



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case No: JR1897/20

In the matter between:

**MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

Applicant

and

**GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL**

First Respondent

LUFUNO RAMABULANA N.O.

Second Respondent

NS MAHADA

Third Respondent

Heard: 12 January 2024

Delivered: 11 February 2025

JUDGMENT

DE HAAN, AJ

Introduction

[1] On the face of it, what serves before me is a simple rescission application. On 3 December 2020, the Minister of Justice and Constitutional Development (Minister) brought a review application against the arbitration award given on 14 July 2020 by the second respondent in his official capacity as a panelist of the first respondent under GPSSBC case number PSGA430-03/04. The rescission application before me is to rescind the default order entered by this court per Moshwana J on 26 October 2021, in terms of which order the Minister's review application was archived. For the reasons that appear below that part is indeed straightforward.

[2] In addition to the prayer for rescission, the Minister's notice of motion contains two substantive prayers, essentially for the same thing, the first being for retrieval of the archived file and the second being for the reinstatement of the Minister's review application. Counsel for both parties submitted that, even if I decided to grant both the rescission and the reinstatement applications, the review application is not before me. I am therefore set the task of formulating a judgment in response to the Minister's prayers for de-archiving and reinstatement, which present some difficulty.

Relevant background

[3] Having been employed since 1971, the third respondent, Mr NS Mahada, was still in the employ of the then Department of Justice of Venda as State Law Advisor when in August 1996 he was seconded to the Provincial Department of Health, Western Cape, for a period of three years ending on 30 September 1999, during which period he was stationed in Cape Town.

[4] On 14 June 1999 Mahada, who was then 51 years of age, applied to the Department of Justice for early retirement effective 1 October 1999, i.e. the day after his secondment would end. Mahada's application for early retirement was never finalized, because Mahada had not stated any reasons for wanting to take early retirement. When his salary was later frozen, Mahada withdrew his application for early retirement.

[5] On 5 July 1999 the Director-General of the Western Cape Department of Health reminded Mahada in writing that his secondment would end on 30 September 1999 and that he would resume his duties with the Department of Justice and Constitutional Development, into which the former homeland offices of the Department of Justice had in the interim been amalgamated. However, Mahada never reported to the Department of Justice and Constitutional Development's Limpopo Regional Office in Polokwane, or indeed anywhere, to resume his duties.

[6] Despite not reporting for duty after his secondment had ended, Mahada continued receiving his salary. Then, on 28 January 2000, the Department invited Mahada to attend its long service awards ceremony on 11 February 2000, where he received a 20-year service award. Only when Mahada queried the award, as he would have been in service for thirty years, not twenty, the Department realized that Mahada had not reported for duty after his secondment ended.

[7] On 14 February 2000, Mr Matlala, the Deputy Director: Labour Relations at the Department's Regional Office froze Mahada's salary and on 18 February 2000, Matlala wrote to the Department Head Office reporting that Mahada had informed him (apparently at the awards ceremony) that he had retired.

[8] On 13 April 2000 Mahada withdrew his early retirement application, stated that he was ready to resume his duties, and requested that the suspension of his salary be uplifted. He still did not report for duty. I note that, at that stage, Mahada had already been absent for more than 6 months and the consequences of section 17(5)(a)(i) would already have flowed from this fact.

[9] On 14 June 2000 the Department addressed a letter to Mahada inviting him to show cause why his absence since 1 October 1999 should not be regarded as abscondment. Mahada did not reply with submissions to show cause, nor did he apply to the Director-General to be reinstated, but instead he alleged that he did not know where to report after his secondment ended.

[10] On 2 August 2002, the Regional Head of the applicant in Polokwane wrote to Mahada informing him that he had been discharged with effect 1 October 1999 in terms of section 17(5)(a)(i) of the PSA and informing him of the provisions of section 17(5)(b) of the PSA, in terms of which Mahada could make representations to the Director-General to be reinstated.

[11] A dispute was referred to the General Public Service Sectoral Bargaining Council (GPSSBC), and on 17 February 2003 Commissioner Roux issued a ruling that the GPSSBC did not have jurisdiction due to Mahada's failure to comply with section 17(5)(b) of the PSA, i.e. Mahada had not requested the Director-General to reinstate him.

