THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable/Of interest to other Judges

Case no: C126/2023

In the matter between:

OFFICE OF THE PREMIER, FREE STATE PROVINCE **Applicant**

And

LEBOGANG GODFREY LESIU **First Respondent**

SEKONYELA MOEKETSI MOEKETSI N.O. **Second Respondent**

GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL **Third Respondent**

Heard: **27 June 2025**

Delivered: **5 August 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, the test for determining whether condonation should be granted or refused is the interests of justice - the duty to

reconstruct a record is a duty that is placed on the arbitrator and both parties to the proceedings especially where both parties are legally represented – application for reinstatement granted)

JUDGMENT

MAY, AJ

Introduction

[1] The Court is confronted with a reinstatement application which has given rise to an application to set aside the filing of a confirmatory affidavit to the opposing affidavit filed therein as an irregular step which, in turn, has given rise to an application for condonation for the late filing of an opposing affidavit to the application to set aside the irregular step taken and finally an application for condonation for the late filing of the Applicant's Heads of argument.

[2] All applications, save for the condonation application relative to the Applicant's Heads of argument, are opposed. A proper case was made out for condonation, as set out in the Founding Affidavit of Mr Chauke for the State Attorney, duly supported by submissions contained in the Applicant's Heads supplemented by the oral submissions by Ms Williams SC who appeared for the Applicant with Mr AIB Lechwano. Mr Du Preez, who appeared for the First Respondent, confirmed that the First Respondent did not oppose the request and consequently the Court granted condonation for the late filing of the Applicant's Heads of argument.

[3] What remains therefore is the condonation for the late filing of the opposing affidavit to the irregular step application, the irregular step application and the reinstatement application itself.

Irregular Step

[4] The reinstatement application was delivered to the parties on 16 September 2024.[1] The First Respondent's answering affidavit, deposed to by the First Respondent, was delivered on 7 October 2024.[2] A replying affidavit thereto was delivered on 23 October 2024.[3] Subsequent to the replying affidavit, and on 15 January 2025, the First Respondent filed what appears to be a confirmatory affidavit deposed to by Mr André Botha, his attorney.[4] On 29 January 2025, the Applicant delivered a notice in terms of Rule 57 alerting the First Respondent to the irregular step and calling upon him to withdraw same within ten days.[5] Having failed to do so, the Applicant delivered its application to set aside the irregular step on 5 March 2025.[6]

[5] The first respondent's answering affidavit was due by 19 March 2025 but was only delivered on 31 March 2025.[7] The applicant delivered a notice of objection thereto on 8 April 2025[8] and on 15 April 2025 the first respondent sought condonation for the late filing of his answering affidavit in the irregular step application.[9] The Applicant opposes same and filed answering papers on 5 May 2025[10] to which the first responded replied on 12 May 2025.[11]

[6] The Court must first consider therefore whether a proper case has been made out by the first respondent to condone the late filing of the answering affidavit in the irregular step application, then the irregular step application and then the reinstatement application.

Principles relevant to Condonation

[1] Reinstatement record: pages 58a to c.
[2] Reinstatement record: page 60
[3] Reinstatement record: page 154
[4] Reinstatement record: pages 195 to 199
[5] Reinstatement record: notices: pages 6 to 9
[6] Irregular step record: pages 1 to 16
[7] Condonation record: pages 17 to 37
[8] Irregular step record: notices: pages 10 to 14
[9] Condonation record: pages 1 to 41
[10] Condonation record: pages 45 to 68
[11] Condonation record: pages 69 to 95

[7] This Court must consider the well-known principles laid down in *Melane v Santam Insurance Co Ltd*[12] and *Grootboom v National Prosecuting Authority & Another*[13].

[8] 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:*
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> *(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.*
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> *…*
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> *[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 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.'*

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[12] 1962 (4) SA 531 (A).
[13] 2014 (2) SA 68 (CC).

