



**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN**

Not Reportable

Case No.:C429/2024

In the matter between:

SUSHILLA LAHRENA PRUDENCE KLINE

First Applicant

TIMOTHY WILLIAM OLKERS

Second Applicant

JEROME FRANCISCO MC LAGHLAN

Third Applicant

and

**THE MEMBER OF EXECUTIVE COUNCIL FOR
THE DEPARTMENT OF HEALTH, WESTERN CAPE**

Respondent

Heard: 04 July 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 20 October 2025.

JUDGMENT

BANDERKER, AJ

Introduction:

- [1] The first quarter of the 2020 year marked the advent of the outbreak of the severe acute respiratory syndrome coronavirus (SARS-COV-2) globally, with the lives of more than 5 million individuals lost due to the coronavirus disease 2019 (COVI-19).
- [2] The South African Journal of Infectious Diseases, published on the 29th March 2022 states that the South African Healthcare system posed unique challenges in terms of limited fiscal resources and infrastructure, stark disparity between public and private health sectors, understaffing and the so-called quadruple burden of disease (viz maternal and child deaths, human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS) and tuberculosis (TB), non-communicable diseases and trauma injury).
- [3] The South African Journal of Infectious Diseases, published on the 29th March 2022 further states that the Western Cape and specifically the Cape Town metropole was the area hit the severest during the initial stages of the pandemic in South Africa. Despite a robust contingency plan implemented by the Western Cape Government: Department of Health, the lives of thousands of patients were tragically lost due to COVID-19.

- [4] In **Soobramoney v Minister of Health (Kwazulu-Natal)**¹ the Constitutional Court per Chaskalson P stated as follows:

[8] *We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.*

- [5] Section 27 of the Constitution provides as follows:

"27 Health care, food, water and social security

(1) Everyone has the right to have access to –

- (a) health care services, including reproductive health care;
- (b) sufficient food and water; and

¹ **Soobramoney v Minister of Health (Kwazulu-Natal)** CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997)

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.”

[6] In **Soobramoney v Minister of Health (Kwazulu-Natal)**, it was pertinently held per Sachs J as follows:

“[51] The special attention given by section 27(3) to non-refusal of emergency medical treatment relates to the particular sense of shock to our notions of human solidarity occasioned by the turning away from hospital of people battered and bleeding or of those who fall victim to sudden and unexpected collapse. It provides reassurance to all members of society that accident and emergency departments will be available to deal with the unforeseeable catastrophes which could befall any person, anywhere and at anytime.”²

² *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC)

- [7] In **Soobramoney v Minister of Health (Kwazulu-Natal)** Sachs J, instructively held as follows:

“ In all the open and democratic societies based upon dignity, freedom and equality with which I am familiar, the rationing of access to life-prolonging resources is regarded as integral to, rather than incompatible with, a human rights approach to health care.”³

- [8] The First Applicant in this matter was employed by the Respondent as a PNB2 Professional Nurse, Grade 2, with a speciality in nursing from 5 December 2016 until 10 September 2020. The Second Applicant was employed by the Respondent as a PNB2 Professional Nurse, Grade 2, with a speciality in nursing from 1 September 2015 until 10 September 2020. The Third Applicant was employed by the Respondent as a NA3 Nursing Assistant, Grade 3, from 1 October 2012 until 10 September 2020. The First to Third Applicants were all stationed at Karl Bremer Hospital situated in Bellville, Western Cape.

- [9] From 28 June 2020 until the 10th September 2020 (the latter date being the date of their deemed dismissals) the Applicants embarked on a course of conduct daily which entailed – them reporting to work and signing the Attendance Register, but wilfully refusing to return to their workstations. This was ostensibly done on the basis, as asserted by the Applicants, until Karl

³ *Soobramoney v Minister of Health (Kwazulu-Natal)* *supra*, at paragraph [52] thereof

Bremer Hospital had fully complied with the COVID-19 policies and guidelines. The Applicants also received full remuneration during this period.⁴

