

**THE LABOUR COURT OF SOUTH AFRICA****(HELD IN JOHANNESBURG)****Not Reportable****Case No: J158/2022****In the matter between:****DEPARTMENT OF CORRECTIONAL SERVICES****Applicant****and****MNIKELWA NXELE****First Respondent****KTLHOLO WABILE N.O.****Second Respondent****GENERAL PUBLIC SERVICE SECTORAL****BARGAINING COUNCIL (PSSBC)****AS COMMISSIONER****Third Respondent****Heard: 29 July 2025****Delivered: 07 November 2025**

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**JUDGMENT**

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**SASS, AJ**Introduction

- [1] This matter started as a review application launched by the Applicant during February 2022 to review and set aside an arbitration award of the Second Respondent (the Arbitrator) handed down on 7 February 2022 (the Award) and issued under the auspices of the Third Respondent (the Bargaining Council).
- [2] Due to the Applicant's failure to file the complete 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Court which was in effect until 17 July 2024 (the Practice Manual), the review application was deemed to have been withdrawn/lapsed and archived by operation of paragraph 11.2.3 of the Practice Manual.
- [3] The Applicant now seeks to revive/reinstate the deemed withdrawn/lapsed and archived review application.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] On or about 25 or 26 March 2022, the Applicant was informed by this Court that the Record had been made available to it by the Bargaining Council. The Applicant was required to deliver the Record within 60 (sixty) days of 24 or 25 March 2025 but was unable to do so due to the Bargaining Council's failure to deliver the complete Record to this Court and various delays experienced by the Applicant in obtaining the complete Record.
- [5] At some point between approximately 25 March 2022 and 12 May 2022, the Applicant instructed transcribers to transcribe the audio recordings of the arbitration proceedings to which the Award relates which formed part of the Record as delivered to this Court by the Bargaining Council.
- [6] The Applicant was subsequently informed by the transcribers that the Record was incomplete insofar as it lacked the recordings of the arbitration proceedings to which the Award related. The audio recordings which were made available by the Bargaining Council apparently related to a different matter.

[7] Between approximately 12 May 2022 and 06 September 2022, the Applicant made a number of attempts to obtain the missing audio recordings by taking the following steps:

- a. Between 12 and 18 May 2022, it sent its first correspondence to the Bargaining Council about the incomplete Record. The Bargaining Council replied to this correspondence on or about 18 May 2022, requesting clarity as to exactly which recording/s the Applicant sought to form part of the Record.
- b. On or about 26 May 2022, the Bargaining Council informed the Applicant that a notice of compliance was filed at the Labour Court. After collection of the compact discs referred to in the notice of compliance, and on or about 30 May 2022, the Applicant sent correspondence to the Bargaining Council to verify if the newly acquired compact discs which formed part of the record, were indeed correct. The Bargaining Council replied to this correspondence on or about 21 June 2022, in which it confirmed that the audio in the record was indeed correct.
- c. On 05 August 2022, the Applicant sent further correspondence to the Bargaining Council to raise more concerns in respect of the incompleteness of the Record and specifically noted that the following items were omitted from the Record, namely -
  - i. the complete testimony of Mr. Moodley;
  - ii. the main evidence of Mr. Ngcobo; and
  - iii. the application for the recusal of Mr. Wabile.
- d. The Applicant placed on record at this juncture that this was the second instance of the Record as provided by the Bargaining Council being found to be incomplete and further noted the prejudice caused to it by that.

- e. The Applicant did not receive a reply from the Bargaining Council to its correspondence of 05 August 2022. Consequently, and on or about 18 August 2022, the Applicant sent the incomplete Record to the First Respondent and informed the First Respondent of the difficulties encountered in attempting to obtain a complete Record and that it would be compelling the Bargaining Council to deliver the complete Record. In this correspondence, the Applicant also requested an extension of time for the filing of the Record in terms of paragraph 11.2.3 of the Practice Manual.
- f. On or about 19 August 2022, the First Respondent confirmed receipt of the incomplete Record and indicated that he would not grant an extension as he believed the matter is deemed to have been withdrawn.
- g. On or about 19 August 2022, the Bargaining Council replied to the Applicant's correspondence of 05 August 2022, stating that it had provided the complete Record, notwithstanding that the missing evidence referred to above did not form part of the Record provided by the Bargaining Council.

