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(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

27/10/2023
DATE

[redacted]
SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J1053/2021

In the matter between:

ALEXCOR SOC LIMITED	**First Applicant**
ALEXCOR RMC JV	**Second Applicant**
MERVYN CARSTENS	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**

Heard: 27 June 2023

Delivered: 27 October 2023 (This judgement was handed down electronically by circulation to the party's legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down is deemed to be 12:00 on 27 October 2023))

JUDGEMENT

DAVE, AJ

Introduction

[1] This is an application to declare a pre-arbitration minute signed by the First Respondent's attorney and the Applicants' erstwhile attorney, void *ab initio*, and therefore unenforceable and accordingly set aside and further directing that a new pre-arbitration conference be held between the Applicant and the First Respondent for the purposes of concluding a "valid" pre-arbitration minute.

[2] The Applicants' case is rooted in the contention that the pre-arbitration minute signed by the Applicant's erstwhile attorney, Mr Feko Myeko (Myeko) (on behalf of his client) is void *ab initio* in that that Myeko did not have the requisite authority to bind the Applicants to the admissions or concessions made in the pre-arbitration minute. In the alternative, the Applicants seek to apply for an order setting aside the pre-arbitration minute on the basis that the minutes do not reflect the true intentions of the parties.

[3] The matrix in this case is novel and complex. Before dealing with the events leading to this application and the various issues, I deal briefly with the issue of condonation in respect of the late filing of the Applicants' replying affidavit.

Condonation

[4] The Applicants delivered a condonation application for the late filing of their replying affidavit in this matter on 29 October 2021.

[5] In Carsten's version, the Applicants' replying affidavit was 35 days late, and on the Applicants' version, 4 weeks late.

[6] Item 11.4.2 of the Labour Court Practice Manual[1] provides that:

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[1] Practice Manual of the Labour Court of South Africa, effective 1 April 2013.

> 'Where the respondent or the applicant has filed its opposing or replying affidavits outside the time period set out in the rules, there is no need to apply for condonation for the late filing of such affidavits unless the party upon whom the affidavits are served files and serves a Notice of Objection to the late filing of the affidavits. The Notice of Objection must be served and filed within 10 days of the receipt of the affidavits after which time the right to object shall lapse.'

[7] Carstens did not serve and file a Notice of Objection referred to above.

[8] The Labour Appeal Court has stated that[2]:

> 'The underlining objective of the Practice Manual is the promotion of the statutory imperative of expeditious dispute resolution. It enforces and gives effect to the rules of the Labour Court and the provisions of the LRA. It is binding on the parties and the Labour Court. The Labour Court does, however, have a residual discretion to apply and interpret the provisions of the Practice Manual, depending on the facts and circumstances of a particular case before the court.'

[9] Despite item 11.4.2, I have considered the application for condonation and in doing so considered the factors to be taken into account as established in the well-known case of *Melane v Santam Insurance Co Ltd*[3] where it was stated that:

> 'the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation thereof, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts.

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[2] *Macsteel Trading Wadeville v Van der Merwe NO & others* (2019) 40 ILJ 798 (LAC); [2018] ZALAC 50 at para 22.
[3] 1962 (4) SA 531 (A); [1962] 4 All SA 442 (A) at 532 C.

> Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked...'

[10] It cannot be said that the Applicants had no prospects of success in their application before this Court, nor is the delay excessive. Whilst the explanation for the delay leaves much to be desired, I am of the view that the matter is important and that the late filing of the replying affidavit would not in my view prejudice Carstens. I consider it in the interests of justice that condonation should be granted.

Background

[11] This matter has, and unfortunately so, a long-winded history. It is nevertheless necessary to consider the events leading up to this application which has, in effect, delayed the swift resolution of the dispute between the parties.

[12] The First Respondent, Mervyn Carstens (Carstens), was the former Chief Executive Officer of the Second Applicant.

[13] Pursuant to a forensic investigation, the Applicants had reason to believe that Carstens was involved in the negligent running of the affairs of the Second Applicant. On or about 4 February 2020, Carstens was placed on a precautionary suspension. Carstens referred an unfair labour practice dispute to the Second Respondent (the CCMA). The CCMA found in favour of Carstens declared his suspension unfair and awarded him compensation (the suspension award). That award has been taken on review by the Applicants.

