THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: C272 /19

In the matter between:

CLEMENT ROLAND DU PLESSIS **Applicant**

and

PUBLIC PROTECTOR:
ADV BUSISIWE MKWEBANE **First Respondent**

REGINALD NDOU
EXECUTIVE MANAGER: PROVINCIAL INVESTIGATIONS
PUBLIC PROTECTOR HEAD OFFICE **Second Respondent**

MR D I K WILSON
SENIOR COMMISSIONER: CCMA: CAPE TOWN **Third Respondent**

MR CAMERON MORAJANE
THE DIRECTOR: CCMA: NATIONAL OFFICE **Fourth Respondent**

PROF CHRIS NHLAPO
THE VICE CHANCELLOR: CPUT, BELLVILLE **Fifth Respondent**

Heard: **10 December 2019**
Delivered: **12 December 2019**

Summary: Review application – application to review decision by Public Protector to decline to investigate complaint by applicant against CCMA commissioner – issue of jurisdiction considered – Labour Court not having jurisdiction to review and set aside decision of Public Protector

Res judicata* – principles considered – applicant seeking relief that has already been decided by Labour Court and Labour Appeal Court – issue *res judicata

Review application – no provision in the LRA providing for consideration of review application

Review application – application dismissed for want of jurisdiction

Costs – proceedings an abuse of process – punitive costs ordered

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JUDGMENT

SNYMAN, AJ

Introduction

[1] The current application is one that should have never burdened this Court. It constitutes the most recent step in a barrage of litigation launched by the applicant to take issue with his dismissal for misconduct by the fifth respondent. The application is couched as a review application, in which the applicant seeks to review and set aside a decision by the Public Protector (the first respondent) not to investigate a complaint brought by the applicant concerning the conduct of a commissioner of the Commission for Conciliation, Mediation and Arbitration ('CCMA'). The application is opposed by the Public Protector and the fifth respondent (his erstwhile employer).

[2] Upon considering the application in this matter, it became apparent to me that the first issue that needed to be decided was whether this Court has jurisdiction to entertain the applicant's application in the first place. Thus, and when this matter came before me for argument on 10 December 2019, I required the parties to only address me on the issue jurisdiction, as this issue would be dispositive of the matter, without the need to consider the merits thereof, should the requisite jurisdiction be lacking.

[3] After hearing argument by all the parties, I indicated that I will first decide the issue of jurisdiction, and hand down judgment in this regard on 12 December 2019. I will now proceed with giving such judgment, by first setting out a summary of only the background facts that are relevant in deciding the issue of jurisdiction.

Background facts

[4] For ease of reference, I will refer in this judgment to the applicant's erstwhile employer, the fifth respondent, as 'CPUT', the third respondent as 'commissioner Wilson' and the first respondent as the 'Public Protector'.

[5] The applicant was employed by CPUT as a lecturer in its media and journalism department. The applicant was dismissed on 30 June 2014 for misconduct concerning the sexual harassment of two female students he lectured and the intimidation and threatening of these two students and their parents. The applicant alleged that these charges were all part of a conspiracy by CPUT to get rid of him.

[6] The applicant was dismissed following a disciplinary hearing presided over by the third party chairperson, one Ms Arthi Singh-Bhoopchand ('Singh-Boopchand'). Of relevance to this current application is the fact that Singh-Boopchand is a panellist of an organization known as IR Change.

[7] When Boopchand-Singh recommended the dismissal of the applicant following the conclusion of the disciplinary proceedings over which she presided, the applicant sought to challenge her determination on review to this Court, alleging that the disciplinary proceedings were in fact arbitration proceedings as contemplated by section 188A[1] of the Labour Relations Act ('LRA').[2] The application came before Steenkamp J under case number C 817 / 14, and the learned Judge held that the matter did not concern a pre-dismissal arbitration in terms of section 188A of the LRA, but was an internal disciplinary hearing in the ordinary course, simply presided over by the third party chairperson. The learned Judge determined that the applicant had to refer his dispute to the CCMA as an unfair dismissal dispute, and dismissed the review application for want of jurisdiction.

[8] The applicant then indeed referred an unfair dismissal dispute to the CCMA, in the ordinary course, in terms of section 191 of the LRA.[3] However, and

[1] The section deals with pre-dismissal arbitration proceedings, which serves as substitute for internal disciplinary proceedings.
[2] Act 66 of 1995 (as amended).
[3] Section 191(1) reads: *'(a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to … (ii) the Commission …'*.

unfortunately, this referral was now out of time,[4] being some 69 days late, requiring a condonation application.[5] The applicant indeed applied for condonation, and it is this condonation application that came before commissioner Wilson for determination.

[9] Commissioner Wilson held that the degree of lateness was substantial, but he found that the explanation for the delay was acceptable. The commissioner decided that the issue of prejudice was a neutral factor. The commissioner however declined to grant condonation because he considered that the application had no prospects of success. As a result, the condonation application was dismissed, which disposed of the applicant's unfair dismissal case against CPUT.

