the correctness standard should be applied. There will, however, be situations where the legal issues are inextricably linked to the facts so that the reasonable decision-maker standard could be applied.'*

[42] In *SARPA & others v SA Rugby (Pty) Ltd & others*[17] the Labour Appeal court explained the application of the correctness test as follows:

> *'[39] The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then the CCMA had no jurisdiction to entertain the dispute in terms of section 191 of the Act.*
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> *[40] 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. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court…*
>
> *[41] The question before the court a quo was whether on the facts of the case a dismissal had taken place. The question was not whether the finding of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether, objectively*

[16] [2014] JOL 32513 (LAC)
[17] [2008] JOL 21862 (LAC)

speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist the CCMA had no jurisdiction irrespective of its finding to the contrary.'

[43] Applying the above legal principles it is my view that the correctness standard applies to the ground of review challenging the second respondent's ruling barring the applicant from defending the matter.

[44] The correctness standard requires a reviewing court to analyse the objective facts to determine whether jurisdiction exists or in this case whether the commissioner, based on the objective facts, correctly barred the applicant from defending the matter. If I am wrong that the correctness test applies, I intend to furnish reasons for my decision based on the application of the reasonable decision-maker test. The outcome, based on the application of either test, is the same due to the nature of issues called upon to be determined under this review and the unique factual background of this matter.

Analysis

[45] The second respondent ruled that the applicant was barred from defending the matter for the following reasons:[18]

(a) The dispute resolution procedure of 2003/2004 was binding on the parties and required the applicant to respond to a referral within ten working days failing which the respondent was required to apply for condonation;

(b) Commissioner Maepe made a ruling in response to a letter by the first respondent's attorneys but did not indicate that his ruling of 9 May 2004, refusing the applicant's for condonation was due to a misunderstanding of the nature of the application.

[18] Pleadings, Volume 1 pages 16-17

(c) Accordingly, the second respondent had no choice but to approach the matter on the basis that Commissioner Maepe had refused to condone the late filing of the statement of defence.

(d) The effect of the above was that the applicant was barred from defending the matter on the merits.

The applicable dispute resolution procedure

[46] The parties addressed this question in supplementary heads of argument on request of this Court. I do not accept the submission made by the first respondent's attorney that this Court is precluded from raising this issue *mero motu*. In my view this is a material issue. It would not serve the interests of justice to bury a point raised by this Court which is material to making a determination in this matter, particularly given the lengthy history of this matter.

[47] Apart from the above, it not a point that never arose before the second respondent. The second respondent raised the point to ascertain whether he had jurisdiction to arbitrate the dispute and whether there existed a requirement for the applicant to file a statement of defence within a stipulated period. The second respondent's view was that if the dispute resolution procedure required a certificate of outcome to be issued and one was not issued, then he lacked jurisdiction to arbitrate the dispute.[19] Further that, if the dispute collective agreement that applied required a statement of defence to be filed then it was required of the applicant to seek and be granted condonation failing which, the applicant would be deprived of the right to be heard.[20]

[48] It is unclear how the second respondent resolved the enquiry into whether or not he did had the necessary jurisdiction to arbitrate the dispute in the absence of a certificate of outcome being issued. This is not dealt with further in the transcript of the proceedings nor in the Award. The record

[19] Record, Bundle B transcript pages 9-10
[20] Pleadings, Volume 1 page 16 at paragraph 32

reflects that after raising this concern the second respondent adjourned proceedings to reflect on provisions of the dispute procedure collective agreement which the first respondent's representative submitted applied to determine the point raised.

[49] The transcript reflects that the first respondent's representative submitted that the applicable dispute resolution procedure that applied to the dispute and which was binding on the parties was the previous agreement which he referred to as 2003/2004 agreement. It was further submitted that this was the basis upon which the matter was argued before Commissioner Lisa Williams-De Beer.

