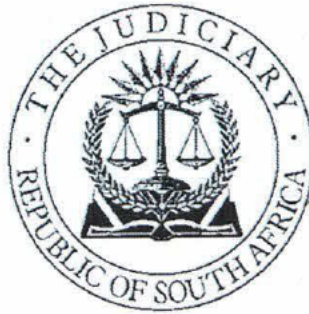




(1) Reportable	Yes/No
(2) Of interest to other Judges	Yes/No
(3) Revised	
Signature	Date

[Signature] *12 Dec 25*

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no : C259/22

In the matter between:

MHLELI MHLABA

Applicant

and

CCMA AND COMMISSIONER

MELVYN NASH

First And Second Respondent

FAWU

Third Respondent

MNGOMEZULU MAYOYO

Fourth Respondent

Heard : 17 September 2025

Delivered : 12 December 2025

Summary : Points in limine "**DEEMED WITHDRAWN**" Erstwhile Practice Manual Clause 11.2.1 to 11.2.3 – Late filing of records and review application - archived – Condonation application for the review application and re-instatement of the review application.

JUDGMENT

GURA, AJ

Introduction

- [1] This judgment specifically deals with the interlocutory application by the third and fourth respondent wherein they raise the following preliminary points:
- 1.1 The applicant failed to timeously serve the record on the third and fourth respondent's appointed address and thus the review application is deemed withdrawn and or lapsed (first preliminary point);
 - 1.2 the applicant failed to timeously file the record, and thus the review application is deemed withdrawn and or lapsed (second preliminary point);
 - 1.3 the applicant instituted the review application outside the six week period stipulated by section 145 (1)(a) of the Labour Relations Act¹ (the LRA), without an application for condonation, and thus the review application is not properly before this court (third preliminary point);

Background

- [2] The point of departure by the Applicant in his Heads of Arguments in reply to the Third and Fourth Respondent's Supplementary Heads to the points *in limine*, was that latter raises last minute preliminary issues in a painstaking effort to block the review from being adjudicated on the merits. The Applicant thus proceeded to deal with the three preliminary points respectively.

First Preliminary Point - the wrong address issue

- [3] The Respondent's point of departure herein was to quote the judgment of *Moraka v National Bargaining Council for the Chemical Industry and others*² where La Grange J confirmed:

¹ Act 66 of 1995, as amended.

² (2011) 32 ILJ 667 (LC) at para 9.

‘Once a party has elected an address for service and properly notified the opposing party of that address, it is entitled to assume that any service will be effected at that address and nowhere else.’

- [4] Argued that by the Applicant’s own admission, did not serve the record on the third and fourth respondents’ elected address, but rather on an alternative address³. The service was thus defective. The Applicant only served the record on the third and fourth respondent’s elected address on 28 January 2025, more than two years after expiry of the 60 day period contemplated in clause 11.2.3 of the Practice Manual, the review application is deemed withdrawn. The Respondents proceeded to quote in their footnote, the case of *Shoba Zikhali v Technology Innovation Agency and Others*⁴, where the Labour Court held that if an applicant does not serve the record on the respondents the applicant has not complied with the requirements of rule 7A(6) of the Labour Court Rules. Van Niekerk J (as he then was) held:

‘Rule 7A(6) refers to the obligation to “furnish” the Registrar and other parties with a copy of the transcribed records, while clause 11.2.2 of the Practice Manual requires the applicant to “file” the record. The only sensible interpretation to be accorded clause 11.2.2 is that the obligation to file the record is no different to the obligation to ‘furnish’ the record for purposes of Rule 7A(6) ... The Applicant does not dispute that the transcribed record was furnished to the first respondents months late. There is no record of any request addressed to the Judge President for a direction. In the absence of compliance with Rule 7 A (6) ... The applicant does no dispute that the transcribed record was furnished to the first respondent months late. There is no record of any request for any extension within which to furnish the record, nor is there any record of any request addressed to the Judge President for a direction. In the absence of compliance with Rule 7A (6) read with clause 11.2 of the Practice Manual, the applicant is deemed to have withdrawn the review application.’⁵

- [5] Respondents thus submitting the Applicant’s service was defective as he served the record on the third and fourth respondent’s elected address on 28 January 2025, more than two years after the expiry of the 60 day period

³ Applicant’s Answering Affidavit : Preliminary Points at para 26.

⁴ (D 1462/2019) [2022] ZALCD 1 (22 February 2022).

