REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 68/13

In the matter between:

NEHAWU OBO KGEKWANE **Appellant**

and

THE DEPARTMENT OF DEVELOPMENT PLANNING

AND LOCAL GOVERNMENT, GAUTENG **Respondent**

Heard: **19 November 2014**

Delivered: **15 January 2015**

Summary: Review of arbitration award – termination of services by operation of law in terms of section 17(5)(a)(i) of the PSA – employee services terminated by operation of law – employee referring unfair dismissal dispute to the CCMA – employee later referred same dispute to bargaining council with jurisdiction- bargaining council ruling that it lacks jurisdiction – employee not reviewing jurisdictional ruling - employee requesting arbitration at the CCMA – employer contending jurisdiction of the CCMA and that matter already dealt with by the bargaining council – commissioner finding that CCMA not bound by bargaining council ruling and reinstating employee. Labour Court substituting arbitration award with compensation. Appeal and cross-appeal – issue of jurisdiction dispositive of the appeal – application of section 147(2)(3) of the LRA- once employee referred the dispute to the bargaining council, referral to CCMA lapses - employee may not refer the same dispute to the CCMA and ask the CCMA to exercise its

powers under s 147(2) or (3) of the LRA. Hearing to the CCMA an affront to the rule against collateral challenges and is estopped by the *exceptio res judicata*. Cross-appeal upheld – Labour Court judgment set aside and substituted with the order that the arbitration award is reviewed and set aside.

CORAM: MUSI JA, MURPHY *ET* SETILOANE AJJA

JUDGMENT

KATHREE-SETILOANE AJA

[1] This judgment concerns both an appeal,[1] and a cross-appeal against the judgment and order of the Labour Court (Bhoola J) dated 25 March 2013 in which, it: (a) upheld the arbitration award of the Commissioner made under the auspices of the Commission for Conciliation, Mediation and Arbitration ("the CCMA") on the merits; (b) reviewed and set aside the relief awarded by it; and (c) substituted it with the following order:

> 'The applicant is ordered to pay the third respondent the sum of R152 861.92, which is an amount equivalent to her salary of R9553.87 for a period of 16 months as compensation for her unfair dismissal.
>
> Each party is to pay its own costs.'

[2] On 30 August 2001, the respondent provided the appellant with a letter in which it informed her that she had been discharged pursuant to s 17(5)(a)(i)[2] of the Public Service Act, 103 of 1994 ("the PSA") with effect from 19 June 2001. Section 17(5)(a)(i) of the PSA provided that an officer in the public service who without the permission of the Head of Department absents herself from official duties for a period exceeding one calendar month "shall be deemed to have been discharged" from the service on account of the misconduct. The letter spawned a host of litigation before various tribunals and courts of which the present appeal is the latest chapter.

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[1] Leave to appeal and to cross-appeal were granted by Lagrange J.
[2] Section 17(5) of the PSA is now replaced by s 17(3) of the PSA.

[3] On 31 August 2001, the appellant referred an unfair dismissal dispute to the CCMA. The matter was set down for conciliation on 26 September 2001, and a certificate of non- resolution was issued. Thereafter, on 27 September 2001, the appellant referred the dispute to arbitration at the CCMA. The arbitration hearing was scheduled for 30 January 2002, but did not proceed. Instead, on 13 October 2001, the appellant referred a second unfair dismissal dispute (arising from the same facts) to the General Public Service Sectoral Bargaining Council ("the GPSSBC") for conciliation. It was common cause at this stage that the GPSSBC (and not the CCMA) had jurisdiction over the parties. It was, therefore, agreed between the appellant (who was at that stage represented by NEHAWU) and the respondent that she would withdraw the referral to the CCMA and proceed with the matter at the GPSSBC. As things turned out, however, the matter was never withdrawn at the CCMA.

[4] The matter then proceeded to the GPSSBC. At the conciliation hearing before the GPSSBC, the respondent argued that the bargaining council had no jurisdiction to resolve the dispute because the appellant had not been dismissed as a result of any decision, taken by the employer, as contemplated in s 186 of the Labour Relations Act, 66 of 1995 ("the LRA") but that she was dismissed by operation of law as contemplated in terms of s 17(5)(a)(i) of the PSA. Ms Skosana, the arbitrator appointed by the GPSSBC to deal with the matter, upheld the respondent's argument and, on 15 April 2002, ruled that because the appellant had been dismissed pursuant to s 17(5)(c) of the PSA, the bargaining council did not have jurisdiction over the dispute, and the appellant could pursue the matter in terms of s 17(5)(b) of the PSA. Section 17(5)(b) of the PSA empowers the relevant executing authority (who in this case was the MEC) "on good cause shown" to approve the reinstatement of an employee, who has been deemed to be dismissed in terms of s 17(5)(a) thereof, in his or her former or any other post or position.