[10] Dissatisfied with this condonation ruling, the applicant then approached this Court on review, seeking to review and set aside the condonation ruling by commissioner Wilson. The review application came before Rabkin-Naicker J on 22 October 2015 under case number C 169 / 15. In a judgment handed down on 17 February 2016, the learned Judge dismissed the review application, with costs. The learned Judge specifically considered the issue of prospects of success as part of the condonation application, on the basis as it was raised by the applicant in the condonation application itself. After a full evaluation of the issue, the learned Judge held that the reasoning of commissioner Wilson on the issue of prospects of success was reasonable, that the commissioner had applied the test for condonation correctly, and his decision was unassailable on review.

[11] Next, the applicant sought leave to appeal against the judgment of Rabkin-Naicker J of 17 February 2016. The learned Judge refused leave to appeal, again with costs, on 9 May 2016. Undeterred, the applicant petitioned the Labour Appeal Court ('LAC') for leave to appeal. The LAC refused to leave to appeal by way of an order granted under case number CA 12 / 16 on 18 August 2016.

[12] It appears that the applicant's failure in the Labour Court before Rabkin-Naicker J and being turned down by the LAC simply spurred him on, rather

[4] Section 191(1)(b) requires the referral to be made within 30 days of date of dismissal.
[5] Good cause may be shown to permit a late referral in terms of section 191(2).

than bringing him to different insights. According to the applicant, he then realized that commissioner Wilson was tainted by a conflict of interest, in that he was also a panellist of IR Change, being the same organization that Boopchand-Singh also served as a panellist on. This prompted the applicant to lay a complaint with the Public Protector in 2016, in which he sought that the Pubic Protector investigate the conduct of commissioner Wilson and the CCMA, by virtue of the fact that he considered this conflict of interest to constitute maladministration and maleficence by the CCMA as public institution deserving of the attention of the Public Protector.

[13] However, the Public Protector declined to entertain the applicant's complaint. In a letter to the applicant dated 17 April 2017, the applicant was informed by the Public Protector that it had no jurisdiction to entertain the applicant's complaint, for a number of reasons. The first reason was that the condonation application had already been disposed of by the Labour Court and LAC. Secondly, the applicant was informed that only the Labour Court and LAC could entertain the complaint raised by the applicant, in any event. And finally, the applicant was informed that the Public Protector Act did not permit the Public Protector to perform judicial functions, which was in essence what the applicant wanted it to do.

[14] The applicant pressed on. He pursued an internal review in the office of the Public Protector. Yet again, and in a letter dated 28 November 2017, the applicant was informed that the Public Protector had no jurisdiction to entertain the applicant's complaint. In this letter, the Public Protector however gave some further background upon which the decision not to investigate was based. Specifically, the conflict of interest issue was dealt with in the letter. It was indicated that this issue had to be dealt with by the Labour Court, however the issue was already disposed of when the condonation application was disposed of. The Public Protector indicated that its file '*remained closed*'.

[15] This outcome has little impact on the applicant's resolve. He then turned his attentions to the Western Cape High Court. He brought an application to review and set aside the decision by the Public Protector not to investigate his complaint. However, and importantly, he sought, as consequential relief, that he be reinstated by the CPUT with full back pay and that the disciplinary

proceedings against him reconvene *de novo*. The applicant's review application was dealt with by Hlophe JP in the Western Cape High Court. In an order dated 19 February 2019 under case number 19493 / 18, it was ordered that the applicant's review applicant be withdrawn, with the applicant paying the wasted costs. That should have been the end of things, but once again, that turned out not to be so.

[16] The next twist came when the applicant contended, after his abortive review application in the Western Cape High Court, that it had been directed by Hlophe JP that the applicant's review application simply be referred to the Labour Court. So, in short, the applicant contended that he came to the Labour Court by way of an order from Hlophe JP giving him permission to do so and in effect transferring the application to this Court.

[17] I however was unable to find such an order or directive in the pleadings. The high water mark of this part of the case, on the evidence, is an e-mail exchange in the period between 27 February and 27 March 2019, in which the applicant communicated with the associate of Hlophe JP about the purported transfer of his matter to the Labour Court. In this e-mail exchange, he suggested that the Judge President had transferred the matter to the Labour Court, and he then required the assistance of the office of the Judge President to in effect conduct the necessary administrative steps to have the transfer to the Labour Court come about. This exchange came to an end on 27 March 2019, when the associate of Hlophe JP made it clear that it was the applicant's responsibility to take his matter to the Labour Court should he wish to do so, and this simply did not concern the office of the Judge President. This final e-mail made no reference to a '*transfer*'.

