



**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case No: JR198/2022

In the matter between:

**THENGA HOLDINGS (PTY) LTD**

**Applicant**

and

**COMMISSIONER RICHARD BYRNE N.O**

**First Respondent**

**J BOOYSEN**

**Second Respondent**

**COMMISSION FOR CONCILIATION, MEDIATION  
AND ARBITRATION**

**Third Respondent**

**SEDZANI THENGA**

**Fourth Respondent**

**Heard: 20 May 2025**

**Delivered: 29 September 2025**

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**JUDGMENT**

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**SCHENSEMA, AJ**

## Introduction

- [1] This is an opposed application brought by the applicant in terms of which the applicant seeks various relief pertaining to a rescission ruling (Ruling) and subsequent default award.
- [2] The applicant has intertwined the grounds of review relating to the Ruling and the default award in its founding affidavit, and for this reason, this judgment will consider the Ruling as well as the default award. Having said this, however, it is obvious that were the review application in respect of the Ruling to succeed, it would not be possible to give effect to the default award.
- [3] In terms of the default award, the applicant was ordered to reinstate the third respondent in the same position and on the same terms and conditions of employment that existed prior to her dismissal, together with backpay in the amount of R600 000.00. The reinstatement was effective from 15 October 2021.
- [4] This matter also consists of two Rule 11 applications, and it is therefore necessary to set out the background to the matter in order to place the review application into its proper context.
- [5] The applicant, upon receipt of the Ruling on 30 November 2021, served its review application, in respect of the Ruling and the default award on the respondents on 31 January 2022.
- [6] In terms of the notice of motion, the applicant sought (a) condonation for the late filing of the review application; (b) the default award be reviewed and set aside; (c) the Ruling be reviewed and set aside; and (d) the CCMA be directed to set down the unfair dismissal dispute to be heard afresh.
- [7] Attached to the founding affidavit to the applicant's review application are a number of annexures, which *inter alia* include the default award, rescission application, applicant's arbitration documents and Ruling.
- [8] On 10 February 2022, the applicant's erstwhile attorneys Mafona Ramothwala Incorporated served and filed an index of the record that it erroneously refers

to as an index in terms of Rule 7(5) of the Labour Court Rules<sup>1</sup> and attached the record of the proceedings, which record did not include the transcription of the audio disc that had been delivered to the Labour Court by the CCMA on 3 February 2022. The record that was served and filed comprises 431 pages.

- [9] Subsequent to the filing of the index and record, Mafona Ramothwala Incorporated, on behalf of the applicant, filed what they had also erroneously referred to as a notice in terms of Rule 8(b) of the Labour Court Rules on 18 February 2022, in respect of which the applicant notified the parties that it had:

‘perused the record filed in terms of Rule 7A(5) of the Labour Court Rules, decided to stand by its Notice of Motion dated 2 February 2022 and, thus, shall not file a supplementary affidavit in respect thereof.’ (own emphasis)

- [10] In response to the review application and the applicant’s Notice in terms of Rule 8(b), the third respondent’s attorneys of record served a notice to oppose and the third respondent’s opposing affidavit on 25 February 2025.
- [11] On 18 March 2022, the applicant served and filed what I will refer to as its ‘first’ Rule 11 application in respect of which the applicant sought the following relief:

11.1 An amendment to its Notice of Motion to read as follows:

‘1.1 The execution of the award which was granted under the auspices of the Commission for Conciliation, Mediation and Arbitration (the CCMA) under case number: GATW2074/21 on the 5<sup>th</sup> of October 2021 in terms of which Sedzani Thenga (Third Respondent in the review application) is reinstated as an employee of Applicant is stayed pending the finalisation of the review application Applicant brought in this Honourable Court.

1.2 The late filing of this application by Applicant be condoned.

1.3 The award granted by First Respondent (“the Commissioner”) under the auspices of the Second Respondent in case number:

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<sup>1</sup> GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court (repealed, effective 17 July 2024).

GATW2074/21 on the 5<sup>th</sup> of October 2021 in terms of which Third Respondent is reinstated as an employee is hereby reviewed and set aside.

- 1.4 The Ruling made by First Respondent under the auspices of the Second Respondent on the 30<sup>th</sup> of November 2021 under case number GATW2074/21 dismissing Applicant's rescission application is hereby reviewed and set aside.
- 1.5 The application brought by Sedzani Thenga under case number J233/2022 is consolidated with Applicant's review application brought under case number: JR198/2022 and that both matters are regarded as one and the same proceedings, and subject to this Honourable Court's directive(s), as to the filing of further pleadings.
- 1.6 Sedzani Thenga's possession of a motor vehicle known as BMW M4 Series with registration number: FG 54 XB (GP) ("the motor vehicle") is unlawful.
- 1.7 Sedzani Thenga is ordered to return the motor vehicle to Applicant within 2 (two days) from date of the order of this Honourable Court.'  
(sic)

[12] The first Rule 11 application was opposed by the third respondent by way of an opposing affidavit, which was served and filed on 31 March 2022. In reply to which, the applicant only served and filed a replying affidavit on 2 September 2022.