[14] On 12 May 2020, and before the suspension award was issued, the Applicants enquired of Carstens whether he would be agreeable to a pre-dismissal arbitration in terms of section 188A of the Labour Relations Act[4] (the LRA). Carstens declined the request and insisted on an internal disciplinary hearing.

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[4] Act 66 of 1995, as amended.

[15] On 20 July 2020, the Applicants notified Carstens of the termination of his employment based on various allegations of misconduct and invited Carstens to make representations within 7 days as to why his employment should not be terminated summarily.

[16] Although Carstens replied to the allegations, he persisted that a disciplinary hearing be held. A disciplinary hearing was not held, and Carsten's employment was terminated with immediate effect on 5 August 2020. In consequence, Carstens referred an unfair dismissal dispute to the CCMA (the dismissal dispute).

The impugned pre-arbitration minute

[17] Prior to the set down of the arbitration, the respective attorneys of the parties agreed to a pre-arbitration conference which was to be held by way of correspondence. The Applicants were represented by Myeko and Carstens was represented by his attorney Richard Brown (Brown).

[18] On 15 November 2020 the pre-arbitration minutes were signed by Myeko and by Brown on 16 November 2020.

[19] The arbitration, which was conducted virtually, was set down for 2 days on 25 and 26 November 2020, before Commissioner Lerato Segotsane (Commissioner Segotsane). The matter commenced with the Applicants case on 25 November 2020 but was postponed on 26 November 2020. The arbitration was rescheduled for 8 June 2021 for 3 days.

[20] On 15 March 2021, a new firm of attorneys, Messina Incorporated (Messina Inc.) was appointed for the Applicants. Myeko's mandate had been terminated.

[21] Mr Lemogang Pitsoe (Pitsoe), the Chief Executive Officer of the First Applicant, deposed to the Founding Affidavit in this matter. According to Pitsoe, although he was aware of the set down dates, he was unaware that the arbitration on 25 November 2020 was part heard or that evidence had been led nor was he aware of the existence of the pre-arbitration minute. He

only became aware for the first time of the pre-arbitration minute on 3 June 2020. He and the Applicants' newly appointed attorneys, Messina Inc., were under the impression that the arbitration set down on 25 November 2020 was postponed without evidence being led.

[22] According to Pitsoe, the signed pre-arbitration minute was not concluded on his authority and it recorded incorrect information. For various reasons, the arbitration that was set down for 8 June 2021 was postponed to 26 and 27 July 2021.

[23] Pitsoe instructed Messina Inc. to request Carstens to agree to terminate the pre-arbitration minute and engage in a further pre-arbitration conference in order to address the alleged inaccuracies in the existing minute. In addition, the Applicants requested the CCMA to direct that the parties hold a further pre-arbitration conference to address and clarify the inaccuracies in the minutes.

[24] Despite several attempts by the Applicants to persuade Carstens to agree to terminate the signed pre-arbitration minute and hold a new pre-arbitration conference, Carstens refused to agree. In this regard, the Applicants' contention was that if Carstens agreed to the termination of the pre-arbitration minute, it would allow the parties to agree to accurate and mandated minutes which would assist in curtailing and/or highlighting the issues in dispute in respect of the upcoming arbitration on 27 July 2021. However, Carstens' refusal is based on the fact that the arbitration hearing already commenced with evidence led by a witness for the Applicants, namely, Ms Shokie Bopape (Bopape) who had given evidence based on what was set out in the signed pre-arbitration minute and that she had been cross-examined on the understanding of what had been agreed to beforehand. Furthermore, Cartens was not satisfied with the reasons given by the Applicants' for wanting to change the pre-arbitration minute.

[25] The CCMA responded to the Applicants' request with the following:

'Our office has noted that you requested to hold a pre-arb conference as the previous one was not competently done. In light of that, you need to be reminded that the tardiness of your client's previous attorneys cannot be used as an excuse with regard to this matter and as the matter raised procedural aspects to be determined in an arbitration hearing such preliminary issue may be raised before the presiding commissioner for determination as the other party has the right to respond or oppose your request.'

