THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Of interest to other Judges

Case no: J701/16

In the matter between:

ROAD ACCIDENT FUND	**Applicant**
And	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER PHALA *N.O.*	**Second Respondent**
ELIAS MOSENEKE	**Third Respondent**
DORIS GOLELE	**Fourth Respondent**

Heard: **26 April 2016**

Delivered: **06 May 2016**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] This matter came before the Court by way of an urgent application in terms of which the Applicant seeks an order in the following terms;

1.1 *'The interdict granted by his Lordship the Honourable Justice Van Niekerk dated 13 August 2015 be renewed and/or revived and the arbitration proceedings scheduled on 16 to 20 May 2016 under CCMA under case number GAJB 9388 – 14 be interdicted and postponed pending the final determination of a petition and finalisation of any subsequent further petition or appeal against the judgment of Matlejoane AJ.*

1.2 *Alternatively, that the arbitration proceedings scheduled on 16 to 20 May 2016 under CCMA case number GAJB9388/14 be stayed pending the final determination of the petition and any subsequent petition or appeal against the judgment of the Honourable Acting Justice Matlejoane'*.

Background:

[2] The application before the court is opposed. The matter has a sorry and protracted history dating back to 29 November 2013 after the Third and Fourth Respondents ('The Employees'), together with two other individuals, David Chelepo and Godfrey Matlading were dismissed by the Applicant on the grounds of alleged misconduct. Since then, the dispute has been characterised by astonishingly unusual and sustained litigation at every turn, and the arbitration proceedings before the CCMA are nowhere near commencement.

[3] According to the Applicant, Chelepo and Matlading jointly referred a dispute to the CCMA on 12 December 2013. The dispute in respect of Matlading was eventually settled in January 2014. Chelepo's matter was arbitrated and finalised in December 2015. The Employees contend that they had referred their dispute to the CCMA on 12 December 2013 together with Chelepo under case number GAJB31371-13. The referral was within the time frames contemplated in section 191 (1) of the LRA. The dispute as referred was set down on 22 January 2014 for a con/arb process.

[4] The Applicant's contention was that it had formally objected to the con/arb process. The Employees deny that any such objection was filed, as a copy in

that regard was never served on them. Be that as it may, Commissioner Hlatshwayo of the CCMA issued a certificate of outcome, indicating the matter as unresolved. On the same date that the certificate was issued, Commissioner Hlatshwayo also issued a ruling in regards to legal representation as consented to by both parties. He also directed the parties to engage in a pre-arbitration conference in anticipation of the arbitration.

[5] The parties convened a pre-trial conference on 3 March 2014 at the offices of the Applicant's attorneys of record. Amongst the issues discussed at that conference was the separation of Chelepo's matter from that of the Employees'. Furthermore, an offer was made by the Applicant to subject them to a disciplinary hearing *de novo*. This offer was made in the light of the common cause fact that their dismissal followed upon the failure by the Applicant as the employer to afford them an opportunity to lead evidence or to challenge the evidence against them.

[6] Following the agreement on the separation of the disputes, the Employees on 18 April 2014 then referred separate disputes for arbitration under case numbers GAJB9388-14 and GAJB9398-14. The referrals were also accompanied by an application for condonation. It is not clear as to the reason that condonation was sought at that stage. The Applicant nevertheless opposed the condonation application. The condonation hearing was initially scheduled for 15 May 2014. Before that hearing date, the parties' legal representatives had formally agreed that the matter in respect of Chelepo was to be separated from that of the Employees, and further that the two subsequent referrals by the Employees were to be consolidated.

[7] On 15 May 2015, the matters under GAJB9388-14 and GAJB9389-14 as consolidated came before Commissioner Vilakazi, who issued a hand-written ruling in the following terms;

> *"The parties had initially referred the matter under case number GAJB31371-13. The matter remained unresolved on the 22/01/2014. It is unclear why the parties decided to re-refer the matter afresh and apply for condonation. I therefore rule that condonation is not required*

in these matters that is GAJB9388-14 and GAJB9389-14. The parties are advised to apply for arbitration".

[8] The two disputes having been consolidated, the matter was then set-down for arbitration on 19 August 2014. At that hearing, the Applicant raised an objection to the jurisdiction of the CCMA, contending that an application for condonation in respect of the late referral for arbitration had not been filed in view of the referral for arbitration being some 89 days out of time. Commissioner Thee issued a ruling, stating that the Employees *must* apply for condonation as the referrals were outside of the time frames. In the same ruling, Commissioner Thee stated that Commissioner Vilakazi had not dealt with the *in limine* issue on 15 May 2014. This finding was indeed strange in the light of Commissioner Vilakazi's clear ruling that '*condonation is not required in these matters that is GAJB9388-14 and GAJB9389-14'*. It is common cause that those two referrals were consolidated, and in my view, a ruling to the effect that condonation is not required in those matters cannot have any other meaning.

