



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA 121/2022

In the matter between:

**MEC HEALTH: LIMPOPO PROVINCE
HEAD OF DEPARTMENT OF HEALTH:**

First Appellant

LIMPOPO PROVINCE

Second Appellant

and

MM MAKGOBA AND OTHERS

Respondents

Heard: 13 May 2025

Delivered: 04 June 2025

Coram: Van Niekerk JA, Nkutha-Nkontwana JA et Basson AJA

JUDGMENT

VAN NIEKERK, JA

Introduction

[1] This is an appeal, with the leave of this Court, against a judgment delivered by the Labour Court (per Mangena AJ) on 21 November 2021. The judgment was delivered consequent on an application filed by the respondents (employees) in which they sought the enforcement of an arbitration award issued in their favour by the Public Service Co-ordinating Bargaining Council (PSCBC).

Background

[2] The arbitration award that was the subject of the application in terms of section 158 (1)(c) of the Labour Relations Act¹ (LRA) was issued on 6 June 2014. The award represents the outcome of proceedings initiated by the Public Servants Association (PSA), a registered trade union, jointly with other registered trade unions in the form of NUPSAW, HOSPERSA and NEHAWU. The respondent in the proceedings was the Department of Public Service and Administration.

[3] The dispute referred to arbitration concerned the application and interpretation of a collective agreement, in the form of PSCBC Resolution 1 of 2012. The Resolution deals with salary adjustments and improvements to conditions of service in the public sector for the financial year 2012/13 to 2014/15. Clause 18.1 of the Resolution provides for employees graded on salary levels 10 and 12 to be appointed and remunerated on salary levels 10 and 12 respectively. The issue that served before the arbitrator concerned the implementation of the Resolution and a distinction that the PSA sought to draw between core and non-core functionaries. Specifically, the issue was whether clause 18.1 of the Resolution contemplated a staggered or phased implementation, or a mode of implementation that differentiated between function staff and corporate staff. The arbitrator concluded that the Resolution should not be so interpreted, and that the respondent in the arbitration proceedings, the Department of Public Service and

¹ Act 66 of 1995.

Administration, was obliged to apply the clause indiscriminately to all employees whose posts as of 1 August 2012 were graded on salary levels 10 and 12, and to appoint and remunerate them on salary levels 10 and 12 respectively.

[4] For present purposes, what is significant is that the arbitrator's award, issued on 6 June 2014, obliges 'the Respondent' to implement clause 18.1 of the collective agreement and to appoint and remunerate the employees accordingly. As I have indicated, the party against whom the award was made is the Department of Public Service and Administration.

[5] The Department of Public Service and Administration sought to have the arbitrator's award reviewed and set aside, but that application was never pursued.

[6] On 1 August 2017, more than three years after the arbitration award was issued, the respondents in this appeal, all employees of the Department of Health, Limpopo (the employees), filed an application to have the award made an order of the Labour Court and for further ancillary relief. In the application, they cite themselves as the first to further applicants, who bring the application in their individual capacities, all listed in a schedule annexed to the founding affidavit. The respondents cited in the application are the MEC for Health, Limpopo, the head of the Department of Health, (the department), the PSCBC and the Department of Public Service and Administration. The deponent to the founding affidavit describes himself as a 'pay-up (sic) member' of the PSA and describes the second to further applicants as 'adult persons employed by the Department of Health, Limpopo'.

[7] The employees contended that the department had failed to comply with the arbitration award, and they had been gravely prejudiced by the department's failure to place them on the correct salary scales, as required by the terms of the arbitration award. They further contend that the department's failure to place them on the correct pay scales 'is *wrongful, unlawful, irrational, illogical and irregular*,. Furthermore, such

deprivation constitutes an arbitrary and unilateral reduction of applicants' emoluments which is unlawful as contemplated by the Public Service Act (Act No 103 of 1994).'

