THE LABOUR COURT OF SOUTH AFRICA, DURBAN

REASONS

Reportable

Case no: **D 1724 / 2018**

In the matter between:

MFANO PHILEMON NTOMBELA & 49 OTHERS **Applicants**

and

UNITED NATIONAL TRANSPORT UNION **First Respondent**

PASSENGER RAIL AGENCY OF SOUTH AFRICA **Second Respondent**

COMMISSIONER A DEYSEL **Third Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Fourth Respondent**

Heard: **12 October 2018**

Delivered: **6 November 2018**

Summary: **Jurisdiction – Labour Court does have jurisdiction to consider urgent applications to intervene in the case of incomplete arbitration proceedings – exceptional and compelling reasons however required – exceptional circumstances not shown**

Urgency – applicant must establish compelling considerations of urgency – proper urgency not shown – substantial redress in due course available – matter not urgent

Section 158(1B) – principles considered – principles applicable to bringing review applications in incomplete arbitration proceedings considered – when it would be appropriate to bring such proceedings

Interdict – interdicting further arbitration pending review – interdict requirements considered – no prospects of success on review – no right to relief exists – alternative remedies available

Functus officio* – principles considered – ruling by commissioner one of jurisdiction – can be revisited under section 144(b) of the LRA – commissioner not *functus officio

Costs – proceedings an abuse of process – costs ordered

JUDGMENT

SNYMAN, AJ

Introduction

[1] This judgment concerns a matter that should never have burdened this Court. It was a dispute that could have been properly dealt with and concluded at the Commission for Conciliation, Mediation and Arbitration ('CCMA'), where the dispute was actually still pending with only arbitration to follow. In the end, and for the reasons elaborated on below, the applicants were acting pursuant to what I believe to be ulterior purposes, and to retain an advantage resulting from a disputed promotion for as long as possible.

[2] I feel compelled to make certain policy statements about applications such as these, especially where parties were at all times legally represented. It is simply untenable for litigants to continue to pursue applications that are simply

hopeless and have no substance. In *Mashishi v Mdladla NO and Others*[1] the Court held:

> 'Judge Owen Rogers recently suggested that it is improper for counsel to act for a client in respect of claim or defence which is hopeless in law or on the facts. (Rogers 'The Ethics of the Hopeless Case' December 2017 30(3) *Advocate* 46.) Although these assertions are directed primarily at counsel (the article having been published in the South African Bar Journal), the same principles apply to attorneys, and indeed all those who have the right of audience before a court.) By this he means that counsel must be able to formulate a coherent argument comprising a series of logical propositions which have a reasonable foundation in law or on the facts and which, if they are all accepted by the court, will result in a favourable outcome, even if counsel believes that one or more of the essential links are likely to fail. But counsel acts improperly when she is 'quite satisfied' that one or more of them will fail. In particular, there is an ethical obligation on counsel to ensure that only 'genuine and arguable' cases are ventilated, and that this be achieved without delay (at 51).'

[3] This case is a matter in point. It was persisted with as an urgent application, when urgency had long since dissipated due to complete lack of diligence on the part of the applicants in prosecuting the matter. It was an application that on the merits, as I will elaborate on hereunder, was completely hopeless. There was simply no basis or reason for the applicants to have stood in the way of this matter simply being determined by the CCMA, which is far more in line with the primary objective of the expeditious resolution of employment disputes.[2]

[4] The above being said, I now turn to the matter at hand. In the notice of motion, the applicants ask that the matter be considered as one of urgency. The applicants also pray for an order that pending the outcome of a review application, all further arbitration proceedings currently pending before the CCMA between the applicants and the first and second respondents be interdicted and prevented from proceeding.

[1] (2018) 39 ILJ 1607 (LC) at para 14.
[2] See *Food and Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd* (2018) 39 ILJ 1213 (CC) at para 187.

[5] The matter came before me for argument on 12 October 2018. It was opposed by both the first and second respondents. After hearing argument by all parties and on the same day, I granted the following order:

> '1. The applicants' application is dismissed with costs.
>
> 2. Written reasons will be handed down on 6 November 2018.'

[6] This judgment now constitutes the written reasons referred to in paragraph 2 of my order, *supra*. I will commence by setting out the background facts.

The relevant background

[7] The relevant background facts relevant to deciding this matter are in essence undisputed. For ease of reference, I will refer to the first respondent as 'UNTU' and the second respondent as 'PRASA' in this judgment.

[8] The applicants were all members of a representative trade union in PRASA, being SATAWU. UNTU is also a representative trade union in PRASA.

[9] This matter arose as far back as October 2014, when PRASA made a number of appointments and issued appointment letters, to various employees, which included the current applicants. As far as the applicants were concerned, these appointments constituted a promotion, and as such, they should have received an increase in remuneration and benefits. When this did not happened, SATAWU pursued an unfair labour practice dispute against PRASA to the CCMA on 8 December 2015, under case number KNDB 15998 – 15. UNTU was not joined to this dispute. The dispute was specifically about the applicants being promoted, but not being paid accordingly, as the basis for the unfair labour practice.

[10] This unfair labour practice dispute between the applicants, SATAWU and PRASA ultimately proceeded to arbitration at the CCMA on 19 February 2016. The matter was however never arbitrated, but a settlement agreement was concluded. The salient terms of this settlement agreement were as follows:

> ‘1. The respondent shall do computations of what the individual applicants are owed in terms of salary adjustments that are outstanding and that shall be done by the respondent no later than 29 February 2016.
>
> 2. The respondent shall thereafter table the proposal to the applicants detailing how much they will be paid and when they will be paid. That shall be done no later than 15 March 2016.
>
> 3. Once the parties have agreed on clause 2 above then the outstanding payment shall be commenced by no later than 27 April 2016.’