[9] In compliance with Commissioner Thee's ruling, the Employees duly filed an application for condonation, which the Applicant promptly and vigorously opposed. The application was heard by Commissioner Thee on 14 October 2014. He had issued a ruling on 27 October 2014 in terms of which condonation was granted. The CCMA then issued notices of set down on 31 October 2014, advising the parties that the arbitration proceedings will commence on 25 November 2014.

[10] Aggrieved by Commissioner Thee's ruling, the Applicant then filed a review application on 18 November 2014 under case number JR2424/14. That application was opposed by the Employees. The arbitration proceedings scheduled for 25 November 2014 were postponed by agreement. The CCMA then re-scheduled the arbitration proceedings for 30 January 2015. An application for a postponement was filed by the Applicant and considered by Commissioner Phala (the Second Respondent) on 30 January 2015, who dismissed it with costs.

[11] The CCMA again re-scheduled the arbitration proceedings for 10 March 2015. At those proceedings, the Applicant brought an application for Commissioner Phala to recuse himself from the matter. That application was also dismissed. The parties agreed that the proceedings should commence on 11 June 2015 for three days. At the commencement of those proceedings, Commissioner Phala explored the possibility of a settlement of the dispute with the parties. Emanating from those discussions, the matter was postponed whilst settlement proposals were considered by the parties.

[12] The review application before this Court was heard by Matlejoane AJ on 3 July 2015. Prior to judgment being delivered, the CCMA set the matter down for 19, 20, and 21 August 2015. By agreement between the parties, the CCMA proceedings were again postponed. Despite the agreement, the Applicant nevertheless approached this Court with an urgent application under case number J1515/15. The matter came before Van Niekerk J on 13 August 2015. An order ('The Van Niekerk J order') was issued directing that the arbitration proceedings set down for 19, 20 and 21 August 2015 before Commissioner Phala be postponed *sine die,* pending the final determination of the review application.

[13] Judgment in the review application was handed down by Matlejoane AJ on 23 December 2015, in terms of which the review application was dismissed. Again aggrieved, the Applicant then filed an application for leave to appeal on 15 January 2016. In the meanwhile, the CCMA set the arbitration proceedings down for 11 March 2016. The matter was removed from the roll at the request of the Applicant, pending the determination of the leave to appeal. The matter was however re-enrolled for 23 March 2016 upon the request of the Employees, based on their firm belief that the dismissal of the review application by Matlejoane AJ entitled them to a set-down date.

[14] On 17 March 2016, the Applicant brought a further urgent application to have the arbitration proceedings postponed pending judgment the application for leave to appeal. On 18 March 2016, the CCMA in the face of that application withdrew the set down notice. Coincidentally, the application for leave to

appeal which was unopposed was dismissed by Matlejoane AJ on 18 March 2016.

[15] On 22 March 2016, and despite the two significant events on 18 March 2016, the Applicant persisted with its urgent application. The Employees opposed the application. Steenkamp J upon consideration of the application established that both reasons for the urgency had since fallen away in the light of the postponement of proceedings having been granted by the CCMA, and the application for leave to appeal having been refused by Matlejoane AJ. Steenkamp J also stated that based on the urgency having fallen away, there was no purpose in persisting with the application on an urgent basis. The application was accordingly struck off the roll with an order of costs.

[16] On 5 April 2016, the CCMA sent notices to the parties, setting the arbitration proceedings for 16 – 20 May 2016. Again, aggrieved at the refusal of Matlejoane AJ to grant the application for leave to appeal, the Applicant then on 6 April 2016 filed a petition for leave to appeal. That petition is still pending before the Labour Appeal Court under case number JA30/16. The present urgent application was launched on 15 April 2016 and enrolled for 26 April 2016.

The urgent application before the Court:

[17] Central to this application are two main issues to be considered. The first is whether in the light of the Applicant's first prayer in its Notice of Motion, the 'Van Niekerk J's order' in its form can be interpreted to include subsequent appeals in respect of the review of Commissioner Thee's condonation ruling. Aligned to that question is whether the same order can be revived or renewed for the purposes of future appeals. I am in agreement with the submissions made on behalf of the Applicant that if this question is answered by the Court in the affirmative, that should be the end of the matter, and a mere declaratory order in that regard would suffice.

[18] I however pause at this stage to mention that as far as the Applicant is concerned, even if the petition for leave to appeal is declined by the Labour Appeal Court, its intention is to pursue its rights to set aside the condonation

ruling, even if it means applying for leave to appeal to the Constitutional Court[1]. This approach is premised on its view that to continue to litigate until Commissioner Thee's condonation ruling is set aside is not a waste of public funds, but a pursuit of its rights under the LRA and the Constitution of the Republic, and further that it is obligated to pursue that path as a matter of law.

[19] The second issue for consideration in the light of the Applicant's alternative prayer (staying the arbitration proceedings until the final determination of the petition and any other subsequent appeals where necessary), is whether a case has been made out in respect of the relief sought.