- [10] It appear that on the 20th July 2020 the Department of Labour conducted an inspection at Karl Bremer Hospital and issued a Directive to Upper Management to improve adherence to the COVID-19 policies and guidelines. However, instructively the Department of Labour on the aforesaid date determined that the Karl Bremer Hospital was adhering to the COVID-19 policies and guidelines.⁵
- [11] This latter finding by the Department of Labour was confirmed by the Answering Affidavit deposed to by Mvuzo Isaac Ngqame, the Acting Deputy Director: Employee Relations, Dispute Resolution.⁶
- [12] It furthermore appears on the Respondent's version of events that when the Department of Labour conducted its aforesaid inspection on the 20th and 21st July 2020, the Applicants were present during such inspection.⁷
- [13] The First to Third Applicants in reply to the foregoing reiterate that if the Department of Labour deemed Karl Bremer Hospital as compliant with the COVID-19 policies and guidelines, the Directive would not have been issued by the Department of Labour. The First to Third Applicants also peculiarly refer to an admission, on their version of events, by a Ms Nancy Bulongo that

⁴ Paragraphs 12 and 13 of First Applicant's Founding Affidavit

⁵ Paragraph 16 of First Applicant's Founding Affidavit

⁶ Paragraph 6.6 of Respondent's Answering Affidavit

⁷ Paragraphs 6 and 7 of First Applicant's Replying Affidavit

Karl Bremer Hospital was not complying with the COVID-19 policies and guidelines. However no affidavit was filed herein deposed to by Ms Nancy Bulongo confirming the aforesaid admission.

- [14] Given the fact that the Department of Labour had determined, on the Applicant's own say-so that Karl Bremer Hospital was adhering to the COVID-19 policies and guidelines, it is highly improbable that Ms Nancy Bulongo would have made the admission as asserted by the Applicants.⁸
- [15] On the Respondent's version, the Applicants participated in health risk assessments during April/May 2020 and, importantly none of them tested positive for COVID-19. This has not been refuted by the Applicant.⁹
- [16] The Applicants, alarmingly, on their own version did not work for an extensive period of time. The Applicants, as set out in various letters addressed to them and annexed to their Founding Affidavit herein were absent from work from at least 28 June 2020, 2 July 2020 and 14 July 2020 respectively to the date of their deemed dismissals viz 10 September 2020.¹⁰
- [17] It is trite law the Applicants' services were terminated by operation of law in terms of section 17 (3)(a)(i) as read with section 17 (2)(d) of the Public Service Act.

⁸ Paragraph 16 of First Applicant's Founding Affidavit. Paragraph 6.6 of Respondent's Answering Affidavit

⁹ Paragraphs 6.10 and 6.11 of Respondent's Answering Affidavit

¹⁰ Paragraph 13 of Respondent's Answering Affidavit

- [18] The jurisdictional requirements to be satisfied for the aforesaid legislative provisions are that an employee must have been permanently employed, the employee must have been absent longer than one (1) month and that the absence must have been without the consent of the employer.
- [19] In terms of section 17 (2)(d) of the Public Service Act if a health care worker (who is deemed to have been discharged) at any time reports for duty, the employer may, on good cause show approve the reinstatement or reemployment of the health worker in his/her former post or in any other post on such conditions relating to the period of the health worker's absence from duty or otherwise as the employer may determine.
- [20] The decision in terms of section 17 (2)(d) of the Public Service Act (as aforesaid) is reviewable in terms of section 158 (1)(h) of the Labour Relations Act. The Applicants must show 'good cause' for their application for reinstatement to be approved. The Applicants have to demonstrate, to the decision-maker that the facts they rely on meet the legal standard of 'good cause'.
- [21] The employer sent correspondence to the Applicants on the 7th August 2020, 11th August 2020, 27th August 2020, 3 September 2020 and 7 September 2020 respectively. All of the aforesaid correspondence reiterated that Karl Bremer Hospital is fully operation and compliant with the COVID-19 protocols.
- [22] The Applicants' version in respect of the application for reinstatement was that they had reported for duty each day during the periods that they were deemed

to be allegedly absent. They furthermore asserted that their refusal was to work in an area which had not been cleaned properly.¹¹

[23] However, the Applicants assertion (as aforesaid) do not bear scrutiny for the following salient reasons:

- (a) The Respondent, as stated earlier, tried to engage with the Applicants on numerous occasions, as is demonstrated in the various correspondence outlined above;
- (b) Despite the foregoing correspondences, Applicants made no attempt to meaningfully engage with the Respondent and to perform their duties;
- (c) Applicants entered the hospital premises and made their way through areas as well as lifts used by other employees/staff at Karl Bremer Hospital as well as used the lifts that were used by other staff and the public and entered the tea-room which was shared by the other staff members;
- (d) The Department of Labour conducted an inspection of Karl Bremer Hospital and the result thereof was shared with the trade union of which the Applicants were members. The hospital remained fully operational throughout the period;

