REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR3004/2010

In the matter between:

JOSEPH KGOBATHA MBULI	**First Applicant**
BERENDT MALEFETSANE MOSIA	**Second Applicant**
SAMUEL MAPHALE MOLOI	**Third Applicant**
SYLVIA MANTEPELA MOFOKENG	**Fourth Applicant**

and

DEPARTMENT OF HOME AFFAIRS	**First Respondent**
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	**Second Respondent**
PM VENTER *N.O*	**Third Respondent**

Heard: **28 May 2015**

Delivered: **21 July 2016**

Summary: **Review of a ruling refusing postponement. Commissioner finding that he is *functus officio* on issues raised by applicants and refusing to postpone matter despite earlier ruling that matter not to be set down until certain preliminary issues have been resolved. Commissioner was not *functus officio*. Ruling reviewed and set aside.**

JUDGMENT

RALEHOKO AJ

Introduction

[1] On 1 September 2010 the third respondent ("the commissioner") refused the applicants' request for a postponement of the arbitration proceedings. The applicants then requested a stay of proceedings to enable them to file a review application challenging the refusal of the postponement. That request was also denied. The applicants informed the commissioner that they would not participate in the proceedings and the commissioner advised that he would proceed with the hearing if the applicants chose not to participate. The applicants and their representative left the hearing. Later that day the commissioner prepared a written ruling in which he documented his reasons for refusing the postponement. He also dismissed the unfair dismissal claim brought by the applicants against the first respondent.

[2] In these proceedings the applicants rely on sections 145 and 158 (1)(g) of the Labour Relations Act No 66 of 1995 (LRA) as well as the Promotion of the Adiministrative Justice Act No 3 of 2000 (PAJA) in seeking an order reviewing and setting aside that ruling. The first respondent opposes the application.

Background

[3] The applicants were employed by the first respondent as immigration officers, based at the Calendonpoort Border Post. They were dismissed following a disciplinary hearing in which they faced charges of misconduct relating to alleged corruption. An internal appeal did not yield a different

result. The applicants referred the matter to the second respondent (the bargaining council).

[4] From the record it would seem that the first set down date was 11 September 2009 but it is unclear what happened on that date.

[5] The second set down date was 22 October 2009 and the matter was postponed to 27 and 28 January 2010 due to the unavailability of the applicants' representative. The applicants were ordered to pay costs occasioned by the postponement.

[6] On 27 and 28 January 2010 the matter was again postponed to 13 and 14 April 2010 due to the unavailability of some of the applicants and their representative.

[7] On 13 April 2010 and after opening statements had been made, the commissioner postponed the matter *sine die* and directed the parties to use the two days allocated to conduct a pre-arbitration conference. It appears that the applicants requested the postponement and therefore, they were ordered to pay the costs. The commissioner also directed that the matter was not to be set down for hearing until the parties had submitted a copy of a signed pre- arbitration minute.

[8] Despite that no pre-arbitration minute was filed, on 26 April 2010 the bargaining council issued a notice of set down for 14 July 2010.

[9] After the issue of the notice of set down but before the hearing date, the applicants filed an application compelling the first respondent to (a) deliver an answer to the applicants' statement of case and (b) submit to a pre-arbitration conference and (c) to discover certain documents and items.

[10] On 23 June 2010 the first respondent filed an answering affidavit agreeing to the pre-arbitration conference and advising the applicants that it would produce the requested documentation for inspection at the conference.

[11] On 9 July 2010, 3 days before the set down date, the commissioner considered the application and issued a ruling in the following terms:

11.1 the parties ignored the April 2010 (erroneously dated January 2010) ruling directing them to hold a pre-trial conference and to file a signed minute.

11.2 the parties must hold a pre-arbitration conference on 14 July 2010 and submit a signed minute within 7 days.

11.3 if the parties fail to attend a pre-arbitration conference, the matter will be dealt with in terms of Rule 29 of the rules governing proceedings before the bargaining council.[1]

11.4 the first respondent was not required to file an answer to the applicants' statement of case as there was no directive to parties to file statements of their cases.

11.5 the matter was not to be scheduled again until a signed minute is filed.

11.6 Both parties were ordered to pay the wasted costs for 14 July 2010.

[12] The parties met on 14 July 2010 for purposes of concluding a minute but agreement could not be reached and no minute was signed. The parties blamed each other for this state of affairs, with the applicants alleging that the first respondent did not co-operate at the conference and the first respondent alleging that the applicants' representative asked irrelevant questions.