[26] Pitsoe's claim that he knew nothing of the events of the arbitration on 25 and 26 November 2020 and of the existence of a pre-arbitration proceedings or signed minutes is puzzling, to say the least.

Applicants' preliminary points raised at the arbitration hearing set down on 27 July 2021

[27] When the parties met on 27 July 2021 before Commissioner Segotsane, the Applicants raised a preliminary point in terms of which it requested that Commissioner Segotsane direct that the signed pre-arbitration minute be set aside and that a fresh pre-arbitration conference be held where new, accurate and mandated minutes could be agreed to which, it argued, would serve to aid the arbitration, rather than hinder it. This request which was made by Mr Weygertze of Messina Inc. in the form of oral submissions, was not supported by an affidavit by Pitsoe or any other person from the Applicants. The request was opposed by Carstens. Commissioner Segotsane dismissed the application.

[28] The Applicants then moved a second application to recall Bopape (who had already given evidence and cross-examined) as a witness. The purpose of wanting to recall Bopape was to clear up inaccuracies in her evidence which, according to the Applicants, was riddled with inaccurate responses which responses would severely prejudice the Second Applicant's ability to successfully oppose Carsten's unfair dismissal referral. Commissioner Segotsane dismissed the second application.

[29] The matter was postponed to the following day. When the matter resumed on 28 July 2021, Pitsoe instructed Messina Inc. to apply for a postponement to

provide Commissioner Segotsane time to submit written reasons for dismissing the two applications that were argued before her on 27 July 2021. The purpose of the postponement application was to allow Pitsoe and the Applicants' legal team to consider the rulings and decide whether or not there were grounds to launch a review application in terms of section 158(1)(g) of the LRA. Commissioner Segotsane dismissed the postponement application.

The recusal ruling

[30] Dissatisfied with Commissioner Segotsane's rulings, the Applicants applied for her recusal. Before receiving the recusal ruling, the Applicants informed Carstens that they intended to review all of Commissioner Segotsane's rulings irrespective of the outcome of the recusal application.

[31] On 10 August 2020, and pursuant to the recusal application, Commissioner Segotsane recused herself.

[32] On 17 August 2021, Commissioner Tsietsi Chakane, the Regional Senior Commissioner (Commissioner Chakane) sent the parties' legal representatives an email in which he informed the parties that in light of Commissioner Segotsane's recusal, the matter will be heard *de novo* and that the recusal ruling overrides the process in its entirety. His email reads as follows:

> 'Dear Marcel
>
> We acknowledge receipt of your email and bears the following reference.
>
> I had been advised that rulings were made on spot during the hearing and such been intended to be recorded on the award once the matter is finalised. However, I had been informed that a recusal application was made and subsequent to that the presiding Commissioner recused herself from the proceedings. Therefore, our understanding is that the matter will be heard de novo and the recusal ruling override (sic) the process in its entirety.
>
> We would set down the matter before a new commissioner and your request for senior commissioner would be taken into consideration. In light of the

above no ruling would be issued and if you intend to exercise your rights to approach the Labour Court feel free to do so and our office would provide the records of the previous hearing as contemplated in terms of rule 7A of the Labour Court.'

[33] The arbitration hearing was to be set down on a new date before a different Commissioner. When the matter came before the new commissioner (Oslo) the arbitration was ultimately postponed pending the outcome of this application.

Analysis

Consequences of Commissioner Segotsane's recusal ruling

[34] According to the Applicants, the effect of Commissioner Chakane's email was that Commissioner Segotsane's rulings would fall away.

[35] However, according to Carstens, if the Applicants are correct in their interpretation of Commissioner Chakane's email, it would obviate the necessity for the application before this Court in that the very same application would be brought afresh before a newly appointed Commissioner in the arbitration proceedings.

[36] The Applicants saw fit to attack the signed pre-arbitration minute at the time of raising its preliminary point before Commissioner Segotsane, and not before this Court. Had Commissioner Segotsane ruled in favour of setting aside the pre-arbitration minute or directing a further pre-arbitration conference, the Applicants would have self-evidently accepted that ruling. In both instances, the result would have been the holding of another pre-arbitration conference between the parties and presumably a different pre-arbitration minute, unless Carstens sought to review that ruling in which case he would have to deal with the impediment imposed by section 158(1B)[5] of the LRA.