Interpretation of the 'Van Niekerk J's order':

[20] The order was granted in the following terms:

> "*1. The arbitration set down on 19, 20 and 21 August 2015 before Commissioner Phala under case number GAJB9388/14, is postponed sine die pending the final determination of the review application filed under case number JR2424/14.*
>
> *2. Each party to pay its own costs."*[2]

[21] The Applicant seeks to be able to finalise the litigation and any further litigation in the form of petitions or appeals which may stem from the matter, prior to the arbitration proceedings seeing the light of day. As already stated elsewhere in this judgment, the application for a review of Commissioner Thee's ruling came and went, and was effectively disposed of by means of a refusal for leave to appeal. The Applicant nevertheless believes that the Van Niekerk J's order should remain effective until such time that the review of Commissioner Thee's ruling is finally determined, including if it so required, by the Constitutional Court.

[22] It was common cause that the Van Niekerk J's order was obtained by consent between the parties. The Applicant's contention is that the parties' intention in consenting to the order should be gleaned from its actual wording, i.e.

[1] See para 41 of the written heads of argument.
[2] Page 32 of the pleadings bundle.

"…pending the final determination of the application for review…" In this regard, it was argued that had the parties intended to postpone the arbitration pending the outcome of the review application before Matejoane AJ at the time, then they would have said so. It was further submitted that the parties had not purposefully done so, and the words *"final determination"* within the contemplation of the parties only means what it says, and further that what was to be determined on appeal, should appeal be granted, can only be the review application in respect of the condonation ruling. To this end, the logic according to the Applicant was that *"pending the final determination of the review application"* can only mean pending the final determination of the review application on appeal and any other further appeals that may be necessary.

[23] Submissions made on behalf of the Employees were to the effect that the question raised by the Applicant should be answered within the context of determining whether the Van Niekerk J's order was final or interim. Thus if it is final, it remains in force until it is appealed or rescinded. If the order is interim, then its operation was defined either by the fulfilment of an event or effluxion of time. It was submitted on behalf of the Employees that the application before Van Niekerk J was based entirely on securing that the arbitration set-down for August 2015 does not continue, and was accordingly time defined. To this end, it was submitted that the order was interim in nature, and its validity was limited to the substance of the application before the court at the time, and thus could not extend beyond what was placed before the court.

[24] In a nutshell, the court is called upon to interpret Van Niekerk J's order to the extent that the parties have a different understanding of the phrase *"…pending the final determination of the review application filed under case number JR2424/14"*. It is trite that in interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the rules relating to the interpretation of documents[3]. Like any other document, the judgment or order and the court's

[3] See *Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa*, 5th ed at p936, where it is stated that the basic rules for interpreting the judgment or order of a court are no different from those applicable to the construction of documents

reasons for giving it must be read as a whole in order to ascertain its intention[4]. The order must be read as a whole by reference to its context and objects. If the meaning is clear and not unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it[5]. It is further trite that in conducting such an interpretation exercise, the context of the judgment or the order is crucial, and any proper interpretation should include a determination of the legal context within which the words in the order were used[6].

[25] The question whether an interdict is interim or final is not a matter of form but of substance. The question depends on the effect of the interdict upon the issue and not only upon its form[7]. An interim interdict is ordinarily a court order preserving or restoring the *status quo.* It would ordinarily be granted pending the final determination of the rights of the parties or some other event which forms part of, or is aligned to the subject matter of the litigation between the parties. By its nature, an interim order is intended to serve parties' rights temporarily, and does not involve a final determination of the parties' rights, nor does it affect their final determination.

[26] I did not understand the Applicant's contention to be that the Van Niekerk J's order was not interim in nature. Any other contention would have been

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[4] See Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South First Africa Limited and Others 2013 (2) SA 204 (SCA) at para [13].
See also *Firestone South Africa (Pty) Ltd Genticuro AG* 1977 (4) SA 298 (A) at 304D-H, where the court held that:

> *'First, some general observations about the relevant rules of interpreting a court's judgment or order. The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. See Garlick v Smartt and Another, 1928 A.D. 82 at p. 87; West Rand Estates Ltd. v New Zealand Insurance Co. Ltd., 1926 A.D. 173 at p. 188. Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it (cf. Postmasburg Motors (Edms.) Bpk. v Peens en Andere, 1970 (2) S.A. 35 (N.C.) at p. 39F-H). Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise – see infra. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court a quo and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it. See Garlick's case, supra, 1928 A.D. at p.87, read with Delmas Milling Co. Ltd. v Du Plessis, 1955 (3) S.A. 447 (A.D.) at pp. 454F-455A; Thomson v Belco (Pvt.) Ltd. and Another, 1960 (3) S.A. 809 (D)'*

[5] See *Simon NO and other v Mitsui & Co. Ltd and others* 1997(2) SA 475 (WLD)
[6] See *Sias Moise v Transitional Local Council of Greater Germiston* Case CCT 54/00 at para [9] and [10]
[7] See *Erasmus: Supreme Court Practice* 2nd Ed (Vol 2) at D6-25 in reference to *Cronshaw v Coin Security Group (Pty) Ltd* 1996 (3) 686 at 690 E-F

unsustainable in the light of the word *'pending'*, as can be gleaned from the order. I am in agreement with the submissions made on behalf of the Employees that the common law rule that an interim or provisional order with a *rule nisi* is an order to which a fixed period of validity has been assigned. This is in line with the principles confirmed in *National Director of Public Prosecutions v Walsh and Others*[8], in reliance on *Fisher v Fisher*[9]. The reasoning behind this principle is that an interim order has no independent existence, but is conditional upon its confirmation or discharge by the same Court in the same proceedings[10].

