**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

Reportable
Case No: JA 7/24

In the matter between:

| | |
|---|---|
| **ALEXKOR SOC LIMITED** | **First Appellant** |
| **ALEXKOR RMC JV** | **Second Applicant** |

and

| | |
|---|---|
| **MERVYN CARSTENS** | **Respondent** |

**Heard:** **30 November 2024**
**Delivered:** **15 May 2025**
**Coram:** **Molahlehi JP, Savage ADJP and Van Niekerk JA**

**Summary:** Appeal against the decision of the Labour Court refusing to declare a pre-arbitration minute concluded in terms of the CCMA Rules to be invalid.

Before the Labour Appeal Court, the issue was whether the Court had jurisdiction to issue a declaratory order regarding the validity of pre-arbitration minutes concluded by the parties under Rule 20 of the CCMA Rules, read with section 115 of the LRA.

The principles governing the issue of cost restated. Costs do not automatically follow the results in labour matters, but are to be considered based on the law and fairness.

---

**JUDGMENT**

**MOLAHLEHI, JP**

Introduction

[1] The key issue in this appeal is whether the Labour Court has jurisdiction to declare invalid and set aside the pre-arbitration minutes concluded by the parties in terms of the CCMA Rules. The appeal stems from the judgment and order made by the Labour Court on 27 October 2023, in which the appellant's application to set aside the pre-arbitration minutes on the grounds of invalidity was dismissed.[1]

[1] At the Labour Court the appellants sought the following relief:

'Part A

1. Declaring the pre-arbitration minutes (the minutes) signed by the First Respondent's erstwhile attorney in and during November 2020 void and therefore, unenforceable, and accordingly set aside;

2. Directing that a further pre-arbitration conference between the Applicants and the First Respondent on a suitable time and location, within 15 (fifteen) court days of the Order having been duly served on the First Respondent, which conference can be done either in person, or virtually through MS teams for the purpose concluding valid pre-arbitration minutes;

3. The Respondent, as the party who is dominis is to prepare the newly agreed pre-arbitration minutes for consideration and signature by the parties within 10 (ten) days after the pre-arbitration conference having been held;

4. Staying the CCMA proceedings under the CCMA case number NC2039-2020 pending the compliance with paragraphs 1-3 of this order;

5. Directing the First Respondent to apply/call for the CCMA to allocate a new hearing date for the arbitration under the CCMA case number NC 2039-2020 once the validly signed pre-arbitration minutes have been agreed to and signed by all parties in accordance with the time period as referred to in prayer 3 above;

6. Directing the First Respondent pay the costs of this application on the attorney and own client, including costs of counsel;

7. In the event that the application is opposed by the Second Respondent, then directing that the Respondents pay the costs of this application on the attorney and own client scale, including costs of counsel.'

[2] The appellants further requested the Labour Court to direct that a further arbitration conference be convened or specific paragraphs of the impugned pre-arbitration minutes be struck out.

[3] The first respondent, Mr Carstens, a former employee of the appellant, opposed the appeal and lodged a cross-appeal in terms of which he contended that the Labour Court erred in not awarding him costs and in not recognising that his case was distinguishable from those cases where the Courts have held that costs do not usually follow the results. He also applied for condonation because his heads of argument and his powers of attorney were filed outside the time frames provided for in the rules. The appellants opposed both applications.

[4] Following the appeal hearing on 5 November 2024, this Court adjourned the matter to 30 November 2024, allowing the parties to engage in settlement discussions.

The background

[5] Mr Carstens was initially placed on precautionary suspension following a forensic investigation that found negligence in how he ran the affairs of the second appellant.

[6] Before the suspension, the appellants proposed a pre-arbitration process to address the findings of negligence on the part of Mr Carstens.[2] He rejected the proposal and insisted that the charges be determined through an internal disciplinary hearing.

[7] Instead of instituting a formal disciplinary hearing, the appellant invited Mr Carstens to respond in writing to the misconduct allegations. He submitted the written response but insisted on having a formal disciplinary hearing.

[2] The pre-arbitration would have been conducted in terms of s 188A of the LRA, had Mr Carstens agreed thereto.

