



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR1863/2022

In the matter between:

GAUTENG DEPARTMENT OF EDUCATION

APPLICANT

and

**EDUCATION LABOUR RELATIONS
COUNCIL**

FIRST RESPONDENT

MBULI MALUS N.O.

SECOND RESPONDENT

MATLOGA VICTOR MOTHOMONE

THIRD RESPONDENT

Heard: 23 July 2025

Delivered: 5 August 2025

JUDGMENT

NAIDOO, AJ

Introduction

[1] The applicant seeks to reinstate its review application which in terms of clauses 11.2.3 and 11.2.7 of the erstwhile Practice Manual,¹ is deemed withdrawn and lapsed. The applicant filed the record some four and a half months outside the prescribed time period and was approximately five months late in requesting the matter be enrolled for hearing.

Background

[2] The third respondent was dismissed for;
'prejudicing the Department of Education by facilitating extortion of money in the amount of R6 500 from a SGB -Educator'.

On 13 July 2022, the second respondent issued an award in favour of the third respondent and awarded him retrospective reinstatement, whereafter the applicant, on 24 August 2022 timeously filed its application to review and set aside the award.

[3] The applicant filed this reinstatement application on 28 February 2024. It is unclear on the papers when the 60-day period in which the applicant had to file the transcribed record commenced however, Mr Mokoka appearing on behalf of the applicant, advised the court that the 60-day period commenced on 16 September 2022 and ended on 16 November 2022. The applicant filed the transcribed record on 29 March 2023, that being four and a half months late.

[4] On 4 July 2023, the third respondent filed his answering affidavit (as recorded by the court stamp to his answering affidavit). The applicant thereafter filed its replying affidavit on 18 January 2024. The 12-month period in which an applicant has to request their matter be enrolled, referred to in clause 11.2.7, expired on 23 August 2023 and thus the applicant was only in a position to make this request nearly five months outside the prescribed period.

¹ Practice Manual of the Labour Court of South Africa, effective 2 April 2013.

[5] In explaining the delay for the late filing of the record, the applicant submits that the state attorney received the transcribed record sometime in October 2022 and on 25 October 2022 delivered the record to the Sheriff in an attempt to serve same on the third respondent.

[6] On 2 November 2022, the Sheriff notified the state attorney that the attempt to serve the record on the third respondent had been unsuccessful. The next relevant submission in the applicant's founding affidavit is that the attorney assigned with the matter thereafter went on leave from 27 December 2022 and returned on 25 January 2023.

[7] On 19 January 2023 the state attorney was informed that the second attempt by the Sheriff to serve the third respondent with the record was again unsuccessful.

[8] On 25 January 2023, upon return from leave, the attorney instructed her candidate attorney to contact the third respondent. On 2 February 2023, the candidate attorney emailed the third respondent and informed him of the unsuccessful attempts to serve him with the record, the candidate attorney further recorded the physical address the Sheriff was sent to and asked the third respondent to confirm whether that was his correct address. On the same day the third respondent replied to the email confirming his address. Additionally, the third respondent informed the state attorney that he thought it strange that his union (as his representative) was not included in any correspondence.

[9] On 22 February 2022 the state attorney again requested the Sheriff to deliver the record to the third respondent and on 15 March 2023, the Sheriff rendered another return of non-service to the state attorney.

[10] At some point in time the attorney remembered that the third respondent was represented by an attorney and on 29 March 2023, the record was filed with the third respondent's representative. Mr Mokoka took the court to the annexure in support of this purported fact and pointed out that the record had not been served on the third respondent's representative but on the third respondent himself. On inspection of the

annexure, it is the third respondent's address which appears on the notice and not his representative's address and it was the third respondent who signed in acknowledgement of receipt and not his then attorney.

