



- (1) Reportable: Yes/No
(2) Of interest to other Judges: Yes/No
(3) Revised

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: **2025-239196**

In the matter between:

DEPARTMENT OF HIGHER EDUCATION

Applicant

and

**SILAS RAMOSHOWANA NO
GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL
MBULAHENI BEN KHAKHU
SHERIFF PRETORIA CENTRAL**

**First Respondent
Second Respondent**

**Third Respondent
Fourth Respondent**

In re:

DEPARTMENT OF HIGHER EDUCATION

Applicant

and

**SILAS RAMOSHOWANA NO
GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL**

**First Respondent
Second Respondent**

MBULAHENI BEN KHAKHU

Third Respondent

Heard: 11 December 2025

Delivered: 16 February 2026 (This judgment was handed down electronically by emailing a copy to the parties. 16 February 2026 is deemed to be the date of delivery of this judgment).

JUDGMENT

KROON AJ

Introduction

- [1] This is an opposed application, one of many set down on the urgent roll during the December 2025 recess, to set aside a “*Writ of Execution*” and to stay the enforcement of an arbitration award dated 28 June 2019 (the Award).
- [2] The matter has a long and troubled history. Pursuant to the issuance of the Award, the Applicant (the Department) launched a review application on 16 August 2019, and, save for a security bond dated 18 June 2021, the challenge to the Award came to a standstill. Thus, what looms over the present state of affairs is that, although more than six years have elapsed since the review application was launched, the Court remains uncertain about its status. The Court is told no more by the Department, through counsel, than that the “*file*” could not be located. The way forward, if there is one, remains unclear, and it seems the application will continue to languish indefinitely in legal no-man’s-land.

- [3] Meanwhile, as the years pass, the Award is accruing interest. According to the Court's calculations,¹ given the passage of some 6.45 years since the issuance of the Award on 30 June 2019, applying the prescribed rate of interest at the time,² then, as of 12 December 2025 (the hearing date), the interest accrued on the Award is in an amount of some R320 000,00. This on a capital amount of R484 860,00.
- [4] The inordinate six-year delay is explained in a princely two pages in the founding affidavit. From the Department's side, the deponent to the founding affidavit, Mr Shikwambana, a legal administration officer within the employ of the Department, says little more than that, pursuant to enquiries by unidentified people on unidentified dates, the Department was informed by the Office of the State Attorney, again it is not specified as to when and by whom, that the attorneys in that office who initially dealt with the matter were either no longer in the employ of the State Attorney or, for reasons which are not disclosed, could not be located. The Court is told that Mr Kopman left in 2022 and Ms Gejengane in 2023. Ms Naidoo, who is apparently now "*handling the matter*," could not be found, notwithstanding that she is still in the employ of the State Attorney.
- [5] As to the role played by the State Attorney during these six years, there is, disturbingly, no affidavit from anyone in that office explaining what happened during this period of inactivity. Mr Masondo, from the Office of the State Attorney, has deposed to an affidavit, but his evidence is confined to the period from 10 October 2025 to the date of the hearing. As a result, the remarkable six-year delay is, for all intents, unexplained. The allegations made by the Department in respect of the prosecution of the review application are hearsay, and they are hearsay of the worst

¹ which are obviously not binding as this was not an issue before the Court

² 10.25%

kind because Mr Shikwambana does not identify the sources of his information.

- [6] To exacerbate matters, the Court has not been placed in a position to evaluate whether the review application has been timeously instituted or is arguable. The founding affidavit makes a few allegations regarding the Award's reviewability. But these allegations are not verifiable in the absence of the review application itself, which is presumably contained in the file, which cannot be located. The deponent does not expressly say that the allegations he makes correspond with the grounds of review or that he has even seen the review application. The Court is left to speculate whether his allegations are based on his memory of something which he may have seen six years ago when the review application was launched, or whether he relies on some other unidentified source. Ordinarily, this would have been sufficient, without more, to have dismissed the application, at least insofar as it concerns the stay in respect of the enforcement of the Award. An applicant is not permitted, save possibly in the most exceptional of circumstances, to ask a Court to grant a stay, as it were, in the dark. However, more needs to be said.

Has the review application lapsed?

- [7] It was contended on behalf of the Department that the Court should not adjudicate on whether the review application had lapsed. If I understood the submission correctly, it was that this task was solely for the review court. Leaving aside that the hearing of a reinstatement application does not fall solely within the purview of the review court (it is a substantive application that can be adjudicated independently of the

review application itself),³ I find myself unable to endorse this submission. The lapsing of the review application has been squarely raised in the answering affidavit. It goes to the question of jurisdiction. If there is no pending review application, the prayer that the enforcement of the Award be stayed pending the review application must necessarily fail, as it is ordinarily not permissible to grant an interdict *pendente lite* when there are no pending proceedings. In *Singh v Adam*,⁴ the Court commented as follows:

"[16] ... Before an interim interdict pendente lite can be granted, there must be a pending lis regarding the restraint of trade. ..."

[8] The Court accepts that this is not an immutable rule and that if there had been an undertaking by the Department to seek a stay so that it may bring a reinstatement application within a specified time period, this may potentially have placed a different complexion on the matter. However, the Department would still have had to overcome the unexplained delay. I emphasise that the Department did not take responsibility for its failure to prosecute the review application and did not acknowledge that it had lapsed. The Department did not seek a stay to bring a reinstatement application.

[9] If one considers the Department's own allegations regarding the matter's history, it is clear that the review application has lapsed. It is not in dispute that, following the filing of the review application on 16 August 2019, no further pleadings were filed, save for the alleged delivery of a security bond dated 18 June 2021, approximately two years later. After the launch of the review application in August 2019, the next step would have been to deliver the record. This was not done.

³ Although it is often convenient to hear the two applications together to avoid a duplication of costs and piecemeal litigation Cf *NUMSA obo Charles v DSV Solutions (Pty) Ltd and Another* [2021] ZALCPE 11 (22 October 2021)

⁴ (2006) 27 IJL 385 (LC)

The allegations regarding the record are unsatisfactory. The deponent says, by way of hearsay, that after there were difficulties with the record, the other side was, without success, approached for their co-operation. He then states that, on an unidentified date, he was advised by an unknown person that, after the other side failed to co-operate, the Judge President was approached for assistance. No documentation is provided to corroborate this allegation. If indeed such an approach was made, he does not know what the response was, if any.

[10] A letter is attached to the founding affidavit indicating that Mr Kopman had approached Mr Khakhu's erstwhile attorneys of record on 20 July 2020 to request co-operation when it comes to the reconstruction of the record. In that letter, it is recorded that, pursuant to a notification from the Registrar on 24 March 2020, the record had been uplifted but that it was defective. Given the mandatory 60-day period applicable for the filing of the record as contained in the Practice Manual of the Labour Court of South Africa (the Practice Manual), the review application would, by virtue of paragraph 11.2.3 of the Practice Manual, have lapsed on 23 June 2020.

[11] The review application would, in any event, have lapsed on 16 August 2020 by virtue of paragraph 11.2.7 of the Practice Manual, which provides as follows:

"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 [sic] be archived or be removed from the archive.” (own emphasis)

Argument advanced by the Department in support of the contention that the review application had not lapsed

[12] The primary submission made on behalf of the Department in support of the contention that the review application had not lapsed was that it could not have lapsed because the Registrar had not given notice to the parties of the archiving. Counsel for the Department placed heavy reliance on *Gololo v Limpopo Department Economic Development Environment and Tourism and Others*,⁵ a case that addressed paragraph 16 of the Practice Manual.