[13] On 2 September 2022, the applicant appointed new attorneys, Victor Nkhwashu Attorneys Incorporated, and in confirmation hereof served a Notice of Appointment of Attorneys of Record.

[14] In addition to the aforementioned replying affidavit in respect of the first Rule 11 application, the applicant's new attorneys of record also served and filed a Notice in terms of Rule 7A(6) together with a consolidated bundle containing the record of the proceedings and the transcripts of the default arbitration proceedings.

- [15] In addition to the notices and consolidated bundle, the applicant also filed a supplementary affidavit in terms of Rule 7A8(a) of the now-repealed Labour Court Rules.
- [16] The applicant further elected to file a 'second' Rule 11 Application on 2 September 2022, in which the applicant sought an order, (a) declaring the purported Rule 8(b) notice attached to the founding affidavit as annexure 'TH2' to be irregular and of no force and effect; (b) that the review application under the above case number be reinstated; and (c) condoning the late filing of the applicant's supplementary affidavit.
- [17] Of significance is that the Notice of Motion to the second Rule 11 application does not seek condonation for the late filing of the transcribed record; however, condonation is sought in the founding affidavit.
- [18] The second Rule 11 Application is similarly opposed by the third respondent in her opposing affidavit of 15 September 2022, in response to which the applicant served and filed a replying affidavit on 23 September 2022.

### The Rule 11 Applications

#### *The First Rule 11 Application – March 2022*

- [19] As aforementioned, the applicant had elected to launch two Rule 11 applications in which it sought various relief.
- [20] For the reasons that follow, I am of the view that no basis has been established as to why the applicant and its attorneys deemed it necessary to launch these applications. I say this for the following reasons:

20.1 In respect of the notice of motion that was served in January 2022, the applicant had already sought condonation for the late filing of the review application; (b) the default award be reviewed and set aside; (c) the Ruling be reviewed and set aside; and (d) the CCMA be directed to set down the unfair dismissal dispute to be heard afresh.

20.2 Upon receipt of the answering affidavit to the founding affidavit, in February 2022, the third respondent raises a number of criticisms in her answering affidavit in respect of the relief sought by the applicant, thereafter which the applicant elected to launch its first Rule 11 application in which it sought to amend its notice of motion by including the additional prayers as set out in 1.5 to 1.7 above.

20.3 In respect of the relief sought pertaining to the return of the BMW in prayers 1.6 and 1.7 above, it is clear from the pleadings that there is a dispute of fact, which this Court is unable to determine.

20.4 In respect of the relief sought in prayer 1.5 above, at the hearing of the review application, a copy of the third respondent's notice of withdrawal in relation to her application filed under case number J233/2022 was provided to me. In light hereof, there is no need for this Court to make a determination in respect of the consolidation of the matters.

20.5 In respect of the second Rule 11 application launched in September 2022, similarly, no basis has been established as to why this application was necessary for the following reasons:

20.5.1 Despite the incorrect citing of the Rule pertaining to supplementing the founding affidavit and filing of a record, there can be no dispute that it was the applicant's intention in February 2022 to stand by its notice of motion and founding affidavit and that it filed the record, which excluded the transcript of the arbitration proceedings, in February 2022.

20.5.2 In respect of the explanation provided, the applicant once again seeks to blame its attorneys for its failure to file the transcribed record and to supplement the founding affidavit. It is trite that there is a limit beyond which a litigant cannot escape the results of its attorney's lack of diligence. It has never been the law that invariably, a litigant will be excused if the blame lies with the attorney; to hold otherwise might have a disastrous effect upon the observance of the rules of this court and set a dangerous

precedent.<sup>2</sup> It is for this reason that condonation for the late filing of the supplementary affidavit is not condoned.

20.5.3 In respect of the relief to reinstate the review application on the basis that the applicant believed that the matter had become archived, this is simply incorrect. With reference to the now repealed Practice Manual, at paragraph 11.2.7:

‘A review application is by its nature an urgent application. An applicant in a review application is therefore required to ensure that all the necessary papers in the application are filed within twelve (12) months of the date of the launch of the application (excluding heads of argument) 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.’

20.6 Given that the review application was served and filed in January 2022, and the record of the proceedings (excluding the transcribed record) was filed in February 2022, and the 12-month period had not yet elapsed, the applicant is not required to apply for reinstatement of the review application.