¹¹ Annexure "SK12" to First Applicant's Founding Affidavit

- (e) Karl Bremer Hospital had approximately 800 health care providers stationed at the hospital. It appears that the Applicants were the only employees who refused to work.¹²

[24] As stated earlier, due to the Applicants' termination of employment being by virtue of operation of law, the decision dismissing the Applicants' representations for reinstatement are reviewable in terms of section 158 (1)(h) of the Labour Relations Act.

[25] The Applicants, on their own version, would sign the attendance register but would refuse to work.¹³ Theatre 2C it appears had a certificate issued by a Mr Reggie Abrahams, the Occupational Health Professional Nurse on the 17th July 2020. This is in addition to theatre 2C being deep cleaned from 12th July to 16th July 2020.¹⁴

[26] The Applicants asset that they did not abscond as the Respondent knew their whereabouts and they were contactable. However it is not for the Respondent to contact the Applicants in order for the latter to perform their duties. The Applicants signed the attendance register and thereafter refused to perform their duties. It is thus clear that the Applicants had absconded.¹⁵

¹² Paragraph 15 of Respondent's Answering Affidavit

¹³ Paragraph 46 of Applicant's Founding Affidavit

¹⁴ Paragraph 16.4 of First Applicant's Replying Affidavit

¹⁵ Paragraph 42 of First Applicant's Founding Affidavit

- [27] In my view I thus cannot find that the decision not to reinstate the Applicant was arbitrary and irrational. Applicants have not set out any facts in support of their contention that the decision not to reinstate them must be set aside.
- [28] On 29 November 2022, 18 months after the jurisdictional ruling by the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) and 19 months after the deemed dismissal of the Applicants, they filed the application.¹⁶
- [29] The Applicants sought not to review the jurisdictional ruling as aforesaid in terms of section 145 or section 158 (1)(6) of the Labour Relations Act but rather to review the Respondent's decision in terms of section 158 (1)(h) of the Labour Relations Act.
- [30] What transpired after the jurisdictional ruling is unclear, the notification of a Case Number by this Honourable Court records as follows:

"In the matter between

Mr TW Olkers & Others (SLP Kline & JF McLaghlan) (Applicants)

and

PHSDSBC & L Goredema N.O. (Respondent)"¹⁷

¹⁶ The Commissioner held that the PHSDSBC lacked jurisdiction in terms of section 158 (1)(h) of the Labour Relations Act

¹⁷ See Annexure "SK18" to Applicant's Founding Affidavit

What is more confusing is that in the Notice of Motion, the following is stated:

***"AND TAKE NOTICE FURTHER** that the Respondent is hereby called upon in terms of Rule 7 (A)(2)(a) and (b) to dispatch to the Registrar the record of the proceedings as well as the reasons as are required by law or desirable to provide for the decision within 10 days of receipt of this application and to notify the Applicant's that this has been done."*

[31] The Applicants' Founding Affidavit addresses the issues related to their deemed dismissal. Their grounds of review can be crystallised as follows:

- (a) they did not absent themselves from work 'for a period exceeding one calendar month' as at all material times, the Respondents and/or upper management knew their whereabouts. They would report to work and sign the attendance register daily, but refused to work in areas that were not cleaned and/or sanitised in accordance with the COVID-19 policies and guidelines;
- (b) the purpose of section 17 (2)(d) of the Public Service Act is for the efficient removal of employees who have absconded, furthermore the Respondent placed the responsibility upon the Applicant to advance reasons why they should be reinstated.¹⁸ Applicants had provided

¹⁸ Paragraphs 42 and 43 of First Applicant's Founding Affidavit

compelling and substantive reasons for their reinstatement it was averred;

- (c) the Respondent had invoked the deemed dismissal and the decision not to reinstate the Applicants was made in bad faith and such was arbitrary and capricious because it was contrary to the spirit and letter of the Public Service Co-ordinating Bargaining Council (PSCBC) Resolution 1 of 2003 – in that the Respondent failed to follow less restrictive procedures as stated in the resolution, which contemplates that the proper disciplinary action against the Applicants for the alleged misconduct complained of would have been for the Respondent to initiate a formal disciplinary enquiry to determine whether Applicants had committed any act of misconduct warranting dismissal.¹⁹

[32] The Applicants were dismissed in terms of section 17 (3)(a)(i) of the Public services Act which states as follows:

“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 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

¹⁹ Paragraph 44 of First Applicant’s Founding Affidavit

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."

