

SOUTH AFRICA / JUDGMENT

Railway Safety Regulator v Mabanga and Others (2025/019807) [2025] ZALCJHB 122 (25 March 2025)

[2025] ZALCJHB 122

COURT

Labour Court Johannesburg

BEFORE

G Mafa-Chali

CASE / FILE NUMBER

2025/019807

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

reportable

Case

No: 2025-019807

In

the matter between:

RAILWAY
SAFETY REGULATOR
Applicant
and
BUSISIWE
BRENDA MABANGA
First Respondent
COMMISSION
FOR CONCILIATION, MEDIATION
AND
ARBITRATION
Second Respondent
CHARLES
NAKEDI MACHAKA N.O
Third Respondent
Heard: 18 March
2025
Delivered: 25
March 2025
This judgment was handed

down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 25 March 2025.

JUDGMENT

MAFA-CHALI, AJ

Introduction

- [1] In this opposed urgent application, the applicant seeks an order staying the arbitration proceedings before the second respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA), pending the final determination of an application to review and set aside a condonation ruling issued by CCMA Commissioner David Sello on 9 September 2024.
- [2] The applicant is challenging the jurisdiction of the CCMA to proceed with the arbitration proceedings on 27 March 2025 when the condonation ruling is 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] The first respondent referred a dispute of unfair dismissal to the CCMA on 27 July 2022. The dispute remained unresolved and subsequently referred to arbitration.
- [5] The arbitration hearing was enrolled for 6 February 2023 and the first respondent withdrew the dispute by completing the withdrawal notice stating that she did not want to take the case any further. On 25 April 2024, the first respondent delivered an application for the condonation of her re-referral to arbitration. Commissioner David Sello entertained the first respondent's condonation application and granted a ruling in favour of the first respondent.
- [6] On 26 September 2024, the applicant sent an email correspondence to the CCMA indicating that the applicant has instructed its legal representatives to institute the review proceedings at the Labour Court to review and set aside the condonation ruling and requested that the arbitration be kept in abeyance pending the initiation and finalisation of the review proceedings. No response was received from the CCMA.
- [7] On 21 October 2024, the applicant instituted the review proceedings under case number JR1895/24 seeking an order to review and set aside the condonation ruling. The review application is still pending before this Court.

- [8] On 2 December 2024, the applicant's attorneys again dispatched an email correspondence to the CCMA advising that the applicant requested the CCMA on 26 September 2024 to hold the arbitration proceedings in abeyance pending the initiation and finalisation of the review proceedings. Again, no response was received from the CCMA.
- [9] The CCMA scheduled the arbitration process on 27 November 2024 which is to be held on 14 January 2025. On 14 January 2025, both the applicant and the first respondent attended the arbitration process, and the applicant made an application for the postponement of the arbitration process based on two reasons. Firstly, on the basis of the pending review application, and secondly on the basis that the applicant's legal representative, Ms Sibiya was booked off due to ill-health.
- [10] It is clear that the Commissioner granted the postponement and rescheduled the arbitration process to an agreed date of 27 March 2025 due to the unavailability of the applicant's legal representative not on the basis of the pending review application.
- [11] The arbitration process is scheduled to proceed on 27 March 2025 and hence the applicant approached this Court on an urgent basis

to stay the arbitration pending the finalisation of the review application, instituted under case number JR1895/24.

- [12] The urgent application was enrolled for hearing in this Court on 18 March 2025 and was opposed by the first respondent. I will have

to consider whether based on the facts placed before this Court, I am satisfied that the application is an urgent one to be dealt with as such; and whether the application has met the requirements of an interim relief to stay arbitration proceedings.

Urgency

- [13] The Court may at its discretion under Rule 8 of the Rules of this Court[1], relax or shorten the strict formal rules relating to time 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.
- [14] Whether the applicant will be able to obtain substantial redress in due course is dependent on the facts and particular circumstances of each case[2]. An urgent relief may be refused in circumstances where the matter has become urgent owing to dilatoriness on the part of the applicant, since the primary objective of approaching a Court on an urgent basis is to prevent a harm or prejudice from occurring[3].

