



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case no: JR 1232/23

In the matter between:

MINE, HEALTH & SAFETY COUNCIL

Applicant

and

MANTJI ELIAS FENYANE

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

COMMISSIONER DAISY MANZANA, N.O

Third Respondent

COMMISSIONER JACOB DANIELE SELLO, N.O

Fourth Respondent

Heard: 16 July 2025

Delivered: 2 September 2025

Summary: Practice and procedure – Review of a default award on the merits – Condonation application not filed – Applicant asserting that section 158(1B) of the Labour Relations Act 66 of 1995, makes it impossible to file a review timeously thus no need for a condonation application –The applicant is not exonerated from applying for condonation – Held: The review of the default award struck from the roll – Court lacks jurisdiction.

Practice and procedure – Review of a rescission ruling – Deemed withdrawal due to failure to timeously deliver the record in compliance with rule 7A(6) – The

application for a review of the rescission ruling deemed to be withdrawn in terms of clause 11.2.2 read with clause 11.2.3 – Held: The review application struck off the roll – Court lacks jurisdiction. There is no order as to costs.

JUDGMENT

MOTSHEKGA, AJ

Introduction

[1] This is a review application, set down for hearing on 27 June 2025, and subsequently postponed to 16 July 2025. The applicant sought to review and set aside a default award, rendered by the third respondent on 4 April 2023 ('the default award') and in the alternative, to review and set aside a rescission ruling, rendered by the fourth respondent 25 May 2023 ('the rescission ruling').

[2] At the outset, and for purposes of context, it is apposite to note that the applicant seeks to review the default award on the merits, and not solely on the basis of its absence from the arbitration proceedings. This has accordingly been framed as a separate prayer for review in the notice of motion. The Court, in this judgment, expresses no view on the competence of that approach, having instead limited itself to a determination on those issues it considered necessary to decide.

[3] The default award and the rescission ruling were both issued under the auspices of the second respondent.

[4] On 16 July 2025, this Court issued an order in the following terms:

- '1. The application for postponement is refused.
2. The application for the review of the default award is struck off the roll for lack of jurisdiction, with no order as to costs.
3. The judgment on jurisdiction for the review of the rescission ruling is reserved.'

[5] Therefore, in what follows hereunder, are the Court's reasons for orders 1 and 2 above; and judgment on the jurisdiction of the rescission ruling.

[6] The current proceedings are opposed by the first respondent ('the respondent'), who has raised several points of law, including the Court's lack of jurisdiction to entertain the review application.

[7] The common practice in our Courts is that, where the court's jurisdiction is raised, a court has discretion to simultaneously hear arguments on jurisdiction and the merits. However, such an approach is not a matter of right. In every matter before it, a court retains its inherent power to protect and regulate its own proceedings, in a manner that remains faithful to the principles of justice and fairness.¹

[8] Therefore, a Court may elect to hear only arguments on a jurisdictional issue and not the merits, if it deems the circumstances of a case, to do so dictate.

[9] In the present matter, the jurisdictional points raised are potentially dispositive and arose distinctly from the pleadings, thus capable of determination without the need for the parties to delve into the merits of the case.

[10] Accordingly, for the sake of procedural clarity, this Court elected to confine itself to the issue of jurisdiction, without hearing the merits of the review application.

[11] The current review application was launched in terms of the now-repealed Labour Court Rules and Practice Manual.² Therefore, as the new Rules have no retrospective effect, any reference to a particular provision of the Rules and Practice Manual pertains to the repealed Rules, unless otherwise indicated.

Factual Background

[12] On 4 April 2023, the default award was delivered wherein the applicant was ordered to reinstate the respondent and compensate him an amount of R740 000.00.

¹ Section 173 of the Constitution of South Africa 1996, as amended.

² GN 1665 of 1996: Rules of the Conduct of Proceedings in the Labour Court (repealed, effective 17 July 2024).

[13] The applicant, dissatisfied with an award which was rendered in its absence, applied for a rescission of the default award in terms of section 144 of the Labour Relations Act³ ('the LRA').

[14] On 26 May 2023, the rescission ruling was delivered and the applicant's rescission application was refused.

[15] Subsequently, on 7 July 2023, the applicant approached this Court seeking to review and set aside the default award, and in the alternative, the rescission ruling as aforesaid.