[5] Ms Skosana's ruling was never taken on review to the Labour Court. Instead, and after a delay of almost two years, the appellant applied to the

MEC for Development Planning and Local Government for reinstatement in terms of s 17(5)(b) of the PSA. The hearing was held on 19 February 2004, and on 24 February 2004 the MEC found that the appellant had not shown good cause and refused to reinstate her pursuant to s 17(5)(a) of the PSA.

[6] On 21 March 2004, the appellant, aggrieved by the outcome of that process, instituted proceedings in the Labour Court under case number J432/04 in which she sought to review and set aside the decision of the MEC "in the exercise of his discretion in terms of section 17(5)(a)(i) of the Public Service Act No. 103 of 1994" and also his decision to refuse reinstatement under s 17(5)(b) of the PSA. A full set of papers was exchanged in that matter, but instead of proceeding to have the matter determined, the respondent withdrew the application, terminated the mandate of her then attorneys (Peers Attorneys), appointed new attorneys (John Broido Attorneys) and decided to follow a different route. In October 2004, the appellant, now represented by John Broido Attorneys, applied to have the matter set down for arbitration at the CCMA.

[7] On 21 October 2004, the parties held a pre-arbitration conference and prepared a minute. It was agreed that the respondent would *in limine* challenge the jurisdiction of the CCMA to consider the matter *inter alia* because: (a) the matter had been referred to the CCMA but was, by agreement, removed and referred to the GPSSBC which ruled that the appellant was dismissed by operation of the law; (b) the GPSSBC and not the CCMA had jurisdiction as the parties fell within the registered scope of the GPSSBC; and (c) the CCMA had no power to determine whether the appellant had in fact been dismissed by operation of the law. At the arbitration proceedings, the respondent raised a further *in limine* point, namely that the appellant was required to apply for condonation for the delay in applying for the dispute before the CCMA to be set down for hearing, which it had not done.

[8] On 9 November 2004, the Commissioner made a ruling on the first *in limine* jurisdictional point. He ruled that:

> 'It is my opinion that I am not bound by the ruling of the panellist from the GPSSBC. The dispute before me had never been adjudicated upon by any forum save for the ruling by the GPSSBC that it lacks jurisdiction.'

On the second point *in limine*, the Commissioner ruled that whether the appellant had been dismissed unfairly in terms of s 186 of the LRA or by operation of the law for absenting herself for duty as contemplated in s 17(5)(a) of the PSA:

> '[Is] a question of law that can only be reached after all the evidence has been led and the trier of fact can determine on a balance of probability what really transpired regarding the dismissal or termination of the services of the applicant. This cannot be determined on papers as a point *in limine*.'

In relation to the question of condonation, the Commissioner found that "the allocation of a date for hearing of an arbitration lies with the CCMA and if the CCMA delays in allocating a date, the applicant cannot and should not be liable".

[9] Having decided that the CCMA had jurisdiction, and that he was not bound by the ruling of the GPSSBC, the Commissioner proceeded to hear testimony and argument, and made an award *inter alia* reinstating the appellant to her former position on terms and conditions no less favourable than those which she had previously enjoyed, and ordering the respondent to pay the appellant an amount of R439 478.02 being the equivalent of 46 months' remuneration. The Commissioner's reasons for making this award are as follows:

> 'In the circumstances I find that the respondent has not discharged the onus of proving that applicant was dismissed from her employment by operation of law in terms of section 17(5)(a) of the Public Service Act and find that the respondent had no basis in law for dismissing the applicant and consequently the applicant's dismissal was both procedurally and substantively unfair.'

