



Reportable

**IN THE LABOUR COURT OF SOUTH AFRICA  
(HELD AT CAPE TOWN)**

Case Number: **C568 /2019**

In the matter between:

**SEBIBENG DIAMOND MINE (JV) t/a  
FRONTIER MINING PROJECT**

Applicant

and

**NUMSA obo PHEKOANTOA AND 164 OTHERS**

First Respondent

**COMMISSION FOR CONCILIATION,  
MEDIATION & ARBITRATION**

Second Respondent

**COMMISSIONER LERATO SEGOTSANE N.O.**

Third Respondent

**Date heard: 14 October 2021**

**Date of Judgment: 4 November 2021**

**Summary: applicant seeking to review, in terms of section 145 of the LRA, a condonation ruling issued by the CCMA in which it condoned the late referral of a dismissal dispute in respect of 165 employees.**

**Held that reviews of CCMA or bargaining council rulings must be brought under section 158(1)(g) of the LRA and not section 145.**

**Held that it was clear from the papers that the applicant did not mistakenly refer to section 145 as opposed to section 158(1)(g) and therefore this was not a case where the court could overlook the reliance on the incorrect section and determine the matter in terms of the correct section.**

**Held that even if the applicant intended to rely on section 158(1)(g) it had not made any submissions as to why it is just and equitable to review a ruling in respect of a dispute that has not yet been finally determined by the CCMA as required by section 158(1B) of the LRA.**

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## **JUDGMENT**

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**CONRADIE, AJ**

### Introduction

1. In this matter the applicant seeks to review a ruling issued by the Third Respondent (the commissioner) on 23 August 2019 in which he granted condonation for the late referral of an unfair dismissal dispute referred by the First Respondent (the union) on behalf of 165 of its members.

### Background

2. The union's members were charged with participating in an unprotected strike between 14 and 29 January 2019 which culminated in the applicant's Mine Manager being taken

hostage. Alternatively, they were charged with unauthorised absence from work during this period.

3. They were all subsequently dismissed although there is a dispute about whether they were informed of their dismissal and if so when they were informed.
4. On 10 July 2019 the union referred an unfair dismissal dispute to the Second Respondent (the CCMA). In the referral form it indicated that its members were dismissed on different dates. Attached to the CCMA referral was a condonation application in which the union indicated that the referral was 136 days late. It repeated its claim that its members were dismissed on different dates. Further that some members received notice of dismissal via the post office.
5. The condonation application was heard on 15 August 2019. At the condonation hearing the union submitted that:
  - 5.1. the disciplinary hearing took place in the absence of its members.
  - 5.2. most of its members were living in neighbouring countries and it took some time to get the correct information given the number of employees involved.
  - 5.3. while it received a list from the applicant indicating which employees were found guilty and which were found not guilty, the list did not indicate whether the employees who were found guilty were dismissed.
  - 5.4. at the heart of its members' unhappiness was the fact that they did not receive their full salaries for September 2018 to January 2019.
6. In response, the company submitted that by the end of March 2019 when the employees did not receive their salaries, they should have gone to the union which knew by then that they had been dismissed.
7. After considering the submissions of both parties, the commissioner granted condonation. Thereafter, the CCMA set the matter down for 25 September 2019 for a con/arb process.
8. Dissatisfied with the commissioner's ruling the applicant launched these review proceedings on 9 September 2019.

### The review application

9. It is important for the decision which I have come to in this matter that the material parts of the notice of motion be set out.
10. In its notice of motion, the applicant seeks an order:
  1. *"That the Arbitration under case number NC1953/2019 to be heard by the 2<sup>nd</sup> Respondent be suspended and/or postponed sine die pending the outcome of this Review.*
  2. *"Reviewing, setting aside for Arbitration Award, in limine Ruling issued by the 3<sup>rd</sup> Respondent" under CCMA Case number NC1953/2019 on or about 25 September 2019.*
  3. *Substituting the said Award for:*
    - 3.1 *That the Application for condonation is dismissed."*
11. In the alternative the applicant requests that the matter be remitted to the CCMA to be heard by another commissioner.
12. The remainder of the notice of motion is consistent with what is required in terms of Rule 7A of the rules of this court when it comes to processing a review application in terms of section 145 of the LRA.
13. While the applicant refers mainly to "the award", it also refers to "the ruling". In this regard in the introductory paragraphs to its founding affidavit it refers to the object of the application as being to obtain an order reviewing and setting aside the award and/or the variation of the award issued by the CCMA. It then goes on to say that the award was issued pursuant to the union applying for condonation for the late referral of a dismissal dispute to the CCMA.
14. The applicant also states that it has been advised that rulings are subject to review under section 145 of the LRA. It records its right to file a supplementary affidavit upon receipt of the record in the matter, consistent with the requirements of Rule 7A of the rules of

this court which applies to reviews in terms of section 145. The applicant then proceeds to make the following submissions in its affidavit:

14.1. It is advised that any award or ruling is reviewable if the commissioner makes an error of law or where the decision is not justifiable or is irrational.

14.2. The respondents (presumably referring to the commissioner) *“perpetrated a number of misdirection’s, which I am advised, constitutes defects within the meaning of the terms as used in Section 145 of the LRA.”*

14.3. It is advised that the test for review is whether a reasonable commissioner having regard to the evidence properly before him, could arrive at the conclusion which the commissioner reached in allowing the application for condonation.