[12] On 12 September 2003, after receiving Mahada's belated representations to be reinstated, the Director-General declined to reinstate him. According to the founding affidavit in the review application, Mahada was informed on 29 September 2003 that his representations for his reinstatement had failed.

[13] Mahada then again referred a dispute to the GPSSBC under case reference PSGA 430-03/04, which was arbitrated on 20 May 2004. Commissioner J Le Roux ruled that Mahada had absconded, but that the reasons for refusing to reinstate him were unfair. It should be noted that this ruling did not address the provisions of section 17(5) of the PSA and that it did not consider that the appropriate remedy for Mahada was to take the 12 September 2003 decision by the Director-General on review in terms of section 158(1)(h) of the LRA.

[14] It does not appear from the court file what occurred for the next 6 years, other than that on 17 February 2010 Basson J granted an application by Mahada to review and set aside a jurisdictional ruling, referring the dispute for arbitration *de novo*. The reasons for the order do not appear in the court file.

[15] On 10 June 2011 Mahada again referred his unfair dismissal dispute to the GPSSBC. I note that there was a 16-month delay between Basson J's order and Mahada's referral. In any event, this referral again resulted in a ruling by

Commissioner Malema that the GPSSBC does not have jurisdiction as there had been no dismissal.

[16] On 21 April 2016, Lagrange J granted Mahada's application to review and set aside the jurisdictional ruling, still under case number PSGA 430-03/04, and remitted the dispute back to the GPSSBC for another hearing *de novo*. Mahada alleges in his answering affidavit to the review application that the court found on 21 April 2016 that the GPSSBC has jurisdiction to determine the dispute, pleading *res judicata* to the issue of jurisdiction.

[17] On 10 August 2017, another 16 months later, Mahada informed the Department of Justice and Constitutional Development that the Labour Court had set aside the jurisdictional ruling of Commissioner Malema and that the dispute was again remitted to the GPSSBC for another hearing *de novo*.

[18] It is this unfair dismissal dispute that was finally arbitrated by the second respondent, Mr Lufuno Ramabulana under the same case number - PSGA430-03/04 - from 13 March 2019. I mention the second respondent by name because it proves to be peculiarly relevant.

[19] At arbitration before Ramabulana, the Minister again argued that the GPSSBC did not have jurisdiction to arbitrate the dispute, as there had been no dismissal. The termination of Mahada's service was due to the operation of law.

[20] In his award of 14 July 2020, Ramabulana held that the Minister's jurisdictional challenge had no merit; that Mahada had been dismissed; that the dismissal was unfair; and that Mahada should be reinstated retrospectively to 1 October 1999, but only up to 28 February 2013, which would have been Mahada's retirement date.

[21] In his award, Ramabulana recorded that, after consulting external parties, he calculated what he estimated Mahada would have received as salary adjustments between February 2000 and February 2013 and, based on these calculations, Ramabulana ordered the Minister to pay Mahada back-pay of R5,683,235.52; leave

pay of R470,511.55; arrears salary for 1 October 1999 to 14 February 2000 of R86,436.50; and the costs or arbitration “*at a higher scale*”.

[22] On 21 October 2020, the award was forwarded to the applicant.

[23] On 16 November 2020, Mahada requested that the award be certified, and this was done by 23 November 2020.

[24] On 23 and 24 November 2020 the Minister’s review application under the above case number was served on the respondents. It was filed on 3 December 2020.

[25] On 17 December 2020, the GPSSBC delivered the record to the Registrar.

[26] On 11 February 2021, the applicant filed the record and on 25 February 2021 the applicant filed its notice in terms of the then rule 7A(8)(b). This was within the time provided for in practice directives 11.2.3 and 11.2.7. On 10 March 2021, Mahada informed the applicant that the record was incomplete. The parties consented to a reconstruction hearing and according to the Minister he requested the GPSSBC to schedule a reconstruction hearing. This is not disputed by Mahada, neither is the allegation that the GPSSBC has not yet scheduled a reconstruction hearing.

[27] On 3 September 2021, Commissioner Lufuno Ramabulana brought an *ex parte* application to the Labour Court for the review application to be archived. This application was only served on the Minister five months later.

[28] On 26 October 2021, Moshwana J considered Ramabulana’s application in chambers and ordered that the file be archived in terms of paragraph 16.1 of the Practice Manual.

