REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case no: C502-2011

HOSPERSA AND OTHERS **Applicants**

and

THE PUBLIC SERVICE CO-ORDINATING

BARGAINING COUNCIL **1st Respondent**

STEPHEN BHANA NO **2nd Respondent**

THE MINISTER OF COMMUNITY SAFETY,

WESTERN CAPE **3rd Respondent**

Heard: **19 November 2013**

Delivered: **22 November 2013**

Summary: Application for condonation. Principles restated. Not in the interest of justice to grant condonation where the delay is excessive, and explanation amounts to no explanation at all, and prospects of success are lacking. Bargaining Council panellist cannot merely rely on contents of referral form in determining jurisdiction. Referral forms cannot be equated to pleadings. Commissioner obliged to make enquiries in terms of the provisions of s138 (1) of the LRA and applicable Rules in order to establish jurisdiction.

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] The applicants sought to review and have corrected, the decision of the second respondent's ruling that the first respondent lacked jurisdiction to conciliate a dispute it had referred. The filing of that application was out of time hence an application for condonation, which the third respondent opposed. The third respondent also applied for condonation for the late filing of an opposing affidavit in respect of the review application.

Background:

[2] The protracted history of this matter dates back to 1 July 2001. Paragraph 8.1 of PSCBC Resolution 7 of 2000 provided for the abolition of rank and leg promotion system effective from 1 July 2001. In 2003, the applicants, more specifically HOSPERSA's member, Messrs H De Waal and AJF De Waal, ("The De Waals") became aware that they qualified for promotion under the rank and leg system prior to 1 July 2001. In 2003, 2005, 2007 and 2008 the De Waals had lodged numerous grievances in view of the third respondent's failure to promote them in accordance with the provisions of paragraph 8.4 of Resolution 7 of 2000.

[3] On 21 October 2008, HOSPERSA on behalf of the De Waals had referred an unfair labour practice dispute relating to promotion to the GPSSBC. On 8 December 2008, a certificate of outcome was issued, certifying the dispute was unresolved and enabling HOSPERSA to refer the dispute for arbitration. Between late 2008 and throughout 2009, negotiations took place in regards to whether the De Waals should be promoted or not. These negotiations came to nought. On 15 December 2009, HOSPERSA had referred the unfair labour practice dispute to the GPSSBC for arbitration, and had simultaneously applied for condonation. The application for condonation was declined in

terms of a ruling issued by the GPSSBC panellist, Seele Mokoena soon thereafter. HOSPERSA did not at all challenge this ruling.

[4] On 15 April 2010, HOSPERSA had then referred another dispute to the first respondent. That dispute was referred in terms of section 24 (2) and section 24(5) of the Labour Relations Act (the LRA), concerning the interpretation and/or application of PSCBC Resolution 7 of 2000. In the referral, HOSPERSA had complained that the third respondent had failed to comply with or apply the provisions of clause 8.4, despite adopting this particular clause in terms of the relevant Personnel Administration Standard (PSA) and the DPSA Circular of 16 July 2001. In the referral form, HOSPERSA had noted that although the De Waals were the two individual members affected by the dispute any relief obtained in respect of the two individuals would merely be incidental to the granting of the relief it sought.

[5] A conciliation meeting was scheduled before the second respondent on 27 July 2010. The third respondent had raised a preliminary point to the effect the PSCBC lacked jurisdiction to conciliate the matter. The parties had presented both oral and written submissions, and the second respondent had upheld the preliminary point in terms of a ruling belatedly issued on 10 February 2011. The six weeks within which the applicants were supposed to file any review application in terms of section 145 (1) (a) of the LRA came and went on 25 March 2011. The applicants had filed a notice of motion and the application for a review on 4 August 2011 together with an application for condonation.