[16] On 27 July 2023, the second respondent filed its notice of compliance in terms of rule 7A (3), wherein it dispatched the contents of the record of the proceedings with the registrar of this Court. The notice lists that the record comprises of 18 items which are as follows: first item being one (1) DVD compact disc and item numbers 2 to 18 being the documentary portion of the record. On the face of rule 7A(3) notice, the documentary portion consisted of 178 pages.

[17] On 28 July 2023, the registrar served its notice in terms of rule 7A(5), informing the applicant's attorneys that the record was available and called upon the applicant to collect it within seven days from the date of the notice. Importantly, the notice informed the applicant that the record was to be filed within 60 days of receipt of the notice, failing which the application will be deemed to have been withdrawn.

[18] On 6 September 2023, the applicant served the transcribed record on the respondent's attorneys, without the documentary portion.

[19] Subsequently, on 21 September 2023, without a notice in terms of rule 7A(8), the applicant served a supplementary affidavit on the respondent wherein it *inter alia* stated that, the documentary portion of the record was incomplete in that the respondent's bundle had not been included by the second respondent.

³ Act 66 of 1995, as amended.

[20] Neither an extension to file the complete record at a later stage was sought nor was an application to compel the second respondent to file the complete record launched.

[21] On receipt of the supplementary affidavit on 21 September 2023, the respondent's attorneys called for a rule 7A(3) notice. The applicant provided the notice as requested, together with various documents, however, not the complete record as enlisted on the first respondent's rule 7A(3) notice.

[22] On 6 October 2024, the respondent filed an answering affidavit wherein he raised various points of law. First, challenging the Court's jurisdiction; second, objecting to the applicant's filing of a supplementary affidavit prematurely without the complete record, as the record served only consisted of 106 pages and lastly, the respondent bemoaned that the supplementary affidavit was served one day out of time, without a condonation application.

[23] The respondent's jurisdictional challenge is twofold: first, it is submitted that there is no review before the Court, in that, the application for review of the default award has been filed out of time, by approximately 51 days, that is, outside of the statutory six-week period, as required by the LRA.⁴ Second, and by implication, there can be no consideration of the alternative relief, that is, a review of the rescission ruling, if there is no application for review of the default award before the Court.

[24] In so far as the filing of the record is concerned, it is common cause that the respondent failed to file its notice in terms of rule 7A(6) as was required in terms of the repealed rules.

[25] The respondent's points of law were met with complete silence from the applicant. The applicant failed to deliver a replying affidavit addressing the deficiencies or an application for condonation regarding the non-compliance as alleged by the respondent. Not even the respondent's initial heads of argument, which persisted with the points of law, prompted the applicant to address any, let alone all, of the issues raised.

⁴ Section 145(1)(a).

Proceedings before this Court

[26] When the matter came before this Court on 27 June 2024, it was postponed to 16 July 2025 and costs were ordered against the applicant on account of its failure to index and paginate the record. In addition, the parties were directed to file supplementary heads of argument expanding on the jurisdictional issue, which directive they abided.

[27] The applicant indexed and paginated on 04 July 2025 and the matter proceeded on 16 July 2025.

[28] In its supplementary heads of argument, the applicant addressed the respondent's jurisdictional challenge regarding the review being filed out of time. It argued that section 145 (1) of the LRA prescribing the six-week period on review applications, should not be read in isolation, but rather with section 158(1B) thereof. This latter section of the LRA provides that the Labour Court may not review any decision or ruling made during conciliation or arbitration by the Commission or Bargaining Council before the issue in dispute has been finally determined by the Commission or the Bargaining Council, unless it is just and equitable to do so.

[29] On the basis of section 158(1B), the applicant submits that due to the default award having been the subject of a pending rescission application, the prescribed time limits could not be complied with. In short, the applicant argued that section 158(1B) stymied its right to challenge the review of the default award prior to a determination of the rescission application. Thus contended the applicant, a condonation application was not necessary in the circumstances.

[30] The respondent's supplementary heads of argument reiterated its initial points of law as raised in the answering affidavit and further submitted that the applicant failed to comply with section 7A(6) and the fact that the applicant only delivered the record on 4 July 2025, is an acknowledgement that the record was not in compliance therewith. Therefore, argued the respondent, the applicant's review application is deemed to have been withdrawn for lack of compliance with the said rule.

[31] On 16 July 2025, when the matter came before the Court, the applicant sought to postpone or remove the matter from the roll in order to: (i) apply for condonation for

any non-compliance with the rules, namely the filing the supplementary affidavit prior to the record being served; (ii) seek a declaratory order that the review of the default award is not out of time; and (iii) if unsuccessful on that basis, seek a declaratory order that, given its held-view that section 158(1B) rendered it impossible to file the review of the default award timeously, no condonation application was required.