[21] For the aforementioned reasons, the two Rule 11 applications are dismissed.

#### Condonation for the late filing of the review application

##### *Degree of lateness*

[22] The applicant received the Ruling dated 30 November 2021, on 1 December 2021. In response to the Ruling, the applicant instructed their attorneys at the time, Selomo Attorneys, to launch the review application.

[23] Notwithstanding the applicant's instruction, this instruction had not been complied with, which came to the realisation of the applicant upon receipt of

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<sup>2</sup> *Superb Meat Supplies CC v Maritz* (2004) 25 ILJ 96 (LAC).

the third respondent's application to certify the default award on 14 January 2022. After making enquiries with Mr Selomo, the applicant was dissatisfied with his responses and, on 18 January 2022, terminated Selomo Attorneys' mandate and appointed Mafona Ramothwala Incorporated.

- [24] Subsequent to the termination of Selomo Attorneys' mandate, the applicant's new attorneys attempted to obtain information from Selomo Attorneys, which request was ignored. The applicant's attorneys also corresponded with the third respondent's attorneys of record on 18 January 2022 in which they were informed that Mafona Ramothwala Incorporated had been instructed to assist the applicant.
- [25] The applicant holds the view that the review application is only five days late, in that the period has been calculated from 7 to 14 January 2022. However, upon perusal of the review application, which is dated 27 January 2022 and was further served on the parties on 31 January 2022, the five-day period as calculated by the applicant is clearly incorrect.
- [26] It is trite that an applicant has six weeks in which to file a review application upon receipt of an award or Ruling. In this regard the applicant has confirmed by way affidavit that it had received the Ruling on 1 December 2021, accordingly the due date for the review application was 12 January 2022. The review application is therefore 12 court days late, contrary to the applicant's assertion that it was only 5 days late. Whilst the delay is not excessive, it is not insignificant.

*The explanation for the delay*

- [27] As aforementioned, the applicant has submitted the reasons for the delay, which reasons relate to Selomo Attorneys' failure to comply with its instructions to file the review application.
- [28] It is clear that upon receipt of the application to certify the default award, the applicant took numerous steps to ensure that the review application was served and filed.

- [29] In opposition, the third respondent in her opposing affidavit criticises the applicant for not attaching a confirmatory affidavit of Mr Selomo. Furthermore, it would not have been possible for the review application to have been launched without the applicant's involvement.

*Analysis of the condonation application for the late filing of the review application*

- [30] The relevant legal principles to be applied in an application for condonation are well established. This Court is required to exercise a discretion, having regard to the extent of the delay, the explanation for that delay, the prospects of success and the relative prejudice to the parties that would be occasioned by the application being granted or refused. The interest of justice will ordinarily reflect regard for all these factors.
- [31] In *A Hardrodt (SA) (Pty) Ltd v Behardien and others*<sup>3</sup> (*Hardrodt*), the Labour Appeal Court (LAC) restated the guidelines laid down in *Queenstown Fuel Distributors CC v Labuschagne NO and others*<sup>4</sup> and held *inter alia* that there must be good cause shown for condonation in the sense that the reasons tendered for the delay have to be convincing. In other words, the excuse for non-compliance with the time periods must be compelling. The onus is on the applicant to satisfy the Court that condonation should be granted.
- [32] The general principles applicable to deciding applications for condonation apply even more stringently when it comes to review applications. In *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) and others*<sup>5</sup> (*Thilivali*), the Court said:

'What is clear from the judgment in *Hardrodt* is that general principles applicable to condonation applications are even more stringently applied where it comes to a condonation application for the late filing of a review application. In review condonation applications, the explanation that needs to be submitted must be compelling and the prospects of success need to be

<sup>3</sup> (2002) 23 ILJ 1229 (LAC).

<sup>4</sup> (2000) 21 ILJ 166 (LAC).

<sup>5</sup> (2015) 36 ILJ 232 (LC) at para 22.

strong. Where it comes to the issue of prejudice, the applicant in fact has to show that a miscarriage of justice will occur if the applicant's case is not heard. The reason for these more stringent requirements is that review applications occur after the parties have already been heard, presented their respective cases and a finding has been made. Under such circumstances, considerations of justice, fairness and expedition require that challenges of such findings must not be delayed and must be completed as soon as possible.'

[33] The courts have held and emphasised that an applicant must necessarily act with the degree of diligence required, thus giving effect to the statutory imperative of expeditious dispute resolution.

[34] The onus is on the applicant seeking condonation to satisfy the Court that condonation should be granted. In employment disputes, there is an additional consideration which applies in determining whether the onus has been discharged, as was held in *Thilivali*:<sup>6</sup>

'There is, however, an additional consideration which applies in employment disputes in determining whether an applicant for condonation has discharged this onus. This is the fundamental requirement of expedition. The Constitutional Court has, as a matter of fundamental principle, confirmed that all employment law disputes must be expeditiously dealt with and any determination of the issue of good cause must always be conducted against the back drop of this fundamental principle in employment law.'

[35] In summary: the Courts have endorsed the principle that where there is a delay with no reasonable, satisfactory and acceptable explanation for the delay, condonation may be refused without considering prospects of success, and to grant condonation where the delay is not explained may not serve the interests of justice. The expeditious resolution of labour disputes is a fundamental consideration.

[36] Notwithstanding the aforementioned principle, a measure of flexibility has been applied where required in the interests of justice. In *National Education Health and Allied Workers Union obo Mofokeng and Others v Charlotte*

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<sup>6</sup> *Thilivali* at para 25.

*Theron Children's Home*<sup>7</sup>, it was determined that, in the interest of justice, the case should proceed, as the policy in question appeared to be deeply influenced by a racist perspective and was perpetuating ongoing racial discrimination. In this case, the circumstances were described as 'exceptional', thereby justifying less focus on the unexplained periods of delay.

[37] In the matter of *Government Printing Works v Public Service Association and another*<sup>8</sup> the Labour Appeal Court held that:

'[26] Judicial discretion involves a value judgment based on the facts of the case. The Labour Court must be fair to both sides. It must also consider the broader objects of the LRA, including the importance of expeditious resolution of employment disputes. The facts that must be considered in determining whether or not it is in the interests of justice to grant condonation, and the appropriate approach, have now been resolved as follows:

"[22] ... [T]he concept "interests of justice"... includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue...' and the prospects of success. It is crucial to reiterate that... the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant. (own emphasis)

[23] it is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great

<sup>7</sup> [2004] 10 BLLR 979 (LAC).

<sup>8</sup> [2025] 2 BLLR 112 (LAC) at para 26.

significance, the explanation must be reasonable enough to excuse the default...

[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."

[27] This description evokes a balancing approach, characterised by proportionality and flexibility. The general principle remains that the various factors are to be considered collectively, and not mechanically, in determining the interests of justice.'

[38] It is in this context that the application for condonation stands to be determined.

#### Explanation for the delay

[39] It is trite that a failure to comply with the timeframes must be explained, and the reasonableness of the delay should be considered by having regard to the explanation for the delay.

[40] The explanation for the delay has to be compelling, convincing and comprehensive and should cover every period of the delay.<sup>9</sup> Furthermore that the explanation provided is reasonable and acceptable. In this regard an

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<sup>9</sup> *Van Wyk v Unitas Hospital and Another* 2008 (4) BCLR 442 (CC).

applicant in a condonation application is required to provide an explanation for the entire period of the delay and the aspects related thereto.

- [41] The applicant's condonation application is purely based on their former attorneys Selomo Attorneys' negligence to file the review application timeously.
- [42] The case law is trite that an applicant cannot hide behind the negligence of its legal representative.
- [43] In *Superb Meat Supplies CC v Maritz*<sup>10</sup>, the court held that there have been frequently repeated judicial warnings that there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. It has never been the law that, invariably, a litigant will be excused if the blame lies with the attorney; to hold otherwise might have a disastrous effect upon the observance of the rules of this court and set a dangerous precedent. It would invite and encourage laxity on the part of practitioners.
- [44] This principle was enunciated in the *PPWAWU & Others v AF Dreyer & Co (Pty) Ltd*<sup>11</sup> where the court held that:

'On the one hand it must be said in favour of the dismissed employees that they entrusted their case to their trade union and were entitled to assume that the union would act with their best interests in mind. There is no suggestion that they knew of the time limits laid down in the Act nor that they were aware, or must have become aware, of the delay in prosecuting their claim. On the other hand, as the courts have stressed many times, there is a limit to which a litigant can rely on the negligence of his representative in failing to comply timeously with time limits.'

- [45] Notwithstanding the case law referred to above as well as my findings in respect of the second Rule 11 application, the time frame in respect of the filing of the review application clearly demonstrates that the applicant did not simply stand by when it became aware that its attorneys had failed to comply

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<sup>10</sup> *Supra* fn 2 at para 16. See also *Saloojee and Another, NNO V Minister of Community Development* 1965 (2) SA 135 (A) at 141C.

<sup>11</sup> [1997] 9 BLLR 1141 (LAC) at para 14.

with instructions to launch the review application. Accordingly, the 'limit' contemplated in the aforementioned authorities, in my view, has not been reached, as this is not a case of an inordinate delay where the applicant took no steps to ensure that the review application was pursued.

- [46] In considering the timeframe explained by the applicant, I am therefore satisfied that the applicant has provided an explanation for the late filing of the review application.