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[5] Section 158(1B) of the LRA provides: "*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*

[37] I must agree with Carstens. If it is so that the effect of Commissioner Chakane's email is the falling away of Commissioner Segotsane's ruling in respect of the pre-arbitration minute, it would follow that the Applicant would continue as it did before, i.e. by raising the same preliminary point with the new Commissioner, as it had with Commissioner Segotsane. In fact this is exactly what the Applicants did when the new Commissioner, Osh, was appointed but then withdrew the point, to rather bring the same question before this Court in its current application.

[38] In her recusal ruling, Commissioner Segotsane found that apprehension of bias had not been established. The reason she recused herself was based on her not wanting her objectivity to be scrutinized and questioned through the arbitration process and she further stated in her recusal ruling that she had ruled against the Applicants 3 times, "correctly so".

[39] The question is what impact does Commissioner's Segotsane's recusal have in relation to her ruling on pre-arbitration minute.

[40] On this point, the Applicants rely on the decision in *Sondolo IT (Pty) Limited v Howes and Others* (*Sondolo*)[6]. This case dealt with the question of whether a commissioner is bound by the prior ruling/s of another commissioner in the same matter. The Labour Court in *Sondolo* distinguished between jurisdictional rulings and rulings which pertain to the substantive merits of the dispute and held that jurisdictional issues in the CCMA such as condonation rulings by a previous commissioner must stand.

[41] The Court in *Sondolo* held that:

> 'It is clear from the record that Commissioner Zwane was fully seized with the matter when he ruled on the application before him and in making the ruling he entered into the arena of the substantive merits of the dismissal dispute. For some or other reason, Commissioner Zwane, however, decided not to

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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".

[6] [2009] 6 BLLR 499 (LC); (2009) 30 ILJ 1954 (LC).

proceed with the substantive merits of the dispute but to postpone it to another commissioner. The LRA does not give guidance on what would happen in the event a commissioner is unable to proceed with the merits of the arbitration whether as a result of death, retirement or for any other reason (as in this case) or where a commissioner recuses himself from the process. Section 17 of the Supreme Court Act 59 of 1959, provides in respect of proceedings in the High Court that, if at any stage during the hearing of any matter by a Full Court any judge dies or retires or is otherwise incapable of acting or is absent, the remaining judges (provided that they constitute the majority of the judges before whom the proceedings commenced) will proceed with the matter. If only a minority of the judges or if only one judge remains, the hearing shall commence *de novo* unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of the remaining judges. This will be the case where a judge becomes unavailable at any stage during the proceedings whether at the beginning or during the hearing or even after the conclusion of argument and after judgment has been reserved (see *Automated Business Systems (Pty) Ltd v Commissioner for Inland Revenue* 1986 (2) SA 645 (T) at 655D – 656A). Where there is only one presiding judge and that judge is unable to proceed with the trial, the trial will resume *de novo* before another judge. Where a judicial officer in civil proceedings recuses himself or herself he or she becomes *functus officio* and can take no further part in the case. In fact, the proceedings become a nullity and the matter will be postponed to another judicial officer for a *de novo* hearing. Unless the parties agree that the succeeding judicial officer may have regard to the record of the evidence that had been adduced in the first trial, the trial will commence *de novo* (see in general Erasmus, *Superior Court Practice* at A1-14G). A similar rule applies in criminal matters. Where a magistrate, for example, retires or resigns, the accused will not be entitled to a demand a verdict but it is for the prosecutor to decide whether it wishes to proceed *de novo*. In *S v Suliman* 1969 (2) SA 385 (A), the Appellate Division also confirmed that an accused may be tried *de novo* where the Judge dies during the criminal trial.'[7]

[42] The first issue to determine is whether or not Commissioner Segotsane's ruling in respect of the pre-arbitration minute stands in the face of her recusal.

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[7] Ibid at para 14.

