THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Reportable

Case No: P13/2024

In the matter between:

MZEKELO NGCINGWANA AND OTHERS **Applicants**

and

NELSON MANDELA BAY MUNICIPALITY **Respondent**

Heard: 26 November 2025

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date for hand-down is deemed to be on 22 January 2026.

JUDGMENT

THYS, AJ

Introduction

[1] In this matter, a group of employees of the Nelson Mandela Bay Municipality referred a dispute to the South African Local Government Bargaining Council and in their referral, sought relief in the form of immediate placement on Task Grade 4, together with elevation to the positions of security guards and/or candidate security officers, the retrospective implementation of the grade outcome applicable to the elevated post from the date of appointment, and the amendment of their job titles to reflect the appropriate post.

[2] Although the dispute was one of mutual interest, it nevertheless or regardless of the correctness of the process followed, proceeded to arbitration because the employees are engaged in essential services and are, by law, precluded from resorting to strike action. Put differently, mutual-interest disputes (ordinarily resolved through industrial action) must, in terms of section 74(4) of the Labour Relations Act[1], be referred to compulsory arbitration.[2] This Court, in *City of Cape Town v South African Local Government Bargaining Council and Others*[3], expressed the principle in the following terms:

> *"Parties engaged in essential services are precluded from participating in a strike as a mechanism to resolve an interest dispute ... A party to an essential service dispute who refers a dispute to the council is calling upon an arbitrator to resolve the impasse between the parties through arbitration and is effectively requiring the arbitrator to determine the outcome of the interest dispute between the parties by issuing an award which will be binding upon the parties."*

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[1] Act 66 of 1995, as amended.
[2] Section 74(4) ... stipulates that a party engaged in an essential service may refer the dispute to the CCMA or applicable Bargaining Council, for conciliation. (4) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration by the council or commission.
[3] [2011] 5 BLLR 490 (LC), at para 16.

[3] The Bargaining Council processed the referral and assigned it to Commissioner Naledi Burwana-Bisiwe, who later produced an award (as contemplated by section 142A of the LRA) and recorded therein that, following earlier conciliatory "*discussion*", the parties reported to her, on the return day, that they had settled their dispute. It is a matter of common cause that no written agreement was ever concluded and the '*discussion*' to which the Commissioner refers yielded, at most, an informal oral exchange of uncertain, unfixed or disputed content.

[4] It is also common knowledge that the award was issued in terms of *section 142A*, as the Commissioner expressly marked it as such on the front cover, and further confirmed this at paragraphs 3 and 4, as well as paragraph 7 (d) of the executive portion of the award. This conclusion is corroborated by the employees' own papers given that at paragraph 11 of the founding affidavit, they allege that their dispute was amicably resolved by way of a settlement agreement which was subsequently made an arbitration award in terms of *section 142A*. Furthermore, at paragraph 15.1 therein, they expressly contend that the award satisfies the criteria set out in *section 142A*.

[5] This is an important aspect, for it, at the very least, demonstrates that the employees and the Commissioner approached the process on the footing that it was a section 142A issue and not a compulsory arbitration under section 74(4) in respect of an essential-services mutual-interest dispute.

[6] There is considerable debate (between the parties) about the existence of the 'alleged' agreement and/or its exact terms, but leaving that controversy aside, it is the Commissioner's award, not the disputed agreement that remains the operative instrument and is the chief subject of the present proceedings. This is because the award, once issued under section 142A carries legal effect and is capable of judicial scrutiny, whereas the underlying agreement, even if it properly existed, has no independent status or is, at this stage and/or according to the 'pleaded' case, merely a secondary consideration, before this Court.

[7] It is also uncontroversial that Commissioner Burwana-Bisiwe bypassed the statutory requirement of a written settlement and instead straightaway transposed the parties' alleged oral "discussion", or unfixed "understanding" into an arbitration award under section 142A. The record, in this regard, shows that the matter was heard on 31 May 2021, and the award is dated the same day, on the cover, in the opening paragraph, and beneath the Commissioner's signature. The inference is inescapable that the "supposed agreement" was reached and the award drafted instantly or contemporaneously, without first reducing it to writing, without obtaining any application from the parties as section 142A requires, and without following the procedures outlined in section 74(4). These are among the issues to which I shall revert when dealing with the matter more fully in this judgment.

