



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D802/21
Not Reportable

In the matter between:

Dept of Home Affairs

Applicant

and

General Public Service Sectoral Bargaining Council

1st Respondent

Vusumuzi F Mthethwa N.O.

2nd Respondent

Pawusa obo Fortesque Mntungwa Bhengu

3rd Respondent

Heard: 23rd April 2025

Delivered: 10th October 2025

JUDGMENT

MM Govender AJ

INTRODUCTION

[1] In its Notice of Motion the applicant indicates that it finds itself in a vexed position.

A significant part of the disciplinary record is lost and cannot be reconstructed.

Its Review application has lapsed and is deemed to be withdrawn in terms clause 11.2.3 of the Practice Manual. It is only when said application is successfully reinstated will this Court acquire the jurisdiction to hear its Review application and the further relief that it seeks.

[2] In its Notice of Motion the applicant indicates the relief it seeks as follows :

- (a) Condonation of the late filing of this application.
- (b) The setting aside of the award issued by the third respondent under case number GPBC2952/2015 dated 11 October 2021 dated 11 October 2021.
- (c) Substitution of said award with an award declaring :
 - (i) The Third respondents dismissal was substantively and procedurally fair;
 - (ii) The Applicant is not liable to reinstate the third respondent and is not liable to pay back pay to the third respondent;
- (d) Alternatively, the matter be and is hereby referred to the first respondent for arbitration *de novo* before another commissioner.
- (e) The enforcement of the arbitration award be stayed pending the final determination of this application.
- (f) Costs against such party opposing the application.
- (g) Further and/or alternative relief.

THE CONDONATION APPLICATION

[3] The factors - not purported to be a conclusive list - but generally considered are:

- (a) Length of the delay
- (b) Explanation for the delay
- (c) Prospects of success (in the main action)
- (d) Prejudice to the parties and
- (e) Interests of Justice

Length of the delay

[4] The applicant was required to have filed its review application within 6 weeks of receipt of the award.

The award is dated **11 October 2021**. It was served on the applicant on **20 October 2021**.

The review therefore should have been filed on **30 November 2021**.

The application was filed on **31 January 2022**.

With the exclusion of 'dies non' (days on which the courts are closed during the December/January period) the application was 30 days late.

[5] This is not a insignificant delay but it is not substantial.

Explanation for the delay

[6] The applicant has presented a lengthy explanation relating to the slow pace at which process proceeds in its departments exacerbated by an internal miscommunication. It states further that the application was already out of time even when it was referred to the State Attorney for attention.

Prospects of success (in the main action)

[7] The charges levelled at the third respondent relate to allegations of birth certificate fraud.

The Applicant briefly believes that it has good merits because the allegations are linked to the third respondent's password/user code.

The respondent on the other hand believes that the merits are not good -as evinced by the arbitration award issued by the second respondent.

It is of the view that the processes with user codes and passwords was so unstructured that it was highly possible (and prevalent it alleges) for said codes to be used interchangeably amongst staff.

Prejudice to the parties

[8] The applicant avers that no significant prejudice will emanate from the condonation of this application.

The respondent reminds the court that the very lengthy delay is to the extreme prejudice of the third respondent

Interests of Justice

[9] The allegations in this matter are very serious. They relate to birth certificate fraud.

EVALUATION

[10] For a considerable period the ‘locus classicus’ on condonations was the judgment in **Melane v Santam Insurance Company Ltd** ¹

The word ‘conspectus’ used in the judgment has peppered many condonation rulings and judgments thereafter and perhaps rightly so. Courts are required to balance an overview of factors in applying its discretion in determining its decision. An excellent explanation for the delay may for instance counterbalance a lengthy delay.

[11] **Our apex court in Grootboom v NPA and another** ² Zondo J (as he was then) said that the standard for considering an application for condonation is the “Interests of justice” thereby emphasizing the overarching importance of the interests of justice.

[12] Compliance with the rules of this court are required to be strictly complied with. This point has been enunciated in many judgments. Including that of the judgment of the LAC in **E Tradex Ltd t/a Global Trade Solution v Finch and Others** ³

[13] This principle has been affirmed consistently. In **Colett v CCMA** ⁴ and others for instance in which the Labour Appeal Court held:

There are overwhelming precedents in this Court, The SCA and the Constitutional Court that where there is a flagrant or gross failure to comply with the rules of Court Condonation may be refused without considering the prospects of success.

[14] The primary directive is to counterbalance the factors indicated above and then be directed by the primary importance of the Interests of

Justice.

[15] The delay is not substantial and it is accompanied by a explanation that is fairly reasonable in the circumstances. This court notes the delay but also notes the significant interest of justice consideration.

The allegations are extremely serious in that they relate to birth certificate fraud linked to the password assigned to the third respondent.

[16] Condonation is granted.