[32] Insofar as the record is concerned, it was argued on behalf of the applicant that the record had in fact been served timeously on 21 September 2023, albeit after the supplementary affidavit. Furthermore, due to informal discussions held between the parties regarding the record, the applicant assumed that the respondent would not pursue this point regarding non-compliance with the filing of the record. However, it had become apparent to the applicant that the respondent continued to persist with this point, which now necessitated condonation to deal with it.

[33] The respondent argued that the record was not filed timeously; as the applicant conceded in its supplementary affidavit. The applicant's supplementary affidavit admitted that the record was incomplete when it was filed on 21 September 2023. The respondent further submitted that the applicant failed to demonstrate compliance with rule 7A(6) and therefore, even if the Court held that it could entertain review application outside of the six-week period, it is deemed to be withdrawn.

[34] The respondent argued that, it could not accede to the postponement request as this would be tantamount to the applicant being afforded a "second bite at the cherry". The objections raised have always been known to the applicant who opted to not act upon them and as such the court needed to make a ruling thereupon.

[35] The principles governing postponements are a well-worn path. Instructive in this regard is the Constitutional Court judgment of *Psychological Society of South African v Qwelane*⁵. The Court, per Nkabinde ACJ held that:

'[30] Postponements are not merely for the taking. They have to be properly motivated and substantiated. And when considering an application for a postponement court has to exercise its discretion whether to grant the application. It is a discretion in the true or narrow sense – meaning that, so long as it is judicially exercised, another court cannot substitute its decision simply

⁵ 2017 (8) BCLR 1039 (CC) at paras 31-32 (*Qwelane*).

because it disagrees. The decision to postpone is primarily one for the first instance court to make.

[31] In exercising its discretion, a court will consider whether the application has been timeously made, whether the explanation for the postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed. All these factors will be weighed to determine whether it is in the interests of justice to grant the postponement. And, importantly, this Court has added to the mix. It has said that what is in the interests of justice is determined not only by what is in the interests of the immediate parties, but also by what is in the broader public interest.’

[36] Having considered the guidelines as outlined in *Qwelane* and the facts of this matter, the Court declined the applicant’s request to remove the matter from roll or a postponement. In granting such a postponement or removal, where the respondent has raised several dispositive points of law which the applicant had failed to properly address in reply or otherwise, the parties would be left in an uncertain position, potentially resulting in unnecessary and protracted litigation. This would not be in the interest of justice or of effective judicial management.

[37] Perhaps as a departing node, the Court must turn to an issue earlier raised concerning the applicant’s intended application for a declaratory order. And without expressing a view on the merits of such an application, it suffices to restate the legal position regarding the Labour Court’s powers and its jurisdiction.

[38] The Labour Court’s power to grant declaratory orders is derived from section 158 of the LRA which confers upon it a myriad of discretionary powers. Moshwana describes the position as follows:

‘The word jurisdiction means official power to make legal decisions and judgments. Where jurisdiction exists, axiomatically power exists. Equally, where there is no jurisdiction, the Labour Court cannot exercise a power’.⁶

[39] Prinsloo J⁷ has cautioned against relying on section 158(1) of the LRA to establish jurisdiction by drawing an incisive juxtaposition between the Labour Court’s jurisdiction and its powers in the following illustration:

⁶ MR Awarab and GN Moshwana *The Role of the Labour Court in the Transformation Age: The Namibian and South African Context* (Juta 2024) pp 65.

‘So, for example, the fact that the LC has the power in terms of s 158(1)(a)(ii) to grant an interdict does not mean that an interdict can be sought in respect of any dispute – the applicant must always identify the cause of action by reference to some statutory provision that confers jurisdiction on the court. To continue the example, the LC has the power to grant declaratory orders, it has no jurisdiction to declare a dismissal for misconduct to be unfair...Although some of the paragraphs of s 158(1) have been held to be jurisdiction conferring, these are limited.’

[40] Whether this court would have been vested with the power to decide on the applicant’s declaratory application where jurisdiction is lacking – or, put differently, whether the powers conferred on Labour Court in terms of section 158(1)(iv) of the LRA to grant a declaratory order are jurisdiction conferring, need not be determined in this judgment.

