



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR1862/22

In the matter between:

DEPARTMENT OF HEALTH NORTH WEST

Applicant

and

**HEALTH AND OTHER SERVICE PERSONNEL
TRADE UNION OF SOUTH AFRICA (HOSPERSA)
on behalf of M M MOLAMU, T J GASELAHLE and
K L GAREOGANEWE**

First Respondent

ANNELIE BEVAN N.O.

Second Respondent

**PUBLIC SERVICE AND CO-ORDINATING
BARGAINING COUNCIL**

Third Respondent

Heard: 19 July 2025

Delivered: 17 November 2025

Summary: The Applicant applied for condonation for the late filing of a review application and sought to set aside an arbitration award granting grade progression from salary level 6 to 7 to three employees under Resolution 3 of 2009, despite their posts being graded at level 5. The Court granted condonation despite the excessive delay and the poor explanation, given the applicant's strong prospects of success. The Court reviewed and set aside the

award for the commissioner's material error in interpreting the resolution, substituting it with an order that the department correctly applied the clause, as grade progression is tied to the post's grading rather than the employee's remuneration level, and no costs were ordered.

JUDGMENT

COOK, AJ

Introduction

[1] In this opposed matter, the Applicant seeks:

1.1 Condonation for the late filing of the review application;

1.2 Reviewing and setting aside an arbitration award issued by the Second Respondent (the commissioner) under case number PSCBC 107/194/2020 dated 14 February 2020 (the award).

The condonation application

The length of delay

[2] Nowhere in the affidavits filed, or even in the heads of argument, does the Applicant indicate the length of the delay.

[3] The Applicant received the award on 14 February 2020. Accordingly, the review should have been filed on or before 27 March 2020.

[4] The review was served on the Third Respondent on 30 August 2022⁷ and on the First Respondent on 7 September 2022. However, the review was only filed in court on 8 November 2022.

[5] The review was accordingly served 611 court days late on the First

Respondent and filed 655 court days late.

[6] The delay is clearly excessive.

Explanation for the delay

[7] The Applicant submits that, in essence, the lateness was due in part to the coronavirus outbreak and to the inaction of the Office of the State Attorney.

[8] The explanation provided by the Applicant is not acceptable.

[9] The Covid-19 pandemic did not prevent the parties from communicating by email or remotely. The explanation regarding the actions taken with the State Attorney reflects negligence on the part of both the State Attorney and the counsel briefed, as well as a lack of diligent follow-up by the Applicant.

[10] The Courts have frequently repeated warnings that there is a limit beyond which a litigant cannot escape the results of their legal representative's lack of diligence or the insufficiency of the explanation tendered.¹

Prospects of success

[11] In *Government Printing Works v Public Service Association and another*², the Labour Appeal Court set out the principles in respect of condonation:

[27] This description evokes a balancing approach, characterised by proportionality and flexibility. The general principle remains that the various factors are to be considered collectively, and not mechanically, in determining the interests of justice.³ While no single factor is ever likely to be decisive, the prospects of success in favour of the party seeking condonation is usually an important factor to be

¹ *Superb Meat Supplies CC v Maritz* (2004) 25 ILJ 96 (LAC).

² [2025] 2 BLLR 112 (LAC).

³ *Grootboom v National Prosecuting Authority and another* 2014 (2) SA 68 (CC); (2014) 35 ILJ 121 (CC) (*Grootboom*) at para 51.

considered⁴. Only in exceptional circumstances would a party's disregard for delay and delay in pursuing a matter justify completely overlooking the merits of the case.⁵ The Western Holdings principle is, in a sense, less exacting and now appears to have been overtaken by the approach of the Constitutional Court. In the words of Zondo J, 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" (own emphasis).⁶ The prospects remain relevant, it seems, even "where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party."⁷

[28] The endorsement of these sentiments in Steenkamp highlights its significance⁸. Steenkamp's single-sentence synthesis of the majority and minority expressions in Grootboom appears to put the settled approach beyond doubt⁹:

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

[29] The effect is that an approach which completely ignores the prospects of success on the merits whenever there is an unsatisfactory, unreasonable or unacceptable explanation for a delay, requires

⁴ *Brummer v Gorfil Brothers Investments (Pty) Ltd and others* [2000] ZACC 3 (CC); 2000 (5) BCLR 465 (CC) at para 3, as cited in *Grootboom* above fn 5 para 50.

