

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA 1/2021

In the matter between:

IVAN MYERS

Appellant

And

**THE NATIONAL COMMISSIONER OF
SOUTH AFRICAN POLICE SERVICE**

First Respondent

**THE PROVINCIAL COMMISSIONER OF
WESTERN CAPE**

Second Respondent

Heard: 24 February 2022

Delivered: 30 June 2022

Coram: Coppin JA, Savage et Tokota AJJA

JUDGMENT

COPPIN JA

[1] This is an appeal against the whole judgment of the Labour Court (Rabkin-NaickerJ) in terms of which it reviewed and set aside an arbitration award (“the promotion award”) of an arbitrator of the Safety and Security Sectoral Bargaining Council (SSSBC) (“the bargaining council”) concerning the appellant’s promotion following his reinstatement, having found that the central issue at the arbitration, namely, whether the upgrade of the post the appellant (“Myers”) occupied, was *res judicata* and could not have been revisited by the arbitrator. Leave to appeal to this court was granted by the court a quo.

Background to the promotion award

[2] The appellant (“Myers”) occupied the position of unit commander of the Maitland dog unit of the South African Police Services (“SAPS”) when he was dismissed by the SAPS on 12 July 2007. At the time he was on salary level 10 and held the rank of Lieutenant Colonel (“Lt Col”).

[3] On 29 November 2012 the Supreme Court of Appeal (“SCA”) ordered Myers’ retrospective reinstatement into the position he held before the dismissal. It is common cause that in between the date of his dismissal and the date his reinstatement was ordered by the SCA, the SAPS, including the dog unit, underwent structural changes. The Maitland Dog Unit was amalgamated with another dog unit, the Faure Dog Unit.

[4] In light of the increased geographical area and responsibility brought about by the amalgamation of those dog units the post of commander of the (now amalgamated) dog unit, which now became known as the “K9 Unit, Cape Town”, was upgraded to salary level 12 and was intended to be occupied by an officer with the rank of Colonel. At the heart of the dispute between Myers and the SAPS is the question whether the SAPS had implemented or was still to implement this upgraded post by the time of Myers’ reinstatement.

[5] It is common cause that the SAPS, when initially confronted with the order of the SCA that it reinstate Myers, was of the view that it could not place him as commander of the restructured post, and, instead, offered him posts at the same salary level and rank as that which he occupied at the time of his dismissal (i.e. at level 10 and for the rank of Lt Col).

[6] Myers refused to accept the alternatives offered to him and approached the Labour Court contending that the SAPS were in contempt of the reinstatement order of the SCA for not reinstating him in the upgraded post at level 12.

[7] The Labour Court (per Steenkamp J)¹ found that even though the SAPS did not comply with the order of the SCA, its non-compliance was not wilful or *mala fide* and it was therefore not in contempt. Steenkamp J, nevertheless, deemed it in the interest of justice to interpret the SCA's reinstatement order and concluded that the order contemplated that Myers be reinstated to the post that he would have occupied had he not been unfairly dismissed; that the restructured post, previously occupied by Myers, was then occupied by a Captain Du Plessis ("Du Plessis") who had been promoted to the rank of Lt Col and salary level 10. Steenkamp J, accordingly, dismissed the contempt application, but held that Myers should be reinstated to the restructured post, i.e. as commander of the K9 unit, but at salary level 10, retrospective to the date of his dismissal.

[8] The SAPS only appealed to this court against that part of Steenkamp J's order that directed Myers' reinstatement as commander of the K9 unit, and Myers cross- appealed against the dismissal of the first contempt application. Both the appeal and cross-appeal were dismissed by this court on 10 April 2015.² The order of Steenkamp J thus stood.

[9] It is common cause that two weeks later, on 24 April 2015, the Provincial Commissioner of the SAPS wrote to a certain Col. Visser ("Visser") and to the provincial commander of emergency services notifying them that Visser's job description had to be changed to that of "Unit Commander K9 Services". It appears from that letter that Visser had been appointed to the post of "Unit Commander: Cape Town K9" a few years before that, but continued to perform duties as K9 and Mounted Unit Coordinator. This "placement" of Visser in the position of commander of the K9 unit seems to have caused Myers to approach the Labour Court a second time, claiming that the SAPS was still in contempt of the SCA order reinstating him, as well as the subsequent orders of Steenkamp J and of this Court.

[10] On 4 May 2015 Myers launched the second contempt application in the Labour Court, in which he alleged, inter-alia, that after this Court's dismissal of the appeal against Steenkamp J's order he had received no indication from the SAPS

¹See: *Myers v National Commissioner of the SA police Service and Another* [2014] 5 BLLR 461 (LC) (28 January 2014)

²See: *National Commissioner of SA Police Service and Another v Myers* [2015] ZALAC 31.

that they intended to comply with the court orders that had been issued up until then, and that this was the position, despite evidence placed before this court showing that Lt Col Du Plessis had been promoted to fill his post. Myers also contended that the SAPS had appointed Visser as Unit Commander of the K9 Unit in violation of his rights.

[11] Seemingly coincidentally, on 5 May 2015, the Provincial Commissioner, in a letter of that date, reversed Visser's placement as commander of the K9 Unit, on the grounds that it was "erroneous". Visser was expressly informed in that letter that he was "not placed in the post of commander: Cape Town K9 Unit" and that he "must continue in [his] duties at Provincial Emergency Services". A letter bearing the same date was also written by the Provincial Commissioner to Myers, in which Myers was requested to report to the Cape Town K9 Unit as commander "with immediate effect". The letter further confirmed Myers's appointment to be on salary level 10.

[12] On 6 May 2015 Myers assumed the position of commander of the K9 unit, but immediately took leave. On 7 May 2015 Myers wrote to the Provincial Commissioner contending, inter-alia, that the Commissioner was still not complying with the extant court orders. He also claimed that he was entitled to the position of commander of the K9 unit, but on level 12 (and to the rank of Colonel), which, he contended, is the level to which the post he occupied had been upgraded and to which he was entitled to be appointed, because his reinstatement was retrospective.

[13] At the hearing of the second contempt application in the Labour Court and specifically concerning the SAPS's alleged duty to promote him to the upgraded level 12 post retrospectively from 29 June 2009, the following was contended on behalf of Myers: Firstly, that if, between the date of his dismissal and his reinstatement there had been salary increases, bonuses payable, post upgrades, or an enlargement of the areas of operational responsibility attached to the restructured position, he would be entitled to all of those benefits; and, secondly, that if the position he held had, in the interim, pending his reinstatement, been merged with another position, he had to be reinstated to the merged position.

