



- (1) Reportable ~~Yes~~/No
- (2) Of interest to other Judges: ~~Yes~~/No
- (3) Revised

Signature _____ Date 2026-01-06

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: J1199/17

In the matter between:

NKATEKO KATE MULAUDZI

Applicant

and

MEC OF BASIC EDUCATION

LIMPOPO PROVINCE

First Respondent

KHATUTSHELO ONICA DEDEREN N.O.

Second Respondent

KHAMA MARTIN MASHABA

Third Respondent

Heard: 28 March 2025

Delivered: 06 January 2026

JUDGMENT

MAFA-CHALI, AJ

Introduction

- [1] The Applicant has brought an application to this court seeking to place the respondents in contempt of court as a result of failing to comply with an order dated 14 February 2022. The first respondent is the Limpopo Province Member of Executive Council: Basic Education; the second respondent is the Head of the Department: Limpopo Basic Education and the third respondent is the Deputy Director General for Corporate Management: Limpopo Basic Education.
- [2] The respondents have also brought a rescission application to rescind the court order. The applicant has opposed the rescission application, and the respondents have also opposed the contempt of court application raising points *in limine* regarding the application.

Background

- [3] The applicant is a 68 year old female person, and a former employee of the Department of Basic Education, Limpopo Province. She was employed as an educator since 1977.
- [4] The applicant has already reached the pensionable age and suffered long term ill health since 2004. Since 2004, the Applicant was at home and receiving her salary. According to the Applicant, she was awaiting the first respondent to assign medical practitioners to determine the incapacity in terms of legislation and policies of the public sector governing the first respondent.
- [5] In 2010, the first respondent stopped the salary payment of the applicant. The applicant approached the district of the first respondent, and the payment were reinstated. Again in 2015, the first respondent stopped the salary of the applicant, seemingly on a “no work no pay” principle, and on the basis that the applicant refused to attend examinations by the medical practitioners of the first respondent.

- [6] The first respondent has not instituted disciplinary hearing against the applicant or terminated her employment until she reached her pensionable age and her pension benefits have also not yet been released.
- [7] In 2017, the applicant launched the proceedings at this court and sought an order for reinstatement and her outstanding benefits from the year 2010 to date of reinstatement and an order for the first respondent to comply with the relevant policies of the public sector for medical incapacity, to appoint the Health Risk Manager to determine her incapacity.
- [8] On 21 August 2018, the application was granted in terms of a court order in default against the first respondent. In 2019, the first respondent launched a rescission application of the court order granted in August 2018 which was granted by the Court on 27 August 2019, and the first respondent was granted leave to file a notice of intention to oppose and the answering affidavit in respect of the main application, however, for a period of two years the first respondent did not file the opposing papers.
- [9] On 14 February 2022, again the applicant was granted an order, which the applicant now seeks to hold the respondents in contempt of failing to comply with. The Court order ordered the first respondent to appoint health risk managers, within a period of ten days from the date of the order, to verify the extent of the applicant's illness in accordance with the provisions applicable in the application process for permanent incapacity leave in the public service, to wit paragraph 15.8.2, read with paragraph 16.1 of the government policy on Determinations and Directive on Leave of Absence in the Public Service issued in June 2015, as amended.
- [10] The first respondent was also directed to reinstate and pay all outstanding salaries of the applicant, with effect from February 2010, pending the final determination of the applicant's permanent incapacity leave process in accordance with paragraph 16 of the Determination and Directive on Leave of Absence in the Public Service issued in June 2015 as amended; such as salaries to be paid within 30 days from the date of this order.

- [11] On 28 June 2022, the respondent's attorneys sent correspondence to the applicant's attorneys indicating that the order which directed the Respondent to file the answering affidavit has no time frame, and same should have been done within a reasonable period. It was also mentioned that since the matter was coming as far back as the year 2003, it was difficult for the respondent to obtain the documents and officials who dealt with the matter at the time could not be able to establish what the actual position is on the matter. Notice to oppose was also filed with the answering affidavit in July 2022. The answering affidavit was filed in July 2022 with the notice to oppose without a condonation application.
- [12] On 10 January 2023, the current attorneys of the applicant sent correspondence to the State Attorneys at three email addresses: [M\[...\]](#), [S\[...\]](#) and [R\[...\]](#). The correspondence was sent with the court order and also sought the first respondent to comply with the court order of February 2022. The three email addresses belong to employees of the State Attorneys.
- [13] In August 2022, the court order was again sent by the applicant's attorneys to the email [T\[...\]](#), which is also the respondent State Attorneys, but no response was received.
- [14] The applicant then launched an urgent application to this court and obtained an interim order seeking the respondents to show cause why they should not be held in contempt of court for failing to comply with the order of February 2024.
- [15] In April 2024, the respondents launched a rescission application which is opposed by the applicant. The Respondent has also raised points in limine regarding the applicant's contempt application.