[8] On 5 August 2020, the appellant terminated Mr Carstens' employment without convening a disciplinary hearing. He challenged the decision before the Commission for Conciliation, Mediation and Arbitration (CCMA) on the ground that it was unfair.

[9] Following the failure of conciliation, the unfair dismissal dispute was referred to arbitration in the CCMA. In preparation for the arbitration hearing, the parties arranged for a pre-arbitration process conducted by correspondence. In this process, Mr Richard Brown of Herold Gie Attorneys (Mr Brown) represented Mr Carstens, and the appellants were represented by their erstwhile attorney, Mr Feke-Myeko (Myeko).

[10] After written exchanges between the parties, Myeko signed a pre-arbitration minute on 15 November 2020 and Brown on 16 November 2020.

[11] The matter was initially set down for two days, 25 and 26 November 2020, before Commissioner Segotsane and was conducted virtually. The matter was postponed on 26 November 2020 and rescheduled for a three-day hearing starting 8 June 2021. At this stage, the arbitration proceedings were part-heard, and the appellant led one of its witnesses, Mr Shokie Bopape.

[12] In the meantime, the appellants terminated Mr Myeko's mandate, and a new firm of attorneys, Messina Incorporated (Messina Attorneys), was appointed as the appellants' attorneys of record.

[13] The evidence of Ms Bopape, who was cross-examined on this matter, was primarily based on concessions made by the appellants in the pre-arbitration minutes.

[14] The appellants and their new attorneys did not dispute the knowledge of the set-down notice for 25 November 2020. They, however, asserted that they were under the impression that the matter would have been postponed without any evidence being led and thus believed that the matter was not part-heard.

[15] The matter was set down for a hearing on 8 June 2021 but was, however, postponed on that day to 26 and 27 July 2021. The appellants further asserted that

they were not aware of the existence of the pre-arbitration minutes. Upon learning of the pre-arbitration minutes, they instructed their new attorneys of record to request that Mr Carstens abandon the pre-arbitration minutes and allow for a further pre-arbitration conference.

[16] Mr Carstens rejected the appellant's request to cancel the pre-arbitration minutes and convene a fresh pre-arbitration conference.

[17] Having failed to persuade Mr Carstens to abandon the pre-arbitration minutes, the appellant sought the intervention of the CCMA. The CCMA rejected the request and stated the following:

> 'Our office has noted that you requested to hold a pre-arb conference, as the previous one was not completely done. In light of that, you need to be reminded that the tardiness of your client's previous attorneys cannot be used as an excuse with regard to this matter and as the matter raised, procedural aspects to be determined in an arbitration hearing such preliminary issue may be raised before presiding commissioner for determination as the other party has the right to respond or oppose your request.'[3]

[18] The appellants pursued the point of setting the pre-arbitration minutes aside on 27 July 2021, when the matter was served before Commissioner Segotsane. They argued that the pre-arbitration minutes were inaccurate and that the erstwhile attorneys were not mandated to conclude them. The application, which was orally made, was dismissed.

[19] After the dismissal of the application to set aside the pre-arbitration minutes, the appellants applied to recall their first witness, Ms Bopape, who, as indicated earlier, had already testified. This application was also dismissed.

[20] The following day, 28 July 2021, the appellants requested a postponement of the hearing, the main reason being to allow them to consider filing a review

[3] See para 25 of the Labour Court judgment.

application in terms of section 158(1)(g) of the Labour Relations Act (LRA),[4] to challenge the commissioner's above ruling. The postponement application was dismissed.

[21] Following the above ruling, the appellants applied for the recusal of Commissioner Segotsane, who upheld the application and recused herself from the proceedings on 10 August 2020.

[22] On 17 August 2020, the CCMA's Regional Senior Commissioner advised the parties via email that, following Commissioner Segotsane's decision, the matter would be set down to commence anew before a different commissioner. The email reads:

> 'Dear Marcel
>
> We acknowledge receipt of your email and bears reference.
>
> I had been advised that rulings were made on the spot during the hearing and such been intended to be recorded on the award once the matter is finalised. However, I have been informed that a recusal application was made and subsequent to that the presiding Commissioner recused herself from the proceedings. Therefore, our understanding is that the matter will be heard *de novo* and the recusal ruling override (sic) the process in its entirety.
>
> We would set down the matter before a new commissioner and your request for senior commissioner would be taken into consideration. In light of the above no ruling would be issued and if you intend to exercise your rights to approach the Labour Court feel free to do so and our offices would provide the records of the previous hearing as contemplated in terms of rule 7A of the Labour Court.'[5]

The Labour Court decision

[4] Act 66 of 1995, as amended.

