IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN
Case Number: JR1777/06
REPORTABLE
In the matter between:
RAWU OBO L NGWELETSANA Applicant
and
PT OPERATIONAL SERVICES (PTY) LTD First Respondent
LANCE CELLIERS N.O Second Respondent
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION Third Respondent
F MASHABA N.O Fourth Respondent
JUDGMENT
MOSHOANA AJ
INTRODUCTION 2

[1] There are three applications before the court. The first one is J1777/06, an application in terms of section 158(1) (c). The second is JR1267/07, a review application seeking to review and set aside rulings made by the second respondent, Lance Celliers, on 26 February 2007 and 10 May 2007 respectively. The third is JR1789/08, a review application seeking to review and set aside a ruling issued by the fourth respondent, Frederick Mashaba on 3 July 2007. These applications are interrelated. The court and Gerber appearing for the first respondent were not averse to consolidation of the applications. Accordingly, an order of consolidation was granted without much ado. It is worth mentioning at this stage that in chambers, I raised an issue with Mr Khoza, appearing for the applicant, that as far as I was aware, the Union, RAWU was deregistered. That being so, in what capacity was he going to appear before me? He retorted by saying that an order was issued by this court suspending the de-registration. In court, he produced a copy of what appeared to be a genuine court order. Without quoting the order, it suffices to mention that it was issued in November 2007. It indeed suspended the de-registration pending an appeal in terms of section 111 of the Labour Relations Act. It was on the basis set out above that I gave Mr Khoza audience. He assured the court that the appeal had been lodged and is pending in this court. Given that assurance, it was unnecessary for the court to stand the matter down in order to investigate that aspect. 3

BACKGROUND FACTS

[2] Ngweletsana was employed by the first respondent as a cashier from November 2002. I could only glean from the default award that the applicant was dismissed for appearing to be drunk. I could not lay my hands to a copy of the charges that led to the dismissal of Ngweletsana. In affidavits in support of rescission applications, the first respondent's Industrial Manager referred to the fact that Ngweletsana was guilty of gross misconduct, which included assault on a fellow female employee whilst under the influence of liquor. In any event, after a disciplinary hearing, Ngweletsana was dismissed on the 8 May 2003. Aggrieved by his dismissal, he referred the dispute about the fairness of his dismissal to the third respondent. It appears that the matter was set down for arbitration on 07 November 2003. At the request of the first respondent, the matter was postponed. On 18 December 2004, the first respondent was apparently notified by registered mail that the matter would continue on 26 January 2006.

[3] On 26 January 2006, the first respondent failed to appear. After a 30 minutes grace, Commissioner Diale Ntsoane proceeded with arbitration in terms of the provisions of section 138 (5) (b) (i) of the Labour Relations Act as amended. He heard the evidence of Ngweletsana. On 5 February 2004, he dispensed with an award reinstating Ngweletsana with back pay. On 12 March 2004, the first respondent signed an application for rescission. On 17 May 2004, the third 4

respondent's case management officer, Nosipho Dlamini, advised the first respondent in writing that the application for rescission is defective for reasons that condonation application was not filed and it shall not receive further attention. Further she advised that the file will be pended for a period of 14 days. Should the first respondent fail to correct the application within that time period, it will be presumed that it has abandoned the application and the file will be closed and sent to archives. On receipt of the said letter, the first respondent wrote as follows on the letter "*we posted by registered mail on 12/3/2006*". It seems that the first respondent held a view that there was no need for condonation as they posted the application on 12 March 2004, which will have been within the 14 days as contemplated in the Rules of the third respondent. Elsewhere in the court documents, it is recorded that the application was received on 25 March 2004. Nonetheless the first respondent maintained its position, and as submitted by Gerber, insisted on a ruling without the condonation application.