[15] The applicant argued that it has sufficiently demonstrated why the matter must be heard on an urgent basis. It was submitted that firstly, because the first respondent has not disputed that the arbitration proceedings are set down for 27 March 2025; secondly that the matter will proceed on that day; thirdly that should the matter proceed it will take away the applicant's statutory right to subject the jurisdictional ruling on review as such right to review would be rendered more academic if the interim interdict is not granted; and lastly if the applicant was to seek the relief sought in the notice of motion in the ordinary court, the application would be heard after 27 March 2025 and therefore the Court would not be able to restore the applicant's right to challenge the jurisdictional ruling of the CCMA thereby infringing upon the applicant's rights as provided in Section 34 of the Constitution^[4] (Constitution). An urgent relief may be refused in circumstances where the matter has become urgent owing to dilatoriness on the part of the applicant.

[16] However, the first respondent submitted and argued that the applicant has failed to substantiate grounds necessary for the relief sought on urgency as the urgency is self-created in that the applicant on its own admission was aware that the arbitration proceedings were set down on 14 January 2025 as far back as 7 November 2024 but only launched the urgent application on the 11th hour. The first respondent further argued that the applicant had ample time to address this matter in a timeous manner in the light that the urgent application is underpinned by a review application which it believed had no merits and prospects of success, and therefore granting the urgent application would not be in the interests of justice but against the expeditious resolution of disputes.

[17] In this matter it cannot be said that the applicant brought this application in the last hour thereby making the urgency self-created under the

circumstances, taking into account that the applicant addressed correspondence to the CCMA twice on 26 September 2024 and again on 2 December 2024, before making a formal application for a postponement on 13 January 2025, requesting to stay the arbitration pending the finalisation of the review application.

Section 158(1B) and the relief sought

[18] 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.’

[19] It is clear that 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 reluctant, to entertain reviews of rulings made during those proceedings prior to the conclusion of the arbitration proceedings, as willingness to easily entertain such applications may allow even those parties with delaying tactics not to proceed with the arbitration. The wording of section 158(1B) is that the Labour Court is constrained from reviewing interlocutory rulings and should only do so when it is just and equitable to review a ruling before the final determination of the dispute. Therefore, this Court should be extremely slow to intervene in arbitration proceedings before the CCMA or bargaining council that have not been

completed.

[20] On the basis that 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] In casu, the applicant seeks an interim order to stay the arbitration proceedings, pending the determination of the review application ultimately to be decided by the review Court. The applicant acknowledges that it is generally not desirable to have a piecemeal review however when it is just and equitable to do so, the provisions of section 158(1B) may be invoked by the Labour Court at its discretion to review the decision even if the issue in dispute has not been finally determined. However, the first respondent's view is that the applicant's reliance on section 158(1B) is misplaced as that section is very clear that the Labour Court may not

review a decision made by CCMA during the conciliation or arbitration process before the final issue in dispute has been determined; and therefore the Commissioner's condonation ruling cannot be a subject of review at this stage as it is premature.

[22] The requirements for interim relief, as sought by the applicant in casu, have already been set out in *Setlogelo v Setlogelo*[6]. They are:

22.1 a prima facie right;

22.2 a well-grounded apprehension of irreparable harm if interim relief is not granted and the ultimate relief is eventually granted;

22.3 the balance of convenience in favour of the granting of the interim relief; and

22.4 the absence of any other adequate ordinary remedy.

[23] In the well-known authority in relation to the application of this test in *Webster v Mitchell*[7], the Court held as follows:

‘In an application for a temporary interdict, applicant’s right need not be shown by a balance of probabilities; it is sufficient if such right is prima facie established, though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by respondent should then be considered, and if serious doubt is thrown upon the case of applicant he could not succeed.

In considering the harm involved in the grant or refusal of a temporary interdict, where a clear right to relief is not shown, the Court acts on the balance of convenience. If, though there is prejudice to the respondent, that prejudice is less than that of the applicant, the interdict will be granted, subject, if possible, to conditions which will protect the respondent.’