This agreement was only binding between PRASA, SATAWU, and the membership of SATAWU (which included the applicants).

[11] Not to be outdone, UNTU referred a dispute to the CCMA on 3 September 2016 against PRASA, in which it challenged the very appointments of the applicants referred to above. According to UNTU, these appointments were contrary to the Recruitment and Selection policy of PRASA. This dispute was allocated case number KNDB 11030 – 16. It was also an unfair labour practice dispute.

[12] The dispute by UNTU had a rocky start. On 26 September 2016, commissioner Ngwane ruled because the dispute was an unfair labour practice dispute, it had to be referred in 90 days, was referred out of time, and required a condonation application. UNTU then did apply for condonation, but also contended that there was no need for condonation, as the dispute was referred in time. Commissioner Paul ruled on 9 November 2016 that the dispute was referred in time, and no condonation was necessary.

[13] The unfair labour practice dispute by UNTU under case number KNDB 11030 – 16 proceeded to arbitration and came before commissioner Sullivan on 30 January 2017. On that day, it became apparent that other parties would be affected by the dispute brought by UNTU, in particular the applicants under case number KNDB 15998 – 15. Commissioner Sullivan made a ruling to the effect that all these parties had to be joined to the proceedings, as co-respondents with PRASA, and that the matter proceed as an unfair labour practice to arbitration.

[14] The arbitration proceedings in case number KNDB 11030 – 16 brought by UNTU ultimately was set down for arbitration on 30 June 2017. Yet again, it was not arbitrated, but only UNTU and PRASA concluded a settlement agreement. The salient terms of the settlement agreement were:

> '1. The promotion of SATAWU members by PARSA was not in accordance with PRASA's Recruitment and Selection policy.
>
> 2. UNTU's claim of an unfair labour practice arising from the promotion of the SATAWU members was upheld.
>
> 3. The promotions of the SATAWU members are set aside.'

The settlement agreement concluded between UNTU and PRASA as aforesaid was only binding between these two parties, and was not extended to the applicants or SATAWU.

[15] The above situation was an entirely unsatisfactory state of affairs. On the one hand, there was a settlement agreement pursuant to an unfair labour practice dispute between SATAWU, the applicants and PRASA, in which it was in effect agreed that the applicants were promoted, and that their increase in remuneration pursuant to such promotion would be calculated. On the other hand, there was an agreement in an unfair labour practice dispute between UNTU and PRASA, in which it was agreed that the appointment of the applicants were contrary to PRASA's own recruitment and selection policy and were set aside.

[16] In an attempt to resolve this conundrum, UNTU caused the unfair labour practice dispute under case number KNDB 11030 – 16, to which the applicants were in any event joined as co-respondents, to be set down for arbitration. This dispute then came before the third respondent as arbitrator, on 28 February 2018. In a ruling handed down on 6 March 2018, the third respondent expressed his reservations about whether the dispute was in fact an unfair labour practice dispute, and whether the applicants and SATAWU were properly parties to the matter. He concluded that the CCMA did not have jurisdiction to arbitrate an unfair labour practice dispute under case number

KNDB 11030 – 16 as it appeared to be a dispute about the interpretation and application of a collective agreement, and directed that the matter be set down for argument to decide whether the CCMA had jurisdiction to arbitrate a dispute about the interpretation of application of a collective agreement.

[17] The matter was then again set down before the third respondent on 3 July 2018 pursuant to the above ruling. In these proceedings, UNTU proceeded to move an application in terms of section 144(b) of the LRA,[3] because of the fact that the third respondent, in making his ruling, appeared to omit most of the essential background referred to above, and erroneously decided that UNTU did not pursue an unfair labour practice dispute, but in fact a dispute about the interpretation or application of a collective agreement. UNTU contended that it always pursued an unfair labour practice dispute, and that it would simply be counter-productive to have a hearing and argument about whether the CCMA can consider a dispute about the interpretation or application of a collective agreement, when that was never its case.

[18] It appears that UNTU must have put up a convincing argument, and considering the facts as set out above, in my view justifiably so. In a ruling dated 11 July 2018, the third respondent then proceeded to have proper regard to all the referral documents, the earlier engagements in the proceedings, and the dispute as actually articulated by UNTU, and concluded that the dispute actually pursued by UNTU was an unfair labour practice dispute based on the fact that because PRASA did not follow its own recruitment and selection policy, the UNTU members stood no chance to complete for the promotions. It is on this basis that UNTU sought to set aside the appointments of the applicants as part of the unfair labour practice dispute, according to the third respondent.

[19] The third respondent also in his ruling of 11 July 2018 concluded that his jurisdictional ruling of 6 March 2018 was issued in error, because he did not consider several of the referral documents submitted by UNTU. The third respondent reasoned as follows:

[3] This provision is dealt with later in this judgment.

> 'The CCMA does not have a discretion when it comes to jurisdictional issues. Jurisdiction is objectively established. An incorrect jurisdictional ruling may be corrected.'

[20] The third respondent then proceeded to rule that the CCAM had jurisdiction to consider and arbitrate the unfair labour practice dispute brought by UNTU, and he proceeded to define what this unfair labour practice dispute entailed, for the sake of clarity. He directed that the matter be set down for arbitration.