Employee's application

[8] The employees contend that the employer breached the unwritten agreement and/or subsequent award, particularly on retrospectivity. They argue that proper implementation of the agreement and subsequent award would render the employer liable for 'back pay'.

[9] In order to remedy the alleged breach, the employees have approached this Court and mandated Mr. Ngcingwana to act as the lead applicant, and/or as the applicant formally cited, in these proceedings. The employees' application is aimed at elevating the settlement agreement, already crystallised into an arbitration award, into the status of a court order and is grounded in section 158(1)(c) of the LRA. This section expressly empowers the Labour Court, upon application, to make any arbitration award an order of court.[4]

[10] The employees' application is strategically significant because, unlike a self-executing judgment of this Court, an arbitration award lacks automatic enforceability. Although binding in law, compliance is not assured because a

[4] Section 158(1)(c) reads: The Labour Court may – make any arbitration award ... an order of the Court.

beneficiary must approach the Labour Court to have the award made an order of court. Once elevated, the award acquires the full force of law and non-compliance exposes the defaulting party to contempt proceedings and other coercive remedies.

Counter application

[11] To resist this potential consequence, the employer has brought a section 158(1)(iv) application, in terms of which the Labour Court is authorised to make declaratory orders.[5]

[12] In most instances, litigants turn to the courts seeking 'remedial' decrees, which are orders that compel performance, enforce obligations, or provide compensation to resolve disputes. Declaratory relief, however, stands apart from this remedial paradigm. Rather than imposing duties, sanctions, or remedies, a declaratory order operates as a judicial statement of rights or, in simple terms, acts as a clarifying mechanism. It dispels uncertainty by clarifying the rights and obligations between disputants, thereby defining their respective standing in law, without the imposition of remedial consequences.

[13] The cornerstone of the employer's application is that it seeks a declaration to the effect that the award is a nullity *ab initio*. The employer contends, this is so because the award was issued without the required statutory authority and is *ultra vires*. Consequently, the award is incapable of enforcement, devoid of legal effect and falls beyond the reach of section 158(1)(c) of the LRA.

Procedural ruling

[14] Even though two applications[6] were placed before me, the employee's application was filed first and would ordinarily be heard first. However, Mr. Kroon, SC

[5] Section 158(1)(iv) stipulates that (1) The Labour Court may – (a) make ... (iv) a declaratory order.

appearing on behalf of the employer submitted that considerations of judicial economy and logic dictate that the employer's interlocutory application should be addressed first.

[15] I endorsed this logic because if the award withstands the employer's (counter) attack and is confirmed as enforceable can it properly be elevated into an order of court, at which point it acquires binding authority and the respect accorded to judicial decrees. Conversely, should the arbitration award ultimately be declared unenforceable, elevating it to the status of a court order would serve no practical purpose because without an enforceable award, there is simply nothing to enforce. I elaborate and give reasons for this position hereunder, setting out both the legal rationale and the practical implications that flow from it.

[16] It is my view, since the central purpose and theme of the LRA is to promote the "*effective*" resolution of labour disputes[7], the Labour Court (being a creation of this Act) must at all times give effect to its objectives. In this context, "*effective*" carries a dual meaning; first, that disputes must be resolved, through practical measures that avoid duplication, waste of judicial resources, and so on; and second, that they must be resolved competently, definitively, decisively, finally, and the like. The Labour Court is thus required by law to adjudicate matters by adopting practical measures that enhance efficiency in dispute resolution. The same principle applies equally to the CCMA and to the various Bargaining Councils, which, as products of the LRA, are similarly obliged to give effect to its objective of promoting the effective (and expeditious) resolution of labour disputes.

[17] Accordingly, when this Court is confronted with an application to make an arbitration award an order of court while an active dispute regarding its validity remains unresolved, whether by way of a declaratory application (as in the present matter) or otherwise, that standoff must first be heard before the award can be

[6] The employees rely on section 158(1)(c), while the employer invokes section 158(a)(iv).
[7] Section 1(d)(iv) of the LRA.

enforced. This approach is both principled and pragmatic, as it ensures that the Court does not enforce an award whose validity is under challenge and questionable.