[8] The appellants opposed the application on the basis, among other grounds, that the appellants and the employees were not parties to the arbitration proceedings that culminated in the award that the employees sought to enforce. The appellants submitted that in these circumstances, there was no arbitration award that could be made an order of Court as against them. No doubt in response to this averment, on 2 June 2020, the appellants filed an amended notice of motion and a supplementary affidavit. The deponent to the supplementary affidavit records that *'The Applicants case strictly speaking is premised on failure by the First and Second Respondents to implement the section 18.1 of the Resolution one of 2012 and not the arbitration award.'* In terms of the amended notice of motion, the employees sought what they referred to as a 'mandamus order', that included the following:

- '1. Declaring the failure by the first and second respondents to implement clause 18.1 of Resolution 1 of 2012 in favour of the Applicants by placing them in their respective correct post levels and salary levels and failure to pay them in their respective correct post levels and salary levels and failure to pay them accordingly as wrongful, unreasonable and unfair and thus constitute unfair labour practice (own emphasis).
2. Directing and Ordering the Department to place individual applicants whose posts were graded on salary level 10 and 12 as at the 1st of August 2012, on their correct post levels and salary levels applicable, and such placement to apply retrospectively to their respective dates of appointment forthwith'

[9] What is clear from the amended notice of motion is that the employees abandoned any attempt to enforce the arbitration award by means of section 158 (1)(c), i.e. by having the award made an order of the Labour Court. Instead, they elected to take issue with the department's failure to implement the arbitration award, and to enforce the terms of clause 18.1 of Resolution 1, as interpreted by the arbitrator in his award, by way of a declaratory order. Specifically, the legal basis on which the

employees relied was that the department's failure to implement the award constituted an unfair labour practice.

Labour Court

[10] The Labour Court's judgment deals in the main with preliminary points raised by the appellants. The first was that the employees were not party to the arbitration proceedings, with the result that the award was not binding on the appellants. The Labour Court rejected this point on the basis that the department, on its own version, took steps to implement a circular issued to give effect to clause 18.1 of Resolution 1, and the interpretation given to it by the arbitrator. The court noted that '*[A]ny attempt by the Department to distance itself from the binding effect of the award is disingenuous and constitute a lame attempt to avoid responsibility*'.

[11] The second point taken by the appellants, one of lack of jurisdiction was similarly dismissed. The appellants had sought to argue that the employees' claim of an unfair labour practice was a matter that fell within the jurisdiction of the bargaining council. The Labour Court dismissed the point on the basis that employees were, in effect, requesting the court to enforce the arbitration award, in so far as it related to them, by confirming its correctness. The court referred specifically to the initial notice of motion (later amended) in which the respondents had ought to have the award made an order of court. In the court's view, the appellants had failed to rebut the respondents' case that the failure to implement the award was unlawful.

[12] The third preliminary point was one of prescription. The Labour Court dismissed the point on the basis that the respondents' claim was not one sounding in money – their claim was for enforcement of the award, which would result in a determination of the amounts due and owing to them. Prescription would commence running only once that determination had been made.

[13] Finally, the Labour Court dismissed a point to the effect that the dispute between the parties was one that concerned the interpretation of clause 18.1 of the collective agreement, a dispute that must be determined by arbitration. The Court held that the arbitrator had interpreted the clause and that its meaning and application were clear.

[14] Having dismissed all the appellants' preliminary points, the Labour Court then granted the following order:

- '1. The failure by the first and second respondents to implement clause 18.1 of Resolution 1 of 2012 in favor of the applicant by placing them in their respective correct post levels and salary levels and pay them accordingly is declared unlawful.
2. The first and second respondents are directed and ordered to place the individual applicants whose posts were graded on salary level X and 12 as at the 01 August 2012 on the correct post level applicable, and such placement to apply retrospectively to their respective dates of appointment.
3. The first and second respondent's order to deliver a statement to the applicant's attorneys of record.... within a period of 21 days this order be granted, reflecting the benefits and monies owing, and due to each of the applicants.
4. The first and second respondents are ordered to pay such amount found to be due to the applicant directly into their accounts within 30 days off (sic) delivery in terms of order 3 above.
5. The amount in order three above shall attract interest at prescribed rate of 7% from the date determined by the respondent's up to the date of payment.
6. No order as to costs.'