[21] The applicants were not satisfied with this ruling. They believed that the third respondent was *functus officio* and thus exceeded his powers in making the ruling of 11 July 2018. I may add at this juncture that it appears the applicants only became aware of this ruling on 17 August 2018.

[22] The arbitration proceedings were set down for 5 September 2018. The applicants indicated only on 31 August 2018 that they intended to challenge the ruling of the third respondent of 11 July 2018, by way of a review application to this Court. At virtually the last moment before the arbitration on 5 September 2018, the applicants then sought a postponement of the arbitration, on the basis of the intended review. UNTU and PRASA however made it clear that the arbitration would proceed.

[23] The applicants then arranged with the registrar of this Court that the current application now before me be heard on 5 September 2018. But the actual application was only filed on 11 September 2018, with a set down date of 12 October 2018. Nonetheless, the applicants attended at the arbitration on 5 September 2018 and applied for a postponement.

[24] UNTU and PRASA were in the end willing to agree to a postponement of the arbitration on 5 September 2018. There is some dispute in the affidavits as to the basis of this agreement to postpone, but I need not concern myself with it. Suffice it to say, the arbitration did not proceed on 5 September 2018. And this application followed about a week later with a set down date more than a month later.

[25] Even when this matter was heard before me, Advocate Kuboni, representing the applicants, conceded that the matter was not urgent. But he nonetheless insisted that fairness and justice required that I nonetheless decide the matter. But that is not how urgent applications work, as I will discuss below. Needless to say, this matter was vigorously opposed by UNTU and PRASA on the basis of a lack of urgency, and it was in fact suggested that this matter should not just be struck from the roll, but dismissed.

Urgency

[26] Urgent applications are governed by Rule 8 of the Labour Court Rules. This Court in *Jiba v Minister: Department of Justice and Constitutional Development and Others*[4] applied Rule 8 as follows:

> 'Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite law that there are degrees of urgency, and the degree to which the ordinarily applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self created when seeking a deviation from the rules.'

[27] Further, and when considering whether urgency has been established, it must be considered whether an applicant would not be afforded substantial redress in due course, and the applicant must provide proper reasons in support of such a case.[5] As succinctly described by the Court in *Maqubela v SA Graduates Development Association and Others*[6]:

> 'Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. In all instances where urgency is alleged, the applicant must satisfy the

[4] (2010) 31 ILJ 112 (LC) at para 18.
[5] *Mojaki v Ngaka Modiri Molema District Municipality and Others* (2015) 36 ILJ 1331 (LC) at para 17; *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2012] JOL 28244 (GSJ) at para 6.
[6] (2014) 35 ILJ 2479 (LC) at para 32. See also *Transport and Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd and Others* (2015) 36 ILJ 2148 (LC) at para 11.

> court that indeed the application is urgent. Thus, it is required of the applicant adequately to set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary. …'

[28] Where an applicant in effect seeks final relief, the Court must be even more circumspect when deciding whether or not urgency has been established.[7] In *Tshwaedi v Greater Louis Trichardt Transitional Council*[8] the Court said:

> '… An applicant who comes to court on an urgent basis for final relief bears an even greater burden to establish his right to urgent relief than an applicant who comes to court for interim relief. ….'

[29] The Court must also further consider the interests of the respondent party, and in particular, the prejudice the respondent may suffer if the matter is urgently disposed of. In *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another*[9] the Court held as follows:

> 'But it is not just about the applicant. Another consideration is possible prejudice the respondent might suffer as a result of the abridgement of the prescribed time periods and an early hearing.'

[30] Finally, urgency must not be self-created by an applicant, as a consequence of the applicant not having brought the application at the first available opportunity.[10] As the Court said in *Northam Platinum*[11]:

> '… the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency. But the longer it takes from the date of the event giving rise to the proceedings, the

[7] [2002] JOL 9452 (LC) at para 8.
[8] [2000] 4 BLLR 469 (LC) at para 11.
[9] (2016) 37 ILJ 2840 (LC) at para 26. See also *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another* 1981(4) SA 108 (C) at 113D-114C.
[10] See *Golding v HCI Managerial Services (Pty) Ltd and others* [2015] 1 BLLR 91 (LC) at para 24; *National Union of Mineworkers v Lonmin Platinum Comprising Eastern Platinum Ltd and Western Platinum Ltd and Another* (2014) 35 *ILJ* 486 (LC) at para 50.
[11] (*supra*) at para 26. See also *Sihlali and Others v City of Tshwane Metropolitan Municipality and Another* (2017) 38 ILJ 1692 (LC) at para 18.

> more urgency is diminished. In short, the applicant must come to Court immediately, or risk failing on urgency. …'

[31] One final, if not the most critical, requirement for urgency applicable to the kind of applications such as the one now before me, remains to be set out. As stated above, this is an application which at its core is an intervention in incomplete arbitration proceedings before the CCMA. In such an instance, what would be central to any urgent intervention in this respect is that the applicant must show that exceptional circumstances, justifying immediate intervention, exist. Quite apposite is the following *dictum* in *Mmatli and Others v Department of Infrastructure Development (Gauteng Province)*[12]:

> 'In exceptional circumstances the Labour Court may intervene on an urgent basis to interdict an unfair dismissal. Thus, there is no inherent jurisdictional obstacle to obtaining such relief. As the Labour Appeal Court observed in the *Booysen* decision there is no closed list of factors to consider, but in my view employees should not even consider seeking this extraordinary relief if the unfairness is not glaringly obvious and of a very fundamental nature which can be easily redressed. …'

[32] Although the judgment in *Mmatli* dealt with intervening in incomplete disciplinary proceedings in an employer, I am satisfied that the same reasoning would equally apply to incomplete arbitration proceedings in the CCMA. This would be especially true where the intervention is based on a pending review challenge of a ruling made by an arbitrator in the course of the proceedings. In this regard, Section 158(1B) is instructive, which reads:

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

[12] (2015) 36 ILJ 464 (LC) at para 13.

