IN THE LABOUR APPEAL COURT OF SOUTH AFRICA HELD JOHANNESBURG

Case no: JA 62/05

IN THE MATTER BETWEEN

PREMIER GAUTENG **1st Appellant**

MEMBER OF THE EXECUTIVE COUNCIL FOR SOCIAL SERVICES AND POPULATION DEVELOPMENT, GAUTENG PROVINCIAL GOVERNMENT **2nd Appellant**

AND

L RAMABULANA N.O **1st Respondent**

PUBLIC HEALTH AND WELFARE SECTOR BARGAINING COUNCIL **2nd Respondent**

V Vena **3rd Respondent**

NEHAWU **4th Respondent**

JUDGMENT

ZONDO JP

[1] I have had the opportunity of reading the judgment prepared by Jappie JA in this matter. I agree with that judgment. The reasons

for the conclusion that Jappie JA has reached in the matter are based on the provisions of the collective agreement containing the dispute resolution procedure applicable to this matter. The purpose of this judgment is to provide additional reasons that are based on provisions of the Labour Relations Act, 1995 (Act 66 of 1995) ("**the Act**") which also justify the same conclusion reached by Jappie JA. I proceed to do so below.

[2] The facts of this matter are very brief and are common cause. The third respondent was employed by the Gauteng Provincial Government in the Department of Social Services and Population Development. The first appellant is the Premier of the Gauteng Province. The second appellant is the Member of the Executive Council responsible for Social Services and Population Development. The first respondent is the arbitrator whose ruling was the subject of a review application in the Labour Court which led to this appeal. He was cited in his official capacity as such. The second respondent is the Public Health and Welfare Sector Bargaining Council. The fourth respondent is the National Health and Allied Workers Union. The third respondent is a member of the union.

[3] The third respondent was dismissed from the employ of the Gauteng Provincial Government. A dispute arose between him and his union, on the one hand, and, on the other, the appellants about the fairness of the dismissal. The union referred the dispute to the bargaining council for conciliation. The referral was made within the prescribed period of 30 days from the date of dismissal. The union and the employee failed to attend a subsequent conciliation meeting convened by the bargaining council to try and resolve the dispute through conciliation. They did not in any way contact the bargaining council as for a postponement or to convey to the bargaining council any difficulties they might have had.

[4] At the conciliation meeting the appellants were represented but, as already stated, the third and fourth respondents were not. The conciliator who had been assigned by the bargaining council to

conciliate the dispute in the conciliation meeting did not issue a certificate to the effect that the dispute remained unresolved. He indicated that he satisfied himself that the union had been notified of the conciliation meeting nor did he postpone it. He concluded that "**the matter**" be "**dismissed**". He did this in a written ruling.

[5] Subsequently the union referred the dispute to the bargaining council for conciliation for a second time. As that referral was made outside the prescribed period of 30 days from the date of dismissal, the union also submitted an application for the condonation of the late delivery of such referral. The appellants opposed the second referral and the condonation application on the basis that the initial referral had been dismissed and because of that the conciliation had no jurisdiction to entertain a second referral and the condonation application. In due course the first respondent, also a conciliator of the bargaining council, granted the union's condonation application.

[6] Aggrieved by the first respondent's decision to grant the union condonation, the appellants launched an application in the Labour Court to have the first respondent's decision reviewed and set aside on the basis that the first respondent had no jurisdiction in the matter as the matter had already been dismissed by the first conciliator. The Labour Court chose to approach the matter on the basis that the union's condonation application had to be treated as an application for the rescission of the first conciliator's decision. On this basis the Labour Court, per Revelas J, concluded that the

first respondent was right in granting the condonation application. It, accordingly, dismissed the appellant's review application. The Labour Court subsequently granted the appellants leave to appeal to this Court.

The appeal

[7] The first issue that this appeal raises is what power or authority the bargaining council's first conciliator had when neither the union nor the third respondent attended the conciliation meeting and what to "**dismiss**" the matter, as the first conciliator put it, means in such a context.

[8] In a case such as this the statutory framework governing the dispute resolution processes in regard to unfair dismissal disputes is primarily to be found in the Act. Therefore, one must start with the Act and ask what, if anything, it provides should happen in a case where the employee party fails to attend a conciliation meeting after referring the employee's dismissal dispute to the CCMA or the relevant bargaining council for conciliation.