[13] Despite that no minute had been signed and filed, on 20 July 2010 the bargaining council set the matter down for hearing on 1 September 2010.

[14] On 1 September 2010 the applicants moved an application to compel the first respondent to file an answer to the applicants' Statement of case. The commissioner responded that this issue had already been dealt with in his ruling of 9 July 2010. As recorded above, in that ruling the commissioner found that the first respondent could not be compelled to file a response because there was no directive from the bargaining council for parties to file documents setting out their respective cases.

[15] Then the applicant's representative submitted that the ruling directing the parties to file a pre-arbitration minute had not been complied with because the first respondent did not co-operate. The applicants were therefore

[1] The rule deals with what should happen in the event that a party fails to attend proceedings.

seeking an order compelling the first respondent to take part in a meaningful pre-arbitration conference and to produce the documents required by the applicants.

[16] The commissioner informed the parties that he was *functus officio* on those issues and that there were remedies available to the applicants' to ensure compliance with the rulings already issued by him.

[17] The applicants' representative then moved a third application for the postponement of the matter to enable the applicants to pursue the remedies available to them in order to enforce the commissioner's prior rulings. The applicant's representative also submitted that the applicants only learnt of the July ruling when they were served with the first respondent's answering affidavit on 7 July 2010. The commissioner indicated that this was impossible because his ruling was dated 9 July 2010.

[18] At some point, the commissioner also took issue with the fact that the bargining council had set the matter down for hearing even though his ruling had made it clear that the matter should not be set down for hearing until certain preliminary issues had been resolved.

[19] At that point the applicant's representative submitted that the applicants' unfair dismissal claim should be upheld without hearing evidence because the first respondent was not co-operating. The commissioner responded that he could not do as requested.

[20] In answer, the first respondent's representative submitted that the pre-arbitration conference was aborted because the applicant's representative asked irrelevant questions such as the colour, type and camera used by the first respondent in recording the alleged corrupt activtives involving the applicants. The first respondent opposed the application for postponement and indicated that its witnesses had travelled from far and wished for the matter to proceed.

[21] After listening to the submissions, the commissioner refused the postponement on the grounds that (a) the notice of set down was sent to the parties on 20 July 2010 and that the applicants ought to have taken steps to enforce the ruling dated 9 July 2010 prior to the September 2010

set down date, (b) the applicants ought to have made inquiries with the bargaining council regarding the ruling of 9 July 2010, (c) that the matter had a protracted history and had been postponed on numerous occasions, (d) the first respondent had incurred costs as witnesses had travelled from far, (e) that the bargaining council had similarly incurred costs scheduling the matter and (f) the applicants were seemingly not complying with previous rulings.

[22] After a short adjournment, the applicants' representative submitted that he held instructions to file a review application in the Labour Court challenging the commissioner's ruling refusing postponement and requested that the written ruling be made available immediately. He also indicated that the applicants would not proceed with the arbitration that day.

[23] The commissioner cautioned the applicants' representative that if the applicants do not participate in the proceedings, he will regard that as abandonment of a matter and might dismiss the matter. The applicants' representative informed the commisisoner that he could do what he want. The applicants and their representative left the hearing.

[24] Subsequently the commissioner issued a written ruling, which is the ruling which is sought to be reviewed and set aside in these proceedings. That ruling is dated 1 September 2010.

Condonation

[25] Section 145 of the LRA requires a review application to be filed within 6 weeks from when the award was received by a party. Section 158(1)(g) of the LRA does not specify a time limit for filing a review but it is now established that it has to be done within a reasonable time.

[26] Rulings as opposed to awards such as the one which forms the subject matter of this review are challenged in terms of section 158(1)(g) of the LRA. A review of such a ruling ought to be brought within a reasonable time.

[27] The ruling sought to be reviewed is dated 1 September 2010. In the founding papers no allegations are made about when the applicants received the ruling but an allegation is made in the Heads of Argument filed on behalf of the applicants that the ruling was received by their attorney on 7 October 2010. The review application was filed on 12 November 2010.

[28] In the papers, the applicants submitted that they sought condonation because the application ought to have been filed within 180 days in terms of PAJA. The first respondent is correct that PAJA does not apply in this case. As I stated above, rulings of this nature are reviewed in terms of section 158(1)(g) of the LRA.

[29] In oral argument, it was submitted that the application was filed within a reasonable time and that condonation was not required. Accepting for a moment that the applicants received the application on 7 October 2010 and filed the application on 12 November 2010, I agree that condonation is not required because the application was filed within a reasonable period.