[33] When the above considerations with regard to urgency are then applied to the applicants' application, together with the applicants' own concession of lack of urgency when the matter was argued, I am compelled to conclude that there simply exists no basis on which to urgently intervene in this matter. As a point of departure, the applicant has made out no proper case why the normal statutory dispute resolution processes under the LRA should be allowed to run its natural course to conclusion and immediate intervention is needed. I will deal with this issue more fully when I deal with the issue of the applicants' right to the relief sought, later in this judgment.

[34] The applicants did not bring this application at the earliest available opportunity. Even if it is accepted that the applicants only became aware of the ruling on 17 August 2018, it still took about two months to bring this application before Court. Added to that, it was brought when a postponement of the arbitration on 5 September 2018 had already been secured, which simply expunged any possible pressing urgent need to have this application decided before the matter is heard. I was also informed at the hearing of this matter that the CCMA has not even set the matter down again for arbitration, which exacerbates the complete lack of urgency.

[35] I am further satisfied that the applicants can obtain proper and full redress in the ordinary course. All that happened, by way of the ruling, is that the third respondent directed that the unfair labour practice dispute by UNTU, which has been in existence since 2016, and of which the applicants were always fully aware, be set down for determination with the applicants fully involved. In my view, and considering the unsatisfactory manner in which the dispute had been dealt with before, especially by way of the ineffective settlement agreements concluded instead of arbitration being conducted, it may quite feasibly be in the interest of the applicants to have this very issue arbitrated, once and for all. The factual basis of both disputes under case numbers KNDB 15589 – 15 and KNDB 11030 – 16 are identical. If the applicants' case succeeds, they may still receive a promotion and commensurate payment. That in my view is substantial redress in due course.

[36] As part of any case of urgency, the interests of PRASA and UNTU must also be considered. This matter has been dragging on since the end of 2014. To have it interdicted until the applicants' review is concluded will, all considered, delay the matter for a further two years. In the interim, the applicants get their increases, to the detriment of PRASA and the members of UNTU that have been prejudiced by what happened. The overwhelming interest in this matter has to that of achieving finality in respect of the unfair labour practice proceedings in the CCMA relating to the appointment of the applicants, one way or another. I also consider that if there is no substance to the case of UNTU, then there is simply no reason why the applicants should not welcome attending at arbitration to finally dispose of the case and cement their position once and for all, which all along has been in contention. There is no case made out, nor any indication, that the applicants would not receive a fair and proper determination of the unfair labour practice dispute in the CCMA.

[37] Therefore, the applicants have failed to make out a case of urgency. The requirements of Rule 8 have thus not been satisfied. This is clearly a matter of self-created urgency. Exceptional circumstances justifying urgent intervention have not been shown to exist. For this reason alone, the application falls to be struck from the roll, or dismissed. The Court in *February v Envirochem CC and Another*[13] accepted that urgency was not established, but the Court nonetheless proceeded to dismiss the matter. For the reasons to follow, I believe that this is a similar situation where the matter must be finally disposed of, and dismissed.

The merits

[38] The applicants' application is founded on one single contention. According to the applicants, and as touched on above, the third respondent was *functus officio* when he decided to hand down his ruling of 11 July 2018 in terms of which the current pending unfair labour practice dispute in the CCMA was to

[13] (2013) 34 ILJ 135 (LC) at para 17. See also *National Union of Metalworkers of SA and Others v Bumatech Calcium Aluminates* (2016) 37 ILJ 2862 (LC) at para 33; *Bethape v Public Servants Association and Others* [2016] ZALCJHB 573 (9 September 2016) at para 53.

be set down for arbitration. This ruling is being challenged on review by the applicants under case number D 1719 / 2018, and the contention is that pending this review, further arbitration at the CCMA should be stopped.

[39] In order to determine whether this case of the applicants has any merit, two questions must be answered. The first is whether this would be a case where it would be appropriate or justified to stop arbitration proceedings at the CCMA pending a review application in the Labour Court, the second is whether, even if intervention is justified, the applicants' review application has at least some prospects of success.

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

[41] In any event, and as a general proposition, this Court should be extremely loathe to intervene in arbitration proceedings before the CCMA that have not been completed. This was recognized about a decade ago in *Trustees for the*

time being of the National Bioinformatics Network Trust v Jacobson and Others[14] where the Court held:

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

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

[14] (2009) 30 ILJ 2513 (LC) at para 4. See also *Jiba* (*supra*) at para 11; *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 937 (LC) at para 16.

158(1B). This was recognized in *Minister of the Department of Correctional Services v Mpiko NO and Others*[15] where the Court said:

> 'In a case where there is uncertainty or confusion as to what are live issues before the arbitrator, it must be clarified before the arbitration commences. In this case, although the review application concerns a ruling made during the arbitration, is it apparent from its reading that there is uncertainty as to precisely what issues are live before the arbitrator and whether the findings of the Labour Court on the issue of Mr Vos' reinstatement are binding on the arbitrator. Given the protracted nature of this dispute, it is clearly in the interests of justice to avoid confusion and protracted argument by determining whether the ruling should be set aside or not …'

[43] I am therefore satisfied that it was justified for the applicants to have brought their review application, and that it would be just and equitable for this Court to consider such a review application despite the existence of pending and incomplete arbitration proceedings in the CCMA. So at least on this basis, the applicants may have cause for the relief they sought.

