



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR715/23

In the matter between:

**MINISTER OF PUBLIC SERVICE AND
ADMINISTRATION**

Applicant

and

**NEHAWU obo M G LETSWALO
MEDIATION AND ARBITRATION**

First Respondent

KATLHOLO WABILE N.O

Second Respondent

**GENERAL PUBLIC SERVICE SECTOR
BARGAINING COUNCIL**

Third Respondent

Heard: 12 June 2025

Delivered: 20 October 2025

(This judgment was handed down electronically by emailing a copy to the parties. The 20th of October 2025 is deemed to be the date of delivery of this judgment).

JUDGMENT

PHAKEDI, AJ

Introduction

- [1] The Applicant approached the Court seeking an order to review and set aside the arbitration award issued by the second respondent dated 24 November 2022. The review application was filed on 15 May 2022 outside the prescribed period of six (6) weeks. The review application was filed together with a condonation application, which is opposed by the first respondent.
- [2] The applicant filed its notice in terms of Rule 7A(8)(b)¹ on 18 October 2023. The Registrar issued a notice in terms of Rule 7A(5) to the applicant on 21 July 2023, and the record was filed on 18 September 2023. However, the notice in terms of Rule 7A(6) was not filed. The first respondent submitted in its heads of argument that the late filing of the record invoked the provisions of the Practice Manual², as such, the review application is deemed to be withdrawn.
- [3] The Court has noted that these issues were not raised in the answering affidavit to enable the applicant to cure the defect by applying for the reinstatement of the review application. The heads of argument of the first respondent are not stamped, and the Court is not in a position to determine whether they were filed in Court or not. As such, the Court has taken a decision to deal with the condonation application for the late filing of the review application for the reasons set out below.
- [4] Clause 1.2 of the Practice Manual provides that by their nature, the provisions of the manual call for flexibility in their application where this is required to promote their purpose.
- [5] Clause 2.1 provides that the Practice Manual is not intended to limit judicial discretion.

¹ GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court, repealed with effect from July 2024.

² Practice Manual of the Labour Court of South Africa, effective 2 April 2013, repealed with effect from July 2024.

- [6] Rule 11(4) provides that “*in the exercise of its powers and in the performance of its functions, or in any incidental matter, the court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act*”.
- [7] The Labour Appeal Court in *Macsteel Trading Wadeville v Van der Merwe NO & others*³ dealt with the provisions of Rule 11(4) and held that a primary object of the Labour Relations Act⁴ (LRA) is to promote the effective resolution of labour disputes, integral to which is the speedy resolution of disputes as stated in *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁵.

Condonation application

- [8] The applicant stated that it received the arbitration award on 29 November 2022 and the six weeks period within which the review application ought to have been filed on or about 10 January 2023. The review application was filed on 15 May 2023, which is approximately 17 weeks outside the prescribed period.
- [9] The matter was referred to the office of the State Attorney for a legal opinion on 14 December 2022. The State Attorneys could not proceed with the procurement process as prescribed by the National Treasury Regulations due to the festive season. Counsel was appointed and briefed on 26 January 2023 to determine the prospects of successfully reviewing and setting aside the arbitration award.
- [10] The said counsel requested a consultation on 3 February 2023, but the officials were only able to consult on 9 February 2023. The applicant received a legal opinion from Counsel on 23 February 2023.
- [11] On 3 March 2023, the applicant received a supplementary legal opinion and opted to engage in settlement discussions with the first respondent. The

³ (2019) 40 ILJ 798 (LAC); [2018] ZALAC 50 at para 20.

⁴ Act 66 of 1995, as amended.

⁵ *Toyota SA Motors (Pty) Ltd v Commissioner for Conciliation, Mediation and Arbitration and Others* [2016] 3 BLLR 217 (CC).

settlement proposal was sent to the first respondent on 22 March 2023 with a request for feedback on 30 March 2023, but there was no response.