[14] The Labour Court (per Whitcher J) found in Myers' favour. Even though the Labour Court there found that Myers occupied the position of commander of the Maitland Dog Unit at salary level 10, it reasoned that the Provincial Commissioner had "misunderstood the true scope of the relief of reinstatement" and ordered the SAPS to fully comply with the orders of the SCA, the Labour court (Steenkamp J) and this court, and in particular, to appoint Myers to the lowest notch at salary level 12, to promote him to the rank of Colonel, and to pay him the difference between the two salary levels (i.e. between salary levels 10 and the lowest notch at salary level 12) retrospectively to 1 March 2011, which was the first day following the upgrade of the post to a level 12 post.

[15] Of significance, the Labour Court (Whitcher J) imposed an onus on the employer to prove that the dismissed employee (Myers) would not have, but for his dismissal, achieved the promotion which was "plausibly within his grasp" had he not been dismissed. It further held in that regard that "[o]nce an employee has established [that] a particular benefit or promotion was plausibly within his grasp, had he not been unfairly dismissed, and this is not rebutted, reinstatement, in fairness, should include these enhancements to his remuneration or rank". Whitcher J held that the SAPS had placed nothing before the SCA or the Labour Court indicating that Myers would not have benefited, as a specialist incumbent, from the fact that his post was upgraded while he should have been in it. Whitcher J concluded that Steenkamp J correctly ordered that the SCA order meant that Myers should be reinstated into the restructured position and that this could only have meant at level 12.

[16] The SAPS successfully appealed against that order to this court³ which found that Myers was not entitled to be promoted to the upgraded post. Myers cross appealed regarding the date from which it was ordered that he should be paid back pay, namely, 1 March 2011, essentially alleging that it should have been ordered from an earlier date. His cross-appeal was contingent upon the admission of new evidence which he sought to adduce at the hearing of the appeal. The application to adduce the evidence was refused and the cross-appeal was dismissed.

³See: *National Commissioner of the SA Police Service and Another v Myers* (2018) 39 ILJ 1965 (LAC).

[17] This court accepted that the order of Steenkamp J still stood and that Myers was to be reinstated into the restructured post at level 10 and that this had been definitively determined by this court in the first contempt appeal. It also accepted the evidence of the SAPS that the restructured level 12 post had not been implemented as yet and was only to be implemented at some future date during phase 2 of the restructuring process; further, that the appointment on 24 April 2015 of Visser as commander of the K9 Unit was erroneous and had been reversed on 5 May 2015 and that Myers had been reinstated on that same day at level 10.

[18] This court also accepted that the discretion of the National Commissioner, under the SAPS Employment Regulations, whether to retain Myers in the upgraded post, or to advertise it, would only be activated upon implementation of the upgraded post. This court further held that Whitcher J had erred in imposing an onus on the SAPS to show that Myers would not have been promoted to the upgraded post.

[19] This court held that on the evidence that served before the court in the second contempt application Myers had failed to establish any legal right to be appointed at salary level 12, retrospectively to the date of his dismissal, and that the claim before Whitcher J ought to have failed on the basis that the orders of the SCA, the Labour Court (i.e. of Steenkamp J) and of this court in the first contempt application, did not direct that Myers be reinstated at a salary level to which he had never previously had a legal entitlement.

[20] Significantly though, this court alluded to the fact that a failure to promote an employee may found a plausible unfair labour practice claim. And in the context of dealing with Myers' application to adduce evidence on appeal, mentioned that if Myers contended that he was entitled to a higher salary because of his reinstatement, he should pursue such a claim in the appropriate forum. It specifically held, *inter alia*, the following:

“[53] The Labour Court erroneously imposed an onus on the SAPS to prove that the dismissed employee would not, but for his dismissal, have achieved the promotion which was plausibly within his grasp, had he not been dismissed. A reinstatement order imposes no such burden on the employer.

It is directed at putting the employee back in the position he or she was [in] before the dismissal. Although a claim by a reinstated employee that, but for his dismissal, he would have achieved a promotion might give rise to a plausible unfair labour practice claim, this does not mean that reinstatement at the salary level and rank at the time of the dismissal would amount to a breach of the reinstatement order. The Labour Court, therefore, erred in arriving at the contrary finding.”⁴

[21] This court further held:

“[85] Lt Col Myers has failed to demonstrate any exceptional circumstances which would justify the admission, at this stage, of the evidence he seeks to adduce on appeal. He has been reinstated at salary level 10, which was his salary level at the time of his dismissal. It is probably impermissible for him to now seek, merely through relief sought in the notice of motion (unsupported by evidence) to claim a higher salary. Lt Col Myers has been reinstated, and if he contends as he does, that he is entitled to a higher salary, he should pursue this claim in the appropriate forum.”⁵

The promotion award

The Bargaining Council

[21] It is apparent that the above *orbiter* statements made by this court in the second contempt matter prompted Myers’ next move. In about May 2018 he referred an unfair labour practice (promotion) dispute to the bargaining council for resolution.

[22] The gist of Myers’ case in that forum was that he was reinstated into the restructured dog unit by the National Commissioner of the SAPS without advertising the post, that he was retained in that post in terms of SAPS Employment Regulation 30(8), and was still serving in that position (at that stage) for about 3 years after such reinstatement. He further contended that the SAPS refused to absorb him into that position in terms of regulation 30(9) of the said regulations, even though the National

⁴Ibid para 53.

⁵ Id fn 3 at para 85.

and Provincial Commissioners had agreed to his appointment to that post. He sought to be promoted to the rank of colonel at salary level 12 retrospectively to 30 April 2009, which he alleged was the date on which the restructured post was implemented. And he wanted to be paid the difference he earned at salary level 10 and what he would have earned at level 12, also retrospectively, from 1 June 2009.

[23] The matter went to arbitration where Myers produced documentary evidence, testified himself and called as witnesses, Major-General Govender (“Govender”), Brigadier Van Wyk (Van Wyk) and a Mr Graham Daniels, secretary of the SA Police Union in the Cape. The SAPS called one witness, Visser, who had retired in the interim.

[24] In a written award dated 11 December 2018 the arbitrator found in Myers’ favour, concluding, essentially, that in light of all the evidence, Myers had proved on a balance of probabilities that the upgraded post had been implemented by the SAPS during phase 1 of the restructuring process, which was completed on or about 13 May 2009 (or June 2009). The arbitrator further accepted that even though Myers had been placed in the restructured post by the National Commissioner on 5 May 2015 in compliance with the orders of the SCA and Labour Court, and not because of the exercise of his discretion, he had retained Myers in that position (i.e. at level 10) for a period of more than 3 years without promoting him to the rank of Colonel.

[25] The arbitrator also found that Myers proved that, since he had received satisfactory performance ratings before his dismissal he would have been promoted, but for his dismissal; that the SAPS did not rebut Myers’ case to that effect; and the SAPS had committed an unfair labour practice when it failed to promote Myers to the rank of Colonel and to salary level 12 in the restructured post.