[24] In order to establish a prima facie right, an applicant must provide prima facie proof of facts that establish the existence of a right in terms of the substantive law. An applicant must also establish a well-grounded

apprehension of irreparable harm if interim relief is not granted and it ultimately succeeds in establishing its right. The balance-of-convenience requirement, as well as its interrelationship with the requirement of a prima facie right, was explained in Olympic Passenger Service (Pty) Ltd v Ramlagan[8]:

‘The expression “prima facie established though open to some doubt” seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict – it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict

be refused, weighed against the prejudice to the respondent if it be granted.’

[25] 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.

[26] The applicant does not seek an order from this Court to pronounce on the issue of jurisdiction, as that is to be decided by the review Court. The applicant only seeks interim relief to stay arbitration proceedings in which the arbitrator found he has jurisdiction, pending the finalisation of the review application.

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.
- [28] The applicant submitted that it has a clear right in terms of section 34 of the Constitution and statutory rights in terms of section 145 and 158 (1B) of the LRA, to which an irreparable harm would ensue if the relief sought does not finally determine the matter between the parties as the order will only remain in force until the final determination of the review application, in order to preserve and protect the integrity of the review application. The applicant's case is that the CCMA has no jurisdiction to arbitrate the first respondent's unfair dismissal dispute, and as such the applicant has filed a review application to determine whether the arbitrator has, on the objective facts, the jurisdiction to arbitrate the dispute and afford the appropriate relief.
- [29] On the other hand, the first respondent argued that the applicant has failed to show that there is an exceptional circumstance where the Court should intervene, and the applicant does not also identify or specify any harm it would suffer should this Court not intervene. It was further argued by the first respondent that the alleged harm is speculative and does not warrant urgent intervention sought as the applicant can easily pursue the review application after the conclusion of the arbitration process with possibly stating the arbitration award pending the outcome of the review and also offer security of bond; and as such the Court should be extremely cautious to intervene in the arbitration process at the CCMA before the matter is completed based on the frivolous urgent application which will cause unnecessary legal costs and delay in resolving the unfair dismissal dispute which has been pending since 2003.
- [30] In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[9] (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.'
- [31] 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

[32] 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.

[33] The applicant seeks to challenge the ruling which determined that the CCMA has jurisdiction and that the dispute be enrolled for arbitration. The reality is that the review application could be dispositive of the matter and could bring an end to the first

respondent's unfair dismissal claim. Should the review court find that the first respondent was not dismissed, the underlying

causa (namely unfair dismissal) would be removed and the jurisdiction of the CCMA to adjudicate the dispute will be ousted and the matter will go no further.

[34] In *Emalahleni Local Municipality v Phooko NO and Others*[10], 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.

[35] 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 jurisdictional ruling. 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.

[36] In *Bulda Construction Cape Proprietary Limited v Verveen and Another*[11], the Court held that:

'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.

The common sense approach determines that if the applicant is successful later on in 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.'

[37] 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.

Balance of convenience

[38] 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.

[39] The applicant's case is that the balance of convenience favours the stay of the arbitration proceedings pending the outcome of the review application. 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.

[40] 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.

[41] It cannot be disputed that the first respondent will be prejudiced if the relief sought is granted and the arbitration proceedings are stayed, as she will have to wait for the review application to be finalised and be dismissed before she can proceed with her unfair dismissal 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 just answer can be found when the review application is adjudicated upon.

[42] In my view, the balance of convenience favours the applicant. The question as to the CCMA's jurisdiction to arbitrate the unfair dismissal dispute should 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.

[43] The harm to the first respondent can be limited by expediting the review application instituted by the Applicant. In the papers before this Court, the Applicant indicated its intention to expedite the adjudication of the review application as it has already been filed on 21 October 2024, although it is apparent from the applicant's submissions that the Applicant is struggling

to obtain the record of the review proceedings from the CCMA with a possibility of reconstruction of the record. However, that challenge is for the review court to deal with.