[13] *Gololo* is not authority for the proposition advanced on behalf of the Department. As pointed out by the bench during the hearing, *Gololo* distinguishes paragraph 16.1 of the Practice Manual from other paragraphs containing deeming provisions, including paragraph 11.2.7. I quote as follows:

“[7] Paragraph 16.1 entitles the Registrar to archive a matter. In the current matter, the Registrar did not do so. Since the matter had not been archived, it remained alive, and the Labour [sic] erred in finding that, without notice to the appellant, it was deemed to have been withdrawn. This is so since paragraph 16.1 does not provide that when the six-month period has elapsed, a matter is automatically dismissed or deemed to have been withdrawn, even if no steps have been taken by the Registrar and the applicant has received no notice of this. In finding differently, the decision in November is wrong, and in the current matter, the court a quo erred in making the order that it did.

⁵ (2025) 46 ILJ 1985 (LAC); [2025] 9 BLLR 925 (LAC)

[8] This position is further bolstered by a complete reading of the Practice Manual, particularly at paragraph 11.2.7, which provides for the automatic archival of review applications where all the necessary documents in the application are not filed within a 12-month period from the date on which the application was launched. In contrast to paragraph 16.1, paragraph 11.2.7 does not require any action on the part of the Registrar for the matter to acquire the status of 'archived', rather, it is the inaction on the part of a delinquent party within the stipulated time period which changes the status of their application to one which is archived, and requiring court intervention to resuscitate it." (own emphasis)

[14] The correct position is as set out in *E Tradex (Pty) Ltd t/a Global Trade Solution v Finch and Others*⁶ wherein the Labour Appeal Court explained that, under paragraph 11.2.7, the lapsing is automatic. I quote:

"[12] ...On these facts, on 16 January 2021, when the 12-month period since the launch of the application in terms of clause 11.2.7 had expired, automatically the case acquired the status of being archived; i.e., having lapsed or having been dismissed..."

What about the bond of security?

[15] The Department, in support of its argument, also relied on the bond of security which had been delivered after the review application had lapsed. If I understood the argument, it was that the filing of a security bond in respect of a lapsed review application somehow revived the review application. This reasoning is self-evidently incorrect. That would

⁶ (2022) 43 ILJ 2727 (LAC)

be for the tail to wag the dog. Only a reinstatement or revival application can salvage a lapsed review application.⁷

[16] In my view, if a security bond had been filed, it would have been a nullity. It could have had no legal significance because it would have been delivered in respect of an application which is no longer pending before the Court.⁸ In *Sidas Security v Commission for Conciliation, Mediation and Arbitration and Others*⁹ the Court explained the position as follows:

“7. The deemed withdrawal of a review application in terms of paragraph 11.2.3 of the Practice Manual is automatic and occurs ipso jure (by operation of law) and no pronouncement to this effect is necessary although it may be convenient or even good practice for the Registrar to notify the parties of this event.

8. As a matter of logic, it must follow that when a review application is deemed to have been withdrawn then, absent an application for the reinstatement of that application, no further litigation should arise in respect of that application save possibly if a respondent sought to recover costs in the wake of the deemed withdrawal. A Court should, absent special circumstances, thus be reluctant to grant any relief pursuant to the bringing of a dismissal application where the review application is deemed to have been withdrawn. This is for the elementary reason that such an application would be superfluous and redundant. A Court would not want, as a matter of judicial policy, to encourage or in any way endorse or give its imprimatur (approval) to the institution of unnecessary litigation which would in turn serve only to congest its roll and would result in a wastage of time and costs.

⁷ Cf *E Tradex* at para [16]

⁸ *Inxuba Yethemba Municipality v South African Local Government Bargaining Council and Others* (PR41/2020) [2022] ZALCPE 1 at para [14]

⁹ (2022) 43 ILJ 934 (LC)

...

10. *By way of further amplification, if a review application is deemed to have been withdrawn then there are no proceedings pending before the Court or, expressed differently, there is no longer a lis before it. Absent an application for the reinstatement of the review application, the Court would have no jurisdiction to entertain the review application and what is more any steps taken by the parties in respect of a review application which is deemed to have been withdrawn will have no legal significance because the parties would effectively be litigating, as it were, in a vacuum.*" (own emphasis)

[17] Thus, after a review application has lapsed, it is impermissible to deliver any further pleadings in respect of a review application which, for all intents, no longer exists. In *Festive, A Division of Astral Operations Limited v Commission for Conciliation, Mediation and Arbitration and Others*¹⁰ the Court explained the position as follows:

"[10] In the present case, the third respondent only filed an application for condonation of the late filing of the transcribed record way after the matter had been deemed withdrawn or archived in terms of the Practice Manual. However, there is no application for the reinstatement of the review application despite the third respondent's concession that the review application is deemed to have been withdrawn, alternatively or archived for the dilatory prosecution. This approach was found to be irregular in *Sol Plaatjie Local Municipality v South African Local Government Bargaining Council and Others*, where Prinsloo, J, found that without an application reinstating the review application, there is no application to entertain, including a condonation application for the late filing of the record....."

¹⁰ JR1686/15) [2020] ZALCJHB 178 (31 August 2020)

- [18] In this context, the Department also contended that the security bond still needed to be set aside. The Court disagrees. If a party files a pleading in respect of a non-existent application, it can be treated as *pro non scripto*. In *Sidas*, it was further explained that:

“18. To summarise in more general terms, what has happened is that the party which brought the review application has furnished security as contemplated by Section 145(7) of the LRA but the review application has, subsequent to that payment, become deemed to have been withdrawn. As mentioned above, there is thus no longer a *lis* before the Court. The furnishing of security in terms of Section 145(7) of the LRA cannot, in and of itself, sustain, breathe life into, resurrect or in any way salvage a review application which would otherwise correctly be regarded as deemed to have been withdrawn. Where a review application is ‘deemed’ to have been withdrawn in terms of the Practice Manual, that operation of deeming is, on a proper interpretation of the Practice Manual, definite in effect[14] and there is, for all intents, no longer a review application in existence.

19. Thus, as matters currently stand, there is no obstacle to Mr Totolo executing on the award.” (own emphasis)

Was there an obligation on Mr Khakhu to have applied for the review application to be dismissed?

- [19] Where a review application has, as in this case, lapsed, there can be no basis for the granting of a stay application, save possibly, as mentioned above, in exceptional circumstances where a litigant acknowledges that a review application has lapsed, gives an undertaking that a reinstatement application will be launched within a stipulated period and demonstrates that such an application enjoyed prospects of success. But the general rule is that, if no court process is pending, a court will

exercise its discretion not to grant a stay particularly where there is no indication that any such Court process will be instituted.

- [20] This much was confirmed, albeit implicitly, by the Labour Appeal Court in *Cheou v Department of Justice and Constitutional Development Limpopo and Others*.¹¹ In *Cross Border Road Transport Agency v Mpato and Others*¹² the Court held as follows:

“The result is that the jurisdictional prerequisites for the review are non-existent in that there is no application for condonation, nor has there been service of the review. Accordingly, there is no review application that complies with the rules of this court. In the circumstances, there is no process pending which warrants the granting of [the order to stay execution on the arbitration award].” (own emphasis)

- [21] It is, however, the case of the Department,¹³ that Mr Khakhu should have first applied to have the review application dismissed. The Labour Appeal Court has recently, in *City of Tshwane Metropolitan Municipality v South African Local Government Bargaining Council and Others*¹⁴, reiterated what, with due respect, should be obvious, that there is no requirement to have a lapsed review application dismissed before execution can take place. In short, it has always been the case that, if any legal proceedings are deemed to have lapsed, absent a successful stay application, execution is permissible.

Is it competent to dismiss a review application which is deemed to be withdrawn or has lapsed?

- [22] Although it is not strictly necessary to consider the point whether it was

¹¹ [2025] 4 BLLR 419 (LAC)

¹² [2010] ZAGPPHC 635.

¹³ at para [12.10] of the founding affidavit

¹⁴ [2025] 11 BLLR 1145 (LAC); (2025) 46 ILJ 2840 (LAC) at para [22]

even competent for Mr Khakhu to have brought a dismissal application, given the circumstance that he was under no obligation to do so before execution, the Court, nonetheless, wishes to say something about the current state of the law on this point. There seem to be conflicting Labour Appeal Court judgments on the issue:

[22.1] There is the approach taken in *E Tradex* as echoed in *South African Police Services v Coericius and Others*.¹⁵ In terms of this approach, a review application which is deemed to have been withdrawn is to be regarded as lapsed or dismissed and the Court will have no jurisdiction to deal with it. The Registrar is not permitted to set it down. This is the approach adopted in civil litigation.