[29] Barely a week later, on 3 November 2021, Mahada caused the Sheriff Pretoria Central to attach office furniture to the value of R1,700,000.00 at the Department of Justice and Constitutional Development’s offices in Pretoria.

[30] On 7 January 2022 the State Attorney, Pretoria was served a copy of the application for an enforcement order. However, the State Attorney, Polokwane is on record for the applicant.

[31] On 3 February 2022 the State Attorney, Pretoria, was served with Ramabulana's archiving application. This was five months after the application was brought and three months after Ramabulana's *ex parte* application was granted in chambers by Moshoana J. The State Attorney, Polokwane, was never served with the archiving application.

[32] On 26 February 2022, the applicant brought an urgent application for the stay of the application for enforcement of the arbitration award, but the application was struck from the roll for lack of urgency.

[33] On 11 March 2022, Mahada applied to the Labour Court *ex parte* to re-issue the writ of execution in terms of Ramabulana's award for R6,240,183.27, plus interest thereon at 15.5% from 10 August 2020 and to attach the Department's bank account. This application too was not served on the Minister.

[34] On 17 March 2022, a notice of set down for the re-issue application was served on the State Attorney, Polokwane. The application itself was not served on the applicant so the Minister's legal representative proceeded to attend court on 26 April 2022 without knowing what the application was about.

[35] On 26 April 2022 at the hearing of the re-issue application the Minister's legal representative became aware of Ramabulana's archiving application and the resulting order by Moshoana J.

[36] On 2 June 2022, the Minister brought the application for rescission and reinstatement that is currently before me.

Rescission

[37] Rule 16A(1) (now rule 46(1)) provided that:

- ‘(1) The court may, in addition to any other powers it may have:
 - (a) of its own motion or on application of any party affected, rescind or vary any order or judgment:
 - (i) erroneously sought or erroneously granted in the absence of any party affected by it;
 - (ii) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;
 - (iii) granted as the result of a mistake common to the parties, or
 - (b) on application of any party affected, rescind any order or judgment granted in the absence of that party.’

[38] The facts relevant to the determination of the rescission application are mostly common cause. Ramabulana brought the archiving application *ex parte* and it was only served on the State Attorney, Pretoria, months after the order was granted in chambers. The requirement of rule 46(1)(b) are therefore met.

[39] Both Ms Tsatsi SC, who appeared for the Minister and Mr Swiegers, who appeared for Mahada agreed with me that they have never encountered a matter in which an arbitrator brought an application to archive an application to review his or her award. I have searched extensively for such a case but could find none.

[40] In my view, the only interest an arbitrator has in the outcome of the review application is academic, or nominal, in that he or she was the arbitrator who made the award. An arbitrator's nominal interest in a review of his or her award does not meet the requirements for *locus standi* to bring an application for substantive relief that would bring an end to the matter. The requirements for *locus standi in judicio* are that the party must have an adequate interest in the subject matter of the litigation; the interest must not be too remote; the interest must be actual; and the interest must not be hypothetical.¹ Ramabulana, having no personal interest in the outcome of the review application, had no *locus standi* to bring the archiving application.

¹ *Four Wheel Drive Accessory Distributors CC v Rattan* NO 2019 (3) SA 451 (SCA); [2018] ZASCA 124.

[41] Ramabulana took a personal interest in the review application to such an extent that he felt obliged to take the unprecedented step of bringing an application to this court to have it archived. He brought the application *ex parte* and without informing the Minister. Ramabulana cited the GPSSBC as an applicant in his application to archive the review application, but there is nothing in that application to definitively indicate that the GPSSBC was in fact aware of the application. Mahada neither brought, nor supported Ramabulana's archiving application, but he very soon thereafter relied on the resulting order for his attempts to execute on the award. The unheard-of involvement of Ramabulana and the sequence of events fill me with a sense of unease.

[42] The Minister's rescission application was not seriously contested on the papers. Before me, Adv Swiegers conceded that it would be appropriate for the rescission application to be granted, with the caveat that I should only rescind the archiving order if it would have any effect on the status of the review application.