[11] With regard to the non-compliance with clause 11.2.7, the applicant submits that the court file was indexed, paginated and a request for the matter to be enrolled was made on 23 October 2023, that being the date the court received the request. Thus, according to Mr Mokoka, the applicant's request to have the matter enrolled was made two months outside the 12- month period contemplated in clause 11.2.7.

[12] However, in terms of the applicant's founding affidavit to the reinstatement applicant, deposed to by the attorney assigned with this matter, the deponent submits that on 30 November 2023 during a consultation with counsel, she became aware that counsel had emailed a replying affidavit to her. Thereafter on 18 January 2024, the attorney filed the replying affidavit at court. In response to Mr Mokoka's passive attempt to advise the court that the replying affidavit filed on 18 January 2024, was not in regard to the applicant's review application but rather was related to 'another application'; having perused the replying affidavit, I am satisfied that the replying affidavit was in respect of the applicant's review application.

[13] The very next relevant submission by the deponent in the applicant's founding affidavit is:

'It is unfortunate that, for reasons alluded to in the preceding paragraphs, the replying affidavit in the review application and the letter informing the registrar that the review application was ripe for hearing were not filed on or before 23 August 2023.'

[14] As to prospects of success, the applicant, in its founding affidavit to the reinstatement application requested that the court have regard to the grounds on review as set out in its founding and supplementary affidavits to its review application. Mr Mokoka did no better in oral argument and simply invited the court, when considering the applicant's prospect of success in the reinstatement application, to do the same.

Evaluation

[15] At the onset this Court has noted that the dates in respect of certain events recorded in the applicant's heads of arguments differ to dates of the same events set out in the applicant's founding affidavit to the reinstatement application. Furthermore, specific dates in the applicant's founding affidavit do not correspond with this court's date stamp as reflected on certain affidavits. The dates set out in this judgment are in accordance with the applicant's founding affidavit and/or with the date a particular document was filed at court, as reflected by the court stamp.

[16] It is settled law that an application to reinstate a review application is akin to a condonation application and the factors to be considered are whether; a) the application is *bona fide*, b) a reasonable explanation is offered and which explains the entire period of the delay, c) the applicant has reasonable prospects of success in the main application and d) it is in the interest of justice to grant the order.²

[17] Having regard to the applicant's explanation for filing the record four and a half months late, what is evident is that the applicant has not accounted for the entire period of the delay, that being from 16 November 2022 to 29 March 2023.

[18] On 16 November 2022, the state attorney was already aware as of 2 November 2022, that the Sheriff's first attempt to serve the record on the third respondent was unsuccessful. The next relevant submission in this regard is that the attorney went on leave on 27 December 2022. There is no explanation for what transpired between 16 November 2022 to 27 December 2022, namely a six-week period. In particular the applicant fails to advise this court when the state attorney requested the Sheriff, for the second time, to serve the record on the third respondent, if indeed such a request was made within the six-week period.

[19] On 25 January 2023 the attorney returns from leave and instructs her candidate attorney to write to the third respondent, yet the candidate attorney only

² *Samuels v Old Mutual Bank* (2017) 38 ILJ 1790 (LAC) at para 17.

does so on 2 February 2023. Again no explanation if offered between 25 January 2023 to 2 February 2023, which is a period of one week. On 2 February 2023, the third respondent confirms the details of his address, yet the state attorney only sends a third request to the Sheriff on 22 February 2023. The applicant is silent on what transpired between 2 February 2023 and 22 February 2023, which is a period of nearly three weeks. Just on these facts, the applicant has not accounted for ten weeks of the four and a half months delay, which period constitutes the majority of the delay.

[20] What makes matters worse, is that a material part of the reason for a portion of the delay which is accounted for, is misleading. The explanation that the attorney forgot that the third respondent was represented and hence requested the Sheriff to serve the record on the third respondent and upon realising her error, served the record on the representative; is not supported on the annexures. There is no proof that there was any attempt made by the state attorney to serve the record on the third respondent's representative, as attested to in the founding affidavit. The only proof of service in respect of the record, is that it had been served on the third respondent at the address he confirmed with the state attorney on 2 February 2023. This reason cannot therefore be considered a reasonable reason in respect of the period of the delay which the applicant does account for.