- [12] In respect of prospects of success, the applicant submitted that the commissioner failed to apply his mind to the facts of the matter. He misdirected himself and ultimately made a decision which a reasonable arbitrator could not have reached based on the same facts.
- [13] In respect of prejudice, the applicant submitted that the first respondent will not be prejudiced and the matter is of public interest as it involves taxpayers' money and may have serious repercussions for the public service administration.
- [14] The first respondent is opposing the condonation application on the basis that the delay is excessive, as the review application was only instituted in May, which is four months outside the period within which the application ought to have been filed. The first respondent also took issue with the fact that the applicant had failed to provide evidence in support of all the events which led to the review being filed late. Furthermore, the applicant failed to provide an explanation and account for the period between 30 March 2023, when they were expecting a response to the settlement proposal and the date when the review application was eventually filed.
- [15] On prospects of success, the first respondent submitted that the applicant had no prospects of success in the review application. In respect of prejudice, the first respondent submitted that the delay is excessive and this is prejudicial to the employees who must wait for years for the matter to be finalised.
- [16] The applicant, in his replying affidavit, chose not to deal with the issues raised, and as such, the averments and allegations made by the first respondent in its answering affidavit remain unchallenged.
- [17] The Labour Court is a creature of statutes and derives its powers and jurisdiction from the LRA. In order to exercise its review powers, it must have jurisdiction to entertain the application. Furthermore, an applicant in a

condonation application has to show good cause that it is deserving of the Court's indulgence for its non-compliance with its rules and the law.

Applicable legal principles

[18] Section 145(1A) of the LRA provides that *"the Labour Court may on good cause shown condone the late filing of an application in terms of subsection (1)"*.

[19] It is trite that in considering an application for condonation, the Labour Court exercises a discretion which must be exercised judicially, premised on all the relevant factors such as good cause, length of delay, explanation for delay, prospects of success, interests of justice and prejudice.

Submissions by both parties in respect of condonation

[20] The applicant submitted that the delay of four months is not excessive based on the circumstances of this matter. As stated above, the first respondent submitted that the applicant failed to provide a reasonable and acceptable explanation for the period of delay between 30 May 2023 and 12 May 2024 when the review application was eventually served on the respondents.

[21] The first respondent also rejects the applicant's submissions that it has strong prospects of success in the review application. Although the delay is not fully explained and it is not insignificant, the Court is further required to consider the prospects of success and related factors in order to properly deal with an application for condonation.

[22] The basic principle in our jurisprudence is that in order to properly deal with condonation applications, the Court must consider all the factors, including the degree of lateness and explanation thereof, prejudice, the interests of justice, prospects of success, as well as the importance of the case to both parties.

[23] The onus of showing the existence of good cause in a condonation application rests with the applicant, and this essentially entails satisfying the two well-established requirements, namely: (a) providing a satisfactory explanation for the delay; and (b) showing the prospect of success in the main

case. The applicant bears the burden of showing good cause. A mere allegation of good cause will not be sufficient to assist the Court in exercising its discretion whether to grant condonation or not. In other words, as stated in *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd and Others*⁶, the applicant must “*at least, furnish an explanation of his default sufficiently full to enable the court to understand how it really came about and to assess his conduct and motives... Where there has been a long delay, the court should require the party in default to satisfy the court that the relief sought should be granted*”.⁷

- [24] In its application for condonation, the applicant submitted that it has strong prospects of success in the review application. It did not, however, specifically outline those prospects, and the Court has to consider the review application in order to determine on what basis he is alleging that the arbitration award is reviewable on any of the grounds advanced.

Arbitration award and grounds for review

- [25] The dispute of unfair labour practice was launched by the first respondent on behalf of Ms Letswalo and Ms Letsoalo. At the arbitration, only Ms Letswalo testified on behalf of the two employees.
- [26] The arbitrator recorded that the issue to be decided was “*whether or not the Employer committed an unfair labour practice against Ms Letswalo and Ms Letsoalo in that it did not award them performance bonuses that were allegedly due to them*”. The performance bonuses were due to be paid during the performance cycle 2018/2019 financial year.
- [27] At the conclusion of proceedings and having heard the evidence of all parties, the arbitrator found that the employer committed an unfair labour practice against the employees and ordered the employer to pay compensation to Ms M Letswalo in the amount of R94 533.75 and Ms Letsoalo an amount of R43 398.75 by no later than 15 December 2022.

⁶ 2000 (3) SA 87 (W) at para 12.

⁷ *Aspen Holdings (Pty) Ltd and another v Phelane and another (Aspen Holdings)* [2025] 4 BLLR 409 (LAC); [2025] ZALAC 4 at para 14.