[18] The applicant however saw this e-mail of 27 March 2019 as some kind of invitation to come back to this Court. Virtually an identical review application to the application which the applicant had filed in the Western Cape High Court then followed in this Court on 30 May 2019, being the current application now before me. Once again, the review application is not directed at CPUT as the applicant's erstwhile employer, but at the Public Protector. The applicant again seeks an order that the decision of the Public Protector not to investigate his complaint be reviewed and set aside. However, and where it comes to the

consequential relief sought, that is then directed at CPUT, as he once again seeks that he be reinstated and the disciplinary proceedings against him be conducted *de novo*.

[19] It is based on the above factual matrix that I will now decide whether this Court in fact has jurisdiction to entertain the applicant's current review application.

Analysis

[20] Jurisdiction cannot be assumed or implied. It either exists or it does not. Jurisdiction is the power of the Court to decide a matter that has been brought before it. If the Court does not have the power to do so, it cannot consider the matter, no matter what the merits or equities may be. As held in *Gcaba v Minister for Safety and Security and Others*[6]:

> 'The specific term 'jurisdiction', which has resulted in some controversy, has been defined as the 'power or competence of a court to hear and determine an issue between parties …'

In *Makhanya v University of Zululand*[7], the Court also dealt with the meaning of jurisdiction as follows:

> '…. Judicial power is the power both to uphold and to dismiss a claim. It is sometimes overlooked that the dismissal of a claim is as much an exercise of judicial power as is the upholding of a claim. A court that has no power to consider a claim has no power to do either (other than to dismiss the claim for want of jurisdiction).'

[21] Jurisdiction is determined on the basis of the case as pleaded by the applicant, which pleaded case in motion proceedings is determined by reference to the notice of motion and founding affidavit.[8] In the notice of motion *in casu*, the applicants prays that the 'review decision' of the Public Protector of 26 June 2018, which refers to the internal review by the Public

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[6] (2010) 31 ILJ 296 (CC) at para 74.
[7] (2009) 30 ILJ 1539 (SCA) at para 23. See also *SA Maritime Safety Authority v McKenzie* (2010) 31 ILJ 529 (SCA) at para 8.
[8] See *Gcaba* (*supra*) at para 75; *Mbatha v University of Zululand* (2014) 35 ILJ 349 (CC) at para 157; *Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union on behalf of Members* (2015) 36 *ILJ* 624 (LAC) at para 21; *Moodley v Department of National Treasury and Others* (2017) 38 *ILJ* 1098 (LAC) at para 37; *Mohlomi v Ventersdorp/Tlokwe Municipality and Another* (2018) 39 ILJ 1096 (LC) at para 42; *Public Servants Association on behalf of Members v Minister of Health and Others* (2019) 40 ILJ 193 (LC) at para 15.

Protector of the decision to refuse to entertain the applicant's complaint, be declared to be unlawful, and be set aside. The second part of the relief sought in the notice of motion is a prayer by the applicant that his dismissal by CPUT in effect be set aside, and that he be reinstated with back pay so the disciplinary proceedings against him could be conducted *de novo*. The applicant also relies in the notice of motion on the purported directive of Hlophe JP transferring the matter to the Labour Court.

[22] In the founding affidavit, the applicant contends that the conflict of interest allegation concerning commissioner Wilson had not yet been decided by a Court, and constitutes 'maladministration' the Public Protector is required to investigate. As such, he pleaded that he is entitled to pursue the decision of the Public Protector not to investigate his complaint founded on this conflict of interest case on review to this Court, because it concerns the CCMA. In the founding affidavit, the applicant however concedes that there is no employment relationship between himself and the CCMA, or himself and the Public Protector. Finally, and in the founding affidavit, the applicant expansively elaborates on the merits of his conflict of interest complaint, which in a nutshell is based simply on the fact that commissioner Wilson was a panellist for IR Change, as was the chairperson of his enquiry, Singh-Bhoopchand.

[23] On this pleaded case, as it stands, the applicant cannot overcome the jurisdictional hurdle, for two principal reasons. The first reason is that this Court has no power or competence to review and set aside a decision of the Public Protector. I specifically asked the applicant on that provision of the LRA he relies in bringing his review application, as the power of this Court to consider review applications concerning organs of state flows only from the LRA. The applicant was not able to provide an answer. However, the only possible place to find an answer has to be sections 157 and 158 of the LRA. In this regard, and firstly, the functions of the Public Protector are not regulated by the LRA or other statute specifically resorting under the jurisdiction of the Labour Court, and thus section 157(1) cannot find application.[9] Secondly, Section 157(2) of the LRA provides that the Labour

[9] The section reads: '*Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court*'.

Court has concurrent jurisdiction with the High Court only in respect of alleged or threatened violation of any fundamental right arising from employment and from labour relations, or any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer. The result is that the insurmountable problem confronting the applicant is that the decision of the Public Protector *in casu* is not a decision arising from employment or labour relations or made by the State in its capacity as employer.[10] In *Motor Industry Staff Association v Macun NO and Others*,[11] the Court said:

> 'Section 157(2) of the LRA was enacted to extend the jurisdiction of the Labour Court to disputes concerning the alleged violation of any right entrenched in the Bill of Rights which arise from employment and labour relations, rather than to restrict or extend the jurisdiction of the High Court. The Labour Court and Labour Appeal Court were designed as specialist courts that would be steeped in workplace issues and be best able to deal with complaints relating to labour practices and collective bargaining. Put differently, the Labour and Labour Appeal Courts are best placed to deal with matters arising out of the LRA. Forum shopping is to be discouraged. When the Constitution prescribes legislation in promotion of specific constitutional values and objectives then, in general terms, that legislation is the point of entry rather than the constitutional provision itself.'

