

SOUTH AFRICA / JUDGMENT

Mining Qualifications Authority v Commission for Conciliation, Mediation and Arbitration and Others (2025/032846) [2025] ZALCJHB 120 (27 March 2025)

[2025] ZALCJHB 120**COURT**

Labour Court Johannesburg

BEFORE

Mafa-Chali

CASE / FILE NUMBER

2025/032846

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Source record**THE****LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG****Not****Reportable****Case****No: 2025-032846****In****the matter between:**

MINING
QUALIFICATIONS AUTHORITY
Applicant
and
COMMISSION
FOR CONCILIATION, MEDIATION
AND
ARBITRATION
First Respondent
COMMISSIONER
ALLAN KAYNE N.O.
Second Respondent
COMMISSIONER
NTHABISENG NGWANE N.O.
Third Respondent
LEBOGANG
MATLALA
Fourth Respondent

Heard: 20 March 2025
Delivered: 27
March 2025

JUDGMENT

MAFA-CHALI, AJ

Introduction

- [1] The applicant seeks an urgent order to stay the arbitration proceedings under case number GAJB22539-24 before the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA), pending the determination of an application under case number 2015-037180 to review and set aside the rulings (the condonation ruling) issued by Commissioner Allan Kayne on 6 December 2024, and the second ruling (the rescission ruling) issued by Commissioner Nthabiseng Ngwane dated 10 February 2025 in terms of which the fourth respondent's condonation application was granted and the applicant's application for rescission of the condonation application was dismissed.
- [2] The applicant is challenging the jurisdiction of the CCMA to proceed with the arbitration proceedings on 28 March 2025, when the condonation and rescission rulings are currently the subject of a review application.
- [3] On that basis, the applicant requested this Court to stay the arbitration proceedings until the finalisation of the review application.

Background

- [4] On 23 September 2024, the fourth respondent referred a dispute of unfair discrimination to the CCMA with allegations of sexual harassment by the applicant's Chief Executive Officer (CEO), who was her line manager at the time. During conciliation, the applicant challenged the jurisdiction of the CCMA in that the referral was made outside of the statutory time period prescribed by the Employment Equity Act[1] (EEA). The conciliator, Commissioner Kaizer Makoela, upheld the jurisdictional point that the CCMA had no jurisdiction to entertain the dispute and ordered that the fourth respondent apply for condonation in terms of the CCMA Rules[2].
- [5] The fourth respondent's attorneys filed the condonation application on 29 October 2024 and also served it on the applicant at the email addresses i[...] and T[...]
- [6] On 2 December 2024, the applicant filed an answering affidavit to the condonation application accompanied by a condonation application for its late delivery, and explained that it did not receive the condonation application because the fourth respondent served it

on different email addresses than those used in the 7.11 referral form as the first email address is simply a general email address not allocated to any employee of the applicant and the second email address is that of the CEO, the alleged harasser, who is not a party to the CCMA proceedings.

- [7] On 6 December 2024, Commissioner Kayne issued a condonation ruling and indicated that the application was unopposed. The applicant subsequently made an application for rescission of the condonation ruling on 19 December 2024, which was opposed by the fourth respondent.
- [8] On 10 February 2024, Commissioner Ngwane issued a rescission ruling that the CCMA lacks jurisdiction to entertain the rescission application and directed that the matter be scheduled for arbitration before a different Commissioner. The CCMA subsequently issued a notice of set down for the unfair discrimination dispute to be heard on 28 March 2025.
- [9] As a consequence, the applicant then launched the present application on 10 March 2025 for an order to stay the CCMA arbitration proceedings set down on 28 March 2025, pending the finalisation of the review application, which was allocated case number 2025-037180 on 19 March 2024. This application is opposed by the fourth respondent.

Urgency

- [10] The Court may, at its discretion under Rule 38 read together with Rule 42 of the Rules of this Court[3] and on good cause shown, relax or shorten the strict formal rules relating to timeframes for service and treat an application as urgent. In such applications, the applicant is required to first, set out explicitly in the founding papers, the circumstances which the party avers, renders the matter urgent and secondly, to also

explicitly advance the reasons why it claims that it could not be afforded substantial redress if it had brought the matter to Court by way of an ordinary non-urgent procedure.