[18] My approach is not a Robinson Crusoe stranded alone on an island it finds, for example, support in *IMATU obo Kelebone Khoaelene v UT Malinzi and Raymond Mhlaba Municipality*[8]. This court proposed that where an attempt was made to enforce an arbitration award through contempt proceedings, the pending review application had to be heard first. The rationale (as stated above) is that if the review were to fail, the arbitration award would remain intact, making enforcement proceedings proper. This Court adopted a similar approach in *Botha v Department of Education (Limpopo Province) and Others*[9], where it first addressed and determined the declaratory application before considering the contempt of court application.

[19] In the circumstances, my endorsement is warranted because prioritising the employer's interlocutory application accords with established legal principles and best promotes the LRA's overarching objective of efficiency.

Power and Jurisdiction

[20] This conclusion naturally leads to a consideration of the Court's power and jurisdiction to grant the relief sought.

[21] By virtue of section 158(1)(a)(iv), the Labour Court is expressly empowered with the authority to grant declaratory relief whenever circumstances require clarification of rights, obligations, or legal status.

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[8] (P22/2022) [2023] LC (09 February 2023).
[9] (2008) 29 ILJ 624 (LC).

[22] Nonetheless, it is not enough for this Court (lacking inherent jurisdiction) merely to be vested with statutory '*power*'; it must also be properly clothed with '*jurisdiction*' to exercise that power lawfully. For example, the Labour Court may be granted the statutory power to issue costs orders, in terms of section 158(vii), but that power cannot extend to matters falling outside its jurisdiction, such as divorce proceedings.

[23] It bears noting that in *Booysen v Minister of Safety and Security and Others*,[10] this Court declined to grant the relief sought, in that matter, as its inherent powers are confined to matters within its jurisdiction. This approach was recently given approval by the Labour Appeal Court in *Cibane and Another v Premier of Province of Kwazulu-Natal*[11] and illustrates that statutory power without jurisdiction is ineffectual.

[24] Therefore to avoid its orders being void, and consigned to oblivion, this Court must be satisfied not only of its statutory power but also of its jurisdictional competence to issue orders sought.

[25] In *National Commissioner of Correctional Services, N.O. and Another v Zono*[12], this Court had occasion to pronounce on the scope of its jurisdiction in relation to declaratory orders. It clarified that section 157(1) of the LRA establishes the Labour Court's jurisdiction in respect of all matters that, "*in terms of the Act or any other law*"[13], are to be determined by this Court. The phrase "*in terms of the Act*" must accordingly be understood as referring to matters provided for in the LRA and given that declaratory orders are explicitly provided for, in section 158(1)(a)(iv), it follows that when this provision is read together with section

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[10] (2009) 30 ILJ 301 (LC), at paragraph 42.
[11] (2025) 46 ILJ 2587 (LAC).
[12] [2024] 10 BLLR 1060 (LC).
[13] Examples of "any other law", in this context, would be a statute outside the Labour Relations Act that nonetheless confers jurisdiction on the Labour Court. For instance: Basic Conditions of Employment Act, section 77(3), gives the Labour Court concurrent jurisdiction with the civil courts to determine any matter concerning a contract of employment. Employment Equity Act, section 50(1): empowers the Labour Court to make any appropriate order, including compensation, in disputes about unfair discrimination.

157(1), the Labour Court is also vested with jurisdiction to issue declaratory orders.

[26] However, quite apart from questions of power and jurisdiction, it remains incumbent upon an applicant (in this case, the employees) to establish, on the merits, a substantive basis for the relief sought.

Incorrect procedure?

[27] Nevertheless regardless of the questions of the power, jurisdiction, as well as the merits, the employees contend that this court ought to decline to entertain the employer's application on, among other grounds, the basis that – (i) an arbitration award, once issued, is final and binding in terms of section 143 of the LRA, (ii) it cannot be impugned on the merits of the dispute through a declaratory order (iii) the proper avenue for challenging the validity or correctness of an arbitration award is a review application under section 145 of the LRA (iv) therefore to permit a declaratory order, in these circumstances, would amount to an impermissible circumvention of the statutory review process, and (v) the employer's supine approach ought, in the same vein, to be condemned.