[22.2] There is the approach in *City of Tshwane*, which embraces the notion that, notwithstanding that, in respect of a lapsed review application, there is no pending application, the Court may still dismiss it. The Registrar may set it down (not because the Applicant wants it set down but because the Respondent does), if only for it to be exposed to an order of dismissal.

[23] In *Coericius*, Sutherland JA explained what “*deemed to be withdrawn*” means. I quote:

“[9] Because the respondent had raised squarely the issue that the review application was, in terms of clause 11.2.3, “*deemed to be withdrawn*” and sought an order dismissing it, the Labour Court had to give an answer. What does “*withdrawn*” in the context of clause 11.2.3 mean? Plainly, it must be understood to mean that the application is abandoned and such an applicant is no longer intent on seeking the relief in the review application.” (own emphasis)

¹⁵ [2023] 1 BLLR 28 (LAC)

- [24] According to *Coericius*, it is the lapse of the review application that lends certainty to the proceedings. It signals that the *dominus litus*, who has brought the application, no longer intends to pursue it. It has, for all intents, in the words of Sutherland JA, been “*abandoned*”. The Supreme Court of Appeal in *Lebra Development (Pty) Ltd and Others v Bester and Others*¹⁶ explained in words which it seems to me find equal application to the prosecution of review applications as follows:

“[24] Legal certainty requires a party aggrieved by an order of court to prosecute its appeal speedily. In the interest of justice, appeals should be heard as soon as possible. Parties must be able to continue with their lives post-litigation without the possibility of legal action indefinitely hanging over their heads. To facilitate legal certainty, the effect of Rule 49(6)(a) is that an appeal is ipso facto deemed to have lapsed after the expiry of the periods provided in the Rule.” (own emphasis)

- [25] *Coericius* concerned an appeal emanating from the Cape Town Labour Court against a decision by Rabkin-Naicker J in *South African Police Services v Coericius N.N.O. and Others*¹⁷ in terms of which the learned Judge found, relying on *Macsteel Trading Wadeville v Van der Merwe NO & others*,¹⁸ that it was permissible to dismiss a lapsed review application. The finding of the Court *a quo* was, however, overturned on appeal. Although *Coericius* did not expressly address whether a review application could be dismissed, in upholding the appeal it set out the three aspects of the controversy between the litigants which fell to be considered by the Court *a quo* on remittal.¹⁹ The possible dismissal of the review application was not one of them.

¹⁶ (A154/2022) [2024] ZAGPPHC 1087 (21 October 2024)

¹⁷ (C 263 of 2019) [2021] ZALCCT 70 (30 August 2021)

¹⁸ (2019) 40 ILJ 798 (LAC)

¹⁹ at para [19]

- [26] In *E Tradex*, the Labour Appeal Court, again per Sutherland JA, emphasising that the Registrar is prohibited from setting down a lapsed review,²⁰ explained the position as follows:

“[10] The use of the term ‘archived’ is peculiar to the Labour Court Practice Manual. In the general civil courts, for example, the failure to prosecute an appeal timeously results in the appeal having lapsed.²¹ The effect of that is that the case shall not be dealt with by a court unless an application to reinstate the appeal is made. It is, in our view, plain that the archiving of a Labour Court case was intended to have the identical effect; indeed, clause 16.3 goes even further, to equate the consequence of an archiving of a case to be understood to mean the application is ‘dismissed’, albeit that a procedure exists to reinstate the case on good cause shown.” (own emphasis)

- [27] In *E Tradex*, the Court thus made it clear that it will not deal with a lapsed appeal unless there is a reinstatement application. Importantly, the Court decided that, whatever label you give to it, the lapsing of a review application was intended to have an “identical effect” to that of the lapsing of an appeal, to which the Court now turns. Simply put, the position, in civil law, is that, where legal proceedings are deemed to have lapsed, then, as a matter of law, there can be no question of dismissing such proceedings. This is because there is no *lis*, and it is not competent to dismiss a non-existent application. If, however, there is a dispute as to whether an application has lapsed, then a declaratory order may be sought.

- [28] In *NAWA And Others V Marakala And Another*,²² Landman J explained that if an appeal is deemed to have lapsed the way to “*dispose of the matter*”, is to issue a declaratory order that the appeal is deemed to

²⁰ Paras [7] to [9]

²¹ Rule 49(6)(a) and (b) of the Uniform Rules of Court.

²² 2008 (5) SA 275 (Bh)

have lapsed.²³ As explained further in *Genesis One Lighting (Pty) v Bradley Lloyd Jamieson and Others*,²⁴ endorsed by the Full Bench in *Taute v Borman*,²⁵ the position when it comes to the lapsing of an application, as follows:

“[33] Rule 49(6)(a) expressly provides that if written application to the Registrar for the hearing of the appeal is not timeously made, the appeal “shall be deemed to have lapsed”. Accordingly, the consequence of a failure to comply with rule 49(6)(a) is a deemed lapsing of the appeal. Should there be a dispute about this, then the court can be approached for the appropriate declaratory relief as to whether the appeal has lapsed or not.” (own emphasis)

- [29] Whilst it is true that, as part of its inherent powers to regulate its own proceedings in terms of section 173 of the Constitution, the Court has the power to dismiss an application without considering the merits of the matter if there is an abuse of Court process,²⁶ it, however, has no jurisdiction to dismiss an application that is not pending before the Court. In such circumstances, there is no issue for the Court to decide, and the Court lacks jurisdiction. In *PL v YL*,²⁷ the Full Bench explained as follows:

“[24] the court’s mandate or jurisdiction is determined by the lis between the parties. The court’s authority in other words does not extend beyond the issues which the action is capable of raising, and which the parties themselves have raised in their pleadings. ...” (own emphasis)

²³ At paras [15] to [17]

²⁴ [2021] ZAGPJHC 862

²⁵ (CIV APP MG 13/2023) [2024] ZANWHC 66

²⁶ *Vena and Another v Vena and Others* 2010 (2) SA 248 (ECP) at para [7]

²⁷ (2013 (6) SA 28 (ECG)

[30] Applying this *dictum*, if an applicant in a lapsed review application has elected not to bring a reinstatement application, it logically has not presented any claim for the Court to decide. It has not given the Court any mandate, and the Court has no jurisdiction to pronounce on the claim he has abandoned, as it is not before the Court.

[31] In *MEC for Health, Province of Eastern Cape NO and Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute*,²⁸ the Supreme Court of Appeal, in a judgment confirmed by the Constitutional Court, explained the position as follows:

“[27] In my view, Makaula J had no jurisdiction to set aside the approvals granted by Diliza in the absence of either an application or a counter-application in which that relief was sought. Section 6(1) of the PAJA, not surprisingly, postulates proper proceedings having been instituted as a pre-condition to a court’s exercise of its powers of judicial review when it states that ‘[a]ny person may institute proceedings in a court . . . for the judicial review of an administrative action’. In terms of s 8(1), a court may grant just and equitable relief, including the setting aside of an administrative action, ‘in proceedings for judicial review in terms of s 6(1)’. Taken together, these provisions mean no more than that, before a court may set aside an administrative action, there must have been proceedings for judicial review that were brought for that relief, in exactly the same way that, before a court may grant an award of damages, there must have been a claim instituted in accordance with the proper procedure.” (own emphasis)

[32] At the risk of restating the point *ad nauseam*, if a review application has lapsed, then there is no application, and the Court will have no jurisdiction. In terms of the common law, as embraced by *E Tradex* and

²⁸ 2014 (3) SA 219 (SCA)

Coericius, the position is that where legal proceedings have lapsed, a court has no jurisdiction or authority to make a pronouncement on them, save that if there is uncertainty whether it has, at the level of proper fact, indeed lapsed. In such circumstances, a party may seek a declaratory order on this issue.