- [11] Therefore, the question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of the absence of substantial redress in an application in due course. The Rules allow the Court to come to the assistance of the applicant because, if the latter were to wait for the normal course laid down by the Rules, it would not obtain substantial redress.
- [12] It is also important to note that the Rules require the absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. The applicant may still obtain redress in an application in due course, but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard.

- [13] In my view, the delay in instituting proceedings is not on its own a ground for refusing to regard the matter as urgent. A Court is obliged to consider the circumstances of the case and the explanation given.[4] The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might sometimes be an indication that the matter is not as urgent as the applicant would want the Court to believe, but it is not necessarily a determining factor, on its own, to refuse an urgent application.
- [14] It then means that if there is some delay in instituting the proceedings, an applicant has to explain the reasons for the delay and why, despite the delay, he claims that he cannot be afforded substantial redress at a hearing in due course. The fact that the applicant wants to have the matter resolved urgently does not render the matter urgent. The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the Rules, would an applicant be afforded substantial redress? If he cannot be afforded substantial redress at a hearing in due course, then the matter qualifies to be enrolled and heard as an urgent application. If, despite the anxiety of an applicant, he can still be afforded a substantial redress in an application in due course, the application does not qualify to be heard on an urgent basis.
- [15] The applicant submitted that this application is urgent and seeks an interim relief, not a rule nisi. The applicant further submits that urgency was not self-created, considering the principles that a court should be slow to refuse to hear a matter where a litigant will be deprived of substantial redress in due course. It was also argued that delaying to approach the Court, with attempts to settle the impasse prior to approaching the Court, is not undue delay, thereby not affording a party's opposition sufficient time to place its case before the Court, and that the notion of 'self-created' urgency means more than a mere delay involving a degree of contrivance to jump the queue of hearings in the ordinary course. The applicant argued that it took steps to seek consent from the fourth respondent to stay the arbitration proceedings, which was refused, and the applicant had to seek legal advice on the matter, therefore, the delay is for one month only before the date the review application was launched.
- [16] The applicant further submitted that as the purpose of the review application is to challenge the refusal of the rescission of the condonation ruling, it would render this application moot if it is heard in the ordinary application procedure, as in all probability, the arbitration hearing would have proceeded and an award would be issued by the Commissioner and the applicant cannot wait until the arbitration is finalised to challenge the condonation and rescission rulings.
- [17] However, the fourth respondent submitted that the applicant has failed to make out a case for urgency in that it has taken the entire month to bring the urgent application to Court and did not articulate what steps were taken until approaching the Court on an urgent basis. It was also argued that the applicant did not even account for the five days between 21 to 25 February 2025, and therefore, the urgency is self-created because it has been significantly

diminished by such failure to demonstrate why this application deserves the urgent attention of this Court.

- [18] I find that, even though there was a one month delay in bringing the urgent application to Court, the applicant has given a reasonable and acceptable explanation for such a delay in bringing the urgent application to Court. I also find that the delay is not excessive under the circumstances considering that the applicant was just not merely sitting and not taking any action. I am, therefore, satisfied that the matter is sufficiently urgent to be heard as an urgent application.

Section 158(1B) and the relief sought

- [19] Section 158(1B) of the Labour Relations Act[5] (LRA) provides that:

‘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.’

- [20] Section 158(1B) allows for the review of a ruling made during arbitration proceedings prior to the finalisation of the dispute, if it is just and equitable to do so, the applicant must establish that it would be just and equitable for the Court to intervene by entertaining the application to review and set aside the arbitrator’s jurisdictional ruling.

- [21] The purpose of this section is to prevent the delays caused by review applications brought prior to the finalisation of a dispute. This Court is generally very slow and reluctant to intervene and entertain reviews of rulings made during those proceedings prior to the conclusion of the arbitration proceedings before the CCMA or bargaining councils.

- [22] The applicant in casu seeks an interim order to stay the arbitration proceedings, pending the determination of the review application to set aside the condonation and rescission rulings of the CCMA.

- [23] To the extent that the applicant seeks an interim order, it must establish or at most, demonstrate a prima facie right; a well-grounded apprehension of irreparable harm if the interim relief is not granted; that the balance of convenience favours the granting of an interim interdict; and that there is no other satisfactory remedy. These are the requirements for interim relief as set out in *Setlogelo v Setlogelo*[6].

- [24] As the applicant seeks an interim interdict, it must satisfy all the requirements for an interim interdict, which I will deal with hereunder. This Court has to decide whether the Applicant has made out a case which would entitle it to the relief it seeks.

