



CONSTITUTIONAL COURT OF SOUTH AFRICA

Mothulwe v Labour Court, Johannesburg and Others

CCT 13/24

Date of judgment: 8 May 2025

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 8 May 2025, the Constitutional Court handed down judgment in an application for rescission of the Court’s previous orders in the same matter. The applicant was Mr Paballo Mothulwe (Mr Mothulwe). The first respondent was the Labour Court in Johannesburg (Labour Court). The second respondent was Mr Martin Sambo who was the main panellist in the arbitration proceedings (Arbitrator). The third respondent was the General Public Service Sectoral Bargaining Council (Bargaining Council). The fourth respondent was the Mpumalanga Department of Public Works, Roads and Transport. The fifth respondent was described as the Judicial Service Committee of South Africa.

On 15 May 2013, Mr Mothulwe and a Mr Percy Nkambule (Mr Nkambule) were charged with corruption for soliciting a bribe in exchange for not impounding a vehicle that belonged to an off-duty police officer and for failing to carry out an instruction to be undertake operations in Greylingstad. Following disciplinary proceedings, they were found guilty on both charges and dismissed. They then referred an unfair dismissal dispute to the Bargaining Council which dismissed it. Failing conciliation, they referred the matter to arbitration. At the arbitration, the Arbitrator held that Mr Mothulwe and Mr Nkambule’s dismissals were procedurally fair but substantively unfair in that the sanction of dismissal was disproportionate to the offence. The Arbitrator ordered their immediate reinstatement, and replaced their sanction of dismissal with a sanction of a final warning. The Arbitrator refused to award compensation or backpay to them because it did not find them with “clean hands”.

Aggrieved with the Arbitrators finding on sanction, the Department brought a review application in terms of section 145 of the Labour Relations Act 66 of 1995 (LRA). It sought to review and set aside the sanction on the basis that a final warning was unreasonable given that the Arbitrator had found them guilty of corruption. In other words, the Department complained that the punishment did not fit the crime. In response to the

review brought by the Department, Messers Mothulwe and Nkambule brought a cross-review challenging the finding that they were guilty of corruption. Considering the matter, the Labour Court found that if it was to uphold the Department's review, the Arbitrator's award would be set aside, and thus there would be no need to consider the cross-review brought by Messers Mothulwe and Nkambule. The Labour Court then found that the Arbitrator committed a reviewable irregularity by imposing a sanction that did not fit the finding of guilt. It thus reviewed and set aside the Arbitrator's award. The Labour Court further held that there was no need to remit the dispute back to the Arbitrator because it could decide on the evidence before it what the appropriate sanction should be. On this basis, it held that the dismissal was both procedurally and substantively fair.

It was common cause that the Labour Court did not consider the cross-review brought by Messers Mothulwe and Nkambule. Agrieved, Mr Mothulwe brought an application for leave to appeal, which the Labour Court refused. He thereafter filed a petition to the Labour Appeal Court for permission to appeal to it, which was also refused. Mr Mothulwe then brought an application for leave to appeal to this Court. Mr Mothulwe's primary complaint was that the Labour Court committed an irregularity by not considering his cross-review. He alleged that there were two separate reviews before the Labour Court. The first was the Department's review on sanction. The second was Mr Mothulwe's cross-review on the finding of guilt. He contended that the Labour Court could not have disposed of the main review, which dealt with sanction, without dealing with his cross-review, which dealt with the finding of guilt. The Department opposed Mr Mothulwe's application in this Court, saying that the Labour Court did not commit a reviewable irregularity, it simply followed the consequences of upholding the Department's review, which was to set aside the Arbitrator's award. The effect of this was that once the entire award was set aside, there was nothing left to consider in the cross-review.

On 19 July 2022, this Court refused Mr Mothulwe's application for leave to appeal on the basis that it did not enjoy reasonable prospects of success (the first order). Mr Mothulwe then brought an application for a rescission of this Court's order refusing him leave to appeal. On 23 May 2023, that second application failed. This was on the basis that no case had been made out for rescission (the second order). The present application was brought as a direct access application against the two previous decisions of this Court. Following directions issued by the Chief Justice, Mr Mothulwe made the following essential submissions. First, that this Court had the power to interfere with its previous orders. Second, that this Court can do so in the interests of justice if the order was inconsistent with the Constitution. Third, the Labour Court failed to adjudicate his cross-review, which violated his right of access to court under section 34 of the Constitution. He argued that the Labour Court's refusal to adjudicate his cross-review was inconsistent with the Constitution and thus the Court holds the power to intervene in its previous orders that, in effect, upheld the Labour Court's decision.

In response to the directions issued by the Chief Justice, the Department accepted that the Labour Court did not consider the cross-review, but said that this naturally flowed from the order it made. Because both orders flowed from the same award, the Department argued, the Labour Court was entitled not to consider the cross-review since the award

would be set aside on the basis of the main review. It persisted in its argument that, as a consequence, there was no need for the Labour Court to consider the cross-review. However, the Department accepted that the fact that Mr Mothulwe was unrepresented at the time he brought his applications to this Court, he may not have had a chance to bring a legally sound case. The Department accepted that these could constitute grounds for this Court to intervene in its previous order refusing leave to appeal. It further accepted that it would have been more prudent if the Labour Court only set aside the award after dealing with both the main review and the cross-review fully, which it did not.

