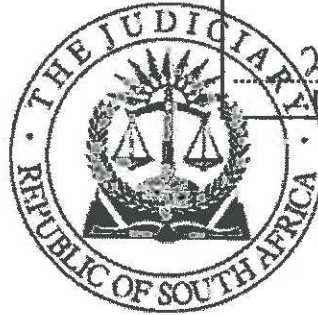


DATE: 28/5/19  
(1) FILED: YES/NO. (C)  
(2) OF INTEREST TO OTHER JUDGES: YES/NO. (C)  
(3) REVISED.



DATE

SIGNATURE

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: JR 1944/13 & J 228282/13

In the matter between:

**PSA obo F K MKHONDO**

**Applicant**

and

**MINISTER OF JUSTICE AND CONSTITUTIONAL**

**DEVELOPMENT: MPUMALANGA REGION**

**Respondent**

*In re*

**MINISTER OF JUSTICE AND CONSTITUTIONAL**

**DEVELOPMENT: MPUMALANGA REGION**

**Applicant**

and

**PSA obo FK MKHONDO**

**First Respondent**

**F.A. MKHONDO**

**Second Respondent**

**THE GENERAL PUBLIC SERVICE SECTORAL**

**BARGAINING COUNCIL**

**Third Respondent**

**G.H. SWAN N. O**

**Fourth Respondent**

**Heard: 23 May 2019**

**Delivered: 28 May 2019**

**Summary:** Lapsed review application ought not to be enrolled by the Registrar and cannot be entertained by a court of review unless reinstated by the court. Opposed application to make an arbitration award an order of this Court. The necessary averments to be made in order to obtain an order are (a) existence of a final, valid and binding award and (b) non-compliance with the said award. A court exercises discretion in making an order contemplated in section 158(1)(c) of the LRA. Held (1) Application to make the award an order of the Labour Court is hereby refused. Held (2) No order as to costs.

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### **JUDGMENT**

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**MOSHOANA, J**

#### Introduction

[1] Two applications were launched in this Court. The one application related to a review and setting aside of an arbitration award. The other, related to making the impugned decision an order of this Court. At a point, the application to make the impugned decision an order of court was enrolled before court. On 15 March 2017, my sister Lallie J made an order removing it from the roll to be heard together with the review application. The review application was launched outside the prescribed time period. There was no proper application within the contemplation of section 145(1A) of the Labour Relations Act<sup>1</sup> (LRA). For that reason, the application was defective in that the Labour Court was not clothed with the necessary jurisdiction to entertain it.

[2] Indeed, the two applications were enrolled before me on 23 May 2019. On this day, an application within the contemplation of section 145(1A)

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<sup>1</sup> Act 66 of 1995 as amended.

was launched. The first respondent in that application is the trade union on behalf of Mkhondo. Counsel appearing for the trade union indicated to the Court that the first respondent was not opposing the application. Whilst hearing the application, this Court picked up from the supporting affidavit, the following allegation:

“7.10 I further noted during the said consultation that the Applicant's record was also not filed within a period of 60 (sixty) days as required in terms of the practice directive”.

- [3] I enquired from counsel appearing on behalf of the Minister as to what the implications of that allegation are? In retort, she implored this Court to exercise its discretion and consider the application. I pointed out to counsel that in terms of the Practice Manual<sup>2</sup>, the review application is deemed withdrawn. I further pointed out that unless reinstated, there is no review application to be condoned<sup>3</sup>. After taking instructions, counsel opted to later bring an application to reinstate the review application.
- [4] What then remained before me was the section 158(1)(c) application. The application remained opposed. Counsel for the trade union then moved it. After hearing submissions from both parties, this Court reserved its judgment in respect of the opposed section 158(1)(c) application.

#### Pertinent facts

- [5] During March 2012, positions of Maintenance Investigators for the Barberton, Middelburg and Delmas Magistrate Courts were advertised. Ms Mkhondo (Mkhondo) together with other candidates applied for the position in the Delmas Magistrate Court. Mkhondo was also shortlisted and interviewed by a panel. Mkhondo was scored lower than one Mr

<sup>2</sup> Clause 11.2.3 if the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application...

<sup>3</sup> See: *Savuka Mine (Anglo Gold Ashanti) v Mazozo and others* Case JR1408/17 dated 29 March 2019 at paragraph 9.



Musekwa (Musekwa). Following the scoring, Musekwa was recommended for appointment.

- [6] Mkhondo was aggrieved by the recommendation and referred a dispute alleging an unfair labour practice to the Bargaining Council. Panellist Swan was appointed to resolve the dispute through arbitration. On 30 May 2013, the Panellist published an award concluding that the Minister was guilty of an unfair labour practice and ordered the placement of Mkhondo into a position with the same salary and benefits applicable to the position of Maintenance Investigator, alternatively to pay Mkhondo the salary and benefits as if she had been placed in that position.
- [7] The Minister was aggrieved thereby and launched a review application. Owing to the non-compliance with the award, Mkhondo and her trade union approached this Court for an order making the impugned decision an order of this Court.

