CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 13/24

In the matter between:

PABALLO MOTHULWE	Applicant
and	
LABOUR COURT, JOHANNESBURG	First Respondent
MARTIN SAMBO N.O.	Second Respondent
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	Third Respondent
DEPARTMENT OF PUBLIC WORKS, ROADS AND TRANSPORT, MPUMALANGA	Fourth Respondent
JUDICIAL SERVICE COMMITTEE OF SOUTH AFRICA	Fifth Respondent

Neutral citation:	*Mothulwe v Labour Court, Johannesburg and Others* [2025] ZACC 10
Coram:	Maya CJ, Madlanga ADCJ, Kollapen J, Majiedt J, Mhlantla J, Rogers J, Seegobin AJ, Theron J, Tolmay AJ and Tshiqi J
Judgment:	Kollapen J (unanimous)
Decided on:	8 May 2025
Summary:	Rescission — res judicata — section 34 of the Constitution — access to courts

ORDER

On application for leave to appeal from the Labour Court of South Africa:

1. This Court's order in CCT 80/22 dated 23 May 2023 is rescinded.
2. This Court's order in CCT 80/22 dated 19 July 2022 is rescinded.
3. Leave to appeal the decision of the Labour Court dated 4 October 2021 is granted.
4. The appeal is upheld on the basis set out below.
5. The applicant's cross-review application in respect of the finding of guilt and the condonation application for the late filing thereof are referred to the Labour Court for determination by another judge.
6. If the Labour Court grants the applicant condonation, upholds the cross-review and sets aside the arbitrator's finding of guilt, the Labour Court's order dated 4 October 2021 in the review application (in respect of sanction) shall fall away.
7. If the Labour Court refuses condonation or dismisses the cross-review, the Labour Court's order dated 4 October 2021 in the review application shall stand.
8. There is no order as to costs.

JUDGMENT

KOLLAPEN J (Maya CJ, Madlanga ADCJ, Majiedt J, Mhlantla J, Rogers J, Seegobin AJ, Theron J, Tolmay AJ and Tshiqi J concurring):

Introduction

[1] This is a rescission application brought by the applicant, Mr Paballo Mothulwe. His complaint is that despite bringing a cross-review application before the Labour Court challenging a finding that he was involved in corruption, the Labour Court failed to adjudicate the cross-review in the proceedings before it. That Court only adjudicated the main review application, brought by his employer, which was confined to the question of sanction.[1]

[2] Mr Mothulwe was previously employed by the fourth respondent, the Department of Public Works, Roads and Transport, Mpumalanga (Department). Mr Mothulwe represented himself in all proceedings until the Johannesburg Society of Advocates (JSA) appointed pro bono counsel, Ms V T Seboko, on his behalf at the request of the Chief Justice on 12 November 2024. The Court is indebted to her and the JSA for their assistance.

[3] The first respondent is cited as the Labour Court, Johannesburg. The second respondent is Mr Martin Sambo in his representative capacity as an arbitrator (Arbitrator) for the third respondent. The third respondent is the General Public Service Sectoral Bargaining Council (Bargaining Council). The fifth respondent is cited as the Judicial Service Committee of South Africa.

Background and litigation history

[4] Mr Mothulwe and Mr Percy Nkambule were employed as transport inspectors by the Department. Pursuant to an incident on 15 May 2013, they were charged with corruption for soliciting a bribe in exchange for not impounding a vehicle that belonged to an off-duty police officer and for failing to carry out a lawful order or routine instruction without just and reasonable cause because they were posted in Standerton

[1] This refers to the sanction following the finding of guilt for corruption.

but elected to go to Greylingstad.[2] Disciplinary proceedings against them were proceeded with after which they were found guilty and dismissed. They referred a dispute of unfair dismissal to the Bargaining Council. After an unsuccessful conciliation, the dispute was referred to arbitration.

[5] The arbitration was held on 20 January 2016 and 23 to 24 March 2016. The Arbitrator considered whether Messrs Mothulwe and Nkambule's dismissals were substantively and procedurally unfair. Regarding the first charge, the Arbitrator found that they had committed corruption. On the second charge, the Arbitrator found that the employees did not commit insubordination. In an award dated 11 August 2016, he held that the dismissals were procedurally fair but substantively unfair (award). He ordered their immediate reinstatement, with the sanction of dismissal replaced with that of final warning and made no order as to compensation or back-pay as he did not "find [the] applicants with clean hands".

[6] The Department then brought an application in the Labour Court in terms of section 145 of the Labour Relations Act[3] (LRA) for an order to review and set aside the award on the basis that the Arbitrator failed to apply his mind to the issue of sanction. Messrs Mothulwe and Nkambule brought a cross-review application challenging the Arbitrator's finding that they committed an act of corruption (finding) that they be

[2] This was under Article 7 of the Code of Good Practice for Dismissals which allows for the establishment of rules for misconduct. It is headed "Guidelines in cases of dismissal for misconduct" and provides:

> "Any person who is determining whether a *dismissal* for misconduct is unfair should consider—
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> (a) whether or not the *employee* contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
>
> (b) if a rule or standard was contravened, whether or not—
>
> (i) the rule was a valid or reasonable rule or standard;
>
> (ii) the *employee* was aware, or could reasonably be expected to have been aware, of the rule or standard;
>
> (iii) the rule or standard has been consistently applied by the employer; and
>
> (iv) *dismissal* with an appropriate sanction for the contravention of the rule or standard."