⁵ Ibid at paras 10 and 11.

contemplated in clause 11.2.2 of the Labour Court Practice Manual (the Practice Manual) and therefore the review application is deemed withdrawn.

- [6] The Applicant's reply in relation to this first point *in limine* submitted that the respondent notified both the court registrar and the applicant by email that they chose their attorneys address as the address where all service will be received, as outlined in their Notice of Opposition. What the Respondents failed to do is to file the Notice in court as outlined in the court directive that was issued during the Covid-19 pandemic, Labour Court Judge President Practice Directive 02/2022. In terms of the Directive clauses 1 (a), (b) and 2(a), the service email should be followed by a contact and service affidavit, and thereafter it should be filed in court as soon as possible. Applicant argued further that there is no record that the respondent attorneys filed the Notice of Opposition in court in line with the court's directive. Both the registrar and the applicant were thrown off by that due to lapse of time, hence Registrar enrolled the matter on the unopposed roll and had to withdraw and re-enroll it as opposed. The application was withdrawn by agreement between the parties after Applicant filled Notice of Objection (Irregular Step). Lastly, Applicant humbly submitted that there was thus no filling of the Notice of Opposition in court.

Second Preliminary Point – Late Filing of Record

- [7] Respondents argued that the record was filed late. On 27 June 2022 the Registrar notified the Applicant that the record was available for collection in terms of Rule 7A (5) of the erstwhile Labour Court Rules. Its common cause that the Applicant uplifted the record from the Labour Court on 28 June 2022 and accordingly arranged transcription of the records by emailing same to the transcriber. Portion of the records were however illegible, thus the Applicant uplifted the records yet again and provided them directly to the transcriber. The second transcription was legible and was filed on 21 October 2022. Respondents argued that the Applicant seems to suggest that the second upliftment to re-transcribe the illegible portions of the records interrupted the 60 day period contemplated in clauses 11.2.2 and 11.2.3 of the erstwhile Practice Manual. Thus argued and placed on record that complications in transcribing

the recordings do not interrupt the 60 day period⁶. If the Applicant encounters such complications, recourse can be found in the provisions of clause 11.2.3⁷.

- [8] Applicant in response to this point *in limine*, was to the effect that the Respondents misunderstand the wording of clause 11.2.3 as in accordance with his understanding this refers to a situation where the record is delayed, and this is not the position herein.

Third Point *in Limine* - No Application for Condonation by the Applicant

- [9] As a point of departure, Respondents argued that the review application was instituted outside the six week period contemplated in section 145 (1)(a) of the LRA. Applicant conceded that the Second Respondent served the arbitration award on him on 14 April 2022 by email. Applicant however only became aware of the award on 18 April 2022. Further that the CCMA is to have made a follow up call to confirm and or alert him and did not. That 18 April 2022 is the date he became aware of the award using Ronald Mbana 's computer as he did not have emails nor a sophisticated phone that received emails, as he handed same back to the erstwhile Employer. Thus, Applicant conceded to being late by two days, after counting 14 April 2022 as per the Respondent's argument. Thus, as per Applicant's calculations and in accordance with section 145 (1)(a) of the LRA, the award reviewed was filed on 2 June 2022 within 44 days from the day it was served. The Respondents argued that if the Applicant's argument was to be entertained that the days should be calculated as at 14 April 2022 he would have had to institute the review by 26 May 2022, which makes the review application seven days late. Further, if 18 April 2022 is to be used as the date of calculation of the six week period, application fell due on 30 May 2022 and is thus still late. Thus Respondents argued that the review application is not properly before the court.⁸

⁶ See: *Muleya V South African Post Office SOC Limited and Others* (JR2107/21) [2025] ZALCJHB 143 (14 May 2025); *Madikizela v CCMA and Others* (D382/22) [2024] ZALCD42 (7 November 2024); *Bophelong Construction (Pty) Ltd v BCEI and Others* (J356/24) [2024] ZALCJHB 176 (2 May 2024).

⁷ See: *Overberg District Municipality (ODM) v IMATU obo Spangenberg and Others* (C 157/18) [2020] ZALCCT 38 (10 June 2020).

⁸ See: *PT Operational Services (Pty) Ltd v RAWU obo Ngweletsana* (2013) 34 ILJ 1138 (LAC).