#### Evaluation

#### Powers it terms of Section 158(1)(c) of the LRA.

- [8] The Labour Court possesses discretionary powers to make any arbitration award an order of the Court. In an application invoking the discretionary powers of this Court, a party must allege the following:
1. That there exist a final, valid and binding arbitration award; and
  2. That there has been non-compliance with the terms of the award.
- [9] Once the above is alleged, this Court's jurisdiction is kicked into gear. Once the Court is appropriately seized with the application, it still has to exercise a discretion whether to grant or refuse the application. It ought to be remembered that the purpose of making an arbitration award an order of court is to enforce compliance with the arbitration award. This implies that a further non-compliance would attract an order of civil disobedience – contempt of court.

- [10] At paragraph 3 of the supporting affidavit, Makgwale Asnath Sedibane alleged that:

“On 30 May 2013 an arbitration award was issued under the auspices of the General Public Service Sectoral Bargaining Council, which award is annexed hereto as Annexure “A”. Subsequent to the award being issued the respondent has failed and or refused to comply with the said award. Due and proper demand has been made for the respondent’s compliance thereof, but despite this no compliance has yet been forthcoming from the said respondent and the entire award and or part of has not as yet been implemented by the respondent.”

- [11] Therefore, I am satisfied that the necessary averments to ignite the jurisdiction of this Court have been made. The existence of an award and its non-compliance were not placed in dispute.

Exercise of discretion.

- [12] Lord Scarman described discretion to be the art of suiting action to particular circumstances. The discretion exercisable by judges is often referred to as judicial discretion. Such is the power of the judiciary to make some legal decision according to their discretion. In 1824, US Chief Justice John Marshall said the following:

“Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law.”<sup>4</sup>

- [13] To my mind, a court must only make arbitration awards that are valid in law an order of court. It is not about the will of the judge but the will of the

---

<sup>4</sup> *Osborn v Bank of the United States* 22 U.S 738 (1824).

legislature. The Labour Appeal Court (LAC) in *South African Post Office Ltd v CWU obo Permanent Part-Time Employees*<sup>5</sup> decreed as follows:

“What all this means is that before the Labour Court will grant an order sought in terms of Section 158(1)(c) of the LRA, it must be satisfied that, at the very least:

- i. ...
- ii. That the ... award is sufficiently clear to have enabled<sup>6</sup> the defaulting party to know what it is required to do in order to comply with the ... award.”

[14] The LAC went further to say<sup>7</sup>:

“Once the Labour Court is satisfied with all the above then it must nevertheless, exercise its discretion whether to grant or refuse the order. In exercising the discretion, the Court must take relevant facts and circumstances into account, such as are necessary to satisfy the demands of the law and fairness ...”

[15] The LAC emphasised, as being crucial, the purpose of this type of applications – to compel compliance, or enable its execution. This Court in *Public Servants Association obo 59 Members v National Health Laboratory Service*<sup>8</sup>, concluded that enforcement proceedings will not succeed if implementation is not possible.

[16] It ought to be remembered that the law dictates the following:

“Everyone has the right to administrative action that is lawful, reasonable and procedurally fair”.<sup>9</sup>

[17] Further, the law dictates that:

<sup>5</sup> (2014) 35 ILJ 455 (LAC); [2013] 12 BLLR 1203 (LAC) at para 21.

<sup>6</sup> My own underlining and emphasis.

<sup>7</sup> Ibid at para 22.

<sup>8</sup> [2007] 6 BLLR 559 (LC) at para 20.

<sup>9</sup> Section 33(1) of the Constitution of the Republic of South Africa, 108 of 1996.



"Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(f) Public administration must be accountable.<sup>10</sup>

[18] Section 11 of the Public Services Act deals with the appointments and filling of posts in the public service. Subsection 11(2) contemplates a process of all persons competing for positions. The Public Services Regulations<sup>11</sup> make the following provisions:

**"40. Creation and filling of posts.** Before creating a post for any new job, or filling any vacancy, an executive authority shall-

- (a) Confirm that he or she requires the post to meet the department's objectives taking into account the norms and standards determined by the Minister for post provisioning for occupations or categories of employees;
- (b) ...
- (c) ...
- (d) Ensure that sufficient budgeted funds, including funds for the remaining period of the medium-term expenditure framework, are available for filling the post".

**65. Advertising.** (1) An executive authority shall ensure that vacant posts in the department are advertised, as efficiently and effectively as possible, to reach the entire pool of potential applicants, including designated groups.

