

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J1779/2010
CCMA CASE NO:

GAJB11894/10

In the matter between:

SPAR GROUP LIMITED t/a SPAR SOUTH
RAND DISTRIBUTION CENTRE

Applicant

and

THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION

First

Respondent

MANDLA DUBE

Second Respondent

HLATSHWAYO, T N.O

Third Respondent

—

JUDGMENT

—

FRANCIS J

1. The applicant, approached this Court on an urgent basis for the following relief:

“1. **DISPENSING** with the provisions of the rules of the above Honourable Court relating to time and manner of service referred to therein and dealing with the matter as one of urgency in terms of rule 8 of the rules for the conduct of proceedings in the Labour Court.

2. **ORDERING** that a Rule Nisi do issue calling upon the Respondents to appear and show cause on a date and time to be determined by this Honourable Court why a final Order should not be made in the following terms:-
 - 2.1 **DIRECTING** that all proceedings under CCMA Case No: GAJB11894/10 be stayed under the auspices of the First Respondent pending the finalisation of the review application proceedings instituted by the Applicant in the above Honourable Court under Case No: JR1955/10;
 - 2.2 **INTERDICTING AND RESTRAINING** the third Respondent from conducting an arbitration on 13 September 2010 under Case No: GAJB11894/10 and any time thereafter until such time as the review application filed under case number: JR1955/10 has finally been determined by this Honourable Court;
 - 2.3 **INTERDICTING AND RESTRAINING** the First Respondent from appointing a Commissioner other than Third Respondent from conducting an arbitration on 13 September 2010 under Case No: GAJB11894/10 and any time thereafter until such time as the review application filed under case number: JR1955/10 has finally been determined by this Honourable Court;
 - 2.4 **DIRECTING** the First Respondent from removing the dispute under Case No: GAJB11894/10 from its arbitration roll on 13 September 2010.
3. **DIRECTING** that such of the Respondents who or which oppose the application for the above relief pay the costs of suit jointly and severally, the one being [paying]the other to be absolved.
4. **ORDERING** that the provisions of paragraphs 2.1 - 2.4 shall operate with immediate effect as an interim Order pending the final Order being made on

the return date of the Rule Nisi as aforesaid.

5. **GRANTING** *the Applicant further and alternative relief.*”
2. The applicant is in essence seeking an urgent interim order, for an order staying the arbitration proceedings pending the finalisation of the review application filed with this Court.
3. The second respondent was employed by the applicant. He was dismissed for gross insubordination on 24 February 2010. On 22 April 2010, he referred an alleged unfair dismissal dispute to the CCMA. The referral was 10 days late which necessitated him having to seek condonation for his late referral. The condonation application was opposed by the applicant. The application was set down for argument before commissioner Makhubela on 18 May 2010. Both parties appeared before commissioner Makhubela. On 25 June 2010, the applicant received the condonation ruling of commissioner Makhubela who condoned the late filing of the referral. Aggrieved with the outcome in the condonation ruling, the applicant on 13 August 2010 launched an application in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995 (the LRA) under case number JR1955/10 seeking *inter alia* to review and set aside the condonation ruling.
4. The arbitration hearing was enrolled by the CCMA for a hearing on 13 September 2010. It is not clear from the founding affidavit when the applicant was notified of the date of the hearing. It is unclear why the date is not mentioned. On 18 August 2010 the applicant’s attorney of record requested the CCMA to remove the matter from the roll pending the finalisation of the review application. The CCMA informed the applicant’s attorney on 19 August 2010 that an application for a review does not

stay further proceedings at the CCMA and that he must apply to this Court for an order to stay the proceedings pending the outcome of the review application. The applicant states that should the review application be upheld, the CCMA will not have authority to arbitrate the dispute. Being granted condonation is a jurisdictional prerequisite to the CCMA validly exercising arbitral powers. Whilst condonation was granted, the applicant contends that the condonation ruling was unreasonable and/or irrational and/or unjustifiable.

5. It is contended in the founding papers that the review application must first be determined, prior to any arbitration being heard by the CCMA. It was contended that the review application was filed within a reasonable time. It was contended that this application was brought on an urgent basis. The urgency, is axiomatic having regard to the set down for arbitration on 13 September 2010. Whilst it is conceded that labour disputes must be expeditiously dealt with, expeditiousness is not a substitute to lawfulness and rationality prevailing. It would be unfair that the matter proceed to arbitration where the review application is still pending and is in its infancy.

6. The applicant has set out its grounds of review. It is for purposes of this judgment not necessary to repeat those. Since the applicant is seeking interim relief on an urgent basis, it must comply with the provisions of rule 8 of the Rules of this Court. The affidavit must set out the reasons for urgency and why urgent relief is necessary and the reasons why the requirements of the rules were not complied with. The grounds for urgency are set out in paragraphs 57 to 62 of the founding affidavit. The explanation is that on 16 August 2010, the applicant notified its applicant's attorney