[10] Dissatisfied with the arbitration award, the respondent brought an application to review and set aside both the jurisdictional ruling and the

arbitration award. The respondent challenged the arbitration award on the following basis: (a) A crucial aspect of the Commissioner's findings was based upon the respondent having withheld certain documents from the CCMA when that possibility was never suggested to the respondent's witnesses; (b) The Commissioner had found that the appellant's reliance upon s 17(5)(a) of the PSA was a ruse to cover up the true reasons for the respondent's dismissal, but the Commissioner had himself prevented the appellant (who raised this possibility) from leading any further evidence to prove the ruse. In so doing , he had prevented this issue from being ventilated; (c) The Commissioner had awarded the appellant 46 months' back-pay calculated from the date on which her services were terminated without taking into account the fact that there was a delay of approximately two and half years between the date when the dispute was initially referred to the CCMA and the date when the appellant applied for the matter to be arbitrated; (d) The Commissioner had misconducted himself by descending into the arena and had so clouded his judgment, and had also demonstrated bias or the appearance of bias. In relation to this aspect the respondent sought costs against the Commissioner *de bonis propriis*. The respondent challenged the jurisdictional ruling on the following basis: (a) The dispute fell within the jurisdiction of the GPSSBC and not within the jurisdiction of the CCMA and accordingly the CCMA lacked jurisdiction to determine the dispute; (b) The GPSSBC had in any event, already determined the dispute; (c) The appellant had removed the matter which was before the CCMA and had transferred it to the GPSSBC and was not entitled to return the matter to the CCMA thereafter; and (d) In any event, the appellant was obliged to apply for condonation before she could "return" the matter to the CCMA. The respondent in accordance with the principle in the *SA Rugby Players Association*[3] case also sought an order declaring that the CCMA did not have jurisdiction over the matter.

[11] The Labour Court did not consider the jurisdictional issue. In rejecting the respondent's reliance upon the jurisdictional ground of review, the Labour

[3] *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd; SA Rugby Players (Pty) Ltd v SA Rugby Players Union and Another* (2008) 29 ILJ 2281 (LAC) at paras 39 to 41.

Court found that the respondent "elected" not to pursue it "at the time". With regard to the argument that the Commissioner misconducted himself, the Labour Court held that "although it would appear that the Commissioner might have overstepped the bounds", the respondent's argument could not "be sustained" and that there was "no merit in the submissions". It reasoned that:

> '[T]here was no indication that [the respondent] had raised [these] concerns at the time with the commissioner or placed [such] concerns that this overly inquisitorial approach constituted a reviewable irregularity'

The Labour Court went on to explain that despite some of the interventions of the Commissioner being "inappropriate", it did not "in itself constitute sufficient grounds for review".

[12] In regard to the award of compensation, which the Commissioner made without having regard to the appellant's delay in referring the matter to arbitration, the Labour Court found that the reasoning of the Commissioner was not supported by the evidence which had been placed before the Commissioner. The Labour Court held, however, that "no point would be served by remitting the matter for the Commissioner to consider whether condonation for the delay of more than two years should be granted". The Labour Court found, in this regard, that the delay was so inordinate that "it must have been apparent that reinstatement in these circumstances (at that stage eight years after the dismissal) was an inappropriate remedy not only given the public finance implications". That being the case, the Labour Court set aside the Commissioner's award for the reinstatement of the appellant and payment of 46 month's compensation, and substituted it with an award of compensation equivalent to 16 months remuneration. The Labour Court also set aside the costs order made in the appellant's favour, and replaced it with an order that each party pays its own costs.

[13] The appellant only appeals against the compensation and costs orders of the Labour Court. The respondent, on the other hand, cross-appeals, against the failure of the Labour Court to deal with the jurisdictional ground

of review on the basis that the respondent had elected not to pursue the point, and its finding that the Commissioner did not misconduct himself by demonstrating bias or overstepping the bounds.

[14] I turn first to consider the jurisdictional ground of appeal, because as conceded by counsel for the appellant at the hearing of the appeal, a finding in the respondent's favour will be dispositive of the issues on appeal and cross-appeal. As indicated, at the arbitration proceedings, the respondent challenged the jurisdiction of the CCMA on the basis that the CCMA had no power to determine a dispute which had been referred to the bargaining council having jurisdiction (the GPSSBC), and had run its full course before that tribunal.