[44] But this is not the end of the enquiry where it comes to whether the applicants would be entitled to the relief of in effect interdicting further arbitration until this question is answered in the Labour Court. Whether or not the interdict is sought in the form of interim relief or as final relief, the fact remains that the applicants have to still satisfy certain interdict requirements. Considering that the applicants have brought this matter on the basis of seeking interim relief, this would mean that the applicants have to at the very least show the following, as articulated in *National Council of SPCA v Openshaw*:[16]

> '… *(a)* A *prima facie* right. What is required is proof of facts that establish the existence of a right in terms of substantive law; *(b)* A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; *(c)* The balance of convenience favours the granting of an interim interdict; *(d)* The applicant has no other satisfactory remedy.'

[15] (2018) 39 ILJ 2038 (LC) at para 20.
[16] 2008 (5) SA 339 (SCA) at 354. See also *Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members and Others (1)* (2014) 35 ILJ 201 (LC) at para 26.

[45] In *Workforce Group (Pty) Ltd v National Textile Bargaining Council and Another*[17] it was held:

> **'**In order to establish a prima facie right for the urgent interim relief sought, the applicant has to show that this is one of those exceptional circumstances where the court should intervene in uncompleted arbitration proceedings.'

[46] The above situation thus necessitates the answering of the second question I have referred to above, being whether the review application has some prospect of success. It is in this respect that the applicants' application falls far short. What is undoubtedly true is that there was initially a ruling issued by the third respondent, first declining jurisdiction in respect of UNTU's unfair labour practice dispute, followed by a later ruling in which the third respondent found that the first ruling was in error and that the CCMA indeed had jurisdiction to entertain that dispute. The simple question now is whether this conduct of the third respondent was not permissible, based on the fact that he was in fact *functus officio*.

[47] It must firstly be considered how the ruling of 11 July 2018 came about. The undisputed evidence was that UNTU had moved an application in terms of section 144(b) of the LRA before the third respondent on 6 July 2018 to correct / vary the initial ruling. It is further clear from the first five paragraphs of the ruling of 11 July 2018 that the third respondent records that there were a number of critical factual considerations that never came to his attention when the first ruling was issued. But more importantly, the third respondent recognized that whether or not the CCMA would have jurisdiction is a question of objective fact, and if these facts show that the CCMA indeed has jurisdiction, he is duty bound to correct an error.

[48] I find no fault in the approach adopted by the third respondent. The reasoning that jurisdiction is determined based on the existence of objective facts establishing this is undoubtedly correct.[18] The simple reality is that the third respondent issued his ruling of 6 March 2018 based on the assumption that

[17] (2011) 32 ILJ 3042 (LC) at para 18.
[18] See *G4S Cash Solutions SA (Pty) Ltd v Motor Transport Workers Union of SA and Others* (2016) 37 *ILJ* 1832 (LAC) at para 18.

UNTU had pursued a dispute relating to the interpretation or application of a collective agreement to the CCMA. In so deciding, he had no regard to the amended referral document and the process that followed it.

[49] The third respondent always had a duty to decide the true nature of the dispute before him for arbitration. This was authoritatively decided in *Commercial Workers Union of SA v Tao Ying Metal Industries and Others*[19] as follows:

> 'A commissioner must, as the LRA requires, "deal with the substantial merits of the dispute". This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.'

[50] The same approach has recently again been confirmed by the Constitutional Court where it comes to arbitration proceedings conducted under the

[19] (2008) 29 *ILJ* 2461 (CC) at para 66. See also *Health and Other Services Personnel Trade Union of SA on behalf of Tshambi v Department of Health, Kwazulu-Natal* (2016) 37 ILJ 1839 (LAC) at para 16; *Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members and Others* (2014) 35 *ILJ* 983 (LAC) at para 47; *National Union of Metalworkers of SA on behalf of Sinuko v Powertech Transformers (DPM) & others* (2014) 35 ILJ 954 (LAC) at paras 16-21; *Coin Security Group (Pty) Ltd v Adams and Others* (2000) 21 *ILJ* 925 (LAC) at paras 15-16; *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union and Others (1)* (1998) 19 *ILJ* 260 (LAC) at 269G-H; *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC) at 2162F; *SA Chemical Workers Union and Others v Afrox Ltd* (1999) 20 ILJ 1718 (LAC) at 1726.

auspices of the CCMA. In *September and Others v CMI Business Enterprise CC*[20] it was said:

> **'**In my view, the commissioner is not bound by a party's categorisation of the nature of the dispute. Rule 15 clearly intended the commissioner to have the right and power to investigate and identify the true nature of the dispute. …'

The Court concluded:[21]

> 'It would therefore be wrong to adopt the Labour Appeal Court's approach, which essentially precludes the courts from referring to evidence outside of the certificate of outcome and referral form, to determine the nature of the dispute conciliated. The general rule is that the referral form and certificate of outcome constitute prima facie evidence of the nature of the dispute conciliated. However, if it is alleged that the nature of the dispute is in fact different from that reflected on such documents, the parties may adduce evidence as to the nature of the dispute. …'

[51] Once the third respondent ascertained that the dispute actually referred to the CCMA for arbitration by UNTU was an unfair labour practice dispute, as he was duty bound to do, despite his earlier ruling, did this now mean that the third respondent was in effect stumped and was unable to correct this? Especially considering that ultimately his findings in this regard as contained in his ruling of 11 July 2018, all considered, was actually correct? I cannot accept this to be the case. In *PT Operational Services (Pty) Ltd v Retail and Allied Workers Union on behalf of Ngweletsana*[22] the Court summarized the *functus officio* doctrine as follows:

> '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

[20] (2018) 39 ILJ 987 (CC) at para 43.
[21] Id at para 52.
[22] (2013) 34 ILJ 1138 (LAC) at para 24.