14.4. The applicant, in concluding its submissions in its founding affidavit, records the following grounds of review:

14.4.1. The commissioner did not apply her mind to the relevant issues and failed to appreciate and give effect to her power and duties in terms of the LRA.

14.4.2. Adopted an approach unjustified on the facts and inconsistent with her statutory duties based on her factual conclusions on grounds that do not accurately or correctly reflect the evidence before her.

14.4.3. Failed to establish reasonable correspondence between the evidentiary material placed before her and her award.

14.4.4. Misconstrued documentary evidence and ignored or misapplied relevant legal principles to an extent that was unreasonable and inappropriate.

14.4.5. Reached conclusions that were not capable of reasonable justification.

14.4.6. Committed misconduct in relation to her duties.

14.4.7. Committed a gross irregularity during *“the procedures.”*

15. The applicant concludes by saying that the commissioner thereby misdirected herself in material respects which justifies setting aside the award in terms of sections 145(2) and/or 158(2) and/or section 158(1)(g) of the LRA.

16. In its supplementary affidavit, the applicant repeats all the grounds of review listed in the founding affidavit. In addition, the applicant, now referring to the commissioner as he and no longer as she, submits that the award is reviewable on the following grounds:
- 16.1. The commissioner's award is reviewable if he made an error of law and the decision is not justifiable and/or rational.
- 16.2. The ruling is wrong and irrational and therefore reviewable.
- 16.3. The commissioner perpetrated a number of misdirection's which constitutes defects in terms of section 145 of the LRA.
- 16.4. The test on review is whether a reasonable commissioner having regard to evidence properly before him could have arrived at the same conclusion.

#### Evaluation

17. It is clear from the applicant's papers that it has approached the matter on the basis that it is a review in terms of section 145 of the LRA. This is apparent from the grounds of review as well as the Rule 7A procedure which was followed in executing the review. It is only in the concluding paragraphs of the founding and supplementary affidavits that there is a single reference to the review being brought in terms of section 158(1)(g) of the LRA.
18. While I accept that in the ordinary course substance should prevail over form, in the sense that if an applicant clearly intended to rely on section 158(1)(g) as opposed to section 145 of the LRA, then the dispute should be determined as a section 158(1)(g) dispute. In the case before me, however, the review was undoubtedly brought in terms of section 145 particularly if one has regard to the grounds of review and the fact that the applicant clearly states that it is brought in terms of section 145 with only a passing reference to section 158(1)(g).
19. Even if I am incorrect in this conclusion and the applicant intended to bring the application in terms of section 158(1)(g), this would still not be of assistance to the applicant. I say this because section 158(1B) of the LRA does not support review

applications in respect of incomplete proceedings. The section provides that *“The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the Commission or any bargaining council in terms of the provisions of this Act before the issue in dispute has been finally determined by the Commission or the bargaining council, as the case may be, except if the Labour Court is of the opinion that it is just and equitable to review the decision or ruling made before the issue in dispute has been finally determined”*.

20. Section 158(1B) contains 2 parts. The first part prohibits this Court from reviewing a decision or ruling in respect of incomplete proceedings in the CCMA or a bargaining council. The second part creates an exception to the general prohibition. The exception only applies if the Court is of the view that it is just and equitable to review the decision or ruling before the issue in dispute has been finally determined.
21. Given that the applicant has decided to premise its review application in terms of section 145 it has made no submissions in support of an argument that it is just and equitable to review the decision to grant condonation for the late referral of the dismissal dispute. In my view this is an issue which the applicant would have to pertinently address in order to convince this court to review a decision or ruling in respect of a dispute that has not yet been finally determined by the CCMA.
22. Section 158(1B) was introduced as part of the 2014 amendments to the LRA in order *“to limit the use of piece-meal review applications during arbitration proceedings as a mechanism for delay.”*<sup>1</sup> The need for this amendment could not be more apparent than in a case such as this where 165 employees, who were dismissed in early 2019, have still not had their unfair dismissal dispute determined nearly 3 years later. This in the context where it appears from the papers that the applicant was in financial difficulty resulting in its employees not receiving their salaries and pleading with the company to commence with retrenchment proceedings in the hope that they would receive some

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<sup>1</sup> Memorandum of Objects: Labour Relations Amendment Bill, 2012 at page 15.

money in case the company closes. Also of concern are the following unchallenged statements by the union during the condonation hearing:

*“So if ... we will argue, Commissioner, that prejudice of the, to the applicants, if you refuse this condonation, far outweighs the prejudice to the respondent.... They have run out of that mine; they have opened another mine, emerged under a new name, and they think we are not aware of that , but we are folling them through ...(sic)*

*Commissioner, that is a mine. That is a mine which, according to our ...(indistinct) has effectively closed operationally. What may be there is really just I’m sure maintenance or trying to get the machines out.”*

23. In the circumstances, I am of the view that if the application is brought in terms of section 145 it is dismissed on the basis that rulings cannot be reviewed in terms of section 145 as this section only applies to arbitration awards. If the review was intended to be brought in terms of section 158(1)(g) then the applicant has failed to provide any reasons why it is just and equitable for this Court to review the commissioner’s condonation ruling before the unfair dismissal dispute has been determined by the CCMA.

#### Order

24. In the circumstances, I make the following order:

1. The application is dismissed.
2. There is no order as to costs.

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BN. Conradie

Acting Judge of the Labour Court



Appearances:

Applicant: Mr P Peyper of Peyper Austen Inc

First Respondent: Adv LK Siyo instructed by CN Phukubje Inc

LABOURT COURT