[5] See para 32 of the Labour Court judgment.

[23] The first issue before the Labour Court was whether Commissioner Segotsane's ruling regarding the status of the pre-arbitration minute was invalid consequent to her recusal.

[24] It is important to note that Commissioner Segotsane's recusal was not due to bias, but rather because, according to her, she had *"ruled against the appellants on more than one occasion"*.

[25] The Labour Court, in dealing with the first issue, referred to the decision of this Court in *Sasol Infrachem v Sefafe & others,*[6] where it was held:

> 'On the question whether the entire proceedings are vitiated by bias, the principle to be deduced from the cases, including *SARFU, Ndimeni*, and others, is as follows. If it is held that the arbitrator, or the judicial officer, ought to have recused himself, or herself, at the outset then the entire proceedings before him or her are vitiated by the failure to recuse himself or herself. It has been held that continuing to sit in proceedings in which the presiding officer ought to have recused himself or herself at the outset, constitutes an irregularity for every minute of the proceedings in which the presiding officer or arbitrator continues to sit. In *Ndimeni* the judge did not disclose his interest in one of the litigants. On appeal, the Supreme Court of Appeal held that he ought to have disclosed his interest and that his failure to do so was an irregularity.'

[26] The Labour Court correctly rejected the appellant's contention that the Commissioner's ruling was a nullity due to her recusal. In other words, the ruling regarding the pre-arbitration minutes was not vitiated by the fact that the commissioner recused herself. There is no evidence that the commissioner should have recused herself at the outset of the arbitration hearing. As stated earlier, she recused herself not because of bias, but because she sought to avoid a complaint that she was not objective, given the number of rulings she had made against the appellants.

---

[6] [2015] 2 BLLR 115 (LAC); (2015) 36 ILJ 655 (LAC) at para 49.

[27] Regarding the evidence of Ms Bopape, presented before the commissioner's recusal, the Labour Court correctly held that the evidence was rendered inapplicable due to the *de novo* principle.[7] In this regard, the Labour Court reasoned:

> 'With the above in mind, and based on what is set out below, I am at odds with Sondolo. A ruling issued by a Commissioner under the auspices of the CCMA can only be set aside on review by this Court in terms of section 145 of the LRA, or as in the present cases in terms of section 158(1)(g) of the LRA. Conjunctively, and outside of the *de novo* principles, the operation of the doctrine of *functus officio* is instructive. In this regard, it is trite that a decision once made which is final, cannot be revisited in the absence of statutory authority. The invalidity of an administrative act does not detract from the legal consequences thereof, which are binding until varied or set aside by a court of law. Hence, an administrator will be *functus officio* once a final decision has been made and will not be entitled to revoke the decision in the absence of statutory authority. An exception to this would be where the administrator has the competence to perform the act in the first place, or where the action was fraudulently performed on the basis that fraud unravels everything.'

[28] The Labour Court held that the pre-trial minutes concluded between the parties should stand, and their validity is a matter to be determined by the Labour Court, not the CCMA. This means that the Labour Court assumed jurisdiction over the issue of the validity of the pre-arbitration minutes.

[29] Turning to the relief sought by the appellants, the Court held that disregarding the Commissioner's ruling would severely undermine and defeat the integrity of the CCMA and its rulings. The Labour Court further found that the approach proposed by the appellants would undermine the provision of section 158(1B) of the LRA.

Condonation applications

[30] As indicated earlier Mr Carstens' heads of argument were filed late. According to Mr Carsten's attorney of record, the late filing of the heads of argument was due to

[7] See para 47 of Labour Court judgment.

his busy practice, which resulted in difficulties setting aside time to draft the relevant papers. The power of attorney was also filed late. The reason for the delay in filing the power of attorney, according to Mr Carstens, was his relocation to Angola after accepting employment in that country.

