

THE LABOUR COURT OF SOUTH AFRICA**(HELD IN JOHANNESBURG)**

Not Reportable

Case No: JR1508/23

In the matter between:

DEPARTMENT OF HOME AFFAIRS

Applicant

and

**GENERAL PUBLIC SERVICE SECTOR
BARGAINING COUNCIL (GPSSBC)**

First Respondent

COMMISSIONER SIVUYILE TSHINGANA N.O.

Second Respondent

PSA obo MF MASOMBUKA

Third Respondent

Heard: 31 July 2025

Delivered: 07 November 2025

JUDGMENT

SASS, AJIntroduction

- [1] This matter began as a review application launched by the Applicant on 1 September 2023 to review and set aside an arbitration award of the Second Respondent (the Arbitrator) dated 21 June 2023 (the Award) issued under the auspices of the First Respondent (the Bargaining Council).

- [2] Due to the non-filing of the record of the arbitration proceedings (the Record) before the date on which the Record was due for filing in terms of paragraph 11.2.3 of the Practice Manual of the Labour Court which was in effect until 17 July 2024 (the Practice Manual), the review application was deemed to have been withdrawn/lapsed and archived by operation of paragraph 11.2.3 of the Practice Manual.
- [3] The Applicant now seeks to revive/reinstate the deemed withdrawn/lapsed and archived review application. None of the Respondents have opposed the revival/reinstatement application and the application is unopposed.

Relevant facts

- [4] The Applicant was informed by this Court on or about 19 September 2023 that the Record had been made available to it by the Bargaining Council.
- [5] The Applicant was required to deliver the Record on or before 13 December 2023 if one has regard to the date on which the Registrar of this Court informed the Applicant's attorneys that the Record was available for collection and the provisions of paragraph 11.2.3 of the Practice Manual.
- [6] At some point between 19 September 2023 and 18 October 2023, the Applicant instructed transcribers to transcribe the audio recordings of the proceedings to which the Award relates (which formed part of the Record).
- [7] On 18 October 2023, the Applicant was informed by the transcribers that the Record was incomplete insofar as it lacked the audio recordings in relation to: (i) the cross examination of the Ms Masombuka and the evidence of Mr Masondo on 19 April 2023; and (ii) the cross examination and re-examination of Ms Makatau on 20 April 2023 (the missing portions of the Record).
- [8] Between 18 October 2023 and 13 December 2023, the Applicant made multiple attempts to obtain the missing portions of the Record from the Bargaining Council. These attempts proved to be futile and on 13 December 2023, the Applicant launched an application to compel the Bargaining Council to provide the missing portions of the Record.

- [9] On 05 November 2024, the Honourable Acting Justice Ramji made an order to the following effect in respect of the application to compel, that it is postponed since the Applicant is directed to serve and file an application for reinstatement within 15 (fifteen) days of that order.
- [10] According to the service affidavit of Nomakwezi Ngqaleni deposed to on 26 November 2024, the revival/reinstatement application was purportedly served on the Respondents on 26 November 2024.
- [11] On 11 March 2025, the Honourable Acting Justice Phehane made an order to the following effect in respect of the revival/reinstatement application, that the matter is removed from the court roll on 11 March 2025 to enable proper service of the revival/reinstatement application on the First and Second Respondents.
- [12] According to the service affidavit of Nomakwezi Ngqaleni deposed to on 17 March 2025, the revival/reinstatement application was served on the First and Second Respondents on 13 March 2025 (as well as the Third Respondent).
- [13] I am satisfied that proper service of the revival/reinstatement application has been made on the Respondents in accordance with the order of the Honourable Acting Justice Phehane and that the revival/reinstatement application may be heard by this Court. The review application of course remains withdrawn/lapsed and archived until and unless the revival/reinstatement application is successful.

Applicable legal principles

- [14] It is now trite law that the principles applicable to an application to revive/reinstate a review application are similar to those applicable to condonation applications, which principles are also well-established.
- [15] The requirements for an application for reinstatement were addressed *inter alia* in *Samuels v Old Mutual Bank*¹ wherein it was held that:

¹ [[2017] 38 ILJ 1790 (LAC); [2017] 7 BLLR 681 (LAC) at para 17. See also *Govender & Others v CCMA & Others* [2024] ILJ 1197 (LAC) at 23.