Alternative remedy

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

[45] The applicant submitted that it has no alternative remedy available but to approach this Court for relief as the CCMA has refused to stay the arbitration process pending the finalisation of the review application. The applicant attempted to obtain the stay of the arbitration process through correspondences with the CCMA prior to the matter being set down for hearing, and by means of a formal postponement application on 13 January 2025, a day prior to the CCMA proceedings of 14 January 2025 pending the finalisation of the review application. The postponement request was opposed by the first respondent, and as such the application was refused by the Commissioner.

[46] I am however observant that the postponement request was granted to the applicant only due to the reason of ill-health of the applicant's legal representative. It can therefore not be said that the applicant brought this application in the last hour thereby making the urgency self-created under the circumstances. The postponement application was for obvious reasons to try and avoid approaching this Court for an interim interdict if the request was allowed. I am satisfied that the applicant, prior to approaching this Court, tried to postpone the arbitration by application, pending the

finalisation of the review application, but those efforts did not yield any positive result; and there is no other alternative remedy available to the applicant under the circumstances than to approach this court for such interim relief.

[47] The remedy that will be adequate at this point, is a temporary relief in the form of an interim interdict, staying the arbitration proceedings, pending the finalisation of the applicant's review application.

Conclusion

[48] The dispute in an application for an interim interdict 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.

[49] In *National Gambling Board v Premier of Kwazulu-Natal and Others*,^[12] 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.”

[50] 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 interim relief *pendente lite*.

Costs

[51] The applicant sought a cost order against the first respondent in view of the fact that the stay of the arbitration process was requested from the CCMA not from the first respondent and it was unnecessary for the first respondent to oppose this application. The first respondent also sought a cost order against the applicant based on the reasons that this application is not in the interests of justice and expeditious dispute resolution as the first respondent who is paying for the legal fees from her own pocket, whereas the applicant has not made out a case for urgency in this matter.

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

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

Order

1. Pending the finalisation of the review proceedings instituted under case number JR1895/24, the arbitration process under case number

GATW10295-22 is stayed;

2. Pending the finalisation of the review proceedings instituted under case number JR1895/24, the second and third respondents are interdicted and restrained from setting down the first respondent’s unfair dismissal dispute under case number GATW10295-22 for arbitration;

3. The applicant and first respondent are directed to jointly approach the acting Judge President of the Labour Court with a request and motivation to expedite the adjudication of the review application instituted under case number JR1895/24.

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 Xolani Mofokeng

Instructed by: Moja Sibiyi Attorneys Inc

For the First Respondent: Advocate Mariska du Plessis

Instructed by: Tuckers Incorporated

[1] GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court, repealed with effect from July 2024.

[2] See East Rock Trading 7 (Pty) Ltd and another v Eagle Valley Granite (Pty) Ltd and others

(2012) JOL 28244 (GSJ); [2011] ZAGPJHC 196 at paras 6 and 7; See also Export Development Canada and Another v Westdawn Investments Proprietary and Others

[2018] ZAGPJHC 60; [2018] 2 All SA 783 (GJ) at para 11; and Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and others

(2014) JOL 32103 (GP); [2014] ZAGPPHC 400 at paras 64 and 65, where it was held: 'It seems to me that when urgency is an issue the primary investigation should be to determine whether the applicant will be afforded

substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent. Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): Whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondents and the administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. This last factor is often called, usually by counsel acting for respondents, self-created urgency.'

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Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): Whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondents and the administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. This last factor is often called, usually by counsel acting for respondents, self-created urgency.’

[3] See *Golding v HCI Managerial Services (Pty) Ltd and others*

[2015] 1 BLLR 91 (LC); [2014] ZALCCT 52 at para 24; *Ntozini and Others v African National Congress and Others*

[2018] ZAGPJHC 415; [2019] JOL 43820 (GJ) at para 11.

[4] Constitution of the Republic of South Africa, 1996.

[5] Act 66 of 1995, as amended.

[6] 1914 AD 221 at 227.

[7] 1948 (1) SA 1186 (W) in the headnote.

[8] 1957 (2) SA 382 (D) at 383D–F.

[9]

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

[10]

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

[11] [2023] ZAGPPHC 178; [2023] JOL 58442 (FB) at paras 33 and 34.

[12]

[2001] ZACC 8; 2002

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

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