⁵ See the minority judgment of Wallis AJ in *Toyota* above fn 2 at para 191. Also see *Von Abo v President of the Republic of South Africa* [2009] ZACC 15 (CC); 2009 (10) BCLR 1052 (CC) at para 19, considering both the explanation for the delay and the prospects of success. In *Van Wyk* above n 54, for example, the delay was inordinate and there was no explanation for a delay of 11 months. In *Grootboom*, although the periods of delay may not have been excessive, the legal representatives had inexcusably "adopted a trend of flagrantly, if not recklessly, failing to comply with directions of the Court" for which there was no explanation: above fn 5 at paras 23–27 and 29. Cf *Council for Mineral Technology* above fn 16 at para 10.

⁶ *Grootboom* above fn 5 at para 51, as cited in *Steenkamp* above fn 13 at para 36. Also see *SA Post Office Ltd* above fn 47 at para 20.

⁷ *Ibid.*

⁸ Cf *Commissioner, South African Revenue Service v Van der Merwe* 2016 (1) SA 599 (SCA) (*Van der Merwe*) at para 19.

⁹ *Steenkamp* above fn 13 at para 37. Also see *A Hardrodt (SA) (Pty) Ltd v Behardien & others* (2002) 23 ILJ 1229 (LAC) at para 5; *Govender & others v Commission for Conciliation, Mediation & Arbitration & others* (2024) 45 ILJ 1197 (LAC) (*Govender*) at para 81.

explication.¹⁰ There does come a time in any case where a party's disregard for procedure and delay in pursuing a matter is so extensive that they will be penalised irrespective of the merits of the case.¹¹ The SCA has confirmed that an assessment of prospects of success is a relevant factor in the exercise of a discretion regarding condonation, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation "obviously unworthy of consideration"¹². It is in cases of "flagrant", "gross" breaches of the rules, especially in the absence of an acceptable explanation, that condonation may be refused regardless of the merits of the appeal, even where the blame lies solely with the legal representative.¹³ In this court, it has been acknowledged that excellent prospects of success lead to the granting of condonation even when the delay is substantial and the explanation inadequate.¹⁴ (emphasis added)

- [12] Despite the excessive delay and the unsatisfactory explanation, do the Applicant's prospects of success nonetheless outweigh the inadequacy of the explanation for such an excessive delay?
- [13] The arbitration proceedings concerned the interpretation and application of Dispute Resolution 3 of 2009, a collective agreement. The arbitration was set down and heard on 21 November 2019. The parties indicated that the matter could be decided on paper.
- [14] The commission was required to determine whether the Applicant correctly interpreted and applied clause 3.6.2.2 of Resolution 3 of 2009 (the resolution) and whether the Applicant refused to grade progress the employees.
- [15] The issue in dispute was whether the employees qualified to progress from

¹⁰ See, for example, *National Union of Mineworkers & others v Western Holdings Gold Mine* (1994) 15 ILJ 610 (LAC) at 613D–E; *Council for Mineral Technology* above fn 16 para 10; *Chetty* above fn 34 at paras 10, 29. In any event, that approach cannot be inflexible: *SA Post Office Ltd* above fn 47 at paras 22–23. Cf *Steenkamp* above fn 13 para 41, in relation to condonation in the case of employer delays in disputes over individual dismissals.

¹¹ See the minority judgment of Wallis AJ in *Toyota* above fn 2 at para 191.

¹² *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) (*Rennie*) at 131H–J.