- [28] The applicant has raised a number of grounds and stated that the arbitrator traversed the definition of unfair labour practice by relying on the decision of the Constitutional Court decision in *NEHAWU v University of Cape Town and Others*⁸. The second ground for review is that the documentary evidence submitted on behalf of Ms Letswalo was not sufficient to support the rating score of 4, and this was also the conclusion of the arbitrator. The third ground is that the arbitrator erred in accepting the second performance assessment submitted by Ms Letsoalo, and this was grossly irregular. The fourth ground was that he failed to confine himself to what the parties had agreed to in the signed pre-arbitration minutes. Finally, the applicant is aggrieved that no evidence was submitted to the arbitrator for the determination of the amount awarded as compensation, and the decision to award compensation was made capriciously in that he did not follow the PMDS policy, which clearly states that the performance bonus is equal to 2.5 of the salary notch of the employee.
- [29] The first respondent submitted that the review application must be dismissed based on the fact that the applicant failed to prove that its decision to deny Ms Letsoalo and Ms Letswalo their performance bonuses was exercised fairly. The first respondent also submitted that the second and fourth grounds for review must be dismissed on the basis that the applicant, in its papers, acknowledged that the employees had referred a dispute of unfair labour practice to the Bargaining Council on or during January 2020, arising from the employer's failure to pay performance bonuses.
- [30] It is further submitted that the applicant failed to adduce evidence it relied on to score the employees in the manner it did, and the demand for the employees to resubmit their performance agreements was a transgression of the policy. Finally, the first respondent denies that there was an agreement between the parties on the amount of performance bonus in the event that the employees were successful, and the signed minutes did not record this.

Findings and conclusions of the arbitrator

⁸ 2003 (2) BCLR 154 (CC); (2003) 24 ILJ 95 (CC).

[31] The arbitrator relied on the decision of the Labour Appeal Court (LAC) in *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*⁹ (*Apollo Tyres*) where it was held that “the rights contested in such cases must be interpreted to include advantages or privileges employees have been offered or granted in terms of a policy or practice subject to the employer’s discretion”.¹⁰ The arbitrator stated further that the exercise of discretion may be challenged on the basis of unfairness and relied on *Apollo Tyres*, where the LAC held that:

‘Unfairness implies a failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended.’¹¹

[32] The arbitrator assessed the conduct of the employer as a whole in considering whether the employees were subjected to unfair labour practices. He then concluded that the conduct of the employer was unfair in that, despite having resubmitted the assessments, the calculator indicated that Ms Letswalo was a highly effective performer. He then concluded that the decision to deprive employees of the benefit was made in terms of a policy (PMDS), which is subject to the employer’s discretion as contemplated in *Apollo Tyres*¹².

[33] In respect of Ms Letsoalo, he also accepted that the employer acted capriciously by concluding that Ms Letsoalo was not entitled to a performance bonus despite having achieved a rating score of 128% which is indicative of highly effective performance. He then found that the two employees were entitled to solatium, and the just and equitable amount, according to him, were an amount equal to 3 months of the employees’ salary.

Evaluation

⁹ (2013) 34 ILJ 1120 (LAC); [2013] 5 BLLR 434 (LAC).

¹⁰ Arbitration award at para 5.9.

¹¹ *Apollo Tyres* at para 53.

¹² *Ibid.*

[34] The current application is premised on the provisions of section 145 of the LRA, the usual question is whether the decision reached by the arbitrator is one that a reasonable decision-maker could not reach.¹³

[35] The Supreme Court of Appeal in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*¹⁴ held as follows:

‘A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.’

[36] In explaining the review test outlined in the *Sidumo* case, the Labour Appeal Court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others*¹⁵ had, *inter alia*, the following, of relevance here, to say:

[18] In a review conducted under s 145 (2)(a)(ii) of the LRA, the reviewing court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator’s award is improper as the reviewing court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make.

[19] To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in s 138 of the LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities

¹³ See: *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC) at para 110 (*Sidumo*).

¹⁴ (2013) 34 ILJ 2795 (SCA); 2013 (6) SA 224 (SCA) at para 25.