[28] Mr. Nzuzo's contention, on behalf of the employees that an arbitration award is "*final and binding*" under section 143 of the LRA, is correct in principle. However, section 143(1) contemplates that an award is binding unless it is set aside on review (or appeal), rescinded in terms of section 144, or declared invalid through appropriate declaratory relief under section 158(1)(iv). The final and binding principle is thus not absolute.

[29] My view is that, given the purposive and distinctive nature of the LRA as a specialist dispensation, it is improbable that the legislature intended to specifically confer jurisdiction on the Labour Court to grant declaratory orders, only to have

that power curtailed whenever review of an arbitration award is available. Had such a limitation been contemplated, the legislature would have said so expressly.

[30] Declaratory relief is not incidental it forms part of the broader remedial framework available to the Court, and serves to prevent unnecessary procedural detours. To exclude it in the context of review proceedings would create an artificial restriction and frustrating the Court's ability to clarify rights, obligations, and the legal consequences of invalid arbitration awards. This consideration is particularly compelling in circumstances where review does not constitute the most appropriate remedy, or where a party has legitimately elected not to pursue that route, and instead alleges that the decision, under scrutiny, is a nullity.

[31] The employees' argument conflates two distinct issues which is the review (of the merits of the award) and declaratory relief (on, for example, its enforceability or validity). Far from undermining the principle of finality the employer's application is concerned not with litigating the reviewable merits but with clarifying whether the award can lawfully be enforced.

[32] Accordingly, the Labour Court's power to issue declaratory orders must be seen as integral to its role in supervising invalid arbitration awards and the legislature, in crafting the LRA, intended to provide this Court with a comprehensive toolkit to address the complexities of labour disputes, and declaratory relief is a critical component of that toolkit.

[33] Apart from my interpretation, the principle that review proceedings may serve as an alternative remedy has also been recognized by the judgment in *NUMSA v CCMA and Others*[14], where this Court observed that review proceedings, if the correct test is applied, may equally provide a means of resolving the problem in place of a declaratory application. The Court nevertheless proceeded to hear and

[14] (2000) 21 ILJ 1634 (LC).

determine the declaratory application, thereby emphasizing that the existence of the review route does not, in itself, operate as a bar to declaratory relief.

[34] This approach also resonated with *Remo Ventures (Pty) Ltd and Others v Honourable Justice Neels Claassen and Others*[15], wherein the High Court entertained an application for declaratory relief, which was framed in the alternative to a prayer that the arbitrator's award be reviewed and set aside. This procedural posture demonstrates that declaratory relief may not only coexist with a review application but, in appropriate circumstances, operate in the place of a review. Moreover, the *Remo Ventures*, matter proceeded on appeal, yet the appellate court did not criticise or disturb the procedural approach adopted by the court *a quo*. The absence of any adverse comment reinforces the acceptability of this method, underlining that the coupling of declaratory relief with review or the substitution of one for the other is procedurally and judicially acceptable.

[35] In other words, these authorities confirm that our courts have acknowledged a measure of procedural flexibility and litigants are not rigidly confined to one form of relief or cause of action, but, for example, may pursue declaratory orders that effectively serve the same purpose as review proceedings.

[36] As a result, the employer cannot be faulted for the procedure it adopted.

[37] I also do not fault the employer for electing not to review the award and instead adopting a 'wait-and-see' approach, particularly given that arbitration awards are not all automatically enforceable. Awards, for example, that are tainted by illegality, offend public policy, or have been issued without jurisdiction or *ultra vires* are a nullity in law and therefore unenforceable.[16]

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[15] (29662/2021) [2022] ZAGPPHC 621 (16 August 2022).
[16] Butler & Finsen, Arbitration in South Africa: Law and Practice (Juta, 1993).