[8] On or about 07 September 2022, this Court enrolled a reconstruction hearing in this matter for 13 September 2022, and after that reconstruction hearing was held, the complete Record was made available during December 2022 (and filed during January 2023).

[9] On or about 15 February 2023, the Applicant's revival/reinstatement application was served on the First Respondent. The service affidavit deposed to by Gerhard Kock of the Applicant's attorneys on or about 24 February 2023 confirms such service.

[10] On or about 15 February 2023, the Applicant's Rule 7A(8)(b) Notice in relation to the review application, confirming that the Applicant stood by its notice of motion, was served on the First Respondent's attorneys. The service affidavit deposed to by Gerhard Kock of the Applicant's attorneys on or about 24

February 2023 confirms such service. The First Respondent has to date not delivered an answering affidavit in the review application.

- [11] In and during September or October 2023, the Applicant delivered its Rule 22B Notice confirming the indexing and pagination of the court file in respect of the revival/reinstatement application and requesting the enrolment thereof.
- [12] On or about 12 June 2025, the revival/reinstatement application was enrolled for hearing by this Court on 29 July 2025. I was not able to establish from the Court file what steps, if any, the Applicant may have taken between at least October 2023 and 12 June 2025 to expedite the enrolment of the revival/reinstatement application.

#### Applicable legal principles

- [13] 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.
- [14] The requirements for an application for reinstatement were addressed *inter alia* in *Samuels v Old Mutual Bank*<sup>1</sup> wherein it was held that:

*'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'.*

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<sup>1</sup> [ [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.

[15] In *Bidvest Protea Coin (Pty) Ltd and SATAWU and others*<sup>2</sup> 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.’*

[16] The above principle was followed in *the City of Ekurhuleni Metropolitan Municipality v SA Local Government Bargaining Council and others*<sup>3</sup> 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.’*

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

### Analysis

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

[18] The Record should have been delivered within 60 (sixty) days of 24 or 25 March 2022 (roughly by approximately 24 May 2022). It was eventually delivered during January 2023 – approximately 8 (eight) months late.

[19] Whilst this delay is 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 25 March 2022 and 13 September 2022 (when the reconstruction hearing was held).

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<sup>2</sup> [2020] JOL 48504 (LC) at para 10.

<sup>3</sup> [2023] JOL 59388 (LC) at para 5.

- [20] For reasons not immediately apparent from the Court file, it took a considerable amount of time for this Court to enrol the revival/reinstatement application for hearing notwithstanding it being launched by the Applicant on or about 03 March 2023 (by which time the complete Record had already been filed).
- [21] Whilst this may be no more than speculation, the delay in having the revival/reinstatement application enrolled might have been caused, in part, by the relief sought/prayers in the notice of motion dated 15 February 2023 which was attached to the founding affidavit deposed to by Gerhard Kock on 15 February 2023 in which the Applicant sets out the factual and legal basis for the revival/reinstatement of the review application. In its notice of motion, whilst seeking further and/or alternative relief, which may include the revival/reinstatement of the review application, the Applicant purports to make application to the Judge President in chambers in terms of the provisions of clause 11.2.3 of the Practice Manual for an order that, *inter alia*, the time period for the filing of the complete record be extended to the date on which the record has been filed. The notice of motion does not contain a specific prayer in relation to the revival/reinstatement of the review application although it is clear from the founding affidavit that it seeks such relief.
- [22] The review application was deemed to have been withdrawn due to 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 a number of attempts to obtain the complete Record from the Bargaining Council. The Applicant's proactive steps in this regard does demonstrate a *bona fide* intention to proceed with the review application at all times.
- [23] 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. 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

- [24] In *Madikizela v CCMA and Others*<sup>4</sup>, 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*<sup>5</sup> 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)*<sup>6</sup>, 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 heard<sup>7</sup>.
- [26] In its founding affidavit in the review application, the Applicant made various factual averments in support of its review application and its grounds of review.
- [27] Some of the more pertinent factual averments made in this regard, underpinning the Applicant's various grounds of review (as described below), were as follows:
- a. On the morning of 12 January 2022 during the pre-dismissal arbitration in terms of section 188A of the LRA, the Arbitrator made a ruling which denied a request by the Applicant, made along with a tender to pay the

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

<sup>5</sup> 2009 30 ILJ 347 (LC) at para 27.