[3] 66 of 1995.

issued with a final written warning and that they should not be compensated or receive back-pay (sanction). They also brought a condonation application for the late filing of their cross-review. None of the parties challenged the Arbitrator's finding regarding the insubordination charge. In its reasoning, the Labour Court indicated that if it was to find the award reviewable there would be no need to consider the cross-review. Since it held that the arbitrator's award was reviewable, it did not consider the cross-review on its merits and made no order in respect thereof.

[7] The Labour Court's judgment of 4 October 2021 concluded that the Arbitrator committed a reviewable irregularity and set the award aside. It also did "not deem it wise to remit the dispute to [the Arbitrator] for arbitration *de novo* [(anew)]" and on the evidence before it, substituted the award with a finding that the dismissal of the employees was procedurally and substantively fair. I emphasise that it did not address the cross-review (which was about the finding of guilt). It also did not address nor decide on the condonation application for the late filing of the cross-review. Leave to appeal was refused and so was a petition for leave to appeal before the Labour Appeal Court.

[8] Mr Mothulwe then brought an application for leave to appeal in this Court. The grounds upon which he relied included a complaint that the Labour Court committed an irregularity in not considering his cross-review. He expanded upon this by pointing out that there were two reviews before the Labour Court, the one dealing with the finding of guilt (his cross-review) and the other with the sanction imposed (the main review), and that the Labour Court could not have only addressed the employer's challenge to the sanction imposed without first addressing his challenge to the finding of guilt. In addition, he argued that there was no evidence that implicated him in the alleged act of corruption that would have warranted a finding of guilt by the Arbitrator.

[9] The Department opposed the application for leave to appeal and on the issue of the alleged irregularity took the view that there was none. It argued that if the review

was successful, resulting in the setting aside of the award, which is what occurred, then once the award was set aside there was nothing left to consider in the cross-review.

[10] This Court refused the application for leave to appeal on 19 July 2022 on the basis that it did not enjoy reasonable prospects of success.

[11] An application for rescission against the refusal to grant him leave to this Court was then launched in which Mr Mothulwe persisted with his original complaint that the Labour Court had erred in not considering and adjudicating his cross-review. That application was refused on 23 May 2023 on the basis that no case had been made out for rescission.

In this Court

[12] Mr Mothulwe has now brought the current application as one seeking direct access in which he continues to place reliance on the arguments he had previously advanced in the application for leave to appeal as well as the application for rescission.

[13] Mr Mothulwe has represented himself until his final submissions before this Court. His arguments are couched in the language of a layperson, but they are sufficiently clear to indicate his grievance that the Labour Court failed to deal with his cross-review, a self-standing application which went beyond the main review application. He argues that if the Labour Court had considered his cross-review, it may well have come to a different conclusion on the merits of his dismissal, despite the setting aside of the award on the basis that it did. He contends that this matter falls "within the ambit of constitutional rights", with reference to sections 165(2), 33(1) and 34 of the Constitution, section 145(2) of the LRA and section 6(2) of the Promotion of Administrative Justice Act.[4]

[4] 3 of 2000.

[14] The respondents did not file notices of opposition or affidavits in response to the application but the Department filed written submissions in response to the directions mentioned below.

[15] On 7 August 2024, the Chief Justice directed that Mr Mothulwe file an electronic copy of the complete record before the Labour Court in the review and cross-review. The Chief Justice also directed the parties to file written submissions addressing the following issues:

(a) Did the Labour Court consider and adjudicate the cross-review on its merits and make an order in relation thereto?

(b) If not, is the applicant entitled to the adjudication of his cross-review?

(c) If so, what order should this Court make?

[16] In Mr Mothulwe's submissions in response to the directions, he again contends that the Labour Court failed to consider and adjudicate the cross-review on its merits and the principles of natural justice demand that it ought to be considered. He submits that, to ensure timely and effective justice, this Court ought to adjudicate the merits of the cross-review rather than remitting it to the Labour Court, given the long duration of the litigation to date.

[17] The Department filed submissions in response to the directions together with a condonation application for its late filing. It accepts that the Labour Court did not consider or adjudicate the cross-review application filed by the applicant, nor make an order in relation thereto. It says, however, that there was no need for the Labour Court to consider the cross-review as it upheld the review and set aside the award. The argument continues that once the Labour Court had set aside the award there was nothing further to review, including the cross-review.

[18] Mr Mothulwe did not file an electronic copy of the record as he said that a lack of financial means prevented him from doing so. As a result, this Court made enquiries from the Labour Court and that Court kindly provided a hard copy of the record.

[19] On 12 November 2024, the Chief Justice issued further directions to the parties directing them to address the following issues:

(a) Do exceptional circumstances exist which warrant a rescission of this Court's previous orders, in the interests of justice, with reference to *Zuma*?[5]

(b) If so, should this matter be remitted to the Labour Court, Johannesburg for determination?

[20] Mr Mothulwe, now represented by pro bono counsel, made the following submissions:

(a) In *Zuma*, this Court established that it has the power to interfere with its earlier orders (a) when the earlier order is inconsistent with the Constitution; (b) to correct an injustice; and (c) when the requirements for rescission in terms of rule 42 of the Uniform Rules of Court, read with rule 29 of the Constitutional Court Rules, have been met.

(b) Jafta J in *Zuma*, writing a minority judgment, clarified that section 172(1) of the Constitution dispenses with the requirement of exceptional circumstances in the interest of justice if the impugned order is inconsistent with the Constitution. The majority did not dispute this interpretation.