- [25] The applicant does not seek from this Court a final order, instead, it seeks an order maintaining the status quo pending the determination of its review application as the final determination to pronounce on the CCMA's jurisdiction is still to be decided by the review Court. The applicant only seeks interim relief to stay the arbitration proceeding pending the finalisation of the review application.
- [26] The fourth respondent argued and submitted that the applicant failed to make an exceptional case for a finding that it is just and equitable for this Court to intervene with incomplete arbitration proceedings in that it states that the applicant is unhappy in the manner the CCMA determined its opposition to the condonation application, and that if the stay is not granted, the pending review application will be academic. It was further argued that such reasons are not good motivation for a just and equitable order and it would defeat the purpose of the legislative interventions through section 158(1B) of the LRA if every disgruntled litigant not happy about an interlocutory ruling is heard with piecemeal approached to the Court rather than review the arbitration outcome when it is not in its favour.

Prima facie right

- [27] The applicant for an interim interdict must show that it has a right, although the right might be open to doubt and a right which is being infringed on or which he or she apprehends will be infringed. The right may arise out of contract, delict, or it may be founded in the common law or on some statute. The right set out by an applicant for interim relief need not be shown on a balance of probabilities. Where the interim relief is sought pendente lite, the applicant is required to furnish proof which, if uncontradicted and believed at the trial, would establish his or her right.[7]
- [28] The applicant submitted that it has a clear right in terms of section 138(1) of the LRA, which somehow guarantees parties a fair hearing and in this matter, a determination of the CCMA's jurisdiction to arbitrate the fourth respondent's unfair discrimination dispute after having failed to properly determine the condonation and rescission applications in accordance with the LRA, CCMA Rules and the EEA.
- [29] The basis of the applicant's attacks of the CCMA jurisdiction on the condonation application are firstly, that the CCMA decided the applications on papers without ensuring that the parties are given an opportunity to be heard; secondly that the CCMA has not considered the answering affidavit filed by the applicant together with the condonation application, and the said affidavit brought to the attention of the CCMA, thirdly that the condonation application was served on the email addresses of the applicant that were not used by the fourth respondent in the 7.11 form and neither of those email addresses belonged to the correct representatives of the applicant but served on the CEO who is not a party to the CCMA proceedings and no consent was given by the applicant for service of the condonation application on the CEO; the person against whom the allegations of sexual harassment have been made by the fourth respondent, and as a consequence, the applicant did not receive

the condonation application.

- [30] The applicant submitted that despite several communications with the CCMA on 25 November 2024 and 26 November 2024 respectively explaining that the applicant has not received the condonation application and the condonation application cannot proceed due to non-service as it would provide further information and evidence on non-receipt of the condonation application at the hearing of the matter, Commissioner Kayne erroneously proceeded with the condonation application on an unopposed basis without affording the applicant an opportunity to be heard.
- [31] The fourth respondent's view is that the applicant seeks final relief not an interim one, and therefore ought to have proven a clear right and shown a threat of breach to such right but failed to do so, thereby failing to make a proper case to be granted the relief sought; and as such, the application must stand to be dismissed on this ground. It was also submitted that the applicant is very aware that the Chairperson of the investigations made very substantive findings and recommendations to remove the fourth respondent and offer her counselling, but the applicant instead concluded that there was no sexual harassment and ignored those findings. It was argued that the CCMA must be allowed to deal with the sexual harassment dispute as it is the fourth respondent's view that there was a proper service of the condonation application upon the applicant, and in particular, upon the CEO, who just deliberately did not attend to it.
- [32] The applicant's challenge of the CCMA jurisdiction on the rescission application is that it was also erroneously decided in the applicant's absence and that neither of the parties challenged the CCMA's jurisdiction to consider and determine the application as the fourth respondent filed the opposing and answering affidavits. However, Commissioner Ngwane issued a ruling indicating that the CCMA did not have jurisdiction to entertain the rescission application because Commissioner Kayne considered the email submissions delivered by the applicant, which was patently wrong and trumped on the applicant's rights in terms of CCMA Rules 31(10) and 31(5).
- [33] In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[8] (OUTA), the Constitutional Court held that:

'Under the Setlogelo test the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm.'

[34] Therefore, it means that the applicant has a prima facie right to approach the court to review the jurisdictional ruling, but following the dicta in OUTA, the mere right to approach the court is not sufficient. The applicant has to show that the prima facie right is threatened by an impending or imminent irreparable harm.