<sup>6</sup> (2011) 32 ILJ 2206 (LC) para 24.

<sup>7</sup> 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'.



wasted costs occasioned by such a delay, to stand the pre-dismissal proceedings down until the next following day as its next witnesses were not available.

- b. The Arbitrator made a ruling to the effect that the Applicant had to present its next witness by 12h30 on that day (12 January 2022) failing which the parties would be required to close their cases whereafter the Arbitrator would determine the matter. The Arbitrator added that the failure by either party to close its case would not prevent the finalisation of the proceedings.
- c. When the Applicant informed the Arbitrator at 12h30 that it did not have its next witness available but could have its next witness available by 15h00 (two and a half hours later, from which the lunch break should also still have been deducted), the Arbitrator called upon the First Respondent to proceed with the presentation his case despite the protestations of the Applicant that it had not closed its case.
- d. In making this ruling and denying the Applicant the opportunity to present the testimony of all its witnesses, the Arbitrator fundamentally deprived the Applicant of its right to be heard (the *audi alteram partem* principle being one of the cornerstones of our jurisprudence).
- e. The Arbitrator's refusal to stand the matter down to the following day, when the Applicant's next witnesses would be available, precluded the Applicant from presenting important evidence in respect of the deposit and withdrawal of millions of Rands by the First Respondent and evidence pertaining to several of the charges proffered against the First Respondent. It also precluded the Applicant from calling witnesses in Supply Chain Management who would have given evidence on the conduct of proceedings during meetings of the Bid Adjudication Committee which had irregularly awarded tenders to two bidders in contravention with Treasury Regulations and the Supply Chain Policy of the Applicant.

- f. Standing the matter down until the next morning could not have made any difference to the proceedings at the time. The matter had been enrolled again from 11 to 18 January 2022, and there remained at the time (on 12 January 2022) another four days for the hearing of the matter. The Applicant was as anxious as the First Respondent to have the matter finalised.
- g. The pre-dismissal arbitration proceedings commenced on 02 November and continued on 5 November 2021. It was then postponed subject to the approval of the Bargaining Council's secretariat to early January 2022. Three of the Applicant's future intended witnesses were not employed by it, and two of those (who were employed by casino operators and who were vital witnesses in respect of a number of charges against the First Respondent) needed to be subpoenaed in order to appear at the Bargaining Council. To subpoena them, the Applicant needed confirmation of the dates on which the pre-dismissal arbitration would continue. There was some confusion when the secretariat at first refused to set the matter down early in January 2022 and then agreed to do so. This meant that the Applicant could only at a late-stage request subpoenas from the Bargaining Council in respect of these witnesses.
- h. The subpoenas were obtained for the two witnesses. It was arranged with them to testify on Thursday 13 January 2022. When they were requested to make themselves available earlier to testify on Wednesday 12 January 2022, they indicated that they had made other arrangements and could not do so.
- i. The third witness not employed by the Applicant informed it that her husband had to travel for work for the week of 10 to 14 January 2022. Since the first school day of the year fell on Wednesday 12 January 2022, she was unfortunately not available to attend the pre-dismissal arbitration proceedings until Monday 17 January 2022.