[43] In effect, Ms Tsatsi SC contended that, given the serious defects in the archiving application brought by Ramabulana I have no choice but to grant the rescission application, which would automatically revive the review application. Although I agree that Ramabulana's archiving application stands to be rescinded, in my view rescinding Moshona J's archiving order would not in and of itself reinstate the review application.

[44] Paragraph 11.2.7 of the 2013 Practice Manual of the Labour Court, which was in effect at all relevant times, provided that:

'11.2.7 A review application is by its nature an urgent application. An applicant in a review application is therefore required to ensure that all the necessary papers in the application are filed within twelve (12) months of the date of the launch of the application (excluding Heads of Arguments) and the registrar is informed in writing that the application is ready for allocation for hearing. Where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown why the application should not to be archived or be removed from the archive.'

[45] Mr Swiegers argued for the third respondent that, even if I rescinded Moshwana J's archiving order of 26 October 2021, the review application has lapsed in terms of paragraph 11.2.7 of the 2013 Practice Manual and it has therefore been automatically archived by operation of law. The rescission of Moshwana J's order therefore does not in itself reinstate the review application. Given that the review application had already lapsed and had been archived *ex lege* under practice directive 11.2.7 due to the lapse of time, even in the absence of the order by Moshwana J, the matter remains archived until a properly motivated reinstatement application is brought and granted.

[46] Mr Swiegers argued that, as the prayers for de-archiving and for reinstatement were not properly motivated by addressing all of the required factors in the founding affidavit, granting the rescission application would be an exercise in futility, as I could not grant an order for reinstatement. Although this argument is appealing, it puts the cart before the horse, as without the rescission of Moshwana J's order of 26 October 2021, any reinstatement application is still born. Therefore, and for the reasons stated above, as a starting point the rescission application must succeed.

De-archiving / reinstatement

[47] It is trite that an application for reinstatement is akin to a condonation application. The court is guided by the requirements for condonation as established in *Melane v Santam Insurance Co. Ltd*². In the final analysis, the court must decide if it is in the interest of justice to grant the application for reinstatement.

[48] In *Zono v Minister of Justice and Correctional Services; In Re: Minister of Justice and Correctional Services v Zono and Others*³ (*Zono*) the court held with respect to review applications deemed withdrawn under paragraph 11.2.3 of the practice manual that:

‘An application for reinstatement of a review application deemed to have been withdrawn is, in essence, an application for condonation. It is incumbent on

² 1962 (4) SA 531 (A).

³ [2020] 11 BLLR 1160 (LC) at para 17; [2020] ZALCJHB 215 (LC).

the applicant to show good cause why, in this case, the record of the proceedings under review was not filed within the prescribed time limit. Condonation is not there merely for the asking, nor are applications for condonation a mere formality...'

[49] As Snyman AJ pointed out in *Moetji v General Public Service Sectoral Bargaining Council and Others*⁴ (*Moetji*) in the case of review applications archived under paragraph 11.2.7 of the Practice Manual a reinstatement application is required to retrieve the review application. In *Samuels v Old Mutual Bank*⁵ (*Samuels*) the LAC held that:

'In essence, an application for the retrieval of a file from the archives is a form of an application for condonation for failure to comply with the court rules, time frames and directives. Showing good cause demands that the application be bona fide; that the applicant provide a reasonable explanation which covers the entire period of the default; and show that he/she has reasonable prospects of success in the main application, and lastly, that it is in the interest of justice to grant the order...'

[50] The judgments in *Zono*, *Moetji* and *Samuels* mean that, after praying for reinstatement in the notice of motion, the Minister was required to set out the grounds for his application for reinstatement - i.e. condonation - in his founding affidavit. This is where the founding affidavit presents me with difficulty, as the Minister appears not to have heeded the trite requirement to show good cause by specifically addressing the prospects of success in the review application, or the interest of justice in his founding affidavit in the application before me. The applicant only offered what it termed a 'reasonable explanation covering the period of delay'. Counsel for the Minister could not assist me at the hearing of the matter, as she persisted in her view that, once the order to archive the review application was rescinded, the review application would thereby automatically be reinstated. Be that as it may, even in the absence of any assistance from the applicant or his counsel, the prospects of success and the resulting interest of justice become clear from an

⁴ [2023] ZALCJHB 320 at para 49.