[24] This then only leaves section 158. Even though this provision on face value appears to deal with powers that are conveyed to the Labour Court only once jurisdiction is first established to exist, this section must be read in conjunction with section 157 as a source of jurisdiction as well. This was recognized in *Merafong City Local Municipality v SA Municipal Workers Union and Another*,[12] where the Court held as follows:

> 'Section 158 is such a section. Its introductory wording specifically states that it deals with the powers of the Labour Court. Because the introductory words of the previous section, that is s 157, state that it deals with the jurisdiction of the Labour Court, the immediate expectation is that s 158 is not a source of jurisdiction, but merely contains provisions defining the powers of the Labour Court in respect of matters, which, in terms of some other provision of that Act,

[10] See *Public Servants Association* (*supra*) at paras 11 and 13.
[11] (2016) 37 *ILJ* 625 (SCA) at para 20.
[12] (2016) 37 *ILJ* 1857 (LAC) at para 31.

falls under the jurisdiction of the Labour Court. However, a close reading of the entire s 158 dispels that initial notion. It does deal with powers (post jurisdiction), but also with powers, which cannot but be construed and understood as sources of jurisdiction.'

[25] Does section 158 however assist the applicant? Unfortunately not. The Public Protector functions in terms of the Public Protector Act.[13] Because of that, section 158(1)(b) cannot apply to decisions of the Public Protector, as it does arise from the LRA or an employment law. The review powers of the Labour Court are found in sections 145, 158(1)((g) and 158(1)(h) of the LRA. Section 145 cannot apply, because it only relates to review applications concerning arbitration awards handed down by commissioners of the CCMA. Section 158(1)(g) equally cannot apply, because it only relates to functions performed in terms of the LRA.

[26] This leaves only section 158(1)(h), which provides that: '*The Labour Court may … review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.*' A review application brought in terms of section 158(1)(h) could include an application based the grounds listed in PAJA[14] provided the decision constitutes administrative action, or in terms of the common law in relation to domestic or contractual disciplinary proceedings, or in accordance with the requirements of the constitutional principle of legality.[15] I will also accept, without deciding, to benefit the applicant, that CPUT could be seen as the State in its capacity as employer. Even considering the wide parameters of section 158(1)(h) in this context, the applicant still remains unassisted by this provision, where to comes to the issue of jurisdiction.

[27] In this instance, a decision taken by the Public Protector does has nothing to do with domestic or contractual disciplinary proceedings. Further, a decision taken by the Public Protector does not constitute administrative action and PAJA cannot apply. In *Minister of Home Affairs and Another v Public Protector of the Republic of South Africa*[16] the Court held:

[13] Act 23 of 1994 (as amended).
[14] Promotion of the Administration of Justice Act 3 of 2000.
[15] See *Hendricks v Overstrand Municipality and Another* (2015) 36 ILJ 163 (LAC) at para 20; *Merafong* (*supra*) at para 38.
[16] 2018 (3) SA 380 (SCA) at para 37.

> 'First, the Office of the Public Protector is a unique institution designed to strengthen constitutional democracy. It does not fit into the institutions of public administration but stands apart from them. Secondly, it is a purpose-built watch-dog that is independent and answerable not to the executive branch of government but to the National Assembly. Thirdly, although the State Liability Act 20 of 1957 applies to the Office of the Public Protector to enable it to sue and be sued, it is not a department of state and is functionally separate from the state administration: it is only an organ of state because it exercises constitutional powers and other statutory powers of a public nature. Fourthly, its function is not to administer but to investigate, report on and remedy maladministration. Fifthly, the Public Protector is given broad discretionary powers as to what complaints to accept, what allegations of maladministration to investigate, how to investigate them and what remedial action to order – as close as one can get to a free hand to fulfil the mandate of the Constitution. These factors point away from decisions of the Public Protector being of an administrative nature, and hence constituting administrative action. That being so, the PAJA does not apply to the review of exercises of power by the Public Protector …'

[28] Can the applicant then finally rely on the constitutional principle of legality as basis for contending that the utilization of section 158(1)(h) is competent? The simple answer must be no. Where it comes to section 158(1)(h), the legality issue as basis for review must arise in the context of the employment relationship. In short, it must be a decision taken that prejudicially impacts upon the review applicant, as being an employee of the State, or the State in the capacity as the employer of an employee.[17] The decision of the Public Protector is not such a decision.