[43] The basis of the Applicants' recusal application was that she was biased. The Labour Appeal Court in *Sasol Infrachem v Sefafe and others*[8] (*Infrachem*), which was heard after *Sondolo*, dealt with the duty of an arbitrator to disclose his/her interest in the matter and the impact of a refusal to recuse him/herself. The Court held that:

> 'On the question whether the entire proceedings are vitiated by bias, the principle to be deducted from the cases, including *SARFU*, *Ndimeni* and others, is as follows. If it is held that the arbitrator, or the judicial officer, ought to have recused himself, or herself, at the outset then the entire proceedings before him or her are vitiated by the failure to recuse himself or herself. It has been held that continuing to sit in proceedings in which the presiding officer ought to have recused himself or herself at the outset constitutes an irregularity for every minute of the proceedings in which the presiding officer or arbitrator continues to sit. In *Ndimeni* the judge did not disclose his interest in one of the litigants. On appeal the Supreme Court of Appeal held that he ought to have disclosed his interest and that his failure to do so was an irregularity.'[9]

[44] The Court in *Infrachem* referred to other cases where it held that:

> 'However, in other cases of bias, the proceedings are not necessarily entirely vitiated as has been consistently held in *inter alia*, *SARFU*, *Ndimeni*, *Rondalia* and *Hall*...'[10]

[45] The Court further held that[11]:

> 'To summarise, in cases where it was held that the presiding officer ought to have recused himself or herself at the outset, but failed to do so, the entire proceedings before the arbitrator or presiding officer are a nullity...'

[46] It would thus follow that where the arbitrator does recuse him or herself, this does not consequently or necessarily vitiate the entire proceedings, in this case, Commissioner Segotsane's ruling regarding pre-arbitration minutes.

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[8] [2015] 2 BLLR 115 (LAC); (2015) 36 ILJ 655 (LAC).
[9] Ibid at para 49.
[10] Ibid at para 51.
[11] Ibid at para 54.

Commissioner Segotsane did recuse herself for the reasons she advanced. Considering *Infrachem* supra, I therefore do not see a basis for her ruling in respect of the pre-arbitration minute becoming a nullity. In so far as the ruling relating to Bopape is concerned, there lies a clear distinction. Unlike her ruling on the pre-trial minute, the *de novo* principle is intrinsically enforced by the consequence of Commissioner Segotsane's recusal i.e. the "evidence" in the arbitration starts afresh. The impact of the *de novo* principle causes the distinction. If the Applicants were to decide for Bopape to give her testimony again in a *de novo* arbitration, the Applicants would have to be faced with a record of her testimony already given. This is an inevitable consequence of a *de novo* arbitration in the circumstances of the Commissioner's recusal.

Relevance of sections 145, 158(1)(g) and 158(1B) of the LRA

[47] With the above in mind, and based on what is set out below, I am at odds with *Sondolo*. A ruling issued by a Commissioner under the auspices of the CCMA can only be set aside on review by this Court in terms of section 145 of the LRA, or as in the present case, in terms of section 158(1)(g) of the LRA. Conjunctively, and outside of the *de novo* principle, the operation of the doctrine of *functus officio* is instructive. In this regard, it is trite that a decision once made which is final, cannot be revisited in the absence of statutory authority. The invalidity of an administrative act does not detract from the legal consequences thereof which are binding until varied or set aside by a court of law. *"Hence, an administrator will be functus officio once a final decision has been made and will not be entitled to revoke the decision in the absence of statutory authority. An exception to this would be where the administrator lacked the competence to perform the act in the first place, or where the action was fraudulently performed on the basis that fraud unravels everything".*[12]

[48] It is also necessary to consider the impact of Commissioner Chakane's email. His email does not vitiate Commissioner Segotsane's ruling in that it does not have the reach in law to undo it. Commissioner Chakane's email can do no

[12] Hoexter *Administrative Law in South Africa* 2nd edition (Juta & Co., 2007) at para 280.

more than what would be required by a *de novo* hearing, i.e. the evidence in the arbitration to start afresh. As alluded to earlier, this would naturally include the fresh evidence of Bopape which is something different to a request to set aside an agreement in the form of a pre-arbitration minute.