Regarding whether this Court, if it overturned its previous orders, should also adjudicate the merits of the cross review, both parties argued that this would not be ideal. Firstly, because the cross-review was factually laden, and it was not ideal for this Court to deal with factually laden issues. Secondly, because the Labour Court was best placed to peruse the record and the facts, and then determine the cross review.

The Court decided to finalise the matter without a hearing.

In a unanimous judgment written by Kollapen J, the Court considered four main issues. First, whether it had the jurisdiction to decide the matter, given its framing as an application for direct access. Second, whether the issue giving rise to the second order was already decided (*res judicata*) and thus whether this Court was permitted to consider the rescission application again. Third, whether rescission of the first order should be granted in the interests of justice. Fourth and finally, whether the Labour Court should have decided Mr Mothulwe's cross-review and thus whether the Labour Court's order should be set aside.

Regarding jurisdiction, this Court held that the issue whether the Labour Court infringed Mr Mothulwe's section 34 rights due to its failure to adjudicate his cross-review was a constitutional matter which engaged this Court's jurisdiction. Further, it was in the interests of justice that this Court reconsider the matter due to the possible manifest injustice that would arise if Mr Mothulwe's cross-review was left unadjudicated. Due to the unusual circumstances in which the Labour Court seemed to have disregarded Mr Mothulwe's cross-review, it was in the interests of justice for this Court to consider whether the Labour Court's judgment was proper or whether it resulted in an unjustifiable infringement of Mr Mothulwe's section 34 rights. Thus, this Court held that the matter should be reconsidered.

Regarding whether the second order was *res judicata*, the Court held that ordinarily, the doctrine of *res judicata* prevented the Court from interfering with its previous orders. The principle has a salutary purpose, this being to ensure finality in the court's orders and thus certainty in the law. However, the doctrine of *res judicata* was not an inflexible doctrine, and should not be applied with absolute rigidity. An exception to the principle of *res judicata* is that a court can re-open a case if it was in the interests of justice to do so and then only in truly exceptional circumstances. These would include where a manifest injustice would arise from the existence of an order, such as where the order unjustifiably infringed on a constitutional right. The Court found that the Labour Court's refusal and the reasons it advanced for refusing to consider Mr Mothulwe's cross-review was fatally

flawed. A court could not refuse to deal with a properly brought challenge against his finding of guilt on the basis that the award was set aside on the basis that the sanction was reviewable. Thus, the Labour Court's failure to consider Mr Mothulwe's cross review infringed on his section 34 right, and resulted in a manifest injustice. This injustice arose in unusual circumstances, namely, on the basis of a flawed approach by the Labour Court. The Court held that these were truly exceptional circumstances which warranted a relaxation of the res judicata doctrine and an intervention in the second order.

Regarding whether rescission of the first order should be granted, the Court found that the traditional common law grounds for rescission did not apply in this case. It held, however, that this Court recognised that it may rescind its own orders if doing so was in the interests of justice. The test, in the context of rescission, this Court held, was that a rescission would only be granted in very exceptional circumstances. The circumstances must be wholly exceptional, and that they must result in a substantial hardship or injustice if the order is not rescinded. Based on these principles, the Court found that the rescission should be granted on the facts of this case. This was because the Labour Court's finding of procedural and substantive fairness and setting aside of the Arbitrator's award resulted in an injustice given the fact that it did not adjudicate Mr Mothulwe's cross-review. In these circumstances, coupled with the fact that he was unrepresented when he brought his application for leave to appeal, this Court found that it should rescind its previous order refusing leave to appeal.

Regarding whether the Labour Court should have decided Mr Mothulwe's cross-review, this Court proceeded from the trite principle that a court should decide any dispute properly before it. Logically, a challenge against a finding of guilt should be dealt with before a challenge against the sanction imposed. This was because the sanction had to follow the finding of guilt. If there was no finding of guilt there could be no sanction. A court could not start with the challenge against sentence and dispose of the matter in that way leaving unaddressed the challenge against guilt. The Labour Court in this matter adopted this fatally flawed approach, which resulted in its failure to adjudicate the proper challenge before it in respect of the finding of guilt. This Court therefore held that the Labour Court could not have arrived at the order it did without considering the cross-review. Doing so resulted in an infringement of Mr Mothulwe's section 34 rights. Thus, this Court held, his appeal against the Labour Court's order must be upheld, and the Labour Court must properly consider Mr Mothulwe's cross-review. Following that, the Labour Court can determine what the appropriate sanction should be in the event that it finds against Mr Mothulwe in the cross-review.

The Court made no comment as to the merits of Mr Mothulwe's cross-review, save to say that in the light of the record that this Court obtained from the Labour Court, the cross-review could not be said to be hopeless, and it deserved proper consideration.