- [33] In *Jowell v Bramwell-Jones and Others*,²⁹ Heher J (as he then was before his elevation to the Supreme Court of Appeal) elaborated on this trite principle as follows:

“... Indeed, the court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. ...Moreover, in such an event, the parties themselves, or at any rate one of them, might well feel aggrieved; for a decision given on a claim or defence not made, or raised by or against a party is equivalent to not hearing him at all and may thus be a denial of justice. The Court does not provide its own terms of reference or conduct its own enquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial ... ” (own emphasis)

- [34] Heher J thus raises a further point. Why should a respondent who has, through his conduct, elected not to place his case before the Court for its judgment, nonetheless be subjected to a judgment? Although the jurisprudence is not harmonious, there has emerged a substantial body of case law which endorses the civil-law approach. By way of illustration:

- [34.1] In *Eskom Holdings SOC Ltd v Kgaile*³⁰ Van Niekerk J (as he then was) held as follows:

²⁹ 1998 (1) SA 836 (W)

“...The review application is thus deemed to have been withdrawn by the respondent. In the absence of an order reinstating the application, there is no review application that serves before the court. For the purpose of the Rule 11 application and the basis on which the dismissal of the review application is sought, there is nothing to dismiss. I agree with counsel for the applicant that in these circumstances, the appropriate order is a declarator to the effect that the review application is deemed to have been withdrawn.”

[34.2] In *Ndlela v Department of Correctional Services: In Re: Department of Correctional Services v Ndlela and Others*³¹ Nkutha-Nkontwana J (as she then was), held, with reference to *Macsteel Trading Wadeville v Van der Merwe NO and others*,³² that the Labour Court has no jurisdiction to “...entertain a defunct review application in terms of Rule 11 ...”.³³

[35] I now turn to the approach adopted in the *City of Tshwane*. What stands out to the Court is that the Labour Appeal Court did not, in that matter, tackle the biggest question, which is: If the Labour Court has no jurisdiction over the review application (something acknowledged by the Court in *City of Tshwane*³⁴), on what basis could it make a pronouncement effectively extinguishing a claim which is not before it?

[36] As to its *ratio*, the Court states that the cause of action underlying an application for the dismissal of a lapsed review application is firstly an entitlement to “*irrefutable finality*”.³⁵ This part of the reasoning is, respectfully, not reconcilable with the erstwhile Practice Manual and the

³⁰ [2021] ZALCJHB 8 at para [9]

³¹ [2022] ZALCJHB 133; [2022] JOL 54984 (LC).

³² (2019) 40 ILJ 798 (LAC)

³³ at para [15]

³⁴ at para [21]

³⁵ at para [23]

current Rules which provide that an applicant in a review application is entitled, as of right, to bring a reinstatement application. If an applicant has such a right, it must follow that a respondent has no right to “*irrefutable finality*” if that right means taking away the right of his opponent to bring a reinstatement application. Stripped of all embroidery, what the Court is in effect saying is that because a respondent has a right to finality it can rely on this right to take away the right of an applicant to apply for condonation.

[37] The second, but allied ground, put forward as a basis for the judgment is that a dismissal application can be brought if there has been an “*inordinate delay*” in the bringing of a reinstatement application. This reasoning is also difficult to follow because, as mentioned above, the very lapsing of the review application provides certainty and the longer the delay, the more certainty it must surely provide. Again, reference to the Rules is apposite. The Rules do not provide that an applicant in a review application has a right to bring a reinstatement application if the review has lapsed, except where there is an inordinate delay. Without wishing to belabour the point, the question of an inordinate delay and whether there is a good explanation therefor should be dealt with by the Court in the event that an application for reinstatement is brought.

[38] The Court further reasons³⁶ that, because the Court has jurisdiction to entertain an application for reinstatement, it follows, by implication, that it has jurisdiction to dismiss a lapsed review application. With due respect, this reasoning cannot be correct. It constitutes a *non sequitur*. The fact that the Labour Court has jurisdiction to entertain a reinstatement application means only that it can make an order in respect of that application, which would include an order either refusing or dismissing that application. However, it does not follow that because the Labour Court has jurisdiction to entertain a reinstatement

³⁶ at para [23]

application which is pending before it, it has jurisdiction to dismiss a review application which is not pending before it.

- [39] Importantly, the Court acknowledged³⁷ that the same principles which apply to a lapsed review application should apply when it comes to lapsed appeals in the Labour Appeal Court as well as the civil courts, but, as pointed out above, it is not competent for an appeal court to dismiss a lapsed appeal for the reason that there is no appeal in existence.
- [40] It appears that in the *City of Tshwane*, the Court endorsed a legal concept, foreign to jurisprudence, under which lapsed legal proceedings that are not pending before the Court may nonetheless be dismissed by the Court, even though there is no *lis*. The Court says, in effect that, even if an applicant does not wish to proceed with its application and does not wish to apply for it to be heard by the Court, the Respondent may, nonetheless, take that application and place it before the Court for dismissal.
- [41] As is apparent from the jurisprudence which supports this second school of thought, there has been recourse to all manner of metaphors to describe the existence of the lapsed review. The cases suggest that it takes some type of shadowy form. It is forgotten, but not dead. Taking a leaf from the book of this jurisprudence it, so to speak, hibernates in some oubliette³⁸ of the law with a lifespan which has no end. In matters of legal characterisation or description, precision is the touchstone. Whilst such analogies may be helpful, the Court should be careful not to risk substituting rhetoric for reason or principle. In the respectful view of this Court, the approach adopted in *City of Tshwane* is lacking in both

³⁷ at para [21]

³⁸ The term is derived from the French word *oublier* (to forget). An oubliette is a secret dungeon found in medieval castles, accessible only through a high ceiling trap door, designed to allow prisoners to be forgotten.

principle and coherency. It flouts the trite doctrine that if the Court does not have jurisdiction, it is not entitled to make an order which affects the substance of the matter. Where a Court has no jurisdiction over a matter, it must strike it from the roll. It is inherently contradictory to say that a Court has no jurisdiction to entertain a matter yet, in the same breath, to say that the same Court has jurisdiction to dismiss it with a result that it extinguishes it. Either there is a claim before the Court on which the Court can make a pronouncement, or there is not.

- [42] One needs to be careful not to conflate a review application that exists as a matter of fact with one that does not exist as a matter of law and thus has legal consequences. Self-evidently, a review application that has lapsed still exists as a matter of fact. But as a matter of law, absent a reinstatement application, it, for all intents, does not exist and it cannot have any legal significance. As explained by the Full Bench in *Myeni v Organisation Undoing Tax Abuse and Another*,³⁹ if an application for leave to appeal has lapsed, it does not exist:

“[26] The application for leave to appeal in the present matter has lapsed. In order for the application for leave to appeal to be revived, condonation will have to be granted by the SCA. Until such time, there is no application as contemplated by section 18(5) of the Superior Courts Act, and the ineluctable consequence is that the section 18(4) appeal is not competent. ...” (own emphasis)

- [43] From a purist’s point of view, one wonders whether the *City of Tshwane* approach will not result in additional and unnecessary litigation, something anathema to the ethos of the LRA or even confusion or uncertainty:

³⁹ (15996/2017) [2021] ZAGPPHC 56 (15 February 2021)

[43.1] As to the former, there is the potential for a flood of dismissal applications to be brought in “*the interests of certainty*”, something which is not permitted in civil litigation. Furthermore, what if these applications are opposed on the basis that a reinstatement application has subsequently been brought or will be brought within a fixed time period? If the opposition is successful, it will mean that there will be two opposed applications covering essentially the same subject matter, each of which will be independently appealable.⁴⁰

[43.2] As to the latter point, what of a review application or a statement of claim that has been filed out of time and is not accompanied by a condonation application? Can parties, on the strength of the reasoning in *City of Tshwane*, apply for such a review application or statement of claim to be dismissed even though they are not pending before the Court? If it is discovered that an appeal which has been enrolled has lapsed, will the Appeal Court, on the strength of the reasoning in *City of Tshwane*, now have the option of dismissing the appeal as opposed to striking it?