[26] The arbitrator then made an award: (a) declaring that the SAPS committed an unfair labour practice relating to the promotion of Myers; (b) promoted Myers into the upgraded position of Unit Commander of the K9, Cape Town Dog Unit at salary level 12, and to the rank of Colonel in terms of Regulation 30(9) of the SAPS Employment Regulations; (c) ordered that Myers’ “promotion shall have retrospective effect from the date of the implementation of the post, which is 1 June 2009”; (d) ordered the

SAPS to pay Myers “the difference in salary level 10 and that of salary level 12 retrospectively from 1 June 2009”; (e) directed that “the calculation of the loss of income since 1 June 2009 shall include notch advances in the salary range of salary level 12 since 1 June 2009”; (e) ordered the SAPS to adjust Myers’ pension fund accordingly; (f) ordered the SAPS to comply with the award by no later than 1 February 2019; and (g) made no order as to costs.

The review of the promotion award in the Court *a quo*

[27] Unhappy with that outcome the SAPS brought an application in the Labour Court (“the court *a quo*”) to review and set aside the promotion award. The judgment in those proceedings is the subject of this appeal.

[28] The SAPS essentially contended in the court *a quo* that the arbitrator could not effectively overturn the findings of this court made in the appeal against the order of Whitcher J. As an alternative, it contended, that even if it were to be found that the SAPS had committed an unfair labour practice by not promoting Myers to the upgraded post, as has been found by the arbitrator, the award of the arbitrator was, nevertheless, reviewable on the basis that it is not one that a reasonable arbitrator would have made. In that regard the SAPS essentially argued that a reasonable arbitrator would not have found that the level 12 post was implemented by the SAPS on 1 June 2009. As a further alternative, the SAPS contended that even if it could be held that a reasonable arbitrator could have found that Myers ought to have been promoted to the upgraded post, a reasonable arbitrator would not have promoted Myers as the arbitrator purported to, and would not have concluded that the promotion to level 12 must be made retrospective to 1 June 2009.

[29] The court *a quo* seemingly found that the issue raised in the review was crisp. It summarised the issue as follows:

“The arbitrator, in contrast to what was found by the LAC, made a factual finding that the restructuring of the post had been implemented. She differed on matters of law as to the import of the relevant SAPS regulations and in finding that an onus existed on the SAPS to show that the National Commissioner decided not to retain the

applicant into the restructured post. The curious feature of the matter before me then, is that the arbitration award overturns points of fact and law previously decided by the Labour Appeal Court, between the same parties.”

[30] Despite a submission by the SAPS that the promotion award stood to be set aside on various grounds the court *a quo* proceeded to decide the review application on a very narrow basis. Rejecting an argument on behalf of Myers that the SAPS did not raise the defence of *res judicata* at the arbitration and should therefore not concern the court *a quo*, it essentially held that the defence went to the jurisdiction of the bargaining council; that the arbitrator was constrained by the principles of *res judicata* and *stare decisis*, and was bound by the factual and legal findings of this court in the appeal against the judgment of Whitcher J, more particularly, its finding that the upgraded post had as yet not been implemented. It also found that the arbitrator could not overturn those findings, or come to a contrary conclusion. The court *a quo*, accordingly, reviewed and set aside the promotion award solely on that basis.

[31] It is significant that the court *a quo* did consider whether the principle of *res judicata*/issue estoppel was applicable to the proceedings in the bargaining council. Having referred to *dicta* in a decision of the Labour Court in *Le Roux v Commission for Conciliation, Mediation and Arbitration and Others*⁶, the court *a quo* reasoned that to allow the decision of the arbitrator to stand “*would not be conducive to legal certainty. Nor would it accord with the provisions of the LRA.*” According to the court *a quo*, in deciding whether those principles were applicable “*the principle of stare decisis in the LRA [had to be] brought into the mix*”. The court *a quo* also held that, in addition, “*the principle outlined*” by Cameron *et al* in *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and others*⁷, “*that the doctrine of res judicata seeks to protect litigants and the courts from never–ending cycles of litigation ...*”, applies.

⁶ (2000) 21 ILJ 1366 (LC) paras 20-22.

⁷ 2020 (1) SA 327 (CC) (“*Ascendis*”).

[33] Having briefly related the history of the litigation between Myers and the SAPS, regarding his reinstatement and concerning the position to which he was reinstated, the court *a quo* concluded:

“in these circumstances, it seems to me that good sense and fairness must direct this court to relax the ‘same cause of action’ requirement in this case. To do so also accords with the *stare decisis* principle reflected in the provisions of the LRA. The principle of finality in litigation is more prescient in labour litigation given the principle of speedy resolution of disputes and this further cements my decision in this matter.”

[34] Finally, the court *a quo* held that in the circumstances the promotion award stood to be set aside on the ground that the arbitrator did not have jurisdiction to hear the matter because the principle of *res judicata*/issue estoppel applied. The promotion award was thus reviewed and set aside and Myers was ordered to pay the costs of the review application. Subsequently, the court *a quo* granted Myers leave to appeal to this court.

Arguments on appeal

[35] Counsel for Myers argued, essentially, that the court *a quo* erred, because this court had specifically directed him to refer his promotion dispute to the appropriate forum; and that by the time he was reinstated the post that he held at the time of his dismissal had already been upgraded and was no longer a post at salary level 10 for a Lt Col, but was a level 12 post for an officer with the rank of Colonel, and, further, that he had functioned in that upgraded post after being placed there by the National Commissioner in compliance with the reinstatement order of the SCA.

[36] Counsel for Myers contended further that Myers’ claim of unfair treatment was also premised on the fact that for three years after his reinstatement he had occupied the new merged post, with greater responsibilities and thus ought to have been promoted to level 12 and to the rank of Colonel. According to counsel, the arbitrator’s award in Myers’ favour was one a reasonable arbitrator could have made. He also argued that the SAPS relied on a number of new grounds and for the first

time on review claimed, and unreasonably so, that the issue of the upgrade of the post before the arbitrator was *res judicata*.

[37] Counsel for Myers further argued that the court *a quo* erred in upholding the *res judicata* point and had failed to decide the merits of the review. In addition to arguing that the arbitrator could not be faulted for not having determined the *res judicata* issue because it was not raised before the arbitrator, it was submitted by counsel that the *res judicata* point should have been rejected by the court *a quo* on the following grounds: (a) the defence applies in civil law and has as its basis public policy and therefore cannot simply be applied in the area of labour law, where fairness is the yardstick; (b) to uphold the defence was to be extremely unfair to Myers; (c) Myers had not been afforded the full benefit of his reinstatement order to which he laid claim in the past in terms of contempt proceedings; (d) (in the second contempt matter) this court had told Myers to pursue his unfair promotion claim in the appropriate forum; (e) Myers had pursued such a claim in the bargaining council and had obtained the benefit of the promotion award after the arbitrator had heard the evidence of all the parties, including evidence which Myers had not been allowed to adduce in the appeal to this court (i.e. against the order of Whitcher J).