[9] Sec 191(a) of the Act provides that **"(i)f 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 an unfair labour practice may refer the dispute in writing to:**

(i) a council, if the parties to the dispute fall within the registered scope of that council; or

(ii) the Commission, if no council has jurisdiction"

Sec 191(1)(b)(i) provides that a referral in terms of paragraph (a) must be made within 30 days of the date of a dismissal, or, if it is a

later date, within 30 of the employer making a final decision to dismiss or to uphold the dismissal." Sec 191(2) provides that "(i)f the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time limit in subsection 1 has expired. Sec 191(3) requires the employee to satisfy the council or the CCMA that a copy of the referral has been served on the employer. Sec 191(4) and (5) of the Act read as follows:

"**(4) The council or the Commission must attempt to resolve the dispute through conciliation.**

5) If the council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved –

(a) the council or the Commission must arbitrate the dispute at the request of the employee if –

i) …

ii) …

iii) …

(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is –

i) …

ii) …

iii) …

iv) …"

[10] What the provisions of sec 191(4) mean is that, once the CCMA or a bargaining council with jurisdiction, has received a referral of a dismissal dispute as contemplated in sec 191(1) of the Act for conciliation within the prescribed period of 30 days or, I am sure, within a longer period and has condoned the late referral, the CCMA or the bargaining council has an obligation to attempt to conciliate it. While in many cases this may mean that the parties must be physically present at a conciliation meeting, I do not think that it can be said that the CCMA or a bargaining council cannot undertake attempts to conciliate a dismissal dispute simply because one party is not physically at the conciliation venue even if he is only a telephone call away and is available to telephonically participate in attempts at conciliation. Accordingly, simply because a party did not arrive at the conciliation venue should not automatically lead to no attempts being made to conciliate the dispute. Indeed, the Act does not anywhere confer on the CCMA or a bargaining council power to dismiss an employee's referral of a dismissal dispute simply because he failed to attend the conciliation meeting. If there is such a power, it certainly is not in the Act. And the CCMA is a creature of statute that, generally speaking, derives its powers from the Act. Of course, it can also derive some of its powers from its rules governing the dispute resolution process that it is empowered to undertake. Needless to say, its rules should not be in conflict or inconsistent with provisions of the Act. Where they are, the Act will obviously prevail and such rules would be ultra vires.

[11] What the provision of sec 191(5) of the Act means is that two eventualities are provided for when the CCMA or a bargaining council

has received the referral of a dismissal dispute within the prescribed period for conciliation. Either there will be attempts to conciliate or there will be no attempts at conciliation within the prescribed period. It seems to me that there will be no attempts where none can be made because the one party is not present at the conciliation meeting or both are not present at the conciliation meeting and can simply not be contacted during that period. In such a case no attempts can be made. The other is where attempts can be made. Where they have been made and they have been unsuccessful, the conciliator can or must issue a certificate that the dispute remains unresolved.

[12] Where no attempts could be made or were made – may be because one of the parties was out of reach or could not for some or other reason be reached, no certificate is made that the dispute remains unresolved but, once a period of 30 days from the date when the CCMA or the bargaining council received the referral has lapsed, the consequence is the same. It is that the employee acquires the right to have his dispute either arbitrated if he so requests or to have it adjudicated by the Labour Court if he refers it to that Court for adjudication.

[13] Whether the dispute goes to arbitration or adjudication depends on whether the case falls within the ambit of either sec 191(5)(a) or (b) of the Act. This means that a failure by the employee to attend a conciliation meeting convened pursuant to his referral of his dispute to the CCMA or a bargaining council for conciliation does not take away, and, cannot possibly to take away, from him the right which sec 191(5)(a) or (b) gives him to have his dispute arbitrated if he so requests or adjudicated if he refers it to the Labour Court for adjudication.