(c) The Labour Court failed to consider Mr Mothulwe's cross-review application, constituting a "dispute that can be resolved by the application of law" as per section 34 of the Constitution, thus violating section 34. The Labour Court's failure to adjudicate the cross-review application renders its order inconsistent with the Constitution. Section 172(1) of the Constitution mandates this Court to set aside any order inconsistent with the Constitution. In the absence of a section 36 analysis, this Court is

[5] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC).

obligated by section 172(1) to set aside its order, even without exceptional circumstances in the interests of justice.

(d) Jafta J in *Zuma*, relying on *Molaudzi*[6] and concurred with by the majority on this point, held that this Court's jurisprudence affirms that the rescission of orders may occur if they result in injustice, even if the requirements for rescission in terms of rule 42 are not met, through the exercise of the Court's inherent power. Khampepe J in *Zuma*, relying on *Ka Mtuze*,[7] held that the interests of justice require that this Court only exercises its inherent power to correct an injustice in exceptional circumstances.

(e) Exceptional circumstances have been found to be linked to the probability of grave individual injustice or where the administration of justice might be brought into disrepute if no reconsideration occurs.[8] In *Molaudzi*, the exceptional circumstances threshold was met partly because the applicant was "an unrepresented, vulnerable party".[9]

(f) Mr Mothulwe's circumstances mirror those of Mr Molaudzi as relevant to the establishment of exceptional circumstances for purposes of rescission to prevent injustice. The Labour Court committed an irregularity by failing to consider his cross-review application on the merits. In *Morudi*,[10] this Court held such an irregularity rendered the Court's order rescindable.[11] Without legal representation, he did not know this and was unable to pursue appropriate legal action, which left him without recourse. To allow him to continue to suffer this injustice due to his lack of legal representation would be contrary to *Molaudzi* as read with *Zuma*.

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[6] *Molaudzi v S* [2015] ZACC 20; 2015 (2) SACR 341 (CC); 2015 (8) BCLR 904 (CC).

[7] *Ka Mtuze v Bytes Technology Group South Africa (Pty) Ltd* [2013] ZACC 31; 2013 (12) BCLR 1358 (CC).

[8] *S v Liesching* [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (4) SA 219 (CC) at para 138.

[9] *Molaudzi* above n 6 at para 38.

[10] *Morudi v NC Housing Services and Development Co Limited* [2018] ZACC 32; 2019 (2) BCLR 261 (CC).

[11] Id at paras 27 and 33.

(g) Two distinct requirements must be satisfied for this Court to rescind its previous order in terms of rule 42 and rule 29: error and absence. The Labour Court's failure to consider the merits of the cross-review application constitutes an irregularity of the nature in *Morudi*, where this Court held that a procedural irregularity in the High Court which was found to prevent parties from being heard satisfied the "error" requirement in terms of rule 42(1)(a).[12] Had this Court previously been presented with this defence, it could have come to a different conclusion.[13] In *Zuma*, this Court held that the absence requirement relates to whether a party was deprived of a genuine opportunity to participate due to procedural irregularities. The Labour Court deprived Mr Mothulwe of a meaningful opportunity to be heard, establishing effective absence within *Zuma*'s framework. Thus the error and absence requirements are met for rescission in terms of rule 42 read with rule 29.

(h) This Court is reluctant to engage in matters requiring factual analysis, preferring to remit such cases to lower courts which are better equipped to resolve such disputes. This Court's primary function is not to resolve factual disputes as a court of first instance.[14] This Court cannot rectify the Labour Court's failure to consider the cross-review application without engaging with the facts not currently on record, which it is not equipped to do. Remitting the matter will ensure procedural fairness, a proper finding of facts, and will thus serve the interests of justice because it allows confidence in the judicial process to be restored. It would also allow the Labour Court to leverage its specialised expertise, fostering a more informed and just outcome.

[12] Id at para 33.

[13] *Zuma* above n 5 at para 64.

[14] *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) and *S v Boesak* [2000] ZACC 25; 2001 (1) BCLR 36 (CC); 2001 (1) SA 912 (CC).

[21] In response to this Court's directions, the Department made the following submissions. On whether exceptional circumstances exist, the Department submits that it cannot be denied that the Labour Court did not consider or adjudicate the cross-review, although it did consider and adjudicate the main review.

[22] The Department maintains its view that the Labour Court was correct in dealing with the review application as it stood, which in turn would inevitably dispose of the cross-review. This is because, it argues, both reviews arose from the same award, and the issues arising therefrom were interrelated. Thus, it was logical for the Labour Court to find that it would only consider the cross-review if there was no merit in the main review. But if the Labour Court held that the award was reviewable, then the entire award would be set aside, and thus there was no need to consider the cross-review. It argues that on this approach, there would have been no purpose in dealing with the cross-review, and that dealing with the cross-review despite setting aside the entire award would have been superfluous.

[23] The Department continues by stating that while it maintains its initial position, *Zuma* makes it apparent that the matter should be considered beyond this. It accepts that Mr Mothulwe was unrepresented at the time the applications for leave to appeal and rescission were made in this Court and thus may not have presented a legally sound case. It further accepts that Mr Mothulwe may not have been aware of his constitutional rights, thus placing him in a similar position to the applicant in *Molaudzi*. In support of Mr Mothulwe's case, the Department submits that this Court may come to a different conclusion on the cross-review and representation issue, and that an injustice may arise without this Court's intervention.