[31] The heads of argument in this matter were filed 31 Court days late and 44 calendar days late, and the power of attorney was also filed outside the period prescribed in the Rules of the Labour Court[8].

[32] In opposing the condonation applications, the appellants contended that the delays in both instances (the heads of argument and power of attorney) were not insignificant, and the explanation for the delay was not reasonable to justify the indulgence sought. They also strongly criticised the condonation application for not being made soon after Mr Carstens became aware of the delay.

[33] The test for determining whether to grant condonation is well established in our law, and I accordingly do not deem it necessary to repeat it in this judgment.[9]

[34] The degree of the delay in both instances is not so excessive as to exclude the consideration of the prospects of success. In this regard, the appellants' Counsel conceded during the debate that the prospects of success carried significant weight in determining whether condonation should be granted. The prospects of success in the present matter compensated for the weakness in the explanation provided in both instances.

[35] Considering the totality of the facts, the importance of the matter, and the circumstances of this case, the pragmatic approach to adopt, despite the criticism in addition to the poor explanation, is to grant Mr Carstens the indulgence in the interest of justice. The appellant will not suffer prejudice because there is no entitlement to the relief sought.

---

[8] GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court, repealed with effect from July 2024.

[9] The test is amongst a number of cases set out in *Grootboom v National Prosecuting Authority and Another (Grootboom)* [2013] ZACC 37; 2014 (2) SA 68 (CC).

Jurisdiction

[36] In dealing with the jurisdiction of the CCMA and the Labour Court, the starting point is to recognise that the LRA created structures and procedures to achieve its objective of expeditious labour dispute resolution. This means that both institutions are creatures of statutes, and thus the scope of their jurisdiction is defined by the legislation that created them. They also have jurisdiction to deal with other labour-related matters as provided for in other relevant legislation.

[37] Before dealing with the issue of the jurisdiction of the Labour Court, which is central in the present matter, it is apposite to briefly discuss the CCMA's jurisdiction concerning declaratory orders.

[38] The CCMA, being a creature of statute, derives its powers from the LRA's provisions to resolve employment relationship disputes. In this regard, the power to grant declaratory orders is provided in section 138 (9)(c) of the LRA, which provides as follows:

> 'The commissioner may make any appropriate arbitration award in terms of this Act, including, but not limited to, an award-
> (a) …
> (b) …
> (c) that includes, or is in the form of, a declaratory order.'

[39] Section 138(9) of the LRA stipulates that a commissioner has the authority to issue declaratory orders on preliminary points, such as jurisdictional issues (e.g., whether an employment relationship exists between the parties), before proceeding to address the substantive merits of the dispute. In this respect, the Labour Court in *Food and Allied Workers Union v Buthelezi and Others*,[10] held that:

> '[16] Presented with such a situation, the Commissioner will be guided by what is appropriate under the circumstances and whether the decision he is called upon to make at that point in time gives effect to the primary objects of

[10] [1998] ZALC 4.

the Act, such as the effective resolution of disputes. In such a situation, I cannot rule out the possibility of a Commissioner making a declaratory order before he considers the substantive merits of the dispute. I do not therefore agree that the third respondent exceeded his powers when he made a declaratory order before considering the substantive merits of the dispute. It was appropriate under the circumstances to do so.'

[40] In *Tsengwa v Knysna Municipality and another*,[11] per Rabkin-Naicker J, the Labour Court correctly rejected as a misconception the notion that a commissioner has powers under section 138(9) of the LRA to declare disciplinary proceedings null and void.

[41] As pointed out earlier, the essential issue in this appeal is whether the Labour Court or this Court has jurisdiction to declare pre-arbitration minutes concluded by agreement between the parties in terms of rule 20 of the CCMA Rules invalid. Rule 20 of the CCMA Rules allows parties in trial proceedings to conclude pre-arbitration minutes, similar to pre-trial minutes in civil proceedings.

[42] The parties in the present matter concluded the impugned pre-arbitration minutes as required by the CCMA Rules,[12] promulgated in section 115(2A) of the LRA. Rule 20 of the CCMA Rules outlines the circumstances under which parties to arbitration proceedings should hold a pre-arbitration conference and the matters that should be addressed in their pre-arbitration minutes.[13] The validity of this rule has never been challenged.