[27] In interpreting the interim order, it is common cause that the application and the consent leading to that order followed upon the setting down of the arbitration proceedings for 19, 20 and 21 August 2015 before Commissioner Phala. In the light of the pending review application under case number JR2424/14 in respect of Commissioner Thee's condonation ruling, the Applicant had sought that those arbitration proceedings be postponed *sine die*.

[28] As the order was obtained by consent, there was no need for Van Niekerk J to traverse the reasons. I am in agreement with the contention that the wording and meaning of the order is clear and not unambiguous. At the stage that the order was sought, it is inconceivable that the parties as having consented to it could have envisaged or anticipated that the review application could be dismissed or granted. To do so would have been to second-guess Matejoane AJ's ruling. It is further inconceivable that the Employees in consenting to the order, would have agreed to give the Applicant unlimited license to litigate further in respect of the review application. This could not possibly have been in their interests to do so. They remain unemployed as can be gleaned from their answering affidavit, and are therefore desirous that their dispute is speedily brought to finality. It is doubtful that they could have agreed to such a burdensome and prejudicial situation.

[8] (5201/07) [2008] ZAGPHC 398 (19 November 2008); [2008] JOL 22905 (T) at para 25
[9] 1965 (4) SA 644 (W)
[10] See *MV Snow Delta: Serva Ship Ltd V Discount Tonnage Ltd* 2000 (4) SA 746 at 751 – 752

[29] In my view, the words *"pending the final determination of the review application filed under case number JR2424/14"* within the context that the order was obtained can and must on their ordinary meaning, be interpreted to mean the final the determination of the review application before Matejoane AJ under JR2424/14. It cannot be interpreted to mean any other matter not before Matejoane AJ at the time that the application before Van Niekerk J was launched, or any other matter to come before the Labour Appeal Court, let alone the Constitutional Court. It is thus not correct as suggested on behalf of the Applicant that any interpretation of the order must mean a final determination of the review application at the level of the petition for leave to appeal or any other subsequent appeal to the Constitutional Court.

[30] The above conclusion is further premised on the grounds that ordinarily, subsequent to the application before Matejoane AJ being dismissed, it would have required of the Applicant to have launched different proceedings under different procedures in respect of the petition, and any other appeals to the Constitutional Court. To interpret the order to include any further appeals implies that the Employees would have agreed to waive their rights to oppose those further applications. The fact that as at the hearing of this application they had not opposed the petition for leave to appeal does not imply that of necessity, they would not have opposed any other further appeals in the event that the petition was declined.

[31] I am thus in agreement with the submissions made on behalf of the Employees that the order could never have incorporated grounds which were not existent before the court at the time. As already indicated, the parties could not have second-guessed Matejoane AJ's ruling on the review application, and I did not understand the Applicant's case to be that in approaching the court on 13 August 2015, it was envisaged that the application for review could be dismissed. To impute a different interpretation to the order would lead to absurdity, and would clearly not be in the interest of justice or expedited resolution of disputes as envisaged by the Labour Relations Act.

[32] What is further of significance is that in its second prayer[11] in the Notice of Motion before Van Niekerk J under J1515/15, the Applicant also sought relief that; *"The arbitration proceedings scheduled on 19, 20 and 21 August 2015 under CCMA case number GAJB9388/14 be stayed pending the outcome of the appeal application in respect of the judgment of the Honourable Acting Justice Matlejoane*". That prayer however does not form part of the Van Niekerk J's order. This can only lead to the invariable conclusion that the subject matter leading to the consent and granting of the order was the review application before Matejoane AJ under JR2424/14, and nothing more. Had it been the parties' agreement otherwise, this alternative prayer would have been included or incorporated in the Van Niekerk J's order.

[33] To conclude then, the Van Niekerk J's order was envisaged to be for a fixed period pending the finalisation of the review application before Matejoane AJ under case number J1515/15. Once judgment was delivered in the review application on 23 December 2015, the Van Niekerk J's order lapsed, as it had achieved the purpose intended.