[41] To conclude on the issue, this Court, as per Moshwana J in *Macaskill v State Information Technology Agency (Pty)Ltd (SITA) and others*⁸, stated with approval the following principle with regards to declaratory orders:

‘... a Court will not grant a declaratory order where the issues raised before it, is hypothetical, abstract and academic, or where the legal position is clearly defined by statute...’ (own emphasis)

Jurisdiction to Review the Default Award

[42] The Constitutional Court in *Gcaba v Minister of Safety and Security*⁹ has described jurisdiction as: ‘*The power or competence of a Court to hear and determine an issue between the parties.*’

[43] The Labour Court in *Du Plessis v Public Protector and others*¹⁰ held that: ‘Jurisdiction cannot be assumed or implied. It either exists or it does not. Jurisdiction is the power of the court to decide a matter that has been brought before it. If the court does not have the power to do so, it cannot consider the matter, no matter what the merits or equities may be.’

⁷ CN Prinsloo & A Van Niekerk *Labour Court Manual* (Juta 2024) pp 7.

⁸ (JR 267/2020) [2021] ZALCJHB 220 at para 13.

⁹ [2009] 12 BLLR 1145 (CC) at para 13.

¹⁰ (2020) 41 ILJ 919 (LC) at para 20.

[44] The time frames prescribed by the LRA are peremptory: a review in terms of section 145 must be instituted within six weeks, unless the late filing is condoned on good cause shown.¹¹ The applicant's review of the default award was launched outside this statutory time frame. A condonation application was also not filed.

[45] The applicant's submissions that section 158(1B) exonerates it from applying for condonation are misguided. The section defines the timing of the Labour Court's review powers, and should neither be conflated with the LRA's statutory time frames, nor serve as an excuse for the non-filing of condonation application.

[46] Importantly, that the applicant had been pursuing a rescission of the default award only covers the explanation for the delay. The explanation, compelling as it may be, does not supersede the other factors which a court must consider in condonation applications. Factors such as¹²: the length; prospects of success; prejudice to the other party; and the interest of justice - need to be interrogated by a court where a review was filed outside of the prescribed six-week period.

[47] In the result, section 158(1B) cannot salvage the applicant's review of the default award, as the Court lacks jurisdiction until such time as a condonation for the late filing has been granted.

[48] It was for the reasons set out above that the Court came to the conclusion that it lacked jurisdiction to entertain the review of the rescission ruling and thus struck it off the roll.

Is the Review of the Rescission Deemed to be Withdrawn?

[49] The applicant argued that there are two reviews before the Court, and that the review of the rescission ruling was filed within the required six-week period, thus the Court has jurisdiction to entertain such a review.

¹¹ Section 145(1A) of the LRA.

¹² *Melanie v Santam Co Ltd* 1962 (4) SA 531 (A).

[50] Furthermore, the applicant argued that the Court is not called upon by the respondent to decide on whether the review was deemed to be withdrawn and that it cannot do so in the circumstances, not even *mero motu*.

[51] That the review of the rescission ruling is deemed to be withdrawn was raised by the respondent in its supplementary heads of argument, following the applicant's belated indexing and filing of the record.

[52] In *Cusa v Tao Ying Metal Industries & Others*¹³, Justice O'Reagan for the majority of the Constitutional Court said:

'Where a material irregularity or other defect appears on the face of the record before the reviewing court, which defect would mean that the proceedings before the tribunal were either unlawful, or procedurally unfair or unreasonable, the reviewing court is not obliged to overlook that defect. Of course, the court must act in a manner that is fair to the parties and ensure that they have an opportunity to address the issue the court has identified.'

[53] The court in *Booi v Amathole District Municipality and others*¹⁴ held that:

'It is trite that courts are bound by the issues that litigating parties raise. However, a court can raise an issue *mero motu* where (i) raising it is necessary to dispose of the matter, and (ii) it is in the interest of justice to do so, which depends on the circumstances at hand.'

[54] Therefore, even if the Court were to accept that it has not been called upon to decide on this issue, which it does not, in aligning itself with the principles enunciated in the authorities above, the Court finds no reason precluding it from raising the point *mero motu*. The procedural point regarding compliance with rule 7A(6) is potentially dispositive, as such, the Court is to decide upon it.

[55] As intimated elsewhere above, the respondent submitted that the complete record was neither served nor filed timeously. On this point, the respondent argued that at best, the applicant could only be said to have partially complied with rule 7A(6) on 4 July 2025, when it indexed and paginated the record. However, continued the respondent, this was outside the 60-day period, thus triggering the provisions of clauses

¹³ 2009(1) BCLR 1 CC, at para 131.