[24] On this point, the Department finally submits that one could accept that since the Labour Court was presented with both a review and a cross-review, it would have been prudent for the Labour Court to consider and pronounce specifically on the cross-review. It submits that an injustice may be visited upon the applicant and the administration of justice might be brought into disrepute if this Court does not

reconsider its two previous orders. It states that there may well be exceptional circumstances for this Court to reconsider its earlier orders in the interests of justice.

[25] On whether the matter should be remitted to the Labour Court, the Department submits that if this Court finds that exceptional circumstances exist for it to reconsider its previous orders, then this Court should remit the matter to the Labour Court, and to Mahosi J (who delivered the judgment which is now before us). It contends that both the main review and cross-review were argued fully before Mahosi J and the cross-review can thus be considered and adjudicated based on the record. It agrees with Mr Mothulwe that it would not be appropriate for this Court to deal with the cross-review.

[26] This Court has decided to finalise the matter without a hearing.

Analysis

Jurisdiction

[27] This matter relates to the application of the LRA, legislation enacted to give effect to section 23 of the Constitution. In light of this Court's decision in *NEHAWU*,[15] such a matter raises a constitutional issue. This matter also relates to the applicant's section 34 right to have any dispute that can be resolved by the application of law decided in a fair public hearing. The alleged failure by the Labour Court to adjudicate the cross-review application would implicate Mr Mothulwe's section 34 rights. This, too, is a constitutional issue. Finally, the present application raises the question whether this Court's previous orders should stand, and that is a matter that only this Court can address. For these reasons, this Court has jurisdiction to entertain this matter.

[28] In his notice of motion, Mr Mothulwe seeks "direct access to this Honourable Court". Although styled as a direct access case, I am of the view that this application

[15] *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town* [2002] ZACC 27; 2003 (2) BCLR 154 (CC); 2003 (3) SA 1 (CC).

is in substance an application to rescind the previous orders of this Court (the orders made in the application for leave to appeal and the first rescission application which followed). Given that the Court has already issued orders in this regard, we are presented with the issue of *res judicata* (the matter has already been decided), a question to which I will return.

[29] Due to Mr Mothulwe's unsuccessful application for leave to appeal and the first rescission application in this Court, an application of this unique nature was the only mechanism left available to him.

[30] This matter involves important section 34 rights and centres on the consequence that must follow when a court fails to adjudicate a justiciable dispute that is brought before it. The narrow issue involved is purely a legal one that has merit and was not previously given the proper consideration it required by the Labour Court, the Labour Appeal Court or this Court. As will become clear, this judgment will not be the final determination of the matter as a whole, and the possibility of appeal will be retained. Given the unusual circumstances of this matter and its litigation history, it is in the interests of justice that this Court re-examine this matter.

Condonation

[31] The Department filed its written submissions eight days late. It submits that the delay is not excessive and its explanation for the delay is reasonable. The Department's counsel was out of the country when the directions were issued until the due date of the submissions, after which she was participating in a trial and had other practice obligations. She proceeded to draft the submissions as soon as she had the opportunity to do so. Because the Department's counsel had been seized with the matter since inception and the State Attorney's procurement process in the appointment of counsel is lengthy, it contends that briefing alternative counsel would not have hastened their submissions. It further submits that the Department's prospects of success are good, it is in the interests of justice for this Court to consider its submissions and no prejudice would be suffered by Mr Mothulwe if condonation is granted. There has been no

opposition to the condonation application. I am of the view that it is in the interests of justice to grant the Department condonation for the late filing of its written submissions for the reasons it sets out. Condonation is granted.

Res judicata

[32] Applying for the third time to this Court, Mr Mothulwe contends that this Court was incorrect in refusing leave to appeal, and in refusing rescission of the decision to refuse leave to appeal. The challenge Mr Mothulwe is faced with is the existence of two orders of this Court which held against him: first, the order refusing his application for leave to appeal (first order); and second, the order refusing his application to rescind the first order (second order). Since Mr Mothulwe's current application is in essence precisely the same as that resulting in the first and second orders, this application runs into the principle of *res judicata*.

[33] This Court in *Molaudzi* dealt extensively with the principle and its import, albeit in the context of a criminal matter. The exception to the principle, that the rule ought not be applied with absolute rigidity, was also fully canvassed. The starting point is section 173 of the Constitution, which states:

> "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[34] The lodestar is the interests of justice.[16] And given that *res judicata* is a common law principle, this Court can develop and relax it if doing so will be in the interests of justice. Whether relaxing the rule will be in the interests of justice must be determined on a case-by-case basis.[17] While the question whether this Court could reconsider its own orders was left open, this Court explored the possibilities of such a relaxation of

[16] *Mukkadam v Pioneer Foods (Pty) Ltd* [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) at paras 32-4.

