



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable/Of interest to other Judges

Case no: C33/2021

In the matter between:

SOUTH AFRICAN POLICE SERVICES

Applicant

And

SAFETY AND SECURITY SECTORAL BARGAINING

COUNCIL

First Respondent

JANA DELL

Second Respondent

JA KOTZE

Third Respondent

CLIVE GERALD BOWERS

Fourth Respondent

Heard: 27 June 2025

Delivered: 11 July 2025

Summary: (Reinstatement application – discretionary power that has to be exercised with circumspection and only in exceptional circumstances because of a litigant's constitutional rights in terms of Section 34 of the Constitution - a Court cannot consider a delay in a vacuum but in light of all of the relevant facts including the prejudice to the parties, the possible consequences of granting, or of not granting the relief sought in respect of the merits, the prospects of success and the interests of justice – protected promotion an available remedy available in the most exceptional kind of cases where there is a certainty that the complainant would have been appointed and if considered that actual damages

can be proven – no reasonable explanation for delay and no prospects of success
– application dismissed)

JUDGMENT

MAY, AJ

Introduction

[1] This is an opposed reinstatement application.

Condonation

[2] It is by now trite that an application for reinstatement is effectively an application for condonation.¹

[3] The review application was launched on the 20th of January 2021. The record was received from the first respondent on the 26th of March 2021 and Notices in terms of Rule 7A (5) were also sent out by the Registrar on 26 March 2021. The Applicant however only delivered their Rule 7A (6) and (8) notices as well as the transcript on the 8th of March 2022 and it was only filed at Court on 23 March 2022. On 5 April 2022, the fourth respondent filed a notice objecting to the late filing of the Applicant's Rule 7A (6) and Rule 7A (8) Notices on the basis that they have been filed outside of the time periods as provided for in the Rules of Court and Practice Manual with no substantive application for condonation or extension of the time periods as provided for in Rule 7A.

[4] The Applicant launched an application for reinstatement of the review on 15 June 2023 which was only filed at Court on 2 August 2023. It was however delivered by e mail to the Respondents and the Registrar on 15 June 2023.

¹ *Samuels v Old Mutual Bank* [2017] 38 ILJ 1790 (LAC)

- [5] Rule 7A (6) requires the delivery of the transcript and record and Rule 7A (8) requires the delivery of a notice confirming that the Applicant either stands by its Notice of Motion or intends supplementing the grounds of review.
- [6] Due to the deficiencies in the rules, the Practice Manual was introduced which were held to be binding.² Clause 11.2.2 requires that records must be filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received. Clause 11.2.3 provides that if the applicant fails to file a record within this period, the application will be deemed withdrawn unless an extension of time and consent has been sought from the respondent and is given.
- [7] Clause 11.2.7 requires an applicant to ensure that all necessary papers in the application are filed within 12 months of the date of the launch of the application 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 be archived or be removed from the archive.
- [8] The Applicant has failed to comply with the clause 11.2.2 and thus in terms of clause 11.2.3 the application is deemed withdrawn. The application was deemed withdrawn on 28 June 2021 (60 days from 26 March 2021). Given that the application was deemed withdrawn from the aforementioned date, the time period in clause 11.2.7 is not implicated as an application cannot be withdrawn or dismissed twice.

² *Samuels v Old Mutual Bank* supra.

[9] This Court must consider the well-known principles laid down in *Melane v Santam Insurance Co Ltd*³ and *Grootboom v National Prosecuting Authority & Another*⁴.

[10] In *Grootboom* the Constitutional Court stated the following in paras [50] and [51]:

[50] *In this Court the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. The factors that are taken into account in that enquiry include:*

- (a) *the length of the delay;*
- (b) *the explanation for, or cause for, the delay;*
- (c) *the prospects of success for the party seeking condonation;*
- (d) *the importance of the issue(s) that the matter raises;*
- (e) *the prejudice to the other party or parties; and*
- (f) *the effect of the delay on the administration of justice.*

[51] *The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused*

³ 1962 (4) SA 531 (A).

⁴ 2014 (2) SA 68 (CC).

where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive, but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.'