[15] It was common cause between the parties that the dispute fell within the jurisdiction of the GPSSBC in terms of s 191 of the LRA and the appellant, on advice of the union, referred the dispute to the GPSSBC. Section 191(1)(a) of the LRA provides that a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice may be referred by the dismissed employee, or the employee alleging the unfair labour practice, to a bargaining council if the parties to the dispute fall within the registered scope of the council, or to the CCMA if no bargaining council has jurisdiction.[4] That said, the dispute concerning jurisdiction is not, as

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[4] See also: Subsections (3) and (4) of s 51 of the LRA, which make provision for the dispute resolution functions of bargaining councils provide:

'(3) If a *dispute* is referred to a *council* in terms of this *Act* [footnote 11 omitted] and any party to that *dispute* is not a party to that *council*, the *council* must attempt to resolve the *dispute*−
(a) through conciliation; and
(b) if the *dispute* remains unresolved after conciliation, the *council* must arbitrate the *dispute* if−
(i) This *Act* requires arbitration and any party to the *dispute* has requested that it be resolved through arbitration; or
(ii) all the parties to the *dispute* consent to the arbitration under the auspices of the *council*.
(4) If one or more of the parties to a *dispute* that has been referred to the *council* do not fall within the registered scope of that *council* it must, refer the *dispute* to the Commission.'
Footnote 11 to subsection 3 of s 51 of the LRA provides in relevant part:
'The following disputes contemplated by subsection (3) must be referred to a council: disputes about the interpretation or application of the provisions of Chapter II (see section 9); disputes that form the subject matter of a proposed statutory council or lock-out (see section 64(1); disputes in essential services (see section 74); disputes about unfair dismissals (see section 191); disputes about severance pay (see section 196); and disputes about unfair labour practices (see item 2 in Schedule 7).'

erroneously assumed by both the appellant and the Labour Court, about whether the CCMA has jurisdiction to determine a dispute which falls within the jurisdiction of the bargaining council, as the weight of authority suggests[5] that s 147(2) and (3) of the LRA empowers the CCMA to exercise jurisdiction even where a bargaining council in fact has jurisdiction. This matter is, rather, concerned with the question of whether the CCMA has jurisdiction to determine a dispute where that very dispute has already been referred to a bargaining council having jurisdiction and that dispute has already been finally determined by that tribunal.

[16] Section 147 of the LRA makes provision for the performance of dispute resolution functions by the CCMA in exceptional circumstances, in order to avoid delays that might otherwise be caused by jurisdictional disputes. Section 147 of the LRA, accordingly, confers a choice on the CCMA whether to resolve a dispute that has been erroneously referred to it or whether to re-direct it to the proper forum[6]. Subsections (2) and (3) of s 147 of the LRA, which are pertinent to the jurisdictional question provide:

> '(2) (a) If at any stage after a *dispute* has been referred to the Commission, it becomes apparent that the parties to the *dispute* are parties to a *council*, the Commission may –
>
> (i) refer the *dispute* to the *council* for resolution; or
> (ii) appoint a commissioner or, if one has been appointed, confirm the appointment of the commissioner, to resolve the *dispute* in terms of *this Act*.
>
> (b)...
>
> (3) (a) If at any stage after a *dispute* has been referred to the Commission, it becomes apparent that the parties to the *dispute* fall within the *registered scope of a council* and that one or more parties to the *dispute* are not parties to the *council*, the Commission may –

[5] *Oosthuizen v CAN Mining & Engineering Supplies BJ* [1999] 4 BLLR 379 (LC); *Franken v Metal & Engineering Industries Bargining Council and Others* (2000) 21 ILJ 1791 (LC); *CWIU and Another v Ryan and Others* [2001] 3 BLLR 337 (LC); *Magic Company v CCMA and Others* (2005) 26 ILJ 271 (LC)

[6] *Oosthuizen v CAN Mining & Engineering Supplies* BJ (above) at para 18.

(i) refer the *dispute* to the *council* for resolution; or

(ii) appoint a commissioner or, if one has been appointed, confirm the appointment of the commissioner, to resolve the *dispute* in terms of this Act.

(b)… .'

[17] In terms of s 147(2) and (3) of the LRA respectively, if at any stage after a dispute has been referred to the CCMA, it becomes apparent (or evident) that the parties to the dispute are parties to a bargaining council or that the parties to a dispute will fall within the registered scope of a bargaining council but one or more of the parties are not parties to that council, the CCMA may either refer the dispute to that bargaining council for resolution or appoint a commissioner, or if one has already been appointed, confirm the appointment of such commissioner to resolve the dispute.