[14] It might be helpful to consider what, if anything, the Rules of the CCMA provide should happen in the event of a situation such as the one that arose in this case. Sec 115(2)(CA)(iii)(aa) and (bb) of the Act empowers the CCMA to make rules:

(iii) regulating the practice and procedure-

aa) for any process to resolve a dispute through conciliation

bb) at arbitration proceedings;

[15] Rule 13 of the CCMA Rules bears the heading: "**What happens if a party fails to attend or is not represented at conciliation**." Rule 13(1) requires a party to a dispute to "**attend a conciliation in person, irrespective of whether they are represented**." It would not be surprising if the validity of this rule were questionable since the Act does not contemplate that there would necessarily have to be a conciliation meeting and certain rights are conferred on the employee simply by reason of the fact that a period of 30 days from the CCMA's receipt of the referral has lapsed. Of course, one understands why it would be a good thing if all parties attended a conciliation meeting once it has been called.

[16] Rule 13(2) deals with a situation where "**a party is represented at the conciliation but fails to attend in person"**. That relates to, among others, a case where an employee has referred his dismissal dispute to the CCMA conciliation but on the day of the conciliation meeting he fails to attend but ensures than an official of a trade union of which he is a member attends to protect his interests. That is not the scenario that occurred in this case. However, it may be

helpful to consider the rule relating to it. Rule 13(2) provides that in such a case the commissioner may –

(a) continue with the proceedings;

(b) adjourn the proceedings; or

(c) dismiss the matter by issuing a written ruling."

[17] Rule 13(3) deals with the factors which a commissioner seeking to exercise his powers under Rule 13(2) may take into account. Rule 13(3) provides:

"(3) **In exercising a discretion in terms of subrule (2), a commissioner should take into account, amongst others –**

a) whether the party has previously failed to attend a conciliation in respect of that dispute;

b) any reason given for that party's failure to attend;

c) whether conciliation can take place effectively in the absence of that party;

d) the likely prejudice to the other party of the commissioner's ruling;

e) any other relevant factors.

[18] Rule 13(4) deal with a situation where a party to a dispute fails to attend in person or to be represented at a conciliation. That relates to the scenario that occurred in this case. Rule 13(4) provides: "**If a party to a dispute fails to attend in person or to be represented at a conciliation, the commissioner may deal with it in terms of rule 30**." Rule 30 bears the heading: "**what happens if a party fails to attend proceedings before the Commission**." Rule 30 (1),

(2) and (3) read as follows:

"(1) If a party to the dispute fails to attend or be represented at any proceedings before the commission, and the party –

a) had referred the dispute to the Commission, a commissioner may dismiss the matter by issuing a written ruling; or

b) had not referred the matter to the commission, the commissioner may –

(i) continue with the proceedings in the absence of that party; or

(ii) adjourn the proceedings to a later date.

2) A commissioner must be satisfied that the party had been properly notified of the date, time and venue of the proceedings, before making any decision in terms of subrule (1).

3) If a matter is dismissed, the Commission must send a copy of the ruling to the parties."

[19] The provisions of the Rules of the CCMA which apply to the scenario which occurred in this case are in Rule 30(1)(a). This is because of Rule 13(4) which says that Rule 30 applies to such a scenario. Rule 30(1)(a) provide that **"(i)f a party to the dispute fails to attend or be represented at any proceedings before the commission, and the party had referred the dispute to the Commission, a commissioner may dismiss the matter by issuing**

a written ruling." The question arises: What does it mean to say that in such a situation the commissioner may dismiss the matter? In seeking to determine what the CCMA Rules mean in this regard, certain observations must be borne in mind. The one is that a commissioner dealing with such a matter has no power to deal with the merits of the dispute in the sense of deciding whether or not a dismissal is fair or not. His authority is limited to attempting to conciliate the dispute. Apart from attempting to conciliate the dispute, his powers would be limited to doing whatever is incidental to attempts to conciliating the dispute. That would be like adjourning the conciliation meeting and, may be, ruling that no further conciliation attempts or meetings would be made in which case he probably should certify that the dispute remains unresolved as provided for in sec 191(4) of the Act.

[20] Another observation that must be borne in mind is that it is the Act that provides for the making of CCMA Rules and in sec 115(2)(cA)(iii)(aa) – which relates to conciliation – it empowers the CCMA to make rules "**regulating the practice and procedures – for any process to resolve a dispute through conciliation**." This means that such rules – in so far as they relate to conciliation – are not meant by the Act to take away any substantive right of any party. At any rate, where the Act confers a right to a party, the CCMA Rules cannot take that away. Any rule that does that would be in conflict with the Act – an untenable situation. Obviously the Act prevails in such a case. Furthermore, it must be borne in mind that in terms of sec 191(4) of the Act a party to a dispute who

refers a dispute to the CCMA or a bargaining council for conciliation has a right, once a period of 30 days from the date when the CCMA or a bargaining council received the referral has lapsed, to have his dismissal dispute arbitrated if he so requests or has a right to refer it to the Labour Court for adjudication, without such party having done anything after referring the dispute for conciliation. The CCMA Rules cannot take that right away.