> 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 cognisable 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. …''

[52] Also, and in *Solidarity on behalf of Smook v Department of Transport, Roads and Public Works*[23] the Court described the doctrine as follows:

> '… The rationale of the doctrine is founded on the principle of the rule of law which holds that individuals should be entitled to rely on governmental decisions, and to be able to plan their lives around such decisions, insulated from the injustice that would result from a sudden change of mind on the part of the functionary. An official who has discharged his official function by making a decision is unable to change his mind and revoke, withdraw or revisit the decision, unless it is vitiated on acceptable grounds such as fraud or want of jurisdiction. The doctrine applies only to final decisions. And 'finality is a point arrived at when the decision is published, announced or otherwise conveyed to those affected by it'. In order for the decision to be regarded as final, it must have been passed into the public domain in some manner.'

[53] Certain central considerations thus emerge in deciding whether the third respondent was entitled to in effect revisit his initial jurisdictional ruling. Firstly, it must be considered whether the decision on jurisdiction made by the third respondent was a final decision that would equally dispose of the substance

[23] (2016) 37 ILJ 2626 (LAC) at para 13.

(merits) of the matter. Secondly, it must be considered whether the decision was conveyed to the affected parties. And finally, it has to be evaluated whether the intervention would be permitted by the provisions of the LRA from which the third respondent derives his power.

[54] From the outset, it had to be emphasized that jurisdictional rulings by CCMA arbitrators, other than condonation rulings, are not final rulings. It is trite that jurisdictional rulings of CCMA arbitrators are rulings of convenience. As held in *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others*[24]:

> '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. …'

[55] Condonation rulings are different, because these rulings arise from the fact that the CCMA already had no jurisdiction for want of compliance with the time periods under the LRA, and deciding a condonation application then requires that a commissioner exercise a discretion as to whether the CCMA would nonetheless entertain the matter. If condonation is refused, the matter is finally disposed of, and this would include the merits of the case. In *Mlambo v Safety and Security Sectoral Bargaining Council and Others*[25] the Court held:

> 'In regard to rulings, it follows that this doctrine would find application in similar circumstances to those identified by Conradie AJ above. Thus, rulings on an application for condonation in respect of a late referral of a dispute or rescission for example, are ordinarily in the nature of being complete in all respects and dispose of all matters that were in dispute. These rulings are irrevocable and arbitrators cannot at their whim revisit them unless under special circumstances as envisaged under s 144 of the Labour Relations Act. However, a ruling as to whether an employee was dismissed as contemplated

[24] (2008) 29 *ILJ* 2218 (LAC) at para 40. See also *Qibe v Joy Global Africa (Pty) Ltd: In re Joy Global Africa (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 1283 (LAC) at para 5; *Universal Church of the Kingdom of God v Myeni and Others* (2015) 36 ILJ 2832 (LAC) at para 27

[25] (2012) 33 ILJ 2427 (LC) at para 54. The Court was referring to the judgment in *Independent Municipal & Allied Trade Union v SA Local Government Bargaining Council and Others* (2010) 31 ILJ 1891 (LC) at paras 17-21. See also *Gauteng Department of Local Government v Mulima NO and Others* (2011) 32 ILJ 1095 (LC) at paras 10 and 14.

> in s 186 of the Labour Relations Act, or whether one was an employee as contemplated in s 213 of the same Act for all intents and purposes remains provisional until such time that the arbitrator is satisfied that the objective facts placed before him have satisfied jurisdictional requirements to enable him to issue a competent award …'

[56] All said, the subject matter of the jurisdictional ruling of the third respondent did not finally dispose of the merits of the case. It only was a determination as to the nature of the dispute that was placed before the CCMA for arbitration. In making this ruling, the actual merits of the matter need not be considered or decided. Ultimately, the true or real nature of the actual dispute may only be determined once all the evidence was in, at arbitration, and even at that point it would be competent for the third respondent to decline jurisdiction. In simple terms, the third respondent had not yet discharged all the duties and functions bestowed upon him by the LRA in finally bringing this matter to an end. As held in *Mlambo*:[26]

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

[57] Next, it must be considered that the power of the third respondent to intervene arises from section 144 of the LRA.[27] In *PT Operational Services*[28] the Court said:

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[26] (*supra*) at para 55.

[27] The section reads: 'Any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the director for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling- (a) erroneously sought or erroneously made in the absence of any party affected by that award; (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; (c) granted as a result of a mistake common to the parties to the proceedings; or (d) made in the absence of any party, on good cause shown'.

> '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 s 144 of the LRA. They may not do so whenever they like, but may do so if the jurisdictional facts in s 144 are present. They may also do so, as I will show presently, when they have performed an allied function but not yet performed the power or duty bestowed on them by the legislature.'