[18] Although the LRA does not set out guidelines that inform a referral in terms of either s 147(2) and (3) of the LRA, our courts have over time developed principles that may be of some guidance. The first is that forum shopping is looked upon with disdain. Thus in the context of referrals in terms of s 147(2) and (3) of the LRA, the incorrect referral must be *bona fide* and not an exercise in forum shopping for a "sympathetic or preferred" forum.[7] The second principle is that where a dispute is referred to the CCMA, the matter may not proceed before the CCMA once it is discovered that the parties are parties to a bargaining council or fall within the registered scope of a bargaining council, until the options set out in s 147(2) and (3) have been exercised by the CCMA.[8] The third principle is that once this is ascertained, it is then for the CCMA or its delegate (and not the commissioner hearing the matter when this was ascertained) to determine whether to refer the matter to the bargaining council or to appoint a commissioner to determine

[7] *CWIU v Ryan* [2001] 3 BLLR 337 (LC) at para 39.
[8] *Oosthuizen v CAN Mining* (above) at paras 17-18; *Franken v Metal & Engineering Bargaining Council,* (above) at 1792I read with 1793A.

the dispute or if one has already been appointed, to confirm his or her appointment.[9]

[19] The fourth principle is that where the CCMA elects to appoint a commissioner to arbitrate the dispute or to confirm the appointment of one who has already been appointed, the matter may then proceed as the CCMA has jurisdiction to determine that dispute. However, where the CCMA elects to refer the matter to the bargaining council, it ceases to have jurisdiction over the matter and the dispute which is before it therefore lapses. Thus in *Oosthuizen v Can Mining and Engineering Supplies BJ,*[10] which concerned a situation in which the Labour Court had to consider an *in limine* objection to its jurisdiction on the grounds that the same dispute was before the CCMA, the Labour Court in finding that s 147 confers a choice on the CCMA whether to resolve a dispute erroneously referred to it or whether to re-direct it to the proper forum reasoned as follows:

> '[20] When the arbitration hearing was suspended, the applicant [the employee] was confronted with two choices. He could either follow what he (or his advisers) deemed to be the correct route − that is, refer the dispute to the bargaining council − or revert to the CCMA and request that the suspended arbitration be resumed with. He chose the former course, had he chosen the latter, the CCMA would have had to consider whether to refer the dispute to the council or whether to appoint a commissioner, or confirm the Commissioner Roopa, to arbitrate. In my view the applicant cannot in the circumstances be blamed for re-directing the referral to what he (and his advisers) had by then come to believe was the correct body. Nor in my view can they be blamed for proceeding with the application in this Court after the bargaining council designated the dismissal as one for operational requirements…
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> [21] In the final analysis, the applicant has referred the dispute to this Court as he would have been free to do if the CCMA had considered the matter and characterised his alleged dismissal as a retrenchment. The respondent now wishes to hold the applicant to arbitration by the CCMA, whether by direct order of this Court, or by the revival of the dormant

[9] *Oosthuizen* supra at par's 17-18; *Magic Company v CCMA* supra at 2751.
[10] [1999] 4 BLLR 379 (LC) at para 18.

> arbitration proceedings, which must be the inevitable consequence if the application is dismissed on the basis of the respondent's present contention. Apart from being wastefully circuitous, such a result will not accord with one of the primary objectives of the Act, namely the effective and expeditious resolution of labour disputes. In my view, the resolution that best accords with that objective is to treat the original referral for what it in reality is − an erroneous referral to the CCMA which was never re-directed in terms of section 147(3), and which must accordingly be deemed to have lapsed when the applicant chose to re-direct the application to the council himself.'

[20] The advantage to the employee of the CCMA referring the matter to the bargaining council having jurisdiction is that there is, in terms of s 147(7)[11] of the LRA, no need for the employee to apply for condonation should there be a delay between the date of dismissal and the date of referral. If the employee chooses to refer the matter to the bargaining council himself instead of awaiting the decision of the CCMA, he would be required to apply for condonation.[12]

[21] It must manifestly be the case therefore, that where an employee refers a dispute to a bargaining council which does have jurisdiction, he or she may not thereafter refer the same dispute to the CCMA and ask the CCMA to exercise its powers under s 147(2) or (3) of the LRA. However, where an employee has referred a matter to the CCMA in the *bona fide* belief that it has jurisdiction and it is then discovered that a bargaining council has jurisdiction over the matter, he or she is obliged to make an election: request the CCMA to exercise its powers under s 147(2) or (3) of the LRA, or himself or herself refer the matter directly to the bargaining council.[13] If the employee requests the CCMA to exercise its powers under s 147(2) and (3) of the LRA, the CCMA may elect to either appoint a commissioner to determine the dispute or refer the matter to the bargaining council having