[21] The construction that must be given to provisions of the Rules of the CCMA must, as far as possible, be a construction that reconciles them with the Act rather than a construction that places them on a collision course with the Act. Indeed, the construction given to them must, as far as possible, be consistent with the powers of the CCMA as conferred by the Act.

[22] In the light of all the above it seems to me that to construe "**dismiss the matter"** in Rule 30(1) of the CCMA Rules as meaning that the employee loses his right to take the dispute to arbitration or adjudication even after the period of 30 days referred to in sec 191(4) has lapsed would be to give the phrase a construction that is not in line with the powers of the CCMA and a construction that is in conflict with sec 191(4) of the Act. In my view it must be given a construction that does not have such effect. If one construes the phrase to mean that implicit in a referral for conciliation is a request for a conciliation meeting and such a request is dismissed in the sense that there will thereafter not be another conciliation meeting, that would not be in conflict with the Act. If the phrase is

construed to mean that the matter is dismissed for purposes of conciliation – and, therefore, not for purposes of any future arbitration or adjudication, that is not in conflict with the Act and is in line with the powers of the CCMA. If it is construed to mean that it is struck off the roll of the conciliation process, that is also not in conflict with the Act. I am of the view that the phrase bears one of the above meanings and cannot conceivably mean that the employee or the union is precluded from having the dispute arbitrated if that is what he wants or that he is precluded from referring the dispute to the Labour Court for adjudication if the matter is one that should be referred to the Labour Court for adjudication. In this regard it seems to me that the approach adopted by Jappie AJA with regard to the provisions of the Dispute Resolution Procedure agreement between the parties is consistent with the approach that commends itself to me both in terms of the Act read with the Rules of the CCMA as well as in terms of the Act read with the collective agreement with which Jappie JA has dealt with in his judgment.

[23] The conciliator had no power to "**dismiss**" the referral in the sense of dismissing it on the merits or in the sense of precluding the employee party from pursuing the dispute to arbitration. What he or she could do, I would imagine, is to make a decision if the relevant rules of the bargaining council permitted him or her to do so the effect of which would be that the dispute could no longer be set down for another conciliation meeting either at all or at the request of the employee party but could be set down again at the

request of the employer party or it could only be set down for a conciliation meeting at the request of the employee party on good cause shown. Assuming that the bargaining council or the CCMA places dispute referrals on the a kind of a "**conciliation roll**" like a motion court roll or a trial roll in the Labour Court or High Court, such a decision can be taken to mean that the matter is struck off the conciliation roll with the result either that it cannot be placed on the conciliation roll again or it can be placed on the conciliation roll again only with the leave of the bargaining council. In such a case, if the matter is not again placed on the "**conciliation roll**" within the prescribed period, including an extended prescribed period, the employee is entitled, once the 30 days period has lapsed, to request that the CCMA or the bargaining council arbitrate the dispute and, if he makes that request, the CCMA or bargaining council is obliged to arbitrate the dispute. The bargaining council or CCMA has no authority or power in such a case to require the employee party to make an application for "**condonation**" of any kind for its failure to attend the conciliation meeting before it can entertain his request for arbitration or before it can arbitrate his dispute.

[24] The effect of the above is that in this case the employee party did not need to make a second referral of the dispute. It had made a referral of the dispute in time and all it needed to do was to request that the dispute be arbitrated by the bargaining council. This means that there was no need for an application for condonation. The conciliator granted that condonation application. He should have

held that the second referral was incompetent as a dispute that has already been competently referred to conciliation cannot be referred to the same process for a second time. He did not do so but, instead, he condoned the "**late referral**" of the dispute.