[4] It is not clear whether the second respondent did in fact close the file after 14 days as indicated in the letter of 17 May 2004. Nonetheless, it appears that if the file was ever closed, it was reopened, because on 12 August 2004, almost two months after the letter of 17 May 2004, the second respondent considered the application. Having done so, he dismissed the application. He ruled: - "*due to the defective process referred to above, I herewith dismiss this application*". On 11 October 2004, the first respondent brought an application seeking firstly the reinstatement of the dismissed application, secondly for the prayers contained therein to be granted and thirdly, in the alternative, condonation of the late filing of 5

the rescission. In the meanwhile, Ngweletsana had brought a section 143 application to certify the award. That application was withdrawn on 9 November 2004. This was after the application in terms of Section 158 (1) (c) was launched on 6 October 2006. This Section 158(1) (c) application was opposed by the first respondent. On 10 November 2004, RAWU filed an opposing affidavit in opposition of the application seeking reinstatement of a dismissed application. Interestingly the deponent of the opposing affidavit, Mr Khoza, testified as follows: - *"therefore, the CCMA would lack jurisdiction to entertain the said applicant's condonation application. However, if the applicant intends to pursue the matter further, it should approach the Labour Court hereto*". The first respondent filed no replying affidavit.

[5] On 26 February 2007, almost two years after the application to reinstate was brought, the second respondent issued a ruling granting condonation and rescission. On 10 May 2007, the second respondent issued yet another ruling setting aside the ruling of 26 February 2007 and varying the ruling of 12 August 2004, by clarifying what the purpose of that ruling was. In addition, he ruled that in the interest of fairness, the application of 5 February 2006 should be heard by another commissioner. The applicant was aggrieved by these two rulings. On 5 June 2007, an application for review was launched to review and set aside the two rulings. On 3 July 2007 following the ruling of the second respondent of 10 May 2007, which was under review at the time, the fourth respondent issued another ruling granting condonation and rescission of the default award. 6

Aggrieved by that, the applicant launched yet another review application to set aside the ruling by the fourth respondent.

GROUNDS OF REVIEW.

[6] In all the two reviews, the applicant persistently raises as grounds of review, the fact that the second and fourth respondent did not have powers to issue the rulings. By issuing them, they exceeded powers and acted in a grossly irregular manner. With regard to the ruling of 26 February 2007, it was contended that the second respondent could not interfere with his own ruling of 12 August 2004, where he dismissed the application. In relation to the ruling of 10 May 2007, it was contended that in setting aside his own ruling, the second respondent exceeded his powers. He also exceeded his powers when varying the ruling of 12 August 2004. With respect to the ruling of 3 July 2007, the applicant added that by entertaining the application whilst knowing that the applicant has taken on review the ruling that the fourth respondent sought to rely on, there was gross irregularity.

ARGUMENT

[7] In court, Mr Khoza submitted that once the second respondent made a ruling to dismiss on 12 August 2004, he became somewhat *functus officio*. He argued that the only avenue available for the first respondent was to apply to this court to set aside the ruling. It was not open for the first respondent to reapply for rescission. 7

In respect of the subsequent rulings by the second respondent he argued that section 144 does not empower the second respondent to consider the application. With regard to the ruling of the fourth respondent, he submitted that since it flew from the ruling of the 10th May 2007, which was under review at the time, the fourth respondent lacked powers to entertain the application.

[8] On the other hand, Gerber argued strenuously that the second and fourth respondents were well entitled to entertain the applications. He argued that section 144 allows them to act *mero motu* or on application. He argued that *res judicata* does not apply since the second respondent in dismissing the application on 12 August 2004 did not deal with the merits of the application. He conceded that *res judicata* and the doctrine of *functus officio* are two distinct doctrines. He relented by saying that he had no problems if the court were to review and set aside the rulings of 10 May 2007 and 3 July 2007 on condition the ruling of 26 February 2007 stands. In reply Khoza argued that the ruling of 26 February suffers under the *functus officio* doctrine. Gerber conceded that the first respondent could have approached this court to set aside the ruling of 12 August 2004. He however argued that it was within the first respondent's rights to reapply and it did so. When entertaining the application of 26 February 2007, the second respondent was acting under section 144(a) in that the award was erroneously granted in the absence of the first respondent, so the argument went. He was emphatic that the court should not allow a situation where an award made in default should be made an order of the court. In relation to the section 158(1) (c) 8

application, he argued that the application should be dismissed on the basis that there is no award to be made an order.

