

SOUTH AFRICA / JUDGMENT

Motha v Commission For Conciliation Mediation And Arbitration and Others (JR827/2022) [2024] ZALCJHB 320 (18 July 2024) [2024] ZALCJHB 320

COURT

Labour Court Johannesburg

BEFORE

GC Phakedi

CASE / FILE NUMBER

JR827/2022

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THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

No: JR827/2022

In

the matter between:

COMFORT
SAMUEL MOTH
Applicant
and
THE
COMMISSION FOR CONCILIATION, MEDIATION
AND
ARBITRATION
First
Respondent
MATOME
VICTOR SEHUNAME N.O
Second
Respondent
RECITT
BENCKISER (PTY)
Third
Respondent
CARRUS
UKHOZI (PTY) LTD
Fourth
Respondent

Heard:	3 July 2024
Delivered:	18 July 2024 (This judgment was handed down electronically by emailing a copy to the parties. 18 July 2024 is deemed to be the date of delivery of this judgment).
Summary:	Review of jurisdictional ruling – the test for review of jurisdictional rulings and doctrine of mootness considered – application dismissed.

JUDGMENT

PHAKEDI, AJ

Introduction

[1] The applicant, a permanent employee of Carrus Ukhozi (Pty) Limited (fourth respondent), referred a dispute to the Commission for

Conciliation, Mediation and Arbitration (CCMA) in terms of section 198A(4) of the Labour Relations Act[1] (LRA) seeking relief to be deemed as a permanent employee of Reckitt Benckiser (Pty) Limited (third respondent). The matter was allocated to the second respondent (second respondent or commissioner) who issued a jurisdictional ruling (Ruling) on 30 March 2022 as follows:

‘a The preliminary point raised by the Respondents is hereby upheld

b CCMA does not have jurisdiction to arbitrate the dispute in the absence of condonation.

c CCMA is ordered to close this file pending the condonation application.

d There is no order as to costs.’

[2] Not satisfied with the outcome, the applicant launched an application in terms of section 158(1)(g) of the LRA seeking to review and set aside the Ruling. The Third Respondent is opposing the application.

Background

facts

[3] The applicant was permanently employed by the fourth respondent as a general worker. The fourth respondent is a temporary employment service employer (TES) supplying the third respondent with employees. The applicant started working for the third respondent as a case packer on 20 February

2018. He was then appointed as a dispenser on or around July 2019 until he referred a dispute to the CCMA desiring to be recognized as a permanent employee of the third respondent because he was not entitled to the same remuneration and benefits afforded to the permanent employees of the third respondent.
- [4] On 20 September 2021, the applicant lodged a grievance and when his grievance was not resolved, he referred the dispute in terms of section 198A(3)(b)(i) of the LRA to the CCMA on 25 October 2021. In his referral form, he stated that the dispute arose on Monday, 25 October 2021 and summarised the facts of the dispute as follows:
- ‘I joined RB (Reckitt Benckiser) through a labour broker (Carrus Ukhozi Pty Ltd) and still under Carrus. Currently, I hold a position of a Dispenser (for years) but remunerated at a general worker rate based on hours worked (no basic). I also do not have any benefits of RB employees.’
- [5] The matter was allocated to Commissioner Byrne who then recused himself on 10 February 2022, whereafter, the matter was allocated to the second respondent.
- [6] The status of the fourth respondent as a TES employer and the operation of the deeming provision of section 198A is not in dispute.
- [7] On 31 May 2022, shortly after referring the matter to the CCMA, the applicant was dismissed from his employment. He referred a dispute to the CCMA and he is now reviewing the arbitration award. The unfair dismissal dispute is pending before the Labour Court.

Applicant's grounds for review

- [8] The applicant submitted that the Ruling must be reviewed and set aside on the grounds envisaged in section 145(2)(a)(i) in that the commissioner committed misconduct in relation to the duties of a commissioner as an arbitrator; and section 145(2)(a)(iii) in that the award was improperly obtained. He submitted further that the commissioner ignored and rejected his submissions and evidence but agreed to have regard to the third and fourth respondents' (respondents) evidence.
- [9] The applicant further submitted that the Ruling must be reviewed and set aside on the basis that the second respondent committed a gross irregularity in the conduct of the arbitration proceedings by failing to assess the evidence in an unbiased manner. As a result of this misconduct, he failed to arrive at a rational conclusion.
- [10] The respondents are opposing the application on the basis that the applicant has not followed the appropriate test for the review of jurisdictional rulings i.e. that of correctness as opposed to reasonableness and further that the application is frivolous in that the applicant chose to drag the matter to Court instead of simply filing a condonation application for his late referral as per the

Ruling.

- [11] The respondents submitted further that the relief sought by the applicant is moot in that he is no longer an employee of either of the respondents. The applicant admitted that he is no longer employed but he is persisting with his application since it is in the interests of justice that the Ruling be reviewed and set aside. Furthermore, this will assist him in quantifying his claim against the respondents and his victory will also pave the way for many of his former colleagues who are not being remunerated at the appropriate salary scale nor receiving any benefits afforded to permanent employees of the third respondent.