[21] While I am mindful that attempts were made to serve the third respondent with the record, when having regard to the lack of an explanation for the majority of the delay, as well as the misleading submissions mentioned; this fact does not somehow wish away the problems the court has identified.

[22] The explanation offered in respect of why all affidavits were not filed within 12 months of launching the review application, is more problematic. As mentioned the applicant's replying affidavit ought to have been filed on 23 August 2023, a year after launching its review application, yet was filed on 18 January 2024. In explaining this approximate five-month delay, the only reason submitted by the attorney is that on 30 November 2023 she became aware of counsel emailing her the replying affidavit and thereafter on 18 January 2024, the replying affidavit was filed. The question of

why it took the state attorney from 30 November 2023 to 18 January 2024 (a period of six weeks) to file the affidavit is left unanswered. Moreover, there is no explanation for the three-month period between 24 August 2023 (the day immediately after the 12-month period expired) to 29 November 2023 (the day before the attorney became of counsel emailing her the applicant's replying affidavit to its review application).

[23] The possibility that at some point during this time period, the applicant was addressing the thirds respondent's dismissal application, is of no consequence. Even if this was a factor (which the applicant has not raised as a reason for the delay in its reinstatement application), a dismissal application does not axiomatically bring an on-going review application to a standstill. Thus, of the nearly five-month delay, four and a half months are left unaccounted for and the reason for the period the applicant does attempt to account for is unreasonable and/or non-existent.

[24] The applicant's view that this court was requested to enrol this matter sometime in October 2023, does not assist the applicant. The applicant obviously wanted this court to have regard to its replying affidavit to its review application which was only filed on 18 January 2024. It was only at that time that the applicant could have requested the matter be enrolled for hearing.

[25] Both the delay of nearly four and a half months to serve and file the record as well as the delay of nearly five months to request the matter be enrolled, are not only excessive within the context of a review application, but furthermore, the applicant has failed to explain or account for the majority period within each delay. The applicant has also failed to provide sufficiently cogent reasons in explaining the periods of the delays it does attempt to account for.

[26] Recently, the Labour Appeal Court in *Aspen Holdings Pty Ltd and another v Phelane and another*³ confirmed the approach that where the delay is excessive and there is no explanation for the delay, that prospects of success are immaterial. On this score the LAC held;

³ [2025] 4 BLLR 409 (LAC) at para 29.

'In this case, considering the principle discussed earlier, I believe the Labour Court erred in considering the prospects of success when the employee failed to provide a reasonable and acceptable explanation for the delay. In NUMSA and another v Hillside Aluminium, the Labour Court held that an unsatisfactory explanation for any delay would generally be fatal to an application, irrespective of the applicant's prospects of success. This was stated in the following terms by the Constitutional Court in Grootboom: "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".

[27] This principle has been followed in a number of authorities.⁴

[28] Although neither party referred this court to the LAC decision in *Government Printing Works v Public Service Association and another*⁵ (*Government Printing*), I do not interpret that decision to materially disturb this principle. In that matter the LAC held;

'It should be clear, when considering the explanation offered, that the non-observance of the rule is 'flagrant and gross' before the inquiry into the prospects of success may be jettisoned. Thirdly, and noting the usual reluctance to do so, the court must exercise a discretion to refuse condonation without any consideration of the prospects of success.'⁶

[29] *Government Printing* did not place a bar on a court forgoing the issue of prospects of success under circumstances where the delay is '*unacceptably excessive and there is no explanation for the delay*'. The LAC found that when the explanation for the delay is '*flagrant and gross*' a court may disregard the issue of prospects of success, *albeit* under rare occasions. As stated, I have found that the

⁴ See *Mziya v Putco. Limited*, (1999) 2 BLLR 103 (LAC), *National Education Health & Allied Workers Union on behalf of Mofokeng & others v Charlotte Theron Children's Home*, (2004) 25 ILJ 2195 (LAC) and *Collett v Commission for Conciliation, Mediation and Arbitration* [2014] 6 BLLR 523 (LAC).