- [33] In *De Villiers v Head of Department: Education Western Cape Province*, Van Niekerk J held as follows:²⁰

"The ratio of that judgment (Phentini v Minister of Education and Others) is that section 14 of the Employment Equity Act is constitutionally valid and that a discharge effected in terms of the section is not the consequence of any discretionary decision rather than a statutory result; hence it is not a 'dismissal' for the purposes of the Labour Relations Act nor is it susceptible to review. . . . An employer who receives an application in terms of section 14 (2) is faced with a contract that has terminated by operation of law independently of any act or decision on the part of the employer."

- [34] In my view the Applicants' dismissal was by operation of law independently of the conduct of the employer, thus resolution 1 of 2003 is not applicable. This clearly dispels the Applicants' contention that the Respondent acted in bad faith and arbitrarily.

- [35] The central issue of section 17 (3)(b) is whether the Applicants in their representations had shown good cause for their reinstatement. Once good cause has been demonstrated, Applicants would be entitled to reinstatement

²⁰ *De Villiers v Head of Department: Education Western Cape Province* (2006) 27 ILJ 477 (SCA)

or re-employment. A perusal of the Applicants' representations states as follows:²¹

- (a) The Applicants had reported for duty each day during the periods for which they were deemed to be allegedly absent;
- (b) In terms of their employment rights as prescribed in the Occupational Health and Safety Act they simply refused to work in an area which had not been properly cleaned during the off-peak COVID-19;
- (c) The employer selectively chose when to prioritize obtaining a cleaning certificate from the Cleaning Services used or have one issued by the Facility Manager in order to cover the staff, once they were exposed to COVID-19 symptomatic/Asymptomatic person.

[36] I agree with the submissions made by Mr F. Rodriques who appeared on behalf of the Respondent, that the Applicants have not demonstrated good cause for reinstatement for the following reasons:

- (a) The Applicants performed duties as nursing staff in Theatre 2C. On their own version they entered the Karl Bremer Hospital premises, signed the register and remained on the hospital premises for approximately 2 hours,²² whilst our country was in the midst of a pandemic;

²¹ Annexure "SK12" to Applicants' Founding Affidavit

²² Paragraph 35 of Respondent's Opposing Affidavit

- (b) From July 2020 until receiving the letter confirming their deemed dismissal dated 10 September 2020 – the Applicants have not demonstrated that they had performed any official duties in Theatre 2C. The Applicants thus failed to demonstrate that they had performed any official duties for more than one calendar month;
- (c) The Applicants in their representations indicate the Respondent and more particularly the Karl Bremer Hospital was not compliant with the Occupational Health and Safety protocols. In light of the Respondent's assertion that the Karl Bremer Hospital was compliance with the protocols, the Applicants' assertion as aforesaid is unsustainable;
- (d) The Applicants' reply to the assertion (by the Respondent) that Karl Bremer Hospital was compliant with all protocols was to merely state that-

*'Save to state that the Applicants have no knowledge of the current state of Karl Bremer Hospital and why such averments are relevant to these proceedings, the Applicant deny the remaining content thereof.'*²³

Applicants do not thus rebut the assertion that the Theatre 2C area was clean and compliant with the protocols."

²³ Paragraph 12 of First Applicant's Replying Affidavit

- (e) The directives from the Department of Labour merely stated contraventions and improvements however the Respondent was not found non-compliant, nor did it indicate the contraventions committed by the Respondent;
- (f) Decontamination and deep cleaning certificate were obtained from private companies confirming the disinfection and deep cleaning of the Karl Bremer Hospital;²⁴
- (g) A checklist was completed following the discharge of infected cases at Theatre 2C. A risk assessment were conducted of the Applicants, scoring a 2 and 4 which suggests their exposure to COVID-19 were low.²⁵

[37] The Applicants sought condonation for the late prosecution of the review application. It is clear that the Applicants' services were terminated by operation of law in terms of the provisions of the Public Services Act. The Respondent refused to reinstate or reemploy the Applicant after they had failed to demonstrate good cause for their reinstatement or re-employment.