of the set down upon receipt same by his office. On 18 August 2010 the applicant's attorney addressed a letter to the CCMA requesting that the matter be removed from the arbitration roll on 13 September 2010, pending the finalisation of the review application. The CCMA responded on 19 August 2010 and advised that an order obtained from this Court would stay the arbitration. The applicant's attorney commenced drafting the application during the afternoon of 23 August 2010. The application was finalised on 27 August 2010. The applicant has not wilfully delayed in the filing of this application and has acted with the urgency in approaching this Court. Having regard to the set down of the matter for arbitration on 13 September 2010, the urgency of the application is axiomatic. The review application was filed with this Court on 18 August 2010. It is trite that the filing of a review unlike an appeal does not stay the enforcement of proceedings at the CCMA or bargaining councils. The applicant must have known that the CCMA after condonation for the late referral was granted that the dispute would be enrolled for arbitration. There is simply no explanation why it waited until the matter was enrolled to bring this application on an urgent basis. It could have applied for this order or a similar one earlier. To launch this application a few days before the arbitration hearing is unacceptable. The applicant's representative contended that the application could not have been brought earlier due to the intervening weekends between when the applicant was notified of the arbitration hearing and instructions were given to him. The intervening weekend is not an excuse for not having launched the application earlier. Since the applicant is seeking condonation for non compliance with the provisions of the rule 8 of the Rules of this Court, it had to explain the delays adequately. It has not done so. The urgency is self created and the matter stands to be struck from the roll for this reason. However, no purpose will be served to strike

the matter from the roll since the application stands to be dismissed for two other reasons.

7. It is trite that review applications brought under section 145 or 158(1)(g) of the LRA must be brought to this Court within six weeks when the ruling or award was served. The review application was filed outside the six-week period. The ruling was received by the applicant on 25 June 2010. The applicant states in the founding papers that the review application was launched on 13 August 2010. This is not correct. The founding affidavit was signed on 12 August 2010. The notice of motion was signed on 13 August 2010. It was filed with this Court on 18 August 2010. It should have been filed on 6 August 2010. It was filed twelve days late. It was served on the respondent on 17 August 2010. There is no application for condonation pending before this Court for the late filing of the review application. The applicant did not file an original founding affidavit with the review application in terms of the provisions of rule 5(3). There is currently no valid review application pending before this Court.
8. It is trite that this Court has jurisdiction in terms of section 158(1)(g) of the LRA to review interlocutory rulings made by commissioners, and is empowered generally by section 158(1)(a)(i) of the LRA to grant urgent interim relief. A worrying trend has developed where parties who are not happy with rulings made by commissioners or arbitrators in uncompleted matters would want to interdict the uncompleted proceedings. This Court may in exceptional cases where a grave injustice might otherwise result or where justice might not by other means be attained, interdict uncompleted proceedings. I share the views and sentiments expressed by Van

Niekerk J in *Trustees for the time being of the National Bioinformatics Network Trust v Jacobson & others* (2009) 30 ILJ 2513 (LC) especially at pages 2516 to 2518. See also the unreported judgment in *Road Accident Fund vs CCMA & others J1779/2010* delivered on 7 September 2010. Two reasons were given by van Niekerk J why the limited basis for intervention in criminal and civil proceedings ought to be extended in uncompleted arbitration proceedings conducted under the auspices of the CCMA and why this Court should be slow to intervene in those proceedings. The first is a policy related reason that it would undermine the informal nature of the system of dispute resolution established by the LRA. The second reason is that to permit applications for review on a piecemeal basis would frustrate the expeditious resolution of labour disputes. In other words, in general terms, justice would be advanced rather than frustrated by permitting CCMA arbitration proceedings to run their course without intervention by this Court. This conclusion was recently underscored in *Commercial Workers Union of SA v Tao Ying Metal Industries & others* (2008) 29 ILJ 2461 (CC) where Ngcobo J (as he then was) stated at paras 62, 63 and 65:

[62] The role of commissioners in resolving labour disputes is set out in s 138(1) of the LRA which provides:

“The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with minimum of legal formalities.”

[63] The LRA introduces a simple, quick, cheap and informal approach to the adjudication of labour disputes. This alternative process is intended to bring about the expeditious resolution of labour disputes. These disputes, by their

very nature, require speedy resolution

[65] *... This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively, commissioners must be allowed a significant measure of latitude in the performance of their functions.”*

9. A commissioner may in terms of section 191(2) of the LRA on good cause shown, permit the employee to refer the dispute to the bargaining council or CCMA outside the 30-day period. It is ironic that the applicant takes issue with the commissioner who had granted condonation to the second respondent whose referral was filed ten days late. The applicant's review application was filed twelve days late without any application for condonation and without filing the original founding affidavit. The second respondent was dismissed from employment on 24 February 2010. He referred a dispute to the CCMA on 22 April 2010 with an application for condonation. The condonation hearing was set down on 18 May 2010. The ruling was served on the applicant on 25 June 2010. The arbitration hearing will take place on 13 September 2010. If the review application proceeds it will in all probability be enrolled for a hearing once all the steps have been followed for a hearing including an application for condonation in June/July 2011. If the review application goes against the applicant, it might want to exercise its right to appeal and this matter might be heard on appeal some time in 2013. There might be further delays.
10. It is trite that the LRA introduces a simple, quick, cheap and informal approach to the adjudication of labour disputes. This alternative process is intended to bring about the

expeditious resolution of labour disputes. These disputes, by their very nature, require speedy resolution. The arbitration hearing is enroled for a hearing on 13 September 2010. This is not one of those exceptional circumstances where this court should intervene by interdicting the arbitration proceedings. The views expressed in *Trustees for the time being of the National Bioinformatics Network Trust* applying equally in the present case.

11. The applicant has failed to establish a *prima facie* right to the relief sought.
12. The application stands to be dismissed. Since the matter is unopposed there is no order as to costs.
13. In the circumstances I make the following order:
 - 13.1 The application is dismissed.
 - 13.2 There is no order as to costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT	:	I I MAHOMED OF EVERSLEDS
FOR RESPONDENTS	:	NO APPEARANCE
DATE OF HEARING	:	7 SEPTEMBER 2010
DATE OF JUDGMENT	:	10 SEPTEMBER 2010