[15] It is apparent from the wording of the order that the court did not make the award an order of court, nor did it declare any non-compliance with the award unlawful. The order ultimately granted was founded on the declaration of the unlawfulness of the appellants' conduct, in the form of a failure to directly implement the terms of the collective agreement.

Grounds of appeal

[16] The grounds of appeal are expressed in general terms, in essence disputing every finding made by the Labour Court. The appellants contend that the Labour Court erred by finding that the respondents' cause of action is founded on the arbitration award; by finding that the respondents were a party to the arbitration proceedings; by finding that the appellants had selectively implemented Resolution 1 of 2012; by finding that prescription commenced only after a determination of the amounts due to the respondents in terms of the arbitration award; by finding that there was no dispute about the interpretation of clause 18.1; and finally, that the court erred by granting the relief that it did.²

Condonation

[17] The history of the prosecution of this appeal is a sorry one. This Court granted leave to appeal, by way of petition, on 30 March 2023, after the late filing of the petition was condoned. The order granting the petition obliged the appellants to deliver the record of appeal within 60 court days from the date of the order. They failed to do so.

[18] In the wake of an application to hold the appellants in contempt, on 8 November 2023, the appellants filed a notice of appeal together with an application for condonation for the late filing of the notice and a request to extend the period within which to file the record by a further 30 days.

[19] On 24 October 2024, the employees served a request for a set down of the preliminary points raised in their objection to the notice of appeal and the reinstatement

² In the heads of argument filed on their behalf, the appellants submit that the interpretation and application of clause 18.1 of PSCBC Resolution 1 of 2012 has been settled by this court. *HOSPERSA obo Naidoo and Others v MEC Dept of Health KZN and Others* (2025) 46 ILJ 933 (LAC).

of the appeal. At this point, the appellants were waiting for the transcription of the record to be finalised.

[20] On 13 November 2024, this Court declared that the appeal was deemed withdrawn and ordered the file to be archived. I accept the appellants' averment that the notice of set down in respect of the proceedings on 13 November 2024 had not been served on them, and that they were unaware of the proceedings

[21] On 18 December 2024, the appellants served the appeal record, together with an application for the reinstatement of the appeal and filed same with the registrar on 6 January 2025. Both the record of appeal and the notice of appeal are out of time, and the appellants have sought condonation for their late delivery. In so far as the appeal was deemed to have been withdrawn for a failure to deliver the record timeously, the appellants seek to have the file retrieved and the appeal reinstated.

[22] In *Grootboom v National Prosecuting Authority and Another*³ the Constitutional Court held that the standard for considering such an application is the interest of justice. That requires a court to consider the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice, the merits of the explanation for the delay, the importance of the issue raised in the intended appeal and the prospects of success

[23] The primary consideration in deciding to grant condonation for the late filing of the notice of appeal and the appeal record, and for reinstating the appeal, is the applicants' prospects of success. The challenge to the Labour Court's jurisdiction to make the order it did raises the founding constitutional value of the rule of law, and the principle of legality derived from it. Where an order falls outside of the scope of a court's adjudicative powers, it falls to be set aside. For reasons that appear below, the Labour Court did not have the jurisdiction to grant the order that is the subject of this appeal. In

³ (2014) 35 ILJ 121 (CC).

these circumstances, the appellants' prospects of success trump the tardiness with which the appeal has been prosecuted and warrant the granting of condonation.

Evaluation

[24] In the present instance, there is no dispute that an arbitration award was issued by the bargaining council on 6 April 2014, and that the award remains extant. The case that ultimately served before the Labour Court was one directed at the appellants' conduct in relation to the arbitration award, rather than the award itself. As I have indicated, in their amended notice of motion, the employees abandoned the attempt to have the Court make the award an order of the Court in terms of section 158 (1) (c) and sought instead to have their employer's failure to implement clause 18.1 of the collective agreement declared wrongful, unreasonable and unfair and '*thus constitute an unfair labour practice*'. Despite the terms of the notice of motion, the Labour Court's order, recorded above, is expressly a declaration of unlawfulness.