---

[11] [2015] 8 BLLR 857 (LC); (2015) 36 ILJ 2392 (LC).

[12] GNR 223 of 17 March 2015: Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA Rules).

[13] The purpose of pre-arbitration minutes was set out in *Kunene v Sithole NO and Others* [2021] ZALCJHB 196, Prinsloo J as follows:

'[15] It is trite that there are no pleadings in CCMA proceedings. However, a pre-arbitration minute is nothing else than the product of a pre-trial conference conducted at the CCMA and the same principles apply. It constitutes an agreement between the parties, it narrows the scope of the issues and it sets the terms of reference for the conduct of the proceedings.

[16] *In casu* the parties signed a pre-arbitration minute, which was read into the record at the commencement of the arbitration proceedings and from then on, the arbitrator and the parties were

[43] There is no dispute in the present matter that the CCMA did not have jurisdiction to issue a declaratory order regarding the validity of the pre-arbitration minutes.

Labour Court jurisdiction

[44] The status of the Labour Court is similar to that of the High Court, except that its mandate is limited to dealing with labour disputes arising from the relationship between employers, employees and trade unions. As a creature of statute, its authority is limited to what is provided in the LRA and other labour statutes conferring jurisdiction.[14] The extent of its jurisdiction is limited by the provisions of section 157(1) of the LRA in the following terms:

> '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.'

[45] Section 158 of the LRA gives the Labour Court the power to make any appropriate order, including, amongst others, the power to make a declaratory order.

[46] The Labour Court also has supervisory powers over the CCMA and bargaining councils, to ensure fairness and lawfulness in resolving labour disputes, specifically concerning arbitration awards issued by the CCMA or bargaining councils as provided in section 145 of the LRA.

[47] In terms of section 158 (1)(g) of the LRA the Labour Court has the power to *"review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law"* and sub-section (h) provides;

---

not merely guided by, but they were bound by the terms of the pre-arbitration minute.' See also *South African Breweries (PTY) v Louw* [2017] ZALAC 63; [2018] 1 BLLR 26 (LAC).'

[14] *See Baloyi v Public Protector and others* 2021 (2) BCLR 101 (CC); (2021) 42 ILJ 961 (CC), where the Constitutional Court held that the Labour Court, being a creature of statutes, its powers can only be determined by reference to the specific provisions of a statute.

*"review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law"*.

[48] The Labour Court also has concurrent jurisdiction with the High Court in all employment and labour relations matters, including employment contracts as envisaged in the Basic Conditions of Employment Act (BCEA).[15] Section 158 of the LRA lists its powers, which include the power to make appropriate, declaratory orders.

[49] In support of the argument that the two Courts have jurisdiction to declare pre-arbitration minutes invalid, the appellants' representatives referred to *Inspektex Mmamaile Construction & Fire Proofing (Pty) Ltd v Coetzee and Others (Mmamaile)*.[16] The facts of that case and the present are distinguishable in law and fact. The issue of jurisdiction in that case concerned the validity of the settlement agreement.[17] The Labour Court, in finding that it had jurisdiction, relied on the decision in *University of the North v Franks and Others*[18], where this Court found that it had jurisdiction under the provisions of section 77(3) of the Basic Conditions of Employment Act[19] to determine the validity of a settlement agreement. In this respect, this Court held that:

> 'The termination of an employment contract and the terms and conditions upon which this is to occur are clearly matters concerning such a contract. The Labour Court correctly held that it had jurisdiction.'[20]

[50] The second basis upon which the Court in *Mmamaile* found jurisdiction to entertain the dispute concerning the validity of the settlement agreement was under

---

[15] See section 77 (3) of the BCEA.

[16] (2009) ZALCJHB 105.

[17] The purpose of a settlement agreement is different to that of a pre-arbitration agreement. A settlement agreement's purpose is to end disputes between the parties. The underlying purpose of the pre-arbitration procedure and its outcome is to identify and narrow down the issues that need to be resolved by the CCMA. It is an internal mechanism made available to the CCMA by the provisions of the LRA.

[18] [2002] ZALAC 13; [2002] 8 BLLR 701 (LAC).

[19] Act 75 of 1997, as amended.