[9] 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.[14]

[10] The first respondent contends his attorney had confused the rules of the High Court with the Rules of this Court resulting in him being under the impression that the affidavit was due within 15 days instead of 10 days as is required under Rule 35 (7).[15] The Uniform Rules provide for a respondent to indicate that it intends opposing the application within the time stated in the application for it to do so, which must be a day not less than 10 days from date of receipt of the application[16], and thereafter filing an opposing affidavit within 15 days of delivering the notice to oppose.[17]

[11] The reason offered seems contrived given that the nexus of the application is the reinstatement application which was necessitated by correspondence addressed by the first respondent to the Applicant in which he quotes, with some authority, excerpts from the Act, Sections 145 (7) and (8) in particular, the Rules and the Practice Manual in support of his contention that the review is either deemed withdrawn in terms of clause 11.2.3 of the practice manual or the application is deemed to be archived in terms of clause 16 of the practice manual.[18] The Applicant in its answering affidavit contends that it is unlikely that an attorney with Botha's experience and knowledge would have made such a mistake particularly given that the filing period post amendment of the rules remain the same.[19] I am inclined to agree that it seems highly unlikely that Mr Botha would have studied the Rules and the practice manual to such an

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[14] *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.
[15] Condonation application record: page 11 para 8.7
[16] Rule 6 (5)(b)(iii) and Rule 6 (5)(d)(i)
[17] Rule 6 (5)(d)(ii)
[18] Reinstatement record: Annexure FA4 pages 48 to 50
[19] Condonation record: AA pages 51 to 52

extent to quote the relevant periods applicable to the matter being deemed withdrawn or archived but not be aware of the time period within which the answering affidavit is due, particularly given the litigation history between the parties as is apparent from the Court file. This seems improbable.

[12] I agree therefore that there is no reasonable explanation offered for the late filing of the answering affidavit. In considering whether there are prospects of success, I must consider whether the original complaint complained of constitutes an irregular step.

[13] The first respondent disputes that the filing of the confirmatory affidavit constitutes an irregular step and contends that it does not constitute a further affidavit and/or causes any prejudice.[20] This view, with respect, is contrived. The issue is not just whether it constitutes a further affidavit *per se* but also that it was filed late and out of sequence without an explanation as to why it is filed late and out of sequence. Despite the first respondent's assertion that it would apply for condonation for the late filing thereof, he has to date not done so.

[14] In *FirstRand Bank Limited v Felico General Merchandise CC and Another* [21] the Court, faced with a similar dilemma, held that the late filing of the confirmatory affidavit seven months after delivery of the application for rescission constitutes an abuse of process[22] and that in failing to apply for condonation for the late filing thereof, it constituted an irregular step and thus liable to be set aside.[23]

[15] It follows therefore that the late filing of the confirmatory affidavit indeed constitutes an irregular step and is liable to be set aside. In the circumstances, the first respondent does not have prospects of success in opposing the irregular step application.

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[20] Irregular Step record: AA pages 35 to 36
[21] (2022/21790) [2024] ZAGPJHC 1083 (22 October 2024)
[22] At para 18
[23] Paras 20 and 21 thereof

[16] To borrow from the first respondent's heads of argument, without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.[24]

[17] It follows therefore that the first respondent's application for condonation must be dismissed and the relief sought by the applicant, that the late filing of the confirmatory affidavit to the answering affidavit in the reinstatement application constitutes an irregular step on the part of the first respondent, will be granted and consequently set aside. I will deal with the costs of these applications at the end of this judgment.

Reinstatement application

[18] The consequence of the rulings made above, is that the Court must consider the reinstatement application as if the confirmatory affidavit had never been filed.

[19] It is by now trite that an application for reinstatement is effectively an application for condonation.[25]

[20] The review application was launched on the 5th of April 2023[26]. The third respondent only filed the bundle of documents used at arbitration and failed to file the complete record. Pursuant to the documents received, notices in terms of Rule 7A (5) were also sent out by the Registrar on 11 August 2023.