[17] See, for example, *Children's Resource Centre Trust v Pioneer Foods (Pty) Ltd* [2012] ZASCA 182; 2013 (2) SA 213 (SCA) at para 15.

res judicata in *Ka Mtuze*.[18] This Court in *Molaudzi*, relying on what was said in *Ka Mtuze*, said this:

> "The incremental and conservative ways that exceptions have been developed to the *res judicata* doctrine speak to the dangers of eroding it. The rule of law and legal certainty will be compromised if the finality of a court order is in doubt and can be revisited in a substantive way. The administration of justice will also be adversely affected if parties are free to continuously approach courts on multiple occasions in the same matter. However, legitimacy and confidence in a legal system demand that an effective remedy be provided in situations where the interests of justice cry out for one. There can be no legitimacy in a legal system where final judgments, which would result in substantial hardship or injustice, are allowed to stand merely for the sake of rigidly adhering to the principle of *res judicata*."[19]

[35] This Court can thus only consider whether to rescind the second order if it is in the interests of justice to reconsider Mr Mothulwe's rescission application. It would be so if the circumstances are wholly exceptional to justify a departure from the *res judicata* doctrine.[20] And "[t]he interests of justice are the general standard, but the vital question is whether there are truly exceptional circumstances".[21] Such would include, as was the case in *Molaudzi*, where a failure to reconsider the matter would result in a failure to give effect to a constitutional right and would result in a grave injustice,[22] or if there was an irregularity in the proceedings which resulted directly in the infringement of a constitutional right.[23]

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[18] This Court in *Ka Mtuze* above n 7 at para 19 held:

> "If the position were to be that this Court does have power outside of rule 29 read with rule 42 to reconsider and, in an appropriate case, change a final decision that it had already made, one can only think that that would be in a case where it would be in accordance with the interests of justice to re-open a matter in that way. The interests of justice would require that that be done in very exceptional circumstances."

[19] *Molaudzi* above n 6 at para 37.

[20] Id at para 38.

[21] Id.

[22] Id at para 42.

[23] *Morudi* above n 10 at para 27 and *Van der Walt v Metcash Trading Ltd* [2002] ZACC 4; 2002 (4) SA 317 (CC); 2002 (5) BCLR 454 (CC) (*Metcash*) at para 14.

[36] Mr Mothulwe brought a cross-review in the Labour Court to challenge the Arbitrator's finding of guilt. The Labour Court did not consider the cross-review after it had adjudicated the review. Its reason for doing so was that in the event of it upholding the review there would be no need to consider the cross-review. This approach is fatally flawed. A court cannot simply refuse to consider a challenge directed at guilt if it finds reason to interfere with a challenge directed at sanction. Since the sanction must follow from the finding of guilt, and since the finding itself was challenged, the only appropriate approach was to consider the challenge to the finding of guilt first. The outcome of the challenge to the finding of guilt would then inform the challenge on sanction.

[37] The Labour Court reviewed the award, and then replaced it with its own decision which spoke to both the finding of guilt and sanction. The Labour Court's order, which implicitly upheld the finding of guilt, did so in respect of an issue it did not adjudicate (or, it refused to adjudicate that issue as a consequence of its approach). Its approach, together with its order, was highly irregular. An error like this is truly exceptional in that the flawed reasoning of that Court had the result of precluding it from adjudicating a justiciable dispute that was properly before it and one which it was obliged to adjudicate. This Court in *Metcash* held that the right of access to court would be implicated if there is an irregularity in the manner a case was dealt with.[24] This case falls squarely into that category.

[38] Mr Mothulwe's cross-review simply did not enjoy the attention of the Labour Court on account of this approach, which I find was grossly irregular, unfair and contrary to the principles of natural justice. That position continues to be a denial of his right of access to court. A manifest injustice would be left unattended if this oversight is not corrected. A finding of guilt on a serious charge of corruption would remain in place permanently with all the attendant negative consequences that go with it. This, under circumstances where a proper challenge was brought against that finding

[24] *Metcash* id at para 14.

and simply not considered on its merits. It is highly unusual for the Labour Court to simply refuse to consider the merits of a cross-review based on a finding of misconduct properly brought before it, not for any lawful or logical reason. This is a truly exceptional circumstance that warrants proper consideration of Mr Mothulwe's complaint.

Rescission

[39] A rescission would ordinarily occur within the bounds of rule 42 of the Uniform Rules read with rule 29 of this Court's Rules. Rule 42(1) provides for a rescission under the following circumstances:

(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission; or

(c) an order or judgment granted as the result of a mistake common to the parties.

[40] Rules 42(1)(b) and (c) are clearly not applicable to the facts of this case. Only rule 42(1)(a) appears to have the potential to be applicable. However, any reliance on rule 42(1)(a) runs into the difficulty that what is contemplated is an order granted in the absence of any party. In this case, that jurisdictional requirement would not be met. As these matters have been decided on the papers, Mr Mothulwe's absence in the proceedings remains an unmet requirement. In fact, he was the applicant in both matters in this Court and it cannot be said that those orders were granted in his absence. The effect of this is that rule 42(1)(a) cannot be relied on to rescind the first order.

[41] Traditional common law rescission grounds are also not open for us to explore. Rescission in terms of the common law requires an applicant to prove that there is "sufficient" or "good cause" to warrant rescission. As per *Fick*:[25]

> "[T]he requirements for rescission of a default judgment are twofold. First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind."[26]

Mr Mothulwe is not in default, so the traditional common law rescission requirements are thus not met.

[42] Finally, there is the possibility of a rescission based on the interests of justice, which is informed by the jurisprudence on *res judicata*. In *Ka Mtuze*, this Court categorically stated that if this Court had the power, outside of rule 29 read with rule 42, to reconsider or change a decision that it had already made, then that would only be where the interests of justice demand the re-opening of a case in that manner, and that the interests of justice would only require such re-opening to be done in "very exceptional circumstances".[27]

[43] This Court in *Molaudzi* developed this position further, stating that an effective remedy must be provided if the interests of justice cry out for one and that there "can be no legitimacy in a legal system where final judgments, which would result in substantial hardship or injustice, are allowed to stand merely for the sake of rigidly adhering to the principle of *res judicata*".[28] Echoing the proviso in *Ka Mtuze*, this Court

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[25] *Government of the Republic of Zimbabwe v Fick* [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC).