[25] The first issue to be considered is that of jurisdiction and specifically, whether the Labour Court has jurisdiction to grant an order declaring an employer's failure to comply with a collective agreement to be unlawful or unfair.

[26] It is not readily apparent from the Labour Court's judgment on what basis it considered the appellants' conduct to have been unlawful. The judgment comprises a consideration of the various points in *limine* raised by the appellants, and the reasons for dismissing each of them. The judgment then moves to consider the question of costs, without articulating the grounds on which it might be said that the appellants have acted unlawfully.

[27] While section 158 (1)(a)(iv) of the LRA empowers the Labour Court to grant declaratory orders, the exercise of that power is dependent on jurisdiction – it applies only to those disputes in respect of which the Labour Court may exercise jurisdiction in terms of section 157. Section 157 (2) provides that the Labour Court has the inherent

powers, authority and standing equal to a division of the High Court, but only in relation to matters under its jurisdiction. The Constitutional Court recently affirmed that the application of section 157 (1) requires the court in the absence of specific sections that delineate the Labour Court's statutory exclusive jurisdiction, to determine whether a matter is one that arises in terms of the LRA or another law, to be determined by the Labour Court.⁴

[28] There is no provision in the LRA that confers jurisdiction on the Labour Court to declare unlawful an employer's failure to implement the terms of a collective agreement. The Labour Court has no general jurisdiction to make declarations of unlawfulness, except in so far as the LRA or other enabling statute extends that power. In *Steenkamp and Others v Edcon Ltd (National Union of Metalworkers of SA intervening)*⁵ the appellant employees contended that their dismissals by the employer were unlawful and invalid because their employer had not complied with time periods established by s 189A of the LRA prior to issuing notices of termination of employment. The majority of the Constitutional Court rejected this contention on the basis that the Labour Court has no jurisdiction to determine the lawfulness of a dismissal. The court observed that there was no provision in the LRA in terms of which an order could be sought declaring a dismissal unlawful or invalid. The court said the following:

'[106] Section 189A falls within chapter VIII of the LRA. That is the chapter that deals with unfair dismissals. Its heading is: 'Unfair dismissal and unfair labour practice'. Under the heading appears an indication of which sections fall under the chapter. . . .

Conspicuous by its absence here is a para (c) to the effect that every employee has a right not to be dismissed unlawfully. If this right had been provided for in s 185 or anywhere else in the LRA, it would have enabled an employee who showed that she had been dismissed unlawfully to ask for an order declaring her dismissal invalid. Since a finding that a dismissal is unlawful would be foundational to a declaratory order that the dismissal is invalid, the absence of a

⁴ *Baloyi v Public Protector and others* 2021 (2) BCLR 101 (CC) at para 23 to 24.

⁵ (2016) 37 ILJ 564 (CC).

provision in the LRA for the right not to be dismissed unlawfully is an indication that the LRA does not contemplate an invalid dismissal is a consequence of a dismissal effected in breach of a provision of the LRA...’.

[29] Thus, when an applicant alleges that a dismissal is unlawful (as opposed to unfair) the Labour Court has no jurisdiction to make any determination of unlawfulness.⁶ The same principle holds good for other forms of employer conduct, including an alleged failure to comply with a collective agreement. The LRA provides mechanisms for the enforcement of collective agreements, but a declaration of unlawfulness by the Labour Court consequent on a failure to implement the agreement is not one of them. The Labour Court accordingly erred when it made a declaration to this effect.

[30] Turning then to the employees’ contention that their employer’s conduct amounted to an unfair labour practice, the term ‘unfair labour practice’ is defined in section 186 (2) of the LRA. That definition makes no mention of any failure by an employer to implement an arbitration award. Even if on some basis such a failure could be construed to be unfair conduct, section 191 makes clear that unfair labour practice disputes must be referred to conciliation within the prescribed time limit and in the absence of a resolution of the dispute, the dispute is to be referred to arbitration under the auspices of the Commission for Conciliation, Mediation and Arbitration or, as in the present case, a bargaining council with jurisdiction. Section 157 (5) provides that the Labour Court does not have jurisdiction to adjudicate a dispute if the LRA requires the dispute to be resolved through arbitration. To the extent that the employees claimed that the appellant’s conduct in failing to implement the arbitration award constituted an unfair labour practice, the Labour Court had no jurisdiction to make such a determination.