[58] In this instance, section 144(a) and (d) would not apply, because the ruling of 6 March 2018 was made after attendance by all the parties at arbitration and did not come about in the absence of a party.[29] Next, no case was made out of a mistake common to the parties, and thus section 144(c) does not apply. This leaves only section 144(b), relating to a variation of the jurisdictional ruling due an obvious error, and then only to the extent of correcting that error. In *Ekurhuleni Metropolitan Municipality v Spies and Others*[30] the Court dealt with section 144(b) as follows:

> '… the rule is a procedural step designed to correct quickly or expeditiously an obvious wrong, a mistake or ambiguity in the judgment.
>
> Where an arbitration award expresses the true intention and the decision of the commissioner, ordinarily, there would be no mistake, inadvertent omission or any oversight on the part of the commissioner or in the award that was made. In the ordinary course of things, an application for variation of the order is limited to a clarification of or the removal of any ambiguous language, patent error or omission in the award. …'

[59] In my view, section 144(b) can competently apply in this instance. An excellent example of this is the reasoning of the Court in *PT Operational Services*.[31] The Court used an example of a judgment in *Ex parte Koster*, which concerned the rehabilitation of an insolvent in terms of the Insolvency Act, where the master had indicated in writing that he would not object to the application, but when the application was brought, it turned out that not only

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[28] (*supra*) at para 28
[29] *Builders Trade Depot v Commission for Conciliation, Mediation and Arbitration and Others* (2012) 33 ILJ 1154 (LC) at para 11.
[30] (2014) 35 ILJ 1283 (LC) at para 11.
[31] See para 29 of the judgment.

did it concern the issue of rehabilitation, but also included a prayer that certain immovable property should vest in the applicant and that he be entitled to deal therewith as he deemed fit, without his curator having any right or interest in this property. The master then refused to recommend the application for rehabilitation, because of the facts relating to the property were only revealed in the application. The applicant argued that the master was *functus officio* and should be held to his indication that he would not object to the application. The Court referred the ultimate conclusion of Erasmus J in that judgment, who held that the master was not *functus officio* because it was not a final decision and the application itself was not before the master when he made his initial recommendation. The Court in *PT Operational Services* then concluded as follows with reference to this judgment in *Ex Parte Koster*:[32]

> 'I fully agree with Erasmus J's reasoning and conclusion. One can strengthen it by stating that it is only after an administrative agency has finally performed all its statutory duties or functions in relation to a particular matter which is subject to its jurisdiction that it can be said that its powers or functions were spent by its first exercise …'

[60] Similar considerations apply *in casu*. When initially seized with this matter, the third respondent did not have all the process in the CCMA proceedings brought by UNTU before him. He in error only had regard to an initial referral document which was amended and had no regard to all the process that followed after that. This led to a wrong characterization of the dispute, which could in any event only be properly determined once regard was had to all this evidence.

[61] The third respondent in my view in fact explained in his award that the ruling of 6 March 2018 did not reflect his true intention, as he would never have made the ruling had it not been for the obvious error discussed above. As it did not reflect his true intention, it was open for variation under section 144(b).[33]

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[32] Id at para 30.
[33] See *Day & Night Investigators CC v Ngoasheng and Others; Byrne v Day & Night Investigators CC* (2000) 21 ILJ 1084 (LC) at para 9.

[62] Further examples bear mention. In *Central Technical Services (Pty) Ltd v Metal & Engineering Industries Bargaining Council and Others*[34] the Court held that where an arbitrator in his award considered the remuneration of all employees to be the same when it was not, that error needed to be rectified through an application for variation, and not by way of review to the Labour Court.

[63] In *Benicon Earthworks and Mining Services (Pty) Ltd v Dreyer NO and Another*[35] the Court dealt with a situation where a commissioner made a final award on the merits and awarded the employee re-employment coupled with a final written warning. But then having done so, the commissioner did what the Court described as a 'complete about turn', and awarded fully retrospective reinstatement of the employee, relying on section 144(b) to do this. The Court concluded:[36]

> '… the commissioner (the first respondent) was not competent to do so in terms of the powers given under s 144 *(b)* of the Act. The commissioner namely gave a completely new award by granting unconditional reinstatement. The commissioner thus exceeded her powers as she was clearly functus officio after issuing the 'first award', having decided that the second respondent should merely be re-employed with a demotion and on a final warning'

I refer to this example to illustrate when it can be legitimately contended that an arbitrator is *functus officio*. In *Benicon*, the arbitrator considered the merits of the case, and finally disposed of it. She made an award as to consequential relied, and provided it to the parties. The matter was for all intents and purposes finally over. There was no error on the part of the commissioner – she simply changed her mind. It should be obvious that it then cannot be revisited by the commissioner under section 144(b). The matter *in casu* is nothing like this.

[34] (2017) 38 ILJ 1651 (LC) at para 33.
[35] (1999) 20 ILJ 118 (LC) at paras 11 – 12.
[36] Id at para 13.