[38] It was further submitted by Myers' counsel that, in any event, the requirements for successfully raising the defence of *res judicata* were not met because: (a) the dispute and the fact in the contempt application, which culminated for decision in this court and those in the bargaining council, were not the same; (b) that in the said contempt application this court did not decide on Myers' claim for higher remuneration, or even, in relation to that question, whether the upgraded post had been implemented; the dispute about the appellant's unfair non-promotion had not been decided by this court, which only decided the issue of Myers' reinstatement; (c) this court in fact directed Myers to refer the dispute relating to his promotion to the correct forum and that is what he did; (d) this court declined to decide the unfair promotion part of the dispute.,

[39] Counsel for Myers submitted in the alternative that even if the requirements of *res judicata* were met, then that defence could not be applied in a manner that resulted in an unfair outcome for Myers, and that if the court *a quo* had considered

the merits of the matter it would have found that the arbitrator's decision was one a reasonable arbitrator could have made.

[40] In response, counsel for the respondents basically argued the following: The court *a quo* correctly determined on the basis of *issue estoppel* that the arbitrator could not have ventilated the same issues of fact and law that had already been decided by this court in the second contempt appeal. In the alternative, in the event of this court finding that the court *a quo* erred in reviewing the award on the grounds of *issue estoppel*, it would have to determine what the court *a quo* has not decided, namely, whether the arbitrator's main conclusion, that the respondents committed an unfair labour practice by not promoting Myers to salary level 12 (and the rank of colonel) is one which a reasonable arbitrator would have arrived at. Further alternatively, that if this court finds that the arbitrator's conclusion, that Myers should have been promoted, falls within the range of decisions a reasonable arbitrator could have made, then the question that arises is whether a reasonable arbitrator would have made the promotion retrospective to 1 June 2009.

[41] In respect of the *issue estoppel* point specifically, counsel for the respondents submitted, essentially, that this court in the appeal against Whitcher J's order, accepted (a) that the order made by Steenkamp J still stood and that the appellant was entitled to be reinstated into the restructured post; (b) that the SAPS's evidence, that the upgraded post had not been implemented as yet and that it was only to be implemented in the future during phase two of the restructuring process, was to be accepted; and (3) that the discretion conferred on the National Commissioner to retain the appellant in the upgraded post, or to advertise it, will only be activated upon implementation of the upgraded post. Counsel submitted further that the arbitrator was faced with the same claims and the same circumstances Myers advanced before Whitcher J and that this court, in the appeal against the order of Whitcher J, overturned that order and made findings which bound the arbitrator.

Discussion

Res judicata/issue estoppel

[42] The requirements of *res judicata* are the following: (a) there must be a previous judgment by a competent court; (b) between the same parties; (c) based on the same cause of action, and (d) with respect to the same subject matter or thing⁸. Even though the court *a quo* mentions *res judicata* the actual principle the respondents are relying on is the principle of “issue estoppel”, an extension of *res judicata*. In the United Kingdom the *res judicata* doctrine is known as “cause of action estoppel” or “issue estoppel”.⁹ The label “issue estoppel” came to refer to instances where the same cause of action requirement of the *res judicata* principle were not rigorously enforced¹⁰. It is also a firm part of South African law, generally.¹¹

[43] It is accepted¹² that the formulation of the issue estoppel rule as applied in South African cases was correctly reflected in a passage from *Spencer Bower on Res judicata*, namely, the following¹³:

“Where the decision set up as *res judicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms; but beyond these limits there can be no such thing as *res judicata* by implication.”

[44] The respondents, thus, contend that the arbitrator in the bargaining council, seized with the unfair labour practice (promotion) hearing, was bound, in terms of that principle, by this court’s decision in the appeal against the order of Whitcher J, and more particularly, this court’s finding that, the upgraded (i.e. level 12) position

⁸See, *inter alia*, *Ascendis* (above) para 71.

⁹See: *Ascendis* (above) paras 111-114; *Molaudzi v S* 2015 (2) SACR 341 (CC) (“*Molaudzi*”) para 25 where reference is made to the definition of the rule in *Arnold v National Westminster Bank Plc* [1991] 2 AC 93; [1991] 3 ALL ER 41 at 104.

¹⁰See *Ascendis* (above) para 114.

¹¹See *inter alia*, *Hyprop Investments Ltd and others v NSC Carriers and Forwarding CC and Others* 2014 (5) SA 406 (SCA) (“*Hyprop*”) para 5; *Ascendis* (above); *Molaudzi* (above).

¹²See, *inter alia*, *Boshoff v Union Government* 1932 TPD 345; *Liley and another v Johannesburg Turf Club* 1983 (4) SA 548 (W) at 551-552; *Hyprop* (above).

¹³ *Spencer Bower and Handley Res Judicata* (LexisNexis)

had not been implemented as yet, and that the arbitrator could not have come to a different conclusion in respect of that issue. The court *a quo* effectively accepted that contention and found that the arbitrator's failure to comply with the principle vitiated the entire proceedings before that arbitrator, since that finding by the arbitrator was at the heart of the matter and the principle itself was relevant to the question of jurisdiction.

[45] The rationale for the principle is to give effect to the finality of judgments. It is a measure intended to limit endless litigation and to ensure certainty in respect of matters that have already been decided by the court.¹⁴ Its roots are in good sense and fairness¹⁵.

[46] In *Molaudzi v S*¹⁶ the Constitutional Court held that although the general thrust of international jurisprudence was that *res judicata* was usually recognised in one way or the other as necessary for legal certainty and the proper administration of justice, many jurisdictions recognise that this could not be absolute since the perpetuation of an error was not a virtue, but to correct it was a compulsion of judicial conscience¹⁷.

[47] Over time our courts have thus expressed the view that the doctrine should not be applied rigidly. The relaxation started in *Boshoff v Union Government*¹⁸ where it was held by the Transvaal Provincial Division that *res judicata* should not be understood literally in all circumstances and applied as an immutable, inflexible rule. And that its requirements may be extended and adapted to avoid unacceptable alternatives. In *Bafokeng Tribe v Impala Platinum Ltd and others*¹⁹ it was held by the High Court that the principle of *res judicata* must be carefully delineated and demarcated in order to prevent hardships and actual injustice to the parties.

¹⁴ See: *Molaudzi* (above) para 16; *KA Mtshu v Bytes Technology Group South Africa (Pty) Ltd and others* 2013 (12) BCLR 1358 (CC) at para 18;

¹⁵ Per Cameron J in *Ascendis* (above) at para 112.

¹⁶ 2015 (2) SACR 341 (CC).

¹⁷ See para 30, or at 355a.

¹⁸ 1932 TPD 345.

¹⁹ 1999 (3) SA 517 (BH) at 566B-E.

[48] In *Smith v Porritt and Others*²⁰ the Supreme Court of Appeal (per Scott JA) explained how the defence of *res judicata* evolved into issue estoppel:

“Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the exception *rei judicata* has over the years been extended by the relaxation in appropriate cases of the common law requirements that the relief claimed in the cause of action be the same (*eadem res ad eadempetendi causa*) in both the case in question and the earlier judgment where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eademquestio*) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of *res judicata* is raised in the absence of a commonality of cause of action and the relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But as was stressed by Botha JA in *Kommissaris van BinnelandseInkomste v ABSA Bank Bpk* 1995 (1) SA 653 (A) at 669D, 670J-671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res judicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis... Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others....”

[49] In *Molaudzi* the Constitutional Court considered that the court’s power to relax the requirements of the doctrine of *res judicata* derived from its inherent power as recognised in section 173 of the Constitution of the Republic of South Africa, 1996 to regulate its own processes and to develop the common law if the interests of justice so demand and because *res judicata* was indeed a common law principle. The Constitutional Court emphasised that this power of the courts does not apply to substantive rights, but rather to adjectival, or procedural, rights only. It also warned that the power had to be exercised sparingly otherwise there would be legal

²⁰ 2008 (6) SA 303 (SCA) at para 10.

uncertainty and potential chaos and that it must not be used by a court to assume jurisdiction it otherwise does not have. Not only must the interest of justice require the departure or relaxation of the *res judicata* principle, but there must be exceptional circumstances present to justify such departure²¹.

[50] The court *a quo* found that in deciding whether the *res judicata*/issue estoppel doctrine was to be applied, the principle of *stare decisis* “*must be brought into the mix*” and that the principle of *res judicata* “*sought to protect litigants and the court from never ending cycles of litigation*”.

[51] The court *a quo* went on to conclude that “*good sense and fairness*” directed it to relax the same-cause-of-action requirement of the *res judicata* defence in this matter. It reasoned that such relaxation accorded with the *stare decisis* principle and that “*the principle of finality in litigation is more patent in labour litigation given the principle of speedy resolution of disputes*”, and it that further “*cemented*” the court *a quo*’s decision on the matter.

[52] While the *res judicata* and *stare decisis* principles seem to have the same broad object, namely, to ensure certainty and finality, they are indeed two different concepts. There is no question that *stare decisis* is applicable to proceedings in the Commission for Conciliation, Mediation and Arbitration (CCMA) and in bargaining councils. The full Latin maxim states “*stare decisis et non quietamovere*” meaning “*one stands by decisions and does not disturb settled points.*”²²

[53] Commissioners and arbitrators in the CCMA and in bargaining councils established in terms of the LRA are bound to follow and apply the *rationes decidendi* of the higher courts. As is confirmed in *Le Roux*, those officials are “*unquestionably bound by [those] judgments*”²³.

[54] A case might also be made for the applicability in such proceedings of the doctrine of *res judicata* in its strict, or rigid form. The difficulty, however, arises with

²¹See: *Molaudzi* (above) at para 38.

²²See, *inter alia*, *Turnbull – Jackson v Hibiscus Coast Municipality and Others* 2014 (6) SA 592 (CC) (“*Turnbull – Jackson*”) para 50 fn. 100.

²³See also, *inter alia*, *Turnbull-Jackson* para 57.

issue estoppel, as the principle entails the exercise of a power to relax the strict requirements of *res judicata* in a particular case. While courts unquestionably have such discretion, as confirmed in *Molaudzi*, it is not clear that Commissioners or arbitrators acting under the auspices of the CCMA, or bargaining councils established in terms of the LRA, have such power.

[55] The court *a quo* did not consider that aspect, but seems to have focussed on its power to relax the requirements of *res judicata*, i.e. as a court, *albeit* in the wrong context. The question ought to have been about what the arbitrator could reasonably have done and not about what the court could do (i.e. whether the doctrine was indeed applicable)

[56] In *BMW (SA) (Pty) Ltd v Van der Walt*²⁴ this court held, in the context of whether a second disciplinary enquiry in respect of the same misconduct could be instituted by the same employer against the same employee, that it was not necessary to decide whether the principles of *autre fois acquit* or *res judicata* applied in Labour law, since, ultimately, the question was one of fairness, which was paramount²⁵. In *Feni v Commission for Conciliation, Mediation and Arbitration and others*²⁶ this Court once again considered the question, but did not conclude that the principle of *res judicata* was applicable, although it held that the principle of *lis alibi pendens* was, apparently following the lead of the Constitutional Court in *Association of Mineworkers and Construction Union and others v Ngululu Bulk Carriers (Pty) Ltd (in liquidation) and others*²⁷, where it, seemingly, accepted that the *lis pendens* principle would be applicable in labour law.

[57] In general, the issue estoppel principle, or the relaxation of the *res judicata* principle, does not seem to lend itself to application in the proceedings of the CCMA or bargaining councils, particularly because these bodies are not courts and do not have the same powers that courts have as envisaged in section 173 of the Constitution. In *Molaudzi* the Constitutional Court identified those powers as enabling courts to “develop” or relax the application of the doctrine of *res judicata* where the

²⁴ (2000) 21 ILJ 113 (LAC).

²⁵ See also: *Brandford v Metrorail Services (Durban) and others* (2003) 34 ILJ 2269 (LAC).

²⁶ (2020) 41 ILJ 1899 (LAC).

²⁷ (2020) 41 ILJ 1837 (CC).

circumstances and interests of justice so demand. Unless an arbitrator in the CCMA or bargaining council has the same or similar powers to a court, the basis upon which an arbitrator would be able to relax the application of the *res judicata* principle in any particular case would be impossible, legally. This, in turn, leads to the question whether an arbitrator would have no discretion, but to apply the doctrine rigidly in every case, notwithstanding the interest of justice, or the hardship and injustice that would ensue. That, in turn, would mean that the very *rationale* for allowing the relaxation of the doctrine, namely, in essence, to prevent hardship and actual injustice to the parties, would be negated.

[58] It can hardly be contended that the power of an arbitrator and a commissioner in terms of section 158(1) of the LRA, to conduct the arbitration in a manner that he or she considers appropriate, is the equivalent of a court's powers in terms of section 173 of the Constitution. The power to develop the common law belongs exclusively to the courts and the legislature.

[59] The argument, thus, that the issue estoppel principle possibly does not apply in such proceedings has merit for at least that reason and because fairness, which is also the basis for the relaxation of the strict requirements of *res judicata*, is in any event, paramount in such proceedings.

[60] Even if one assumes, for the sake of argument, that the doctrine applies to such proceedings, it would have to be invoked by the party relying on it. It is common cause that in this matter the doctrine was not expressly invoked before the arbitrator in the proceedings in the bargaining council and that it was raised for the first time in the review application in the court *a quo*. In the practice of the High Court the defence of *res judicata* has to be raised in the pleadings, and if it is not specifically pleaded it is assumed that the defence has been waived²⁸. The same must axiomatically apply to issue estoppel.

[61] The argument by counsel for the respondent, that the defence could not have been pleaded in the bargaining council because there were no pleadings, cannot

²⁸See, *inter alia*, *Blaikie Johnstone v P Hollingsworth (Pty) Ltd* 1974 (3) SA 392 (D) at 395 and the authorities cited there.

hold. Even if there were no pleadings the defence could have been raised fairly through other means, such as by way of a special point (i.e. *in limine*) or as, or in, an objection. The further argument by counsel, even though the defence was not raised by name, it was effectively raised because the record shows that the arbitrator's attention was drawn to the fact that the issues Myers sought to re-ventilate before it had already been determined by this court, can also not hold.

[62] What is clear is that in the bargaining council the respondents did not object to the evidence on the basis of the doctrine of *res judicata*, estoppel, which, if applicable, would have required the arbitrator to consider whether the doctrine should be applied rigidly, or whether, in the interest of justice, or due to the presence of exceptional circumstances, its application should be relaxed. A contention that Mr Myers was alive to the issue because of the nature of the questions put to him is not adequate and does not equate to having raised the defence of *res judicata* (or more appropriately, of issue estoppel) squarely, and fairly.

[63] During his evidence in chief Myers, *inter alia*, was asked to explain a paragraph in a document dated 28 August 2008 pertaining to the restructuring of the SAPS. In his answer he sought to infer, *inter alia*, that Visser had been placed in the upgraded post. The record shows that counsel for the SAPS did not object to the answer *per se*, but had, in an exchange, after counsel for Myers showed why Myers's interpretation was relevant, submitted that the factual dispute about the implementation of the upgraded post was dealt with by this court in the contempt matter. That retort was met by a denial from Myers' counsel, who submitted that the issue had not been subjected to cross-examination at all, i.e. in the proceedings before this court, and that it was the very reason why the matter had been referred to arbitration, namely, to deal with the factual disputes.

[64] If the defence of *res judicata* was indeed seriously relied upon by the SAPS, that was an opportune moment to have raised it clearly and unequivocally, but it was not. The exchange can hardly be said to have been an instance where the respondents raised the defence of *res judicata* (or more appropriately, issue estoppel), let alone properly, or even adequately.

[65] The arbitrator can hardly be faulted for not having mentioned the doctrine. It was not expressly (or even impliedly, or adequately) relied upon. If fairness (and relevance) was the only measure for allowing evidence and accepting it, which would have been the same as relaxing the doctrine, then the arbitrator could hardly be said to have acted unreasonably in that regard.

[66] In any event, it would not have been fair to relax the requirements of *res judicata* in circumstances where the finding, that the upgraded post had not been implemented as yet, was made by this court in motion proceedings on paper, on the strength of the *Plascon Evans*' rule, and without the benefit of cross-examination and the discovery of documents. Deviation from the requirements of *res judicata* could reasonably have been regarded as permissible, since it was likely to give rise to potentially unfair consequences in the proceedings at the bargaining council.

[67] The evidence given at the arbitration, concerning the question of the implementation of the upgraded post, underscored the fallacy of finding that Myers was bound in the bargaining council by the finding of this court on that issue. Such a conclusion might have resulted in the perpetuation of an error and would have caused injustice.

[68] In the second contempt application (i.e. that was decided by Whitcher J) Myers simply alleged that he would like to be promoted to salary level 12 with effect from 29 June 2009 (or for September 2008), but furnished no factual basis for his contention. While the SAPS did not dispute in those proceedings that since 29 June 2009 there was approval, in principle, to upgrade the post of commander of the Dog Unit, it repeatedly asserted on affidavit that the upgrade had not been implemented as yet and was only to be implemented during phase 2 of its restructuring process.

[69] Myers unsuccessfully contended in the second contempt appeal in this court that that was a bare denial. This court found that it was not and effectively held that it was adequate in light of the absence of any "*factual assertions*" by Myers in his founding affidavit "*calling for a more complete answer.*" This court held that on the basis of the *Plascon Evans* principle and on the basis of the facts accepted by Steenkamp J in the first contempt application, Whitcher J ought to have accepted

that the upgrade had not been implemented and was only to be implemented during phase 2 at some date in the future; and that the failure to accept that fact had caused Whitcher J to err fundamentally. This court found that “*there was accordingly no basis in law and fact*” for Whitcher J to have found that the salary level 12 post had been implemented on 1 March 2011.

[70] In the proceedings in the bargaining council Myers produced documentary evidence to show that his post had indeed been upgraded, approved and had been implemented by June 2009. He also produced documentary evidence to show that Visser had been laterally transferred to the upgraded post. Myers was not cross-examined in respect of this documentary evidence, as counsel for the SAPS maintained that Myers could not explain the documents adequately and that only the officers who actually produced them could give such an explanation. Since the issue of the implementation was crucial, one would have expected the SAPS to then call those officers, but it did not. It only called Visser to give evidence at the proceedings in the bargaining council. He was not the author of, or the person responsible for, any of the crucial documents produced in evidence by Myers.

[71] On the other hand, in the proceedings in the bargaining council Myers called two officers, namely Major General Govender and Brigadier Van Wyk, who had made averments on behalf of the SAPS in the second contempt application to the effect that the upgrade had not been implemented and was only to be implemented in phase 2 of the restructuring process. In the bargaining council it was confirmed that despite having made those averments, neither of them had actual knowledge of those facts and they conceded, effectively, that those averments were based on hearsay, namely, on what they had been told by their subordinates. The subordinates themselves did not make any affidavits and were never called as witnesses in any of the proceedings. Of further significance, it appears that in the proceedings in the bargaining council the officers, Govender and Van Wyk, in effect, in light of the documentary evidence Myers produced, appeared somewhat doubtful whether the upgraded post had in fact not been implemented already.

[72] Myers also called a Mr Graham Daniels, provincial secretary of SAPU (i.e the police union) in the Western Cape, who gave evidence of his knowledge and

involvement in the restructuring process. According to his testimony, the restructuring of the Maitland Dog Unit was part of the first phase, which was completed during 2011.

[73] Visser, who gave evidence on behalf of the SAPS in the bargaining council proceedings, could not reasonably or adequately explain why his name appeared on the official meeting attendance lists and on the PERSAL payroll as unit commander of Maitland, or of the K9 Unit and, generally, why he would have been placed in a post that had not been implemented. It is a rather strange that the SAPS did not call any officials who were directly involved with the restructuring process and who could give first-hand evidence of or concerning, *inter alia*, the status of the post occupied by Myers, or, perhaps more appropriately, that was occupied by Visser.

[74] To summarise, the court *a quo* erred in concluding that issue estoppel applied to the proceedings in the bargaining council, even though it had not been raised specifically in that forum, or by implying that the arbitrator had the power, as it were, to relax a requirement of the *res judicata* defence. In any event, and on the assumption that the doctrine was applicable, the court *a quo* erred in finding that given all the circumstances, the requirements would have been relaxed in this particular instance.

[75] In light of that conclusion, it is now necessary, with the agreement of the parties²⁹, to decide the other grounds of review that (unfortunately) were not considered by the court *a quo*. The test on review pertaining to decisions on the merits of unfair labour practice matters is trite. It is essentially whether they are decisions that no reasonable arbitrator could reach³⁰.

The other grounds of review

Background

²⁹*National Union of Metalworkers of SA on behalf of Sinuko v Powertech Transformers (DPM) and Others* [2014] 2 BLLR 133 (LAC) para 41.

³⁰See, *inter alia*, *Sidumo and another v Rustenburg Platinum Mines Ltd and others* [2007] 12 BLLR 1097 (CC).

[76] In the second contempt matter, this court, like the Labour Court, had to decide whether the SAPS was in contempt in not reinstating Myers at level 12. The finding was³¹ that it did not constitute contempt, because reinstatement meant that he had to be put back in the position he was in at the time of his dismissal; that Steenkamp J correctly found that it was at level 10 and that Whitcher J's order was inconsistent when the meaning of "*reinstatement*" as articulated by the Constitutional Court in *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* ³². It appears that Myers case before Whitcher J was thus, in effect, an impermissible conflation of an alleged contempt claim and an implied unfair labour practice claim (i.e. relating to an alleged failure to promote him). The Labour Court (Whitcher J) could only have been properly seized of the former and not the latter.

[77] In terms of section 186(2)(a) of the LRA "an unfair labour practice" includes "any unfair act or omission that arises between an employer and an employee involving...unfair conduct by the employer relating to the promotion... or relating to the provision of benefits to an employee."

[78] Myers referred an unfair labour practice dispute to the bargaining council relating to his (alleged) promotion. His case in that forum was basically the following: that he was reinstated by the National Commissioner in the restructured post (that had already been implemented) on 5 May 2015; that it was not advertised; that he was retained in the upgraded post in terms of Regulation 30(8) of the SAPS Employment Regulations, because he continued to serve in their position for a period of three years after his reinstatement; that, notwithstanding, the SAPS refused to "*absorb*" him into the upgraded position as envisaged in Regulation 30(9) of the Employment Regulations and even though, the National and Provincial Commissioners had agreed to appoint him to the post.

[79] Myers further alleged that he was performing the functions and responsibilities of the command of the largest dog unit in the country, but was not being paid a salary (i.e. at level 12) or promoted to the rank (i.e. of Col) required by the position;

³¹See this court's judgment in *National Commissioner of SA Police and Another v Myers* (2018) 39 ILJ 1965 (LAC) paras 51-61.

³² 2009 (1) SA 390 (CC) at para 36.

that he wished to be promoted to that level and rank, and to be paid the difference in what he earned at level 10 as a salary and what he would be paid at level 12, retrospectively from 1 June 2009 (which he seems to have alleged to have been the date from which he would have occupied the upgraded post, but for his dismissal).

[80] It was incumbent on Myers to show that there was an unfair act or omission on the part of the SAPS relating to his promotion, or relating to the provision of benefits to him. Regarding his promotion during the period of his absence due to his unfair dismissal, that was really a matter of speculation that was ultimately tied to his reinstatement, and that had already been authoritatively decided upon by the SCA, the Labour Court and this court. In any event, the thrust of Myers case in the bargaining council related to the period after his reinstatement and was in particular based on the fact that he was retained in that post for years after his reinstatement.

[81] The arbitrator seems to have (unreasonably, or wrongly) conflated the two periods. This is also apparent from the relief awarded. The relevance of evidence regarding implementation of the upgraded post only related to Myers' case after his reinstatement. Neither Myers, nor the bargaining council, could review the reinstatement issue. They were bound by the decisions of the courts in that regard.

[82] As regards the second period, i.e. following Myers' reinstatement – the issue essentially was whether there was any unfairness in the form of an act or omission on the part of the SAPS relating to his promotion, or benefits. Myers clearly could not show a contractual entitlement to a promotion (as found by this court in the second contempt matter). Whether he had such an entitlement by virtue of the fact that he was actually operating in a position that had been upgraded since his dismissal and in respect of which there were added duties and responsibilities, was an issue that had to be decided by the bargaining council.

[83] The arbitrator concluded that the post Myers had been placed into had added responsibilities, his and retention in that post, without promoting him, was unfair; that the SAPS had *“failed to apply its mind to the promotion”* of Myers and had *“not advanced any cogent reasons for its failure to promote”* Myers to *“the salary level of*

the restructured post that the currently occupies” and that in the light of all of those facts the SAPS had committed an unfair labour practice.

[84] Regulation 30 of the SAPS Employment Regulations deals with the grading of posts and the determination of salaries. In terms of regulation 30(7) the National Commissioner may increase the salary of a post to a higher salary level in order to accord with job weight – (a) if the job evaluation system indicated that the post was graded incorrectly; and (b) there are sufficient funds available.

[85] In terms of Regulation 30(8) if the National Commissioner increases the salary of a post as provided under sub-regulation (7) then he must, either transfer the incumbent employee to a post that accords with that employee’s salary level and advertise the vacant post at the higher salary level, or elect to retain the incumbent employee in the upgraded post without advertising it, if (a) the incumbent already performs the duties of the post; (b) the incumbent has received a satisfactory rating in his or her most recent performance assessment; and (c) it will be in the interest of the Service.

[86] Regulation 30(9) further provides that if the National Commissioner continues to employ the incumbent in the higher graded post without advertising it – (a) the absorption of the incumbent in the higher graded post, as provided for in sub-regulation (8) – must take effect on the first day of the month following the month during which the National Commissioner approved that absorption; and (b) the salary of the employee must be adjusted to the minimum notch of the higher salary level with effect from the date referred to in subparagraph (a).

[87] It is apparent from the award that Myers relied principally on these regulations and that the arbitrator found that they applied to him, even though the National Commissioner *“has not formally in writing exercised his discretion on whether or not to retain”* Myers in the restructured post. The fact that Myers had remained in that (restructured) post for more than three years after his reinstatement, according to the arbitrator, appeared to indicate that the National Commissioner did indeed decide to retain him in that position *“since no evidence to the contrary has been adduced”*. The

arbitrator thus seems to have required of the SAPS to show the opposite, i.e. that the National Commissioner did not decide to retain Myers in the restructured post.