**67 Selection.** (1) An executive authority shall appoint a selection committee to make recommendation on the appointment to a post.

<sup>10</sup> Section 195(1)(f) of the Constitution of the Republic of South Africa, 108 of 1996.

<sup>11</sup> GNR.877 of 29 July 2016: Public Service Regulations, 2016 (GG No. 40167).

- [19] The Constitutional Court in *Khumalo and Another v MEC: Education-Kwazulu-Natal*<sup>12</sup> emphasised that persons who do not meet the requirements for a post in the public sector ought not to be appointed.

Is the award capable of being implemented?

- [20] As a point of departure, this Court is alive to the fact that the review application is deemed to be withdrawn. Generally, the practice in this court is to refuse to entertain section 158(1)(c) applications where a review is pending. As at the time of this judgment, there was no pending review. However, this Court cannot lose sight of the fact that a withdrawn review is capable of being reinstated.<sup>13</sup> To that extend, this Court was told by the Minister's counsel that an application to reinstate is imminent.
- [21] This Court may state in passing that the review application seems to possess reasonable prospects of success. The balance of convenience and fairness suggest that granting this application would unfairly prevent the applicant from reviewing the impugned award.<sup>14</sup>
- [22] Nonetheless, what does not satisfy the Court is the fact that the award is not sufficiently clear to enable the Minister to know what to do. It requires the Minister to place Mkhondo in a position with the same salary and benefits applicable to the position of Maintenance Investigator. The first difficulty is that there is no evidence that such a position exists within the establishment under the Minister. Secondly, there is no evidence that Mkhondo meets the requirements for such a position. Further, the award requires of the Minister to be consulted before the placement in order to ensure that both parties (who had not been identified) are satisfied with the placement and conditions thereof. This ruling is vague and ambiguous. It is unclear as to who should consult the Minister and how? It is also unclear as to what is meant by satisfaction with the placement. Section 193 (4) of the LRA empowers an arbitrator to order reasonable

<sup>12</sup> 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC).

<sup>13</sup> *Robor Tube (Pty) Ltd v MEIBC and Others* [2018] 39 ILJ 2332 (LC)

<sup>14</sup> See *Nehawu obo Vermuelen v DG: Department of Labour* [2005] 8 BLLR 840 (C) at para 25.



terms which may include ordering re-employment; reinstatement or compensation.

- [23] Counsel for the trade union submitted that the placement ordered is equivalent to re-employment. I do not agree. Mkhondo was never dismissed. In terms of section 186(2)(c), it is an unfair labour practice to fail or refuse to reinstate or re-employ a former employee in terms of any agreement. To my mind, re-employment and or reinstatement is competent for this type of an unfair labour practice. The arbitrator found shortcomings in the process leading to the appointment of Musekwa. In my view, a competent ruling to make would have been to order a restart of the interview process. Nonetheless, this may be an issue to arrest the attention of the reviewing court at a later stage, if the review is reinstated.
- [24] The award further requires the Minister to pay Mkhondo a salary and benefits applicable to an unidentified position. Counsel for the trade union submitted that this should be interpreted to mean compensation. I do not agree. Section 194 of the LRA limits compensation. Even if the Court were to assume that the payment of a salary and benefits mean compensation, it is not clear for how long should the payment be made. There is no limitation expressed in the award. This is inconsistent with the provisions of section 194 of the LRA.
- [25] Therefore, it is my considered view that the award is not sufficiently clear and thus incapable of implementation.

Does the award satisfy the demands of law and fairness?

- [26] It is by now settled that an arbitration award is an administrative action. By law, the Minister has a constitutional right to a lawful and reasonable administrative action. Accepting that factually, the decision (award) exists, if it is unlawful, it has no legal consequences. The Constitutional Court in *Department of Transport and others v Tasima (Pty) Ltd*<sup>15</sup> held thus:

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<sup>15</sup> 2017 (1) BCLR 1 (CC).

“[88] On the contrary *Oudekraal* lays down a narrower principle that applies in specific circumstances only ... An invalid administrative act that does not exist in law cannot in itself have legal force and effect. Yet the act may exist in fact ... It exists in fact until set aside on review. However, since the act does not exist in law, it can have no binding effect.”

[27] Thus, the Minister is not bound by an unlawful decision. Since the award is not binding and valid, it cannot be made an order of court. The law is that a public administration must be accountable. Further, the law requires that a position must be within the sufficient budgeted funds. There was no evidence that there were sufficient budgeted funds for the position to which Mkhondo is to be placed. It shall be unaccountable and thus unconstitutional for the Minister to create a position without sufficient budgeted funds and an indication that such a position meets the objectives of the department. Filling the position without an advertisement and a recommendation of a selection committee is unlawful.

