

SOUTH AFRICA / JUDGMENT

CCMA v De Jager and Others

(JR292/19) [2023] ZALCJHB 87; [2023] 7 BLLR 637 (LC) (17 March 2023)

[2023] ZALCJHB 87

COURT

Labour Court Johannesburg

BEFORE

Moshoana

CASE / FILE NUMBER

JR292/19

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Source record**THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG****Reportable****case no: JR292/19**

In the matter between:

THE
CCMA
Applicant
and
L.J.DEJAGER
First
Respondent
COMMISSIONER
M.C LEBEA N. O
Second
Respondent
VALINOR
TRADING 133 CC
Third
Respondent

Heard:

23 March 2023 (In Chambers)

Delivered:

17 March 2023

Summary: Application for leave to appeal. Where a party abides by the Court's decision, that party perempts its right to appeal. An appeal does not lie against the reasons of the order. Where an appeal will not have any practical effect leave to appeal ought to be refused.

Held: (1) The application for leave to appeal is refused. (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

- [1] For time immemorial the consistent practice of the Commission for Conciliation Mediation and Arbitration (CCMA) and Bargaining Councils has been not to oppose an application to impugn any of its arbitration awards and rulings by way of a review. In fact, these dispute resolution bodies declare that they shall abide by the decision of the Court of review. As expected, the CCMA chose not to oppose the review application sought by Valinor Trading 133 CC (Valinor). In fact, on 29 March 2019, Lebea noted the following: "Save for the First (CCMA) and Second (Lebea) Respondents opposing any cost order sought, we abide by the decision of the Honourable Court."
- [2] By that conduct the CCMA chose not to be a party to the controversy raised by Valinor and not to challenge the decision of the Court by way of an appeal. Section 166 of the Labour Relations Act (LRA) allows any party to any proceedings before the Labour Court to apply for leave to appeal to the Labour Appeal Court (LAC). Having opted not to oppose the order sought and elected to abide, it is doubtful whether the CCMA remained a party to the proceedings. Differently put, the CCMA advanced no factual or legal basis in support of the impugned rulings.
- [3] That notwithstanding, in this judgment, this Court in considering whether leave to appeal ought to be granted or not, it shall also consider the question whether a notice to abide takes away the right of a party to appeal. In other words, did the CCMA preempt its rights to appeal the judgment of this Court. Other legal principles to be considered in this judgment are (a) whether an appeal lie against the reasons or the order and (b) whether there is any live dispute to be resolved by a Court of appeal or not. Differently put, is the CCMA effectively seeking to obtain a legal opinion of the LAC or not.

- [4] The CCMA is a juristic person established as such in terms of section 112 of the LRA. One of the discretionary functions of the CCMA in terms of section 115 (2A) is to make regulating rules. It suffices to declare upfront that where the CCMA is in any manner hampered in the performance of its discretionary functions, regard being had to the principle of legality, its remedy lies in Courts by seeking declaratory and interdictory reliefs. Like many other law abiding citizens, the CCMA is not entitled to resort to self-help.[1]
- [5] Having said that, before me serves what this Court, for lack of better words, may describe as a strange application for leave to appeal. In the Court's view, this is a declaratory relief application masquerading as an application for leave to appeal. As contemplated in clause 15 of the Practice Manual, parties were on 3 March 2023 called upon to submit written submissions. The dies as prescribed had since expired and none of the parties had rendered any written submissions. However, on 16 March 2023, parties belatedly presented submissions. It is with great sadness to state that the written submissions made on behalf of the CCMA do not advance, even with an ounce, a case that satisfies the applicable test for applications for leave to appeal. Perhaps, the CCMA would have done service to itself by opposing the review application and advance those argument during the hearing of the review application. It is trite that a party is not allowed to raise a new argument at an appeal level, which argument was not considered by a Court below[2].