[38] Consequently, in regard to the employees' supine objection, it is my determination, a losing party who regards an award as '*a nullity*' is entitled to remain passive and await enforcement proceedings by the successful party, rather than being compelled to take proactive steps to challenge the award.

[39] Again my view is not isolated because this principle was expressly accepted by the High Court in *Independent Municipal and Allied Trade Union v Buffalo City Municipality and Professor R Midgley*,[17] where it was stated that a party against whom an award has been given may adopt a passive stance, await enforcement proceedings, and then raise invalidity as a defence to resist enforcement. It is therefore rational for a party (like the employer) to reserve its challenge until enforcement is pursued, thereby avoiding unnecessary litigation over an award that may never be acted upon.

[40] Even if I am wrong in my above conclusions it is my judgment that each case must be determined on its merits and/or it remains trite law that declaratory relief lies particularly within the discretion of the Court to grant or refuse.[18]

[41] In exercising the discretion afforded to me, I find no legal basis to censure the employer for electing the declaratory rather than the review path. This is particularly given the specific merits of the case as well as the employees' extensive delay in enforcement, as the award was issued on 31 May 2021 while the employees' application was only delivered almost three years later, on 20 February 2024. In other words, this delay further underlines the prudence of the employer's decision to await formal proceedings rather than litigate prematurely.

[42] It follows that the employer's choice of procedure was neither irregular nor impermissible, but entirely consistent with established judicial practice.

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[17] Unreported judgment of the High Court, Eastern Cape Division (Case No. 119/2001), 31 January 2002.
[18] Nomcebo Nothule Nkwanyana and Emazulwini Production and Projects (Pty) Ltd v Open Mic Productions (Pty) Ltd and Africori SA (Pty) Ltd [2025] ZAGPPHC 422 (9 May 2025).

Consequently, I reject the employees' contention that the employer adopted an incorrect procedure.

Requirements for declarator

[43] Even so, it is not sufficient for an applicant merely to demonstrate that the correct (declaratory) procedure has been followed. For litigants to succeed in obtaining declaratory relief, they must also satisfy the Court on three essential fronts – first, that the Court has the requisite power and jurisdiction to grant the order; second, that the applicant demonstrates a direct and legitimate interest (standing) in the dispute; and third, that a specific right, obligation, or legal (positions, relationships) status exists which requires judicial clarification of a controversy of a justiciable nature. In other words, the application must not be confined to academic speculation or abstract propositions. Its purpose is to secure the resolution of an actual controversy and to dispel a material uncertainty that has practical consequences for the parties concerned.[19]

Analysis of material

[44] In my judgment, the employer's application meets all these requirements. Firstly, because the LRA, as already noted, clearly confers upon this court both the power and jurisdiction to make declaratory orders. Secondly, the employer is directly affected by the award, because if the employees' application succeeds or reaches its final outcome, the employer may be compelled to comply with an award that is legally compromised. In such circumstances, the employer's legal position would be directly undermined and its interests materially prejudiced by the ultimate order of this Court. Therefore, I find that the employer also satisfies the interest requirement, in the matter, given its clear and substantial stake in the award or potential court order.

[19] See Herbstein & Van Winsen, *The Civil Practice of the Supreme Court of South Africa* (4th ed.) at 1054, together with the authorities cited therein.

[45] This leads to the third requirement, which is linked to the paramount question namely whether the Commissioner acted with the requisite authority when issuing the award under examination, such that it cannot be enforced as a binding order of the Labour Court.

[46] In this context, the employer's application is consequently or self-evidently aimed at resolving a real controversy, which is neither academic, nor abstract, nor hypothetical. The declaratory relief, once granted, will operate with legal force and effect, establishing rights and obligations that will indeed bind the parties and govern their future conduct.

[47] Another consideration is that if the law does not permit an arbitration award, the consequences are unmistakable – the public interest, the interest of justice, and the rule of law compel the judiciary to fulfil its constitutional function: to declare the law and to secure clarity, legality, and justice.