[50] Commissioner Lisa Williams-De Beer records the following in the ruling dated 1 November 2008 as submissions made by the first respondent before her:

> *'This matter was referred under the previous Collective Dispute Procedure of 2004 and clause 3.5 (e) thereof obligated the Respondent to serve an answer to the Applicant's case within 10 days of the receipt of the referral…He pointed out that that the wording of clause 3.5 (e) was peremptory and the statement of defence was a mandatory step to allow for the Respondent to follow to defend the claim.*[21]

[51] I have considered the past collective agreements for the purpose of assessing which dispute resolution agreement was relied upon by the first respondent's representative in both instances referred to above. The references to the dispute resolution procedure applicable in 2003/2004 by the first respondent's representative and then the reference to a Collective Dispute Procedure of 2004 by Commissioner Lisa Williams-De Beer blurs the line concerning precisely which collective agreement the first respondent's representative was referring to. This is relevant because the first respondent's representative submitted to the second respondent that the previous agreement applied based on the same reasons that were

[21] Record, Bundle A page 106

argued before Commissioner Lisa Williams-De Beer. This is also relevant because it is apparent from the second respondent's reasons that he placed reliance on the reasoning previously given Commissioner Lisa Williams-De Beer on the same point.

[52] The following is apparent from an assessment of the prior collective agreements that were referred to:

(a) The first respondent was relying on, and continued through all stages of the matter before the third respondent, Collective Agreement 02/2001 dated 13 February 2001 which contained, at clause 3.5 (e) an obligation on the applicant to file a statement of defence within ten working days of receipt of a referral. It appears that this collective agreement applied as at the date that the first respondent referred the dispute being on or about 15 November 2003.

(b) Collective Agreement 2/2001 was amended by Collective Agreement 1/2004 dated 6 February 2004. The amended clause 3.5 did not contain an obligation for the applicant to file a statement of defence within a prescribed time period.

(c) Collective Agreement 1/2008 was in force at the time the matter came before the second respondent and similarly did not contain an obligation for the applicant to file a statement of defence within a prescribed time period.

[53] The reference to a 2003/2004 by the first respondent is actually a reference to Collective Agreement 2/2001. It could not have been reference to Collective Agreement 1/2004 as that collective agreement had already omitted the requirement for the applicant to file a statement of defence within a stipulated period.

[54] The first respondent's representative submitted that despite various subsequent amendments to the dispute procedure by way of collective

agreements, the dispute resolution collective agreement that applied to the dispute was the one in place at the time the dispute was referred.[22]

[55] The second respondent raised the pertinent question of the possible retrospective application of amendments to the dispute resolution procedure in the event that subsequent amendments brought about procedural changes only. The first respondent's representative's response to this was that the retrospective application of amendments will depend on transitional arrangements provided for though did not make any reference to precisely what transitional provisions were being relied on. There are in fact no transitional arrangements provided for in Collective Agreement 02/2001 or Collective Agreement 1/2008.

[56] The second respondent was in doubt on this point and expressed this as follows:

> *'I don't know if it is so clear as far as I am concerned. I've got a vague recollection that things are different when it comes to procedure. Obviously the Act with retrospectively would not affect substantial rights that existed prior to it, because its deemed not to affect existing rights, but on procedural issues I'm not that certain that it doesn't, unless there's of course, like you say, interim arrangements saying that the procedure will continue to apply in pending matters.'*[23]

[57] There is no further reference in the transcript of proceedings relating to the basis upon which the second respondent accepted the first respondent's submissions that the dispute resolution procedure that applied was the one that existed at the time the dispute was referred. No reasons are furnished in the Award as to why the second respondent found that the "*disputes procedure contained in the Constitution of the SSSBC (as it was in 2003/2004) was binding on the parties and required of the respondent to respond to a referral within ten days..".*[24]

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[22] Record, Bundle B Transcript at pages 10-13
[23] Record, Bundle B Transcript at page 13
[24] Pleadings, Volume 1 at page 16 paragraph 32

[58] The dispute resolution procedure that applied at the time of issuing the ruling barring the applicant from defending the matter is significant. In the event that there was no requirement for the applicant to deliver a statement of defence then it is my view that the second respondent had no power to make a ruling barring the applicant from defending the matter based on a procedural requirement that no longer existed.