The Applicants sought to review the decision of the Respondent in terms of section 158 (1)(h) of the Labour Relations Act. Section 158 (1)(h) empowers

²⁴ Paragraph 3 of Respondent's Opposing Affidavit

²⁵ Paragraph 6.10 of Respondent's Opposing Affidavit

the Labour Court to review any decision or action taken by the State as an employer, provided that the grounds of review are permissible.²⁶

[38] In *Asiphephe Primary School and Another v Head of Department of Education Kwazulu-Natal* it was held as follows:

*"[15] The nature, purpose and ambit of s158(1)(h) has been the subject of considerable judicial scrutiny. The resultant decisions have, in the main, concerned four issues: whether employees in the public sector enjoy a right to challenge State action in terms of s158(1)(h) in circumstances in which privately employed employees are limited in similar circumstances to litigation under the dispute resolution mechanisms provided for in the LRA; what type of action taken by the State may be subjected to review under s158(1)(h); the standard of review applicable in applications brought in terms of s158(1)(h); and whether the State itself may have recourse to s158(1)(h) when seeking to review and set aside its own actions or decisions."*²⁷

[39] The Applicants' reliance on section 158 (1)(h) of the Labour Relations Act is that the decision not to reinstate the Applicants was arbitrary and irrational, the Applicants would sign the attendance register but refused to work in areas,

²⁶ Section 158 (1)(h) of Labour Relations Act

²⁷ *Asiphephe Primary School and Another v Department of Education, Kwazulu-Natal* [2024] ZALCD 51

including their designated area Theatre 2C, that were not cleaned or sanitised in accordance with COVID-19 policies and guidelines.²⁸

- [40] In ***Chirwa v Transnet Ltd and Others***, the Constitutional Court explained the rationale for the inclusion of s 158(1)(h) as follows:

“Consistently with this objective, the LRA brings all employees, whether employed in the public sector or private sector under it, except those specifically excluded. The powers given to the Labour Court under section 158(1)(h) to review the executive or administrative acts of the State as an employer give effect to the intention to bring public sector employees under one comprehensive framework of law governing all employees.”²⁹

- [41] In ***Public Servants Association of South Africa obo De Bruyn v Minister of Safety and Security and Another*** the Labour Appeal Court held as follows:

“The review powers entrusted to the Labour Court in terms of section 158(1)(h) must be understood in the context when this section (indeed the entire LRA) was enacted. At that time, the employment of public servants was regulated by the common law contract of employment, the unfair labour practice jurisdiction of the industrial court in terms of the

²⁸ Paragraph 14 of First Applicant’s Replying Affidavit

²⁹ ***Chirwa v Transnet Limited and Others*** 2008 (4) SA 367 (CC)

Labour Relations Act 28 of 1956, other statutes and by means of common law judicial review.

Public servants were in a privileged position with regard to other employees as their choice of remedies extended to judicial review. Section 158(1)(h) was intended to preserve the common law judicial review remedy of public servants. The permissible grounds of common law review are well known.”³⁰

- [42] The Applicants sought to rely on the action of the Respondent not to reinstate them as being materially influenced by an error of law. In ***Opperman v Commission for Conciliation Mediation and Arbitration*** the court dealt with the situation where the Applicant sought to review and set aside an award of substantive fairness on the basis of an error of law, and held as follows:

“In the case before me, the arbitrator committed an error of law by referring to and then not following the dictum of Basson J in Rennies. But even if that in itself does not make the award reviewable, it led to an unreasonable result. It must be reviewed and set aside on that basis.”³¹

- [43] It is trite law that the mere existence of an error of law is insufficient to substantiate a successful review application. The error of law has to have the

³⁰ *Public Servants Association of South Africa obo De Bruyn v Minister of Safety and Security and Another* (JA 91/09) [2012] ZALAC 14 at paragraphs 26 - 27

³¹ *Opperman v Commission for Conciliation Mediation and Arbitration* (2017) 38 ILJ 242 (LC) at para [25]

concomitant result of an unreasonable outcome, In ***Head of Department of Education v Mofokeng and Others*** it was held:

*"Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her."*³²

- [44] It is clear that the Applicants entered the premises of the Karl Bremer Hospital, used the areas that were used by many other staff as well as the public and entered the tearoom shared with other staff members. However, despite the Respondent obtaining the Department of Labour to conduct an inspection and confirming that Theatre 2C was safe to work at and enter, the Applicants refused to report for duty at their workstation. Thus at the time that South Africa was experiencing the COVID-19 and the lives of thousands of citizens being placed at risk. Additionally it must be borne in mind that none of the

³² *Head of Department of Education v Mofokeng and Others* (2015) 36 ILJ 28082 (LAC) at para [32]

Applicants tested positive for COVID-19.³³ This conduct by the Applicants placed an additional workload on other staff at the Karl Bremer Hospital.³⁴

I cannot find that the Applicants placed any compelling and substantive reasons for their reinstatement before the Respondent. The Respondent attempted to engage with the Applicants during the course of 29 June 2020 until 10 September 2020, all which proved futile.³⁵

[45] The Applicants, in my view, through their conduct failed to appreciate the nature and scope of their duties, especially during the COVID-19 pandemic. In **G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero N.O. and Others** it was held:

*"The employment relationship by its nature obliges an employee to act honestly, in good faith and to protect the interests of the employer. The high premium placed on honesty in the workplace has led our courts repeatedly to find that the presence of dishonesty makes the restoration of trust, which is at the core of the employment relationship, unlikely. Dismissal for dishonest conduct has been found to be fair where continued employment is intolerable and dismissal is "a sensible operational response to risk management."*³⁶

[46] The application for review was brought in terms of section 158 (1)(h) of the Labour Relations Act. The section does not prescribe a time limit for filing of

³³ Paragraph 6.11 of Respondent's Answering Affidavit

³⁴ Paragraph 54 of Respondent's Answering Affidavit

³⁵ Annexure "SK13" to First Applicant's Founding Affidavit

³⁶ **G4S Secure Solutions (SA) (Pty) Ltd** 38 ILJ 881 (LAC) at para 26

the application. In contradistinction, section 145 (1)(a) of the Labour Relations Act prescribe a time limit of six weeks from the date that the award is served on an Applicant.

- [47] The application, as envisaged in terms of section 158 (1)(h) of the Labour Relations Act, has to be brought within a “reasonable time”. In **Gqwetha v Transkei Development Corporation Limited and Others** it was held:

“It is important for the efficient functioning of public bodies . . . that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule . . . is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more important, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions.”³⁷

- [48] The issue is thus what is a “reasonable time” in the context of section 158 of the Labour Relations Act. I am in agreement with the submissions made by Mr F. Rodrigues, who appeared on behalf of the Respondent, that the extent of the delay must be considered together with the other factors as outlined in **Melane v Santam Insurance Co Limited**.³⁸

³⁷ *Gqwetha v Transkei Development Corporation Limited and Others* 2006 (2) SA 603 (SCA) at p. 612 E - F

³⁸ *Melane v Santam Insurance Co Limited* 1962 (4) SA 531 (A)

A delay of approximately 19 months took place from the date of the decision not to reinstate the Applicants and the launching of the present application.

[49] The Applicants sought to attribute the delay in launching the present application to the following:

- (a) The Applicants launched the proceedings in the Public Health and Social Development Sectoral Bargaining Council ("PHSDSBC") which was referred to arbitration on 26th March 2021. The aforesaid arbitration was finalised on the 25th May 2021.³⁹
- (b) Applicants consulted with labour consultant, Peter Cloete, who on 11th August 2021 applied for a review case number in respect of the potential review of the ruling of the PHSDSBC.⁴⁰
- (c) Thereafter Applicants consulted their attorney of record, Mr S Blows, but due to lack of finances they could not proceed. The Applicants sought other potential legal representation but the Applicants' attorney of record appeared the most reasonable;⁴¹
- (d) By June 2022 Applicants were only able to secure a substantial amount of finances and the balance of the deposit Applicants were

³⁹ Paragraph 51 of the First Applicant's Founding Affidavit

⁴⁰ Paragraph 53 of the First Applicant's Founding Affidavit

⁴¹ Paragraph 56 of the First Applicant's Founding Affidavit

only able to secure the balance of the finances requested by their attorney of record;⁴²

- (e) On 8th October 2022; Applicants gave their instructions to their attorney of record to launch the present application. Although the Applicants only gave the instructions on the aforesaid date, the application was only launched on the 29th November 2022. No explanation has been furnished for the period between the 8th October 2022 and the 29th November 2022.

[50] The delay is approximately 19 months (from date of the decision not to reinstate the Applicants to the launching of the present application). Since 25th May 2021 the Applicants, on their own version, became aware that the PHSDSBC lacked the requisite jurisdiction to arbitrate the dispute. It took the Applicants until November 2021, another six months before launching the present application. The applicants have not explained this delay in any particularity nor have the Applicants sought to explain their inaction during the period 7th October 2021 until 4th June 2022 when (on their version) they secured the deposit required by their attorney.

In ***Saloojee and Another NNO v Minister of Community Development*** it was held as follows:

“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

⁴² Paragraph 60 of the First Applicant's Founding Affidavit

*tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of the Appellate Division. Considerations **ad misericordiam** should not be allowed to become an invitation to laxity.*

... The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.⁴³

[51] I consider the extent of the delay and the lack of complete explanation to be unreasonable and cannot find that the Applicants have initiated these proceedings without undue delay. I thus cannot find that this application has been brought within a reasonable time as envisaged in terms of section 158 (1)(h) of the Labour Relations Act.

[52] As stated earlier, the application for review was brought in terms of section 158 (1)(h) of the Labour Relations Act. The section does not prescribe a time limit for the filing of the application and the Applicants' seeking condonation for the late prosecution of the review is misplaced.

[53] Applicants furthermore sought relief that the matter be reinstated and be heard. On or about the 29th November 2022 the Applicants launched the present application setting aside the decision not to reinstate them taken on or about the 28th January 2021. The Respondent filed their answering affidavit

⁴³ *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 135 (A) at p. 141 C - E

on the 25th April 2023 and their confirmatory affidavits thereto on the 8th May 2023. The Applicants thereafter filed their Replying Affidavits on the 26th July 2023.

- [54] The Applicants submitted their request for allocation of a court date to the Registrar of this Court on the 17th August 2023. On the 26th February 2024, the Applicants reserved their Notice in terms of Rule 7 (8)(b) upon the Respondent and filed same with the Registrar of this Honourable Court.

On the 9th May 2024 the Applicants' attorneys of record were advised that the Applicants had to bring an application for the retrieval of an archived referral. In my view the matter was not archived and it is thus unnecessary to consider the application for reinstatement.

- [55] This leaves the issue of costs to be decided upon. It is trite law that in awarding costs, a court has a discretion to be exercised judicially upon a consideration of the facts of the case. In **Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd**, it was held as follows (in relation to costs *de bonis propriis* against legal representatives):

"It is true that legal representatives sometimes make errors of law, omit to comply fully with the Rules of Court or err in other ways related to the conduct of the proceedings. This is an everyday occurrence. This does not however per se ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard

expected of the legal practitioners, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are, dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, and gross incompetent and a lack of care. See, for instance, Cilliers et al Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa 5th Edition Vol 2 at p. 984. See also: Ward v Sulzer 1973 (3) SA 701 (AD) at 706 – 707.⁴⁴

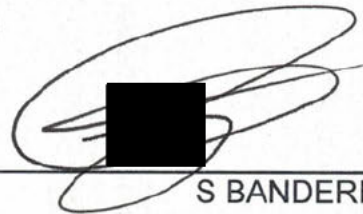
[56] The Applicants did not file Heads of Argument in the main application, despite the review application also being enrolled for hearing on the 4th July 2025. Ms Essa who appeared on behalf of the Applicants sought to also limit her address only to the application for retrieval despite the intimation by Mr Rodriques and the Court that the matter had not become archived. The Applicants clearly demonstrated a disregard to the rules of this Honourable Court by not filing Heads of Argument in the review application. It is unclear whether this was intentionally done by the Applicants and/or their legal representatives. I find that it would be just and appropriate to award the Respondent costs.

[57] In the premises, the following order is made:

⁴⁴ *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* 2014 (3) SA 265 (GP) at p 289 A - D

Order

1. The application to review and set aside the decision of the Respondent not to reinstate the First, Second and Third Applicants, as communicated in the letter of Ms Z. Rikwe dated 28th January 2021, in terms of section 158 (1)(h) of the Labour Relations Act 66 of 1995 is dismissed.
2. The First to Third Applicants shall pay the Respondents costs.



S BANDERKER

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

N Essa instructed by SB Attorneys Inc.

For the Third Respondent:

F Rodriques instructed by State Attorney Cape
Town