[11] The dismissal of a review application is a discretionary power that has to be exercised with circumspection and only in exceptional circumstances because of a litigant's constitutional rights in terms of Section 34 of the Constitution to have any dispute that can be resolved by application of law decided in a fair public hearing before a Court. In the exercise of that discretion therefore, a Court cannot consider a delay in a vacuum but in light of all of the relevant facts including the prejudice to the parties, the possible consequences of granting, or of not granting the relief sought in respect of the merits, the prospects of success and ultimately the interests of justice.⁵

[12] Even in circumstances where a delay has not been adequately explained, such a delay cannot be evaluated in a vacuum but must be evaluated taking into account the potential prejudice to the parties, the possible consequences of granting the relief sought or not granting it or not dealing with the matter on its merits. The nature of the application and the strength of the merits may also either favour or not favour overlooking a delay.⁶

[13] In other words, and whilst not necessarily being a closed list, the factors a Court must consider are:

13.1 the length of the delay;

13.2 the explanation for, or cause for, the delay;

⁵ *SAMWU obo Shongwe and Others v Moloi N.O. and Others* [2021] 5 BLLR 464 (LAC) at paragraph 26.

⁶ *City of Johannesburg Metropolitan Municipality and Others v Independent Municipal and Allied Trade Union and Others* (2017) 38 ILJ 2695 (LAC) at paragraphs 55, 56 and 76.

- 13.3 the prospects of success for the party seeking condonation;
- 13.4 the importance of the issue(s) that the matter raises;
- 13.5 the prejudice to the other party or parties in granting or not granting the relief requested and not considering the merits of the dispute;
- 13.6 the effect of the delay on the administration of justice;
- 13.7 the litigant's rights in terms of Section 34 of the Constitution to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court; and ultimately
- 13.8 the interests of justice.

[14] The corollary to this is that an application for condonation must give a full explanation for the delay covering the entire period of the delay and the explanation must be reasonable.⁷ In *Allround Tooling (Pty) Ltd v NUMSA and others*,⁸ the Labour Appeal Court (LAC) restated the well-established principle that a condonation application must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. The absence of a reason for such failure is fatal to the condonation application.⁹

[15] Sight also cannot be lost of the fact of the now trite proposition that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success.¹⁰ In addition, it is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default¹¹.

⁷ *Van Wyk v Unitas Hospital and Another* [2007] ZACC 24; 2008 (4) BCLR 442 (CC) at paragraph 22.

⁸ [1998] ZALAC 8; [1998] 8 BLLR 847 (LAC) at para [8].

⁹ See also *Aspen Holdings (Pty) Ltd and Another v Phelane and Another* (JA71/23) [2025] ZALAC 4 (23 January 2025)

¹⁰ *Colett v Commission for Conciliation, Mediation and Arbitration and Others* [2014] 6 BLLR 523 (LAC) at paragraph 38.

¹¹ *Grootboom* at paragraph 23.

Period of delay and explanation

- [16] The Applicant has failed to comply with clause 11.2.2 and thus in terms of clause 11.2.3 the application is deemed withdrawn. The application was deemed withdrawn on 28 June 2021 (60 days from 26 March 2021).
- [17] The Applicant launched an application for reinstatement of the review on 15 June 2023 which was only filed at Court on 2 August 2023. It was however delivered by e mail to the Respondents and the Registrar on 15 June 2023
- [18] There are 2 periods of delay applicable. One is between the receipt of the record and its subsequent delivery. The reason preferred for the delay is not really any reason at all and is most certainly not acceptable.
- [19] In essence the State Attorney alleges that Mr Ramabulana was appointed to assist with the taking over of all the SAPS matters in April 2022 which would already be after the record had been filed and thus provides no reason why the record was filed late at all.
- [20] In relation to the second period, the Applicant's reasons appear to be Mr Ramabulana's busy practice and the lack of time and resources available to attend to this matter. What doesn't assist the Applicant is that they annex what appears to be a request for a progress update from SAPS dated the 29th of August 2022 as MVZ1 in which at August 2022 the SAPS confirmed that approval was given to transcribe the record on 24 November 2021, and thus a request was made prior thereto for such approval, and recognised that an application to reinstate the review application would be required¹². Despite this, there is no explanation why the record and transcript are only filed in March 2022 and no explanation why the application for reinstatement

¹² Page 20 of the reinstatement record.

is only delivered in June 2023 almost a year after SAPS had requested it be made and over 2 years after it was due.