¹⁴ 2022 (3) BCLR 265 (CC) at para 35.

11.2.2 and 11.2.3 of the Practice Manual which deems the review application to be withdrawn.

[56] Having been informed by the registrar on 28 July 2023 that the record was ready for collection, the applicant was required to serve and file the record on or before 24 October 2023.

[57] Counsel for the applicant contends that the record was served and filed timeously. To fortify her submission, she argued that the record was served on the respondent and filed on 21 September 2023, albeit after the supplementary affidavit. During argument, the Court requested the applicant to provide proof of the 7A(6) notice bearing the official stamp and it could not do so. The applicant could only direct the court to a service affidavit which confirmed that a supplementary affidavit was served, together with a rule 7A(3) notice on 21 September 2023. This service affidavit, argued the applicant, constitutes proof that rule 7A(6) has been complied with. Lastly, according to the applicant, the record was in the court file on 27 June 2025 when the matter was postponed is indicative of its timeous filing.

[58] It is trite that the provisions of the Practice Manual are obligatory;¹⁵ accordingly, and for the sake of brevity, it is unnecessary to burden this judgment with a list of the authorities on the point.

[59] Briefly, the provisions of clauses 11.2.2 and 11.2.3 of the Practice Manual stipulated that records must be filed by the applicant within the 60-day period of being notified by the registrar to uplift same and failing which the application is deemed to be withdrawn; unless an extension or consent has been granted to file outside the said period.

[60] The consequences of a deemed withdrawal have been succinctly captured in *Ralo v Transnet Port Terminals and Others*¹⁶, where Van Niekerk J held that :

‘.... The plain and unambiguous wording of the practice manual is to the effect that the applicant must be regarded as having withdrawn the review application...

¹⁵ See *Samuels v Old Mutual Bank* (2017) 38 ILJ 1790 (LAC) at para 15.

¹⁶ [2015] 12 BLLR 1239 (LC); (2015) 36 ILJ 2653 (LC) at paras 10 to 11.

To the extent that the applicant contends that he will suffer prejudice on account of any application of paragraph 11.2.3 of the practice manual and that he will be deprived of his right to access to court and to have his application fully ventilated, this is simply not so. The proper order, it seems to me, in circumstances such as the present, is to strike the review application from the roll. There is no bar, either in the Rules of this court or the practice manual to the applicant filing an application in which he seeks to have the review application reinstated, together with an application in which condonation for the late filing of the record is sought.'

[61] In *casu*, there is clearly a dispute regarding when the record, complete or not, was served and filed in accordance with the provisions of the practice manual. Compounding to this challenge, is the failure by the applicant to file a rule 7A(6) notice which would enable the Court to determine the date on which the record was served and filed. However, what is clear is that, when the matter proceeded on the 16 July 2025, the record as per the second respondent's rule 7A(3) had been served and filed.

[62] However, to the applicant's contention, even if the Court were to adopt a charitable approach and accept the applicant's submissions from the bar that the respondent was timeously served with the record on 21 September 2023, notwithstanding that only 106 pages and not 178 pages of the documentary portion was served at that stage, the applicant is saddled with one other hurdle: to demonstrate that the record was also filed timeously. This, the applicant failed to do. The contention that the presence of the record in the court file at the previous sitting is indicative of timeous compliance is a strained one. The Court rejects this contention on the basis that, in the absence of rule 7A(6) notice or a registrar's date stamp, the date on which the record was filed rests on mere speculation, and such speculation cannot be countenanced by this Court.

[63] On the basis of what is set forth above, the Court is impelled to conclude there was a failure to comply with rule 7A(6), read together with clauses 11.2.2 and 11.2.3 of the Practice Manual, in that absent a rule 7A(6) notice, the record was neither served nor filed timeously.

[64] Having determined that review of the rescission is deemed to be withdrawn, the respondent's earlier jurisdictional point relating to a review in the alternative becomes moot, as there is no alternative review before the Court.

Costs

[65] The Court has considered the issue of costs and is of the view that, in the interest of fairness and equity, costs should not be awarded in this matter.

[66] In the result, the following order is made.

Order

1. The application for review of the rescission ruling is struck from the roll for want of jurisdiction.
2. There is no order as to costs.

M J Motshekga
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv. L Pillay
Instructed by:	NG Dlamini Attorneys
For the First Respondent:	Mr. C G Grové of Christoffel Gerhardus Grové Inc.