[20] *University of the North v Franks and Others* at para 30.

section 158 (1)(j) of the LRA which provides the Court may *"deal with all matters necessary or incidental to performing its function in terms of this Act or any or other law"*.

[51] The facts of the present matter are similar, if not the same, to those in *MTamila v Samacor Western Chrome Mines and Others (Samancor)*.[21] Like the present case, the Labour Court in that case addressed the issue of the validity of the pre-arbitration agreement, which was also concluded under the auspices of the CCMA.

[52] Similar to the present case, the Court in *Samancor* raised the issue of jurisdiction and invited the applicant to point out any provision in the LRA and other laws that gave the Labour Court jurisdiction to entertain the relief sought. In paragraph 6 of its judgment, the Labour Court held that the applicant had failed to point out any provision in the LRA that gave it jurisdiction to entertain the relief sought. The Labour Court (per Van Niekerk J, as he then was) in dismissing the application, reasoned as follows:

> 'This court has no inherent power of supervision over the CCMA and its processes; the scope of intervention is limited to the remedy of review, and in a few instances, appeal. To the extent that the applicant has sought to invoke the remedy of review, this is a matter that has been dealt with and determined above. To the extent that the applicant relies on the submission that the terms of the Commissioner's ruling contemplate a referral to this court of the dispute about the validity of the pre-arbitration agreement, that is not a basis on which this court might acquire jurisdiction. It seems to me that the dispute concerning the validity of the pre-arbitration agreement is a matter internal to the CCMA and that it ought properly to be dealt with on that basis. In any event, as the first respondent's counsel points out, there are a host of factual disputes regarding the conclusion of the pre-arbitration agreement, none of which are suitable for determination by way of motion proceedings.'

[21] [2023] ZALC 324.

[53] The representative of the appellants contended that what the Labour Court stated in *Samancor* does not constitute a principle governing the issue at hand, as that was not the Court's intention. The suggestion is that the Labour Court made an *obiter* statement and did not seek to set a principle to govern the issue. The appellants' interpretation of what the Labour Court intended above is wrong. The proper interpretation of the decision of the Labour Court in the above matter, which I align myself with, was that it did not have jurisdiction to declare the pre-arbitration minutes concluded by the parties invalid. The Labour Court rejected the contention that it had the power to interfere with a pre-arbitration procedure, whose outcome is set out in rule 20 of the CCMA Rules. As indicated above, the CCMA is empowered by section 115 of the LRA to regulate the pre-arbitration procedure. This procedure is an internal mechanism to regulate arbitration proceedings and assist commissioners in determining disputes fairly and quickly with minimum legal formalities.[22]

[54] For the above reasons, the appeal stands to fail. The appeal further stands to fail because of the well-established principle of our law that says an administrative decision stands until set aside by a competent court. This principle was set out by the Labour Court in *Taung Local Municipality v Mofokeng*,[23] as follows:

> 'It is generally accepted that an unlawful administrative decision remains valid until it is set aside by a competent court. The authorities say that an unlawful act is invalid in law but is, however, valid as a matter of fact. As a general rule an unlawful administrative decision is in fact valid and has legal consequences until such time that it is set aside by a court.'

[55] In the present matter, the commissioner's ruling exists in fact and thus could not be ignored by the Labour Court or this Court. It stands and is of full force until set aside on review.[24] The appellants elected not to review the Labour Court's decision.

---

[22] See section 138(1) of the LRA.

[23] [2011] 12 BLLR 1243 (LC); (2011) 32 ILJ 2259 (LC) at para 11.

[24] See *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA); [2003] 3 All SA 1 (SCA) where the SCA at para 26 said:

'…. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to

Following the commissioner's recusal, only the evidentiary materials presented before the Commissioner can be relied upon.

Costs

[56] It is now well established that the principle of costs follows the result does not automatically apply in labour matters. This approach was emphasised by the Constitutional Court in *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and Others* [25] *(South African Custodial Management).* In that case, the Court, in dealing with the issue of costs issued by the Labour Court under section 162 of the LRA, said the following:

> '[33] The principles set out above form the bedrock of how the question of costs should be understood in labour matters in the context of our democracy. These principles find expression in section 162 of the LRA, which rejects the ordinary rule of litigation that costs should follow the result in favour of an approach based on "law and fairness". When we pay heed to this fairness standard, we do so because we are obliged by the LRA and the above constitutional imperatives. Hence, I repeat: when making costs orders in labour matters, courts are enjoined to apply the fairness standard in the LRA as a matter of constitutional and statutory obligation.'