'In essence, an application for the retrieval of a file from the archives is a form of an application for condonation for failure to comply with the court rules, time frames and directives. Showing good cause demands that the application be bona fide; that the applicant provide a reasonable explanation which covers the entire period of the default; and show that he/she has reasonable prospects of success in the main application, and lastly, that it is in the interest of justice to grant the order. It has to be noted that it is not a requirement that the applicant must deal fully with the merits of the dispute to establish reasonable prospects of success. It is sufficient to set out facts which, if established, would result in his/her success. In the end, the decision to grant or refuse condonation is a discretion to be exercised by the court hearing the application which must be judiciously exercised'.

[16] In *Bidvest Protea Coin (Pty) Ltd and SATAWU and others*² it was held that:

'[10] From the above authorities, it is clear that the enquiry to be conducted is that which would be applied in an application for condonation, and that the period between the date of filing of a review application and the expiry of the 60-day period within which the record is to be filed, as well as events after that date, must be taken into account.'

[17] The above principle was followed in *the City of Ekurhuleni Metropolitan Municipality v SA Local Government Bargaining Council and others*³ wherein it was held that:

'[5] In an application to reinstate a review deemed withdrawn, the applicant must demonstrate good cause. This is so in that such applications are akin to seeking condonation for the failure to comply with stipulated time-lines. When considering whether good cause has been demonstrated, the court exercises a discretion having taken account of inter alia the degree of lateness, the explanation therefor, the prospects of success and the importance of the case.'

[18] I now turn to consider whether the Applicant has demonstrated good cause.

² [2020] JOL 48504 (LC) at para 10.

³ [2023] JOL 59388 (LC) at para 5.

Analysis

The degree of lateness and the explanation for the degree of lateness

- [19] The Record should have been delivered on or before 13 December 2023. It has not been delivered yet. At the very least and calculated up to the date on which this matter was heard (31 July 2025), the delivery of the Record is between one year and seven months and one year and eight months late.
- [20] Whilst this delay is certainly not trivial, when viewed in the context of the various attempts made to obtain the complete Record, the delay is not excessive. The Applicant took various steps to obtain the complete Record from the Bargaining Council between 18 October 2023 and 2 April 2024 when it ultimately launched an application to compel the Bargaining Council to provide the complete Record. It took some time for the application to compel to be enrolled.
- [21] The review application was ultimately deemed to have been withdrawn due as a consequence of the Bargaining Council's failure to provide the complete Record. It does not appear that the Applicant intentionally delayed the prosecution of the review application. The Applicant made many attempts to obtain the complete Record. The Applicant's proactive steps in this regard does demonstrate a *bona fide* intention to proceed with the review application at all times.
- [22] The explanation for the delay in prosecuting the review application appears to be reasonable in the circumstances and although it is not overly detailed, it does cover the various parts of the entire period of the delay such as the following time periods – from when the Record became due for delivery and the launching of the application to compel, from the launching of the application to compel until it was enrolled for hearing, from when the application to compel was enrolled until the launching of the application to revive/reinstate the deemed withdrawn/lapsed review application, and the further delays after that due to concerns about the service of the various applications on the Respondents. Not reviving/reinstating the review

application in such circumstances would be prejudicial to the Applicant's right to have the review application determined by this Court.

The prospects of success

- [23] I am aware that the complete Record is not before this Court, and I make this assessment of the prospects of success based on the founding affidavit in the review application and in the absence of any answering affidavit/s filed by any of the Respondents (which answering affidavit/s is not due yet in terms of the Rules).
- [24] In *Madikizela v CCMA and Others*⁴, it was held that although an application for reinstatement need not show excellent prospects of success, non-meritorious reviews should not be reinstated so as not to clog the court roll.
- [25] In *Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd*⁵ it was held that a consideration of prospects of success merely implies a determination of the likelihood or chance of success when the main case is heard. A similar approach was followed in *Seatlholo and others v Entertainment Logistics Service (A division of Gallo Africa Ltd)*⁶, where it was held that the test is whether the applicants would succeed in the main action if the facts pleaded by them in their condonation application were established at trial. Equally so, the prospects of success do not entail an applicant having to prove on a balance of probabilities that he or she would succeed when the merits of the case are heard⁷.
- [26] The Applicant raised a number of grounds of review in its review application. Firstly, the Applicant contends that the Arbitrator committed a gross

⁴ (D382/22) [2024] ZALCD 42 (7 November 2024) at para 27.