¹³ *Ferreira v Ntshingila* 1990 (4) SA 271 (AD) (*Ferreira*) at 281J–282.

¹⁴ *Govender* above fn 61 at para 81. Also see *Moodley v Department of National Treasury & others* (2017) 38 ILJ 1098 (LAC).

salary level 6 to level 7 under the resolution.

[16] The commissioner found that clause 3.6.2.2 of the resolution sets out the qualifying criteria for grade progression.

[17] The commissioner held:

‘The only sensible interpretation that one can reach from clause 3.6.2.2 is that an employee who is on a certain salary level is entitled to grade progression if there is compliance with the two requirements. Should the employee’s post be job evaluated in future, it simply means that a certain weight is now attached to the post, but if the employer is already on a higher salary level, on completion of the 15 years of service and required performance assessment, the employer will be entitled to move to the next salary level through grade progression. The grade progression will not have an impact on the weight attached to the post. This is the only way that a principal job evaluation can have an impact on grade progression as provided for in Section 3.6.2.2.’

[18] The commissioner was of the view that neither the resolution nor any of the circulars issued by the DPSA specifically addressed the practical implications of grade progression when a post is downgraded and the incumbent continues in the downgraded post, while retaining the salary level from before the post was downgraded.

[19] The commissioner found:

‘I am respectfully of the opinion that the First Respondents arguments relating to the interpretation of clause 3.6. 2.2 of the resolution leads to an absurdity or to some repugnance, which can never be the intention of the parties. In my mind this defies the purpose of grade progression for average performance in clause 3.6 of the resolution. The purpose of grade progression was to present average performance with career advancement due to the effluxion of time – in this case, 15 years of continuous service (see clause 3.6.2.11) - coupled with satisfactory performance assessment. These two elements fall within the control of the employee; if an employee is loyally serving the Respondent for a continuous period of 15 years on the same salary level and keeping his or

her performance acceptable, then the employee could grade progress to the next salary level. Taking into consideration the prior time period, it goes without saying that one employee will most probably only benefit from the clause in the Resolution once or at most twice and all his/her years of service in the public sector.'

[20] The commissioner ruled:

- '49. The Respondent has incorrectly interpreted and applied paragraph 3.6.2.2 of Resolution 3 of 2009.
- 50. The Respondent is ordered to grade progress the Applicants from salary level 6 to salary level 7 effectively from the following dates:
 - 50.1 The Applicant Gasealahwe, T: 1 March 2013;
 - 50.2 The Applicant Gareoganelwe, L: 3 April 2014; and
 - 50.3 The Applicant Molamu, M M: 1 March 2015.
- 51. The Respondent is to pay progress the Applicants on/or before 20th March 2020.'

[21] In *Sugar Berry CC t/a Horison Staff Solutions v Motor Industry Bargaining Council and Others*¹⁵, the Labour Appeal Court held:

- '[33] More than a decade ago this Court has held that a collective agreement concluded in terms of the LRA is not an ordinary contract. Therefore, the context within which such an agreement operates is different from that of a commercial contract. Collective agreements operate within the framework established by the LRA and the interpretation thereof ought to be approached with the objects and purpose of the LRA in mind¹⁶.

[34] In *North East Cape Forests v SA Agricultural Plantation & Allied*

¹⁵ (CA20/24) [2025] ZALAC 48 (2 October 2025)

¹⁶ Du Toit Labour Relations Law – A Comprehensive Guide 7th ed. at 366.