[29] Accordingly, that has to be the end of it insofar as it concerns the jurisdiction of this Court to review and set aside the decision of the Public Protector not to investigate the complaint brought by the applicant, even if it concerns the conduct of a commissioner of the CCMA. The simple reason for this is that the LRA does not provide for it. The LRA provides for the review of the conduct of a commissioner which may include an issue of conflict of interest, by the Labour Court under section 145(2) of the LRA.[18] This power includes

[17] See *Mohlomi v Ventersdorp/Tlokwe Municipality and Another* (2018) 39 ILJ 1096 (LC) at para 29.
[18] The section reads: '*A defect referred to in subsection (1), means- (a) that the commissioner- (i) committed misconduct in relation to the duties of the commissioner as an arbitrator; (ii) committed a*

exercising a supervisory duty over any irregular conduct of such a commissioner.[19] This would also include any contention of bias or conflict of interest on the part of a commissioner.[20] However, this cannot include a decision of a third party functionary such as the Public Protector not to become involved in this process, which is exclusively reserved for the Labour Court and LAC.

[30] The point can perhaps be illustrated by a simple example. If there is an allegation concerning bribery and corruption by the management of the CCMA, such as for example in awarding a tender to supply a research database to the CCMA, then that would be an issue that the Public Protector can investigate. Any decision made by the Public Protector in this context would be subject to review by the High Court, and not the Labour Court. However, and where is comes to allegations of bribery or misconduct by individual commissioners of the CCMA in the course of discharging their duties as commissioners in terms of the LRA, those are issues that must be brought to the Labour Court in terms of the LRA, and does not concern the Public Protector.

[31] Applying the most generous approach to the applicant, it can perhaps be said that the applicant's notice of motion contemplates a prayer that his dismissal be reviewed and set aside, and that he be reinstated, which would of course be something the Labour Court has the power to decide. Even accepting this is so, and considering it in isolation, the applicant faces an insurmountable obstacle. That obstacle can be found in the fact that the applicant already pursued an unfair dismissal dispute to the CCMA and lost. He then challenged the matter further to the Labour Court and Labour Appeal Court, and also lost. It simply does not matter on what basis he lost. What matters is that his unfair dismissal case is finally disposed of, and therefore, it is simply not competent to afford the applicant any relief setting aside his dismissal and affording him reinstatement. That kind of relief is prohibited by the *exceptio res judicata*. In

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gross irregularity in the conduct of the arbitration proceedings; or (iii) exceeded the commissioner's powers; or (b) that an award has been improperly obtained.'

[19] See *Pep Stores (Pty) Ltd v Laka NO and Others* (1998) 19 *ILJ* 1534 (LC) at para 23; *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman NO and Others* (2013) 34 *ILJ* 2347 (LC) at para 34; *Baur Research CC v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 1528 (LC) at para 24; *Satani v Department of Education, Western Cape and Others* (2016) 37 ILJ 2298 (LAC) at para 21.

[20] Compare *Premier Foods (Pty) Ltd (Nelspruit) v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 658 (LC).

SA National Defence Union and Another v Minister of Defence and Others; SA National Defence Union v Minister of Defence and Others[21] it was held:

> 'The requisites for a valid defence of res judicata are that the matter adjudicated upon must have been for the same cause, between the same parties and the same thing must have been demanded …'

In *Yellow Star Properties v MEC Department of Development Planning and Local Government*[22] the Court amplified on this *dictum* in *SA National Defence Union* as follows:

> '…. it is necessary to stress not only that the parties must be the same but the same issue of fact or law which was an essential element of the judgment on which reliance is placed must have arisen and must be regarded as having been determined in the earlier judgment.'

[32] In simple terms, the *res judicata* principle can hardly be better described than how it was done in *MEC Department of Education, KwaZulu-Natal v Khumalo and Another*[23], where the Court said:

> 'Res judicata literally means "a matter already judged"; the doctrine is that the matter cannot be judged again. This is a presumption founded on public policy requiring litigation not to be endless, to be in good faith and to prevent the same claim being demanded more than once.'

[33] Whilst it may be so that the Public Protector has been added as a party to the conflict only after the conclusion of the original proceedings in the Labour Court and the LAC, that does not change the real issue. As was made clear by the applicant himself in argument, it was always about his dismissal by CPUT, his challenge of such dismissal, the decision taken by commissioner Wilson, and being reinstated by CPUT so his name can be cleared. The Public Protector is nothing but an added conduit to achieve exactly the same result

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[21] (2003) 24 ILJ 2101 (T) at 2109H-J. See also *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) at 239F-H*; Makhanya* (*supra*) at paras 45, 46 and 98; *Score Supermarket Kwathema v Commission for Conciliation, Mediation and Arbitration and Others* (2009) 30 ILJ 215 (LC) at para 29 – 31.

[22] 2009 (3) All SA 475 (SCA) at para 22. See also *Gauteng Shared Services Centre v Ditsamai* (2012) 33 ILJ 348 (LAC) at paras 13 – 14.