[30] The first respondent filed the opposing affidavit 2 months after receipt of the applicants' Rule7A(8) (b) notice and sought condonation. The applicants did not oppose.

[31] I have decided to grant the first respondent condonation and to dispose of the matter on the merits.

<u>The parties' respective submissions on the merits</u>

[32] The ruling refusing the postponement and dismissing the alleged unfair dismissal claim is sought to be reviewed on a number of grounds, some of which are raised for the first time in the Heads of Argument filed on behalf of the applicants. Those grounds are as follows:

32.1 by refusing the postponement, the commissioner effectively revisited his decision that the matter should not be set down until a minute is signed and filed but he had found that he was now *functus officio* as far as previous rulings were concerned.

32.2 the commissioner was not *functus officio* and could revisit the rulings about the pre-arbitration minute and the discovery of documents which he had issued previously, which did not have a final effect and assist the applicants.

32.3 the commissioner was biased in that:

32.3.1 on 12 April 2010 (it must be 13 April) he was seen having a conversation with the first respondent's representative in the absence of the applicants' representative, which allegation was not denied by either the commissioner or the first respondent. This created a reasonable apprehension of bias.

32.3.2 the commissioner deferred to the first respondent for a decision whether or not to postpone the matter instead of exercising his discretion independently.

32.3.3 at the commencement of the proceedings on 1 September 2010 the commissioner indicated that he would not delay the matter any further. This was clear proof that he had already made up his mind even before he could hear the parties.

32.3.4 the commissioner denied the applicants the opportunity to complain about the first respondent's failure to comply with rulings issued previously. This rendered the proceedings procedurally unfair.

32.3.5 the remedies, which the commissioner found were available to the applicants, were in fact not remedies.

32.3.6 both parties were to blame for the delays in the matter.

32.4 the commissioner's finding that the applicants withdrew from the matter was unjustified because the applicants were present and merely requested a postponement. The commisisoner ought to have postponed the matter to enable the applicants to refer the matter to the Labour Court.

[33] The applicants sought orders reviewing and setting aside the ruling, remitting the matter to the bargaining council for a fresh hearing, for the court to make an appropriate order regarding the pre-arbitration

conference and submission of a signed minute and costs. In the supplementary Heads of Argument filed on behalf of the applicants, Mr Van der Westhuizen submitted that the commissioner to be appointed to hear the matter afresh must determine afresh the issues of the pre-arbitration conference.

[34] The first respondent defends the ruling on the following grounds:

34.1 the applicants did not have an automatic right to a postponement. They made applications for postponements previously which were granted and it was not unreasonable for the commissioner to refuse a postponement on this occasion.

34.2 applicants failed to specify the grounds in section 145 of the LRA which they were relying on and failed to allege that the ruling is unreasonable and PAJA relied upon by the applicants has no application.

34.3 the commissioner was never confronted with the allegations that he was biased.

34.4 the applicants chose to abandon proceedings even though they had other remedies at their disposal.

34.5 the rulings of April and July 2010 fall into the category of rulings that are not an end in themselves and did not completely dispense with the dispute. Therefore, commissioner could have been wrong that he was *functus officio* but he was perfectly entitled to refuse a request for a further postponement, given the circumstances of the case.

34.6 the applicants were ready to proceed on a previous occasion when the matter was set down for hearing contrary to a ruling that the matter should not be set down and therefore could not argue that on 1 September 2010 they expected the matter to be postponed.

[35] The first respondent asks for an order dismissing the review application with costs.

Evaluation of submissions

(a) Whether the commissioner was *functus officio*

[36] In both the April 2010 and the July 2010 rulings the commissioner ruled that the matter was not to be set down for hearing until a pre-arbitration minute is filed. Notwithstanding that there was no minute and without consulting the parties, the bargaining council set the matter down for hearing on 14 July 2010 and again on 1 September 2010. The commissioner lamented this fact on 1 September 2010 but decided to proceed with the matter anyway.

[37] On 1 September 2010, the applicants raised the same issues already addressed by the April and July 2010 rulings. The commissioner informed the parties that he had already ruled on those matters and that in case of non-compliance, there were remedies available to the applicants to ensure that those rulings were complied with. The commissioner refused to issue other rulings dealing with the same issues stating that he was *functus officio* on those matters.