[21] On 29 August 2023, the third respondent enquired from the arbitrator when the recordings and bundles would be submitted to which the arbitrator replied on 30 August 2023 that the audio recordings of the proceedings were lost as his recording device crashed in February 2023.[27] He called upon the parties

[24] Page 13 of the first respondent's Heads of argument quoting from *Colett v CCMA* [2014] 6 BLLR 423 (LAC) at para 38.
[25] *Samuels v Old Mutual Bank* [2017] 38 ILJ 1790 (LAC)
[26] Review application record: page 1 to 6
[27] Reinstatement record: pages 26 to 27

to assist the Council by providing the Council with the record for the transcribing of same.[28]

[22] The Applicant's attorney, Mr Chauke, addressed a letter to the first respondent's attorney, Mr Botha, requesting that they provide him with copies of their recordings taken during the proceedings which they in turn will merge with their own recordings and submit at Court alternatively that a meeting be arranged between the two legal teams to discuss the issue of a transcribed record with a view of agreeing on the reconstruction thereof.[29]

[23] Mr Chauke contends that he had subsequent chance meetings with Mr Botha at the High Court on several occasions reminding him of his request for the recordings of the proceedings and that he undertook to provide same. Also, importantly, that he never at any stage indicated that he would not provide the recordings to Mr Chauke. On each occasion, Mr Chauke was left with the impression that Mr Botha was cooperating and would provide the recordings.[30]

[24] Mr Chauke then lost track of the matter, ostensibly, on the face of it, waiting for Mr Botha to send the promised recordings, and focused on his other, over 500 active matters. Mr Chauke is also the Acting Deputy State Attorneys and as such is required to undertake the duties of the State Attorney whenever she is not at the office or available to attend to them. He also provides oversight to 5 attorneys in the Road Accident Fund Claims division and is the Deputy Chairperson of the Briefing Committee whose meetings are held every second workday for the purpose of appointing Counsel to matters.[31]

[25] He received the letter from the first respondent on 2 September 2024 in which he advises that the matter is deemed withdrawn. He replied to the letter and reminded Mr Botha that the cooperation of both parties was required for the

[28] Reinstatement record: page 27
[29] Reinstatement record: pages 27 to 28 thereof
[30] Reinstatement record: pages 28 to 29 thereof
[31] Reinstatement record: page 30

purposes of having the record reconstructed and that he makes no mention of the several requests to provide their audio recordings.[32]

[26] The Applicant launched an application for reinstatement of the review on 16 September 2024[33].

[27] Due to the deficiencies in the rules, the Practice Manuel was introduced which was held to be binding.[34] 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.

[28] The amended Rules came into force on 17 July 2024. They replaced the old rules and the practice manual. In terms of Rule 37 (13) the 60-day period contemplated in subrule (14) will commence running only once a complete record has been delivered.

[29] In this matter it is common cause that the complete record has not yet been delivered. The Court's view is therefore that the provisions of clause 11.2.2 have not been triggered as yet. The Applicant has therefore not failed to comply with the clause 11.2.2. The application is therefore not deemed withdrawn.

[30] 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.

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[32] Reinstatement record: page 31
[33] Reinstatement record: page 4
[34] *Samuels v Old Mutual Bank* supra.

[31] The review application was launched on 5 April 2023 and the period contemplated in clause 11.2.7 therefore arose on 5 April 2024, prior to the promulgation of the new rules.

[32] The other relief sought by the Applicant is condonation for the failure to have applied for a date in the matter to be heard within 6 months of delivery of the review application in terms of Section 145 (5) of the LRA. Section 145 (5) however states that it is subject to the Rules. Rule 37 (13) provides that the 60-day period will commence running only once a complete record has been delivered. The 6-month period contemplated in Section 145 (5) must consequently also be extended accordingly.

[33] In terms of Clause 11.2.7, the application is deemed archived and regarded as lapsed unless good cause is shown why the application should not be regarded as archived or be removed from the archive. The file has not been archived, and the consideration therefore must be whether the Applicant has shown good cause why the application should not be archived.