[23] (2010) 31 ILJ 2657 (LC) at para 32. See also *National Education Health and Allied Workers Union on behalf of Kgekwane v Department of Development Planning and Local Government, Gauteng* (2015) 36 ILJ 1247 (LAC) at para 26; *Bidvest Food Services (Pty) Ltd v National Union of Metalworkers of SA and Others* (2015) 36 ILJ 1292 (LC) at para 24.

the applicant was unsuccessful in obtaining from the CCMA, the Labour Court and the LAC. In short, the parties are the same, the cause is the same, and what is ultimately demanded as consequential relief is the same. The Labour Court has already decided all of this. The LAC declined leave to appeal. The case is thus disposed of, and cannot be revisited under a new guise.

[34] The applicant has sought to overcome the aforesaid difficulty by contending that he did not raise the issue of the conflict of interest of commissioner Wilson before the CCMA, Labour Court or LAC until now, because it only came to his attention later in 2016. Even accepting this is true, it simply does not matter. It cannot change what has already come to pass. In *Bouwer v City of Johannesburg and Another*[24], an applicant initially sought an order declaring his position redundant by virtue of the abolition of his post, which would have entitled him to be retrenched and to receive his full severance benefits. This application came before Landman J (as he then was), and the learned Judge ruled that without certain expert evidence on the evaluation of the respective posts, he could not decide the matter, and he consequently dismissed the application. Undeterred, that applicant then referred another dispute to the Labour Court, claiming that as a result of restructuring, the post that he previously filled had been abolished, and he sought declaratory relief including an order that he is entitled to terminate his employment and receive severance benefits. Francis J (as he then was) heard the matter, and considered a defence of *res judicata* in this context, and in particular an argument that Landman J in the previous application had not made a final and definitive judgment and order on the merits of the dispute.[25] Francis J held as follows:[26]

> 'It is clear from the judgment and order made by Landman J that he had made a definitive and final order. It is probably appropriate to conclude this judgment by referring to *Wolfaardt v Colonial Government* (1899) 16 SC 250 at 252 where it is stated that:
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> 'The plaintiff cannot, by now changing the form of action, make substantially the same claim as he made in the former action. The test as to what he claimed must be sought in the pleadings, and not in the evidence tendered by

[24] (2006) 27 ILJ 2590 (LC).
[25] See para 5 of the judgment.
[26] Id at paras 12 – 13.

him in support of his declaration. It is his own fault if he failed to substantiate his case by sufficient evidence.'

Landman J had found inter alia that the applicant had failed to lead expert evidence on the two different posts and therefore his case was shipwrecked. The applicant had failed to substantiate his case by sufficient evidence in the previous case. In launching the present application the applicant has attempted to salvage his wrecked ship which he clearly cannot do. The special plea stands to be upheld and the applicant's claim stands to be dismissed.'

[35] The comparisons between the judgment in *Bouwer supra* and the matter *in casu* is immediately apparent. The fact that the applicant failed to place the issue of conflict of interest before commissioner Wilson and Rabkin-Naicker J cannot assist his case, as he simply cannot raise it later, once his case has been finally dismissed, as a basis for seeking the same outcome.

[36] But even accepting for the purposes of argument that the applicant can competently bring another application, and raise legal grounds not raised before, to substantiate the same relief, the principle of *res judicata* further contemplates that an applicant needs to raise all the issues upon which the applicant seeks relief, once, and up front, in the same application. Continued piecemeal litigation is equally contrary to public policy. It is entirely undesirable that a litigant brings one claim after another based on in essence the same *lis* between the same parties, simply by rotating different possible causes of action to justify the same ultimate relief. This principle is often also expressed as the '*once and for all rule*', and is nothing else but a manifestation of the *exceptio res judicata*. In *Evins v Shield Insurance Co Ltd*[27], the Court described the '*once and for all rule*' as follows:

'… the rule is to the effect that in general a plaintiff must claim in one action all damages, both already sustained and prospective, flowing from one cause of action (see *Cape Town Council v Jacobs* 1917 AD 615 at 620; *Oslo Land Co Ltd v The Union Government* 1938 AD 584 at 591; *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A) at 330; *Custom Credit Corporation (Pty) Ltd v Shembe (supra* at 472). …. it is a well-entrenched rule. Its purpose is to prevent a multiplicity of actions and to ensure that there is an end to litigation.'

[27] 1980 (2) SA 814 (A) at 835C-E.

[37] As further explained in *Janse van Rensburg NO and Others v Steenkamp and Another; Janse van Rensburg and Others v Myburgh and Others*[28]:

> 'The scope of the "once and for all" rule was said, in the *National Sorghum* case (*supra*) at 241D–E, to require that all claims generated by the same cause of action be instituted in one action.'