#### Prospects of success

- [47] For purposes of properly determining the condonation application and for the aforementioned reasons, I have not limited my assessment of the review application on the basis of the reasons for the delay only.
- [48] In order to ensure that this process is complete, I have further considered the prospects of success in order to determine whether there are compelling reasons for this Court to grant condonation.
- [49] It is obvious that were the review application in respect of the Ruling to succeed, it would not be possible to give effect to the default award in respect of which the Commissioner reinstated the third respondent.
- [50] It is uncontroversial that the review test is whether an arbitrator has misconceived the nature of the enquiry or arrived at an unreasonable result.<sup>12</sup> A result will be considered to be unreasonable if it is one that a reasonable arbitrator could not reach on all the material presented to him or her.<sup>13</sup>
- [51] The evidence contained in the documents, which were served on 10 February 2022, i.e. excluding the transcript of the default arbitration proceedings, clearly highlights the Commissioner's failure to properly evaluate the evidence before him, as well as his failure to consider the obvious conflict of interest that existed between the parties.

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<sup>12</sup> *SA Rugby Union v Watson and Others* (2019) 40 ILJ 1052 (LAC) at para 25.

<sup>13</sup> *ibid.*

[52] It is also evident that had the Commissioner properly considered the sanction imposed at the internal disciplinary enquiry, where Advocate Seboko in his outcome summarised the evidence and, at paragraph 31, recorded that the third respondent herself admitted she no longer trusted her employer, the Commissioner ought to have taken this into account before considering whether reinstatement was appropriate. Based on the above, the applicant has demonstrated that it has prospects of success in this matter.

### Prejudice

[53] The potential prejudice to the third respondent must be balanced against the prejudice faced by the applicant. Should the third respondent also have reasonable prospects of success, the matter can be remitted to the CCMA, allowing both parties to present their respective cases. Although some prejudice to the third respondent cannot be excluded, the prejudice to the applicant in these circumstances substantially outweighs that of the third respondent.

[54] For these reasons, I am of the view that a basis has been established by the applicant to justify its shortcomings in its late filing of its review application, which shortcomings are to be overlooked in the interests of justice.

### Background

[55] The applicant summarises the facts in its founding affidavit as follows:

55.1 The third respondent was appointed as the Deputy Chief Executive Officer of the applicant on about 1 August 2020, earning a salary of R1 023 670,30 per annum, as per a written contract of employment.

55.2 The applicant was run by "the Thenga family", namely the late Mr MC Thenga ("Mr Thenga") and his wife, Ms Sithabiso Nompilo Thenga ("Ms Thenga").

55.3 Ms Thenga, the deponent to all of the applicant's affidavits, is the sole director, shareholder, and chairperson of the Board. The third respondent is her sister-in-law, as Ms Thenga's late husband was the

third respondent's brother. The applicant is an associated company of Goliah Capital (Pty) Ltd ("GC"), which it utilised to provide performance guarantees, a prerequisite for securing major construction and related engineering projects.

- 55.4 On 3 September 2020, the applicant was awarded a project worth R23.7 million by the Gamagara Local Municipality in respect of which a performance guarantee was required.
- 55.5 Following the passing of Ms Thenga's husband, who had been a director of GC, it became necessary to remove him as director and appoint Ms Thenga in his place in order for the required performance guarantee to be issued.
- 55.6 When the change was attempted on the CIPC system, it became apparent that the third respondent had altered the CIPC login details, thereby preventing Ms Thenga and another employee from accessing the CIPC database and effecting the required changes.
- 55.7 Ms Thenga requested that the third respondent provide the login details on 2 and 4 to 10 November 2020, as the performance guarantee was required by no later than 13 November 2020. By 13 November 2020, the third respondent refused to provide the login details.
- 55.8 The basis for the third respondent's refusal was that she was of the view that she had a claim as heir in Mr Thenga's deceased estate, and she believed that providing the login details would somehow compromise her in this regard.
- 55.9 The third respondent was of the view that the executors of her late brother's estate were to be effecting changes of this nature, but ultimately it became clear that the third respondent prioritised her personal interests over her fiduciary duties to the applicant as an employee.

55.10 The third respondent did not provide the login details even after the executors confirmed that the intended change was permissible. She was ultimately suspended and brought before a disciplinary enquiry, and was dismissed.

[56] Dissatisfied with her dismissal, the third respondent referred an unfair dismissal dispute to the CCMA. Prior to the commencement of the arbitration, the applicant's attorney of record at the time, Mr Selomo, on behalf of the applicant, raised a jurisdictional point, the outcome of which resulted in the CCMA confirming that it had jurisdiction to arbitrate the dispute.