Written agreement required

[48] The first and most immediate clarity that emerges from the abovementioned controversy, or factual and legal reality, is that section 142A speaks in unequivocal terms. Its wording is explicit and leaves no room for ambiguity. A settlement agreement must be reduced to writing in order to fall within its scope. This is underlined by section 142A(2), which provides: *"For the purposes of subsection (1), a settlement agreement is a written agreement in settlement of a dispute ...".*

[49] The statutory text therefore establishes a threshold requirement that only written agreements qualify for conversion into arbitration awards under this provision.

[50] In support of this interpretation, Brassey in *Employment and Labour Law, Vol. 3: Commentary on the Labour Relations Act* observes: *"An oral agreement cannot ... be made an award in application proceedings of the nature envisaged in this*

section." This authoritative commentary reinforces the plain meaning of the statute and confirms that oral undertakings, however genuine or consensual, fall outside the ambit of section 142A.

[51] Consequently, the Commissioner had no authority to convert a supposed oral agreement into an enforceable section 142A arbitration award.

Two distinct pathways

[52] Another factor discharging clarity is the phrase "*by agreement between the parties or on application by a party*" in section 142A. It is necessary to have regard to this provision, since the employees and/or the Commissioner clearly failed to appreciate that this section contemplates only two distinct pathways by which a settlement agreement may be converted into an arbitration award – i.e. either (one) by agreement between the parties or (two) on application, by one of the parties. The "*on application*" route applies where one party seeks enforcement because the other party has, for example, failed to comply with the agreement. The "*by agreement*" route, in contrast, applies where both parties jointly agree that their written settlement agreement be made an award, thereby giving it the force of law.

[53] This section expressly employs both the singular term "*party*" and the plural "*parties*." The use of these distinct terms confirms that the legislature envisaged that a single *party* may apply for the agreement to alter into an award, and another where both *parties*, acting jointly, may consent to their written agreement being made an award. To read the section otherwise would do harm to its language and undermine the legislative intention.

[54] This statutory precondition is absent, in this matter, because there had factually not been agreement or an application by any party to make their "written" agreement an arbitration award. In any event, this was an impossible feat, since

no written contract existed to provide the basis for the "agreement" or "application" contemplated in section 142A.

[55] The factual reality and legal consequence is that the Commissioner acted on her own accord, thereby irregularly and unlawfully creating a third pathway wholly *ultra vires* or outside the scope of section 142A.

Section 74 exclusion

[56] Another important consideration is that section 142A provides that the CCMA or empowered Bargaining Councils can turn a settlement agreement into an arbitration award only if the dispute is one that could properly be referred to arbitration or the Labour Court, but excludes disputes that fall under section 74(4) or section 75(7) of the LRA.

[57] The exclusion means if the dispute is one about essential services, even if the parties reach a settlement agreement, the Commissioner cannot convert that agreement into an arbitration award under section 142A.

[58] Therefore only disputes that fall within the ordinary jurisdiction of arbitration or the Labour Court can be converted. This means, if two parties in an ordinary employment dispute (e.g. unfair dismissal and benefits) reach a written settlement, the CCMA and/or empowered Councils can convert that settlement into an arbitration award under section 142A. But if the dispute arises in an essential service (e.g. nurses in a public hospital striking over working hours), even if the parties sign a settlement agreement the Commissioner cannot convert it into an arbitration award, under section 142A. The dispute must follow the special procedures in sections 74 and 75.

[59] This means that, while the commissioner is barred from issuing an arbitration award under section 142A, the parties' agreement may still conclude in a valid

settlement, which can be made an order of court and enforced through the normal Labour Court section 158(c) procedures.[20]

[60] In this case, it is evident that the Commissioner, despite these stipulations, acted as though empowered to convert the agreement. However, she lacked authority to do so. The statutory design draws a clear boundary. Essential service disputes are excluded from section 142A, and any attempt to bypass the procedures in sections 74 and 75 results in an *ultra vires* decision.

Declaration

[61] The abovementioned facts clearly establish that the Commissioner lacked authority on multiple fronts. The critical question is – what is the effect of an award made without authority? The answer is firmly rooted in principle, because authority is the essential foundation upon which judicial and quasi-judicial influence rests. Without such, any order no matter how carefully reasoned, well-intentioned, or procedurally regular cannot stand. It is a nullity in law. The defect is not even curable, by consent of the parties, because authority is conferred by statute or other legal instrument.

