THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1927/2021

In the matter between:

HOSPERSA OBO TSHAKATA TT	**First Applicant**
HOSPERSA OBO HAMISI T	**Second Applicant**
HOSPERSA OBO NEMUDZIVHADI T	**Third Applicant**
HOSPERSA OBO RAMEREGI P	**Fourth Applicant**

and

MEC OF HEALTH: LIMPOPO PROVINCE	**First Respondent**
DEPARTMENT OF HEALTH LIMPOPO	**Second Respondent**
HEAD OF DEPARTMENT DR MHLONGO	**Third Respondent**
DEPUTY DIRECTOR GENERAL DR DOMBO	**Fourth Respondent**

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Heard: **3 September 2025**

Delivered: **09 September 2025**

JUDGMENT

DE WITT, AJ

Introduction

[1] This is a review application in terms of s158(1)(h) of the Labour Relations Act[1] ("LRA") to review and set aside the decision of the first respondent dated 24 March 2021 and received by the applicants on 23 April 2021, under reference number S7/4/I/2, together with ancillary relief, including condonation for the late filing of the review application.

[2] Although a notice to oppose was delivered by the respondents on 18 October 2021, the respondents took no further steps in the opposition of the matter. No answering affidavit was delivered, and despite the respondents being directed on 8 August 2024 to deliver heads of argument, they failed to do so.

[3] The matter was then set down on the unopposed roll.

Background facts

[4] The application is brought by HOSPERSA on behalf of the applicants. The applicants were employed by the Department of Health: Limpopo ("the Department") as professional nurses. They were stationed at the Tshino Clinic, Vhembe District.

[5] Due to an uproar by the community alleging that the applicants' negligence

[1] Act 66 of 1995, as amended.

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had resulted in the death of a minor child during birth, the applicants were precautionarily transferred to other clinics around the Vhembe District on or about 31 December 2018, pending the outcome of an investigation.

[6] Upon conclusion of the investigation and various meetings with stakeholders, a meeting was held on 3 March 2020 between the Department and HOSPERSA in terms of which a resolution was signed directing that the applicants would be transferred back to the Tshino Clinic and had to report for duty at the Tshino Clinic on 1 April 2020.

[7] In terms of the resolutions, HOSPERSA was granted until 31 March 2020 to prepare its members (including the applicants) to return to work at Tshino Clinic. HOSPERSA was advised to start the process immediately to effect the resolution from 1 April 2020.

[8] On 20 March 2020, HOSPERSA requested an extension of the 31 March 2020 deadline on the basis that HOSPERSA was '*grounded until further notice*' (presumably because of COVID).

[9] The applicants did not report for duty at the Tshino Clinic on 1 April 2020, and the Department delivered a letter to each of the applicants on 11 May 2020 instructing them to return to Tshino Clinic. HOSPERSA received the letters on behalf of the applicants on 13 May 2020.

[10] The applicants were concerned about their safety at the Tshino Clinic, given the hostility of the community, which gave rise to their transfers in December 2018. Each of the applicants consulted with a general practitioner and then a psychologist on 15 and 16 May 2020. They each obtained a medical certificate stating that they were, for medical reasons, unfit to return to work from 14 May 2020 to 20 May 2020, and the psychologist's reports recommended that the applicants be posted at clinics other than Tshino Clinic.

[11] It is apparent that HOSPERSA addressed a letter to the Department on 26 May 2020, and the Department responded on 28 May 2020, stating that it would be

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considered closely by the Director PHC, Mrs Tshikovhi R and feedback would be received in due course. On 8 June 2020, Dr Mhlongo, the third respondent, sought clarification (presumably of the letter dated 26 May 2020).

[12] The medical certificates were delivered by HOSPERSA shop stewards at the Tshino Clinic, to the applicant's supervisor/managers. The Department did not respond to the medical certificates.

[13] On 17 June 2020, the Department prepared letters of termination to the applicants in terms of s17(3)(a)(i) of the Public Services Act[2] (the "Act"). The letters of termination record the resolution taken on 3 March 2020, the letters of 11 May 2020, the fact that as at 12 June 2020 the applicants had not reported for duty and were not on approved leave, and advised the applicants that they were entitled, within ten working days, to make written representations to the MEC (i.e., the application for reinstatement was due on or before 1 July 2020).

[14] A meeting was then held between HOSPERSA on behalf of the applicants and the third and fourth respondents on 23 June 2020. The outcome thereof was that the third and fourth respondents would consider the matter, but believed that the matter was no longer within their jurisdiction, and HOSPERSA was directed to submit a written application requesting the MEC to reinstate the applicants.

[15] On 24 June 2020, HOSPERSA addressed a letter to the third and fourth respondents seeking an extension of time within which to deliver the applicant's application for reinstatement and an opportunity to engage with the Department to find a collective resolution to the matter. In response, the third respondent stated in a letter dated 30 June 2020, that the Department was available for a Teams meeting on 7 July 2020.