[26] Id at para 85.

[27] *Ka Mtuze* above n 7 at para 19.

[28] *Molaudzi* above n 6 at para 37.

held that the circumstances must be "wholly exceptional".[29] I read this as confirmation that this Court is entitled to intervene and set aside its own decision if the result of that order leads to "substantial hardship" or injustice and if the circumstances are "truly exceptional". It was on this basis that this Court in *Molaudzi* "relaxed" the principle of *res judicata*, and re-opened the matter, to come to the aid of an unrepresented litigant who would have suffered a "grave injustice".

[44] In *Zuma*, this Court considered whether the interests of justice required this Court to "expand the grounds of rescission" to allow for a rescission in the interests of justice that fall outside the scope of rule 42.[30] Relying on *Ka Mtuze* and *Molaudzi*, this Court held that it might be open to reconsider Mr Zuma's contempt order if it would be in the interests of justice to do so. It then considered what would constitute exceptional circumstances justifying an intervention in the contempt order in the interests of justice, to determine whether Mr Zuma's case met this high threshold. Exceptional circumstances entail considering the probability of grave individual injustice and the possibility that the administration of justice might be brought into disrepute. This Court concluded that it would not be in the interests of justice for this Court to expand the definition of "error" to provide for any allegation of unconstitutionality because the development of the grounds of rescission would have profoundly detrimental effects on legal certainty and the rule of law.[31] It went on to say "[w]e must ponder the possible outcomes of doing so carefully, for if we do not, this Court might soon find itself inundated with similarly unmeritorious applications, all raising any number of allegations of unconstitutionality".[32]

[45] While *Zuma* closed the door to granting rescission to Mr Zuma because it was not in the interests of justice to do so in that case, it is still possible that the Court could

[29] Id at para 38.

[30] *Zuma* above n 5 at paras 86-96.

[31] Id at para 99.

[32] Id.

do so in another case after careful pondering of the consequences, as this Court did in *Molaudzi*.

[46] This is consistent with what this Court said recently in *R v R*.[33] Citing *Zuma*, this Court stated that "a court should only allow a rescission . . . of an order in exceptional circumstances".[34] This principle only applies to orders falling outside of rule 42 because "a court does not have a discretion to set aside an order in terms of rule 42 where one of the jurisdictional facts contained in rule 42(1)(a)-(c) [does] not exist".[35] *R v R* confirms that, for cases falling outside the scope of rule 42, this Court is entitled to intervene in its own previous order in the same case if it is in the interests of justice and in truly exceptional circumstances.

[47] Herein lies the relationship between *res judicata* and rescission in cases falling outside rule 42(1), since rescission is about a court undoing its own previous (final) order, and *res judicata* is about a court not intervening in its own previous orders, with the exception being that a court can do so in the interests of justice and in truly exceptional circumstances. Simply put, the principle of *res judicata* and the exceptions thereto enable a Court to properly moderate its power to rescind its orders outside of the power granted to it by rule 42(1).

[48] The question then is whether Mr Mothulwe's application meets the interests of justice and truly exceptional circumstances tests in respect of both orders of this Court. Is the flawed manner in which the Labour Court dealt with his cross-review truly exceptional? Yes. I have explained above why this is so.

[49] Does the flawed disposition of his cross-review "cry-out"[36] for an effective remedy, in the interests of justice? The effect of the Labour Court's judgment and the

[33] *R v R* [2023] ZACC 5; 2023 (9) BCLR 1126 (CC).

[34] Id at para 51.

[35] Id.

[36] *Molaudzi* above n 6 at para 37.

setting aside of the award is that Mr Mothulwe's finding of guilt for corruption has been upheld. This finding, particularly given Mr Mothulwe's previous employment as a transport inspector, is a serious charge that has no doubt affected his employment prospects, both in the public and private sectors. He remains unemployed to this day. Due to his consequent indigence, Mr Mothulwe has not had legal representation until the very final stages of these proceedings and has been limited to his layman's submissions. Apart from this Court reconsidering the appeal, there is no effective alternative remedy for Mr Mothulwe.

[50] If this Court could not entertain this application, he would be denied his right of access to courts due to the Labour Court's oversight in not adjudicating his cross-review and due, it must be frankly acknowledged, to this Court's failure, when making the first and second orders, to discern the true justice of his case, a failure that might have been attributable to the fact that his papers were drafted without the benefit of legal representation.

[51] A serious injustice will result from denying Mr Mothulwe the opportunity to have the merits of his cross-review considered by a court. A manifest injustice would arise if a court were allowed to summarily dismiss a cross-review on the flawed reasoning that it did not need the attention of the court. Allowing this Court's previous orders to stand would result in a situation where a claim properly brought would simply not be adjudicated for reasons that are indefensible. This would be inimical to the right of access to court, which guarantees the right to have a justiciable dispute resolved by the application of law in a fair public hearing before a court.[37] And as this Court said in *Chief Lesapo,*[38] "very powerful considerations would be required for its limitation to be reasonable and justifiable".[39]

[37] *Le Roux v Johannes G Coetzee and Seuns* [2023] ZACC 46; 2024 (4) SA 1 (CC); 2024 (4) BCLR 522 (CC) at para 29.