[49] In so far as section 144 of the LRA is concerned, the section allows for any Commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the director for that purpose, to vary or rescind a ruling, there are certain prescribed precepts that must exist for this to happen[13] and in casu, these precepts play no role. This leaves the Applicants with one remedy, namely, to review the ruling in respect of the pre-arbitration minute. The Applicants were aware of this remedy as they had advised Carstens that they intended to do just that.

[50] It is for the reasons referred to above, that Commissioner Segotsane's ruling in respect of the signed pre-arbitration minute must stand. Whether her ruling is right or wrong would be a question for this Court to consider and not the CCMA. This is by virtue of the powers of this Court versus the powers of the CCMA. However, the Applicants are not seeking to review Commissioner Segotsane's ruling in the present application. What is before this Court is whether the signed pre-arbitration minute should be set aside on the basis that it is void *ab initio* in that Myeko did not have the requisite authority to bind the Applicants to the admissions or concessions made in the pre-arbitration minute, in the alternative, to apply for an order setting aside the pre-arbitration minutes on the basis that the minutes do not reflect the true intentions of the parties. *Infrachem*, supra, disposes of the application of the principle of void *ab initio* in the circumstances which are applicable in this matter.

[13] Section 144: "*Any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the director for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling—*
(a) erroneously sought or erroneously made in the absence of any party affected by that award;
(b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission;
(c) granted as a result of a mistake common to the parties to the proceedings; or
(d) made in the absence of any party, on good cause shown".

[51] For this Court to grant relief sought by the Applicants would mean that Commissioner's Segotsane's ruling on the pre-arbitration minute is to be disregarded. In my view, to do so would severely undermine and defeat the integrity of the CCMA and rulings issued by Commissioners on such like points. It would mean that a party who is dissatisfied with a CCMA ruling, could side step sections 145 and 158 of the LRA. Further to this, there is an obvious intention behind the inclusion of section 158(B) of the LRA, i.e. to allow the completion of an arbitration (without interruption) which is what the LRA intends, i.e. requires swift resolution of disputes.

[52] A Commissioner should thus be at liberty to make a ruling on an issue that requires a ruling during the arbitration process and in such instance the proceedings should be allowed to reach a rapid conclusion without the interruption of a review application, which is exactly what is intended by section 158(1B). Once the arbitration is concluded, a dissatisfied party thereafter may invoke the rights accorded in terms of sections 145 and 158(1)(g) of the LRA.

[53] What the Applicants seek from this Court is to ignore the said ruling and override it in the form of a declarator. In my view, this is not a suitable approach in the face of the provisions of sections 145, 158(1)(g) and 158(1B) of the LRA.

Conclusion

[54] Part B of the Notice of motion is to direct that certain specified paragraphs in the pre-arbitration minute be struck and that a further pre-arbitration conference be held between the parties. The application that was made on 27 July 2021 before Commissioner Segotsane in respect of the pre-trail minute was to direct that it be set aside and a fresh pre-arbitration conference held. The Applicants now ask this Court to override Commissioner Segotsane's ruling, which I have found to be improper in the circumstances of this case. If Part A of the Notice of Motion is dismissed, its impact on Part B is axiomatic. In this context, it would not make sense to grant Part B if Part A is dismissed.

[55] I have considered other various technical points raised in this matter and am of the view that these ought to be raised and addressed by the CCMA should these be pursued.

[56] On the issue of costs, I am mindful that Carstens has lost his job and is an individual involved in litigation. However, with the novelty of this matter, I do not believe that the application brought was wholly unreasonable. It is thus my view that the ordinary principle in relation to costs in this Court should apply, i.e. that costs do not follow the result.

[57] In the premises, the following order is made:

Order

1. Condonation for the late filing of the Applicant's replying affidavit is granted with no order as to costs.
2. The main application (Part A and Part B) is dismissed.
3. The CCMA is directed to set the matter down for continuation of the arbitration on an expedited basis.
4. There is no order as to costs.

[redacted]

L Dave

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicants:	Advocate BM Jackson
Instructed by:	Messina Incorporated
For the First Respondent:	Mr Richard Brown
Instructed by:	Herold Gie Attorneys