Considerations for reinstatement

[34] 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.[35]

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

[35] In other words, in addition to the well-known principles laid down in *Melane* and *Grootboom,* and whilst not necessarily being a closed list, the factors a Court must consider are:

35.1 the length of the delay;
35.2 the explanation for, or cause for, the delay;
35.3 the prospects of success for the party seeking condonation;
35.4 the importance of the issue(s) that the matter raises;
35.5 the prejudice to the other party or parties in granting or not granting the relief requested and not considering the merits of the dispute;
35.6 the effect of the delay on the administration of justice;
35.7 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.
35.8 the interests of justice.

[36] 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.[36] A condonation application must be filed without delay and as soon as an applicant becomes aware of the need to do so and the absence of a reason for such failure is fatal to the condonation application.[37]

Period of delay and explanation

[37] The Applicant's reasons are highlighted in paragraphs 21 to 25 herein. They are disputed by the first respondent. The first respondent concedes one chance meeting with Mr Chauke and denies the others. The difficulty is that, without the confirmatory affidavit from Mr Botha, the contentions by Mr Lesiu

[36] *Van Wyk v Unitas Hospital and Another* [2007] ZACC 24; 2008 (4) BCLR 442 (CC) at paragraph 22.
[37] See *Allround Tooling (Pty) Ltd v NUMSA and others* [1998] ZALAC 8; [1998] 8 BLLR 847 (LAC) at para [8] and *Aspen Holdings (Pty) Ltd and Another v Phelane and Another* (JA71/23) [2025] ZALAC 4 (23 January 2025)

constitutes inadmissible hearsay[38]. The version of the Applicant must therefore be accepted.

[38] The first respondent raised the issue with the Applicant on 2 September 2024 and the application for reinstatement was delivered on 16 September 2024, some 2 weeks later, after some engagement between the parties. I am satisfied that the application was brought as soon as reasonably possible and without further delay. There is thus only one period of delay to be considered.

[39] The delay, in my view, is solely attributable to the failure by the second and third respondents to provide the full record.

[40] In *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v CCMA and Others*[39] the manner in which a reconstruction ought to be done was properly explained by the court as follows:

> *'A reconstruction of a record (or part thereof) is usually undertaken in the following way. The tribunal (in this case the commissioner) and the representatives (in this case Ms Reddy for the employee and Mr Mbelengwa for the employer) come together, bringing their extant notes and such other documentation as may be relevant. They then endeavour to the best of their ability and recollection to reconstruct as full and accurate a record of the proceedings as the circumstances allow. This is then placed before the relevant court with such reservations as the participants may wish to note. Whether the product of their endeavours is adequate for the purpose of the appeal or review is for the court hearing same to decide, after listening to argument in the event of dispute as to accuracy or completeness.'*[40]

[41] Although the Bargaining Council is responsible for the overall preservation of the proceedings, it is the arbitrator who is in charge of the

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[38] *PRASA v CCMA and Others* (JR137/2015) [2018] ZALCJHB 160 (26 April 2018) at para 14
[39] (2003) 24 ILJ 931 (LAC).
[40] At para 17.

proceedings and the recording. He/she is very important in the reconstruction process. It is therefore of utmost importance that the arbitrator should be made aware of the problem and for him to make suggestions as to how the situation can be remedied, if it can.[41]

[42] I am of the view that the duty to reconstruct a record is a duty that is placed on the arbitrator and both parties to the proceedings especially where both parties are legally represented. The duty extends to the legal practitioner as an officer of court and in his/her duty to ensure that the Court has all of the relevant material before it to dispense justice speedily and fairly. It does not behove a practitioner to take an armchair approach in the hope of benefiting from the deeming provisions in the LRA and the rules. Such conduct should be discouraged and deprecated.

[43] Mr Botha's had as much of a duty as Mr Chauke to provide his and his Counsel's notes and any recordings he has available to the arbitrator to reconstruct the record. This Court accepts that he undertook to make those available and that Mr Chauke acted reasonably when he awaited same.