[59] This was acknowledged by the third respondent's representative to be the position:

> *'Commissioner:…Are you submitting that it's the previous dispute resolution process that is applicable or is it the present one?*
>
> *Mr Howse: No, no, we're saying it's the previous one which is applicable. That's the basis on which we argued the matter before Mrs Williams de Beer on the last occasion as well, because the understanding is that in terms of the present dispute procedures, the respondent would not necessarily be barred either because I believe it's not a specific requirement that a statement of defence be filed, whereas in those dispute resolutions it was a specific requirement.'*[25]

[60] The Labour Court has held that where an amendment to laws does not impact on any substantive rights of a party but is an amendment to the regulation of procedure, such as a time period, then the amendment operates with retrospective effect, being the date of promulgation of the amendment.[26]

[58] The Constitutional Court[27] set out the legal position in regard to the effective date of application of amendments to laws as follows:

> *'[16] According to our common law, provisions of a statute do not, unless the contrary is stipulated, have retrospective effect. They do not affect vested rights or obligations. However, provisions that regulate procedural rather than substantive matters ordinarily have immediate effect on all*

[25] Bundle B, Transcript page 10
[26] *Van Schalkwyk v Spoornet* [2000] 21 ILJ 21 ILJ 1876
[27] *Fredericks and others v MEC for Education and Training and others* [2001] JOL 9225 (CC)

disputes even if they arose prior to the enactment of the legislation. In Curtis v Johannesburg Municipality 1906 TS 308 at 312 Innes CJ held that:

> *"Every law regulating legal procedure must, in the absence of express provision to the contrary, necessarily govern, so far as it is applicable, the procedure in every suit which comes to trial after the date of its promulgation. Its prospective operation would not be complete if this were not so, and it must regulate all such procedure even though the cause of action arose before the date of promulgation, and even though the suit may have been then pending. To the extent to which it does that, but to no greater extent, a law dealing with procedure is said to be retrospective. Whether the expression is an accurate one is open to doubt, but it is a convenient way of stating the fact that every alteration in procedure applies to every case subsequently tried, no matter when such case began or when the cause of action arose."*

It is not always easy to tell whether a statutory provision is purely procedural in effect or not. To avoid confusion, therefore, many statutes that repeal other statutes expressly regulate their transitional effect.'

[59] The third respondent is a Bargaining Council established in terms of section 36(2) of the Labour Relations Act, 1995 (LRA). It is empowered in terms of section 36(5) of the LRA to conclude collective agreements. Collective agreements concluded under the auspices of the third respondent alternatively a Bargaining Council constituted in accordance with the requirements of the LRA are binding and apply with the same force as a law.

[60] In my view the same principle concerning the effective date of application of amendments to laws applies to collective agreements concluded under the auspices of a Bargaining Council. In the event that a collective agreement does not provide for transitional arrangements, which is the case in this matter, then amendments to procedure apply with effect from the implementation date of the collective agreement to pending disputes, even if the cause of action arose prior to the amendment coming into force. Put another way, the dispute procedure collective agreement in

force at the time a matter is heard or a determination is required to be made, is applicable.

[61] The requirement, as it existed, for the applicant to file a statement of defence within a specific time period was a procedural requirement. There were no stipulated minimum requirements that applied. Even if wholly inadequate, no provision existed for the content to be interrogated at the risk of the party being barred from defending the matter. The statement of defence[28] that was submitted by the applicant was basic and lacking in detail to say the least, however, nothing on the merits turns on this.

[62] The second respondent incorrectly relied on the provisions of a dispute resolution procedure that did not apply. Had the second respondent applied the correct dispute resolution procedure, being the one in force at the time the matter came before him for determination, namely Collective Agreement 1 of 2008, the result would not have been the same. The collective agreement that applied did not require the applicant to file a statement of defence. That obligation was deleted by amendments to the dispute resolution collective agreement. The second respondent lacked power to make a ruling barring the respondent from defending the matter for any reason relating to the statement of defence as it was no longer a requirement.