[57] The third respondent's attorney of record also brought an application for legal representation, which application was not opposed by the applicant. It is clear from these facts alone that the applicant was legally represented and had every intention of defending the unfair dismissal dispute.

[58] The arbitration was subsequently set down on 23 September 2021, and the applicant's erstwhile attorneys mistakenly believed that the arbitration had been scheduled for 12h00 (not 09h00). As a result, the arbitration proceeded in the absence of the applicant.

[59] The applicant's attorney of record subsequently filed a rescission application, in accordance with section 144 of the Labour Relations Act<sup>14</sup> (LRA).

#### The Ruling

[60] Rescission was refused by the Commissioner *inter alia* on the basis that he had not accepted the explanation provided by Mr Selomo, that the merits were weak and further determined that the CCMA's attendance register, which was attached to the rescission application, '*showed signs of possible tampering*'. How the Commissioner made this determination is not explained by him in the Ruling.

#### The Default Award

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<sup>14</sup> Act 66 of 1995 as amended.

- [61] The Commissioner, in his analysis, determined that an executor '*steps into the shoes of the deceased person*' and accordingly has the sole authority to effect changes to management, and in light hereof, any instruction by another person to make changes to the directorship of one of the companies in the estate without the consent of the executor would therefore be unlawful.
- [62] In light of the above, the Commissioner found that the instruction given to the third respondent was unlawful and, as such, she could not be guilty of gross insubordination. Despite this finding, the Commissioner was of the view that the third respondent should nevertheless have requested the executor to effect the changes to the CIPC documents.
- [63] Notwithstanding the above, the Commissioner held that the third respondent's dismissal was substantively unfair and that there was no basis for denying her reinstatement with full retrospective effect

#### Grounds of review

- [64] The applicant holds the view that in respect of the Ruling and Default Award, the Commissioner failed to *inter alia* take into consideration the following:
- 64.1 the rescission application clearly demonstrated that no fault could be established on the part of the application;
  - 64.2 there was no basis for the applicant's erstwhile attorney to have believed that the matter had been scheduled for 12h00;
  - 64.3 that the applicant was not in willful default;
  - 64.4 that the applicant's absence was due to its attorneys having advised that the matter was scheduled for 12h00, which clearly demonstrates human error and no willful default on the part of the applicant;
  - 64.5 the applicant has a *bona fide* defence, which defence would have clearly demonstrated that the third respondent had deliberately and without just cause or reasonable grounds refused to obey a lawful instruction to release the login details. In response, the third

respondent submits that she was afraid of acting unlawfully by releasing the login details and reasoned further that she was entitled to refuse, because she was an heir to her brother's estate and the change of directorship would affect her claim in the estate;

64.6 the Commissioner ought to have fully assessed the third respondent's duty as an employee;

64.7 that it could never have been a valid ground for the third respondent to have refused to comply with the instruction to change the login details;

64.8 that the third respondent had persistently refused to comply with the instruction, which was not considered by the Commissioner. That the third respondent had acted in her own interest;

64.9 the Commissioner had failed to put proper and due weight on the lawfulness of the instruction, and had the Commissioner afforded the applicant an opportunity to be heard, the applicant would have been able to demonstrate that:

64.9.1 there was a lawful instruction;

64.9.2 the third respondent had refused to obey the instruction;

64.9.3 the refusal constituted gross insubordination;

64.9.4 the finding in respect of the internal disciplinary enquiry was correct; and

64.9.5 the third respondent's dismissal was substantively fair.

64.10 the Commissioner had further acted unreasonably in that he had determined that the applicant's instruction to the third respondent was unlawful. In so doing, the Commissioner appeared to have considered the third respondent's claim of being an heir in her late brother's estate without any evidence to confirm that the third respondent was actually an heir;

64.11 furthermore, whether the third respondent was an heir to the estate bears no relevance as to whether the instruction given to the third respondent was lawful, as the instruction given clearly related to an operational need which the applicant required in order to run its operations. The evidence, even without the applicant having led any, clearly demonstrates that the third respondent was acting in her own best interest and not those of the applicant, contrary to her obligations as an employee;

64.12 in respect of the Commissioner's findings in relation to the sanction outcome, the Commissioner failed to deal with the obvious conflict of interest between the third respondent's obligations as an employee and those of being an heir. No explanation is provided by the Commissioner as to why he considers the applicant had no merits in respect of the matter based on his reading of the sanction outcome;

64.13 the applicant further raises issues in respect of the Commissioner's reinstatement of the third respondent, in that the applicant believes that the Commissioner was obligated to consider section 193 of the LRA to determine whether reinstatement was an appropriate remedy; and

64.14 no reasons are provided by the Commissioner as to why he believed that no reason existed as to why the third respondent should not be reinstated, this notwithstanding the fact that he had made reference to the sanction, which clearly sets out the conflict of interest and the fact that, on the third respondent's own version, she no longer trusted her employer. The Commissioner failed to deal with this aspect in its entirety and accordingly misdirected himself by failing to take into consideration the third respondent's own version, as recorded in the sanction, that the trust relationship had irretrievably been broken. Accordingly, reinstatement was not appropriate and is clearly indicative of a decision that a reasonable decision maker could not have made under the circumstances.