[11] Section 147(7) of the LRA provides as follows:
'Where the Commission refers the dispute in terms of this section to a person or body other than a commissioner the date of the Commission's initial receipt of the dispute will be deemed to be the date on which the Commission referred the dispute elsewhere.
[12] *Franken v Metal & Engineering Bargaining Council* (above) at 1793A-C.
[13] *Oosthuizen* (above) at para 20.

jurisdiction. But once the CCMA makes its election, the parties are bound by it (unless, perhaps the decision was taken in a manner which itself gives rise to a reviewable irregularity).

[22] If, on the other hand, the employee elects to refer the matter to the bargaining council having jurisdiction, that bargaining council must then determine the dispute, and the employee cannot thereafter elect to revert to the CCMA. In the current matter, the appellant referred the dispute to the CCMA and, when conciliation failed, referred it to arbitration. Thereafter, she realised that the matter was erroneously referred to the CCMA, as there existed a registered bargaining council within whose jurisdiction the dispute fell, namely the GPSSBC, and with the assistance of her union referred the matter to the GPSSBC. In my view, once she made that election and referred the dispute to the GPSSBA, the dispute which was before the CCMA lapsed, and any powers which the CCMA possessed under s 147 of the LRA ceased. The CCMA thereafter had no jurisdiction to deal with the matter. The ruling of the Commissioner that he was not bound by the GPSSBA ruling, and that the CCMA had jurisdiction to determine the dispute was, therefore, manifestly unfounded, and fell to be set aside on review.

[23] As indicated, the Labour Court refused to make a determination on the question of whether the CCMA had jurisdiction to deal with the matter, on the basis that the respondent had elected not to pursue this issue in the review proceedings before her. Quite apart from the fact that the respondent had not abandoned the challenge to the CCMA's jurisdiction in the review application,[14] the Labour Court was obliged *mero motu* to enquire into the question of the CCMA's jurisdiction even if the point was not raised by the parties. Since the jurisdiction of the CCMA is intrinsic to the question of whether there was a dismissal in terms of s 186 of the LRA, the Labour Court was required to first determine whether, on the objective facts and the

[14] No aspect of the respondent's jurisdictional points was abandoned before the Labour Court in the review application.

law, the CCMA had jurisdiction to adjudicate the dispute.[15] The question of whether the CMMA's has jurisdiction to adjudicate a dispute is a matter of fact and law. Thus as observed by the Constitutional Court in *Tao Ying Metal Industries and Others v CWU of SA* [16]

> 'Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality.'

The Labour Court accordingly erred in failing to determine the question of whether the CCMA had jurisdiction to deal with the dispute. Its failure to do so infringed upon the principle of legality.

[24] A further reason why the CCMA had no power to entertain the unfair dismissal dispute when the appellant set it down for arbitration in October 2004, is that once the GPSSBC ruled that the appellant had been dismissed by operation of the law in terms of s 17(5)(a) of the PSA and that there was, therefore, no dismissal in terms of s 186 of the LRA, the rule against collateral challenges precluded the CCMA from considering the same dispute.

[25] The House of Lords (per Lord Diplock) in *Hunter v Constable of West Midlands and Another*[17] explained the rule against "collateral challenges" in these terms:

> "The abuse of process which the instant case exemplifies is the initiation of proceedings in a Court of justice for the purpose of mounting a collateral attack on a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in

[15] *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SA Rugby Players Union* (2008) 29 ILJ 2218 (LAC).
[16] 2009 (2) SA 204 (CC) at para 68.
[17] 1981 3 ALL ER 727 HL.

> which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."[18]

In *Gerland v Consumers' Gas Co,*[19] the Supreme Court of Canada (per Iacobucci J) described the 'fundamental policy' against a collateral attack as being to "maintain the rule of law and to preserve the repute of the administration of justice". "The idea is", said Iacobucci J, that "if a party could avoid the consequences of an order issued against it by going to another forum, this could undermine the integrity of the justice system".[20] Similarly, in *Reichel v Magrath,*[21] Lord Halsbury described it as "a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again".