Background

facts

- [6] On or about 3 February 2023, this Court issued an order in the following terms:
1. Both the rulings issued by Commissioner Lebea issued under the auspices of the CCMA under case number LP6905-18 dated 13 November 2018 and 10 January 2019 respectively are hereby reviewed and set aside.
 2. They are replaced with an order that the default award issued under the same case number dated 19 September 2018 is hereby rescinded and set aside.
 3. There is no order as to costs.
- [7] I pause to mention that the practical effect of this order is that the CCMA, if so requested, within the contemplation of section 191 (5)
- (a) (i) of the Labour Relations Act (LRA)[3] to resolve a dispute alleging unfair dismissal through arbitration, the CCMA may now do so. The two rulings reviewed and set aside by this Court had before being reviewed refused to rescind a default arbitration award. It is unknown whether the dismissed employee Mr. De Jager (De Jager) has already made such a request to arbitrate the unresolved dispute of unfair dismissal. It is safe to assume that if such a request has already been made, given the view taken by the CCMA at this stage, which view to my mind is not in keeping with the provisions of section 1 of the LRA, the CCMA shall not

entertain the request by arbitrating the dispute as obliged by section 191 (5) (a) of the LRA. To my mind this is a very sad state of affairs for De Jager.

- [8] Nevertheless, on or about 20 February 2023, the CCMA launched an application seeking to obtain leave to appeal the whole judgment and order granted by this Court on 3 February 2023.

Grounds of appeal

- [9] Understandably, the present application is predicated on extremely emaciated grounds. The CCMA was not a party that sought to oppose the granting of the order sought earlier. To my mind, this fact accounts for the limitation with which the CCMA approaches this Court for leave to appeal.

- [10] The grounds, emaciated as they are, are the following:

10.1 The Court erred in reviewing and setting aside the second respondent's rulings, alternatively the first ruling;

10.2 The Court erred in not finding that a valid objection to con/arb was one delivered within the time period prescribed in Rule 17 (2);

10.3 The Court erred in not finding that on proper interpretation of Rule 17 (2), a party whose objection was delivered out of time must first obtain an order condoning the late delivery thereof before the objection could be entertained, alternatively, to validate the objection.

10.4 The Court erred in concluding that "when Lebea proceeded, he was not doing so under the powers contemplated in section 138 (5) of the LRA."

10.5 The Court ought to have found that an objection to con/arb delivered outside the prescribed time period was invalid in the circumstances where the objector had not been granted condonation for the late filing thereof.

10.6 Additionally, since the application for leave to appeal involves the proper interpretation and application of Rule 17 and section 191 (5A) of the LRA, such constitutes a compelling reason for leave to appeal to be granted.

Evaluation

Dismissal of the application

- [11] In its belated submissions, Valinor implored this Court to dismiss the application for leave to appeal due to non-compliance with the practice manual. In support of that implore, it relied on the judgment of this Court per Acting Justice Snyman in *Ndebele v South African Police and Another*(Ndebele)[4]. The learned Acting Justice stated the following:

"[8] In my view, the applicant's failure to file written submissions despite the clear provisions of the Practice Manual and despite being called on to do so, should lead to the dismissal of the application for leave to appeal for this reason alone"

- [12] Inasmuch as this Court agrees with the learned Acting Justice that where submissions are not filed, such denudes the application for leave of motivation, with considerable regret, this Court does not share the view that an application for leave to appeal should be dismissed on that reason alone. Similar sentiments were echoed by the same Acting Justice in *Symeg Trading (Pty) Ltd t/a Pick 'n Pay Tsepisong v Sheriff, Roodepoort South and Others (Symeg)* [5].
- [13] To my mind the provisions of clause 15 of the practice manual do not suggest and or provide for the dismissal of the application for leave to appeal. The clause ought to be read together with rule 30 (3A) of the Labour Court rules which allows a judge to direct otherwise. This implies that a judge may direct parties to make oral submissions at a time and place convenient for the judge. Lack of submissions does not mean no application for leave to appeal. This Court do accept that clause 15.2 is couched in peremptory terms – must file submissions. However, the clause refers back to the rule, which allows a judge an opportunity to direct otherwise. The view that in the absence of written submissions the application must be dismissed indirectly bereaves a judge of the power to direct otherwise. That direct otherwise, may mean no written submissions. Regard being had to the approved symbiotic method of interpretation, which takes into account, text, context and purpose, it cannot be said that it was the intention of the drafters of the practice manual to visit the non-submission with a dismissal of the application. That approach is, in my view, inconsistent with the provisions of section 34 of the Constitution of the Republic of South Africa, 1996.