The revival argument:

[34] The revival argument as advanced on behalf of the Applicant has some fundamental flaws. Firstly, the Applicant seeks to revive the Van Niekerk J's order in its form, to extent to further appeals beyond the determination of the review application under case number J2424/24. It has been held, *albeit* in respect of the execution of an interim court orders pending an appeal, that to the extent that a litigant considers that new circumstances have arisen which would impact upon the court's decision to order execution pending appeal, the litigant may approach that court once again to seek a variation or, where appropriate, clarification of the order[12]. Conversely, within the context of interim orders that have lapsed or where ambiguity and vagueness is alleged, an avenue was open to the Applicant in terms of the provisions of section 165 (b) of the LRA[13] to the extent that the Van Niekerk J's order needed

[11] Paragraph 3 at page 5 of the Notice of Motion under case number JR1515/15
[12] Minister of Health and Others v Treatment Action Campaign and Others. 2002 (5) SA 721 (CC) at para [11]
[13] Section 165. '**Variation and rescission of orders of Labour Court**

clarification. Even then, to have approached the court with a fresh application as in this case did not help the Applicant's cause, as any such application would ordinarily have come before Van Niekerk J under case number J1515/15.

[35] The revival or extension of the Van Niekerk J's order could further have been achieved by way of consent from the Employees[14]. That option would however have been a non-starter for the Employees, in the light of their desire to speedily put the dispute to an end.

[36] Fatal to the revival argument however is that it has also been held that the noting of an appeal does not automatically revive an interdict granted *pendete lite*, and that that if a litigant desires further protection by way of interdict pending the determination of an appeal, he must make application in that regard.[15] The revival argument therefore ought to be dismissed. Since the Applicant has however made an application as gleaned from the alternative prayer in its Notice of Motion, such an application must nevertheless be determined on its own merits.

The stay of arbitration proceedings pending the final determination of the petition subsequent and any subsequent petition or appeals:

[37] In opposing the application, the Employees contended that the application is not urgent; that the application would delay the finalisation of the CCMA proceedings; that it is against public policy considerations; and further that it lacks merit. Last but not least, it was contended that the matter was not finalised at the CCMA and therefore the Court should not interfere with the proceedings there at this stage.

The Labour Court, acting of its own accord or on the application of any affected party may vary or rescind a decision, judgment or order -

(a) ……..
(b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
(c) ……..'

[14] See *Erasmus' Commentary on the Superior Court Practice* B1-370. See also *National Director of Public Prosecutions v Rautenbach* 2005 (4) SA 603 (SCA) at 610 C-G
[15] *Ismail v Keshavjee* 1957 (1) TPD 684 at page 688 A

[38] The requirements of an interim interdict are well-known[16]. These are (a) a *prima facie* right; (b) a well-grounded apprehension of irreparable harm; (c) the balance of convenience; and (d) the absence of any other satisfactory remedy. It was correctly pointed out on behalf of the Applicant that where an interdict is sought pending an appeal, the threshold is even higher.

[39] It is also accepted that by virtue of the provisions of Rule 49 (11) of the High Court Rules, this Court regards the filing of a petition to the Judge President of the Labour Appeal Court as being equivalent to an application for leave to appeal. Accordingly, the filing of a petition would stay the enforcement of orders pending the outcome of the petition[17]. However, this matter does not concern the enforcement of court orders. It pertains to the stay of proceedings at the CCMA pending the determination of the petition for leave to appeal. Prior to considering whether a case has been made out for the relief sought, the main issue is whether this application should be accorded urgency.

Urgency:

[40] Urgent applications before this Court are considered in accordance with the provisions of Rule 8 of the Rules for the Conduct of Proceedings in the Labour Court which provide that;

> "(1) A party that applies for urgent relief must file an application that complies with the requirements of rules 7(1), 7(2), 7(3) and, if applicable, 7(7).
>
> (2) The affidavit in support of the application must also contain-
>
> (a) the reasons for urgency and why urgent relief is necessary;
>
> (b) the reasons why the requirements of the rules were not complied with, if that is the case; and

[16] See *National Council of SPCA v Open Shore* 2008 (5) SA 339 SCA
[17] *See Christo Bothma Finansiale Dienste v Havenga & Another* (2010) 31 ILJ 93 LC) at paras [17] and [18]

(c) if a party brings an application in a shorter period than that provided for in terms of section 68(2) of the Act, the party must provide reasons why a shorter period of notice should be permitted".

[41] In considering whether an application should be accorded urgency, Lagrange J in *Samuel Chief Seatlholo v CEPPAWU* recently held that*;*

> "The key issues to consider when determining if an application for interim relief is sufficiently urgent to warrant it being heard without following the time periods for filing pleadings in terms of the court rules, is whether the applicant acted timeously (neither prematurely nor too late) in seeking to assert their right to the relief sought and that there is a real risk that if the relief is not granted on an interim basis any permanent relief they may obtain in due course will be of little value. The applicant must also justify the extent to which they seek to attenuate the ordinary time limits within which the respondent is afforded a reasonable opportunity to oppose the application"[18] (Authority omitted).

[42] It has also been said that it is not sufficient for a party approaching the court on an urgent basis to merely contend that the matter is urgent. Thus in considering whether the requirements set out in Rule 8 (2) (a) - (c) of the Rules have been met, the Court will also take into account whether in approaching the Court, the Applicant acted with the necessary haste and diligence that the matter before the court deserves.