ANALYSIS OF EVIDENCE AND ARGUMENT.

[9] This matter raises three very important legal questions. Those are:-

(a) Does the doctrine of *functus officio* apply to the rulings of the CCMA?

(b) If *functus officio* applies, does the LRA allow the CCMA commissioners to set aside their own decisions?

(c) Did the second respondent in issuing the ruling of 26 February 2006 exercise judicial or administrative function?

[10] In this judgment, an attempt shall be made to address those legal questions and at the same time deal with other related issues. Other related issues are whether the rulings are reviewable on other grounds permissible in law and so on.

Does the doctrine apply to the CCMA rulings?

[11] In order to give accurate attention to this issue, it is perhaps apposite to define what the doctrine means. From the authorities reviewed, within the limited time the court had to prepare this judgment, it appears that the doctrine means that once an official had discharged its official function would be unable to revoke, withdraw 9

or revisit the decision. In general the doctrine applies only to final decisions. (See *President of the Republic of South Africa v SARFU 2000 (1) SA 1 (CC)*.
[12] There is authority for the proposition that the CCMA performs administrative functions. I shall revert to this aspect when I deal with the other legal questions. So, it seems to me that the doctrine must find application in CCMA rulings. Even if it could be said that in issuing rulings the CCMA performs judicial function, the doctrine would, in my view, still apply. Section 10 (2) of the Interpretation Act 33 of 1957 provides thus:-
"*Where a law confers a power, jurisdiction or right, or imposes a duty on the holder of an office as such, then, unless the contrary intention appears, the power, jurisdiction or right may be exercised and the duty shall be performed from time to time by the holder for the time being of the office or by the person lawfully acting in the capacity of such holder."*
Section 10(1) provides thus:-
"*Where a law confers a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires".* 10

[13] **Cora Hoexter in Administrative Law in South Africa 2007 Juta** had the following to say about section 10 (1), which I believe applies with equal vigour to section 10 (2):-

"*This enigmatic provision could be interpreted as allowing for the free variation or revocation of non-legislative acts, in accordance with the proposition that effective daily administration is inconceivable without the continuous exercise and re-exercise of statutory powers and the reversal of decisions previously made. But the better interpretation is that section 10 (1) merely enables administrators to exercise their powers anew in different situations-not to revisit or revoke their existing decisions whenever they like. There are good reasons for this. The rule of law holds that individuals should be entitled to rely on governmental decisions, and be able to plan their lives around such decisions, insulated at least to some degree from the injustice that would result from a sudden change of mind on the part of an administrator. There is also the fundamental principle that administrators must have lawful authority for everything they do –or undo".*

[14] I agree with the above view. I may add that it seems to be against public policy for administrators to blow hot and cold. Finality with regard to disputes is of paramount importance. The LRA for instance has as one of its purpose, the effective resolution of labour disputes. It cannot be said that allowing CCMA commissioners, at the altar of the provisions of section 144, authorising them to 11

act at own accord, to revisit their decisions is consistent with effective resolution of disputes. In *casu*, the second respondent decided to dismiss-the question whether he had powers to dismiss the application is of no moment. Fact is he decided to dismiss the application; therefore he took a final decision in as far as the rescission application was concerned. He cannot, in my view, reverse his decision as he did on 26 February 2006. I shall return to this issue later.

[15] I therefore cannot agree with Gerber's submission that the first respondent was entitled to reapply. The CCMA made a decision-whether right or wrong-it is immaterial. The only course available would have been to approach a review court to set aside that decision. The provision of section 10 of the Interpretation Act refers to *unless the contrary intention appears*. In my view the contrary intention appears from the provisions of section 158(1) (g) of the LRA. The section empowers the Labour Court to review the performance or purported performance of any function provided for in the Act on any grounds that are permissible in law. If at all the LRA, being the law referred to in section 10, allowed a commissioner to revisit his or her function repeatedly, then the Labour Court should never have been given a supervisory power of review. Every time a commissioner would be entitled to change his or her mind without being supervised by this court as it were. This offends certainty and fairness. (See Daniel Malan Pretorius: *The Functus Officio doctrine in South African Law with reference to Analogous* 12

Principles in the administrative law of other Commonwealth Jurisdictions- unpublished thesis 2004 Wits and (2005) 122 SALJ 832).

[16] In summary, I am saying the doctrine finds application to CCMA rulings. Therefore CCMA rulings, once made, cannot be revisited, otherwise it renders the function of the Labour Court as envisaged in section 158(1) (g) superfluous and that could not have been the intention of the legislature. In *casu*, the second respondent and or fourth respondent in revisiting the decision to dismiss the application offended the common law doctrine of *functus officio*. The effect thereof being that their decisions are unlawful. (See *Majake v CGE and others (2009) 30 ILJ 2349 (SGJ).*

Does the LRA permit revisit?

[17] As pointed out earlier, revisiting would be contrary to the intention of section 158 (1) (g). However, even if I am wrong in my conclusions above, I want to believe that a commissioner must do that within the purview of the enabling legislation. In this regard, the provisions of section 144 are apposite. The section provides thus:-

Any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the director for that purpose may on that 13

commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award-
(a) Erroneously sought or erroneously made in the absence of any party affected by that award.
(b) In which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission.
(c) Granted as a result of a mistake common to the parties to the proceedings.

[18] Some observations might be helpful before cutting it to the chase. In my view, the section permits only the commissioner who had issued the award or a ruling to act on own accord-*mero motu* as they say. To my mind, it seems impossible that a commissioner, who had not issued an award or a ruling can pull out an award or ruling issued by a fellow commissioner and seek to rescind and or vary it on his own applying the requirements in (a)-(c). The only time another commissioner can rescind or vary an award issued by another commissioner is when an application is made by the affected party.
[19] *Prima facie*, it seems that (a) applies to awards and not rulings. But contextual reading would suggest that it does apply to rulings too. Where reliance is placed on (a), by a commissioner acting on own accord, the award or ruling must have been erroneously sought or erroneously made. Simply put, the ruling or award must have been made or sought in error. To my mind, the determinative phrase 14

is: *in the absence of any party affected by the award or ruling*. So it follows somewhat that an award sought or made in the absence of an affected party is made in error. (See *Day and Night Investigators CC v Ngoasheng and Others (2000) 4 BLLR 398 (LC).* On a simplistic approach, it can be taken that a commissioner once he issues an award, in particular, in the absence of another party affected thereby, he can the following day on his own accord rescind the award using the powers bestowed in him by (a). As I say that is a simplistic approach. Section 138 (5) (b) (i) empowers a commissioner to proceed in the absence of another party. Therefore a commissioner in that situation can act on own accord only in respect of (b). In (a), a commissioner, even the one who issued the award, can only act upon an application by an affected party.

[20] The last observation to be made, which I suppose has already been made repeatedly, is that in (b), the rescission or variation is only to the extent of the ambiguity, error or omission. In such cases, the award remains but with the changes effected.

Returning to the issue, it is settled law that if a statute allows revisiting of a decision, the requirements of those enabling provisions should be the limitation. In *casu,* it should either be in terms of (a), (b) or (c) and nothing more or less. (See *Thompson, Trading as Maharaj and Sons v Chief Constable, Durban 1965 (4) SA 662 (D) and Maluleke v The Northern Province MEC for Health and Welfare and Another (1999) All SA 407 (T).* If the requirements in (a) to (c) do not arise, the commissioner is not empowered to rescind its own decision. See also 15

Carlson Investment Share Block v Commissioner SARS 2001 (3) SA 210 WLD at 225 E-J

[21] In summary, the LRA does allow revisiting in terms of the provisions of section 144 once one of the requirements in (a) to (c) obtain. Absence of which, there is no power.

Does the CCMA perform judicial or administrative function when issuing rulings?