- [21] This Court is of the view that this constitutes a flagrant disregard of the Rules of Court. The Constitutional Court's words in *Grootboom*¹³ are apposite:

*"The respondents are not ordinary litigants. They constitute an essential part of government. In fact, together with the office of the State Attorney, the respondents sit at the heart of the administration of justice. As organs of state, the Constitution obliges them to "assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts." Furthermore: "The primary duty of the office of the State Attorney is to serve the interests of the government by initiating proceedings on behalf of or defending any proceedings against the state."*¹⁴

- [22] This Court's view is that the lack of an explanation for either period of the delay is fatal to the application, however, mindful of the factors listed above especially the consequences to the parties should the merits not be considered, this Court will nevertheless consider the prospects of success. The Court will accept that the matter is important to both parties and takes into account the effects the delay has had and continues to have on the administration of justice. This Court also accepts that both parties stand to be prejudiced with a finding either way. This Court will weigh those carefully.

Prospects of success

- [23] The dispute concerned an Unfair Labour Practice related to promotion in terms of which the third respondent, after he had competed with the fourth

¹³ At paragraph 30.

¹⁴ *Grootboom* at paragraph 31 quoting from Section 3(1) of the State Attorney Act 56 of 1957.

respondent for the post in question, scored 76% and the fourth respondent scored 73.2% and the third respondent was accordingly appointed¹⁵.

[24] The fourth respondent referred a dispute to the first respondent and the second respondent was appointed to arbitrate said dispute. The fourth respondent called the chairperson of the interviewing panel, Major-General Jacobus Johannes Matthys, as his sole witness and the Applicant relied on the evidence of General Henriette De Waal who sat at the moderation committee where the scores and recommendations of different panels were presented and agreed upon¹⁶.

[25] General Matthys testified that at the promotion evaluation panel the fourth respondent was recommended as the successful candidate as he had the highest score, and his equity profile met the equity requirements in terms of the Applicant's equity plan. He testified that after their recommendation was sent to the moderation committee, Lt. Gen Shivuri, the Provincial Commissioner of Police, instructed him to recommend the third respondent as the recommended candidate as he wanted him promoted¹⁷.

[26] He testified that as the interviews had already taken place, the only way that the third respondent could be recommended is if the scores awarded to the parties were altered. The scores were accordingly altered to give the third respondent a higher score of 76%. The provincial commissioner then accepted the recommendation of the third respondent. He did not divulge the irregularity at that stage as he was near pension and did not want to be seen to be on the wrong side of the provincial commissioner¹⁸.

¹⁵ Paragraph 7 of the arbitration award.

¹⁶ Paragraph 21 of the award.

¹⁷ Paragraphs 13 of the award.

¹⁸ Paragraphs 14 to 17 of the award.

[27] Importantly, General De Waal confirmed that all of the chairpersons do not sit in while the moderation committee is in sitting and that they are called in one by one. She therefore conceded that she would not have been in the room when the provincial commissioner gave the alleged instruction and could therefore not gainsay it¹⁹. She conceded that such an instruction, if indeed given, would be unlawful and constitute an irregularity.²⁰ She also conceded that the equity guidelines favoured the appointment of a person of colour.²¹

[28] It appeared that another witness, as a member of the interviewing panel, Brigadier Hender, who may or may not have been able to confirm the version of the third or fourth respondents, was initially available to give evidence but was ultimately not called by the Applicant.²² The credibility of General Mathys was attacked on the basis that he couldn't submit the original scoresheets. In this respect, however, his evidence was that only the corrected scoresheets were submitted to the Moderation committee.²³

[29] The second respondent in assessing the evidence accepted that General Mathys was the chairperson of the interview committee and was instructed to change the scores and recommendation, as a result the third respondent was recommended, that the fourth respondent would have been the successful candidate but for the score change and that the Applicant failed to lead any evidence to gainsay the fourth respondent's version especially not Brigadier Hender who was available.