The legal framework:

[6] Section 145 (1a) of the LRA provides that the Labour Court may on good cause shown, condone the late filing of an application in terms of subsection (1). Rule 12 (3) of the Rules of this Court also require a party where there is non-compliance with the Rules to also show good cause. The then Appellate Division in *Melane v Santam Insurance Co. Ltd*[1] explained the concept of *"good or sufficient cause"* as including an evaluation of the degree of lateness,

[1] [1962] (4) SA 531 (A)

the explanation for the delay, the prospects of success and the importance of the case. These factors are interrelated, and are not on their own, individually decisive.

[7] Over the years, various courts have expanded further on the factors identified in *Melane* or alternatively elaborated on the principles set out therein. In *NUM v Council for Mineral Technology*[2], the Labour Appeal Court held;

> "….that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused"

The Labour Appeal Court in *Kerradam Properties (PTY) LTD t/a Cabanga Conference Centre v Sonica Matthee*[3] per Tlaletsi JA held as follows;

> "This Court had an opportunity to consider the approach to be adopted in applications of this nature in SA Post Office Ltd v CCMA and Others (citation omitted)
>
> The degree of delay and the reason therefore complement each other. While the degree of delay is a mere arithmetical calculation, it is significant in relation to the expeditiousness with which the matter was required to be resolved. Hence, in matters where importance is placed upon the speedy and expeditious resolution of a dispute, even a short delay may not be excusable unless an explanation is provided that sets out the reasons for the delay which the court finds acceptable. With the factor of delay, go the prospects of success. Where it is evident that the party seeking condonation has no prospects of succeeding in its principal claim or opposition, no purpose is served in granting condonation and the court must in such circumstance refuse to grant condonation irrespective of the degree or explanation provided. Where the prospects of success are reasonably good or even fair then, depending on the delay and the explanation, consideration must be given to the prejudice that the parties may suffer before the discretion can be exercised on whether to grant the indulgence sought. The factor of prejudice plays a role only when the delay is substantial"

[8] In *Foster v Stewart Scott Inc*[4] two further factors were added to those identified in *Melane*. These were that an applicant must have shown; (a) an interest in the finality of the matter and the convenience of the court; and (b)

[2] [1999] 3 BLLR 209 (LAC) at page 211 paragraph G-H
[3] Case no: JA 72/2010 at para 5
[4] [1997] 18 ILJ 367 (LAC)

avoidance of unnecessary delays in the administration of justice. The Constitutional Court in *Brummer v Gorfil Brothers Investments (Pty) Ltd*[5] stated that the interests of justice should be an overall consideration when dealing with applications for condonation. In this regard, Jacoob J held as follows;

> "…It is first necessary to consider the circumstances in which this Court will grant applications for condonation for special leave to appeal. This Court has held that an application for leave to appeal will be granted if it is in the interests of justice to do so and that the prospects of success, though an important consideration in deciding whether to grant leave to appeal, is not the only factor in the determination of the interests of justice. (Fraser v Naude and Others (Citation omitted). It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect"

The extent of the delay:

[9] The delay in filing the application for review is exactly 126 days which is an equivalent of four months. Mr. Christison on behalf of the applicants sought to downplay the excessive nature of the delay. In his view, an application brought within 180 days of service of an award or ruling was not excessively late. There is an inherent difficulty with this laid back approach. Once parties are encouraged to determine the reasonableness of the period of their own non-compliance with the prescribed time frames, this would ultimately lead to an absurdity and complete disregard of such times frames as laid down either by legislation or the rules of this Court. Parties cannot set their own time limits as to when it would be reasonable to file documents outside of the prescribed time frames. Obviously the only exception is in instances where a matter is brought before the Court on the basis of urgency.

[5] [2000] (2) SA 837 (CC) at 839 F

[10] Mr. Christison had further correctly pointed out that section 145 (1) of the LRA was aimed at the expeditious resolution of labour disputes. This view is in sync with the views expressed by Tlaletsi JA in *Kerradam Properties*[6]. To this end, it is my view that a delay of four months is clearly excessive in the extreme, more specifically given the history of this dispute. The excessive delay has far reaching consequences for the expeditious resolution of disputes. Furthermore, it cannot be said that such excessive delays are in the interests of bringing finality to disputes. Invariably, such delays also prejudice the other party to the dispute.