⁵ 2009 30 ILJ 347 (LC) at para 27.

⁶ (2011) 32 ILJ 2206 (LC) para 24.

⁷ See: *Production Institute of South Africa (Pty) Ltd v CCMA and others* (2011) 32 ILJ 1712 (LC) at para 12; See also: *SA Democratic Teachers Union v Commission for Conciliation, Mediation and Arbitration and others* (2007) 28 ILJ 1124 (LC) at para 38, where it was held that: 'A commissioner in considering prospects of success does not have to pronounce on the merits of the case. All that the commissioner needs to do is to investigate whether on the averments made by the applicant there is a *prima facie* case, that there is a chance of succeeding when the main case is heard. In other words, to establish whether there is a reasonable prospect of success on the merits, it suffices if an applicant can show a *prima facie* case through setting out averments which, if established at the proceedings of the main case, would entitle the applicant to some relief. The applicant need not deal fully with the merits of the case'.

irregularity by failing to consider material evidence that was placed before him regarding the selection criteria which justified the non-shortlisting of the Ms Masombuka, resulting in an unreasonable award and rendering the Arbitrator's decision reviewable as that failure materially affected the outcome. Secondly, the Applicant contends that the Arbitrator failed to properly apply the test for unfair labour practices in relation to promotion, in that an employer's discretion in promotion decisions should only be interfered with where such discretion is exercised unfairly or irrationally, and that the Arbitrator therefore failed to assess whether the Applicant (as the employer) had exercised its discretion reasonably. Thirdly, the Applicant contends that the Arbitrator failed to appreciate the nature of the dispute, leading to a decision that is unreasonable and unjustifiable. These are all *prima facie* legally valid and permissible grounds of review.

[27] In the absence of the complete Record containing the evidence which served before the Arbitrator, it would be somewhat problematic to determine whether the Applicant it would succeed with the review application on a balance of probabilities when the merits thereof is heard. That, is, however, not the threshold to be applied.

[28] It is not necessary for the Applicant to prove on a balance of probabilities that it will succeed when the merits of the review application are considered. It is only necessary for the Applicant to prove that there is a likelihood or chance of success when the review application is heard if the facts averred in, and grounds of review relied on, in the review application, are established when it is heard. The Applicant has done so. It also cannot be said that the review application is unmeritorious. At the very least, the Applicant does enjoy at least some prospects of success.

[29] I am satisfied that, notwithstanding the difficulties caused by the lack of a complete Record at this stage, the Applicant has been able to show that it at least has *prima facie* prospects of success by virtue of the factual averments and grounds of review set out in its review application which, if established and accepted by this Court when the review application is determined, may

provide both a factual and legal sustainable basis for a successful review application.

The importance of the case, balance of convenience and interests of justice

- [30] The matter is important as it involves the public sector and may be of importance or relevance to other employees and parties in the public sector falling under the jurisdiction of the Bargaining Council in relation to the manner in which the Bargaining Council stores, preserves and makes available the record of arbitration proceedings.
- [31] If the revival/reinstatement application is not successful, the Applicant will be deprived of the opportunity to have this Court consider its review application and decide whether or not the Award is reviewable. In those circumstances, the Applicant will also be required to give effect to the Award and pay the sum of R173 319.00 to Ms Masombuka (including interest thereon calculated from 30 June 2023).
- [32] If the revival/reinstatement application is successful, and the review application is ultimately determined by this Court and is dismissed, the Applicant would be required to pay Ms Masombuko the same quantum and interest including interest calculated up until the date of the judgment in the review application. This Court could also award costs against the Applicant if the review application is dismissed. There also does not appear to be any ongoing prejudice accruing to Ms Masombuko as a consequence of the delay in finalising the review application seeing that interest on the sum of R173 319.00 continues to accrue and the possibility continues to exist that costs may be awarded against the Applicant if the review application is dismissed. The prejudice to the Applicant if reinstatement is not granted, namely that its review application will not be ventilated before this Court, outweighs any possible prejudice that Ms Masombuka may suffer. The balance of convenience therefore favours the Applicant in my view.