[38] As to when the cause of action would be considered to be the same for this purpose, the Court in *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union and Others*[29] said:

> 'The cause of action is the same whenever the same matter is in issue: *Wolfaardt v Colonial Government* 16 SC 250 at 253. The same issue must have been adjudicated upon. An issue is a matter of fact or question of law in dispute between two or more parties which a court is called upon by the parties to determine and pronounce upon in its judgment, and is relevant to the relief sought: *Horowitz v Brock & others* 1988 (2) SA 160 (A) at 179F-H. …. The reason for the rule is to prevent difficulties arising from discordant or mutually contradictory decisions due to the same action being aired more than once in different judicial proceedings: Voet 44.2.1. The object of the rule is that of public policy which requires that there should be an end to litigation and that a litigant should not be harassed twice upon the same cause: *Boshoff v Union Government* 1932 TPD 345 at 350; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A-E. ….'

[39] The judgment in *Fidelity Guards Holdings* is in fact a proper example, directly comparable to the matter *in casu*, of how the '*once and for all rule*' would work in the context of relief sought under the LRA. The Court dealt with two different applications to declare a strike unprotected, based on the same factual matrix, but on different grounds. The Court described the issue as follows:[30]

> 'The enquiry in this matter is whether the cause of action in the first application (heard by Revelas J) was the same in the second application which is the subject-matter of this appeal. In both applications the contention was that the strike was unprotected. What differed was the basis for that contention. In my

[28] [2009] 1 All SA 539 (SCA) at para 27. See also *Truter and Another v Deysel* [2006] JOL 16961 (SCA) at para 22; *Symington and Others v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd* [2005] 4 All SA 403 (SCA) at para 26.
[29] (1999) 20 ILJ 82 (LAC) at para 7.
[30] Id at para 5.

> view, the cause of action was nevertheless the same, namely, that the strike was unprotected for want of compliance with the provisions of the 1995 Act.'

The Court held that a strike could be considered unprotected for various reasons under the LRA, as contained in Sections 64 and 65, and on either substantive or procedural grounds, or both. The Court then said the following, which in my view finds direct application to approach adopted by the applicant *in casu*:[31]

> 'If an employer in the initial application contends that the strike is unprotected because of a procedural defect, such as that the 48 hours' notice has not been given, and fails in its application, can the employer thereafter approach the court on another basis, for example, that the strikers are bound by a collective agreement that prohibits a strike in respect of the issue in dispute?
>
> The answer must be in the negative. In an application for a declaratory order and an interdict on the basis that a strike is unprotected, the employer is obliged to raise all its contentions in that application. It is not entitled to litigate piecemeal with the union and its members. …'

[40] I have little difficulty in concluding that what the applicant is seeking to do, where it comes to bringing the purported new issue of 'conflict of interest' into the proceedings, is exactly that which the Court in *Fidelity Guards Holdings supra* described as further proceedings relating to the same cause of action. As in fact said by the Court in *Fidelity Guards Holdings*:[32]

> '… What the appellant did in the present matter, however, was to attempt to circumvent these provisions of the law by launching new proceedings on the same issue, albeit on a different basis. That it cannot do …'

[41] In my view, and similarly, the applicant cannot keep litigating by just changing the grounds of his application, and the '*once and for all*' rule must find application, bringing matters to an end. In *Sgt Pepper's Knitwear and Another v SA Clothing and Textile Workers Union and Others*[33] the Court held:

> 'Our courts are not in favour of a piecemeal approach to litigation. Hence the 'once and for all' approach has been developed … '

[31] Id at paras 10 – 11.
[32] Id at para 13.
[33] (2012) 33 ILJ 2178 (LC) at para 28.

[42] The simple fact is that the alleged bias or conflict of interest of a commissioner constitutes proper cause for challenging any determination made by the commissioner on review to the Labour Court. The issue needed to be raised before Rabkin-Naicker J in the review application in this Court. Even if it was not raised, it cannot be raised later, as the basis of the case remains the same, being the application to review and set aside the condonation ruling of commissioner Wilson. The judgment of Rabkin-Naicker J (considered with the refusal of leave to appeal by the LAC) means that the condonation ruling of commissioner Wilson stands. It will continue to stand no matter what new grounds the applicant may come up with at a later stage. That must therefore be the end of any relief sought by the applicant in respect of the setting aside of his dismissal and his reinstatement.

[43] The applicant then faces a final difficulty, being that section 6(6) of the Public Protector Act specifically precludes the Public Protector from investigating judicial functions by a court of law, with the Labour Court clearly being a Court of law, and the Labour Court having discharged its judicial functions in upholding the condonation ruling of commissioner Wilson. It is out of bounds for the Public protector to investigate this.

[44] All said, the end result is inevitable. This Court has no jurisdiction to review and set aside the decision of the Public Protector complained of by the applicant. It is not a decision that arises from the LRA or has anything to do with the employment relationship. The Public Protector in any event cannot become involved in the decision making by functionaries tasked to fulfil dispute resolution functions under the LRA. The oversight of those decisions resort exclusively under the jurisdiction of the Labour Court. The Labour Court *in casu* has in fact considered the decision taken by commissioner Wilson, and has upheld the same. It is impermissible to in essence launch exactly the same challenge, but just in a roundabout way and under a different guise, as the applicant in my view did.