[43] In the founding affidavit, it was contended that in the light of the appeal in respect of the condonation, were the Labour Appeal Court to find in favour of the Applicant, this would result in the finalisation of this matter, as the Employees would not be able to continue with the arbitration. In this regard, it was further contended that it would be nonsensical for the arbitration proceedings to proceed pending the outcome of the appeal, as any commencement of those proceedings would be a waste of tax payers' money for its funding.

[44] It is my view that the above contentions are presumptuous in the extreme. Notwithstanding the Applicant's firm belief, there is no guarantee that the

[18] Case no: J 131/16 at para [17]. Delivered on 9 February 2016

petition before the Labour Appeal Court will succeed. Any inclination to believe that the petition will be successful is merely to second-guess the outcome of the Labour Appeal Court, and that cannot in my view be a basis for according urgency to this matter.

[45] The further contention by the Applicant that the Employees would not be prejudiced and/or suffer any loss or harm should the application be granted is equally without merit. Whilst the Applicant is of the view that the harm will be mitigated by the matter proceeding at arbitration should the appeal fail, at the same time, there is nothing to gainsay its well-known intention to pursue this matter as far as the Constitutional Court. This intended path is clearly prejudicial to the Employees.

[46] Other than the above, I am not convinced that the Applicant acted with due diligence and haste in bringing this application before the court. My conclusions are fortified by the background material which is worth repeating. The application for leave to appeal against the judgment of Matejoane AJ was dismissed on 18 March 2016. On 22 March 2016, the Applicant had approached the court with its ill-fated application before Steenkamp J. On 5 April 2016, the CCMA sent notices to the parties, setting the arbitration proceedings for 16 – 20 May 2016. Only on 6 April 2016, a day after receipt of the set-down notice before the CCMA the Applicant filed a petition for leave to appeal. The Van Niekerk J's order had long been granted on 13 August 2015, and it is inexplicable that the Applicant would wait until the notice of set down was received from the CCMA to any make attempts to fully understand the full implications of that order. It appears that this application was a mere knee-jerk reaction to the CCMA setting the matter down, and cannot be said to be in tandem with the Applicant's assertions that it always intended to pursue its rights in respect of the impugned condonation ruling.

[47] In the heads of argument, it was further submitted on behalf of the Applicant that the period between 5 April 2016 when the set down notice was received, and 14 April 2016 when this application was launched was not time wasted, moreso since the application is complex and novel. It was further submitted that Senior Counsel's opinion had to be sought whether the Van Niekerk J's

order included appeal processes against the Judgment and Order of Matejoane AJ. The Applicant does not however indicate when Senior Counsel was approached in the light of the Van Niekerk J's order having been granted on 13 August 2015 and the leave to appeal having been dismissed on 18 March 2016. It is doubted that it would have taken the Applicant a period of about seven months to decipher the meaning of *"pending final determination of the review application…"* in a court order. In fact, on the submissions made on behalf of the Applicant during the hearing of this application, two Senior Counsels were briefed and involved in the interpretation of the court order from the 5 April 2016 after the CCMA set down notice was received. Again, it is doubted that it would take two Silks a period of about eight days to determine from the wording of the Van Niekerk J's order, whether this application should be launched or not. In my view, there is nothing novel or complex about this application or the interpretation of the Van Niekerk J's order. Any complexity is either imagined or self-created.

[48] It has been said that the basis for allowing parties to dispense with the Rules of Court relating to time periods is to prevent the occasioning of an injustice and involves the balancing of this consideration with that of the rights of parties to a considered opportunity to place their cases before the court[19]. The application before the Court does not intend to achieve these ends, and on the contrary, to grant it would perpetuate an injustice to the Employees in the light of the background given. It has further been said an applicant is not entitled to rely on urgency that is self-created when seeking deviation from the rules[20]. As correctly pointed on behalf of the Employees, the urgency in this application is clearly self-created in the light of the background of this matter and the time line between when the Van Niekerk J's order was obtained on 13 August 2015; when the Matejoane AJ's judgment and order were delivered in respect of the review application and, between the date that the CCMA issued notices of set-down, and when the Applicant approached this court on 15 April 2016.

[19] See *National Police Services Union v National Commissioner of the National Police Services and Others* (1999) 20 ILJ 2408 (LC)
[20] See *Jiba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 ILJ 112 at para 18

[49] I am further of the view that the court should decline to accord urgency to a matter which by all accounts amounts to an abuse of its processes. There is a fine line between a party asserting what it terms its legal rights and obligations in terms of the LRA or the Constitution, and an abuse of court processes at great costs and inconvenience to the tax payer. The eminent American Jurist, Felix Frankfurter[21], once said that; *"Litigation is the pursuit of practical ends, not a game of chess"*. With various applications before this Court and the CCMA, some of which have been found by this Court to have been pointless, it appears that the Applicant is bent on engaging the Employees in a game of chess. Thus every move and step taken by the Employees or the CCMA to finalise the dispute, is met by the Applicant's counter moves to thwart the arbitration process.