[33] In *Steenkamp and Others v Edcon Limited*⁸ the Constitutional Court re-affirmed that granting condonation must be in the interests of justice and referred with approval to its decision in *Grootboom v National Prosecuting Authority*⁹:

[36] *Granting condonation must be in the interests of justice. This Court in Grootboom set out the factors that must be considered in determining whether or not it is in the interests of justice to grant condonation:*

“[T]he standard for considering an application for condonation is the interests of justice. However, the concept ‘interests of justice’ is so elastic that it is not capable of precise definition. As the two cases demonstrate, it 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 to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasise 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.

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

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

⁸ [2019] 11 BLLR 1189 (CC), specifically the Constitutional Court’s second judgment.

⁹ 2014 (1) BCLR 65 (CC) at para 20.

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.”¹⁰

[37] All factors should therefore be taken into account when assessing whether it is in the interests of justice to grant or refuse condonation.”

[34] Taking into account all the relevant factors, and in particular, that the delay is not excessive, the review application would most likely not have been deemed to have been withdrawn/lapsed if the Bargaining Council had delivered the complete Record by 13 December 2022, there is an explanation for the delay which is satisfactory and granting the revival/reinstatement would not prejudice Ms Masombuka, I agree with the Applicant’s contention that it is in the interests of justice to revive/reinstate the review application as it would facilitate the determination of the review application on its merits rather than the dismissal thereof on procedural grounds.

Synopsis

[35] The explanation provided by the Applicant for the delay appears to be *bona fide* and reasonable. It was not contentious that the Bargaining Council failed to produce the complete Record and that the Applicant took all reasonable and diligent steps to obtain the complete Record from the Bargaining Council. The Applicant’s conduct indicates an ongoing intention to diligently prosecute the review application to finality at all times.

¹⁰ Ibid at paras 22-3 and 51.

- [36] Without going into the merits in depth in relation to a consideration of the prospects of success, it would appear that the Applicant has some likelihood or chance of succeeding with the review application when it is heard if the factual averments made and grounds of review postulated in the founding affidavit in the review application, are established when the review application is heard.
- [37] The application was not opposed by any of the Respondents and the delay in filing a complete Record has not been unduly prejudicial to Ms Masombuka. The balance of convenience appears to favour the Applicant. I also believe that it is in the interests of justice to allow the review application to be reinstated.
- [38] That being said, I was somewhat perplexed by the following three aspects. Firstly, why the Applicant did not request consent to an extension of time from the Third Respondent, and if that consent was refused, approach the Judge President in chambers for an extension of time as contemplated in paragraph 11.2.3 of the Practice Manual. Secondly, why the Applicant has not relied on the mechanism in paragraph 11.4 of the Practice Manual [now Rule 37(27)] through which directions may be obtained in relation to the inadequacy of the Record. Thirdly, why the Applicant has not formally engaged the Third Respondent in relation to reconstructing the missing portion of the Record amongst themselves. Whilst the Applicant may be criticized for not doing any of the above, its failure to do so does not preclude it from obtaining the revival/reinstatement of the review application.
- [39] Having considered the matter and having regard to the abovementioned principles, it is my view that a proper case has been made out for the revival/reinstatement of the review application and its retrieval from archiving.
- [40] In the circumstances, it is appropriate to revive/reinstate the review application, and I make the following order:

Order

1. The review application under case number JR1508/23 is revived/reinstated.

2. The court file under case number JR1508/23 is to be retrieved from archiving.
3. To the extent that the missing portion of the Record has not been reconstructed and filed as at the date of this order, the Applicant is directed to comply with the provisions of Rule 37(27) in relation to the reconstruction of the missing portion of the Record.
4. There is no order as to costs.

Mendel Sass

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Attorney M Ngcobo of Lusenga Attorneys Incorporated.

For the Respondents: No appearances.