[63] The application of the incorrect dispute resolution collective agreement also had a direct impact on the second's respondent's jurisdiction to arbitrate the dispute. As stated above, the second respondent was alert to the fact that he was duty bound to satisfy himself that he had jurisdiction to arbitrate the dispute by establishing whether a certificate of outcome was required to be issued. It appears that this point was resolved on the basis that a certificate of outcome was not required to be issued in terms Collective Agreement 02/2001. Indeed this was the case then, though clause 4.6 of Collective Agreement 1 of 2008, which was in force with

[28] Bundle A, Volume 5 at page 442

effect from 1 April 2008, did require a certificate of outcome to be issued. Had the second respondent applied the provisions of Collective Agreement 1 of 2008, he would have found that he did not have jurisdiction to arbitrate the dispute in the absence of a certificate of outcome being issued. This was not raised as a ground of review however it is evident from the record of proceedings that it was a matter that was raised and dealt with prior to making a determination over the ruling of bar under review. This is my view demonstrates the degree to which the application of the incorrect dispute resolution procedure impacted on the proceedings.

[64] As I have stated above, if the correctness test does not apply it is my view on the application of a reasonable decision-maker test that the ruling barring the applicant from defending the matter was one that a reasonable decision-maker could not have reached. The second respondent:

(a) exceeded his powers by making a ruling that he was not empowered to make under the dispute procedure collective agreement that applied;

(b) did not apply the legal principles applicable to the effective date of application of procedural amendments to the dispute resolution collective agreement;

(c) As a result of the application of the incorrect dispute procedure collective agreement, the second respondent misdirected himself in determining the material legal issues that he was required to determine being:

(i) Whether he had jurisdiction to arbitrate the dispute in the absence of a certificate of outcome; and

(ii) Whether the applicant was required to file a statement of defence at the time the matter came before him thereby empowering him to make a ruling barring the applicant from defending the matter.

[65] The above constituted gross irregularities in the proceedings that impacted on the outcome to such an extent that the result was one that no reasonable decision-maker could have reached.

[66] In my view the findings made above is sufficient to grant the relief sought by the applicant. The second respondent's reliance on the incorrect dispute procedure collective agreement materially impacted on his assessment of the issues placed before him to determine which resulted in a conclusion which was not reasonable to justify.

[67] Notwithstanding the view I have expressed above, I intend to deal with my findings on the grounds of review concerning the existence of a prior ruling and adjournment below. I proceed to do so for the sake of completeness and for the purpose of making a determination, as sought by the parties, on issues which the parties have been in dispute over for a considerable period of time.

The existence of a prior ruling

[68] The applicant submits that the first respondent committed a gross irregularity in the manner in which he approached and evaluated Commissioner Maepe's ruling. Had the second respondent conducted a proper assessment of Commissioner Maepe's rulings he would have found that the applicant's application for condonation had not been determined and accordingly that the applicant was not barred from defending the matter.

[69] Commissioner Maepe's ruling dated 16 April 2004, reflects that he had mistaken the applicant's application for condonation for the late filing of its statement of defence as an application brought by the applicant to condone the late filing of its opposition to the first respondent's application for condonation.

[70] It is sufficiently clear from the written reasons provided regarding which applications Commissioner Maepe believed he was dealing with. The following extracts of the ruling are relevant:

> *'On the 15th November 2003 an application for condonation of the late filing of a dismissal dispute was made to the Council…*
>
> *Council informed the respondent of **this** application and that respondent must submit its response within ten days of receipt of the application. A copy of this letter was also received by the applicant's attorneys on 2 December 2003.*
>
> ***Respondent's reply to the condonation application** was received on 19 January 2004…*
>
> *In this regard the duty to reply within ten days **to the applicant's condonation application** rested with the respondent who failed to do so within the stipulated time. I do not find the respondent's grounds for delay sufficient and satisfactory and condonation must accordingly fail.'*[29] *(own emphasis).*

[71] In this ruling Commissioner Maepe denied condonation but without specific reference to either party. It is clear that Commissioner Maepe, in determining whether to grant the first respondent's application for condonation, first sought to establish whether the applicant had a satisfactory explanation for not timeously opposing the first respondent's application for condonation.

[72] It is not surprising that the first respondent's attorneys reacted by querying the ruling which led to the variation ruling being issued. A record of the query that led to the issuing of the variation ruling appears in the record,[30] yet the third respondent's representative submitted to the second respondent that it was a mystery to him as to why it was put before

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[29] Pleadings, Volume 1 pages 17-18
[30] Bundle A, Volume 5 page 424

Commissioner Maepe on 9 May 2004.[31] It was not a mystery at all, the first respondent's attorneys queried the ruling for the obvious reason that there was only one application for condonation by the first respondent for the late referral. It was not in dispute between the applicant and first respondent at any stage during this matter that the applicant did not oppose the first respondent's application for condonation for the late referral.

[73] The variation ruling issued by Commissioner Maepe on 9 May 2004 sought to clarify his earlier ruling. If it was not varied then what it meant, despite the reasons given, was that the first respondent's application for condonation was denied, amounting to the end of the road for the first respondent, unless the ruling was set aside by this Court.

[74] When the variation ruling was issued on 9 May 2004, Commissioner Maepe was clearly under the same misunderstanding. Once again he records the following:

> *'On the 15th November 2003 an application for condonation of the late filing of a dismissal dispute was made to the Council…*
>
> *Council informed the respondent of* ***this*** *application and that respondent must submit its response within ten days of receipt of the application. A copy of this letter was also received by the applicant's attorneys on 2 December 2003…*
>
> ***Respondent's reply to the condonation application*** *was received on 19 January 2004.*
>
> *In this regard the duty to reply within ten days* ***to the applicant's condonation application*** *rested with the respondent who failed to do so within the stipulated time. I do not find the respondent's grounds for delay sufficient and satisfactory and condonation must accordingly fail.'*[32] *(own emphasis).*

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[31] Bundle B, Transcript at page 3 lines 15-16
[32] Record, Bundle A Volume 2 pages 144-145

[75] Commissioner Maepe still mistakenly viewed the applicant's application for condonation for the late delivery of its statement of defence as the applicant's application for condonation for the late delivery of its opposition to the first respondent's application for condonation.

[76] This is made expressly clear by the following words which immediately precede the ruling made on 9 May 2004:

> *'I do not find the respondent's grounds for delay sufficient and satisfactory and condonation must accordingly fail. Under the circumstances the applicant's application for condonation for the late referral of his dispute stands* ***unopposed*** *and accordingly the following rulings are made:*
>
> *Ruling*
>
> *The respondent's application for condonation is denied.*
>
> *The applicant's application for condonation is granted.'(own emphasis)*

[77] The above makes it patently clear that Commissioner Maepe, at no stage considered and made a determination on the applicant's application for condonation for the late filing of its statement of defence. What occurred is that he considered an application that did not exist. A ruling made on an application that did not exist and to which the Commissioner did not apply his mind has no effect on future proceedings. The fact that the applicant did not make an application to oppose the first respondent's application for condonation is common cause between the parties. The first respondent's attorneys emphasised this in a letter dated 12 November 2004.

[78] In addition, the reference to the letter from the third respondent to which Commissioner Maepe refers is also material to assess the application that Commissioner Maepe was determining. In that letter the third respondent states the following:

> *'We have received an application for condonation from the applicant and are now awaiting your response.*

> *As the respondent, you may oppose the application for condonation by serving an answering affidavit on the referring party and the Council within ten working days of the date of referral…*[33]

[79] The response referred to in the above letter is unequivocally a notice to the other party notifying it of an application for condonation and reminding the other party that it has the opportunity to oppose the application for condonation.

[80] The applicant's application for condonation for the late delivery of its statement of case was misconstrued by Commissioner Maepe as an application for condonation for late delivery of the applicant's opposition to the first respondent's application for condonation.

[81] It appears clear within this context that, when Commissioner Maepe considered the applicant's explanation for delay and denied condonation to the applicant, that he did so in the context of determining the first respondent's application for condonation for the late referral. He makes reference to the applicant's explanation for delay in the context of considering whether to condone what he perceived as the applicant's application for condonation for its late opposition to the first respondent's application for condonation.

[82] In my view the above is reinforced by the reasons given for issuing the rescission ruling on 3 December 2004. Commissioner Maepe specifically explains the context within which he considered the applicant's explanation for delay. He explained that it was relevant to make an informed decision. He immediately thereafter confirms that the first respondent's application for condonation was unopposed. A consideration of the applicant's application for condonation for the late delivery of its statement case has no bearing on making an informed decision on whether the first respondent's application for condonation was should be approached as opposed or not. It follows, that the applicant's application

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[33] Record, Bundle A Volume 5 at page 435

for condonation for the late delivery of its statement of defence was not determined.

[83] The wording below appears in Commissioner Maepe's rescission ruling dated 3 December 2004 and once again makes it clear that construed the applicant's papers received on 19 January 2004, as the applicant's late reply to the first respondent's application for condonation.

> *'…respondent's reply to the condonation application was received on the 19 January 2004 some 18 days later, that this gave the impression that the applicant's condonation application was opposed.*
>
> *I have to clarify the reference to the above is made to show the degree of lateness which is necessary to make an informed decision. It is indeed correct that the unopposed applicant's condonation should be heard by the arbitrator chosen to preside over the case and it on these grounds that the condonation ruling of 9 May 2004 is rescind to enable the process to be taken further..'*

[84] It could not be clearer in my view that Commissioner Maepe did not apply his mind nor make a ruling on the applicant's application for condonation for the late filing of its statement of defence.

[85] In any event, the ruling issued on 3 December 2004 rescinded Commissioner Maepe's ruling dated 9 May 2004. In my view, any debate as to whether Commissioner Maepe made a determination on the applicant's application for condonation for the late delivery of its statement of defence in his ruling of 9 May 2004, is put to an end by virtue of the rescission of this ruling.

[86] The first respondent's contention is that one has to read into Commissioner Maepe's ruling dated 3 December 2003 that he only rescinded the first respondent's condonation ruling but the ruling refusing condonation to the applicant recorded in his ruling 9 May 2004 stood. There is no merit to this in my view based on a proper assessment of the rulings, the context within which the rulings were made and the common

cause fact between the parties that the applicant did not oppose the first respondent's application for condonation.

[87] The respondent contends that commissioner Maepe's ruling must be interpreted in the context of the communication dated 12 November 2004.

[88] What is quite alarming about the first respondent's argument is that this communication in fact does not support the argument which the first respondent has subsequently elected to persist with since Commissioner Maepe issued the ruling rescinding the ruling of 9 May 2004.

[89] The relevant extracts of the communication are highlighted below:

> *'It should be noted that the Honourable A E Maepe ought not to have ruled on the applicant's condonation application because Clause 6.4 of the dispute procedure provided that where the application for condonation is unopposed it must be heard by the arbitrator appointed to hear the main dispute at the commencement of the proceedings.*
>
> *The difficulty facing all parties to the arbitration proceedings is that there appears to be some ambiguity in the nature and extent of the condonation rulings by the Honourable A E Maepe. Whereas it is unequivocal from the application itself that the respondent sought condonation for the late filing of the statement of defence and that this application was opposed by the applicant, then Honourable A E Maepe in paragraph 3 of his ruling under the heading* ***"DETAILS OF THE APPLICATION"*** *states:*
>
> *"Respondent's reply to the condonation application was received on the 19 January 2004 some 18 days later"*
>
> *This paragraph allows for the interpretation that the documents submitted by the respondents were understood by the Honourable Arbitrator to constitute a reply to the previous condonation application by the Applicant. This paragraph appears in both rulings.*
>
> *Clearly the Respondent's application for condonation did not constitute a reply to the Applicant's previous application for condonation and was never intended to constitute such a reply…*

In the unlikely event that Honourable A E Maepe did misunderstand the nature of the application for condonation and dealt with it as a reply to the Applicant's previous application for condonation, it will follow that the Respondent's application for condonation for the late filing of the Statement of Defence has not been adjudicated upon…

Clause 6.1 read with Clauses 6.3, 6.4 and 6.5 of the Dispute Procedure requires that where any time limit is not complied with, condonation must be sought. If the condonation is opposed it must be adjudicated separately before the commencement of the arbitration.'

[90] The consequence of the query was the rescission ruling which rescinded the ruling of 9 May 2004 thereby clearing the slate for the parties to pursue the matter further.

[91] The first respondent's interpretations of the rulings also cannot be sustained because it is common cause that the first respondent's application for condonation only came up for determination before Commissioner Van der Merwe on 25 February 2009, approximately four years thereafter. Any ruling on an application for condonation for the late filing of a statement of defence could only stand if it was issued thereafter. As I have found above, as at 2009 the requirement for the applicant to file a statement of defence did not exist. Under these circumstances, the interpretation that only part of the ruling of 9 May 2004 was rescinded and part stood was based on the first respondent's submission that certain extracts of the dated 12 November 2004, which suited the first respondent, be read into the ruling.

[92] The above in any event is at odds with the first respondent's argument because the letter relied upon is not a model of clarity that allows for only one interpretation, that only the first respondent's application for condonation was rescinded. This was not the case. To the contrary, the third respondent states in the same communication that one of the possibilities is that the applicant's application for condonation for the late filing of its statement of defence had not been dealt with.

[93] Under these circumstances, had the commissioner issued a ruling denying the applicant condonation for the late filing of its statement of defence and intended for that part of his ruling of 9 May 2004 to stand then that would have been stated. It was not. In fact, Commissioner Maepe stood by his initial ruling and restated in his rescission ruling that his reference to the applicant's reply to the first respondent's application for condonation was taken into account to make an informed decision on whether the first respondent's application for condonation was opposed or not.

[94] This being the case, it was incorrect based on the objective facts, for the second respondent to find that Commissioner Maepe had made a ruling denying the applicant condonation for the late filing of its statement of defence and that he had no choice but to approach his determination on this basis.

[95] A gross irregularity was committed by the failure to properly analyse Commissioner Maepe's rulings and by accepting the first respondent's interpretation of the rulings.

[96] Ultimately, it is clear from a thorough assessment of the rulings that no ruling was made denying the applicant condonation for the late delivery of its statement of defence. A ruling was made by Commissioner Maepe concerning an application that was not in existence. That ruling did not dispose of the applicant's application for condonation for the late filing of its defence because Commissioner Maepe did not apply his mind to such an application and did not make a ruling on that application. In any event, Commissioner Mape rescinded his ruling of 9 May 2004 which included the ruling he made over what he considered to be the applicant's application for condonation for the late filing of opposing papers.

<u>The adjournment</u>

[97] The second respondent records in the Award that even if he is wrong in his ruling barring the applicant from defending the matter he would have refused an adjournment and proceeded with the arbitration. I am not

convinced that this can be dealt with as a ruling on an adjournment after the ruling barring the party from participating in the arbitration proceedings was issued. The obvious impact is that the applicant had no capacity to bring the application for adjournment, if it was barred.

[98] Be that as it may, given the inordinate delays in this matter the approach I take is that it would not serve the interests of justice to leave this issue undetermined. I accordingly proceed to determine this issue as if a ruling refusing an adjournment had been issued by the second respondent.

[99] In *Carephone (Pty) Ltd v Marcus NO and others*[34] the trite principle that a postponement is an indulgence, and not a right, was upheld. A commissioner exercises a discretion when determining an application for a postponement. The question to be considered by a reviewing court is whether or not a commissioner exercised his/her discretion properly.[35]

> *'[54] In a court of law the granting of an application for postponement is not a matter of right. It is an indulgence granted by the court to a litigant in the exercise of a judicial discretion. What is normally required is a reasonable explanation for the need to postpone and the capability of an appropriate costs order to nullify the opposing party's prejudice or potential prejudice. Interference on appeal in a matter involving the lower court's exercise of a discretion will follow only if it is concluded that the discretion was not judicially exercised'.*[36]

> *'[55] There are at least three reasons why the approach to applications for postponements in arbitration proceedings under the auspices of the Commission under the LRA is not necessarily on a par with that in courts of law. The first is that arbitration proceedings must be structured to deal with a dispute fairly and quickly (section 138(1)). Secondly, it must be done with "the minimum of legal formalities" (section 138(1)). And thirdly, the possibility of making*

[34] [1998] 11 BLLR 1093 (LAC)
[35] [1998] 8 BLLR 872 (LC)
[36] See *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 398-399

costs orders to counter prejudice in good faith postponement applications is severely restricted (section 138(10)).'

[100] The Labour Appeal Court held in *Carephone*[37] that there was sufficient material before the Commissioner to justify the refusal to postpone. Further that there had been proper consideration given to prejudice.

[101] There are two main reasons proffered by the second respondent for denying an adjournment:

(a) The matter had been outstanding for a very long period of time;

(b) The reasons tendered by the applicant for not attending prepared to continue with the matter were not acceptable given the lengthy delays.

[102] Although the second respondent enjoyed a wide discretion it remained a discretion that was required to be exercised judicially on a consideration of all the facts and taking into account the prejudice that would be suffered if an adjournment would not be granted. In my view the second respondent did not exercise his discretion judicially on a consideration of the all the facts.

[103] It appears that this conclusion was arrived at hastily and fundamentally influenced by the duration of time that had lapsed from the date of referral to the date the matter came before him.

[104] The circumstances surrounding this matter were extraordinary. The applicant's lack of preparation was evident however the extraordinary background could not be entirely disregarded. Factually, the point over the status of the applicant to defend the matter had not been resolved. It was an issue that remained outstanding to be determined afresh according to the ruling issued by Commissioner Lisa Williams-De Beer.

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[37] Paragraph 57

[105] On a close examination of the record it is apparent that all the delays were not occasioned solely by the applicant. On a number of occasions the matter had to be postponed due to the non-availability of the first respondent's counsel. Further delays were occasioned due to the first respondent's persistence with the point over the applicant's capacity to defend the proceedings.

[106] The second respondent acknowledges this in his Award:

> *'It is very difficult to judge to what extent the applicant was responsible for the delays that occurred. In my view it would be fair to find that the parties were equally responsible for the delays. It would be fair to the parties to order that the reinstatement operate retrospectively for half of the five years and eight months period referred to in the preceding paragraph'*

[107] No proper consideration was given to the factor of prejudice to be suffered. The second respondent's primary focus was the long delay.

[108] In summary, it is my view that the second respondent did not exercise his discretion judicially for the following reasons:

a) unreasonable weight was placed on the issue of delays on the erroneous premise that the delays were the fault of applicant;

b) insufficient weight was given to extraordinary factual history of the matter and the complexity of the *point in limine* that was required to be determined. The applicant could not have known what its status was until a determination was made;

c) an assessment of the prejudice to be suffered by the applicant weighed against the prejudice to be suffered by the first respondent was not properly conducted.

Costs

[109] The applicant sought costs to be awarded in its favour.

[110] I do not think that it is appropriate to make an adverse costs order against the first respondent for costs. The review application was not prosecuted diligently. The record in this matter was voluminous and very poorly complied. There was no chronological order to the record, numerous repetitions and vast portions of record that were not relevant to the issues called upon for determination. It was very challenging to study the records and to locate the material records relevant to determine this application.

[111] Apart from the above, it is not appropriate to grant a costs order in this matter having regard to:

(a) the grounds upon which this application for review succeeds;

(b) the fact that this is not the end of the road for either party in that the merits of the dismissal dispute still needs to be determined; and

(c) there exists the potential that the parties may have a future relationship.

Order

1. The application to review and set aside the Award is granted.
2. The matter is remitted to the third respondent for arbitration on the merits *de novo,* before a commissioner other than the second respondent.
3. No order is granted as to costs.

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M Naidoo, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Advocate L Naidoo
Instructed by:	The State Attorney
For the First Respondent:	V Singh
	Viren Singh and Company