[22] This is a somewhat vexed question. The issue was considered in the celebrated *Sidumo* judgment of the Constitutional Court. It was considered in the context of arbitrations and not rulings like the ones this judgment is concerned with. Again, the intention there seems to have been to determine whether PAJA found application or not. In the judgment of Navsa J, the view is that arbitrations are administrative actions and therefore PAJA applied. In Ngcobo J (as he then was)'s judgment a view emerges that it depends on the nature of the function. In issuing rulings, I doubt whether it can be said that the functions are judicial. Although the function mirror, in cases of rescissions, that which is performed by the judiciary. In my view, issuing of a ruling of rescission amounts to an administrative action. Although I have already concluded that even if the function is judicial, the doctrine still finds application. If I am right, then the doctrine of 16

functus officio applies to them. The doctrine is in tandem with the principle of legality, which should apply to all administrative actions.

Is the ruling of 26 February 2007 reviewable?

[23] In my view the second respondent in issuing the ruling he was already *functus officio,* in that on 12 August 2004 he had issued a decision that is at odds with that. It is clear that in revisiting the application, the second respondent was not acting *mero motu*. He did so upon an application to reinstate. In the body of the ruling *he says the respondent has applied*.

[24] Interestingly, he does not seem to be referring to the old application. He refers to the reinstatement one. This makes sense because he had dismissed the first one. That had been finally decided. The issue here is that the first respondent is not, in my view, entitled to reapply. What the second respondent should have done was to refer to his ruling of 12 August 2007 and perhaps advise the first respondent to first review it in terms of section 158(1) (g). By entertaining it and issuing a contradictory ruling, the second respondent acted unlawfully. That is so by application of the *functus officio* doctrine. If there was no earlier ruling, I would have refused to set aside this ruling. It is by all means within the purview of section 144 (a). In *Fidelity Guards Holdings (Pty) Ltd v Epstein NO and others (2000) 21 ILJ 2382 (LAC),* it was confirmed that the maxim *omnia praesumuntur rite esse acta* is applicable to administrative actions. In this matter, it is undesirable to have two mutually destructive decisions. The effect of the ruling of 12 August 2004, despite the qualifications, is that the application was dismissed. 17

In that way the third respondent had performed its function. If it performed it wrong, the Labour Court must say so. In terms of section 158(1) (g), even purported performance of functions come under the scrutiny of the Labour Court. In short, until and unless the decision of 12 August 2004 is reviewed and set aside, no other ruling could be valid. This appears to be a hardliner approach, but the rule of law must prevail. A view can be expressed that, why apply the *functus officio* doctrine instead of allowing the ruling of 26 February 2007 to stand. That view would mean that there are two administrative decisions in conflict with each other. Such is undesirable.

Is the ruling of 10 May 2007 reviewable)?

[25] The most obvious difficulty with this ruling is that it seeks to set aside the ruling in favour of the first respondent. Hence Gerber was not averse to its review. But the most telling about it is that the basis thereof is the commissioner's own negligence. He called that an obvious error. It therefore means that he intended to bring himself within the purview of (b). However having attempted to bring himself within the purview of (b), he does not vary to the extent of the error. He sets aside the entire award and actually passed the buck in the altar of fairness. By so doing he acted outside the enabling section. He also did what in my view is not allowed by the section he was purportedly acting in terms of. He sought to explain his intentions when he made the ruling on 12 August 2004. Assuming he was entitled to do that in the name of varying and purportedly acting in terms of (b), then he should have done so to the extent of the ambiguity or error. However 18

the effect of this ruling is that the ruling of 12 August 2004 remains with the added intention. What remains is that the application was dismissed.