[26] The rule against collateral challenges has been accepted in South African law with one qualification: unless proceedings of a coercive nature have been brought against a party, he or she is not entitled to launch a collateral challenge against an earlier juridical act, until the earlier act is itself set aside.[22] Allied to the rule against collateral challenges is the *exceptio res judicata*, which is available where another court (or tribunal) of competent jurisdiction has already pronounced finally on the same issue between the same parties.[23] The previous judgment must have been given by a competent court, the matter must have involved the same parties (or their successors-in-title) and must have been based on the same cause of action with respect to the same subject matter or thing.[24] These elements were all present in the dispute before the Commissioner in this matter. Importantly, in this regard, the *exceptio res judicata* is applicable also to arbitration

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[18] *Hunter v Chief Constable of West Midlands and Another* 1981 3 ALL ER 727 HL.
[19] 2004 1 SCR 629 at 662.
[20] At 662.
[21] 14 App Cas 665.
[22] *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere* 1999 (3) SA 389 (SCA) at 403E-G*; V & A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services* (Pty) Ltd 2006 (1) SA 252 (SCA) at paras 10 and 15; *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at paras 30-38.
[23] *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA).
[24] *Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 (3) SA 517 (B).

awards whether obtained in private arbitration proceedings or in proceedings under the LRA.[25]

[27] In the current matter, the appellant, instead of applying to review and set aside the ruling made by the GPSSBC – a route which would have required her to apply for condonation for the delay in doing so − sought to circumvent it altogether by returning to the CCMA. This step was irregular, first because the arbitration proceedings in the CCMA had lapsed on referral to the GPSSBC, and second because it is an affront to the rule against collateral challenges and is, by any measure, an abuse of process because it is estopped by the *exceptio res judicata*.

[28] The GPSSBC had made a final ruling on the matter. It found that it did not have the requisite jurisdiction to deal with the dispute, because the appellant was dismissed by the operation of law in terms of s 17(5)(a) of the PSA. The question of jurisdiction of the GPSSBC in this case was integrally linked to the question of whether the appellant was dismissed in terms of s 186 of the LRA or dismissed in terms of s 17(5)(a) of the PSA. The enquiry into jurisdiction by the GPSSBC was, thus, a factual one that had to be determined on the objective assessment of the evidence before the arbitrator.

[29] The finding of the GPSSBC that it lacked jurisdiction to deal with matter, because the appellant was dismissed by operation of the law in terms of s 17(5)(a) of the PSA, is a finding with final effect until set aside on review by the Labour Court. The Commissioner's finding that the jurisdictional determination of the GPSSBC is interlocutory, as it did not deal with the merits is, therefore, simply wrong. In the circumstances, I find that the CCMA had no jurisdiction to deal with the matter. Accordingly, the respondent's cross-appeal must be upheld.

[30] Having arrived at this conclusion, there is no need to deal with the appellant's grounds of appeal and the remaining grounds of the

[25] *Johnson v Commission for Conciliation, Mediation & Arbitration and Others* (2005) 26 ILJ 1332 (LC).

respondent's cross-appeal. This matter has regrettably taken 13 years to reach this Court on appeal. As is apparent from the chronology of events that span the period from the initial referral of the dispute to the CCMA, on 31 August 2001, to the date of hearing of the review application before the Labour Court, on 25 March 2013, both the appellant and the respondent have been equally responsible for the delays in finalisation of this dispute. Accordingly, I consider this to be a matter in which there should be no cost order in the review application, as well as in the appeal and cross-appeal.

[31] In the result, I make the following order:

1. The appeal is dismissed, with no order as to costs.

2. The cross-appeal is upheld, with no order as to costs.

3. The decision of the Labour Court is set aside, and substituted with the following order:

'1. The arbitration award of the Commissioner is reviewed and set aside

2. There is no order as to costs'

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F Kathree-Setiloane AJA

Musi JA and Murphy AJA concur in the judgment of Kathree-Setiloane AJA

APPEARANCES:

FOR THE APPELLANT:	Ms A Tiry with Ms P Jara (original heads of argument prepared by Mr P Seleka Instructed by Thaanyane Attorneys
FOR THE RESPONDENT:	Mr Malindi SC (heads of argument prepared by Mr Hulley SC Instructed by the State Attorney