[64] An example contrary to the judgment in *Benicon* can be found in *SA Municipal Workers Union v SA Local Government Bargaining Council and Others*[37]. In that matter, the commissioner conveyed a preliminary view to the parties about making his award retrospective, but when he issued his final award, the changed his mind, and did not. In this regard, the Court said:[38]

> **'**As already pointed out, the commissioner held a particular view with regard to making his award retrospective and changed that view when he issued the final award. In my view nothing prevented him from changing his view for as long as it was not what he presented as his final view. Of course it may not be advisable to do as the commissioner did in this case as an expectation was or could be created in the minds of those who stood to benefit from his view, if it finally became his decision. However, it cannot be said on the facts of this case that the commissioner was functus officio. The views expressed in his email cannot be said to be his intended final and determinative view of the matter. For the functus officio doctrine to apply it is a requirement that there be a final judgment or order. In that situation the commissioner would have no power to correct, alter, or supplement the order because his jurisdiction in the case has been fully and finally exercised, unless he/she acts in terms of s 144 of the Act. …'

[65] In point however is the judgment in *Mlambo*.[39] The Court, in specifically considering whether a similar jurisdictional ruling by an arbitrator, as the one now in issue before this Court, reasoned as follows:[40]

> '… it follows that the ruling issued by the second respondent was not in the nature of a final decision on the merits of the case. The ruling was not complete in all respects to dispose of the matters that were in dispute, which was whether the applicant was dismissed, and if so, whether the dismissal was substantively and procedurally fair. This ruling was provisional and issued for the purposes of convenience. This much can be gleaned from the second respondent's analysis in his award where he states that in dealing with the jurisdictional issues for the purposes of his ruling, he had only dealt with

[37] (2014) 35 ILJ 2824 (LAC).
[38] Id at para 19. See also *Member of The Executive Council, Free State Provincial Government: Tourism, Economic and Environmental Affairs v Moeko and Others* (2013) 34 ILJ 2256 (LC) at para 28.
[39] (*supra*) fn 25.
[40] Id at para 56.

> procedural fairness of the termination. Thus the doctrine of functus officio cannot find application in the ruling. The mere fact that a ruling on jurisdiction was issued and communicated to the parties does not imply that it is binding for all intents and purposes. …'

The Court ultimately concluded:[41]

> 'To this end, by coming to a different conclusion on the issue of jurisdiction in his subsequent final award after having had regard to objective factors, it cannot be said that the second respondent committed a gross irregularity in relation to his duties as arbitrator …'

[66] Considering all of the above, I thus conclude that the applicant's pending review application relating to the fact that the third respondent was *functus officio* when issuing the ruling of 11 July 2018 has no substance. The third respondent was ultimately well within his rights to have acted as he did, and his decision is ultimately correct and unassailable. The applicants have thus failed to even establish a *prima facie* right for the relief of interdicting further arbitration proceedings, to be granted.

[67] But there is a further consideration that works against the applicants being entitled to the relief they ask for. This is the consideration of an alternative remedy, which is similar to the issue of substantial redress being available in due course discussed under the heading of urgency above. The arbitration proceedings have not even been set down. The applicants have never actually engaged with the third respondent by way of a proper postponement application before him, in terms of which he could then exercise his own discretion as to whether the matter should be postponed pending the review before this Court being decided. Or the applicants could have simply participated in the arbitration, and if they not satisfied with the outcome, then take all the determinations made in the proceedings on review to this Court. This situation was aptly described in *Southern Sun Hotel Interests (Pty) Ltd v*

[41] Id at para 57.

Commission for Conciliation, Mediation and Arbitration and Others[42] as follows:

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

[68] In the end, one can hardly do any better than quote the following applicable *dictum* in *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[43]:

> **'**The applicant will suffer no prejudice should the matter proceed to arbitration. It will be able to raise the jurisdictional issue it would like to, and a commissioner will be able to weigh evidence on the issue (after hearing all the evidence as this is an issue which is linked to the merits) and give a binding award. At that stage, would any party be dissatisfied, it will be able to seek to review the award in accordance with the LRA. This will mean the Labour Court will have the benefit of the CCMA's decision and will not become involved prematurely in matters. This will prevent a flood of similar applications.
>
> The third respondent and the first respondent however do suffer prejudice. The third respondent's dispute has been delayed due to these applications despite having the right in terms of the LRA to refer the matter to the first respondent for arbitration. Should this precedent be confirmed then the first respondent's efficient resolution of disputes will be compromised …'

[69] In sum, the applicants have thus failed to make out a case for the relief they sought. They have failed to establish a *prima facie* right to the relief sought,

[42] (2011) 32 ILJ 2756 (LC) at para 38. See also *Workforce Group* (*supra*) at para 18.
[43] (2010) 31 ILJ 937 (LC) at para 16.

because the underlying review application forming the basis of the relief sought in my view has little prospects of success. The applicants have alternative remedies available to them, all of which would provide them with the necessary redress in due course once the arbitration proceedings have concluded in the CCMA. Any finally, considerations of prejudice clearly favour UNTU and PRASA. The application must therefore be dismissed, and not just struck from the roll for want of urgency.

[70] This then only leaves the issue of costs. The applicants were legally assisted throughout these proceedings. The applicants should thus have known, from the outset that the current application, especially brought on the basis of urgency, was doomed to fail. As touched on above, I get the distinct impression from the applicants' conduct that they are trying to stop the unfair labour practice dispute from being arbitrated so that they can enjoy the fruits of their possibly unfair appointments for as long as possible. There was nothing standing in the way of the applicants simply participating in the arbitration, where they were free to raise all the defences they wanted. The kind of approach adopted by the applicants in this case is not conducive to the fundamental requirement of the expeditious resolution of employment disputes, and should be frowned upon. And finally, the continuous failure by litigants to heed the numerous warnings by this Court where it comes to these kind of applications must be visited with adverse consequence. In terms of the broad discretion I have with regards to costs, in terms of section 162 of the LRA, I believe this is a situation where a costs order against the applicants was certainly earned, and justified.

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

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S Snyman

Acting Judge of the Labour Court of South Africa

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