[44] It behoved Mr Botha, at the very least, to reply in writing to Mr Chauke and advise him that no such recordings existed, could be found or would be provided. After all, there is an ethical obligation on all legal practitioners not to deliberately seek to catch an opposing legal practitioner off-guard[42].

[45] The first respondent criticises the Applicant's reliance on the fact that the office of the State Attorney is notoriously understaffed and overworked. The first respondent also references this Court's justified criticism of the State relying on the State Attorney's mishandling of cases brought by or on behalf of state parties and then expecting the Court to be more tolerant.

[46] The Constitutional Court's words in *Grootboom*[43] are apposite:

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[41] Francis Baard District Municipality v Rex N.O. and Others (JR1000/2011, JA29/2015) [2016] ZALAC 33; [2016] 10 BLLR 1009 (LAC); (2016) 37 ILJ 2560 (LAC) at para 19.
[42] Clause 61.12 of the CODE OF CONDUCT FOR ALL LEGAL PRACTITIONERS, CANDIDATE LEGAL PRACTITIONERS AND JURISTIC ENTITIES
[43] At paragraph 30.

> *"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.* ***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****."*[44] (my emphasis)

[47] There is nothing in this file that indicates that the approach adopted by Mr Chauke was lackadaisical or that the understaffing of the State caused Mr Chauke to miss any deadlines herein. in fact, apart from the fact that the record has not been filed, all other time periods have been met.

[48] I am of the view that the reasons preferred for the delay, being in essence that the record is lost and that Mr Chauke was awaiting the recordings from Mr Botha is reasonable and satisfactory as an explanation for the delay in the peculiar circumstances of the matter.

[49] I am of the view that the Applicant has taken reasonable steps to prosecute the matter and provided a reasonable and thorough explanation for the delay, which covers the entire period of the delay. It is evident that the Applicant had every intention to prosecute the review application.

[50] Zondo J (as he then was) writing for the minority in *Grootboom* reminds us that the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted.[45]

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[44] *Grootboom* at paragraph 31 quoting from Section 3(1) of the State Attorney Act 56 of 1957.
[45] At paragraph 50

[51] He finds further: *"In NEHAWU v UCT[46] this Court noted that the Judges of the Labour Court and Labour Appeal Court, in that and other matters, were divided on the correct interpretation of section 197 of the Labour Relations Act (LRA). This Court regarded this as a prima facie indication that NEHAWU had reasonable prospects of success for purposes of determining whether it was in the interests of justice to grant it leave to appeal.[47] In other words the fact that a certain number of Judges from those courts had taken the same view as NEHAWU on the interpretation of section 197 of the LRA was regarded as prima facie indicative of the existence of reasonable prospects of success for NEHAWU. An even stronger view was expressed along these lines by Jafta J[48] in Aviation Union[49] when he said: "The divergent views expressed by the Supreme Court of Appeal in the two judgments and the views expressed in the judgments of the Labour Appeal Court show prospects of success."[50] The same approach applies to condonation applications because this Court has said that condonation applications must be decided on the same basis as applications for leave to appeal.[51]*

[52] 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

[53] The dispute concerned a dismissal for misconduct of a public servant who is alleged to have, whilst heading the bursary unit as a Deputy Director, he took more for himself than he was entitled to receive as a part-time bursary holder and therefore abused his position as the head of the Unit for personal gain. He is

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[46] *National Education Health and Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU v UCT*).
[47] At para 26
[48] Moseneke DCJ, Mogoeng J, Mthiyane AJ and Nkabinde J concurred.
[49] *Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and Others* [2011] ZACC 39; 2012 (1) SA 321 (CC); 2012 (2) BCLR 117 (CC) (*Aviation Union*).
[50] At para 42.
[51] See *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3

alleged to have on 3 separate occasions claimed and received monies he was not properly authorised or e titled to receive in contravention of the Bursary Policy and the PFMA. He is also alleged to have used R7000.00 of the funds earmarked for registration, tuition and books and created a meal pocket for himself when he was not entitled to a meal allowance as a part- time bursary holder.