[88] The arbitrator further concluded that Myers did not just remain in the restructured post and that the National Commissioner “*would surely have exercised a discretion not to retain*” him in that post after his reinstatement. And found that “*the only reasonable inference that can be drawn in the circumstances is that [Myers] is retained in the restructured post.*”

[89] The arbitrator thus effectively found that the National Commissioner had tacitly exercised his discretion to retain Myers in the upgraded post, because he never moved him from the post for what could be regarded as a substantial period of time. Myers had been reinstated in May 2015 and had been effectively retained in what was an upgraded post since then. By the time the promotion dispute was referred to the bargaining Council, i.e. in May 2018, more than three years had elapsed.

[90] In light of the facts the arbitrator could reasonably have come to such a conclusion. In the period since his reinstatement Myers received favourable performance assessments and therefore one could legitimately assume a deliberate intention to retain him in the position. It is undisputed that the responsibilities of the post he occupied since his reinstatement had increased due to the restructuring and the amalgamation of dog units, Myers was therefore not operating on the same level that he was operating at before or at the time of his dismissal, but on a higher level without being paid and promoted commensurate with such higher level. If the provisions of the regulations were properly applied Myers ought to have been absorbed in the higher post, whatever his rank and level at the time of his reinstatement.

[91] Having declared that the SAPS had committed an unfair labour practice in failing to promote Myers, the arbitrator, *inter alia*, held that Myers was promoted to salary level 12 and to the rank of Colonel in terms of Regulation 30 (9) of Employment Regulations, retrospectively from the date the post was found by the arbitrator to have been implemented, namely, 1 June 2009; ordered the SAPS to pay

Myers the difference in salary from 1 June 2009; declared that the *“loss of income since 1 June 2009 shall include notch advances in the salary range of salary level 12 since 1 June 2009”*; ordered the SAPS to adjust Myers’ pension accordingly and to comply with the award *“by no later than 1 February 2019”*.

[92] The arbitrator did not determine exactly when the National Commissioner had tacitly exercised his discretion to retain Myers in the upgraded post. According to the respondents the exercise of the discretion could not have occurred before the date of referral of the promotion dispute to the bargaining council, namely, May 2018, which is also the date when this court gave judgment in the second contempt matter. The respondents go on to argue as if the arbitrator found that the unfair labour practice had only been committed after the three-year period since Myers had been reinstated, and submit, in effect, that the award if upheld should only take effect from the date it was made namely 11 December 2018, and that it could not have been made retrospectively at all.

[93] The premise the respondents argue from, namely, that the unfair labour practice was only found to have been committed after the three years Myers had been in the post since his reinstatement, is clearly wrong. That was not the finding of the arbitrator. The arbitrator in effect found that the unfair labour practice had occurred before that, or otherwise in the period since Myers had been retained in the post since his reinstatement.

[94] However, making the award effective from 1 June 2009 appears incongruent in particular if the award itself is based on SAPS regulation 30 (7), (8) and (9). The effective date could only be one subsequent to the date of Myers’ reinstatement on 6 May 2015. On the respondents’ version he had been reinstated to level 10 (and the rank of Lt. Col.), but the evidence indicates that Myers had been operating in an upgraded post, with added responsibilities and which was fundamentally different from the post he occupied at the time of his dismissal.

[95] A reasonable arbitrator, having found that Myers had been tacitly absorbed into the upgraded post, or ought to have been absorbed in that post, as contemplated in Regulation 30, would have concluded that such absorption could

only have taken place in line with the provisions of that regulation. In terms of Regulation 30(8) the “*absorption date*” is the first day of the month following the month during which the National Commissioner approved the absorption. Such approval could only take place after the National Commissioner elected to retain the incumbent in the upgraded post if the incumbent “*already performs the duties in the post*”, “*received a satisfactory rating of his most recent performance assessment*” in that post and “*it would be in the interests of the Service*”.

[96] Myers only performed the duties in the upgraded post on his own version, which was not or not effectively rebutted, after his reinstatement, i.e. from 6 May 2015. One assumes that he would have received a satisfactory assessment a year or so after that date. His uncontested version is that he received satisfactory assessments in that position. There is no indication that his performance in the upgraded position was not in the interest of the SAPS. All indications are that it in fact was. Taking into account all those facts a reasonable arbitrator would have concluded that a reasonable date for absorption would have been after the date Myers received a favourable performance assessment in that upgraded post. A date two years into the post would indeed be reasonable.

[97] Even though the arbitrator could not promote Myers she was indeed empowered to find that he had been tacitly absorbed into, or that he ought to have been absorbed into the upgraded position and to order the National Commissioner (Including the Provincial Commissioner and the SAPS) to do all that was administratively necessary to give effect to such absorption with effect from a particular date, including an order that Myers be paid a salary commensurate with the upgraded position from that date.

[99] It follows that even though the award would require some amendment it was essentially a reasonable award in the circumstances and the appeal should succeed.

Costs

[100] As regards the costs, while the general rule is that costs do not follow the result in labour matters, this is an exceptional case where, taking into account the

law and fairness, the cost should follow the result. The respondents' obfuscation of the fact of the implementation of the upgrade in effect made it necessary for Myers to refer an unfair labour practice (promotion) dispute to the bargaining council; and the very fact of the implementation was not only at the heart of the promotion dispute, but was the basis on which the court a quo found in favour of the respondents, and which, in turn gave rise to this appeal.

[101] In the result, the following is ordered:

Order

100.1 The appeal is upheld with costs;

100.2 The order of the court a quo is set aside and is substituted with the following order:

"1. The review application is dismissed and the award of the arbitrator is amended to read as follows: (a) It is declared that the SAPS committed an unfair labour practice relating to the promotion of Myers; (b) Myers is to be absorbed into the upgraded position of Unit Commander of K9 Cape Town Dog Unit at salary level 12 and the rank of Colonel as contemplated in terms of Regulation 30(9) of the SAPS Employment Regulations, retrospectively and with effect from 1 May 2017; (c) The respondents are directed to do all that is administratively required to give effect to such absorption; (d) The SAPS is ordered to pay Myers the difference between what he was paid on level 10 and what he should have been paid on level 12, retrospectively from 1 May 2017; (e) The calculation of the payment contemplated in paragraph (d) should include all notch advances and other benefits on salary level 12 since 1 May 2017; (f) The SAPS is ordered to adjust Myers' pension fund accordingly; (g) There is no order as to costs."

100.2 The respondents and the SAPS are to comply with the award as amended by no later than 30 August 2022.

P. Coppin
Judge of the Labour Appeal Court

Savage and Tokota AJJA concur in the judgment of Coppin JA.

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