Irreparable harm

[35] The applicant must show irreparable harm or damage and a well-grounded apprehension of a prejudicial act on the part of the respondents. It is trite that the arbitrators of the CCMA cannot assume jurisdiction where it does not exist, and they cannot decide their own jurisdiction as this is ultimately to be decided by this Court.

[36] Since the applicant seeks to challenge the ruling which determined that the CCMA has jurisdiction and that the dispute be enrolled for arbitration, it is my considered view that the review application could be dispositive of the matter and could bring an end to the fourth respondent's unfair discrimination claim. Should the review succeed, the underlying causa (namely, unfair discrimination) would be removed and the jurisdiction of the CCMA to adjudicate the dispute would be ousted, and the matter would go no further.

[37] In *Emalahleni Local Municipality v Phooko NO and Others*[9], it was held that irreparable harm will invariably result if there is a possibility that the underlying causa may ultimately be removed, i.e. where the underlying causa is the subject matter of an ongoing dispute between the parties.

[38] In casu, the parties are involved in an ongoing dispute, and the pending review application seeks to remove the underlying causa and to set aside the CCMA rulings. If the applicant is compelled to continue with the arbitration prior to the adjudication of the review application, and the review application is ultimately successful, the underlying causa would be removed, and the applicant would have suffered irreparable harm in defending the alleged unfair dismissal dispute.

[39] In *Builda Construction Cape Proprietary Limited v Verveen and Another*[10], the Court held that:

‘[33] I find that the applicant will suffer irreparable harm should the arbitration proceedings proceed before the review application is finalised. From the outset the applicant has opposed the forum of arbitration. It would be impractical to continue with the arbitration proceedings.

[34] The common sense approach determines that if the applicant is successful later on review and the findings confirm that the matter was not arbitrable, then the applicant would have not only incurred unnecessary expenditure and time but was forced to participate in proceedings it did not concede to. In this instance, the applicant is further prejudiced as it has not pleaded to the statement of claim in light of the dispute. The prejudice suffered by the applicant most certainly outweighs the prejudice the respondent would suffer if the arbitration proceedings are not stayed.’

[40] In my view, all the parties would be prejudiced if the arbitration proceedings were to continue before the issue of jurisdiction has been decided by this Court as they will all spend time, money and resources to participate in a process before a body which might not have had jurisdiction to adjudicate the dispute in the first place and the outcome of such process, would inevitably lead to further litigation and would contribute to the burden of this Court. It would therefore be an irreparable harm towards the applicant to allow the arbitration process to proceed whereas there is a challenge on the jurisdiction of the CCMA to arbitrate the dispute since once the arbitration continues and the award is issued, the applicant would lose an opportunity to still challenge the CCMA jurisdiction but rather only to challenge the arbitration award if it is not in its favour.

Balance of convenience

[41] The Court has to consider the balance of convenience, and in exercising its discretion, weigh the prejudice to the applicant if the relief sought is withheld against the prejudice to the respondent if it is granted. It is the balancing of respective harms and an assessment of which of the parties will be least

seriously affected or prejudiced by being compelled to endure what may prove to be a temporary injustice until the just answer can be found at the end of the trial.

[42] The applicant's case is that the balance of convenience favours the stay of the arbitration proceedings pending the outcome of the review application as the Labour Court will finally determine the issue of jurisdiction and provide the parties with certainty as to whether the CCMA has jurisdiction to arbitrate the dispute.

[43] Indeed, once the Labour Court has decided the matter, the parties will have certainty as to the way forward. If the Court finds in favour of the applicant, it will be the end of the matter, and the parties and the CCMA would not have wasted resources to arbitrate a dispute over which it has no jurisdiction. Should the Court find that the CCMA indeed has jurisdiction, the unfair dismissal dispute would be set down for hearing, and the arbitration process would be concluded.

[44] It cannot be disputed that the fourth respondent will also be prejudiced if the interim relief sought is granted and the arbitration proceedings are stayed, as she will have to wait for the review application to be finalised, and if dismissed, she can proceed with her unfair discrimination dispute. However, this Court has to balance the respective harms and the prejudice to be suffered and make an assessment of which of the parties will be least seriously affected or prejudiced

by being compelled to endure what may prove to be a temporary injustice until the answer can be found when the review application

is adjudicated upon.

[45] The question as to the CCMA's jurisdiction to arbitrate the unfair discrimination dispute should obviously be considered and decided before the dispute is arbitrated as this would provide clarity and certainty to the parties and would avoid the wasting of resources and unnecessary litigation. The outcome of the review application could be dispositive of the entire matter. Therefore, in my view, the balance of convenience favours the applicant.

Alternative remedy

[46] The final requirement for the grant of an interim interdict is the absence of another adequate remedy.

[47] The applicant submitted that it has no alternative remedy available but to approach this Court for relief as it approached the fourth respondent to stay the proceedings pending a review application but such request was not conceded to and that the postponement request would have met a similar opposition and may have only been limited to the date of the hearing on 28 March 2025.

[48] I am satisfied that the applicant, prior to approaching this Court, tried to seek consent from the fourth respondent to stay the arbitration by agreement, pending the finalisation of the review application, but those efforts did not yield any positive result. There is, therefore, no other alternative remedy available to the applicant.

[49] Under the circumstances, it is my view that the applicant did not have any other remedy than to seek a temporary relief in the form of an interim interdict, staying the arbitration proceedings pending the finalisation of the applicant's review application.

Conclusion

[50] This dispute is an application for an interim interdict and is therefore not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict, the dispute is whether, applying the relevant legal requirements, the status quo should be preserved or restored pending the decision of the main dispute. At common law, a court's jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo. It does not depend on whether it has the jurisdiction to decide the main dispute.

[51] In *National Gambling Board v Premier of Kwazulu-Natal and Others*,^[11] the Constitutional Court considered interdict proceedings and held that:

'An interim interdict is by definition

"a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination."

[52] The relief sought by the applicant is interim in nature, to stay the CCMA arbitration process pending the final determination of a review application. I am satisfied that the applicant has met the requirements for an interdict and is entitled to the interim relief pendente lite.

Costs

[53] The rule of practice, that costs follow the result, does not apply in labour matters, but the Court has a wide discretion in respect of costs in consideration of the requirements of law and fairness. Both the applicant and the fourth respondent did not pursue the issue of costs and indicated that the issue must be left to the discretion of the Court.

[54] In my view, this is a case where the interest of justice will be best served by making no order as to costs.

[55] In the premises, I make the following order:

Order

1. Pending the finalisation of the review proceedings instituted under case no: 2025-037180, the arbitration process under case no: GAJB22539-24 is stayed;

2. Pending the finalisation of the review proceedings instituted under case no: 2025-037180, the first respondent is interdicted and restrained from setting down the fourth respondent's unfair discrimination dispute under case no: GAJB22539-24 for arbitration;

3. The parties are directed to jointly approach the Judge President of the Labour Court with a request and motivation to expedite the

adjudication of the review application instituted under case no: 2025-037180.

4. There is no order as to costs.

G. Mafa-Chali

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Zinhle Ngwenya

Instructed by: Phatsaone Henney Attorneys

For the Fourth Respondent: Mr Bongani Luthuli of Bongani Khanyile Attorneys

[1] Act No 55 of 1998, as amended

[2] Rules 9 and 31 of the Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration GN R3318 of 21 April 2023, effective 24 April 2023.

[3] GN 4775a of May 2024: Rules Regulating the Conduct of the Proceedings of the Labour Court (effective 17 July 2024).

[4] See: Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others 2004 (2) SA 81 (SE) at 94C–D; Stock and Another v Minister of Housing and Others 2007 (2) SA 9 (C) at 12I–13A.

[4] See: Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others 2004 (2) SA 81 (SE) at 94C–D;

Stock and Another v Minister of Housing and Others 2007 (2) SA 9 (C) at 12I–13A.

[5] Act 66 of 1995, as amended.

[6] 1914 AD 221 at 227.

[7] See: Webster v Mitchell 1948 (1) SA 1186 (W). See also: City of Johannesburg Metropolitan Municipality v Mphefo and Others (J787/2024) [2024] ZALCJHB 287 (30 July 2024) at para 19.

[8]

[2012] ZACC 18; 2012 (6) SA 223 (CC) at para 50.

[9]

[2021] ZALCJHB 61; (2021) 42 ILJ 2196 (LC).

[10]

[2023] ZAGPPHC 178; 018498/13 (22 March 2023) at paras 33 and 34.

[11]

[2001] ZACC 8; 2002

(2) SA 715 (CC) at para 49.

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