[17] The second aspect of relief sought by the applicant relates to a review and setting aside of the arbitration award issued by the second respondent.

[18] The fundamental issue however is that a significant part of the record is not available for scrutiny due to a purported failure of the arbitrator to record said evidence. It is quite clear also that the missing evidence cannot be reconstructed in any way that will ensure the accuracy and integrity of said evidence.

[19] This section of the evidence relates to crucial witness evidence including the crucial evidence of the third respondent.

[20] There are a few avenues open to this court - in these fairly vexed circumstances- in determining the relief sought with regard to the Review application .

[21] The LAC decision in **The Minister of Police v Police and Prisons Civil Rights Union(POPCRU) obo Senti and Others** ⁵ is on point and instructive.

[22] An essential part of the record is unavailable .

inaudible or otherwise incomplete records are usually ascribed to faulty recording systems - often corrected with smart technological intervention that succeeds in restoring the essential integrity of the recording .

[23] The issue in this matter is far more serious and beyond the reach of any such intervention .

The Second Respondent unchallenged position is that he did not record said proceedings – evidently there are also no hand written notes with which this error can be remedied.

[24] The next option of attempting the process to repair the missing parts of the recording with the hand written notes of the parties is quite clearly a pointless exercise .

[25] The first option this Court has to consider is whether to dismiss the review due to the Applicants inability to present a proper complete record for the review scrutiny of this court .

[26] This would be neither fair or reasonable . It is trite that the primary prerogative of ensuring that the hearing proceedings are properly recorded lies with Bargaining Council (the first respondent) and its appointed Commissioner (the third respondent).

[27] In the LAC decision (supra) ⁴ in dealing with this very point said at paragraph 27

"The missing evidence is necessary to determine the reasonableness of the Commissioner's decision.

To argue that the onus is upon the Appellant to ensure a full and proper record is before the Court is in my view not always correct.

It is the responsibility of all the parties particularly the Commission, who has the responsibility to ensure not only that it keeps a full and proper record, but to ensure in the event of a review, that a full and complete record of the proceedings is before the reviewing Court."

[28] As in this matter the parties had virtually identical divisive positions on the purport of the missing aspects of the records

At paragraph 18 of said judgment the court said :

"In its affidavit, the Appellant set out why it believed the incomplete record was inadequate and the Respondents continued to hold the view that the record incomplete as it was, was sufficient to determine the review application."

[29] The respondents have argued that any decision to 'drag the matter ' further would be unfair to the second respondent .

This is an important consideration but is neither the only or the most important deliberation factor . The ultimate interests of justice is the over arching guiding principle - in which prejudice is one factor .

[30] The LAC supra ⁴ had the following to say on this point at paragraph 28 ..

"Furthermore, while the delay of a few years may well be reason enough to dismiss a review, this can only apply where the applicant has failed to act diligently. "

[31] In this matter there is no compelling evidence of the negligence of the Applicant itself in relation to the missing recording . It was a failure by the Bargaining Council and its erstwhile appointed Commissioner.

[32] The judgment also went on to say later at paragraph 28

“In the circumstances, it would, in my view, be unconscionable to dismiss the appeal against the interlocutory application and the review application simply because of the lapse of time.

While I accept that it is the Respondents, if successful, who bear the brunt for the delay, any adequate relief that they may be granted at a later date, may never be sufficient to address the prejudice they currently suffer. However, I consider it to be in the interests of justice that this matter be referred back to the Bargaining Council to be arbitrated anew before a commissioner other than the Third Respondent.

[33] This court is of the view that equally in this matter this is the only course that properly accords with the interests of justice .

COSTS

[34] In the Constitutional Court decision in **Zungu v Premier of the Province of KZN and Others** ⁶ Zondo JP (then) explained the Labour Courts position on costs.

“The rule of practice that costs follow the result does not govern the making of costs orders in this court. The relevant statutory provision is to the effect that orders of costs in this court are to be made in accordance with law and fairness.”

[35] This court does not find a basis to award costs.

ORDER

1. The late filing of the Applicant's Review application is condoned;
2. The Application for Review under case number D802/2021 - deemed to have been withdrawn in terms of Clause 11 of the Practice Manual of the Labour Court - be and is hereby reinstated;
3. The Award issued by the third respondent under case number GPBC2952/2015 dated 11 October 2021 is hereby set aside;
4. This matter is to be referred to the first respondent for arbitration *de novo* before another commissioner.
5. No order as to costs.

MM Govender

Acting Judge of the Labour Court of South Africa

Appearances

Applicant: Attorney S Giba
instructed by the Office of the State Attorney

Respondent: Attorney AS Mathonzi

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1. 1962 (4) SA 531 (A)
 2. 2014 (2) SA 68 CC
 3. (2022) 43 ILJ LAC
 4. 2014 ZALAC 1
 5. 2023 (44) ILJ 2685 LAC
 6. 2018 ZACC 1 .