[50] Counsel for the Applicant had submitted that the Applicant was not engaged in over litigation. To this end, it was further submitted that an offer of settlement was made which was rejected by the Employees. The Applicant's conduct nevertheless paints a different picture. In essence, its conduct of litigating at every turn, including threats of future litigation should its appeals at the Labour Appeal Court be unsuccessful, can be said to be designed to make the Employees submit. In my view, this conduct gives new meaning to the phrase *'litigating into a pulp'*. This appears to be the Applicant's intention since Commissioner Thee granted condonation. The Applicant is thus bent on litigating the Employees into submission or a pulp, and unfortunately, at the expense of the long suffering tax payer. The Applicant's conduct is no longer about asserting its right as a public funded entity. In this court, such conduct is referred to as an 'abuse of court processes'. Others might even call it abuse of public resources.

[51] There is a limit to which the Applicant as a public funded entity can continue to litigate. The pockets of the tax payer are not a bottomless pit. The irony of it all is that with these countless litigation manoeuvres and threats of future litigation, the Applicant professes to do so in the name of asserting its rights, and does not consider it to be a waste of public funds. I however believe

[21] American Jurist, 1882-1965

otherwise, as such conduct clearly appears to have little or no regard for the interests of hapless tax payer, nor the interests of expeditious resolution of disputes, which all parties are entitled to in terms of our laws.

[52] I am in agreement with the sentiments expressed by Mooki AJ in *PRASA v CCMA*[22] to the effect that there should be bounds within which public bodies such as the Applicant are allowed to litigate at public expense, and that its officials should not be allowed to litigate endlessly without proper reflection. I am further in agreement with Counsel for the Employees' assertions that the facts and circumstances of this case are not dissimilar to those that Francis J dealt with in a matter involving the Applicant in *casu*[23]. In order to emphasise the point being made, and to remind the Applicant of what Francis J said in that matter, reference is made to para 13 of that judgment where the Learned Judge stated that;

> *"The views expressed by van Niekerk J referred to above apply equally to the present matter. The second respondent was charged with misconduct. He was dismissed on 2 October 2009. He thereafter referred an unfair dismissal dispute to the CCMA. It is not clear from the papers whether the applicant contended that the second respondent had to apply for condonation which he did. Condonation was granted. The applicant applied for a rescission which was granted. It later turned out that there was no need for the second respondent to have applied for condonation. The matter was set down for arbitration on 25 July 2010. The applicant brought an application for legal representation. The application was heard and was dismissed. The matter was re-enrolled for a hearing on 9 September 2010. The applicant was provided with a copy of the ruling on 12 August 2010. It was not satisfied with the ruling and brought an application to interdict the arbitration hearing from proceeding on 9 September 2010 and a review to be heard later. It was contended that the issues are complex and the important public interest of the matter taking into account the applicant's status as a publicly-funded body. The issues are not complex at all. The applicant depends on public funds to compensate persons who have suffered injuries in motor collision accidents. It is public knowledge that it has approached Treasury on a regular basis for a*

[22] (2014) 35 ILJ 1609 (LC) at para [66]
[23] *Road Accident Fund v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 707 (LC)

bail out. It had at great costs to the applicant and ultimately to the tax payers decided to employ a senior counsel to chair the disciplinary hearing for the second respondent. It has also at great costs employed a labour law firm and senior counsel to prosecute the disciplinary hearing on its behalf. After the second respondent had referred his dismissal to the CCMA, it has persisted with proceeding with the legal team that represented itself at the disciplinary hearing at again great costs to the taxpayer. It has persisted with this application with senior and junior counsel. What is a simple dispute has become a frightfully expensive exercise for the applicant and ultimately the tax payers. The arbitration hearing would have been heard but for the intervention and the request for legal representation. If the applicant is allowed to proceed with the review application, it means that the arbitration hearing will be postponed for a second time until the review application is granted. Should the review application not be granted the applicant will in all probability appeal which would take a few years to be finalised."

[53] Unfortunately, the above reproach appears not to have invoked some reflection on the part of the Applicant or its officials when litigating. Even more perplexing with this matter is that the arbitration proceedings in respect of Chelepo, who was dismissed together with the Employees was finalised on 28 December 2015. It is common cause that Chelepo's matter was dismissed. On the Applicant's version, Chelepo dismissal for misconduct followed upon similar facts and circumstances as those that led to the dismissal of the Employees, and according to it, the misconduct was so gross that the dismissal was justified. It nevertheless remains incomprehensible as to why the Applicant would in the light of its strong case against the Employees, persist with such applications before the court and continue to put every spanner in the wheels of the arbitration proceedings.