[30] The second respondent, correctly in this Court's view, and with reference to the relevant authorities, concludes that the decision not to promote the fourth respondent and thus the decision to promote the third respondent

¹⁹ Paragraph 22 of the award.

²⁰ Paragraph 36 of the award.

²¹ Paragraph 40 of the award.

²² Paragraph 60 of the award.

²³ Paragraph 61 of the award.

constituted an unfair labour practice. The second respondent, also correctly in the Court's view, concludes that neither the third nor the fourth respondents were involved in the irregularity perpetrated by the provincial commissioner.

[31] The second respondent's finding therefore that the decision amounts to an unfair labour practice accords with the material properly before her and therefore does not constitute an award that a reasonable commissioner would not have made.

[32] The Applicant contends further that the remedy of protective promotion is beyond the power of the second respondent and is precluded by Section 194 (4) of the LRA, which allows a maximum of 12 months compensation.

[33] This statement is of course an incorrect statement of the law. As correctly pointed out by the second respondent, *Minister of Safety and Security v SSBC and others*²⁴ is authority that relief may take the form of a protected promotion if and when the circumstances of the promotion dispute in question clearly show that the unfair labour practice most probably had the effect of denying the employee appointment in a post, as in this instance, that a compensatory form of promotion of this kind is likely to be an appropriate remedy under section 193(4) of the LRA²⁵.

[34] The Applicant's reliance on *KwaDukuza*²⁶ and *Ekurhuleni*²⁷ is accordingly misplaced. This Court in *KwaDukuza* clearly countenanced the remedy being available in the most exceptional kind of cases where there is a certainty that the complainant would have been appointed and if considered

²⁴ [2010] 9 BLLR 965 (LC) at paragraphs 27 to 28.

²⁵ See also *Willemse v Patelia NO and Others* [2007] 2 BLLR 164 (LC) at paragraphs 92 and 93.

²⁶ *KwaDukuza Municipality v SALGBC and other* (2009) 30 ILJ 356 (LC)

²⁷ *Ekurhuleni Metropolitan Municipality and another v SALGBC and others* [2019] ZALCJHB 91

that actual damages can be proven as distinguished from itself and as compared to the facts in *Willemse*.²⁸

Grounds of review and assessment

[35] For a review on the grounds of unreasonableness to be determined, the court has to consider the often-inter-related questions of rationality, lawfulness and proportionality. The court must consider the purpose, basis, reasoning or effect of the decision against the review grounds such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously etc²⁹. The court must also consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence before the arbitrator.³⁰ In other words, whether the arbitrator misconceived the inquiry or undertook the inquiry in a misconceived manner and thus whether there was a fair trial of the issues.³¹

[36] Mere errors of fact or law may therefore not be enough to vitiate the award. Something more is required. Therefore flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result.³²

[37] The second respondent's findings are ultimately findings she was empowered to make having considered all of the facts and circumstances.

²⁸ At paragraph 11 of *KwaDukuza*.

²⁹ *Head of the Department of Education v Mofokeng and Others* [2015] 1 BLLR 50 (LAC) at paragraph 32.

³⁰ *Herholdt v Nedbank Ltd* 2013 (6) SA 224 (SCA) at paragraph 12.

³¹ *CUSA v Tao Ying Metal Industries and Others* [2009] 1 BLLR 1 (CC) at paragraph 76.

³² *Herholdt supra* at paragraphs 21–25.

The findings do not have the effect that the trial between the parties was not fair. They accord with the material and evidence before her and is therefore reasonable.

[38] On the basis of the discussion above, the decision by the second respondent cannot be said to be irrational or unreasonable. It follows therefore that the application for condonation does not have prospects of success. There is therefore no reasonable explanation for the delay and no prospects of success.

[39] In view of the above, the application for reinstatement stands to be dismissed, the effect of which would be that the matter remains deemed withdrawn. I make the following order.

Order

1. The application for reinstatement is dismissed.
2. There is no order as to costs.



C May
Acting Judge of the Labour Court of
South Africa.

Appearances

For the Applicant

M Ramabulana instructed by State
Attorney, Kimberley

For the Fourth Respondent

A Gerber instructed by the South
African Policing Union (SAPU)