*Workers Union & others*¹⁷, Froneman DJP stated:

‘It is, in my view, quite clear that these primary objects of the Act are better served by the practical approach to the interpretation and application of the collective agreement as set out in the judgment of Myburgh JP, rather than by reference to purely contractual principles. On the particular facts of this case the object of orderly collective bargaining and effective expression of the fundamental right to strike will be frustrated by the latter approach.’

and

[37] In *eThekweni Municipality (Health Department) v Independent Municipal & Allied Trade Union on behalf of Foster & others*¹⁸, this Court held that a collective agreement must be interpreted “in such a manner as to ensure effective and sound industrial relations”¹⁹. Further, in *Western Cape Department of Health v Van Wyk and others*²⁰, this Court held:

‘In interpreting the collective agreement the arbitrator is required to consider the aim, purpose and all the terms of the collective agreement. Furthermore, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract. Since the arbitrator derives his/her powers from the Act he/she must at all times take into account the primary objects of the Act. The primary objects of the Act are better served by an approach that is practical to the interpretation and application of such agreements, namely, to promote the effective, fair and speedy resolution of labour disputes. In addition, it is expected of the arbitrator to adopt an interpretation and application that is fair to all the parties.’

[22] The Labour Appeal Court, in *Herbert v Head of Education: Western Cape*

¹⁷ (1997) 18 ILJ 971 (LAC) at 980H-I.

¹⁸ (2012) 33 ILJ 152 (LAC).

¹⁹ *Ibid* at para 27.

²⁰ [2014] 11 BLLR 1122 (LAC); (2014) 35 ILJ 3078 at para 22.

*Education Department & others*²¹, provided the following pertinent summary:

‘In MacDonald’s Transport it was found that the LRA did not contemplate that a CCMA or bargaining council arbitrator, both statutory roles, would have the last word on the proper interpretation of an instrument as this would mean that a patently wrong interpretation would be left intact, which ‘would be absurd’. The wrong interpretation of an instrument by an arbitrator could therefore constitute a reviewable irregularity as envisaged by s 145 of the LRA, in the sense that a reasonable arbitrator does not get a legal point wrong. The court concluded that either ‘the reasonableness test is appropriate to both value judgments and legal interpretations. If not, “correctness” as a distinct test is necessary to address such matters’. This view was echoed in NUMSA, in which it was stated that an incorrect interpretation of the law by a commissioner constitutes a material error of law which ‘will result in both an incorrect and unreasonable award’, which ‘can either be attacked on the basis of its correctness or for being unreasonable’.’

Resolution no. 3 of 2009

- [23] Resolution 3 of 2009 of the Public Service Co-ordinating Bargaining Council (the resolution) applies to all government employees on salary levels 1 to 12 not covered by occupational-specific dispensation. The resolution applies to the parties.
- [24] To correctly interpret clause 3.6.2.2 of the Resolution, the other provisions of the Resolution must also be considered.
- [25] The objective of the Resolution was to give effect to clause 5 of Resolution 1 of 2007 by introducing a revised salary structure for occupational categories graded on salary levels 1-12 not covered by any occupation specific dispensation (OSD).
- [26] The relevant clause of the Resolution reads:

²¹ (2022) 43 ILJ 1618 (LAC) at para 24.

'3.5 The grade progression models are based on the following principles:

3.5.1 posts are graded based on the outcome of Job Evaluation;

3.5.2 recognition of performance; and

3.5.3 completed continuous years of service on the salary level irrespective of the notch.

3.6.2.2 With effect from 1 April 2010 (salary adjusted with effect from 1 July annually), an employee on salary level 4, 5, 6 or 7 who has completed 15 years of continuous service on a salary level, irrespective of the notch, and has obtained at least satisfactory rating in his/her performance assessment (the average assessment over the last two year period would determine the performance rating), shall grade (salary level) progress to salary level 5, 6, 7 or 8 respectively. This is not subject to the availability of posts."

3.6.2.4 Employees can only grade progress from salary levels 4 to 5 or from salary levels 5 to 6 or from salary level 6 to 7, or from salary level 7 to 8.

3.6.2.6 An employee is appointed on a post graded on salary level 5, he/she shall only progress to salary level 6.

3.6.2.9 No employee who was appointed on salary level 4, 5 and 6 can grade progress to salary level 6, 7 and 8 respectively, i.e. grade progress over two salary levels. These employees must apply for a vacant funded post that is graded on those salary levels.

3.6.2.10 This provision does not do away with the provision of the job evaluation system in the public service.'

[27] Collective agreements are not the only source of conditions of employment in the public service. Section 5(6) of the Public Service Act, Proclamation 102 of 1994 (the PSA) states:

- '(a) Any provision of a collective agreement contemplated in subsection (4), concluded on or after the commencement of the Public Service Amendment Act, 2007, shall, in respect of conditions of service of employees appointed in terms of this Act, be deemed to be a determination made by the Minister in terms of section 3(5).
- (b) The Minister may, for the proper implementation of the collective agreement, elucidate or supplement such a determination by means of a directive, provided that the directive is not in conflict with or does not derogate from the terms of the agreement.'

[28] On 11 September 2009, Circular No 2 of 2009 was issued by the Department of Public Service and Administration to clarify the interpretation of the Resolution. Circular 29 of 2011 specifically addresses this issue:

'7.9.4 In practical terms, this means the following:

- (b) When an employee is appointed in a post graded on salary level 5, he/she may only progress to salary level 6 while he/she is occupying a post graded on salary level 5.

7.9.5 Therefore, no employee who was originally appointed in a post graded on salary 4, 5 and 6 respectively can grade progress to salary levels 6, 7 and 8 respectively – therefore grade progress over two salary levels while occupying the same graded post."

[29] There is no conflict between the directive and Resolution 3 of 2009.

[30] In the *MEC for Public Works and Roads North West and Another v Public Service Co-ordinating Bargaining Council and Others*²², the Labour Court held:

- '[24] A decision-maker's sense of fairness cannot be used as a means of compelling parties to a collective agreement into an agreement other than the one they concluded.

²² (JR842/17) [2023] ZALCJHB 6 (12 January 2023) [23].

- [25] Clearly clause 3.6.2.2 of the Collective Agreement cannot be read in isolation but must be read in the light of the Collective Agreement as a whole.
- [26] The Commissioner's award does not deny that the employees' occupation was graded at salary level 5 based on a job evaluation process in 2012. Further, the Commissioner's award pays no attention to the fact that the grading and job evaluation process was meant to address the remuneration disparities that were caused by the abolished Rank and Leg Promotion Dispensation.
- [27] The Commissioner's award incorrectly downplays the importance of the grading and job evaluation process. The words used in clauses 3.5 and 3.6.2.5 to 3.6.2.8 of the Collective Agreement make it clear that grading and job evaluation are one of the principles that govern grade progression. Rewarding employees for their length of service is not the only purpose of the Collective Agreement. A reference to job evaluation in these provisions of the Collective Agreement necessarily means the purpose of job evaluation is imported into the Collective Agreement, which purpose is to ensure that work of equal value is remunerated equally as set out in the provisions of the Public Service Regulations of 2001 quoted above. The Commissioner did not at all consider this important principle of equal pay for work of equal value espoused by the requirement of job evaluation in the Collective Agreement. This was a material error on the part of the Commissioner in her interpretation of the Collective Agreement, which resulted in unfairness to the employer party to the Collective Agreement and amounted to unreasonableness in the performance of her statutory function.
- [28] Although clause 3.6.2.2 of the Collective Agreement refers to an employee on a salary level and does not expressly refer to job grading and job evaluation, clauses 3.6.2.5 to 3.6.2.8 of the Collective Agreement clarify that an employee can only grade-progress from the graded position he or she occupies to the next salary level. Clauses 7.6.1 and 7.9 of Circular 2 of 2009, which must be taken into account when interpreting the Collective Agreement, emphasise the same

point. The Commissioner's failure to consider these clauses was a material misdirection that rendered her award unreasonable.

- [29] The Commissioner's attempt to side-line the requirements of grading and job evaluation constitutes making a new contract for the parties other than the one they concluded, and is inconsistent with the following findings of this Court in *Tabane*:²³

"[23] ... I agree with the submissions made on behalf of the Department that clause 3.5 of the Resolution should be read conjunctively with clause 3.6, which set out the salary structure of the model. Accordingly, the fact that an employee has served 12 cumulative years in a grade is not a basis for an automatic grade progression, as any grade progression is based on a variety of factors, including job evaluation, recognition of performance and obviously the cumulative 12 years."

...

- [29] To the extent that it was submitted on behalf of the Applicant that these circulars were in conflict with the provisions of the Resolution, and further to the extent that the Commissioner had regard to them, it is important to highlight that clause 7. 6 of circular 2 of 2009 provides that the grade progression model is introduced based on the principle that posts are to be graded based on outcome of the job evaluation unless indicated otherwise, and that the grade determined with job evaluation formed the basis from which employees could be grade progressed. This provision cannot by all accounts be in conflict with the provisions of clause 3.5 of the Resolution, which also outlines the principles applicable to grade progression, including that of an outcome of job evaluation. As already indicated however, the Commissioner paid scant regard to these principles or requirements" (my emphasis).

²³ *Tabane v Vlieger-Seynhaeve N.O. and Others* (C27/15) [2017] ZALCCT 43 (28 September 2017), at paras 23 and 29.

[30] In a nutshell, the Collective Agreement read with Circular 2 of 2009 does not allow the employees to be grade-progressed to salary level 7 because their positions are not graded at salary level 6 but are graded at salary level 5. The fact that they are remunerated on salary level 6 whilst occupying positions that are graded on a lower salary level is an anomaly the Collective Agreement meant to rectify. Thus, the Commissioner should not have granted the employees a grade-progression to salary level 7 and her decision to do so was based on a material misinterpretation of the Collective Agreement. This Court recently reached a similar conclusion in *The Department of Health: KwaZulu-Natal*.²⁴

[31] In *Department of Health: KwaZulu-Natal and Another v Commissioner Ngcengeni and Others*²⁵, the Labour Court held:

[32] In consideration of the aforementioned, it is clear that the term 'salary level' was intended to apply to the salary level applicable to the grade at which the incumbent had been appointed. To find otherwise, that 'salary level' was intended to mean the salary level at which the incumbent was remunerated, would lead to absurd results, and would also conflict with the remaining clauses in the Resolution.'

Analysis

[32] The overarching principle of the grade progression model introduced by the Resolution is that posts are graded based on the outcome of job evaluation, and the post's grade, not the employee's remuneration level, determines the parameters for grade progression.

[33] A proper and contextual reading of the Resolution and circular makes it clear that all three conditions of the grade progression model must be met for an employee to qualify for grade progression. These are:

²⁴ *The Department of Health: KwaZulu-Natal and Another v Commissioner V Ngcengeni and Others* (0967/2019) [2022] ZALCD 36 (15 August 2022).

²⁵ (0967/2019) [2022] ZALCD 36 (15 August 2022).

33.1 The job evaluation of the post,

33.2 Continuous years of service, and

33.3 Satisfactory performance.

[34] These conditions are interlinked and must be applied collectively. None of the conditions can be read or applied in isolation.

[35] The term “salary level” in this context refers to the level applicable to the graded post on which the employee was appointed, rather than the salary level at which the employee is remunerated. Interpreting “salary level” as the actual remuneration level would yield absurd and inconsistent results, undermining the integrity of the grading system and conflicting with other provisions of the Resolution.

[36] In this case, the employees occupy posts graded at salary level 5, yet they are remunerated at salary level 6. This situation is a historical anomaly resulting from the discontinued Rank/Leg Promotion Dispensation, which allowed employees to be paid above the grade level of their posts. Such employees are considered “out of adjustment”.

[37] The employees’ current salaries exceed the grading of their posts. Their positions are formally graded at salary level 5, and they therefore cannot grade progress to level 7, as this is expressly prohibited by clauses 3.6.2.6 and 3.6.2.9 of the Resolution and 7.9.4(b) of the circular.

