

9 SEPTEMBER 2019

EMPLOYMENT ALERT

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Can arbitration awards for compensation accrue interest pending review?

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Mr Khwaile Rufus Malatji (Mr Malatji) was employed by the Department of Home Affairs (Department) and was dismissed following a disciplinary hearing where he was found guilty on various charges. Mr Malatji referred an unfair dismissal dispute to the General Public Services Sector Bargaining Council (GPSSBC) where on 14 August 2006, an arbitration award was issued in his favour ordering his retrospective reinstatement and compensation equal to 12 months remuneration (the Award). The Award was varied on 30 August 2006, in terms of which the retrospective back pay was limited to the value of 12 months' remuneration.

The Minister and the Department applied to the Labour Court for the review and setting aside of the Award. On 2 April 2013, the Labour Court set aside the Award on the grounds of procedural unfairness and awarded Mr Malatji R399,750.00. No order was made in respect of interest. On 24 April 2014, the Department paid the principal amount and interest from 2 April 2013, which was the date of judgment of the Labour Court. However, Mr Malatji insisted that interest should have been paid from 1 September 2006, the date pursuant to the issuing of the variation

award by the GPSSBC. He further argued that he was entitled to interest in terms of s143(2) of the LRA which provides:

"If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Interest Act, 55 of 1975, unless the award provides otherwise."

In light of the above, on 21 January 2015, Mr Malatji applied for a declaratory order from the Labour Court, ordering the Minister and the Department to pay interest from 1 September 2006 until 24 April 2013, the date which the Department paid interest on the capital amount. On 19 January 2017, the Labour Court dismissed the application for the declarator and held that s143(2) of the LRA does not apply where the Labour Court substitutes the decision of an arbitrator with its own and that where the Labour Court decides to substitute the award "in toto" then either expressly or by necessary implication it has dealt with the issue of whether interest should be payable on the sum of money. The Labour Court also held that it had no jurisdiction to overrule the judgment of a fellow judge and was bound by it.

Mr Malatji appealed the above decision in the Labour Appeal Court (Appeal Court) and contended that the Labour Court had erred in its finding and argued that the Labour Court sat as an arbitrator satisfying

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s143(2) of the LRA, and further contended that substituting the arbitrator's decision "in toto" in effect disallowed the payment of interest on the capital sum. Mr Malatji further contended that substitution of the award of compensation as opposed to reinstatement lessened the financial burden imposed on the Minister and the Department (the Respondents).

In light of the above, the Appeal Court addressed the question of when the calculation of *mora* should run and held that *mora* interest can only accrue once the amount of compensation is ascertained or easily ascertainable. In addition, the Appeal Court stated that where the award is subject to review, it cannot be said that the quantum is readily ascertainable and the time for performance by the debtor is fixed once the Labour Court hands down judgment in the review application.

The Appeal Court referred to the case of *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus and Others* where the court stated that although s143(3) of the LRA empowered the Labour Court to postpone the enforcement of an award pending a review application. It did not follow automatically that the award was enforceable. If this were the case then the applicants for review would be prejudiced as arbitration awards constitute administrative action, not claims capable of being enforced.

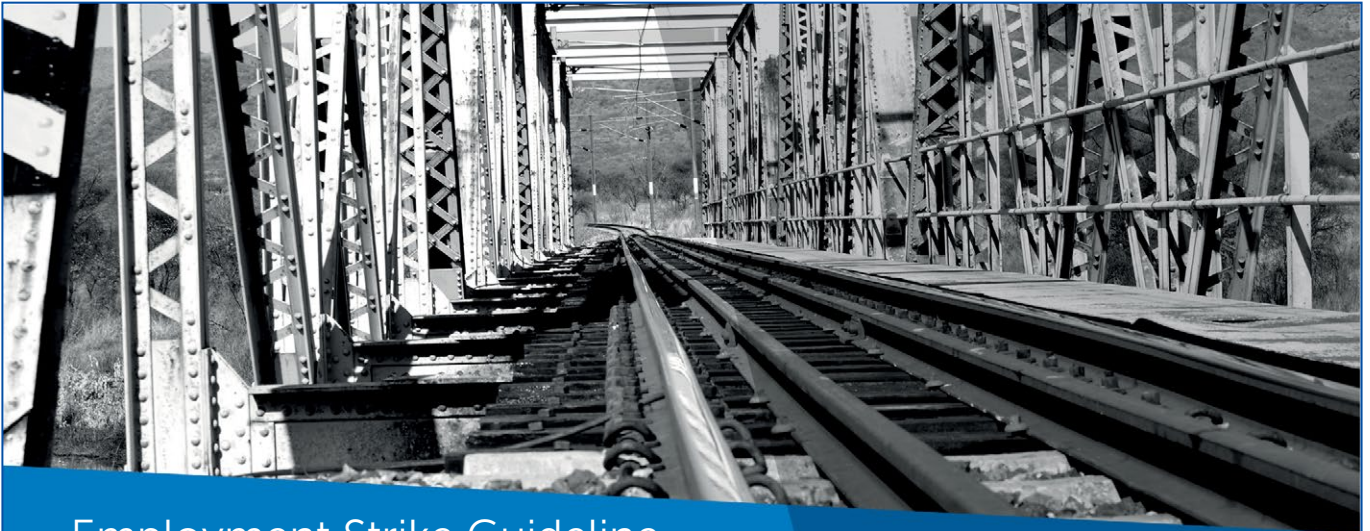
The Appeal Court further considered the award for the retrospective reinstatement of Mr Malatji made by the GPSSBC. The Appeal Court made it clear that an order of reinstatement does not constitute a debt thus interest could not have accrued from the date of the issue of the award.

In conclusion, the Appeal Court stated that the Respondents would only be entitled to pay the interest at the time that the unliquidated claim can be claimed or deemed payable from the date of the award, only if such award has not been challenged in a review process or can be claimed from the date that the review judgment is handed down, pursuant to the court's determination of the quantum of the claim. The appeal was partially upheld, and a portion of the Labour Court's order was set aside and substituted with an award entitling Mr Malatji to an amount equivalent to nine month's salary with interest bearing at the rate of 15.5% from the date of judgment being 2 April 2013.

This case makes it clear that an award shall accrue interest from the date which it is awarded subject to review processes. In essence, an award becomes due and payable when it is free from any pending reviews and final orders.

Sikelelwa Stemele and Samiksha Singh

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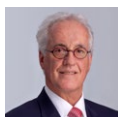
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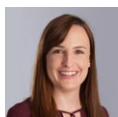
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