I*s the ruling of 3 July 2007 reviewable?*

[26] The ruling of 3 July seeks to ignore the existence of the ruling of 12 August 2004. The fourth respondent says "*However, the relevant ruling now will be the last ruling issued by Commissioner Cilliers, which rescinded the previous ruling".* This is inconsistent with the material properly placed before him. In terms of the last ruling- the one of 10 May 2007, all the second respondent did in relation to the ruling of 12 August 2004 was to vary it by setting out what his noble intention was. The only ruling he had set side is that of 26 February 2007. Therefore applying the *functus officio* doctrine, the third respondent cannot through the fourth respondent set aside its own decision. In any event he does not do so; he issues another award which seeks to contradict the one of 12 August 2004. This is untenable. Two mutually destructive decisions cannot be allowed to stand. There is no review application for the ruling of 12 August 2004. Therefore the ruling of 3 July cannot stand. A party can apply to court to have its own decisions reviewed and set aside. Such was the course open for the third respondent (see *Nfshangase v MEC for Finance: KwaZulu Natal and another (2009) 30 ILJ 2653 (SCA)*). 19

The issue of res judicata and functus officio.

[27] Gerber correctly conceded that there is a difference between *res judicata* and *functus officio.* A simple distinction between the two is that with regard to the former, same can be raised as defence *inter partes* and has nothing to do with the decision maker or the body to make a decision. The latter is directed at the decision maker or the body. The first respondent's defence to all of this is that the second respondent had not decided the merits when he ruled on the 12th August 2004; therefore the matter is not *res judicata*. That is true, regard being had to the ruling of the 12th August 2004. In my view, he was not empowered to dismiss the application when he had not considered the merits-such a conduct is not sanctioned by the Act or the Rules of the CCMA and amounts to an irregularity. Nonetheless the ruling of 12 August 2004 is not under review.

[28] The fact that he did not deal with the merits is irrelevant for the purposes of the doctrine *functus officio* as I understand it. To my mind once a final decision is made by a functionary, that functionary is not entitled to revisit the decision made, unless authorised by law to do so. It cannot be doubted that had the first respondent not taken the irregular step to reapply, that would have been the end of the matter, unless the decision is reviewed by this court. Therefore it is my finding that the applicable doctrine is that of *functus officio* as opposed to *res judicata*. Therefore, I am unable to uphold the submission that because the 20

matter was not *res judicata* the second respondent was entitled to revisit his ruling.

The section 158(1) (c) application.

[29] It is without doubt that the Labour Court retains a fair amount of discretion in applications of this nature. One of the factors to be taken into account in the exercise of the discretion is whether another party is refusing to comply with the award. In the matter before me, it is clear that the first respondent is refusing to do so. An argument that this court should refuse to make default awards an order of court purely on equity considerations seems to be at odds with the provisions of the section. The section refers to any award and not a particular award. (See *City of Tshwane v Campanella NO and others (2004) 1 BLLR 1 (LAC).*

[30] The defences raised by the first respondent relates to lack of jurisdiction due to *lis pendes* principle. In that regard, it is contended that a section 143 application is pending. The applicant withdrew that application in November 2004. Therefore nothing is pending before the CCMA. Accordingly the defence cannot be upheld. Further the first respondent raises a defence of delay. It contends that two years went pass without doing anything. The simple answer to that is that where matters are regulated by the Prescription Act, there is no room for a defence of unreasonable delay. On those basis, I am unable to uphold that defence too. Prescription need to be specifically pleaded before a court can uphold same. 21

Arbitration awards are governed by the Prescription Act. The applicant interrupted prescription by bringing the application within the three years period. (See *CEPPAWU and another v Le-sel Research (Pty) Ltd (2009) 5 BLLR 421 (LC)*).
[31] Therefore, there is nothing left to impede the exercise of discretion to make the award an order of court.

The issue of costs.

[32] Both parties are *ad idem* that costs should follow results. I have no reason to be averse to that submission.
[33] In the result, I am constrained to make the following order:-
1. The three applications are consolidated for the purpose of hearing.

2. The rulings of 26 February 2007, 10 May 2007 and 3 July 2007 are hereby reviewed and set aside.

3. The award issued on 5 February 2004 is hereby made an order of this court.

4. The first respondent to pay the costs of all the applications.

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G. N MOSHOANA
Acting Judge of the Labour Court 22

Date of Hearing: 26 January 2010
Date of Judgment: 01 February 2010

APPEARANCES

For the Applicant: W T Khoza of RAWU
For first respondent: H Gerber.