[65] The applicant concludes that, given these numerous reviewable irregularities, the Commissioner's default award and Ruling ought to be reviewed and set aside on the basis that he had acted unreasonably in his factual and legal findings and as a result made a decision which a reasonable decision maker would not have made under the circumstances.

[66] In opposition to the review grounds, the third respondent sets out the shortfalls as contained in the applicant's notice of motion, that being:

- 66.1 both the notice of motion and founding affidavit do not pray for the stay of the implementation of the award;
- 66.2 no security has been filed in terms of section 145(7) and (8) of the LRA;
- 66.3 the review application fails to disclose any defect in the award; and
- 66.4 a number of the averments made are not supplemented or supported by way of a confirmatory affidavit.

[67] In respect of the review grounds, the third respondent opposes the review application on the following grounds:

- 67.1 the applicant elected not to be present at the arbitration;
- 67.2 the applicant could not have simply handed over the review application to its attorneys, as the applicant would have had to depose to affidavits;
- 67.3 the set-down notice had been served on the applicant, and accordingly, there is no basis for the applicant to blame her attorneys;
- 67.4 during the arbitration, the third respondent was required to respond to numerous questions by the Commissioner, during which she had indicated the relief she sought as being reinstatement and compensation for her lost salary;
- 67.5 the Commissioner correctly determined that the third respondent's dismissal was unfair and that the applicant had failed in its review application to demonstrate any grounds of review;

67.6 the third respondent is being severely prejudiced as a result of the 'frivolous' review and condonation application, and ultimately, the applicant has never been denied the right to be heard; and

67.7 in respect of the facts resulting in the third respondent's dismissal, the third respondent denies having refused to comply with the instructions on the basis that she had escalated the instruction she had received to the executor and ultimately complied with the instructions received from the executor. Furthermore, at no stage had she received a direct instruction from the applicant and was further not aware of the deadline for the Gamagara project.

#### Test for review

[68] In a range of cases, starting with *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*<sup>15</sup> and the jurisprudence that followed<sup>16</sup>, the test on review, and as set out in *Herholdt v Nedbank Limited*<sup>17</sup>, has been defined with great clarity:

68.1 It must be established either that the arbitrator has misconceived the nature of the enquiry or that they arrived at an unreasonable result.

68.2 For an award to be unreasonable, the arbitrator's conclusion must be one that a reasonable decision-maker could not reach on the material that was before the arbitrator.

<sup>15</sup> (2007) 28 ILJ 2405 (CC).

<sup>16</sup> *Cusa v Tao Ying Metal Industries and others* 2009 (2) SA 204 (CC); *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others* (2008) 29 ILJ 964 (LAC); *Herholdt v Nedbank Ltd (COSATU as amicus curiae)* 2013 (6) SA 224 (SCA) (*Herholdt*); *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC).

<sup>17</sup> *Herholdt* supra.

68.3 Material errors of fact, including errors concerning the weight and relevance to be attached to certain facts, are only of consequence if their effect is to render the outcome unreasonable.

68.4 If the arbitrator's reasons provide a reasonable 'route' leading towards the conclusions, it must follow that the decision is one that could have been reached (and in fact was) by a reasonable decision-maker. A review application would, in such circumstances, not succeed.

68.5 Even if there are flaws in the arbitrator's reasons, a review must still consider whether, apart from the arbitrator's reasons, *'the result is one a reasonable decision maker could reach in the light of the issues and the evidence'*<sup>18</sup>.

68.6 A review court is required to examine the merits *'in the round'* only.

[69] It is thus obvious that reasonableness can only be assessed with regard to the evidence before the decision-maker.

[70] It is uncontroversial that the review test is whether an arbitrator has misconceived the nature of the enquiry or arrived at an unreasonable result.<sup>19</sup> A result will be considered to be unreasonable if it is one that a reasonable arbitrator could not reach on all the material presented to him or her.<sup>20</sup>

[71] In respect of a rescission application, section 144(d) of the LRA provides for the rescission of an award issued in the absence of a party on good cause shown. In *Mohube v Commission for Conciliation, Mediation and Arbitration and others*<sup>21</sup> the court noted that there is no precise definition of the term 'good cause' which is required to be demonstrated in a rescission application but it is accepted that the applicant must show at least the following (a) an absence of wilfulness; (b) that it has a reasonable explanation for the default; (c) that the application for rescission is *bona fide* and not made with the intention to delay; and (d) that it has a *bona fide* claim against the other

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<sup>18</sup> Ibid at para 12.