[44] As pointed out by Heher J in *Bramwell-Jones* the interpretation also offends one’s sense of justice as well as the *audi* rule. Take the example of a litigant who initiated a review application but, due to changed circumstances, allowed it to lapse and has no intention of pursuing it before the Court. Surely there is something wrong where that litigant is vulnerable to having a Court order made against him in respect of proceedings which he has no intention of pursuing.

⁴⁰ It is trite that an application granting condonation is appealable, more so an application dismissing the main review application. Cf *Charles* (supra) which illustrates the perils of litigation being conducted in this manner.

- [45] Finally, one wonders whether the approach taken in *City of Tshwane* is consistent with the Constitution. In terms of Section 34 of the Constitution, every litigant has an entrenched right to due process. It is only in exceptional circumstances, such as where there has been an abuse of the process and a litigant has, for example, proven to be a vexatious litigant, that such a right may be restricted or even forfeited.⁴¹ This right to access to justice finds expression in the right which a litigant has to bring a reinstatement application. The bringing of the dismissal of a lapsed review application says to the Applicant that he should be stripped of his right, given to him in terms of the Rules, to bring a condonation application in the first place. As mentioned above, the outcome of this application does not turn on which approach is to be preferred and this Court obviously accepts that it is bound by the decisions of the Labour Appeal Court. Insofar as *City of Tshwane* is now binding because it is the most recent decision, it is respectfully submitted that this question needs to be revisited for the reasons set out above.

Additional arguments raised on behalf of the Department

- [46] As part of a scattergunning of legal points, the Department further, in an apparent attempt to deflect blame, contended that Mr Khakhu should have set the matter down and complained about the fact that he had not delivered a Notice of Opposition. The latter point can be easily disposed of. There was no obligation on Mr Khakhu to deliver a Notice of Opposition until a supplementary pleading had been delivered either in terms of the erstwhile Rule 7A(8) or in terms of the current Rule 37(20). The contention that Mr Khakhu should have set the review application down is also nonsensical. Leaving aside the fact that Mr Khakhu was not *dominus litis* and the fact that the obligation to set a review

⁴¹ *Skulpad and Another v Department of Health Eastern Cape and Others* [2025] 1 BLLR 70 (LC); (2025) 46 ILJ 193 (LC) at paras [45] to [47]

application down falls on an applicant in a review application,⁴² any attempt to have set the review application down would, in any event, have been premature because pleadings were not closed. Accordingly, the matter would not have been ripe for hearing. By way of amplification, the obligation to apply for a set-down date within six weeks is “*subject to the rules*,” which can only mean that, if pleadings have not closed, it is not competent to make such a request.⁴³

Prescription

[47] The Department also sought, in its founding affidavit, to invoke the defence of prescription. This was after the State Attorney had transmitted correspondence to the legal representatives of Mr Khakhu on 20 November 2025 referencing case law⁴⁴ decided some 15 years ago. On the strength of this case law it was contended that the claim of Mr Khakhu had prescribed because the launching of a review application does not interrupt prescription. Mr Khakhu was threatened with a “*special cost order*” if he did not withdraw “...*the warrant of execution*.”

[48] The belated attempt to invoke prescription is, in my view, regrettable. The jurisprudence on whether an award prescribes notwithstanding the institution of review proceedings has developed considerably since the case relied on by the Department.⁴⁵ Decisively, the contention overlooks the fact that a year and a half prior to the issuance of the Award, the LRA was amended to include section 145 (9) which reads as follows:

⁴² Paragraph 11.2.7 of the Practice Manual and section 145(5) of the LRA

⁴³ *Cf Madikane and Others v Bantwini and Others* (P403/11) [2018] ZALCPE 25 (3 October 2018) at para [5]

⁴⁴ *SATAWU obo Phakathi v Ghekko Services SA (Pty) Ltd* (2011) 32 ILJ 1728 (LC)

⁴⁵ See *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus & Others* 2018 (1) SA 38 (CC); (2017) 38 ILJ 527 (CC); [2017] 3 BLLR 213 (CC)

“An application to set aside an arbitration award in terms of this section interrupts the running of prescription in terms of the Prescription Act, 1969 (Act No. 68 of 1969), in respect of that award.”

[49] In this context, it is important to reiterate that the Department is adamant that the review application must be prosecuted to finality. In this context, it was indicated to the Court that, if necessary, a further bond of security would be filed. Thus, on the Department's own account, the proceedings relating to the review application are not at an end, and their conclusion has not yet eventuated. Following on from this, resorting to invoking a preliminary point about prescription with the clear aim of thwarting Mr Khakhu's access to justice, is cynical. It is aggravated by the fact that it was preceded by a communication transmitted to Mr Khakhu in intimidatory vein. Effectively, the Department is seeking to rely on its own remissness and ineptitude in failing to prosecute the review application diligently as a basis for non-suiting Mr Khakhu. In *Hudaco Trading (Pty) Ltd t/a Ambro Steel and Others v Ramothwala*⁴⁶ the Labour Appeal Court was confronted with an analogous set of facts where an employer sought to rely on its own failure to properly prosecute the review application as a basis to contend that the Award was no longer enforceable owing to prescription. The Court, referencing *Myathaza*, took a dim view of this strategy.⁴⁷ Its criticism culminated in the following statement by Jolwana AJA:

“[29] ... I fail to understand how the Award could have become prescribed while the review application was still being pursued.”

⁴⁶ (2024) 45 ILJ 1987 (LAC)

⁴⁷ See paras [30] and [36]

Urgency

[50] The applicable timeline is the following:

[50.1] After the issuance of the Award at the end of June 2019, it was certified and attempts were made to enforce it by Mr Khakhu. These attempts stopped, so the Department alleges, when it filed a bond of security on 18 June 2021. However, after the passage of a number of years, the patience of Mr Khakhu ran out and renewed attempts were made to enforce the Award.

[50.2] On 24 June 2025, the Sheriff visited the Department and attached its furniture. No proceedings were instituted on behalf of the Department by the Office of the State Attorney. No reasons are provided for the inactivity.

[50.3] On 8 October 2025, three and a half months later, the Sheriff again visited the Department and left a notice of attachment. Again, no legal proceedings were instituted. The only reason furnished was that the "*file*" could not be found.

[50.4] On 17 November 2025, the Sheriff again arrived at the Department's premises to attach property. Again, no proceedings were instituted. Instead, the response of the Office of the State Attorney was to contend, on 23 November 2025, in my view disingenuously so, that the Award had prescribed and to threaten Mr Khakhu with a punitive costs order.

[50.5] It was only on 27 November 2025, five months after the visit of

the Sheriff on 24 August 2025, that one Mr Hayayana⁴⁸ (who has not deposed to an affidavit) apparently thought that it might be a good idea to establish whether a copy of the file could be obtained from the Labour Court.

[50.6] Lastly, there was a further delay in the matter because the Counsel on brief was acting as a Judge in the Labour Court and, accordingly, could not assist with the drafting of the application.

[50.7] The application was ultimately brought on 6 December 2025, and the respondents were given a mere two days to deliver answering papers, this after, on the Department's own version, it had known since 24 June 2025 that Mr Khakhu had run out of patience and was of the mind to enforce the Award.

[51] The facts drive the Court to the conclusion that this is *par excellence* a case of self-induced urgency compounded by a wholly unjustified and unreasonably stringent timetable. When it comes to urgency, the bull point of the Department is to be found in the vague statement that the attached property "... *is being used for the purpose of effecting service delivery to the general public...*". The only concrete allegation made in support of this contention is that computers (it does not say how many) have been attached and that these computers contain unidentified "*important information*" of learners. Leaving aside that the vagueness of allegation seriously detracts from its probative value, no explanation is put forward as to why, in this modern age, "*the important information*" cannot be preserved through off-device backups and, where necessary, encryption.