⁵ [2025] 2 BLLR 112 (LAC)

⁶ at para 30.

applicant's explanation, or lack thereof, for its non-compliance to the rules have met the threshold of being '*flagrant and gross*'

[30] For the above reasons, the applicant's prospects of success in its review application is immaterial.

[31] This Court must point out that the alleged conduct which the third respondent was dismissed for, may appeal to the notion that this is a matter of some public importance which ought to warrant the granting of condonation. However, that is but a factor to weigh up when considering whether it would be in the interest of justice to grant condonation, it is not a decisive factor. In any event, unlike the facts in *Government Printing*, where on the common cause facts, the appellant in that matter had excellent prospects of success in its review application, on a reading of the arbitration award, the applicant's grounds on review, together with the third respondent's answering affidavit; this does not appear to be the case in *casu*.

[32] Moreover, and assuming this Court's cursory assessment of the applicant's merits in its review application is incorrect, and that the applicant does indeed have reasonable prospects of success in its review application; this conclusion has to nevertheless be weighed and assessed against what was held by the Constitutional Court in *Grootboom v National Prosecuting Authority and Another*⁷, that being:

'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.'

[33] The applicant took nearly 17 months from when it launched its review application to the time it was in a position to request for the matter be enrolled. Due to the lengthy delay in prosecuting its review application, the third respondent sought the intervention of the Judge President. Granting condonation will only exacerbate the prejudice the third respondent understandably raises in his answering affidavit to this reinstatement application. Granting condonation with costs would not assist or ameliorate the third respondent's prejudice, as suggested by Mr Mokoka.

⁷ 2014 (1) BCLR 65 (CC); [2014] at para 51.

[34] On the issue of prejudice and despite the applicant not having raised this issue, this Court is mindful that the negligence in prosecuting the applicant's review application is attributed to the applicant's legal representative and not the applicant *per se*. However, there is a

'limit beyond which a litigant cannot escape the result is of his attorney's lack of diligence or the insufficiency of the explanation tendered'.⁸

On the facts presented, the negligence of the applicant's representative, in particular failing to provide reasons for the full duration of an excessive delay, as well as offering an unreasonable reason in respect of a certain portions of the delay; has not only reached this limit but has surpassed same.

[35] In *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*⁹ the Constitutional Court pointed out that;

'The new Labour Relations Act (LRA) introduced a new approach to the adjudication of labour disputes. This alternative process was intended to bring about the expeditious resolution of labour disputes which, by their nature, require speedy resolution. Any delay in the resolution of labour disputes undermines the primary object of the LRA. It is detrimental not only to the workers who may be without a source of income pending the resolution of the dispute but, ultimately, also to an employer who may have to reinstate workers after many years'

[36] The applicant has failed to prosecute its review application with the necessary speed and diligence required. This much is evident from the facts. I am further mindful of the fact that after the third respondent filed his answering affidavit in June 2023, the applicant had ten days thereafter in which to file a replying affidavit yet only did so on 18 January 2024. Having regard to the spirit and purpose of the LRA as set out by the apex court and for reasons recorded herein, I am not of the view that granting the applicant's reinstatement application would be in the interest of justice.

⁸ *Saloojee & Another v Minister of Community Development* 1965 (2) SA 135 (A) 141 B-H.

⁹ 2016 (3) BCLR 374 (CC) at para 1.

Order

1. The applicant's reinstatement application is dismissed with no order as to costs.

M Naidoo

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: O Mokoka
Instructed by: State Attorney
For the third respondent: Self representing