- j. The most important witness that the Applicant intended to call had refused to testify in November 2021 (although she had indicated in October 2021 that she would be prepared to do so), because the First Respondent had previously intimidated her by sending various SMS messages. When she refused to testify in November 2021, the Applicant had to find a witness to stand in for her – this was Mr Ncqobo, a pensioner. His testimony commenced on Friday 5 November 2021 and after the adjournment of the proceedings, continued on Tuesday 11 January 2022. He finished his testimony on Wednesday 12 January 2022, far earlier than had been anticipated. Given the extended cross-examination of the SIU witness, the Applicant had expected that Mr Ngcobo would remain on the stand far longer than that Wednesday morning. It was after the completion of this testimony that the Applicant requested that the matter stand down until the following day.
- k. The Applicant was precluded from presenting its case in the full, and calling on the First Respondent to present his case when the Applicant had not closed its case and had not called all its witnesses, caused a material injustice not only to the Applicant but also to the public in general see that the allegations against the First Respondent were put to him as a public service employee.
- l. There was no doubt that the Arbitrator's refusal to stand the matter down, thereby preventing the Applicant from presenting its case in full, particularly in view of the serious allegations against the First Respondent, constitutes a ground for review.

[28] The Applicant's grounds of review, arising from the above factual averments as well as others contained in the founding affidavit in the review application, are that the arbitrator:

- a. committed gross misconduct in relation to the duties of the commissioner as an arbitrator; alternatively
- b. committed a gross irregularity in the conduct of the arbitration proceedings; alternatively
- c. exceeded his powers.

[29] These grounds of review are all *prima facie* legally valid and permissible.

[30] 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.

[31] I am satisfied that 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*

[32] 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.

[33] If the revival/reinstatement application is not successful, the Applicant will be deprived of the opportunity to have its review application fully ventilated

before this Court which could potentially result in the Award being reviewed and set aside, and, *inter alia*, the matter being remitted back to the Bargaining Council for a *de novo* pre-dismissal arbitration before a different arbitrator during which proceedings the Applicant may be permitted to call the witnesses which it was precluded from calling previously. In those circumstances, the Applicant would be precluded from presenting all its available evidence and fully ventilating its case during the pre-dismissal arbitration proceedings against the First Respondent in relation to allegations of serious misconduct pertaining to procurement irregularities, non-disclosure of interests and/or gambling activities in various casinos.

[34] If the revival/reinstatement application is successful, and the review application is ultimately determined by this Court and is it dismissed, the *status quo* will remain intact - i.e., the First Respondent, whose suspension was uplifted by the Award during February 2022 and who returned to work during February 2022 in terms of the Award, will continue to be employed by the Applicant. This Court may also award costs against the Applicant if the First Respondent elects to oppose the review application and the review application is dismissed. There does not appear to be any ongoing prejudice accruing to the First Respondent at this stage as a consequence of the delay in finalising the review application.

[35] The prejudice to the Applicant if reinstatement is not granted, namely that it's review application will not be ventilated before this Court, outweighs any possible prejudice that the First Respondent may suffer if the review application is reinstated, alternatively, any prejudice that the First Respondent could suffer may be ameliorated by a cost order. In my assessment therefore, the balance of convenience therefore favours the Applicant in my view.

[36] In *Steenkamp and Others v Edcon Limited*<sup>8</sup> the Constitutional Court re-affirmed that granting condonation must be in the interests of justice and

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<sup>8</sup> [2019] 11 BLLR 1189 (CC), specifically the Constitutional Court's second judgment.

referred with approval to its decision in *Grootboom v National Prosecuting Authority*<sup>9</sup>:

[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 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*

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<sup>9</sup> 2014 (1) BCLR 65 (CC) at para 20.

*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.”<sup>10</sup>*

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

[37] Taking into account all the relevant factors, and in particular, that the delay is not excessive (when viewed in context), the review application would not have been deemed to have been withdrawn if the Bargaining Council had provided the complete Record timeously, there is an explanation for the delay which is satisfactory and granting the revival/reinstatement would not prejudice the First Respondent, my assessment is that that it is in the interests of justice to revive/reinstate the review application.

### Synopsis

[38] 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.

[39] 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 review application are established when the review application is considered.

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<sup>10</sup> Ibid at paras 22-3 and 51.

[40] The application was not opposed by any of the Respondents and the delay in filing a complete Record has not been unduly prejudicial to the First Respondent. 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.

[41] 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.

[42] 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 J158/2022 is revived/reinstated.
2. The court file under case number J158/2022 is to be retrieved from archiving.
3. There is no order as to costs.

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Mendel Sass

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate TP Kruger SC instructed by the State Attorney  
(Attorney G Kock)

For the Respondents: No appearances.