⁴⁸ It is unclear as to who Mr Hayayana is. An unsigned affidavit was uploaded on case lines in terms of which no more is recorded that Mr Hayayana is a personal assistant. He does not say who his employer is.

- [52] In *Tekoa Engineers (Pty) Ltd v Alfred Nzo Municipality and Others*,⁴⁹ Lowe J was confronted by an urgent application where similar arguments were raised by the party which had made itself guilty of self-created urgency:

“38. It is argued for the applicant that it has shown sufficient and satisfactory grounds to permit the hearing sought, not only seeking to exercise its right to approach a court for relief not solely for financial reasons, but also in protection of unlawful spending of tax payers’ money which it is alleged cannot be reversed in the event that the appeal proceedings are not in respondents’ favour. It is alleged that there has been no undue delay in bringing the application and that on the facts applicant may not obtain substantial redress in the event that it is successful but forced to wait in the queue to argue the application.”

- [53] The Court rejected this argument:

“61. In my view, the allegations made in the founding affidavit and in reply, do not serve to address or cure the defects pointed out above. It seems to have been applicant’s attitude that having regard to the fact that public moneys were involved, it was the court’s duty to deal with the matter however inappropriate the time line may have been. This is obviously an unsustainable argument.

62. In my view accordingly and having regard to all of the above, this is a matter which simply cannot proceed on the urgency time line adopted by the applicant as a result of both the self-created urgency adverted [sic] to above and quite separately from that the unreasonable and unnecessary stringent and unsustainable time line adopted. ” (own emphasis)

⁴⁹ (1284/20) [2022] ZAECKMHC 84 (25 October 2022)

- [54] In my view, the sentiments expressed by Louw J apply equally, if not with more force, to the current state of affairs.

The State Attorney

- [55] Lastly, the question of urgency aside, I return to the lamentable conduct of the State Attorney when it comes to the prosecution of the review application. The State Attorney has done little to nothing to prosecute the review application over a period of six years. This unsatisfactory state of affairs is amplified by the absence of any meaningful record of what actually occurred during the passage of more than half a decade. Because the missteps cannot be traced, it is impossible to say what went wrong and to charter a better course forward. Insight into failure is the first condition of progress. As recorded above, no attorney from the Office of the State Attorney assumed the responsibility of deposing to an affidavit explaining what had happened and apologising for the six-year delay.

- [56] The State Attorney has developed a policy styled “*THE POLICY ON INITIATING, DEFENDING AND OPPOSING ON MATTERS ON BEHALF OF THE STATE*”.⁵⁰ It is a policy initiated by the Office of the Solicitor General and approved by Cabinet. The policy was discussed at length by the Full Bench in *North West Department of Health*.⁵¹ I quote from that matter as follows:

“[15] In terms of the Objects of the Policy, its purpose is to provide norms and standards between attorneys and client departments on initiating, defending and/or opposing of matters on behalf of the Organs

⁵⁰ developed in terms of section 3(4) of the State Attorney Amendment Act 13 of 2014

⁵¹ *Member of the Executive Council, North West Department of Health v LSM obo OM In re: In the application to declare the appeal lapsed: L[...] S[...] M[...] obo O[...] M[...] Case No. FC 06/2024 (16 October 2025)*

State. It is to ensure uniform procedures in initiating and defending of matters on behalf of Organs of State; and ensure compliance with the norms and standards in initiating and defending of matters on behalf of Organs of State. Central to the policy is the alignment and redefining, where necessary, the functions and processes in the initiating and defending of matters on behalf of Organs of State. Ultimately, it aims to assist in reducing the cost of litigation against and on behalf of Organs of State.

...

[17] That having been said, the scope of application of the Policy provides that the principles espoused in the policy apply to all State Attorneys and Client Departments within the national, provincial, local spheres of Government and including State owned enterprises. The Objects and Scope of Application of the Policy therefore implicate not only the Office of the State Attorney but all Organs of State which they are legally obligated to represent in terms of the State Attorney Act. This is underscored by Item 2.3 of the Policy that State Attorneys are professional public sector legal practitioners reporting to the Office of the Solicitor General whose function is to provide legal services to Client Departments. Their work is regulated by the Legal Practice Act and the State Attorney Amendment Act

...

[20] Of particular importance relevant to the blame apportioned solely to the conduct of Mr Sekgota, the Policy which equally applies to the appellant, instructively provides that all correspondences between the Attorney and Client Department must be in writing, either by letter or e-mail. Telephone and verbal discussions on the matter must be subsequently confirmed in writing either by letter or e-mail. All incoming and outgoing emails must be copied to the legal secretary and where an Attorney to whom a matter is allocated is away for an extended period of time, that attorney must activate the Outlook out of office assistant information. After receipt of instructions and a consideration thereof, the Attorney must call for all necessary additional information regarding the matter. The correspondence (requesting the relevant information) must clearly list all the required information, e.g. statements, reports and documents so required and an indication of when such information

should be furnished to the requestor. The file must, depending on the urgency, be diarised for a period of no more than ten (10) days. After the expiry of the period aforesaid, further correspondence should be addressed to the Client Department informing them of steps taken in relation to the matter and clearly outlining whether a notice of intention to defend/oppose has been served and filed and when. In order to protect the interests of the State, the attorney should clearly and unequivocally inform the Client Department when either a plea (in the case of claims), answering or replying affidavit (in the case of motion proceedings) shall be required to be served and filed as well as outlining the consequences that might ensue in the case of non-adherence with the timelines. In the event that the Client Department fails to respond after the second request has been sent, the Attorney must refer the matter to the Section Head or Supervisor (as the case might be) for intervention. In the event that the intervention by the Section Head or Supervisor does not yield the desired results, then the State Attorney shall, after notifying the Head of Office of State Attorney, liaise with the Head of Legal Services for the relevant Organ of State or Client Department recording the issue of non-response or lack of cooperation by the Client Department. The escalation to the Head of Legal Services on the issue of non-responsiveness or lack of cooperation should be reduced to writing in a letter or email to be transmitted to the relevant Client Department for record purposes. Should escalation of the issue of non-responsiveness and/or lack of cooperation yield no results, then and in that event the matter shall be referred to the Office of the Solicitor-General for a decision and directions on the further handling of the matter.....

...

[22] Mr Sekgota is accused of claiming that he was overworked and had forgotten about the matter or undertaking she made regarding the matter. There can be no excuse for such conduct as Item 8.3 of the Policy makes it peremptory that all Attorneys must at all times keep and maintain a diary in which they record all dates of consultations, trial dates and other important appointments and/or all attendances. In addition, the Attorney must keep one or more of the following diary systems namely: (a) Electronic/outlook, (b) Pocket diary, (c) Board diary,

(d) Section Heads/Supervisors must over and above the mentioned diary systems, also keep and maintain a central diary to monitor and manage litigation in their respective sections. The Attorney must also diarise all files for attention on a future date and then record the same date on the file cover. Each day the attorney or his/her secretary must draw all the files diarised for that day. No file may be filed away unless it has been diarised for a future date.

...

[24] Nowhere in the papers filed of record by the appellant, is there any reference to escalation of the ineptitude of Mr Sekgota. Instead, rather than escalate the matter in accordance with the policy by which the appellant is bound, steps were taken to terminate the mandate of the State Attorney. Item 8.7 of the Policy provides specifically that all the work in the Offices of the State Attorney, including legal advice and opinions will be supervised by the respective managers and/or supervisors, with the oversight of Heads of Offices. Any contravention of the Policy by any role player covered by the Policy must be met with consequence management. Rather than follow the prescripts of the Policy, the mandate of the State Attorney was terminated.” (own emphasis)

- [57] In light of the obligations resting on attorneys in the Office of the State Attorney, in particular the responsibility to keep a written record of each step in the litigation, the yawning evidentiary chasm spanning the six-year period of inactivity when it comes to the prosecution of the review application boggles the mind. Black holes are located in outer space; there is no place for them in the prosecution of review applications. Despite the flagrant disregard for the time limits and the jarring absence of progress made in the review application, there is not only no accountability demonstrated but, it would seem, no potential for accountability because no one knows what happened. The only answer given is that the file is lost.