[38] *Chief Lesapo v North West Agricultural Bank* [1999] ZACC 16; 1999 (12) BCLR 1420 (CC); 2000 (1) SA 409 (CC).

[39] Id at para 22.

[52] Allowing the situation to remain unaddressed would also imperil the administration of justice in that it would effectively leave a litigant who has a justiciable dispute in perpetual limbo. The interests of justice require Mr Mothulwe's cross-review to be considered. This Court must under such circumstances be open to considering his application for leave to appeal without it being hamstrung by the principle of *res judicata*.

Merits

[53] In *Afrocentrics*[40] this Court held:

> "A court must effectively dispose of the dispute that has come before it, and in doing so, it must act in accordance with its powers relative to the matter at hand. This is after all what provides the certainty and finality that parties seek when they bring a dispute to a court.
>
> The right of access to courts found in section 34 of the Constitution is a right to have a justiciable dispute *decided* by a court. A judgment gives insight into the reasoning of the Court, how it dealt with the different and often competing submissions before it, and why it came to a particular conclusion. However, it is ultimately the order of the court that brings finality to the proceedings and says to the parties what is required of them or declares what their rights are."[41]

[54] The Department accepts that had Mr Mothulwe been properly represented, this Court may have come to a different conclusion, specifically on the prospects of success in the condonation application and in granting leave to appeal. However, the Department maintains the position, without concession, and "in fairness and open to acceptable interpretations", it accepts that the Labour Court could have been more specific in dealing with the cross-review. The Department maintains that in dealing with the matter in the manner that it did, the Labour Court did so in a logical manner. It submits that the Labour Court therefore deemed it prudent to deal with the matter

[40] *Afrocentrics Projects and Services (Pty) Ltd t/a Innovative Distribution v State Information Technology Agency (SITA) SOC Ltd* [2023] ZACC 2; 2023 (4) BCLR 361 (CC).

[41] Id at paras 28-9.

holistically, which was a logical approach, for the reason that had it found that there was no merit to the review application. Simply put, the Department argues that having upheld the review, the Labour Court set the award aside with the result that there was nothing left to cross-review.

[55] In addressing this line of reasoning, which is formalistic in the extreme, it is necessary to recall that there was a review and a cross-review before the Labour Court. The review dealt with the sanction (in other words, it assumed guilt but challenged the mildness of the sanction), while the cross-review challenged the finding of guilt. By dealing with the review on sanction first, and disposing of the matter on this basis, the finding of guilt was left in place. This is a problem since it was that same finding of guilt that was being challenged in the same proceedings.

[56] In contrast, if the cross-review was successful and the finding of guilt was set aside, there would be no need to deal with the sanction which was the subject of the review. In a criminal appeal against conviction and sentence, a court would ordinarily decide the appeal against conviction first, and if the appeal on conviction is successful and the conviction is set aside, there would be no need to deal with the appeal against sentence. It would, however, not be acceptable for an appeal court to deal with the appeal against sentence, and then having done so, not address the appeal against conviction. This is the effect of the approach of the Labour Court in its failure to address the cross-review. Mr Mothulwe was entitled to have his challenge against the finding of guilt adjudicated, which was embodied in the cross-review. This simply did not happen.

[57] The argument that there was nothing left to review after the Labour Court had set aside the award places form rigidly and unacceptably over substance. In setting aside the award, the Labour Court did not, by doing so, adjudicate the cross-review. The setting aside of the award was in substance a setting aside of the sanction and its replacement with a different sanction. It did not set aside the finding of guilt, even though in form it may be argued that it did. At best and even if it could be said that it

did, it simply proceeded to reinstate the finding of guilt without addressing the challenge to that very same finding. There is no other logical explanation for its actions and it cannot be open to the Department to argue that the Labour Court could not address the cross-review once it had set aside the award.

[58] The Court addressed in some detail the question of sanction, but there is nothing in its judgment that suggests that it applied its mind to the question of guilt, which it accepts was the subject matter of the cross-review. It was in law required and obliged to adjudicate the cross-review and to provide reasons for either upholding or rejecting it. This Court has held that "[a] judgment gives insight into the reasoning of the court, how it dealt with the different and often competing submissions before it, and why it came to a particular conclusion".[42] The Labour Court's failure to provide reasons for its disregard of the cross-review must mean that Mr Mothulwe's right, in terms of section 34 to have his justiciable dispute resolved, remains unfulfilled and must be addressed.

[59] What remains is whether this Court should consider the cross-review or refer the matter to the Labour Court for adjudication. Mr Mothulwe initially urged us to

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[42] Id at para 29. In *S v Molawa; S v Mpengesi* 2011 (1) SACR 350 (GSJ) (*Molawa*) at para 17, although in the context of criminal proceedings, the Court explained succinctly:

> "[I]f a trial court does not furnish reasons for its findings in the form of a reasoned judgment, the reviewing judge would be disadvantaged in applying the test as to whether the proceedings were in accordance with justice. The reviewing judge would be compelled to call for such reasons."