- [10] Respondents thus argued that the court lacks jurisdiction to adjudicate the Applicant's review application for at least the above 3 distinct reasons. Firstly, there is not review application before this Court as it was filed outside the prescribed time limit; secondly, the review application is deemed withdrawn and or lapsed as Applicant did not serve same on the Respondent's appointed address until January 2025; and lastly, the application is deemed withdrawn and/or lapsed as Applicant did not file the review record within the prescribed 60 days.

The Law

- [11] Paragraphs 11.2.2 to 11.2.2 of the Practice Manual provided as follows :

'11.2 Applications to review and set aside arbitration awards and rulings

11.2.1 Once the registrar has notified an applicant in terms of Rule 7 A (5) that a record has been received and may be uplifted, the applicant must collect the record within 7 days.

11.2.2 For the purposes of Rule 7 A (6), records must be filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received.

11.2.3 If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given. If consent is refused the applicant may on notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties and answering and replying affidavits may be filed within the time limits prescribed by Rule 7. The Judge President will then allocate the file to a judge for ruling, to be made in chambers, on any extension of time that the respondent should be afforded to file the record"

- [12] The Labour Appeal Court (LAC) in the matter of *SAMWU obo Shongwe and Others v Moloi N.O and Others*⁹ held that:

“In IMATU, this Court held in respect of the delay in the prosecution of a review brought in terms of the LRA, essentially, that the Labour Court has the discretionary power to dismiss a review for that reason, but it was a power that had to be exercised with circumspection and in exceptional circumstances, because of a litigant’s rights in terms of section 34 of the Constitution to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court. It was held further there, that in the exercise of that discretion, the delay must not be considered in a vacuum, but must be evaluated in light of the relevant facts, including the prejudice of the parties, the possible consequences of granting the relief sought in respect of the merits, and the prospects of success, although there is no close list. This Court also held that, ultimately the interests of justice are paramount.”

- [13] In *City of Johannesburg Metropolitan Municipality and Others v Independent Municipal and Allied Trade Union and Others*¹⁰ the LAC held:

“[55] Having found that there has been an inadequately explained unreasonable delay, the court nevertheless retained the discretion to determine the application on its merits. In other words, the Court a quo, in the exercise of its discretion had to decide whether it was going to deal with the merits despite the delay. The delay cannot be evaluated in isolation or in vacuum but must be evaluated taking into account at least the following :the potential prejudice to the affected parties,the possible consequences if granting the relief sought and the effect of not granting it or not dealing with the matter on the merits.

[56] The nature of the application and the strength of the merits may also either favor or not favor overlooking the delay. Unfortunately, the Court aquo came to a conclusion that the application stood to be dismissed by looking at the issue of delay in isolation ...

[76] The Court a quo erred in dismissing the application because of the delay, without considering ,whether, in light of factors such as the right

⁹ [2021] 5 BLLR 464 (LAC) at para 26.

¹⁰ (2017) 38 ILJ 2695 (LAC) at paras 55, 56, and 76.

of the parties in terms of section 34 of the Constitution, the importance of the matter, the prospects of success of the application, the potential prejudice of the parties, including the consequences of not granting the relief sought and of not finalizing the application on its merits, it should, nevertheless, entertain the application, despite the delay, and concluding accordingly...'

[14] In *Samuels v Old Mutual Bank*¹¹ it was held that:

"In essence, an application for the retrieval of the file from 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; the applicant provide a reasonable explanation which covers the entire period of default and shows that he/she has reasonable prospects of success in the main application, and lastly that it is in the interests of justice to grant the order. It is not a requirement that the applicant deal fully with the merits of the dispute to establish prospects of success, it is sufficient to set out facts which if established, would result in success. In the end, the decision to grant or refuse condonation is a discretion which must be judicially exercised."

[15] Authority is to the effect that the court has a wide discretion whether condonation should be granted which should be exercised judicially, on the consideration of each and every case¹². That condonation is not merely there for the asking¹³. The court's discretion is furthermore not absolute or unqualified and must be exercised in accordance with certain recognized principles. What is mainly required for the Applicant is to show good cause when applying for condonation.

[16] The courts have laid down factors, although not exhaustive, which have been identified as being relevant to the consideration of whether or not an Applicant for condonation, has succeeded in showing good cause for condonation¹⁴. The

¹¹ (2017) 38 ILJ 1790 (LAC) at para 17.

¹² See: *S v Yusuf* 1968 (2) SA 52 (A) at para 53.