- [58] In the founding affidavit, Mr Shikwambana makes the extraordinary statement that the Department is compelled to utilise the services of the State Attorney. I quote:

“It is also important to mention that as the Department of Education, we are bound to be represented by the State Attorney and therefore could not instruct anyone else.”

- [59] It is difficult not to gain the impression that this paragraph contains an appeal for sympathy or special treatment by the Department. Reading between the lines, what the Department says, in effect, is that it is, so to speak, saddled with the Office of the State Attorney, does not have access to private firms of attorneys and for that reason it is prejudiced. The complaint is premised on an assumption that the Office of the State Attorney provides inferior legal services. The statement is problematic for two reasons.

- [60] Firstly, it is inaccurate. The State Attorney should have advised the Department that the Department *is* entitled to outsource legal work to private firms of attorneys. The very legislation on which the Department, through the State Attorney, relies in support of its point about the allegedly invalid writ (see below), explicitly contemplates government departments engaging private attorneys.⁵² The right of the State Attorney to outsource legal work finds expression in another policy developed by the State Attorney, namely the *“BRIEFING AND OUTSOURCING OF STATE LEGAL WORK”*.⁵³ In terms of that policy, the State Attorney has a discretion to outsource work to both attorneys and advocates. Paragraph 1.2.11 of that policy provides as follows:

⁵² Section 3(1) of the SLA refers to the “State Attorney or attorney of record appearing on behalf of the Department concerned. ...”

⁵³ developed in terms of section 3(4) of the State Attorney Amendment Act 13 of 2014

“1.2.11. In briefing and outsourcing legal work, this policy is applied in conjunction with the Framework Contract, which establishes the pre-approved list of legal practitioners (Law firms/Attorneys and Advocates) who will provide legal services on behalf of the State.”

[61] The policy further provides as follows:

“4.2. OUTSOURCING OF STATE LEGAL WORK

4.2.1 The Office of the State Attorneys shall outsource State Legal work to Legal practitioners, including the instruction of correspondent attorneys under the following circumstances:

4.2.1.1 Where the Office of the State Attorney does not have an office within the jurisdiction of the Court, the State Attorney shall appoint a private Legal practitioner to act as a correspondent attorney to receive, serve and file documents or court processes with the Court and the opposing party. Page 14 of 23 Briefing and Outsourcing of State Legal Work Policy

4.2.1.2 Where the Office of the State Attorney lacks capacity requirements or is conflicted in the matter and it will be in the interests of transformation.”

[62] Thus, if there was a lack of capacity to deal with the review application at the Durban office of the State Attorney, then, contrary to the Department's allegation, the State Attorney could and should have outsourced the conduct of the review application to a private law firm.⁵⁴

⁵⁴ That is, coincidentally, what happened in *North West Department of Health* when the State Attorney was not performing. Regrettably, in that matter, the engagement of a private attorney did not improve matters.

[63] I turn now to the apparent attempt by Mr Shikwambana to paint the Department as powerless, or at least handicapped, and deserving of special treatment or at least sympathy. This sentiment is not reconcilable with the jurisprudence which, to the contrary, dictates that Organs of State should set an example when it comes to litigation. In *Mluleki Fihlani v Port St John's Local Municipality*,⁵⁵ Jolwana J with reference to Constitutional Court authority, reiterated the position in the following terms:

"[39] The underlying constitutional principle with regard to the municipality's obligation to respect the law and its fidelity to the constitutional framework is not optional. This principle has been restated in various ways in different circumstances and contexts by our courts all the way up to the Constitutional Court. As an illustrative examples, in Asla Construction⁵⁶, not so long ago, the Constitutional Court said:

"This Court has repeatedly stated that the state or an organ of state is subject to a higher duty to respect the law. As Cameron J put it in Kirkland:

'[T]here is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.'

In Khumalo⁵⁷, the court made it clear that the constitutional and legislative framework must inform an approach that does not undermine the hard-won protections afforded to public sector employees. The standard against which a state litigant's conduct is measured is high and ought to accord with the prescripts of the law."

⁵⁵ (1046/2025) [2025] ZAECHC 66 (8 July 2025)

⁵⁶ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* 2019 (4) SA 331 (CC) paras [60] to [61]

⁵⁷ *Khumalo v MEC for Education* 2014 (5) SA 579 (CC) at 589D

- [64] In short, it is not open to the State, in our democratic and Constitutional order, to plead ignorance and lack of resources. In this matter, the Department, although not itself blameless, was let down by the Office of the State Attorney. Had there been a request for a costs order *de bonis propriis*, the Court would have given it serious consideration. If the matter had been conducted in the same vein by a private firm of attorneys, such a firm would have been exposed to a claim for damages flowing from the gross failure to fulfil the mandate.

Writ of execution

- [65] The Department has a last string to its bow. It contends that the “*writ of execution*” is invalid because there was non-compliance with the State Liability Act 20 of 1957 (the SLA). A final order was sought, setting it aside. At the level of proper fact, there is in truth no writ in existence. There is only the certified arbitration award. Thus, if there is going to be an attack under this heading, it would have to be aimed at the decision to certify the award. For the sake of convenience, I will however refer to the certified award as the Writ.
- [66] The Department contends that the writ must be set aside because Mr Khakhu has not complied with his obligations under section 3 of the SLA to serve the award on the State Attorney, the Accounting Officer (the head of the department), and National Treasury. Revealingly, the Department does not disclose whether the State Attorney has complied with its self-standing obligations under section 3(2) of the SLA regarding service on the Accounting Officer and the relevant treasury.⁵⁸ The facts suggest otherwise.

⁵⁸ In the light of the inactivity accompanying the prosecution of the review application, the Court has reservations as to whether there has been compliance.

- [67] The first hurdle facing the Department is that neither the Commission for Conciliation, Mediation and Arbitration (the CCMA) nor the official who certified the award, the Director of the CCMA, have been joined in these proceedings. Yet, it is their administrative decision which is impugned. On the face of it, this is a material non-joinder.⁵⁹
- [68] The Court requested the parties to furnish supplementary submissions on whether the SLA applies to arbitration awards issued in terms of the LRA. It did so primarily in light of the SLA's language, which references court process, court officials, court rules, court orders, and court judgments. It does not refer to arbitration proceedings, arbitration officials, CCMA or Bargaining Council awards. It is not difficult to understand why this is the position. Prior to the amendment to section 143 of the LRA, which had the result that arbitration awards did not have to be made orders of court before they could be enforced, there was no need for the SLA to refer to arbitration awards. The law has always been self-enforcing or immediately executable. If there was non-compliance with an arbitration award, the successful party seeking to enforce it would have to approach a court for assistance to seek that the arbitration award be made an order of court. This remains the position when it comes to arbitration awards other than those contemplated by the LRA.⁶⁰ In short, the SLA was never meant to apply to arbitration awards. In *Mateis v Plaaslike Munisipaliteit Ngwathe en Andere*,⁶¹ it was argued that in the light of the constitutional dispensation, section 3 of the SLA should be interpreted as applying to municipalities. The Supreme Court of Appeal however disagreed. It said the wording was clear. It held that an interpretation that the SLA applied to municipalities would constitute a statutory amendment rather than a statutory interpretation, so too an interpretation that the SLA applies to

⁵⁹ See *CCMA v MBS Transport CC and Others* [2016] ZALAC 34 where the CCMA was a party and where the Director of the CCMA actively participated in the proceedings and indeed was the appellant.

⁶⁰ See section 31 of the Arbitration Act 42 of 1965 (the Arbitration Act); *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) at para [9].