[57] In determining whether to award costs, this Court has discretion to exercise based on the requirements of the law and fairness.[26] In exercising its discretion

---

disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.'

[25] [2021] ZACC 26; (2021) 42 ILJ 2371 (CC).

[26] See section 179 of the Labour Relations Act.

whether to award costs, this Court may, in terms of section 179 of the LRA take into account amongst others the following:

'(a) …

(b) the conduct of the parties-

(i) in proceeding with or defending the matter before the Court; and

(ii) during the proceedings before the Court.'

[58] In *Member of the Executive Council for Finance, KwaZulu-Natal & another v Dorkin NO & another*[27] *(Dorkin),* this Court held that the approach to adopt when dealing with the issue of costs is that costs ought not to be made unless the requirements of law and fairness are met.[28] The Court further explained:

> 'In making decisions on cost orders this court should seek to strike a fair balance between, on the one hand, not unduly discouraging workers, employers, unions and employers' organizations from approaching the Labour Court and this court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this court frivolous cases that should not be brought to court. That is a balance that is not always easy to strike, but if the court is to err, it should err on the side of not discouraging parties to approach these courts with their disputes.'

[59] In *Zungu v Premier of the Province of KwaZulu-Natal and Others*,[29] the Constitutional Court (CC) held that it was entitled to interfere with the exercise of discretion by the Labour Court and the Labour Appeal Court in mulcting the applicant with costs, as they did not exercise their discretion judicially. The CC found that the two Courts erred in not following the abovementioned principle of law and fairness

---

[27] (2008) 29 ILJ 1707 (LAC); [2007] ZALAC 41 at para 19.

[28] This principle was further restated by this Court in *Vermaak v MEC for Local Government and Traditional Affairs, North West Province and Others* [2017] ZALAC 2, which addressed the issue of costs in the Labour Court in the context of section 162 of the LRA. The Court further explained that *"the requirements of law and fairness are on equal footing, and none is secondary to the other".* The same approach was followed under the old LRA—see, for instance, the decision of the then Appellate Division in *National Union of Mineworkers v East Rand Gold Mine and Uranium Co Ltd* 1992 (1) SA 700 (A); [1991] ZASCA 168 at 738F.

[29] [2018] ZACC 1; (2018) 39 ILJ 523 (CC).

set out in *Dorkin*. The same approach was followed by the CC in *South African Custodial Management,* where, after quoting with approval what was said in *Dorkin*, said:

> '[W]hen making an adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties.'

The appellants in this matter contended in the notice of appeal that it was entitled to costs because Mr Carstens had unreasonably refused to convene a further pre-arbitration conference on multiple occasions. This would mean that Mr Carstens would not be entitled to costs if the appeal were unsuccessful. I do not agree with this proposition because nothing compelled him to agree to the appellant's proposal. As stated above the law is well established that the commissioner's decision regarding the pre-arbitration minutes was valid and enforceable until set aside on review. The appellants decided to proceed to seek the declaratory order despite this well-established legal principle. It is also unclear why this appeal is before this Court when the matter is to start *de novo*. The appellants can raise the issue before the new commissioner. In my view, there is no legal basis for the appeal. Thus, the fairness requirements would favour that Mr Carstens be granted the costs of these proceedings, except for the two applications, the late filing of the heads of argument and the powers of attorney.

Order

[60] In the circumstances, the following order is made:

1. The late filing of the heads of arguments by the respondent is condoned with no order as to costs.
2. The late filing of the powers of attorney by the respondent is condoned with no order as to costs.
3. The appellants' appeal is dismissed with costs.

Molahlehi JP

Savage ADJP and Van Niekerk JA concur.

APPEARANCES:

| | |
|---|---|
| FOR THE APPELLANTS: | Adv B Jackson |
| Instructed by: | Messina Inc |
| FOR THE RESPONDENT: | L Brown Attorneys |