[38] This restriction stems from the principle that grade progression is tied to the formal grading level of the post, rather than the salary level at which the incumbent is currently paid, especially when the latter is higher due to historical anomalies.

[39] Clause 3.6.2.6 provides that an employee appointed to a post graded at salary level 5 may only progress to salary level 6. Clause 3.6.2.9 reinforces this by stipulating that no employee appointed on salary level 5 may grade

progress to salary level 7, as this would constitute progression over two salary levels, which is explicitly prohibited. Employees who wish to move beyond the next level must apply for a vacant funded post graded at the higher level.

- [40] Because these employees are already remunerated at salary level 6, the maximum permissible progression for a post graded at level 5, they have effectively reached the ceiling within their current graded posts. They are therefore not entitled to further grade progression to level 7.
- [41] The three employees are already benefiting from being remunerated at salary level 6 despite occupying posts graded at salary level 5. They are accordingly not entitled to any further benefits and are not eligible to progress to level 7.
- [42] Clause 3.6.2.2 cannot be interpreted in isolation to justify progression beyond this ceiling. On a proper reading of the Resolution as a whole, all three conditions of the grade progression model must be satisfied simultaneously, and the grading of the post remains the decisive criterion.
- [43] The commissioner erred in law by failing to consider the aim, purpose, and full context of the collective agreement and the relevant circulars. Instead, the commissioner's interpretation of clause 3.6.2.2 was based on a misguided reliance on the perceived intention of the parties and on considerations of fairness, rather than on the clear, unambiguous wording of the Resolution and its directives. This approach led to an unreasonable, inconsistent, and unfair interpretation for all parties.
- [44] Accordingly, the commissioner's interpretation and resultant award rest on a material error of law, rendering the award both incorrect and unreasonable.

The importance of the case

- [45] This matter concerns a salary increase for public servants and is accordingly important not only to the parties but also to the public in general.
- [46] Consequently, justice would be best served if the matter were to be

determined on the merits.

Costs

[47] In *Zungu v Premier of the Province of KwaZulu-Natal & others*²⁶, the Constitutional Court held:

‘The rule of practice that costs follow the result does not apply in Labour Court matters.’

[48] The Labour Appeal Court in *Member of the Executive Council v Finance, KwaZulu-Natal & another v Dorkin NO & another*²⁷ held:

‘[19] The rule of practice that costs follow the result does not govern the making of orders of costs in this Court. The relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and fairness.’

[49] The Court has a wide discretion to order costs. However, there are no compelling reasons in accordance with the requirements of the law and fairness to order costs in light of the ongoing relationship between the parties.

Conclusion

[50] The Applicant’s interpretation of the Resolution was not incorrect, and the Applicant correctly applied clause 3.6.2.2.

[51] The commissioner’s arbitration award constitutes a material error of law to the extent that the determination she arrived at is unreasonable and thus cannot

²⁶ (2018) 39 ILJ (CC).

²⁷ (2008) 29 ILJ 1707 (LAC).

be sustained. The arbitration award, therefore, falls to be reviewed and set aside.

[52] In light of the excellent prospects of success, it would not be in the interest of justice, despite the unacceptable explanation for the delay, to refuse condonation.

[53] Consequently, the Court makes the following order:

Order

1. Condonation is granted for the late filing of the review.
2. The arbitration award dated 14 February 2022, issued by the Second Respondent acting in her capacity as arbitrator for the Third Respondent under case number PSCBC 107-19/20, is reviewed and set aside.
3. The award is substituted with an order that the Applicant correctly applied and interpreted clause 3.6.2.2 of the resolution 3 of 2009.
4. There is no order as to costs.

A.L. Cook

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: L. Kalashe

Instructed by: Khumalo and Apie Attorneys

For the Respondent: Adv. Tau Munatsiwa

Instructed by: Martin Kubayi Attorneys

LABOUR COURT