⁶ After the judgment was delivered the employees referred a dispute to the Labour Court under s 189A (13) of the LRA, claiming compensation for a procedurally unfair dismissal. The Labour Appeal Court refused to condone the late referral of the claim; a decision upheld on appeal. The judgment of the Constitutional Court is reported at *Steenkamp and Others v Edcon Ltd* (2019) 40 ILJ 1731 (CC).

[31] At the hearing of the appeal the parties were afforded the opportunity to file supplementary heads of argument on the issue of the Labour Court's jurisdiction. The respondents submitted that the Court had jurisdiction in terms of section 77 (3) of the Basic Conditions of Employment Act⁷ (BCEA) to make the order that it did, notwithstanding the fact that the respondents had made no specific reference to section 77 (3) in their pleadings.

[32] Section 77 (3) confers concurrent jurisdiction on the Labour Court, with the civil courts, to hear and determine any matter concerning a contract of employment. Section 77(3) is one of those provisions referred to in section 157 (1) of the LRA that confers jurisdiction of the Labour Court to adjudicate defined disputes- in this instance, a dispute about a contract of employment. What the section envisages is a claim brought in contract and pleaded as such. The pleadings in the present instance make no reference to the respondents' contracts of employment and disclose no cause of action based on the application of the law of contract. It is not open to the respondents, as they now seek to do by way of supplementary heads of argument, to make out a case that they were contractually entitled to be treated as contemplated by clause 18.1 of Resolution 1 of 2012. The case made by the respondents was one of alleged wrongful and unfair conduct on account of a failure to implement the terms of a collective agreement. If the respondents are of the view that they have a remedy in contract, it is for them to make out a case on the facts and in law, for the granting of that remedy.

[33] Jurisdiction aside, even if the application filed by the respondents (as the Labour Court found) was in substance an application to have the arbitrator's award made an order of court, the granting of declaratory relief was not appropriate given the specific means of enforcement established by the LRA. The Labour Court (correctly) captured the essence of the employees case when it stated that '*Properly construed, the applicants are asking this court to enforce the arbitration award in so far as it relates to them by confirming its correctness*'. Declaratory relief, even if it is competent, is not appropriate in circumstances where the applicant has alternative remedies. Put another

⁷ Act 75 of 1997.

way, where tailored remedies are available under the LRA for the resolution of a particular dispute, as they are, the court should generally exercise its discretion against granting declaratory relief.⁸

[34] Given the above findings in respect of the correctness of the Labour Court's judgment, it is not necessary to canvass the remaining grounds of appeal.

[35] In so far as costs are concerned, the requirements of the law and fairness are best served by each party bearing its own costs.

[36] In the result, the appeal stands to be upheld.

[37] In the premise the following order is made:

Order

1. The late filing of the notice of appeal and the appeal record is condoned.
2. The appeal is reinstated.
3. The appeal is upheld.
4. The order of the Labour Court is set aside and substituted by the following:
 '1. The application is dismissed'
5. There is no order as to costs.

A. van Niekerk

Nkuta-Nkontwana JA and Basson AJA concur.

APPEARANCES:

FOR THE APPELLANTS: MS Mphahlele SC, with R Munzhelele

⁸ See: *Vico v Department of Forestry, Fisheries and Environment and Others* (C 666/2023) [2025] ZALCCT 26 (23 April 2025).

Instructed by State attorney, Polokwane

chaLedwaba@justice.gov.za; MaphPhasha@justice.gov.za

FOR THE RESPONDENTS: M Mahlase of VTM Sekhukhuni Attorneys
vtmsek@gmail.com