[38] The applicants submit that in making that ruling, the commissioner miscontrued his powers because as at 1 September 2010, he was not *functus officio* for two reasons, (a) those rulings were not final and (b) the rulings had in fact not been complied with.

[39] In the supplementary Heads of argument filed on behalf of the applicants, Mr Van der Westhuizen for the applicants made the further submission that the commissioner failed to apply his mind as to whether he was *functus officio* or not and the consequences thereof in that:

39.1 if the commissioner was *functus officio*, by refusing the request for postponement and proceeding with the matter, the commissioner effectively revisited his decision that the matter should not be re-enrolled and therefore his actions are invalid, unenforceable and should be reviewed and set aside and;

39.2 if the commissioner was not *functus officio*, then his decision not to revisit rulings regarding disclosure of documents and the pre-

arbitration hearing was prejudicial to the applicants in that he refused them assistance.

[40] Mr Nhlapo for the first respondent agreed that both the April and July 2010 rulings did not completely dispense with the rulings and that the commissioner was wrong by finding that he was *functus officio.* However his point of departure was that notwistanding this, the commissioner exercised his discretion properly when he refused the potsponement, taking into account the history of the matter, considerations of fairness and of practicality.

[41] In *PT Operational Services (Pty) Ltd v Retail and Allied Workers Union obo Ngweletsana*[2] (2013) 34 ILJ 1138 (LAC) the court said the following regarding the *functus officio* doctrine:

[22] Does the functus officio doctrine apply to CCMA commissioners?...

[23] It is now settled that commissioners conducting arbitrations under the auspices of the CCMA are performing an administrative function. Although commissioners perform an administrative function such function includes adjudicative functions.

[24] Pretorius explains the functus officio doctrine as follows:

> *"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter. This rule applies with particular force, but not only, in circumstances where the exercise of such adjudicative or decision-making powers has the effect of determining a person's legal rights or of conferring rights or benefits of a legally cognizable nature on a person. The result is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker. However, this is not an absolute rule. The instrument from which the decision-maker derives his adjudicative powers may empower him to interfere with his own decision. Furthermore, it is permitted to make variations necessary to explain ambiguities or to correct errors of expression in an order, or to deal with accessory matters which were inadvertently overlooked when the order was made, or to correct costs orders made without having heard argument on costs. This list of exceptions might not be exhaustive and a court might have discretionary power to vary its orders in other cases. However, this power is exercised very sparingly, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded.*

[2] (2013) 34 ILJ 1138 (LAC) at para 28.,skdedd

> *The same considerations that require finality for the decisions of courts of law apply to the decisions of administrative authorities. Consequently, the functus officio doctrine applies in administrative law as it does in relation to curial proceedings. In elementary terms, the effect of the functus officio doctrine in administrative law is that an administrative agency which has finally performed all its statutory functions or duties in relation to a particular matter subject to its decision-making jurisdiction has exhausted its powers and has discharged its mandate in relation to that matter. Consequently, such an agency is without further authority as far as that matter is concerned because it's duties and functions have been fully accomplished. Thus, an administrative agency which is functus officio is unable to retract or change its own earlier decision, unless it is authorised by its enabling legislation to do so."*

[42] Thereafter the court stated as follows:

> *[28] … In my view the Court a quo was correct in its conclusion that the functus officio doctrine applies to CCMA commissioners. They may therefore only revisit their decisions to the extent that it is permitted by the provisions of* ***section 144*** *of the LRA. They may not do so whenever they like but may do so if the jurisdictional facts in* ***section 144*** *are present. They may also do so… when they have performed an allied function but not yet performed the power or duty bestowed on them by the legislature. (Own underlining)*

[43] It is not in dispute that section 144 of the LRA is not applicable in the present matter.

[44] The parties agree that the commissioner could revisit his earlier rulings because they were not final in nature. Stated differently, the parties are in agreement that as at 1 September 2010 the commisisoner was not *functus officio* and that he could revisit his earlier decisions regarding the preliminary issues. Having regard to the legal principles as set out above, this is correct.

[45] However, the parties have differing views on the consequences of that approach, as I have set out above.

[46] I am in agreement with Mr Van der Westhuizen that the commissioner failed to properly exercise his mind on whether he was indeed *functus officio*.

[47] On the one hand, he found that he was *functus officio* in respect of the pre-arbitration minute and the discovery documents but on the other hand, he was prepared to continue with the matter despite his previous rulings that the matter should not be set down for hearing until all the preliminary issues had been addressed. If the commissioner was indeed *functus officio* as he stated, this ought to have applied to all the rulings he had issued and not only to some. Similarly, if the commissioner was *not functus officio*, then this also applied to all rulings which he had issued at that stage.