[16] As such, HOSPERSA prepared an application for reinstatement, which was served on the Department on 16 July 2020. The application for reinstatement was delivered outside of the ten-day period and therefore required condonation (i.e. the

[2] Proclamation no 103 of 1994.

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application had been due on 1 July 2020).

[17] A further meeting was held on 17 July 2020, and HOSPERSA acknowledged that it had made some mistakes in the manner in which it had handled the dispute and acknowledged its failure to '*hold the end of the opportunity they were given to address the employees accordingly'*. The Head of Department, the third respondent, indicated that the matter was beyond her jurisdiction and had to be addressed by the MEC: Department of Health.

[18] On 21 April 2021, HOSPERSA followed up as to the outcome of the reinstatement application.

[19] The outcome of the application for reinstatement is dated by the MEC: Department of Health on 3 March 2021 but was communicated to the applicants on 23 April 2021. That is, the MEC took from 16 July 2020, when the application for reinstatement was delivered, until 3 March 2021 to decide the outcome of the reinstatement application. The reinstatement application was refused, and the MEC determined that the applicants were dismissed with effect from 12 May 2020.

[20] The application for review is dated 9 September 2021. That is, the review application was delivered about four and a half months after the refusal to reinstate the applicants had been communicated to the applicants.

Application for condonation

[21] While s158(1)(h) does not prescribe a specific time period within which a review application must be launched, it must be brought within a reasonable time[3] and has equated this with the six-week limit established in s145. Any review application brought under this section and filed later than six weeks after the impugned decision was served on the applicant should be accompanied by an application for condonation.

[3] See: *Member of the Executive Council for the Department of Health, Western Cape v Weder; Member of the Executive Council for the Department of Health, Western Cape v Democratic Nursing Association of SA on behalf of Mangena* [2014] 7 BLLR 687 (LAC) (*Weder*).

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[22] The test for condonation is no doubt well settled in our law following *Melane v Santam Insurance Co Ltd*[4], where the following was said:

> '…the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach, incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.'

[23] This Court may, if sufficient cause is shown, excuse a party from compliance with any of the court's rules. This is an unfettered discretionary power to be exercised where the party seeking condonation has made out a case to justify the court's indulgence in the interests of justice. The standard to be obtained is imprecise, requiring consideration of a range of well-known factors. Relevant factors are to be determined by the circumstances and, generally, to be approached collectively. The Court must be fair to both sides and must also consider the broader objects of the LRA, including the importance of expeditious resolution of employment disputes.[5]

[24] It is clear that the application was not delivered within a reasonable period, and rather about 20 weeks after the expiry of the six-week period, ordinarily considered reasonable, for the filing of the application. The degree of lateness is

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[4] 1962 (4) SA 531 (A) at 532C – E.

[5] *Government Printing Works v Public Service Association and Another* [2025] BLLR 112 (LAC) at paras 6 and 7.

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open to severe criticism, and the only real explanation provided therefor is that the country's national alert level was raised to level 4 with stricter regulations imposed, which made it difficult for HOSPERSA to consult with their legal representatives, coupled with the riots in KwaZulu-Natal, making it impossible for HOSPERSA to consult with its legal representatives. The explanation for the delay is equally open to severe criticism. What counts heavily with the Court, however, is that the applicants appear to have been blameless. It is their representatives (HOSPERSA) who acted negligently.[6]

[25] It is also important to do justice to both sides. The MEC took from 16 July 2020, when the application for reinstatement was delivered, until 3 March 2021 (that is, the MEC took about 7 ½ months) to decide to refuse their reinstatement. In the present dispute, the only major prejudice of 'turning the clock back' would relate to whether the respondents could reinstate the applicants to the same/similar positions to those which they had previously held; that is, whether it is possible, in terms of s 17(3)(b) of the Act to reinstate the applicants into any other similar post or position as the respondents may determine? The respondents, despite delivering a notice to oppose, did not oppose the application – they did not deliver any affidavits or heads of argument. Having adopted that approach, they can hardly be said to complain should condonation be granted.

[26] For the reasons that will be stated below, there are also particularly good prospects of success.

[27] In the circumstances, it is appropriate for this Court to exercise its discretion in favour of granting condonation in the interests of justice.

<u>The merits</u>

[28] Section 17(3)(a)(i) of the Act provides:

> 'An employee, other than a member of the services or an educator or a member of the Intelligence Services, who absents himself or herself from his

[6] *National Union of Mineworkers v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at para

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or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been dismissed from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of duty.'

[29] In accordance with s17(3)(b), an application was made by HOSPERSA for the reinstatement of the applicants; however, the MEC refused their reinstatement. It is this decision that the applicants seek to review and set aside in terms of s158(1)(h) of the LRA.