[54] What is further disconcerting with the history of this matter is that notwithstanding Commissioner Vilakazi's ruling on 15 May 2014 that there was no need for the Employees to apply for condonation, the Applicant took the very same point before the same forum on 19 August 2014. One also questions the Applicant's *bona fides* with these various applications and persistence with the contention that there was a need to apply for condonation. On 22 January 2014 at the con/arb proceedings, Commissioner

Hlatshwayo issued a certificate of outcome, granted legal representation, and directed the parties to convene a pre-arb hearing. The question to be posed is why would Commissioner Hlatswayo issue all of these rulings and directives unless the matter was clearly supposed to be arbitrated? Contrary to the arguments advanced on behalf of the Applicant, Conciliating Commissioners do not take the liberty to case-manage matters at the level of conciliation proceedings, as opposed to con/arb proceedings. They do not issue binding rulings in respect of legal representation nor would they willy-nilly direct parties to convene pre-arbitration meetings unless disputes are ready for arbitration. In my view, Commissioner Hlatshwayo could only have issued those rulings and directives in his capacity as Arbitrator in that once conciliation failed, ordinarily, he would have proceeded with the arbitration as the matter was set down as a con/arb process. He had nevertheless not done so in the light of the parties' need to hold and finalise a pre-arbitration meeting.

[55] In this case, it is apparent that the continuous litigation is clearly an abuse of this court's processes and the requirements for urgency have not been met. The countless applications brought before this court and other stalling measures taken at the level of the CCMA are not meant to achieve any objective other than to unreasonably drag the dispute between the parties. I am in further in agreement with the submissions made on behalf of the Employees that the Court should be reluctant to interfere in uncompleted proceedings before the CCMA[24]. It was in the light of these continuous disruptions of proceedings before the CCMA and Bargaining Councils that when recently amending the LRA, the drafters saw it fit to insert the new provisions of 158 (1B)[25].

[24] See *Trustees for The Time Being of the National Bioinformatics Network Trust v Jacobson and Others* [2009] 8 BLLR 833 (LC) where it was held at para [3] that;

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

[25] (Section 158(1B) inserted by section 26(b) of Act 6 of 2014) provides that;

[56] It is accepted that whether the Applicant should have approached this Court to review the condonation ruling is not a matter before me for determination. That determination was made by Matejoane AJ. However, to the extent that the Applicant still persist in its endeavour to set aside Commissioner Thee's ruling, a point needs to be made that any ruling issued by the CCMA in terms of which condonation for the late referral of a dispute is dismissed effectively puts an end to the dispute. An aggrieved party in this regard is entitled to approach this Court by way of review proceedings, on the basis that such a ruling effectively closes all doors for further litigation.

[57] On the other hand, a ruling granting condonation before the CCMA does not constitute a final determination of the issue in dispute between the parties within the meaning of section 158 (1B) of the LRA. A party in whose favour the ruling was made is entitled to proceed with the dispute. Such a ruling is neither final nor definitive of the parties' rights. In my view, once the CCMA grants condonation in respect of a late referral of a dispute, the arbitration should proceed. To the extent that the aggrieved party against whom the ruling was issued also gets an adverse award, it still has a remedy by way of review proceedings, but only once the dispute has been finally determined by the issuance of an award. Even if at the end of review proceedings it is found that the condonation ruling was wrong, this ordinarily is part and parcel of litigation.

[58] The purpose of section 158 (1B) of the LRA is to prevent piece-meal litigation, and unfortunately, the Applicant by persisting to seek a ruling setting aside the condonation ruling before the arbitration proceedings are finalised is engaged in peace-meal litigation. Having taken into account these provisions, and without necessarily pronouncing on the merits of the application, it is doubted that the Applicant may have any prospects in any future appeals. On the whole however, I am not satisfied that the Applicant has met the requirements of Rule 8 of the Rules of this Court. The urgency in this application is on the

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"The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the Commission or any bargaining council in terms of the provisions of this Act before the issue in dispute has been finally determined by the Commission or the bargaining council, as the case may be, except if the Labour Court is of the opinion that it is just and equitable to review the decision or ruling made before the issue in dispute has been finally determined."

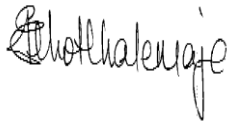
other hand self-created and on these grounds, the matter ought to be struck off the roll.

Costs:

[59] Section 162 of the LRA provides that this court may make an order for the payment of costs according the requirements of the law and fairness. Having had regard to the background and history of this matter, it is my view that it would not be fair to burden the Employees with legal costs in circumstances where they were compelled to defend an application that should not have come before the court or where its motives are questioned. Accordingly, that burden must be carried by the Applicant.

Order:

i. The Applicant's application is struck off the roll for lack of urgency.
ii. The Applicant is ordered to pay to the Third and Fourth Respondents, the costs of this application.



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Tlhotlhalemaje, J

Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:	Adv. L Halgryn SC
Instructed by:	Hogan Lovells (South Africa) Incorporated as Routledge Modise Inc
On behalf of the Respondent:	Adv. B Ford
Instructed by:	Nkosi Nkosana Inc