¹⁵ (2014) 35 ILJ 943 (LAC); [2014] 1 BLLR 20 (LAC).

and do so expeditiously and fairly. This is also confirmed in the decision of *CUSA v Tao Ying Metal Industries*.¹⁶

- [37] In terms of section 185(b) of the LRA, every employee has the right not to be subjected to unfair labour practices.
- [38] Section 186(2)(a) of the LRA defined unfair labour practice as “*any unfair act or omission that arises between an employer and an employee involving (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee*”. The arbitrator in his award, found that the conduct of the applicant was unfair towards the employees in that the decision not to award them bonuses was made capriciously and not in line with the PMDS policy.
- [39] The Labour Court in *Aucamp v SA Revenue Service*¹⁶, eloquently summarised the issue of whether a discretionary salary and/or bonus would fall within the ambit of a benefit as provided for in section 186(2)(a) of the LRA. The Court stated:
- ‘Even if a benefit is subject to conditions and the exercise of a discretion, an employee could still, as part of the unfair labour practice proceedings, seek to have instances where the employee then did not receive such benefit adjudicated. So therefore, even if the benefit is not a guaranteed contractual right *per se*, the employee could still claim the same on the basis of an unfair labour practice if the employee could show that the employee was unfairly deprived of the same. An example would be where an employer must exercise a discretion to decide if such benefit accrues to an employee, and exercises such discretion unfairly.’
- [40] The LAC judgment of *Apollo Tyres*¹⁷ held that a benefit, for the purposes of section 186(2)(a), is not limited to an entitlement that arises *ex contractu* or *ex lege* and included an advantage or privilege which is offered or granted in terms of policy or practice subject to the employer’s discretion.

¹⁶ (2014) 35 ILJ 1217 (LC); [2014] 2 BLLR 152 (LC) at para 29.

¹⁷ (2013) 34 ILJ 1120 (LAC); [2013] 5 BLLR 434 (LAC).

- [41] The Labour Appeal Court LAC in *Health & Other Services Personnel Trade Union on behalf of Tshambi v Department of Health, KwaZulu-Natal*¹⁸ held that:

‘An arbitrator is required to determine the true dispute between the parties. To that end, it is necessary to establish the relevant facts and construe the category of dispute correctly. An arbitrator must make an objective finding about what is the dispute to be determined. This court in *Wardlaw v Supreme Mouldings (Pty) Ltd (Wardlaw)* (2007) 28 ILJ 1042 (LAC), addressed directly the question of whether the employee’s characterisation of a dispute should enjoy deference and rejected that approach. Distinguishing the formalistic school of thought from that of the substantive school of thought, this court held that the latter should prevail. As a result, in *Wardlaw*, an arbitrator was held to have incorrectly assumed jurisdiction over a dispute that was about an automatically unfair dismissal, a category of dispute reserved for adjudication by the Labour Court.’

- [42] The Constitutional Court disposed of the above-mentioned issue in *CUSA v Tao Ying Metal Industries and Others*¹⁹ and held that:

‘...commissioners are required to “deal with the substantial merits of the dispute with the minimum of legal formalities”. This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively, arbitrators must be allowed a significant measure of latitude in the performance of their functions. Thus, the LRA permits commissioners to “conduct the arbitration in a manner that the commissioner considers appropriate”. But, in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.

¹⁸ (2016) 37 (ILJ) 1839 (LAC); [2016] 7 BLLR 649 (LAC) at para 16.

¹⁹ 2009 (2) SA 204 (CC); [2009] 1 BLLR 1 (CC) at paras 65 and 66.

A commissioner [arbitrator] must, as the LRA requires, “deal with the substantial merits of the dispute”. This can only be done by ascertaining the real dispute between the parties.’

- [43] I have considered the prospects of success advanced by the applicant in this matter, and I do not believe that there is a need to interfere with the arbitration award on any of the grounds listed by the applicant.

Principles applicable in condonation applications

- [44] The LAC in *Govender and others v Commission for Conciliation, Mediation and Arbitration and others*²⁰ expanded the above-mentioned principles and held that:

[57] ... The factors relevant in the consideration of the grant or refusal of condonation include the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. And in certain cases, the interest of justice may play a role.

[58] Added to the factors applicable to condonation applications is the consideration that employment disputes should be dealt with expeditiously as a delay in the resolution of labour disputes undermines the object of the LRA and “*any determination of the issue of good cause must always be considered against the backdrop of this fundamental principle*” and further that review applications are by their nature, urgent and must be treated with a degree of diligence and promptness.’

- [45] The LAC in *Lekhesa: In re Ngwenya v Trustees for the Time being of Sishen Iron Ore Co Community Development Trust & another*²¹ stated:

‘The grant of condonation involves the exercise of a discretion, with a decision to condone a party's non-compliance with the rules of the court or directions constituting an indulgence granted by the court. Such an application should be granted if, having regard to the particular circumstances of the matter, it is in the interests of justice to do so, and refused if it is not. To

²⁰ [2024] 5 BLLR 453 (LAC); [2024] ZALAC 6.