[54] The misconduct constituted 4 counts of theft alternatively gross dishonesty, that ultimately led to his dismissal. The Second Respondent thought differently and held that his dismissal was substantively unfair. He determined that the evidence led by the Applicant did not establish that the first respondent had committed the offences for which he was charged.

[55] There is no benefit of a transcript and thus at this stage no means of assessing whether the commissioner's view is reasonable. I am reminded by the Applicant, however, that showing prospects of success doesn't entail the applicant showing on a balance of probabilities that it will succeed when the full merits of the matter are considered but only that they have a good chance of succeeding[52].

Grounds of review and assessment

[56] 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 etc[53]. The court must also consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably

[52] *Production Institute of Southern Africa (Pty) Ltd v CCMA and others* (JR1974/2009) (2011) 32 ILJ 1712 (LC) at para 8.
[53] *Head of the Department of Education v Mofokeng and Others* [2015] 1 BLLR 50 (LAC) at paragraph 32.

reached in light of the issues and the evidence before the arbitrator.[54] 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.[55]

[57] 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.[56]

[58] On the basis of the discussion above, the Applicant may be able to show that the decision by the second respondent is irrational or unreasonable based on his assessment of the evidence and with reference to the record, once it is reconstructed. The application therefore has prospects of success.

[59] Considering prejudice, a substantial sum of money, of about R 1 860 986.64 has been paid to the sheriff as security as contemplated in Section 145 (8) of the LRA. The Court assumes that the sheriff has invested the funds for the benefit of the parties as is required and therefore that the sum earns interest. The funds paid effectively ameliorate any prejudice that the first respondent could suffer weighed against the complete shutting of the doors of justice to the Applicant should the application be refused. The balance of prejudice therefore favours the grant of the application over its dismissal.

[60] Considering all of the relevant factors, the interest of justice dictate that good cause has indeed been shown and that a proper case is made out for the matter not to be archived.

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[54] *Herholdt v Nedbank Ltd* 2013 (6) SA 224 (SCA) at paragraph 12.
[55] *CUSA v Tao Ying Metal Industries and Others* [2009] 1 BLLR 1 (CC) at paragraph 76.
[56] *Herholdt supra* at paragraphs 21–25.

[61] In relation to costs, I agree with the submissions made by the Applicants that given the indulgences sought by the Applicant weighed against the recalcitrance of the First Respondent, the requirement of law and fairness demand that the First Respondent not benefit from its own recalcitrance and thus the most appropriate Order is that the costs of the irregular step, condonation applications and the reinstatement application be costs in the cause/review application.

[62] In view of the above, I make the following order.

Order

1. Condonation for the late filing of the Applicant's Heads of argument is granted.
2. Condonation for the late filing of the First Respondent's Answering Affidavit to the Irregular Step application is refused.
3. The service of a confirmatory affidavit by the First Respondent's attorney of record on 15 January 2025 and concomitant filing thereof in the reinstatement application constitutes an irregular step on the part of the first respondent and is hereby set aside.
4. Condonation is granted to the applicant for its failure to have complied with the timeframes set forth in paragraph 11.2.7 of the Practice Manual, which was repealed on 3 May 2024 when the new Rules of this Court came into effect;
5. The applicant has shown good cause as to why the Registrar of this Court should not archive the file as contemplated in paragraph 11.2.7 of the erstwhile Practice Manual, and the Applicant's review application is reinstated;
6. The third respondent is directed to schedule a reconstruction hearing within 30 days of the granting of this order at which the applicant, first and second respondents must attend and participate and reach consensus on the reconstruction of the record and file a reconstructed record, which record must be filed with this Court within a period of sixty days of the date of the reconstruction hearing;

7. The costs of the condonation applications, the irregular step application and the reinstatement application will be costs in the cause/review application.

C May

Acting Judge of the Labour Court of South Africa.

Appearances

For the Applicant	R Williams SC with A.I.B Lechwano instructed by Mr G Chauke from the State Attorney, Bloemfontein
For the First Respondent	T Du Preez instructed by Mr A Botha, Peyper Attorneys, Bloemfontein