[14]

Submissions

are more like heads of argument. A Court is not empowered to dismiss a matter, simply because a party has failed to file heads of argument. This point is buttressed by clause 11.6.4 of the practice manual, which provides that failure to file heads may not lead to the matter not being heard. As a matter of law, a case shall be dismissed only after its merits have been evaluated by a Court. Where the merits have not been evaluated, a course open for a Court is to strike the matter off the roll instead of dismissal of the case[6]. By way of an example, if a Court is not satisfied that a matter commands urgency, an appropriate order to make is to strike the matter off the roll as opposed to dismissal of the matter. Failure to file written submissions is analogous to the lack of urgency situation.

- [15] For all the above reasons, I consider myself not bound by the view expressed by the learned Acting Justice, for a simple reason that I consider the view to be wrong in law. In *Ndebele*, despite the sentiments expressed, the learned Acting Justice proceeded to consider the application for leave to appeal. This,

therefore, suggests that what the learned Acting Justice said was said in obiter dictum and effectively not binding on this Court on the application of the stare decisis principle. In Symeg, the learned Acting Justice also considered the application nevertheless.

[16] Accordingly, this Court is not empowered to dismiss and shall not dismiss the present application for reasons advanced by Valinor.

Merits of the application.

[17] Before this Court engages frontally with the grounds upon which the present application is predicated, it is incumbent on this Court to clearly state that this matter concerned a review of two rescission rulings. This case did not involve a proper interpretation of rule 17 and section 191 (5A) of the LRA. Differently, put the parties before Court did not quibble about the meaning of rule 17 and section 191 (5A) of the LRA. It was this Court in reasoning out its order, which is clear and unambiguous, that interpreted the rule and the section in order to reach its now impugned order.

[18] In that regard, the Supreme Court of Appeal in *Neotel (Pty) Ltd v Telkom SA SOC Ltd and others*[7] authoritatively concluded that a party is not entitled to appeal against the reasons of the order. In accepting this apt legal

position, the erudite Coppin AJA, writing for the majority, rejected the notion that the dictum of the Constitutional Court under the mighty pen of the learned Moseneke DCJ, in the matter of *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*[8] accepted that in exceptional cases an appeal lies against the reasons for an order.

[19] Coppin AJA reverberated thus:

“[26] In truth the appellant was requesting this court to give an opinion on the meaning of s 9 (2) (b) read with s 136 of the ECA, in the circumstances where the substantive order made by the court a quo is not before this court and which, consequently, is incapable of being altered or substituted. That is not in the interest of justice.”

[20] In casu, this Court expresses the same sentiments. With regard to the second ruling, this Court exercised its review powers by application of the functus officio rule. Application of that rule has nothing to do with proper interpretation of rule 17 and or section 191 (5A) of the LRA. With

regard to the first ruling this Court effectively applied a trite and well known rule that applies to rescissions; namely; had the decision maker known that something prevents him or her from making a decision, a decision would not be issued. That something is that a party had objected to arbitration commencing immediately. Therefore, in the Court’s view, the default award was granted in error in the absence of the other affected party[9]. The obligation to commence arbitration depended on no party having objected. Logic dictates that in terms of the section where a party objected an arbitration must not commence. If the provisions of the section depended on rule 17, the legislature would have expressly stated the following “no party has

objected in terms of the rules of a dispute resolution body”. Alternatively, the legislature would have stated that “subject to the rules of a dispute resolution body.” As a matter of logic, the rules are created at the pleasure of the Act. Therefore, the tail cannot wag the dog.

[21] For reasons not clearly understood by this Court, the CCMA seeks to make a connection between the order made by this Court and the

interpretation of the rule and the section to somewhat justify its application for leave to appeal. In my view it cannot do so. In making almost a similar point that is being made in this judgment, Coppin AJA felicitously remarked as follows:

“[25] In any event, I am not persuaded that there are exceptional circumstances present that would justify what would be a radical

departure from a sound, tried and, doubtlessly, trusted principle. The contention that appellant and others, who may have to comply with s 9 (2) (b) of the ECA would not be able to do anything about binding effect of the court a quo’s interpretation of that section and s 13 of the ECA, is, in my view, grossly exaggerated. There is nothing preventing anyone affected from challenging the correctness of that interpretation in a matter where it is properly raised. It was not for this court, in a matter such as present, to anticipate what may or may not be faced by those that are required to comply with the BEE requirement, and to act precipitately and thereby unleash the undesirable consequences referred to above, which, until thus far, have been restrained by the sound principle that reasons for judgments and orders are not appealable.”

[22] It is apparent that the CCMA not having been a participating party to the process leading to the order made by this Court is seeking to protect the “future”. Its intentions in launching the present application are laid bare in the directive issued by its national director on 27 February 2023[10]. In the directive, the CCMA condescendingly stated that, “in light thereof, it is necessary for the CCMA to obtain judicial certainty[11] on the status of the CCMA Rules, in particular, Rule 17 (2) thereof”. This of course suggests that this Court in its judgment did not provide judicial certainty for the party that was properly before it. This is nothing but a quest for a declaratory relief. Corbett CJ in *Shoba v OC Temporary Police Camp, Wagendrift Dam*[12], laid the following principle with regard to declaratory reliefs: -

“An existing or concrete dispute between persons is not a prerequisite for the exercise by the Court of its jurisdiction under this

subsection, though the absence of such may, depending on the circumstances cause the Court to refuse to exercise its jurisdiction

in a particular case ... But because it is not the function of the Court to act as an advisor, it is a requirement of the exercise of jurisdiction under this subsection that there should be interested parties upon whom the declaratory order would be binding ...”

[23] In *Proxi Smart Services (Pty) Ltd v The Law Society of SA and others*[13], the High Court, correctly, in my view, held that a Court will not grant a declaratory order where the issue raised before it is

hypothetical, abstract and academic, or where the legal position is clearly defined by statute. It is and was open for the CCMA to approach a competent Court for a declaratory relief. However, it cannot do so under the guise of an application for leave to appeal. A process for leave to appeal serves a specific purpose. It is there to enable an affected and aggrieved party to pave its way to the audience of the higher Courts subject to the opinion of a judge or judges. The process exists as a tool to serve both the rule of law and the interests of justice. It certainly constitutes an abuse of the process if non-parties would be allowed an opportunity to air their views on a judgment of a Court. Section 34 of the Constitution of the Republic of South Africa, 1996, allows everyone to have any dispute that can be resolved by the application of law decided in a fair manner. The CCMA was afforded that opportunity and it opted not

(a) to oppose the relief sought and (b) to be bound by the decision of the Court.

[24] Section 115 (2A) of the LRA is perspicuous, the intended status of the CCMA rules is to regulate. The dictionary meaning of regulate is to control, govern, or direct by rule or regulations; subject to guidance or restriction, adapt to circumstances or surroundings. The LAC has already decreed that the CCMA Rules cannot take precedence over the LRA. Section 210 of the LRA also provides an answer. A declaratory relief is designed to clarify what before was uncertain or doubtful and parties to it must have existing, future or a contingent right or obligation.

[25] In a sense, the CCMA seeks to secure a position where commissioners of the CCMA in particular would be justified to ignore as it were the interpretation afforded by this Court to rule 17 (2) in reasoning out its ultimate order. It is important to clarify that the operating effect of the order made by this Court is to review the rulings and to set aside the default arbitration award. Therefore, within the contemplation of section 18 (1) of the Superior Courts Act (SCA)[14], what will cease to operate pending the decision on the application for the leave to appeal is the order reviewing the rulings and the setting aside of the default arbitration award. This has nothing to do with future matters or matters that were never before this Court when the order was made. A matter is moot if it bears no practical effect to a party. The order that the rescission rulings are upheld will bring no practical effects to the CCMA, hence it initially adopted a stance not to oppose and effectively deferred to the Labour Court, as it mundanely does, as a supervisory body.

[26] To my mind, there is nothing that would prevent the CCMA to firm up the provisions of the rule in order to achieve the desired results;

namely the objection will be invalid if made outside the prescribed period without a condonation ruling. Section 16 (2) (a) (i) of the SCA, specifically provides that when at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or results, the appeal may be dismissed on this ground alone. In any event, if this Court were to allow the CCMA to appeal, a principle established by the SCA in the matter of *Khumalo v Twin City Developers*[15] will be offended. The majority in *Khumalo*, aptly stated the law as follows:

“[58] In Mgwenya NO & others v Kruger & another, the first respondent, an ordained pastor of the Apostolic Faith Mission Church of South Africa, whose pastoral status was terminated by the Church passed away before the hearing of the appeal. In view of the demise of the first respondent, the appellants conceded that there were no live issues remaining between the parties and that the appeal and any order made thereon would have no practical effect or result. The appellants however contended that the church would be saddled with costs orders made in favour of first respondent and this would be most ‘unfair’ to the church.

[62] For all those reasons there are no exceptional circumstances justifying this court to have regard only to the consideration of costs. The appeal must therefore fail.”

[27] In casu, inasmuch as the CCMA did not acknowledge that the appeal will have no practical effect, it is the finding of this Court that the appeal will have no practical effect to the CCMA. That being the case, section 16 (2) (a) (ii) of the SCA provides that it is only in exceptional circumstances that the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs. The minority judgment in *Khumalo*, acknowledged that markedly unusual or special different circumstances constituted the exceptional circumstances that would justify

adjudication of the appeal on costs. I do not believe that the appeal Court would find anything markedly unusual to entertain the appeal punted for, in the circumstances where the CCMA by action or by conduct indicated that it shall abide by the decision of this Court.

[28] The rule as presently worded does not imply invalidity at all. There is no magic wand in not delivering an objection within the stated period. The stated period finds no application in respect of a dispute relating to the dismissal of an employee for any reason related to probation or an unfair labour practice relating to probation; a dispute relating to a compliance order; or a claim for failure to pay any amount. Therefore, contrary to the contention of the CCMA, there is nothing of a compelling nature for the appeal to be entertained.

[29] I now turn to the peremption principle. By not opposing the granting of the order sought and by abiding with the order, the CCMA has perempted its right to appeal[16]. To abide by means to obey or to follow something. The CCMA chose to abide and cannot suddenly make a volte face. It cannot reprobate and approbate at the same time. It is a trite principle of law that an unsuccessful litigant who has acquiesced in a judgment cannot appeal against it[17]. The conduct of the CCMA is one inconsistent with any intention to appeal[18]. Its conduct and actions indubitably and necessarily showed no intention to appeal.

[30] When regard is had to the above perspicuous principles of law the CCMA cannot at this stage be allowed to apply for leave to appeal the order of 3 February 2023. Assuming that the Court is wrong in its understanding of the principles outlined above, this Court takes a view that the application fails to meet the applicable test.

Grounds considered

[31] It requires no repetition in this judgment that the legislated test for granting leave to appeal has been heightened. Leave may only be given where the judge(s) is of the opinion that the appeal would have a reasonable prospects of success. Regard being had to the principles discussed above, the contemplated appeal will have no reasonable prospects of success. The CCMA failed to meet the heightened threshold. In substantiation, the following is said about each of the punted for grounds.

Err in setting aside the rulings

[32] As indicated earlier both rulings related to the rescission of a default award. There can be no doubt that the second ruling was reviewable on application of the functus officio rule. As outlined above, where a decision maker is not aware of something that would prevent him or her to make a decision, the

decision is rescindable. In short, the decision will be made in error in the absence of the affected party. All this Court pronounced on is that in the presence of an objection (an expression or feeling of disapproval or opposition; a reason for disagreeing), arbitration

proceedings must not commence. At the time when Lebea commenced with the arbitration proceedings there was undoubtedly an objection.

Albeit that Lebea, took, what this Court considered to be a wrong view that no valid objection was present, factually, what obtained is that there was a party who had objected. A reasonable decision maker would not commence an arbitration in the face of an objection. Even on a benign and expanded interpretation (requiring condonation), the disapproval and or opposition to the commencement of arbitration proceedings cannot be wished away. In similar fashion, as held in Oudekraal, judgment a defective action remains with legal consequences until set aside by a competent Court. Equally, until the objection is somewhat withdrawn, it shall remain with consequences – disapproval to commence arbitration proceedings.

[33] It is difficult to understand how the Labour Appeal Court would reach a conclusion that wishes away a stubborn and effectual fact that a party had objected. The implicated section allows a party to object. Rights are the fundamental normative rules about what is allowed of people or owed to people according to some legal system. Section 191 (5A) of the LRA allows a party to object, thus a right to object normatively exists for parties in arbitration proceedings. It is a right specifically afforded to parties in arbitration proceedings. A procedural hurdle cannot be elevated to a level of denying rights guaranteed in a statute. Accordingly, on application of the heightened test, this Court opines that no reasonable prospects exist for this ground to be upheld.

Valid objection being one delivered timeously.

[34] The LAC has already decreed in the Premier Gauteng and Another v Ramabulana N.O and Others (Ramabulana)[19] judgment that rules shall not override the Act. Nowhere in section 191 (5A) of the LRA is there time period referenced. Something is said to be invalid if it lacks foundation or force. Indeed, if the Act had expressly stated that the objection must be made within a stated period prima facie an invalidity shall follow, if the objection is made outside the stated period. For an example clause 11.4.2 of the practice manual

specifically provides that the notice of objection must be served and filed within 10 days of the receipt of the affidavits after which the right to object shall lapse. This Court has already stated that section 210 of the LRA does provide that the provisions of the LRA prevails in the event of conflict. That being the statutory command a Court cannot find invalidity where the LRA does not contemplate an invalidity. Even the rule as currently worded no invalidity is envisioned in it. Again on application of the heightened test this ground is devoid of reasonable prospects.

Obtaining condonation before validity

[35] The text of the implicated rule does not envisage condonation being sought in order for an objection to acquire validity. It is apparent that the rule exists for the convenience of the CCMA. Surely it helps it for scheduling purposes. It may be so that certain of the CCMA Commissioners are accredited to mediate and conciliate only. Thus if an objection is received within a stated period, the CCMA may allocate a commissioner accredited to mediate and conciliate only since arbitration certainly may not commence. Elsewhere where the rules prescribe a time period, for the parties to do something, the phrase at least is not employed. For an example rules 32 and 33 just to mention but a few. It is for that reason that rule 9 finds application to referrals or applications only.

[36] In the matter of The Judicial Service Commission and Another v Cape Bar Council and Another[20], the Supreme Court of Appeal (SCA) had the following to say:

[29] What Chaskalson CJ pointed out in New Clicks (para 71) was that this is not an immutable rule and that the question whether the legislature intended to visit the decision of a body established by a particular statute with invalidity, unless taken by all the members of the body jointly, is always dependent on an interpretation of the particular empowering statute. In New Clicks Chaskalson CJ concluded that a proper interpretation of the empowering legislation in that case did not warrant the inference of invalidity.'

[37] Where the phrase at least is used, what it means is that a number is the smallest that is possible or likely and that the actual number may be greater. Clearly

flexibility becomes contemplated where at least is employed. All rule 17 (2) intends to deal with is the scheduling arrangements. Seven days will be the least the CCMA would require to finalize scheduling. It is difficult to infer any invalidity of the objection on any reasonable interpretation of the rule, in the circumstances where text, context and purpose are symbolically taken into account.

[38] There was nothing that would have prevented Lebea to, in line with rule 35, request Valinor to show good cause why the objection should be accepted as opposed to not be made. The issue to be condoned is the delivery of as opposed to the making of the objection. Visiting the objection with invalidity is not a power that arise anywhere in the Act or the CCMA rules. Had Lebea called upon Valinor to show good cause why the late delivery, as opposed to the making of an objection, should be condoned, he would have been guided by expediency in order to achieve the objects of the Act. In order to make an objection, a party does not require any condonation, let alone permission. It is only the delivery of the objection made that requires condonation, if made outside the suggested 7 days. Unleashing invalidity was the harshest manner of dealing with the non-compliance of timeous delivery in circumstances where an inference of invalidity does not emerge on proper interpretation of the Act and the rules.

No powers under section 138 (5) of the LRA

[39] What kicked Lebea into gear was not the failure to appear but it was a declaration of invalidity of the objection. In order for the powers in section 138 (5) (b) to obtain there must be a failure to appear at the arbitration proceedings. In terms of rule 30 (2) before a commissioner may continue with proceedings in the absence of a party who did not refer the dispute, the commissioner must be satisfied that the party had been properly notified of the date, time and venue of the proceedings before making any decision to proceed in the absence of that party. This situation obtains where the Commission had notified the parties of an arbitration hearing 21 days prior to the scheduled date within the contemplation of rule 21.

[40] Logically con/arb hearing is not an arbitration hearing as the name suggests. It is a hybrid process which encapsulates conciliation and arbitration. Unlike in rule 21, the notification period is less as outlined in rule 17 (1). Where a party fails to appear at the con/arb hearing, a commissioner would be required to commence arbitration where there is no objection lodged. Reading rule 17 (4) (b) in isolation suggests that it is only an objection lodged in terms of sub-rule (2) that can stall the

commencement. This reading in isolation would be inconsistent with the provisions of the LRA, which entitles a party as a matter of right to object. Where reference is made to 'has been lodged in terms of subrule (2)', reference is not made to time but reference is made to an objection contemplated in section 191 (5A) of the LRA. The phrase 'has been lodged' refers to an event of lodging the objection.

[41] There is no dispute that Valinor had lodged an objection. The dictionary meaning of the word lodge is to deposit an official formal statement, to bring forward. In rule 17 (1) reference is made to deliver as opposed to lodge. Grammatically to deliver means to hand something over. That something that is to be handed over must exist before it being handed over. Rule 41 of the CCMA

rules defines deliver to mean serve on other parties and file with the Commission. When something is delivered late, it does not follow that that something

did not come into existence. On the contrary lodge should mean creation of an objection. Thus, once created (lodged) what the CCMA call upon an objector to do is to hand over that

objection to it and the other party.

[42] The fact that the objection is delivered late to the CCMA does not suggest that it was never lodged. Therefore, in consonant with the Act subrule 17 (4) means that where an objection exists, as in lodged, arbitration must not commence.

[43] As an indication that the process contemplated in subrule 17 (4) is different from the one contemplated in section 138 (5), a commissioner retains a discretion to invoke the provisions of section 138 (5) in a con/arb process by only adjourning the commenced proceedings (subrule 17 (4) (c)).

[44] Regard being had to the above, the CCMA fails to meet the heightened test in respect of this ground.

Compelling

reasons.

[45] The CCMA takes a view that an interpretation issue constitutes a compelling reason. In Neotel, the Court refused to elevate an interpretation issue to exceptional circumstances. To my mind, there are no compelling reasons why the appeal should be heard. Interpretation issue factored in the reasoning of a Court cannot amount to compelling reasons. This Court has already remarked, there is nothing that prevents the CCMA to amend the rule to ensure that it brings about the desired invalidity. This Court doubts whether such an amendment will be consistent with section 34 of the Constitution as well as section 33 of the Constitution read with the provisions of PAJA.

[46] Just to restate, in terms of section 17 (1) (a) (ii) of the Superior Courts Act, leave to appeal may only be given where the judge and not a party is of the opinion that there is some other compelling reason why the appeal should be heard. With regard to what compelling reasons includes, the Supreme Court of Appeal (SCA) in Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd^[21] stated that those are important question of law or a discrete issue of public importance that will have an effect on the future disputes. It was also emphasised by the SCA that merits remain vitally important and often decisive.

[47] The issue around the status of rule 17 (2) of the CCMA Rules, the interpretation thereof and that of section 191 (5A) are not discrete

matters of public importance. The issue of powers emanating from the Rules and not provided for in the LRA was clarified by the LAC in Ramabulana. The impugned judgment followed the Ramabulana

judgment.

Conclusions

[48] In summary, the CCMA is seeking to appeal against reasons of the order and such is not permitted. The appeal if granted will not yield any practical results for the CCMA. By not opposing the review application and abiding by this Court's decision, the CCMA perempted its right to appeal. The above notwithstanding, the CCMA failed to meet the test in section 17 of the SCA.

[49] In light of the reasons outlined above, the application for leave to appeal must fail.

[50] In the results I make the following order:

Order

1 The application for leave to appeal is refused.

2 There is no order as to costs.

GN Moshoana

Judge of the Labour Court of South Africa

Appearances:

None.

[1] See *Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC).

[2] See *Naude v Fraser*

[1998] ZASCA 56; 1998 (4) SA 539 (SCA) at 558A-E and *Ras and others NNO v Van der Muelen* 2011

(4) SA 17 (SCA) para 16.

[3] Act 66 of 1995 as amended.

[4] (JR2395/14)

[2017] ZALCJHB 251 (4 July 2017)

[5] (J820/21)

[2023] ZALCJHB 2 (17 January 2023).

- [6] Commissioner for SARS v Hawker Aviation Services Partnership & others 2006 (4) 292 (SCA)
- [7] (605/2016)
- [2017] ZASCA 47 (31 March 2017).
- [8] 2012
- (4) SA 618 (CC)
- [9] See Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) (Colyn).
- [10] This Court expresses doubt in the legality of the directive. A national director is a statutory appointee (section 118 of the LRA) and derives powers from the LRA and from a proper delegation. In its judgment, this Court never suggested and or ordered that rule 17 is out of force.
- [11] This suggests that the Labour Court did not provide the illusive certainty.
- [12] 1995 (4) SA 1 (A) at 14F-I.
- [13]
- [2018] 3 All SA 567 (GP).
- [14] Act No 10 of 2013 as amended.
- [15] (328/2017) [2017] ZASCA 143 (2 October 2017).
- [16] See Davis v Bulldog Abrasives SA (Pty) Ltd and others (J123/21) [2021] ZALCJHB 136 (1 July 2021) para 4 “...where a party files a notice to abide, all it means is that such a party will comply with the judgment of the Court. Such a party perempts and waives its right to appeal against the order to be made by the Court.”
- [17] See Dabner v SAR&H 1920 AD 583 and many other judgments that followed it as cited in Venmop 275 (Pty) Ltd and Another v Cleverland Projects (Pty) Ltd and Another 2016 (1) SA 78 (GJ) at para 25.
- [18] See Natal Rugby Union v Gould
- [1998] ZASCA 62; 1999 (1) SA 432 (SCA) and Numsa & Others v Fast Freeze
- (1992) 13 ILJ 963 (LAC).
- [19] [2008] 4 BLLR 299 (LAC).
- [20] 2013 (1) SA 170 (SCA).
- [21] 2002 (5) SA 35 (SCA).

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