[25] Although the conciliator had no jurisdiction to deal with such a referral and such condonation application, his decision granting the condonation did not adversely affect any of the employer party's rights or interests. This is so because by that time a period of 30 days from the date of receipt of the first referral of the dispute had lapsed and, because of that, the employee party had become entitled to have his dispute arbitrated by the bargaining council if he so requested. In other words the granting of the condonation application did not give the employee party a right that it did not already have nor did it take away from the employer party a right which it had acquired before such order was made. That being the case, the employer party should not have brought a review application to set aside the decision condoning the so-called "**late referral**". Even if the order condoning the "**late referral**" were granted, as it was, and that order was set aside, in law that would not have prevented the employee party from making the request for arbitration and having the dispute arbitrated. For this reason, the bringing of the review application by the employer party was moot and was an exercise in futility that would not have brought the employer party any practical benefit. For that reason, it should not have been brought. It could, and, should, have been dismissed by the Labour Court on that ground alone.

[26] In the circumstances the appeal falls to be dismissed – not for the reasons given by the Labour Court - but for those given in this judgment and in that of Jappie JA. It seems to me that there should be no order as to costs both in this Court and in the Court below. This is because both parties launched unnecessary proceedings. Instead of simply requesting the bargaining council to arbitrate the dispute, the employee party made an unnecessary and incompetent second referral and an unnecessary condonation application. Instead of acknowledging that the order condoning the "**late**" referral was of no consequence as the employee party was entitled to pursue the dispute to arbitration any way, the employer party brought an unnecessary review application in the Labour Court.

[27] In the premises I agree that the appeal be dismissed with no order as to costs.

Zondo JP

I agree.

Jappie JA

I agree.

Leeuw JA

Appearances

For the Appellant	:	Adv. M.M Oosthuzen
Instructed by	:	State Attorney
For the Respondent	:	Adv R La grange
Instructed by	:	Cheadle Thompson & Haysom
Date of judgment	:	21 December 2007

JAPPIE AJA

[1] This is an appeal against a judgment of Revelas J, sitting in the Labour Court. The *court a quo* dismissed with costs an application to review a ruling of the First Respondent, L Ramabulana N O, in which ruling the First Respondent condoned the late referral of an unfair dismissal dispute for conciliation.

[2] The material facts are either not in dispute or appear from the documents filed in the appeal. During August 1999 the Third Respondent, V. Vena, commenced employment with the Provincial Government of Gauteng in the Department of Social Services and Population Development. On the 8th August 2002 and at a disciplinary inquiry, the Third Respondent was found guilty of having on two occasions assaulted a senior manager. He was dismissed for gross misconduct. He lodged an internal appeal against his dismissal. The internal appeal was dismissed and he consequently referred the dispute of his dismissal to the Public Health and Welfare Sector Bargaining Council, the Second Respondent, for it to be conciliated.

[3] The conciliation hearing was set down for the 14 May 2002. On the day of the hearing neither the Third Respondent nor an official of the Fourth Respondent attended. The appointed conciliator, Mr Baloyi, after having satisfied himself that the Third Respondent and the Fourth Respondent has been properly notified of the date of the hearing dismissed the dispute. The Third Respondent and an official of the Fourth Respondent were informed by telephone on that same day that the matter which had been referred for conciliation had been dismissed.

[4] Nothing further transpired until the 26th July 2002 when the Third Respondent again referred the same dispute to the Second Respondent to have it conciliated. This referral was out of time. Clause 3.6 of the Dispute Resolution Procedure provides:-

> "If the dispute concerns an alleged unfair dismissal, the dispute must be referred to the Secretary within 30 days of the date of dismissal."

[5] As more than 30 days had elapsed since the Third Respondents dismissal the Third Respondent lodged an application for condonation for the late referral. The application for condonation was set down on the 13th August 2002 and came before Mr S. Seedat. At this hearing, the Appellants raised the point that the matter had already been before

another conciliator and he had dismissed the dispute. It was argued that there was no legal basis or provision in the Dispute Resolution Procedure that permitted a seconded referral for concilication of the same dispute. It was contended that there was no basis in law for the conciliation to continue and accordingly asked for the application for condonation to be dismissed. The conciliator, Mr Seedat did not make a ruling but postponed the hearing on the basis that the Second Respondent would provide to the Appellants relevant information and/or an explanation at to the legal basis on which the second referral was permitted.