The explanation for the delay:

[11] In applications of this nature, the applicant party is essentially seeking an indulgence from the court. That indulgence is not there for taking, and it is therefore expected that the reasons given for the delay must go a long way in detailing each and every aspect that contributed to that delay. In effect, it is expected of a party to take the court into its confidence and disclose in minute details, what could or what had caused the delay, and the steps taken to show that notwithstanding, the matter was still attended to in the most expeditious and diligent way possible in the circumstances. Where individuals are blamed for the delay, these must be mentioned, and confirmatory affidavits must be filed in that regard. In effect, a litigant cannot solely blame the elements. He or she must show when and how he dealt with those elements in ensuring that every endeavour was made to comply with the prescribed time frames.

[12] It needs to be stated from the onset that the explanation proffered by the applicant is wholly inadequate in all material respects. In fact, it *"amounts to no explanation at all"* as Zondo JP (As he then was) observed in *Moila v Shai NO and Others*[7]. The main explanation proffered on behalf of the applicants merely pertains to HOSPERSA's own internal administrative problems. The explanation or lack thereof as proffered by its Provincial Secretary, Western Cape, Leon Liebenberg, in his founding affidavit is as follows;

[6] Supra
[7] [2007] 28 ILJ 1028 (LAC), at para [34]

Firstly, he blames the second respondent for rendering his ruling long after the matter was heard. It is acknowledged that the second respondent took six months in rendering his ruling, and this was clearly prejudicial to the parties. However, the failure to render the ruling within the expected standard fourteen days is a matter between the first and second respondent. In any event, even if the applicants unsuccessfully made enquiries with the PSCBC in respect of the outstanding ruling, nothing prevented them from approaching this Court to seek a *mandamus.*

[13] On the other hand, in the light of the ruling having been issued so belatedly, one would have expected that this would have been enough reason to treat the matter with more diligence and urgency. In the light of the alleged importance of the case to HOSPERSA, one would have thought that despite the delays by the second respondent, it would have acted speedily in the interest of the finality of the matter. Nevertheless, the excuse that the second respondent issued his award six months later still does not explain the delay after the ruling was rendered on 11 February 2012.

[14] The rest of the so-called explanation deals with the internal problems of the union. These related to the union being short-staffed, and how other union officials or Labour Relations officials could or could not perform certain tasks in certain areas. The so-called explanation becomes even more bizarre when the personal affairs of the union officials are brought into the picture. There are no confirmatory affidavits to support allegations in respect of these individuals insofar as their private or personal affairs may have contributed to the delay. It is not the intention of this Court to appear or sound unsympathetic. However, the personal and private affairs of the union officials, the union's lack of capacity, its workload, the clear negligence on the part of union officials, or the provisions of its constitution in regards to taking up legal matters on behalf of members, are not matters that this Court nor the respondents should be burdened with.

[15] A point needs to be made in respect of the now stale excuses proffered by unions whenever there has been dilatoriness and negligence in the fulfilment of their primary obligations towards their subscription paying members, and

more specifically in regard to referral of disputes. Lessons are to be learnt from the saga in *FAWU v Ngcobo NO and Mkhize*[8], where the Constitutional Court held that a trade union cannot avoid liability for its neglect to prosecute claims by its members merely because the union has a constitutional right to determine its own administration. The Constitutional Court in that matter had stressed that the union did not have the right to withdraw its representation of its members with impunity, and that it still had to act in a manner that did not cause prejudice to its members.

[16] Conversely in this case, by virtue of the fact that union members expect quality service other than merely representation when it came to matters of mutual interests, unions are also expected to diligently attend to their members' legal matters especially where time frames are applicable. The union's internal problems, policies or protocol, or the personal or private affairs of its officials should not come in the way of the fulfilment of its members' needs.