⁵ (2017) 38 ILJ 1790 (LAC); [2017] 7 BLLR 681 (LAC) at para 17.

analysis of the merits of the review application, which I am required to consider in deciding the reinstatement application.

Explanation for delay

[51] The Minister provides an explanation for the delay in the founding affidavit. It boils down to the fact that the first respondent has not yet scheduled a reconstruction hearing as requested, combined with the peculiar archiving application by Ramabulana, which was not served on the Minister until 5 months after the fact, and the subsequent enforcement application by Mahada, which was also not served on the Minister. In essence, the applicant has complied with the timelines in the practice manual, but the first respondent must still convene a reconstruction hearing.

[52] The delay in filing the record, if any, was not excessive and I am satisfied with the explanation provided by the applicant.

Prospects of success

[53] Any consideration of the application for reinstatement requires an assessment of the Minister's prospects of success in the review application. In *Govender and others v Commission for Conciliation, Mediation and Arbitration and others*⁶ (*Govender*) the LAC held:

[81] Turning to the merits, I must add that it is in my view always important to consider the merits of an appeal/application where condonation is sought because it is only in considering the merits that one can deal with the crucial issue of prospects of success, and this is cardinal in the determination of the granting of condonation. It is trite that excellent prospects of success lead to the granting of condonation even when the delay is substantial and the explanation inadequate.⁷ Furthermore, a failure to consider the merits of a matter would result in a failure to determine whether the interests of justice

⁶ (2024) 45 ILJ 1197 (LAC); [2024] 5 BLLR 453 (LAC).

⁷ *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) & others* (2015) 36 ILJ 232 (LC).

may play a role in determining the merits of the case and consequently the condonation application.'

[54] The deciding consideration in any reinstatement application must ultimately be the interest of justice. To determine whether the interest of justice plays a role in the reinstatement application, I am enjoined by the LAC judgment in *Govender* to consider the merits of the review application.

Jurisdiction / res judicata

[55] In opposing the review application Mahada pleads that the issue of the jurisdiction of the GPSSBC is *res judicata*, as this was decided by the Labour Court on 21 April 2016 per Lagrange J.

[56] There is nothing in the order by Lagrange J to suggest that the court made any finding as to the GPSSBC's jurisdiction. All the court did was to review the jurisdictional ruling and remit the dispute for a hearing *de novo*. There is nothing in the order or in the papers before me to suggest what Lagrange J's reasons were for setting aside the jurisdictional ruling, or that the GPSSBC in fact has jurisdiction in a case such as this where it appears from the objective facts that there was no dismissal.

[57] In *SA National Defence Union and another v Minister of Defence and others; SA National Defence Union v Minister of Defence and others*⁸ (*SA National Defence Union*) the court held that "*The requisites for a valid defence of res judicata are that the matter adjudicated upon must have been for the same cause, between the same parties and the same thing must have been demanded ...*". In *Yellow Star Properties 1020 (Pty) Ltd v MEC Department of Development Planning and Local Government*,⁹ the Court amplified the dictum in *SA National Defence Union* as follows:

'.... it is necessary to stress not only that the parties must be the same but the same issue of fact or law which was an essential element of the judgment on which reliance is placed must have arisen and must be regarded as having been determined in the earlier judgment.'

⁸ (2003) 24 ILJ 2101 (T) at 2109 H-J.

⁹ 2009 (3) All SA 475 (SCA); 2009 (3) SA 577 (SCA) at para 22.

[58] In *Democratic Alliance v Brummer*,¹⁰ the court dealt with what should be considered when determining whether the same issue had already been decided, and had the following to say:

‘Where the judgment does not deal expressly with an issue of fact or law said to have been determined by it, the judgment and order must be considered against the background of the case as presented to the court and in the light of the import and effect of the order. Careful attention must be paid to what the court was called upon to determine and what must necessarily have been determined, in order to come to the result pronounced by the court. The exercise is not a mere mechanical comparison of what the two cases were about...’

[59] I am not satisfied that Lagrange J’s order of 21 April 2016 justifies a plea of *res judicata* - it does not appear from the judgment, the court file, nor from the papers filed in the review application or in the application before me what the grounds for the review application that served before Lagrange J were. Importantly, it does not appear that the court was called upon to determine whether the GPSSBC had jurisdiction to adjudicate Mahada’s dispute. The court notably failed to make such an order. All that was necessarily required for the court to come to the order that it made was a finding that the jurisdictional ruling was reviewable because one of the defects in section 145(2) of the LRA existed.