Molawa at para 18 goes on to quote the following from Corbett CJ, "Writing a Judgment: Address at the First Orientation Course for New Judges" (1998) 115 *SALJ* 116 at 117:

> "As a general rule, a court which delivers a final judgment is obliged to give reasons for its decision. This applies to both civil and criminal cases. In civil matters this is not a statutory rule but one of practice. In *Botes and Another v Nedbank Ltd* the Appellate Division held that where a matter is opposed and the issues have been argued, litigants are entitled to be informed of the reasons for the judge's decision. The court pointed out that a reasoned judgment may well discourage an appeal by the loser; and the failure to state reasons may have the opposite effect, that is, encourage an ill-founded appeal. In addition, should the matter be taken on appeal, the court of appeal has a similar interest in knowing why the judge who heard the matter made the order which he did. But there are broader considerations as well, in my view, it is in the interests of open and proper administration of justice that the courts state publicly the reasons for their decisions. Whether or not members of the general public are interested in a particular case – and quite often they are – a statement of reasons gives some assurance that the court gave due consideration to the matter and did not act arbitrarily. This is important in the maintenance of public confidence in the administration of justice."

adjudicate the cross-review, given the amount of time that has elapsed in the ongoing litigation in this matter. But it was later argued on his behalf that a remittal to the Labour Court would be appropriate for an adjudication of his cross-review. I am not persuaded that this Court should adjudicate the cross-review. It is not ordinarily in the interests of justice for this Court to be a court of first and last instance. It has not heard argument on the merits of the finding of corruption, even though Mr Mothulwe has gone to some lengths to argue why the finding of guilt is not sustainable. We would effectively be addressing the merits at the first instance, which is undesirable. In all of this I make no comment as to the merits of Mr Mothulwe's cross-review application, save to say that in the light of the record that this Court obtained from the Labour Court, the cross-review cannot be said to be hopeless, and it deserves proper consideration.

[60] The Department requested that, if remitted, the cross-review be dealt with by the same judge (Mahosi J) who determined the main review and that the cross-review be dealt with on the basis of the record (so that the cross-review is not re-argued). Mahosi J, writing for the Labour Court, has already expressed a cursory view on the merits of the cross-review, despite not fully considering and adjudicating it. It is out of an abundance of caution that this Court holds that the cross-review should be considered and adjudicated upon by another judge. As the matter will be determined by another judge, it would be proper that full argument be advanced in respect of the cross-review so that the presiding judge has an opportunity to hear both parties fully and pronounce freely on the matter.

[61] This matter raises sharply the principle of finality and the inherent danger of ongoing and unending litigation when courts are enjoined to reconsider orders previously made by them. Of course that is a salutary principle but not one that must always be rigidly applied, particularly when to do so will result in a manifest injustice and tarnish the integrity of the administration of justice. There are those cases where exceptional circumstances exist and the interests of justice call for a remedy. When that happens a court then advances the principles and ideals of the Constitution. If not, those principles stand to be undermined largely in the interests of finality. This has never

been a feature of our constitutional order. Finally, and in response to concerns that courts will be inundated with requests to reconsider orders previously made by them, the simple answer must be that the high threshold of truly exceptional circumstances, coupled with the interests of justice, remains a valid moderating tool to manage such outcomes if they should occur. Litigants who abuse this safety net, which exists to remedy injustice in truly exceptional cases, should expect short shrift from this Court and should not be surprised when they are mulcted in punitive costs.

Costs

[62] The application was unopposed. However, the Department filed written submissions and did not seek costs for its preparation of those submissions. No order of costs is warranted.

Conclusion

[63] Mr Mothulwe's application for rescission must be granted. He must be granted leave to appeal against the Labour Court's failure to decide his cross-review, and the appeal must succeed, with the appropriate remedy being remittal to the Labour Court.

[64] The Arbitrator's award in substance contained two findings in its conclusion that the dismissal was substantively unfair and procedurally fair. The finding of guilt was upheld. The sanction for dismissal was replaced with that of a final written warning and an order was made for Mr Mothulwe to be reinstated immediately. No order on compensation or back pay was made because the Arbitrator found Mr Mothulwe without "clean hands". The review dealt with the sanction of dismissal and the cross-review dealt with the finding of guilt. The Labour Court, having upheld the review, set aside the entire award but in substance only adjusted the sanction of dismissal. Practically, the Labour Court ought not have set aside the entire award (incorporating both conclusions) until the cross-review was dealt with.

[65] However, we are not required to interfere with the Labour Court's decision regarding sanction. In setting aside the Labour Court's order, we only do so insofar as it relates to the finding of guilt. If the cross-review is ultimately successful in the Labour Court, the finding on sanction in the main review will become academic. If the cross-review is unsuccessful, the Labour Court's decision on the review in relation to sanction will continue to remain valid and operative. However, since no order should have been made on the review until the cross-review was determined, the Labour Court's order reviewing and setting aside the award should itself be set aside, on the basis however that the Labour Court's proposed order on the review will apply if the cross-review fails.

Order

[66] The following order is made:

1. This Court's order in CCT 80/22 dated 23 May 2023 is rescinded.
2. This Court's order in CCT 80/22 dated 19 July 2022 is rescinded.
3. Leave to appeal the decision of the Labour Court dated 4 October 2021 is granted.
4. The appeal is upheld on the basis set out below.
5. The applicant's cross-review application in respect of the finding of guilt and the condonation application for the late filing thereof are referred to the Labour Court for determination by another judge.
6. If the Labour Court grants the applicant condonation, upholds the cross-review and sets aside the arbitrator's finding of guilt, the Labour Court's order dated 4 October 2021 in the review application (in respect of sanction) shall fall away.
7. If the Labour Court refuses condonation or dismisses the cross-review, the Labour Court's order dated 4 October 2021 in the review application shall stand.
8. There is no order as to costs.

For the Applicant:	V T Seboko
For the Fourth Respondent:	S Tilly instructed by the Office of the State Attorney, Pretoria