[62] The courts have consistently affirmed this position. In *Eskom v Marshall and Others*[21] the Labour Court concluded that a tribunal which issues an order without jurisdiction acts *ultra vires*, and the result is that the order is a nullity.

[63] This principle has deep roots in South African jurisprudence. As far back as 1926, the Appellate Division in *Schierhout v Minister of Justice*[22] held that a thing done contrary to the direct prohibition of the law is *void* and of no effect. This position

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[20] Section 158(1)(c) reads: The Labour Court may – make any settlement agreement ... an order of the Court.
[21] (2003) 1 BLLR 12 (LC).
[22] 1926 AD 99.

remains authoritative, emphasizing that acts performed in contravention of statutory limits are legally ineffectual.

[64] Similarly, in *Vidavsky v Body Corporate of Sunhill Villas*[23] the Supreme Court of Appeal unanimously held that where there is an absence of authority, the resultant award is null and void and incapable of producing legal consequences.

[65] In sum, these authorities demonstrates that where a CCMA or Bargaining Council commissioner acts outside the powers conferred by the LRA, the resultant award is a nullity, and incapable of elevation to lawful and enforceable status.

[66] In the circumstances, the Commissioner's purported award is void *ab initio* since she lacked lawful authority to issue it. To elevate such an award to the status of a court order would undermine the integrity of section 142A and erode the principle that only valid, enforceable awards may be converted into court orders. Otherwise it would permit commissioners to act beyond the limits of their statutory mandate, thereby compromising both the rule of law and the legislative design.

[67] In the result, the employer's application has merit.

Costs

[68] Regarding the issue of costs, I am persuaded that the contemplation underlying section 165 of the LRA would not be advanced were I to order the employees to bear the costs of this litigation. The employment relationship is, by its nature, ongoing, and the imposition of costs against employees could preventable undermine same.

[23] [2005] 4 All SA 201 (SCA); 2005 (5) SA 200 (SCA).

[69] Furthermore, my view is that the true responsibility for the costs does not lay with the parties. However, I will refrain from making any pronouncement in that regard, as it falls outside the scope of the present determination.

[70] Accordingly, and in keeping with the broader interests of justice, equity and fairness, I deem it appropriate to make no order as to costs.

Conclusion

[71] In conclusion it must be emphasised that the manner in which the proceedings unfolded means that the Bargaining Council never in fact dealt with the employees' (section 74(4)) dispute. The employees accordingly have the right to re-approach the Bargaining Council to have their matter properly attended to. For this reason, I have not engaged with all the issues raised by Mr. Kroon, SC since those may well be ventilated afresh should the employees decide to revert to the Bargaining Council, where a commissioner will be able to address them in due course.

[72] Another remark I make is that I deliberately refer to section 74(4) (in paragraph 71 above) as opposed to section 142A because, for all the reasons stated above, I hold the view that section 142A route was improperly invoked and should never been pursued by the commissioner. My above-mentioned conclusions however, remain valid and are intended to stand in the event that I am found to be incorrect in this regard.

[73] A final consideration is that this court retains a discretion when asked to convert an arbitration award into an order of court. Such discretion ensures that the court does not simply rubber-stamp an award, but first satisfies itself that the award is legally enforceable.

[74] Without this safeguard, the law would expose an affected party to absurd consequences. To illustrate, if a CCMA or Bargaining Council Commissioner were

to purport to grant a divorce decree and a maintenance order for minor children, the employees' reasoning would suggest that (provided the award was clear and unchallenged) it must automatically made an order of court. That conclusion is plainly untenable.

[75] Accordingly and for all the reasons advanced above, the following order is made:

Order

1. The arbitration award issued by the South African Local Government Bargaining Council, under case number ECD072001, dated 31 May 2012, is a nullity and unenforceable.

2. There is no order as to costs.

Mark Thys

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr. PN Kroon.
Instructed by	McWilliams & Elliot Inc.
For the Respondent:	Mr. S Nzuzo.
Instructed by	Diko Attorneys.