Applicable law

- [12] Section 198A(3)(b)(i) of the LRA provides that “for the purposes of this Act, an employee... not performing such temporary service for the client... is deemed to be the employee of that client and the client is deemed to be the employer”.
- [13] Section 198D(3) provides that “a party to a dispute contemplated in subsection (1)... may refer the dispute, in writing, to the Commission or to the bargaining council, within six months after the act or omission concerned”.
- [14] Section 198D(6) provides that “the Commission or the bargaining council may at any time, permit a party that shows good cause to, refer a dispute after the relevant time limit set out in subsection (3)...”
- [15] Section 213(a) of the LRA defines an employee as “any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration”.

Analysis

- [16] The legislature should be commended for guaranteeing access to the Labour Court through the provisions of section 151
- (1) of the LRA which states that “the Labour Court is established as a court of law and equity”. In complying with the Constitutional mandate to guarantee everyone access to the courts, section 161(1) allows any party to the proceedings to appear in person before the Labour Court.
- [17] The applicant in these proceedings appeared in person and despite not being legally trained, presented his case to the best of his ability. The respondents repeatedly contended that the applicable test in review of jurisdictional rulings is that of correctness as opposed to reasonableness and that the review application must fail on this basis because the applicant has pleaded that the commissioner’s decision is unreasonable and irrational instead of attacking its correctness.

[18] The Constitutional Court in *Booi v Amathole District Municipality and Others*[2] emphasised that labour litigation as envisaged by the LRA, is distinct from any other civil litigation. This is evident from the preamble of the LRA which states that the Act seeks "to provide simple procedures for the resolution of labour disputes." In essence, this means that litigants before the Labour Court must not be non-suited based on technical defences only and each case must be decided on merits.

[19] The Labour Appeal Court (LAC) in *Cape Peninsula University of Technology v Kabengele and Others*[3] dealt with a matter where the Labour Court had decided the papers on the basis of correctness although the applicant had not specifically

pleaded that the award was reviewed on the basis of correctness. The LAC held that:

‘In suggesting that Mr Kabengele should be non-suited on this basis, CPUT sought to raise what amounted to an unmeritorious technical defence. Within the context of labour litigation, such defences are to be viewed with caution by our courts and are not to be quickly accepted given the constitutional right to fair labour practices, the nature of labour disputes and the approach of the LRA to the resolution of such disputes.’

[20] Be that as it may, in the present matter, the argument about the applicable test for review of jurisdictional rulings is academic/moot since the applicant was dismissed on 31 May 2022. The applicant admitted that he had been dismissed but argued that his referral preceded said dismissal. On the other hand, the third respondent submitted that the applicant is not entitled to the relief sought (to be deemed a permanent employee of third respondent) because there is no employment relationship between the parties. It is the intention of the legislature that only current (not former) employees are able to enforce their rights in terms of section 198A(3)(b)(i) of the LRA against their employers.

[21] The Constitutional Court dealt with the doctrine of mootness in *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Ltd and Another*[4] and held as follows:

‘[47] Mootness is when a matter “no longer presents an existing or live controversy”. The doctrine is based on the notion that judicial resources ought to be utilised efficiently and should not be dedicated to advisory opinions or abstract propositions of law, and that courts should avoid deciding matters that are “abstract, academic or hypothetical”.

[48] This court has held that it is axiomatic that “mootness is not an absolute bar to the justiciability of an issue... [and that this] Court may entertain an appeal even if moot, where the interests of justice so require”. This Court has “discretionary powers to entertain even admittedly moot issues”.

...

[50] Moreover, this Court has proffered further factors that ought to be considered when determining whether it is in the interests of justice to hear a moot matter. These include –

- (a) whether any order which it may make will have some practical effect either on the parties or on others;
- (b) the nature and extent of the practical effect that any possible order might have;
- (c) the importance of the issue;
- (d) the complexity of the issue;
- (e) the fullness or otherwise of the arguments advanced; and
- (f) resolving the disputes between different courts.’

[22] I have considered the above-mentioned factors and I am not convinced that it is in the interests of justice that this matter be taken any further due to the fact that the issues involved are not complex nor of such importance to deserve deviation from the doctrine of mootness. Even if the Ruling is reviewed and set aside, the applicant will not be able to pursue any claim in terms of section 198A(3)(b)(i) of the LRA against the third and/or fourth Respondents due to his dismissal.

[23] The applicant has failed to make a proper case for the Ruling to be reviewed and set aside.

Conclusion

[24] Both parties have indicated that they are seeking costs if I find in their favour. As mentioned above, the Labour Court is established as a Court of law and equity. To award costs against unrepresented litigants who are exercising their constitutionally entrenched rights to fair labour practices will defeat the primary purpose of the LRA.

[25] In the result, the following order is made:

Order

1. The review application is dismissed.
2. There is no order as to costs.

GC Phakedi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: In person For the Respondent: Malesela Letwaba Instructed by: Cliffe Dekker Hofmeyr Inc

[1] Act 66 of 1995, as amended.

[2] [2021] ZACC 36; (2022) 43 ILJ 91 (CC) at para 50.

[3]

[2007] ZALAC 11; [2024] 6 BLLR 553 (LAC) at para 15.

[4] [2020] ZACC 5; 2020 (4) SA 409 (CC) at paras 47 – 48 and 50.

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Prepared on 13 October 2026 · Esheria