<sup>19</sup> *SA Rugby Union v Watson and Others* (2019) 40 ILJ 1052 (LAC) at para 25.

<sup>20</sup> Ibid.

<sup>21</sup> [2023] 8 BLLR 733 (LAC) at para 25.

party/ies. The court also stated that '*All these elements must be considered and weighed and, for example, proof of a bona fide claim may make up for a weaker explanation*'.<sup>22</sup>

### Analysis of the Ruling

- [72] The Commissioner determined that the applicant or its legal representative had not demonstrated that it had taken any care in checking the actual time of the arbitration and that it was a 'weak defence' of the applicant to suggest that the third respondent ought to have contacted the applicant's legal representative.
- [73] It is clear from the reading of the rescission application that this was not what the applicant's representative was relying upon, but rather that, given the vigorous opposition to the third respondent's referral, it would have been expected for a legal representative to have made contact with the opposition. Whilst this is not a requirement, given the known opposition to the third respondent's referral, it would have been appropriate for either the applicant's representative alternatively, the Commissioner to have attempted to make contact with the applicant's representative in light of the history of the matter.
- [74] The Commissioner further surprisingly makes a determination that the CCMA's attendance register from the security on the ground floor, '*showed signs of possible tampering*'. How the Commissioner came to this conclusion is not substantiated and further demonstrates the Commissioner's failure to properly consider the rescission application in its totality and in line with the requirements of section 144 of the LRA.
- [75] In respect of the merits, the Commissioner makes reference to the chairperson's outcome report of the disciplinary enquiry and, once again without any substantiation or any evidence being led, determines that the chairman misdirected himself on the questions of law before him, that he disagreed with the chairperson in respect of the merits and as such, the applicant's merits are 'weak'.

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<sup>22</sup> *Ibid* at para 25.

- [76] Having considered the Ruling, it is clear that the Commissioner provided no reasons for his conclusions.
- [77] I am therefore in agreement with the applicant that the Commissioner simply provided conclusions without any basis, justification or rationale for the conclusions reached. In short, the Commissioner clearly failed in his primary task to properly assess the application.
- [78] In my view, the findings by the Commissioner in respect of the Ruling are not reasonable and, as such, the Ruling must be set aside. The Commissioner's irregularities are such that they result in a misconceived decision which no reasonable decision maker could reach on the material that was before him.
- [79] In light of the fact that the review application in respect of the Ruling succeeds, there is no need for this court to make a determination as to the default award, which, as aforementioned and as a consequence, would automatically fall away.

### Costs

- [80] Insofar as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.
- [81] In *Zungu v Premier of the Province of KwaZulu-Natal and Others*<sup>23</sup>, the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand, allowing those parties to bring to this Court (or oppose) cases that should not have been brought to Court (or opposed) in the first place.
- [82] This Court is required to strike a balance between the requirements of law and fairness. In my view, an appropriate costs order must be issued in respect of the two Rule 11 applications. This is particularly so given that the applicant

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<sup>23</sup> (2018) 39 ILJ 523 (CC) at para 24

was legally represented at all times and nevertheless filed two Rule 11 applications, which were unnecessary for the pursuit of the review application. As a result, the third respondent was compelled to incur avoidable costs in opposing them.

[83] Although this Court has found that a basis exists for the review of the Ruling and therefore the Default Award, the applicant unnecessarily burdened the Court with two additional applications, thereby forcing the third respondent to oppose them. Fairness dictates that the third respondent should not be required to bear the costs arising from these applications. It is accordingly in the interests of justice that the third respondent be awarded costs in respect of the two Rule 11 applications.

[84] In the premises, I make the following order:

Order

1. Condonation for the late filing of the review application is granted;
  2. The Ruling under case number GATW 2074/21 is reviewed and set aside, and is replaced with a Ruling in the following terms:  
'The rescission application by Thenga Holdings (Pty) Ltd is successful.'
  3. The default award under case number GATW 2074/21 is reviewed and set aside in its entirety.
  4. The matter is remitted to the CCMA for arbitration *de novo* by a commissioner other than the first respondent.
  5. The two Rule 11 applications are dismissed with costs.
  6. There is no order as to costs in respect of the review application.
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H Schensema

Acting Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicant: Advocate Sarajulie Swartz

Instructed by: Victor Mkhwashu Attorneys Inc.

For the Third Respondent: Advocate Mmaphuti Ngoetjana

Instructed by: Mulima Denga Attorneys.

LABOUR COURT