⁶¹ 2003 (4) SA 361 (SCA)

arbitration awards. An arbitration award is self-evidently not equivalent to a court order or a judgment. The CCMA and the Bargaining Councils are statutory tribunals. They are not Courts of Law. Their decisions, although quasi-judicial in nature, constitute administrative action. The Director of the CCMA, when certifying an award, does not convert it into a Court Order. Thus, if the SLA applies to LRA arbitration awards, one must look beyond the SLA's own wording to reach that conclusion

[69] In the Department's supplementary submissions, the Court was not referred to any authority supporting the proposition that the SLA applies to arbitration awards. It was referred to *Denel SOC Ltd v NUMSA obo Petersen and Another*,⁶² a case which did not concern the setting aside of a writ, but merely mentioned, *en passant*, that a writ may be set aside if it is unlawful.⁶³ The Court's attention was drawn to an obiter footnote stating no more than that a writ of execution issued in contravention of section 3 of the SLA would be unlawful. That is no more than a restatement of the law. It begs the question as to what the position is when it comes to an arbitration award in respect of which no writ has been issued.

[70] The purpose of section 143 is, to put it colloquially, to make the enforcement of arbitration awards more user-friendly.⁶⁴ The framework, and in particular, the certification process which culminates in the legal fiction that the certified award is to be regarded as a writ,⁶⁵ was self-evidently devised to ensure economy and expedition. At a practical level, the section was inserted, *inter alia*, to do away with the time-consuming requirement that employees approach the Labour Court in terms of section 158(1)(c) of the LRA to make awards an order of Court or the Registrar to have writs issued.

⁶² (2022) ZALCJHB 143

⁶³ At para [12]

⁶⁴ *MBS* at para [25]

⁶⁵ Section 143(1)

- [71] In its supplementary submissions, the Department relied, in particular, on section 143(5) which provides that:

“Despite subsection (1), an arbitration award in terms of which a party is required to pay an amount of money must be treated for the purpose of enforcing or executing that award as if it were an order of the Magistrate’s Court.”

- [72] On the face of it, there is scope for an argument to be developed based on this section. Still, questions do arise. If the overarching purpose of this section was to obviate the need to obtain a writ, why then would the Legislature deem it fit that the conditions necessary to obtain a writ as contained in the SLA should be met? Why did the Legislature not use language equivalent to that found in the Arbitration Act when it comes to the enforcement of private arbitration awards?⁶⁶ If the purpose of section 143(5) was to make arbitration awards which are enforceable against the State subject to the SLA, why is it of general application and why does it apply to all arbitration awards? Is the application of the SLA a secondary consequence of this section? Why did the Legislature choose not to convey, in the amendment so introduced, that the SLA remained applicable to LRA arbitration awards?

- [73] In his supplementary submissions, Mr Maisela, appearing on behalf of Mr Khakhu, approached the matter from a different angle. He referred to *Minister of Police v Miya*⁶⁷ wherein the Supreme Court of Appeal, albeit in a different context, dealt with the question as to whether the failure to effect proper service as required by the SLA was fatal. The Supreme Court of Appeal agreed with the Court *a quo* that it was not. Revealingly, the Court commenced its judgment as follows:

⁶⁶ Section 31(3) of the Arbitration Act

⁶⁷ 2025 (3) SA 130 (SCA)

“[1] A little less than a decade ago, the Constitutional Court, to underscore the approach our courts should employ in applying the laws in this country, including the interpretation of the Constitution, statutes, and contracts in matters before them remarked:

‘Our peculiarity as a nation impels us to remember always, that our Constitution and law could never have been meant to facilitate the frustration of real justice and equity through technicalities. The kind of justice that our constitutional dispensation holds out to all our people is substantive justice. This is the kind that does not ignore the overall constitutional vision, the challenges that cry out for a just and equitable solution in particular circumstances and the context within which the issues arose and are steeped. We cannot emphasise enough, that form should never be allowed to triumph over substance....’⁶⁸

- [74] It is not my intention to investigate whether a similar approach would be justified when the materiality of the alleged breach is considered. I would however say that, at first glance, it appears to be disingenuous for the Department to complain about non-service in circumstances where, before the Award was certified, the Department instructed the State Attorney to launch a review application to have it set aside. The Department and the State Attorney were thus highly alive to the existence of the Award. As to service on Treasury, had the state attorney complied with its obligations under section 3, Treasury would have been aware of the Award under section 3. However interesting the debate about the application of the SLA may be, the Court is not prepared to decide this issue finally. The Department, on its own version, was aware that Mr Khakhu was enforcing the award, up until the bond of security was delivered on 18 June 2021. To delay for such a lengthy period, more than half a decade, and then to bring an urgent

⁶⁸ *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) para [18]

application to set aside the writ on two days' notice is conduct which cannot be countenanced. It is not only a misuse but indeed an abuse of the court process.

- [75] Furthermore, this is not the type of issue that should be properly determined on the back of an urgent roll, without the benefit of proper argument. In *In Re several matters on the urgent Court roll*,⁶⁹ the Court made the following observation which applies to the question as to whether this Court should, on an urgent basis, make a finding regarding the validity of the writ:

*“[15] Further, if a matter becomes opposed in the urgent court and the papers become voluminous there must be exceptional reasons why the matter is not to be removed to the ordinary motion roll. ‘The urgent court is not geared to dealing with the matter which is not only voluminous but clearly includes some complexity and even some novel points of law.’ See *Digital Printers v Riso Africa (Pty) Ltd* case number 17318/02, an unreported judgment of Cachalia J delivered in this Division...”. (own emphasis)*

Conclusion

- [76] As to urgency, this Court has broad discretion. It may, if it is in the interests of justice to do so, adjudicate the merits of a matter, or part thereof, even if the requirements of urgency have not been satisfied.⁷⁰ I am inclined to dismiss the application to stay the enforcement of the Award on the merits because of the inordinate and unexplained delay and, decisively so, because the review application has lapsed.⁷¹ The

⁶⁹ [2012] ZAGPJHC 165; [2012] 4 All SA 570 (GSJ); 2013 (1) SA 549 (GSJ)

⁷⁰ *Windsor Hotel (Pty) Ltd v New Windsor Properties (Pty) Ltd and Others* (1820/2013) [2013] ZAECHMHC 14 (7 August 2013)

⁷¹ In this context, it is noted that the Award was not attached to the founding affidavit as required by the Rules. Mr Khakhu annexed a copy of it to his answering affidavit. It was not contended that Mr Khakhu had followed the wrong route in seeking to execute on the Award.

order this Court will issue does not prohibit the Department, if so advised, from filing a reinstatement application and potentially seeking another stay application. The fate of that application will be determined by another court based, *inter alia*, on the explanation for the inordinate delay in the bringing of the reinstatement application.

- [77] As to the application to set aside the writ, I intend to strike it from the roll for lack of urgency. As mentioned, it is not appropriate for this type of novel and nuanced question to be adjudicated by way of urgent application proceeded by an unreasonably truncated timetable without the benefit of full argument. There is also the circumstance that neither the CCMA nor the Director of the CCMA has been joined. It would also not be in the interests of justice for the Court to decide on such an important and novel issue with such potentially far-reaching consequences⁷² without the input of the CCMA and the Director of the CCMA.

Order

1. The application to stay the enforcement of the writ is refused on the merits.
2. The application to set aside the writ is struck from the roll for lack of urgency.
3. The Applicant is ordered to pay the costs of the application on Scale C.

⁷² If compliance with the SLA is required, there would then be onerous duties on all concerned, including unrepresented litigants, to the effect that they will now be required to serve their arbitration awards on the officials identified in the SLA before applying for certification.

4. This Registrar is to bring this judgment to the attention of the Solicitor General

P N KROON

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms NS Mteto
Instructed by the Durban State Attorney

For the Third Respondent: Mr RR Maisela
Instructed by Kotana Babalwa Inc. Attorneys