[48] The rulings, which he had issued, were rulings issued whilst performing an allied function and did not dispose of the issues that the commissioner was called upon to decide. They were not final in nature and therefore the commissioner could revisit them. He was not *functus officio and in* my view, this renders his decision refusing to postpone the matter reviewable.

[49] If the commissioner was concerned about the delays and a lack of progress, he could have revisited his decision that the matter should not be set down until a pre-trial minute had been filed but on notice to the parties. He could not simply decide to proceed on 1 September 2010.

[50] The first respondent's submission that the the applicants did not protest when the matter was set down for hearing in July 2010 contrary to the April 2010 ruling is a relevant factor but not decisive. It has not been argued that by not objecting when the matter was scheduled in July 2010, the applicants waived their right to raise the issue. The applicants were perfectly entitled to raise that issue even after the September ruling had been issued as they have done. The bargaining council could not simply set the matter down contrary to valid rulings. The commissioner expressed this concern but did nothing about it.

[51] The finding that the commissioner erred in law when he found that he was *functus officio* but deciding to proceed with the matter contrary to his earlier ruling necessarily disposes of the matter. The effect of reviewing

and setting aside the postponement ruling is that the dismissal ruling falls away and the review must suceed.

[52] I however deem it necessary to deal with the allegations of bias made against the commissioner.

(b) Allegations of bias

[53] That a commisisoner spoke to one party in the absence of another party, on its own, and without more, in my view should not lead to the conclusion that the commisisoner was biased. It is surprising that the applicants did not raise this issue directly with the commissioner in April 2010 and request his recusal. They also had an opportunity to raise this issue in July 2010 and again on 1 September 2010 and still did not do so. The issue is raised for the first time only after a ruling has been made against the applicants. There is no merit to this allegation.

[54] All the other allegations of bias are made for the first time in the Heads of Argument submitted on behalf of the applicants, when such allegations ought to have been made in the pleadings so that the first respondent would know of the case that it was expected to meet. Be that as it may, I have perused the very brief transcript of the proceedings of 1 September 2010 and could not find evidence that the commissioner deferred to the first respondent's submissions in deciding the postponement application. The commissioner merely afforded both parties an opportunity to address him before deciding the matter. He was required to take that approach.

[55] The commissioner's statement that he was "not inclined to delay the matter any further" cannot be construed to mean that he had pre-conceived ideas about how he would deal with the matter even before hearing arguments. The commissioner merely expressed a *prima facie* view and he gave the reasons for the view. After making the statement, he allowed the parties to address him and only decided the matter after hearing submissions.

[56] There is also no substance to the allegation that the applicants were denied an opportunity to complain about the first respondent's conduct

during the pre-arbitration conference. The applicants' representative dealt with this issue in his submissions and he was not stopped.

[57] The *Raswiswi v CCMA & Others*[3] judgment which the applicants seek to rely on does not assist them because the applicant in that matter succefully pointed out clear examples from the record where the commissioner was assisting the employer in presenting its case. In the present matter, other than the statement of the commisisoner dealt with above, the applicants have not pointed out other references from the record where it can be said that the commissioner was clearly biased against their case.

[58] For these reasons this ground of review would have failed.

Costs

[59] Even though the applicants have been successful, I do not believe that the first respondent acted unreasonably in defending the ruling. I have also taken into account the fact that the first respondent made a concession on the issue of whether the commissioner was in fact functus officio on 1 September 2010. For those reasons I do not intend to burden the first respondent with a costs order.

[60] In the circumstances I make the following order:

60.1 The ruling dated 1 September 2010 issued in case number GPBC960-08/09 is hereby reviewed and set aside.

60.2 The matter is remitted to the bargaining council for a *de novo* hearing before another commissioner other than Commissioner PM Venter.

60.3 The new arbitrator will decide how the preliminary issues are to be dealt with.

60.4 The bargaining council is directed to deal with the matter on an expedited basis.

60.5 There is no order as to costs.

[3] (2011) 32 ILJ 2186 (LC).

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TC Ralehoko

Acting Judge of the Labour Court

Appearances

For the Applicants:	Advocate Van der Westhuizen
Instructed by:	O D Kau Attorneys
For the First Respondent	Advocate SB Nhlapo
Instructed by:	The State Attorney