[6] On the 19th August 2002 the Appellants wrote to the Second Respondent requesting it to inform the Appellant of the legal basis for setting the matter down again for conciliation.

[7] On the 4th September 2002 the Appellants received a directive from the Second Respondent calling upon the Appellants to respond, in the usual manner, to the Third Respondent's application for condonation. The Second Respondent appointed the First Respondent as conciliator for this second referral. On the 8th October 2002 a meeting was convened before him to deal with the question of the condonation. Once again the Appellants raised the point that the earlier conciliation proceedings has been dismissed and argued that the application for

condonation could not be granted. Nevertheless, on the 24 October 2002 the First Respondent handed down a ruling condoning the late referral of the dispute for conciliation. The Appellants approached the Labour Court to have the ruling reviewed and set aside.

[8] In the Labour Court, the matter came before Revelas J. The Appellants argued that the Second Respondent had committed a reviewable irregularity by permitting the second referral of the same dispute whilst the ruling dismissing the first referral was *extant*. It was further argued that the effect of the first dismissal was that the matter had become *res judicata* and the First Respondent lacked the necessary jurisdiction to hear the matter as there was no live dispute which the Second Respondent could resolve. The *court a quo* dismissed the review application with cost.

[9] The Appellants applied for and was granted leave to appeal against the judgment of the *court a quo* and is now before this Court.

[10] The Appellants argued that the *court a quo* had committed a misdirection by regarding the application for condonation as if it was an application for the rescission of the ruling of the conciliator Mr Baloyi. It was submitted that the *court a quo* had therefore erred in dismissing the review of the First Respondent's ruling to grant

condonation on the basis that by granting condonation it had the same effect as a rescinding the ruling of the dismissal of the referral for conciliation.

[11] It was argued that the court a quo ought to have found that it was not legally permissible for the Third and Fourth Respondents to have applied for a second referral for the conciliation of a dispute which had already been dismissed under an earlier referral. The earlier decision was binding between the parties.

[12] It was further argued that there is no provision (either in law or in terms of the Dispute Resolution Procedure) for the same dispute to be conciliated, once it had been dismissed. The Second Respondent was *functus oficio* and, in so far as the conciliation was concerned and, therefore could not have entertained the second referral. It had acted *ultra viris* when it had set down the second referral for hearing before the First Respondent. It, therefore, follows that the First Respondent had no jurisdiction to entertain or grant the application for condonation of second referral in the face of the dismissal which dismissal remained valid.

[13] Counsel who appeared for the Third and Fourth Respondents conceded that the *court a quo* may have erred in its approach in regarding the application for conciliation as having the same effect as

an application for rescission. Nevertheless it could not be said that the *court a quo* had erred in upholding the First Respondent's ruling. It was submitted that the First Respondent correctly granted condonation to the Third and Fourth Respondents on the basis that it was apparent to the First Respondent that the first conciliator (Mr Baloyi) had erred by dismissing the referral for conciliation. That being so, the First Respondent correctly took into consideration all the factors which would have entitled a party to condonation. For this reason, it was submitted that this court ought not to interfere with the judgment of the *court a quo.*

[14] In the judgment of the *court a quo,* it is pointed out that the Dispute Resolution Procedure, makes not provision for the rescission of a ruling made by a conciliator. Further there is no provision in the Dispute Resolution Procedure which allows for an application for condonation. Revelas J stated the position as follows:-

> "[20] If the collective agreement regulating dispute resolution proceedings between the parties did not make provisions for a rescission procedure, that is a patent omission. Sections 114 and 164 of the Labour Relations Act, 66 of 1995, as amended ("the Act") makes provision for rescission of arbitration awards (or rulings) and Labour Court orders respectively. It is unthinkable that a bargaining council should be deprived of the inherent power to rectify a wrong or

> a mistake. Furthermore, dismissing a matter in the absence of a party, is akin to striking a matter from the roll as it would happen in a court. If a court strikes the matter of the roll in error, it may reinstate it. The effect of reinstatement is to rescind the ruling in terms of which the matter was struck off the roll. No rescission application would be necessary, let alone a review application."

Further she states the following:-

> ‘‘The first respondent's final ruling, namely that the matter be conciliated afresh, is precisely the object of a rescission ruling. The fact that factors applicable in a condonation ruling were dealt with by the first respondent as well, does not nullify that part of his reasoning which is applicable to rescission application. Even if the first respondent erred in law, the error did not lead to an injustice. In fact, it led to fairness and justice."