²¹ (2024) 45 ILJ 1220 (LAC); [2024] 6 BLLR 585 (LAC) at para 14.

reach a decision, regard is to be had to factors including the nature of the relief sought, the extent and cause of the delay, the reasonableness of the explanation for the delay, the importance of the issue to be raised, issues of prejudice and the prospects of success. As a general proposition, the factors to be considered are not individually decisive of an application for condonation but are all considered to determine what is in the interests of justice.'

[46] In *Grootboom v National Prosecuting Authority & another*²², the Constitutional Court stated as follows:

'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.'

Conclusion

[47] Based on the authorities applicable in this court and on the principle of *stare decisis*, this court comes to a conclusion that the award falls within the band of reasonableness and warrants no interference.

[48] The applicant has not succeeded in showing good cause entitling it to be pardoned for its failure to comply with the period prescribed for the filing of review applications.

Costs

²² (2014) 35 ILJ 121 (CC); [2014] 1 BLLR 1 (CC) at para 51.

[49] The first respondent sought costs in the event that the application is dismissed. It is trite that the awarding of costs in the Labour Court is discretionary as envisaged in section 162 of the LRA. The Constitutional Court in *Long v South African Breweries (Pty) Ltd and others and a related matter*²³ held as follows:

[27] It is well accepted that in labour matters, the general principle that costs follow the result does not apply. This principle is based on section 162 of the LRA, which reads:

- “(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.
- (2) When deciding whether or not to order the payment of costs, the Labour Court may take into account —
 - (a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and
 - (b) the conduct of the parties —
 - (i) in proceeding with or defending the matter before the Court; and
 - (ii) during the proceedings before the Court.”

[28] The relationship between the general principle of costs and section 162 was considered and settled by this Court in *Zungu*:

“In this matter, there is nothing on the record indicating why the Labour Court and Labour Appeal Court awarded costs against the applicant. Neither court gave reasons for doing so. It seems that both courts simply followed the rule that costs follow the result. This is not correct.”

²³ 2019 (5) BCLR 609 (CC); (2019) 40 ILJ 965 (CC).

[50] The Constitutional Court in *Booi v Amathole District Municipality & others*²⁴, dealt with the issue of costs in the Labour Court and held as follows:

‘However, this is a labour matter and this court’s jurisprudence is settled: the ordinary rule that costs follow the result does not apply in labour matters. Rather, what emerges from the provisions of the LRA and the jurisprudence is that courts, when awarding costs in labour disputes, must consider what fairness demands and err on the side of not discouraging parties from approaching the courts for the peaceful resolution of labour disputes. Further, if costs are to be awarded in labour matters, there must be reasons that justify a court’s decision to depart from the position that a losing party should not be mulcted in costs in labour disputes.’

[51] The above-mentioned principle was clearly espoused in *Member of the Executive Council for Finance, KwaZulu-Natal & another v Dorkin NO & another*²⁵ where the Court held:

‘In making decisions on cost orders this court should seek to strike a fair balance between, on the one hand, not unduly discouraging workers, employers, unions and employers’ organizations from approaching the Labour Court and this court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this court frivolous cases that should not be brought to court. That is a balance that is not always easy to strike but, if the court is to err, it should err on the side of not discouraging parties to approach these courts with their disputes. In that way these courts will contribute to those parties not resorting to industrial action on disputes that should properly be referred to either arbitral bodies for arbitration or to the courts for adjudication.’

[52] Based on the above authorities, this Court comes to the conclusion that it is in the interests of the law and fairness that each party be burdened with its own costs.

[53] In the result, the following order is made:

²⁴ (2022) 43 ILJ 91 (CC); [2022] 1 BLLR 1 (CC) at para 60.

²⁵ (2008) 29 ILJ 1707 (LAC); [2008] 6 BLLR 540 (LAC) at para 19.

Order

1. The application for condonation of the late filing of the review application is dismissed.
2. The review application is dismissed.
3. There is no order as to costs.

GC Phakedi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv BK Hlangwane
Instructed by: State Attorneys Pretoria

For the Respondent: Adv L Quilliam
Instructed by: Ncube Inc Attorneys