¹³ See: *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) at para 6.

¹⁴ See: *TLE (Pty) Ltd v The Master of the High Court and Others* 2012 (2) SA 502 (GSJ) at para 12; *Express Model Trading 289 CC v Dolphin Ridge Body Corporate* [2014] 2 All SA 513 (SCA) at pages 11 and 19; *Subramanian v Standard Bank Ltd* [2013] JOL 30321 (KZP) at para 12 and *Gumede v Road Accident Fund* 2007 (6) SA 304 (C).

application must be made *bona fide*, the Applicant must show that it has reasonable prospects of success¹⁵. The degree of non-compliance and the explanation for the delay¹⁶. The importance of the case¹⁷. The nature of the relief sought¹⁸. The other party's interest in finality¹⁹. Prejudice to the Respondent which cannot be compensated for by a suitable costs order²⁰. The convenience of the court. The avoidance of unnecessary delay in the administration of justice, and the degree of negligence of the persons responsible for the non-compliance²¹. Willful default or gross negligence will preclude a finding of good cause²². The Applicant must argue that where there are no sufficient prospect of success for lateness to be condoned, the interest of justice is not served by condoning lateness²³. That the explanation for the delay must cover the entire period for the delay²⁴. In *Melane v Santam Insurance*²⁵ the court held that a slight delay and a good explanation may help compensate for prospects of success which are not strong. The Applicant further argued that some allowance must be made for *bona fide* errors and omissions, and fault can only preclude relief in the event of intentional disregard, indifference or gross negligence²⁶.

[17] The approach to an application for reinstatement of the review should be considered in the same light as an application for condonation²⁷, bearing in mind the litigant's right in terms of section 34 of the Constitution of the Republic

¹⁵ See: *Marco Fishing (Pty) Ltd v Gemfarm Investments (Pty) (Ltd)* [2003] 4 All SA 614 (C) paras 31-33 and *Kgantsi v S* [2012] JOL 29402 (SCA) at para 7.

¹⁶ See: *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* 2012 (2) SA 637 (CC) at paras 15 and 16.

¹⁷ See: *Kgobane and another v Minister of Justice* 1969 (3) SA 365 (A) at 369.

¹⁸ See: *Maloney's Eye Properties and another v Bloemfontein Board Nominees BPK* 1995 (3) SA 249 (O) at 253.

¹⁹ See: *Van Wyk V Unitas Hospital and another* 2008 (2) SA 472 (CC) at para 31; *Laerskool Generaal* (Id fn 18) at para 16.

²⁰ *Long v Appeal Authority iro Ndlambe Municipality and Others* [2024] 1 All SA 364 (ECG) at 29.

²¹ Ibid.

²² See: *Securiforce CC v Ruiters* 2012 (4) SA 252 (NCK) at para 12.

²³ See: *Princeton Protection Services (Pty) Ltd v Western Cape Provincial Government and Others and related matters* [2024] 3 All SA 301 (WCC) at 29-30

²⁴ See: *eThekweni Municipality v Ingonyama Trust* 2014 (3) SA 240 (CC) at 28, *Pangbourne Properties Ltd v Pulse Moving CC and Another* 2013 (3) SA 140 (GSJ); *Van Heerden and Another v Master of Eastern Cape High Court, Port Elizabeth and Others* [2023] 4 All SA 875 (ECP) at para 36.

²⁵ See: *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A) at 532 B-E.

²⁶ See: *Burton v Barlow Rand t/a Barlow Tractors and Machinery Co* 1978 (4) SA 794 (T).

²⁷ See: *Tokwe v General Public Service Section and Others* (PR90/19) [2024] ZALCPE (25 July 2024) at para 45.

of South Africa, 1996, and the interests of justice. Should the reinstatement application be refused, the Applicant will suffer significant and irreparable prejudice. It follows that it would in that unfortunate event be deprived of the opportunity of having its case for review determined on the merits.

[18] In the premise the following order is made:

Order

1. The Third and Fourth Respondent's Points in limine are upheld.
2. The Applicant is to bring a condonation application for the late filing of the review application and for the reinstatement of the review application if such late filing is condoned.
3. There is no order as to costs.

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L. Gura

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant : MHLELI MBANA

Instructed by : IN PERSON

For the respondent : CHEADLE THOMPSON & HAYSOM INC.

Instructed by : JEREMY PHILLIPS