[45] As a final observation, I must deal with the applicant's reliance on the purported transfer of this matter to the Labour Court by way of an alleged directive by Hlophe JP of the Western Cape High Court. On the facts, no such directive and no such transfer exists. It is trite that the High Court has the jurisdiction to review decisions and reports made by the Public Protector, so I

cannot comment why Hlophe JP may have granted an order on 19 February 2019 that the applicant's application be withdrawn. However, the reason for this cannot be of any moment in the current matter, because there is no order transferring the application brought in the High Court, to this Court. I in any event have my doubts whether such an order would be competent. It would be always up to this Court to decide for itself, based on the relevant provisions of law and the case as pleaded by the applicant, whether it has jurisdiction.

[46] For all the reasons as set out above, I therefore conclude that the Labour Court has no jurisdiction to entertain the applicant's application. The applicant's application falls to be dismissed on this basis alone, without needing to consider the merits thereof or any issue of condonation for the late filing of the applicant's review application. I may add that the applicant's application never had any merit, and a modicum of common sense and circumspection of the matter should have made it clear to the applicant that he had his day in the CCMA and in this Court, but unfortunately lost, and that to doggedly press on with the case was entirely unfounded and unreasonable.

Costs

[47] The fifth respondent brought a counter application to declare the applicant a vexatious litigant. I however indicated in Court that I did not believe that there was a basis for granting such relief in this case, and it was not persisted with. The fifth respondent however did persist in seeking a costs order against the applicant, and prayed for an order that this Court expresses its dissatisfaction at what is tantamount to an abuse of process by the applicant.

[48] Considering all of the above events, it is unfortunately now the time to properly warn the applicant, and to convey censure for the manner in which he has chosen to conduct himself and his clear abuse of the processes of this Court. On each occasion he does so, he takes up the valuable time and already stretched resources of this Court without any basis for doing so. And also on every occasion, the Public Protector and CPUT are compelled to come and defend themselves, using taxpayers' money and their own limited resources to

do so. This Court has consistently said that this kind of frivolous and unfounded litigation is deserving of punitive costs orders.[34]

[49] The applicant's claim, as stated above, never had substance, and was *res judicata*. When he did not achieve the outcome he wanted in this Court, the applicant switches forum to Public Protector, then the High Court, but when he does not come right at these *fora*, he switches back to this Court.[35] The conduct of the applicant is nothing else but an abuse of process. The applicant must now be told, in no uncertain terms, that exercising his right of access to the Courts must be done in a responsible manner and always in compliance with the rules and processes of the Court.[36] The only way that the applicant can learn this lesson is by way of an appropriate punitive costs order. As held in *Sepheka v Du Pont Pioneer (Pty) Ltd*[37]:

> 'Punitive costs will also be justified where a litigant adopts what is called an 'unconscionable stance', or conducts him/herself in an unacceptable manner in the course of the proceedings. Punitive costs also serve as a mark of a court's displeasure. …'

[50] Because the applicant seems undeterred by past costs orders made against him, something more is needed to prevent this kind of abuse of process to simply happen again, going forward. What I shall therefore do is to make an order to the effect that all the costs orders granted by this Court against the applicant, including the order I will make in this judgment, must be taxed and must first be paid by the applicant before the applicant is entitled to institute any litigation against CPUT or the Pubic Protector in this Court.

[51] In the premises, I make the following order:

Order

1. The Labour Court has no jurisdiction to entertain the applicant's application.

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[34] See for example *Democratic Nursing Organisation of SA on behalf of Ramaroane v Member of the Executive Council for Health, Gauteng Province and Others* (2019) 40 ILJ 2533 (LC) at para 20; *Sihlali and Others v City of Tshwane Metropolitan Municipality and Another* (2017) 38 *ILJ* 1692 (LC) at para 29.

[35] Compare *Maluleke v Greater Giyani Local Municipality and Others* (2019) 40 ILJ 1061 (LC) at paras 35 – 36

[36] See *Mashishi v Mdladla NO and Others* (2018) 39 ILJ 1607 (LC) at para 14; *Ngobeni v Passenger Rail Agency of SA Corporate Real Estate Solutions and Others* (2016) 37 ILJ 1704 (LC) at para 14.

[37] (2019) 40 ILJ 613 (LC) at para 42.

2. The applicant's application is consequently dismissed.

3. The applicant is ordered to pay the costs of the application.

4. The applicant shall not be entitled to institute any further proceedings in this Court against the first and fifth respondents, until the taxed bills of costs in respect of the costs orders made against the applicant under case number C 169 / 15, as well the costs order in paragraph 3 of this order, have been paid to the respondents by the applicant.

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S Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: In person

For the First Respondent: Mr M Sithole of the Office of the Public Protector

For the Fifth Respondent: Adv J K Felix

Instructed by: Gunston Stradvik Attorneys