[15] There is a fundamental difference between condonation and rescission. Condonation is granted in circumstances where there is non-compliance with rules of procedure. It is usually granted on good cause shown. A judgment or an order may only be rescinded in certain specific instances and on grounds recognised either by law or in terms of a set of applicable rules. Condonation and rescission cannot, therefore, be treated as if it is one and the same thing. The concession made on behalf of the Third and Fourth Respondents is correct and that the *court a quo* err in its approach in treating the application for condonation as if it was an application for rescission.

[16] The *court a quo* however correctly pointed out that Dispute Resolution Procedure did not make provision for applications to rescind a conciliator's ruling as already pointed out there is not provision for condonation procedure as well It in fact do not make provision for condonation procedure as well. In my view Section 144 of the Labour Relations Act No. 66 of 1995 is not applicable in the present situation. The position between the parties is governed by a collective agreement. The agreement contains Dispute Resolution Procedure. Disputes between the parties are to be resolved in terms of the agreed Dispute Resolution Procedure. A court cannot *ex mero motu* make procedure not agreed upon by the parties or provided in law applicable to the parties.

[17] What the Dispute Resolution Procedure does provide for is that in the event when conciliation fails is for the matter to proceed to arbitration. This is set out in Clause 3.5 of the Dispute Resolution Procedure. It reads as follows:-

> "If the dispute is one that is contemplated in terms of clause 3 (1) (c), that is dispute that the council will conciliate and if not resolved at conciliation arbitrate, the following procedure applies:- …
>
> (c) If the Secretary is satisfied that the referral has been properly served, Secretary must –
>
> i) appoint an arbitrator to arbitrate the dispute;

ii) set the matter down for arbitration within 30 days of the referral;

iii) appoint a conciliator to attempt to settle the dispute prior to the arbitration; and

iv) set the matter down for conciliation no later that 4 days before the arbitration."

[18] In my view, the dismissal of the first referral for conciliation by Mr Baloyi had the effect of not resolving the dispute at conciliation. The next procedural step that then came into play is that set out in Clause 3.5 of the Dispute Resolution Procedure. If the Third and Fourth Respondents were still of the view that the dispute could be resolved through conciliation the arbitrator could have been requested to proceed in terms of Clause 5.1 of the Dispute Resolution Procedure which reads as follows:-

> ‘‘An arbitrator appointed by the Secretary to arbitrate the dispute may, should it be agreed upon by all the parties to the dispute, attempt to resolve the dispute through conciliation."

The door to conciliation, in terms of the Dispute Resolution Procedure, had not been shut by the dismissal of the referral for conciliaton. What is evident is that the Dispute Resolution Procedure do not provide for an aggrieved party whose referral for conciliation had been dismissed to apply for a “second referral for conciliation” and neither does it provide condonation if the second referral is out of time. It was an error

to treat the application in these circumstances as if it is an application to rescind the earlier ruling of the dismissal an application to conciliate. The correct approach was for the First Respondent to have applied the provisions of the Dispute Resolution Procedure by referring the parties to arbitration.

[19] If the parties had been referred to arbitration there would have been no need for the Third and Fourth Respondents to apply for a second referral of the dispute. This means that there was no need for an application for condonation. What ought to have occurred was that the second referral should have been held to have been incompetent as the dispute had already been referred to conciliation and the same dispute cannot be referred for a second time.

[20] The conciliator had no jurisdiction to deal with the second referral and the application for condonation, his decision nevertheless did not adversely affect the Appellants. For this reason, the bringing the of the review application in the Labour Court was an exercise in futility on the part of the Appellants. In my view the court a quo ought not to have entertained the review application and was correct in dismissing the same.

[22] In the result I am persuaded that the decision of the court a quo ought not to be interfered with. In the result the appeal stands to be dismissed with no order as to costs.

Jappie JA

I agree.

Zondo JP

I agree.

Leeuw JA

Appearances

For the Appellant	:	Adv. M.M Oosthuzen
Instructed by	:	State Attorney
For the Respondent	:	Adv R La grange
Instructed by	:	Cheadle Thompson & Haysom
Date of judgment	:	21 December 2007