[60] Section 17(5) of the PSA provides that:

‘(5)(a)(i) An officer, other than a member of the services or an educator or a member of the Agency or the Service, who absents himself or herself from his or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been discharged from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of duty.’

¹⁰ 2022 JDR 3159 (SCA); [2022] ZASCA 151 at para 15.

(ii) If such an officer assumes other employment, he or she shall be deemed to have been discharged as aforesaid irrespective of whether the said period has expired or not.

(b) If an officer who is deemed to have been so discharged, reports for duty at any time after the expiry of the period referred to in paragraph (a), the relevant executing authority may, on good cause shown and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that officer in the public service in his or her former or any other post or position, and in such a case the period of his or her absence from official duty shall be deemed to be absence on vacation leave without pay or leave on such other conditions as the said authority may determine.'

[61] In the founding affidavit to the review application, the Minister raises several grounds for review. These are that Ramabulana committed a gross irregularity or misconduct in relation to his duties by finding that the GPSSBC had jurisdiction given the facts and the provisions of section 17(5)(a)(i) of the PSA; by ignoring Mahada's absence in excess of a calendar month; by ignoring the fact that Mahada had never reported for duty; by ordering back-pay without having heard any admissible evidence regarding the manner of calculation thereof; by receiving and considering extra-curial submissions to guide his back-pay calculations; by awarding back-pay for the entire period from 1 October 1999 even though it was common cause that Mahada had not tendered his services or rendered any services from that date; not considering the delays in the prosecution of the dispute caused by Mahada in coming to a fair award; considering irrelevant evidence relating to Mahada's application for early retirement and misconstruing the evidence before him relating to Mahada's knowledge of his place of employment.

[62] In *Grootboom v National Prosecuting Authority and Another*¹¹ (*Grootboom*) the Concourt dealt with the application of section 17(5)(1) of the PSA. It upheld Grootboom's appeal upon finding that the requirements of section 17(5)(1) had not been met in that Grootboom did not absent himself from his work, because he had already been suspended. Notably, the Concourt did not overturn the LAC's finding

¹¹ 2014 (2) SA 68 (CC); [2014] 1 BLLR 1 (CC) at para 14.

that, if section 17(5)(a)(i) of the PSA applied, the discharge would be by operation of law and would not constitute a dismissal. It was Mahada's case that he should be excused from the consequences of section 17(5)(a)(i) of the PSA, because he did not know where to report for duty. Ramabulana relied on this argument to support his finding that Mahada was dismissed. This is not the same as Grootboom's case, as the Concourt held in *Grootboom* that he had been suspended and was therefore not obliged to report for duty. I consider that a senior employee like Mahada with thirty years' experience within the Department would know where to report for duty, even without explicit instructions and even if it was simply by reporting to the nearest office of the Department. Mahada's *ex post facto* reliance on the lack of clear instructions by the Department where to report for duty smacks of opportunism, especially when viewed with his application for early retirement and his statement to Matlala that he had in fact retired.

[63] It has been the Minister's case throughout that the GPSSBC did not have jurisdiction to arbitrate the dispute, as there had been no dismissal. In my view, this is the correct position in law. The law was set out by Moshoana J in *NEHAWU obo James v General Public Service Sectoral Bargaining Council and Others*.¹² Ramabulana was therefore *prima facie* wrong in his jurisdictional ruling that Mahada had been dismissed and that the GPSSBC therefore had jurisdiction. Ramabulana failed to understand that Mahada's remedy was not to refer an unfair dismissal dispute, but to apply under section 158(1)(h) of the LRA to this court for the review of the Director-General's refusal to reinstate him.¹³

[64] For these reasons it appears to me that the Minister's prospects of success in the review application are excellent on the issue of the jurisdictional ruling.

Merits of review

[65] In paragraph 7 of his award, Ramabulana expressly states that his award was deferred while he sought, "*other documents and in this regard the salary adjustment*

¹² *NEHAWU obo James v General Public Service Sectoral Bargaining Council and Others* [2021] ZALCJHB 465.

