IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

Case Number: JR1777/06

REPORTABLE

In the matter between:

RAWU OBO L NGWELETSANA	Applicant
and	
PT OPERATIONAL SERVICES (PTY) LTD	First Respondent
LANCE CELLIERS N.O	Second Respondent
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	Third Respondent
F MASHABA N.O	Fourth Respondent

JUDGMENT-LEAVE TO APPEAL

MOSHOANA AJ

INTRODUCTION

[1] This is an application for leave to appeal against the whole judgment and order made by this court on 11 February 2010. It may not be necessary for the purposes of this judgment to enumerate all the grounds that the applicant for leave to appeal relies on. Equally, it is not necessary to recount the facts of this matter. A detailed exposition of the facts appears in the main judgment which has been reported already.

EVALUATION

[2] Despite having raised a number of grounds, the main ground upon which the applicant contends that this court erred on is a finding that the second respondent was *functus officio* when it issued a further ruling on 26 February 2007. Gerber argued that the rule find application only on the so-called completed administrative actions. In his view, the decision of 12 August 2004 was incomplete in that the second respondent did not deal with the rescission application. He only dealt with it for the first time on 26 February 2007, so the argument went. On the other hand Khosa argued that the decision was final and ought to have attracted the *functus officio* rule. He argued that the fact that the final decision is wrong or right is immaterial when it comes to the application of the rule.

[3] The test in applications of this nature remains that of a reasonable possibility that another court may come to a different conclusion. This court is convinced that its

conclusion is correct, but such does not defeat a reasonable possibility and is not the test. If this court finds that a reasonable possibility exists, it must grant leave. The fact that the rule applies to final decisions seem to be conceded by Gerber, hence the submission that the decision of 12 August was not final. Of course the troublesome question is what constitutes a final decision? As far as this court was concerned, the decision was final and as such the rule found application. I am of course mindful of the fact that when the second respondent decided on 12 August 2004, he stated that the reason for the dismissal of the rescission application is that there was no condonation application. The question then is does that make it an incomplete decision which should not attract the application of the rule? **J R De Ville in Judicial Review of Administrative Action in South Africa, Revised First Edition 2005,** said:

"*Where an unfavourable decision affects the rights and interest of only the applicant(s) the refusal of an application for an immigration permit or of a single person, such a decision may be revoked by the public authority concerned. (**Holden v Minister of the Interior 1952 (1) SA 98 (T).** However, where the rights or interests of other parties are also at stake, the public authority is regarded as being functus officio. (**Bronkhorstspruit Liquor Licensing Board v Rayton Bottle Store (Pty) Ltd and another 1950 (3) SA 598 (T)**"*.

Of course another court may arrive at the decision that when the second respondent reconsidered with a condonation application on 26 February 2007, it was entitled to and not barred by the *functus officio* rule. It is apparent that when the second respondent dealt with the rescission application on 12 August 2004,

he was doing so in terms of Rule 32 of the Rules of the CCMA. In terms of that Rule, an application should be brought within 14 days. If the application is brought outside the 14 days period with no good cause shown, the application could be dismissed. In **Shoprite Checkers (Pty) Ltd v CCMA and others [2007] 10 BLLR 917 (LAC)**, it was confirmed that section 144 must be interpreted to include good cause. This was after this court per Her Ladyship *Pillay J* found otherwise.

[4] In **Cosmo Health (Pty) Ltd v CCMA (Eastern Cape) and others [2005] 7 BLLR 691 (LC),** this court found that a CCMA commissioner rightly dismissed a rescission application where there was no condonation application. In my view I do not think that another court may come to a conclusion that the second respondent acted wrongly by dismissing the application on 12 August 2004. Therefore that remains a valid decision. However is it a final decision or not? This is a question I suppose another court may answer differently. In **Chandler v Alberta Association of Architects [1989] 2 S.C.R 848** the majority found that the Board was not *functus officio*. In reasoning, the majority said as a general rule, once an administrative tribunal has reached a final decision in respect of the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made error within its jurisdiction or because there has been change of circumstances. However the majority found that since the Board acted *ultra vires*, it failed to dispose of the matter before it in a manner permitted by the Act, therefore the Board was not *functus officio.* In *casu, Gerber* argued that since the second respondent did not deal with the provisions of section 144 as in whether the award was erroneously

issued or not, then as it was the case in *Chandler*, the CCMA did not perform its functions in terms of the enabling provisions-section 144. The argument was not that the CCMA acted *ultra vires* as it was in *Chandler,* but that that the CCMA did not perform its function in terms of the enabling section. Although the CCMA in my view performed its functions by dismissing an application that was filed out of time, another court may find persuasion that the function is performed when a decision is made in terms of whether the award was erroneous or not. The view of this court being that by dismissing it due to lack of condonation, the second respondent was acting in terms of section 144- *Shoprite Checkers and Cosmo Health supra.*

[5] It is important to highlight that the minority in *Chandler* held that when an administrative tribunal has reached its decision, it cannot afterwards, in the absence of statutory authority, alter its award except to correct clerical mistakes or errors arising from accidental slip or omission. In reasoning it held that the fact that the original decision was wrong or made without jurisdiction is irrelevant to the issue of *functus officio*. This view I agreed with in my earlier judgment. I find persuasion in the reasoning that it is a dangerous precedent to expand the powers of administrative tribunals beyond the wording or intent of the enabling statute. Recently this court in **MEC Department of Education Kwazulu Natal v Khumalo [2010] 11 BLLR 1174 (LC)** endorsed a view that decisions made on ignorance; mistake or fraud should be reversed in the public interest. This court held that the doctrine of functus officio does not bar the MEC from undoing irregularities in the interest of justice. Was a reconsideration of the rescission application on 26 February 2007 in the interest of justice? Perhaps yes perhaps

no.

CONCLUSION

[6] In the light of the above evaluation, and in acute realisation of the applicable test, I find it appropriate to grant leave. Accordingly, the following order issues:

1. The application for leave to appeal is hereby granted.
2. Costs to be costs of appeal.

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G. N MOSHOANA

Acting Judge of the Labour Court

Date of Hearing: 13 December 2010.

Date of Judgment: 22 December 2010

APPEARANCES

For the Applicant: W T Khoza of RAWU

For the Respondent: Adv H Gerber instructed by Cornell Botha Attorneys