[17] It is acknowledged that unions operate within and are guided by their own constitutions and policies in regard to such matters. It is further acknowledged that informed decisions need to be made as to whether cases should be pursued or not. It is not for a moment suggested that unions should willy-nilly take up or pursue matters and ignore their own policies or constitutions. What is being stressed is that even if a decision whether to litigate or not has to go through the union structures by virtue of its constitution, such a process should bear in mind the time limits imposed by either legislation or the rules of the Courts, the CCMA or the Bargaining Councils. To this end, this Court should reject any of these excuses out-rightly as in this case, irrespective of how honestly they may have been given.

Prospects of success:

[18] In the light of the decision in *NUM v Council for Mineral Technologies* referred to above, that *"without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial",* it would be academic to still

[8] (CCT 50/12; [2013] ZACC 36)

consider whether the applicants have any prospects of success on the main application. However, on the principled approach in *Melane* that none of these factors are decisive on their own, and further in view of the alleged importance of this case to the applicants, I will proceed to consider the parties' prospects of success in respect of the main application.

[19] In *Harold Arthur Thompson v National Health Laboratory Services* [9] Khampepe ADJP (As she then was) held as follows;

> "It is a well established principle that in applications of this sort, the appellant must set forth briefly and succinctly such essential information as will enable the court to properly asses the appellant's prospects of success. (Darries v Sherrif, Magistrate Court, Wynberg And Another (citation omitted) and NUM v Council for Mineral Technology (citation omitted)."

[20] The applicants sought to review the second respondent's ruling on the grounds that his reasoning betrays errors of law; that there was a failure to adequately apply his mind to the issues before him, that the decision was one which no reasonable decision-maker could have reached, and also that the ruling reflected a gross irregularity.

[21] The review test as set out in *Sidumo and Another v Rustenburg Platinum Mines and Others*[10] does not apply to the review of jurisdictional rulings of the nature issued by the Bargaining Councils or CCMA. In *Global Outdoor Systems Ltd v Du Toit and Others*[11] Francis J formulated the approach as follows;

> "The question is not whether the finding of the commissioner was …. justifiable, rational or reasonable. The issue is simply whether, objectively speaking, the facts which could give the CCMA jurisdiction to entertain the dispute existed"

[22] In *SA Rugby Players' Association (SARPA) and Others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPU and Another*[12], the Labour Appeal Court held that the CCMA being a creature of statute did not have the power

[9] Case number JA 09/07, at para 22
[10] [2007] 28 ILJ 2405 (CC)
[11] [2011] 32 ILJ 1100 (LC) at para 18
[12] [2008] 9 BLLR 845 (LAC)

to determine its jurisdiction, but may do so for convenience. Thus the CCMA or the bargaining council cannot grant itself jurisdiction which it does not have. For the purpose of this application then, the enquiry is whether objective facts existed before the second respondent that conferred jurisdiction on the first respondent to determine the dispute as referred by the applicants.

The ruling:

[23] It needs to be stated upfront that the quality of ruling issued by the second respondent was sub-standard. It is clear that it is one of those rulings rendered six months after the hearing simply for the sake of getting it out of the way and with not much thought put into it. The second respondent had identified the issue that he had to determine as to whether the Council had jurisdiction to arbitrate the dispute *"given the long delay between the event and the referral of the dispute"* (Sic). Clearly the second respondent had misconstrued what was required of him to determine in the light of the arguments presented before him, and this became evident from his conclusions. The manner with which he had characterised the issue he had to determine suggests that he was dealing with an application for condonation when in fact this was not the issue before him.

[24] In his analysis, the second respondent had stated that it was common cause that the applicants' case centred on their non-promotion, and that they had previously referred an unfair labour practice. He continued and stated that the dispute was not about the application and interpretation of the PSCBC Resolution 7 of 2000; that the PSCBC was unable to hear individual disputes like dismissals and unfair labour practices. He then concluded that the matter was *res judicata* and the PSCBC had no jurisdiction to hear it. The ultimate conclusion of the second respondent was that the issue at hand was an alleged failure to promote the applicants, and that the PSCBC lacked jurisdiction to hear the matter.

[25] In his written heads of argument, Mr. Christison had submitted that there was no rational connection between the second respondent's finding, the reasons advanced therefor and the issue he identified as being in dispute. This was

particularly moreso in view of the issue that the applicants had referred to the PSCBC, being the interpretation and/or application of Resolution 7 of 2000.

[26] Mr De Jager for the third respondent had conceded that the ruling is clearly incoherent and the reasoning in that regard was muddled. He had however referred the Court to *Lithotech Manufacturing Cape v Statutory Council Printing, Newspaper & Packaging Industries and Another*[13] for the proposition that the fact that an arbitrator's reasoning was muddled was not *per se* a ground for review, provided the arbitrator's conclusions are sustainable on the evidence and not so defective as to indicate failure to apply his or her mind. Furthermore, it was submitted on behalf of the third respondent that the second referral of the applicants was a sham in that the applicants had created the false impression that the dispute referred related to interpretation/application of a collective agreement, when in truth the employee applicants (The De Waals), who were incidentally identified as the persons that the dispute pertained to, were once again seeking to advance their abortive claims in relation to non-promotion.

[27] In the referral before the second respondent, it was reflected that only two employees (The De Waals) were affected by the dispute. The dispute was characterised as follows;

> "In terms of paragraph 8.4 of Resolution 7 of 2000 of the PSCBC the employer had to finalize the rank and leg promotion within 4 years. This should be done in conjunction with the relevant Personnel Administration Standard as well as DPSA Circular of 16 July 2001. The department is refusing to apply these prescripts"

[28] I have no hesitation in concluding that when the applicants' first referral relating to an unfair labour practice ran aground, and the ruling in that regard was not challenged, they had conjured a stratagem to circumvent the consequences of that ruling and their failure to challenge it. This stratagem obviously included a re-formulation of their dispute under the provisions of section 24 of the LRA. The same dispute was referred and the same end results were sought previously under the referral in terms of s186 of the LRA to the GPSSBC. This stratagem cannot be countenanced as it was an abuse

[13] [2010] 6 BLLR 652 (LC)

of the dispute resolution system, and this Court cannot be seen to be encouraging such abuse.

[29] Mr. Christison had argued that in determining the dispute before him, the second respondent was bound by the principles set out in *Gcaba v Minister of Safety and Security*[14] where the Constitutional Court held that jurisdiction was to be determined on the basis of the pleadings and not on the substantive merits of the case. This approach followed that of Langa CJ in *Chirwa*[15]. In essence, what Mr. Christison was contending was that the second respondent was obliged to determine the dispute before him in the same way the applicants had referred or "pleaded" it, without making any further enquiries into the merits of that dispute. In this regard, it was contended that to the extent that the second respondent had concluded that the first respondent lacked jurisdiction on another ground that was not pleaded, he had committed gross irregularity.

[30] The question whether the principles set out in *Gcaba* should be applicable at the level of the CCMA and Bargaining Councils when determining jurisdiction appears contentious when in my view, it should not be the case. The principles set out in *Gcaba* and *Chirwa* should be read within context, bearing in mind that in those cases, the applicants had directly launched their applications in the High Court immediately after obtaining a certificate of non-resolution, and that the issue of jurisdiction was determined at that level.

[31] To the extent that there may be debates surrounding the status of referrals before the CCMA and Bargaining Councils, and more particularly which approach should a Commissioner or panellist adopt in determining whether he or she is clothed with jurisdiction, the test was long laid out and the matter put to rest in *CUSA v Tao Ying Metal Industries and Others*[16] where Ncgobo J held as follows;

> "Consistent with the objectives of the LRA, commissioners are required to "deal with the substantial merits of the dispute with the minimum of legal formalities." (Citation

[14] [2010] 31 ILJ 296 (CC) at para 57
[15] Chirwa v Transnet Ltd & others [2008] 2 BLLR 97 (CC)
[16] [2009] (2) SA 204 (CC)

omitted) 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. Thus the LRA permits commissioners to "conduct the arbitration in a manner that the commissioner considers appropriate". (citation omitted) But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do. (citation omitted)[17]

And;

"A commissioner must, as the LRA requires, "deal with the substantial merits of the dispute". This can only be done by ascertaining the real dispute between the parties. (citation omitted) In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in."[18]

[32] There can be no doubt that the above approach is apposite to the CCMA and Bargaining councils where referral forms are utilised. This approach is consistent with the provisions of section 138(1) of the LRA which Ncgobo J had made reference to[19] and 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 the minimum of legal formalities."

[17] [at para 64]
[18] [at para 65]
[19] [At para 62]

The approach laid out by Langa CJ in *Gcaba* flowing upon from *Chirwa* on the other hand is specifically appropriate in circumstances where parties are required to file pleadings or statement of case. This approach cannot in my view be construed to be at odds with that of Ncgobo J in *CUSA* in view of what the Constitutional Court had to determine on each occasion. On the contrary, the approaches complement each other. The approach of Ngcobo J in *CUSA* is also deemed apposite for proceedings before the CCMA or Bargaining Councils for the following reasons;

[33] In the High Court or other Courts for that matter, it is a requirement that parties, whether for the purposes of a trial or motion proceedings, must file either a statement of case or pleadings in support of their cases. Ultimately, when the matter is heard, the parties are expected to stand or fall by what they have pleaded. This emanates from the expectation that the parties would have set out the issues in the pleadings precisely and with sufficient particularity so that it will also be clear to the presiding Judge and other interested parties what the dispute is about. The object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise.[20] Furthermore, in *King v King*[21] it was stated that the function of pleadings is: (a) to inform the parties what the issues are in order to prepare for the trial; (b) to inform the court of the issues in order to know the extent (scope) of the dispute; and (c) to place the issues on record in case one of the parties wishes to reopen the same issues after it had already been decided.

[34] On the other hand, as pointed out by Ncgobo J in CUSA, there are no requirements for pleadings at the Bargaining Councils and the CCMA. The exceptions in the CCMA are in terms of Rule 19, where a Commissioner may direct a party to file a statement of case or in regards to interlocutory applications filed in terms of Rule 31. Because of the objectives of the LRA is to provide a simplified and expedited dispute resolution mechanism, referring parties are merely required to complete simplified LRA Form 7.11 for conciliations in terms of Rule 10, or Form 7.13 in terms of Rule 18 for

[20] Harms Civil Procedure in the Supreme Court at 263-4.
[21] [1971] (2) SA 630 (O)

arbitrations. The referral forms in part require a ticking of boxes, and in some parts, require a brief, if not scant summary of the issues in dispute and the relief sought. These standard referral forms cannot in any manner or shape be equated with formal pleadings as expected in normal Court proceedings.

[35] Because of the informal nature of proceedings at the CCMA or Bargaining Councils, in most instances, parties have not even concluded pre-arbitration minutes prior to the hearing. In most cases, because of the scant nature of information contained in the referral forms, the conciliator or arbitrator is in the dark about the case until the proceedings commence. In some cases, the respondent party might also not even know what case it must meet until at conciliation or arbitration.

[36] It would therefore be a travesty of justice to expect referring parties at the level of the CCMA or Bargaining Councils to stand and fall by scant information pertaining to their disputes as contained in the referral forms. It would equally be a travesty if the conciliator or arbitrator were to simply assume jurisdiction over disputes purely based on what is contained in the referral form without embarking on some enquiry of his own. In terms of Rule 14 of the CCMA Rules, the commissioner must require the referring party to prove that the Commission has jurisdiction to conciliate the dispute. Rule 22 makes similar provisions in respect of arbitrations at the CCMA. The PSCBC Rules 13 and 20 are similar to those of the CCMA in that regard. To this end, there is an obligation on a commissioner to make enquiries as to whether the requisite jurisdiction exists, rather than merely relying on the referral forms.

[37] It would be unfair, and contrary to the principles of *audi alteram partem* to expect commissioners and panellist to simply adjudicate matters on the basis of information contained in the referral forms. At worst, it would lead to absurdity in the sense that without commissioners making enquiries into the true nature of the dispute referred, they might end up either adjudicating matters when they do not have jurisdiction to do so, or conversely, refusing to adjudicate matters simply on the basis of what is contained in the referral form. This could not have been what the LRA intended.

[38] In the light of the conclusions above, it follows that the principles as set out in *Gcaba* in respect of the basis for establishing jurisdiction cannot find application in the cases before the CCMA or Bargaining Councils. In respect of what was before the second respondent in this case as captured in the referral form, the oral and written submissions it could not have been expected of him to simply make his determination on the basis of how the applicants had characterised their dispute. He was obliged as he did, to enquire further into the substantial merits of the case and to come to a decision whether he had the requisite jurisdiction or not.

[39] Given the history of the case and the material that was placed before him by the parties, the second respondent, notwithstanding the incoherent manner with which he approached the matter, was correct in expressing the view that what was clearly before him was an unfair labour practice dispute, which was initially referred to the GPSSBC. The fact that the dispute as referred to the first respondent came about the second time in the guise of section 24 of the LRA referral did not give it any new colour or nature. The fact that the dispute allegedly also affected the De Waals could not have been a coincidence. HOSPERSA's contention that any incidental remedies arising from the dispute may have other effects on its members generally is clearly an attempt at concealing its true intentions. The second respondent's approach, albeit incoherent and muddled, was consistent with the provisions of section 138 (1) of the LRA, and Rule 13 of the PSCBC Rules, and it cannot be said that objective facts existed before him to assume jurisdiction over the dispute as referred. To this end, it follows that the applicants' prospects of success on the main claim are non-existent.

Other considerations:

[40] The third respondent had highlighted in elaborate terms the prejudice it would suffer if condonation was granted, more specifically in the light of the protracted history of this matter, and the fact that as a result of staff movements, it would be difficult to keep track of the events and the case pertaining to the De Waals' dispute. On the other hand, the applicants' view was that if condonation is not granted, on the whole, nothing prevented them

from again referring the dispute to the PSCBC as its merits were never dealt with in the first place.

[41] In the light of the above, and having taken account of all the other factors in terms of which conclusions have been reached, it would not be in the interests of justice to grant the applicants' application for condonation. To grant condonation in circumstances where the applicants have also clearly abused the dispute resolution system, had further shown an inclination not to desist from such conduct in the foreseeable future, and through their conduct, have shown no interest in either bringing the matter to finality, cannot be in the interests of justice. It is in consideration of these factors and the total circumstances of this case that a cost order is deemed appropriate.

[42] In regards to the third respondent's late filing of its answering affidavit, it was contended on its behalf that the delay was about two months, and that a full explanation was tendered in its founding affidavit. In the light of the conclusions reached in regards to the parties' prospects of success in the main application, it would not be necessary to deal with other aspects pertinent to the third respondent's application. To that end, the third respondent's late filing of its answering affidavit in respect of the review application is condoned.

Order:

1. The late filing by third respondent of its answering affidavit in respect of the application for review is condoned.
2. The application for condonation for the late filing of the review application is dismissed with costs.

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TLHOTLHALEMAJE, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Adv. A Christison

Instructed by: Llwelyn Cain Attorneys/Cliffe Dekker Hofmeyr INC

For the Third Respondent: Adv. NC De Jager

Instructed by: State Attorney