[30] Van Niekerk J (as he then was) in *De Villiers v Head of Department: Education, Western Cape Province*[7], considered within the context of similar legislation (i.e. s14 of the Employment of Educators Act[8]) the implications of a deemed dismissal in terms of s 17(3)(a)(i) of the Act and the power given to reinstate in terms of s 17(3)(b) of the Act. In analysing whether a review of a decision taken in terms of s 14(2), or in this case s 17(3)(b) of the Act, was permissible, Van Niekerk J (as he then was) held that:

'If this court were to adopt a "hands off" approach to its oversight functions over the exercise of a discretion such as established by s 14 of the EEA, the respondent's power would effectively be unchecked, and the applicant would be left without a remedy.'[9]

[31] The decision is open to review on the grounds of legality. Public functionaries are required to act within the powers granted to them by law.[10] In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others*[11], the court laid down the core element of legality as follows -

'It is a requirement of the rule of law that the exercise of public power by the

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[7] (2010) 31 ILJ 1377 (LC) (*De Villiers*).
[8] Act 76 of 1998.
[9] Ibid fn 7 at para 20.
[10] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 58.
[11] 2000 (2) SA 674 (CC) at para 85.

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> Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement.'[12]

[32] Insofar as the requirement of 'good cause shown' in s17(3)(b) is concerned, it should be interpreted to mean '*that unless the employer, having regard to the full conspectus of relevant facts and circumstances, is satisfied that a continued employment relationship has been rendered intolerable by the employee's conduct, the* employer *should as a general rule approve the reinstatement of the employee*'.[13]

[33] In refusing to reinstate the applicants, the MEC pointed out that HOSPERSA had admitted to 'mishandling' the matter and that it had apologised for '*fault and the omission to advise the employees accordingly'*. The MEC also placed much reliance on the fact that the applicants were required to personally submit their application for sick leave to their supervisor, whereas the HOSPERSA shop stewards had gone to the Tshino Clinic on 20 May 2020 to submit the forms on their behalf. That, coupled with the fact that the applicants had not reported for duty when they were required to do so and had absented themselves for a period exceeding one calendar month, justified the conclusion that s17(3)(a)(i) had properly been invoked.

[34] The MEC failed to consider whether the continued employment relationship had been rendered intolerable. The applicants relied on HOSPERSA, which was in discussions with the Department as to the applicants' concerns about their safety should they return to Tshino Clinic. They relied on the advice of HOSPERSA in obtaining their medical certificates for sick leave, and HOSPERSA had delivered the medical certificates to the Tshino Clinic. The applicants held the *bona fide* belief that they were acting within their rights, based on the advice of HOSPERSA – their failure was not wilful or deliberate.[14]

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[12] Ibid at para 85.
[13] *De Villiers* supra at para 30. See also *Weder* at para 36.
[14] *De Villiers* supra.

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[35] The applicants were not told that the Department rejected their medical certificates and required them, notwithstanding the medical certificates, to report for duty.

[36] At best for the Department, the applicants can be criticised for refusing to return to Tshino Clinic, but that alone does not constitute conduct on the applicant's part which is sufficient to render the continued employment relationship intolerable.[15] A reasonable and fair-minded decision maker in the position of the MEC would, in considering the submission made by the applicants for their reinstatement, have taken into account the facts and circumstances of this matter and could, in applying his or her mind, appreciate that fairness dictated that termination of the employment of the applicants ought to be reversed. Other steps and measures could have been taken thereafter if the applicants had persisted with their position.[16]

[37] No reason was provided by the MEC as to why their continued employment would have been rendered intolerable. Steenkamp J made the point in *Public Servants Association on behalf of Mphaphuli NO and Others*[17] that:

> 'without his [i.e. the relevant functionary] having given any reasons for his decision, it cannot be said to be reasonable. How can it be ascertained if it was reasonable, if he gave no reasons? It simply begs the question.'

[38] In my view, applying the test of legality, insufficient evidence was provided by the MEC as to why the decision to reject the representations made was sufficiently rationally related to the purpose for which that power was given to the MEC. In particular, insufficient evidence was provided as to why a continued employment relationship had been rendered intolerable by the conduct of the applicants.

<u>Order</u>

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[15] *Weder* supra.
[16] *Mogola and Another v Head of Department: the Department of Education NO* [2012] 6 BLLR 584 (LC).
[17] (2014) 35 ILJ 2260 (LC) at para 26.

1. The application for condonation for the late filing of the review application is granted;

2. The decision of the first respondent dated 24 March 2021 under reference number S7/4/I/2 is reviewed and set aside;

3. The applicants are reinstated with immediate effect in their employment on the same terms and conditions as those which governed their employment immediately prior to their deemed discharge in terms of s17(3)(a)(i) of the Public Services Act, 1994, save that the applicants are not to receive any salary or emoluments in respect of the period 17 June 2020 to 31 March 2021, being the date on which the first respondent dismissed the applicants' reinstatement applicant; and

4. There is no order as to costs.

C De Witt

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Nozipho Mvulane

Instructed by: Rajaram Mvulane Attorneys

For the First Respondent:

Instructed by:

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