¹³ *Mahlangu v Minister of Sport and Recreation* (2010) 31 ILJ 1907 (LC); [2010] 5 BLLR 551 (LC).

circulars, and consulting people who understand the payments schemes in the public service". By his own admission, Ramabulana made his calculations of the amount of back-pay he awarded to Mahada, and in particular the annual salary adjustments Mahada might have received, without having received any admissible evidence in this regard, but after seeking extra-curial documents and submissions. In doing so, Ramabulana *prima facie* committed gross irregularity and misconduct in relation to his duties. What's more, Ramabulana ignored the fact that Mahada did not tender his services for at least 5 months and the delays caused by Mahada himself, there being at least two instances of a 16-month delay in prosecuting the dispute, as I mentioned above. Ramabulana should therefore *prima facie* at the very least have reduced the back-pay payable to Mahada by 37 months. The Minister's prospects of success are therefore excellent in respect of this ground for review.

[66] Although Mahada withdrew his application for early retirement, Ramabulana dedicated paragraphs 16 to 23 of his award to that application for early retirement. There therefore appears to be merit in the grounds for review relating to the gravity with which Ramabulana regarded this irrelevant aspect, as it appears that Ramabulana allowed it to influence his decision. The Minister therefore has good prospects of success on these grounds.

[67] The principles governing cost orders in the Labour Courts are set out in section 162 of the LRA and have been distilled in the judgments of the LAC in *Member of the Executive Council for Finance, KwaZulu-Natal and Another v Dorkin N.O. and Another*¹⁴ (*Dorkin*) and by the Concourt in *Biowatch Trust v Registrar Genetic Resources and Others*¹⁵ (*Biowatch*), and in *Zungu v Premier of the Province of KwaZulu-Natal and Others*¹⁶ (*Zungu*). Ramabulana ordered the Minister to pay the cost of arbitration on a punitive basis. This he appears to have done without having due regard to the evidence before him and without considering the precedents relating to cost orders in labour matters.

¹⁴ [2007] ZALAC 41; (2008) 29 ILJ 1707 (LAC).

¹⁵ 2009 (6) SA 232 (CC); [2009] ZACC 14.

¹⁶ [2018] ZACC 1; [2018] 4 BLLR 323 (CC).

[68] For these reasons, in my view, the Minister has excellent prospects of success on review on all the grounds set out in the review application. This is reason enough to grant the reinstatement application, even if there was an undue and unexplained delay by the Minister in filing all the papers within a year.

[69] As I said before, a sense of dread fills me when I consider that Mahada was never dismissed, that the GPSSBC, therefore, *prima facie* did not have jurisdiction to arbitrate Mahada's unfair dismissal dispute; that Ramabulana's award is replete with irregularities in how he arrived at the very significant amounts he awarded to Mahada; and that Ramabulana took the unprecedented step of entering the fray on Mahada's behalf, thereby reflecting an unwarranted personal interest in the outcome of review application.

[70] I simply cannot come to the conclusion that it is in the interest of justice to refuse to reinstate the review application simply because the Minister did not enumerate all the requirements for his reinstatement application under clear headings in his founding affidavit. Refusing to reinstate the review application would mean that Mahada would receive more than R6,500,000.00 at the taxpayer's expense in circumstances that *prima facie* indicate that the award is irregular in several aspects, that Ramabulana exceeded his authority and committed misconduct in his duties as an arbitrator, and that the award is therefore reviewable.

[71] In view of the Minister's good explanation for any delay and the excellent prospects of success in the review application I find that, despite the technical shortcomings of the founding affidavit, the interest of justice requires that the review application be reinstated.

Costs

[72] Having considered the requirements of law and fairness and the judgments of the LAC and the Concourt in *Dorkin*, *Zungu*, and *Biowatch* I am not persuaded that this is a matter in which a cost order is justified.

[73] In the result, the following order is made:

Order

1. The order dated 26 October 2021 by Moshoana J under the above case number is rescinded.
2. The review application under the above case number is reinstated.
3. The first respondent is ordered to convene a reconstruction hearing to remedy the deficiencies in the record within 30 days of this order.
4. There is no order as to costs.

L de Haan

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Adv EK Tsatsi SC, with Adv MB Matlejoane

Instructed by: State Attorney

For the respondent: Adv Swiegers

Instructed by: