



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case No: C178/2021

In the matter between:

NOMFUNDO DLAKANA

Applicant

and

**EDUCATION LABOUR RELATIONS
BARGAINING COUNCIL**

First Respondent

COMMISSIONER R OLIVIER

Second Respondent

WESTERN CAPE DEPARTMENT OF EDUCATION

Third Respondent

Heard: 5 March 2026

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 6 March 2026.

JUDGMENT

DE KOCK, AJIntroduction

- [1] This matter comes before this Court as a review application wherein the Applicant is seeking the Jurisdiction Ruling by the Second Respondent, dated 2 March 2021 and issued under case number PSES436-18/19 WC, to be reviewed and set aside.
- [2] The Applicant and the Third Respondent duly filed their respective pleadings in respect of the review application, and both parties submitted heads of argument. At the commencement of the opposed review proceedings, this Court requested both parties' representatives to address the Court regarding the ruling issued by the Second Respondent. More specifically, this Court enquired as to whether the ruling dismissed the alleged unfair dismissal dispute and/or whether the Second Respondent simply declared the arbitration proceedings null and void due to the Applicant having been represented by a person who did not have the required *locus standi*.
- [3] Neither of the two representatives could refer this Court to any paragraph in the ruling where the Second Respondent dismissed the referral of an alleged unfair dismissal dispute to the First Respondent. It is necessary for this Court to refer to the relevant parts of the ruling to determine this issue.

Jurisdictional Ruling

- [4] Paragraph 31 of the ruling states the following:
- "I find that the material and fraudulent misrepresentation in this matter where Mr Kwayiso, as the applicant's representative, acted as her representative without having locus standi vitiated the whole of the arbitration proceedings and the matter is therefore null and void."*
- [5] This Court was also referred to paragraph 29 of the ruling which states as follows:

"The applicant submitted that even should costs be considered it should only be considered when the arbitration is completed. I have already noted that this matter is null and void and from that point of view the matter is concluded..."

- [6] It was argued that an inference was drawn from this ruling that the referral was dismissed. This is obviously the case as the Second Respondent at no stage made a clear ruling that the alleged unfair dismissal dispute referred was dismissed. It was conceded by the Third Respondent's representative that no such ruling was made and that the dispute should be referred back to the First Respondent for the arbitration proceedings to be heard *de novo*.

Evaluation

- [7] This Court is of the view that the Second Respondent did not issue a ruling that the alleged unfair dismissal dispute be dismissed, as the ruling does not contain any reference to such an order. This Court will not consider this review application based on an inference to be drawn from a ruling. Either in terms of the ruling the referral is dismissed, or the arbitration proceedings are declared null and void.
- [8] Even if it was the intention of the Second Respondent to dismiss the referral, such a decision would be highly irregular and subject to being reviewed and set aside in totality. The distinction between a defect going to the council's jurisdiction and a defect going to a representative's authority is a material one in law. Jurisdiction concerns the competence of the tribunal to hear the dispute at all. This is a matter that cannot be conferred or waived by the parties. The authority of a representative is an altogether different inquiry. It is a constraint operating on the representative alone and does not infect the underlying dispute or the party's entitlement to have it determined. Where a representative is found to lack authority, the proper legal consequence is that the unauthorised representation falls away and not that such representation should lead to a premature dismissal of a referral.

- [9] Section 138(1) of the Labour Relations Act¹ (LRA) requires a commissioner to determine the dispute fairly and quickly. When an issue of *locus standi* in the representation arises during arbitration proceedings, the appropriate course is to deal with it as a procedural matter by excluding the unauthorised representative and by affording the employee an election to obtain proper representation before proceeding. A cost order against the offending party is available where prejudice has been caused. What is not permissible is to treat the representative's lack of authority as a basis for terminating the proceedings and leaving the dispute unresolved. Since the dispute has not been determined, the only appropriate relief to be granted in this application is for the dispute to be referred back to the First Respondent.
- [10] Even on the most adverse view of the Applicant's conduct, her right to have her dispute determined has not been forfeited. The right of access to dispute resolution entrenched in sections 23 and 34 of the Constitution is not extinguished by a representative's misconduct or the employee's complicity in it. The system provides for costs to be awarded as an instrument to address culpable conduct; costs are not a substitute for a hearing on the merits. This principle is now confirmed at the highest level. In *AFGRI Animal Feeds (A Division of PhilAfrica Foods (Pty) Limited) v National Union of Metalworkers South Africa and Others*², the Constitutional Court held that even where a union's authority to represent members was *ultra vires* its registered constitution and void, "the dismissed employees themselves are entitled to continue with the Labour Court proceedings in their own names." The invalidity attaches to the representative's act; it does not extinguish the party's substantive right to have the dispute heard. There is no principled basis for a different approach where the representative is an individual rather than a trade union.

¹ Act 66 of 1995.

² [2024] ZACC 13; 2024 (9) BCLR 1111 (CC); (2024) 45 ILJ 1937 (CC); 2024 (5) SA 576 (CC); [2024] 10 BLLR 999 (CC) (21 June 2024) at para 59.

[11] The Court therefore finds that the jurisdictional ruling must be set aside in its entirety. The cost order against the Applicant in the amount of R18,000.00 does not survive the setting aside of the jurisdictional ruling. Both parties had to incur unnecessary legal costs to pursue a review application when neither party ought to have been put through this unnecessary expense. It is noted, however, that the setting aside of the cost order in these proceedings does not preclude the commissioner presiding at the *de novo* hearing from making a cost order in respect of the conduct of the unauthorised representative, should that be warranted, in the exercise of the discretion available under section 138(9) and (10) of the LRA.

[12] Insofar as both parties requested this Court to order costs, this Court is not of the view that costs should be ordered. The review application was not a frivolous application, and neither was the opposition thereto frivolous. It is not in the interest of law and fairness for either party to pay costs.

[13] In the premises, the following order is made:

Order

1. The jurisdictional ruling is reviewed and set aside.
2. The First Respondent is directed to reschedule the dispute before a commissioner other than the Second Respondent and the arbitration proceedings are to be conducted *de novo*.
3. No order is made as to costs.



C. de Kock

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv. Z Mdana
Instructed by:	Pam Ayanda Mdanjelwa from PA Mdanjelwa Attorneys
For the Third Respondent:	Adv. Ngobeni
Instructed by:	Lerato Rapasha from the State Attorney