[28] Therefore, I conclude that the award does not satisfy the demands of the law.

### Conclusions

[29] In summary, I am not satisfied that this award is capable of implementation, nor am I satisfied that it satisfies the demands of the law. In exercising my judicial discretion, I refuse to make this award an order of this Court.

[30] In the results I make the following order:

### Order

1. The application in terms of section 158(1)(c) is hereby refused.
2. There is no order as to costs.



GN Moshwana

Judge of the Labour Court of South Africa

**Appearances:**

For the Applicant: Adv K Maphwanya.

Instructed by: Radzilani Attorneys.

For the Respondents: Adv M Rantho.

Instructed by: State Attorney Pretoria.



## Riyaana Pandy

---

**From:** Riyaana Pandy  
**Sent:** 27 May 2019 08:12 AM  
**To:** 'VRamruch@justice.gov.za'; 'radzilani.wonder@gmail.com'  
**Subject:** J 2282/13 & JR 1944/13 PSA obo F K MKHONDO // DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT  
**Attachments:** SKM\_28719052708061.pdf

Good day

The above matter refers.

Kindly find a letter for your attention.

Kind regards



### Riyaana Pandy

Judge's Secretary  
Labour and Labour Appeal Court  
86 Arbour Square Building, 6<sup>th</sup> Floor Cnr Juta & Melle  
Streets, Braamfontein, 2017  
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Website: [www.judiciary.org.za](http://www.judiciary.org.za)  
Facebook:  
<https://www.facebook.com/TheSouthAfricanJudiciary>

## Broadcast Report

P 1

27/05/2019 08:28

Serial No. A7AH021003787

TC: 137564

Addressee	Start Time	Time	Prints	Result	Note
0864762894	27-05 08:08	00:03:42	001/001	OK	
0123091649	27-05 08:26	00:00:56	000/001	No Ans	
0116229848	27-05 08:27	00:00:56	000/001	No Ans	

Note TMR:Timer TX, POL:Polling, ORG:Original Size Setting, FME:Frame Erase TX,  
 DPS:Page Separation TX, MIX:Mixed Original TX, CALL:Manual TX, CSRC:CSRC,  
 FWD:Forward, PC:PC-FAX, BND:Double-Sided Binding Direction, Sp:Special Original,  
 FCODE:F-code, RTX:Re-TX, RLV:Relay, MBX:Confidential, BUL:Bulletin, SIP:SIP Fax,  
 IPADR:IP Address Fax, I-FAX:Internet Fax

Result OK: Communication OK, S-OK: Stop Communication, PW-OFF: Power Switch OFF,  
 TEL: Rx from TEL, NG: Other Error, Cont: Continue, No Ans: No Answer,  
 Refuse: Receipt Refused, Busy: Busy, M-Full:Memory Full, LOVR:Receiving length over,  
 POWR:Receiving page over, FIL:File Error, DC:Decode Error, MDN:MDN Response Error,  
 DSN:DSN Response Error, PRINT:Compulsory Memory Document Print,  
 DEL:Compulsory Memory Document Delete, SEND:Compulsory Memory Document Send.



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 Ref: 4848/2013/Z38

And to: **T RADZILANI ATTORNEYS**  
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 Email: [radzilani.wonder@gmail.com](mailto:radzilani.wonder@gmail.com)  
 Ref: TR/74/LAB

Date: Monday, 27 May 2019

Dear Sirs

**J 2282/13 & JR 1944/13 PSA obo F K MKHONDO // DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT – JUDGMENT**

The above matter refers.

Kindly take notice that the order in the above matter will be delivered in court on Tuesday, 28 May 2019 at 10h00 at Johannesburg Labour Court situated at 6<sup>th</sup> Floor Arbour Square, 86 Juta Street, Braamfontein, Johannesburg.

Kind regards

  
 Riyaana Pandey  
 Judge's Associate  
 Labour and Labour Appeal Court  
 86 Arbour Square Building,  
 6<sup>th</sup> Floor Cnr Juta & Melle Streets,  
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Ref: 4848/2013/Z38

**And to: T RADZILANI ATTORNEYS**  
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Ref: TR/74/LAB

**Date: Monday, 27 May 2019**

Dear Sirs

**J 2282/13 & JR 1944/13 PSA obo F K MKHONDO // DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT – JUDGMENT**

The above matter refers.

Kindly take notice that the order in the above matter will be delivered **in court** on **Tuesday, 28 May 2019 at 10h00** at Johannesburg Labour Court situated at **6<sup>th</sup> Floor Arbour Square, 86 Juta Street, Braamfontein, Johannesburg.**

Kind regards

**Riyaana Pandey**  
Judge's Associate  
Labour and Labour Appeal Court  
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