Submissions on contempt of court

Submissions by Applicant

- [16] The Applicant submitted that there is a court order issued by this Court, which the respondents accepts, and the court order was served on the respondents,

which service the respondents confirmed occurred on 23 January 2023. The respondents answered on emails used to send the court order that one of the employees have left the service of the respondent's attorneys but silent on the other three emails, of which one of the emails belong to the Head of State Attorney in Polokwane and other email was provided by Ms Makhamathe.

[17] The court was again served on the respondents' attorneys in August 2023 by email. The court order provides for specific timeframes for the first respondent to comply specifically:

17.1 The respondents directed to appoint health risk managers, within a period of ten days from the date of this order, to verify the extent of the applicants illness in accordance with the provisions of applicable in application process for permanent incapacity leave in the public service, to with paragraph 15.8.2 read with paragraph 16.1 of the government policy on determination and Directive on Leave of Absence in the Public Service issued in June 2015, as amended.

17.2 The respondent is directed to reinstate and pay all outstanding salaries of the applicant, with effect from February 2010, pending the final determination of the applicant's permanent incapacity leave process in accordance with paragraph 16 of the government policy on "Determination and Directed in Public Service issued in June 2015 as amended, such salaries to be paid within 30 days from the date of this order.

[18] The mere fact that a court order has not been complied with, despite same being known to a party, it is presumed that non-compliance is wilful and *mala fide*. The respondents lied to the court about not receiving emails and the court order. The respondents being members of the executive are dangerously comfortable with non-compliance

[19] Once non-compliance has been proven by the applicant, the burden shifts to the respondent who must provide evidence beyond reasonable doubt that non-compliance is not wilful and *mala fide*. Even after becoming aware of the court order of February 2024, non-compliance has been shown, and no

application was launched to stay the order. Instead, the rescission application has been launched.

- [20] The defence of the respondents that reinstatement of the applicant is impossible due to the pensionable age of the applicant is untenable. The purpose of reinstatement is restitution, which has to place the applicant in the position she would have been had it not been for the unlawful conduct of the respondents arbitrarily stopping her salary. The non-payment of the applicant's salaries for all those years has a direct and material influence on the pension benefit of the applicant and same must be restored. The no-work-no-pay principle does not apply here. The applicant could not work as she was incapacitated and was denied a Health Risk Manager's report.
- [21] The Employment of Educators Act¹ (the Act) is clear on what must be done with the employee who is medically incapacitated and has exhausted their leave days. Schedule 8- Item 3 of one makes it a misconduct which ought to be subjected to a disciplinary hearing if there is refusal by an educator to submit to medical examination. Nothing in the Act justifies the withholding of an employee's remuneration.
- [22] The Policy and Procedure on Incapacity Leave and Ill-Health Retirement August 2021, paragraph 7.1.9.2 provides:
- “Failure by the employee to submit an application form within the stated periods, or failure by the supervisor manager to properly manage it, must be viewed in a serious light given the financial and service delivery implications. Disciplinary steps should be taken against both the supervisor manager and the employee. For this purpose, the employee must be charged with unauthorised absence from work, and the supervisor manager must be charged with failure to comply with or contravenes an act, regulation or legal obligation”.
- [23] The respondents chose not to institute disciplinary action against the applicant, and that does not excuse the unlawful termination of the applicant's

¹ Act 76 of 1998

salary and benefits and no reasons was advanced by the respondents for that.

- [24] The respondents have launched an abortive rescission application, and the court must dismiss it. Nothing in the Labour Relations Act² (LRA) or the Rules Regulating the Conduct for the Labour Court provides for the suspension of the operation of the order by merely bringing an application to rescind. Case law makes it clear that a suspension of a court order amounts to the limitation on the substantive rights of a litigant and same cannot be easily extinguished by the existence of an application before a court. It is only upon the granting of an order to stay the operation of the order can the enforceability of an order be stayed/suspended. The respondents ought to bring a substantive application seeking to stay any order, and until such time the court grants a stay in the operation of the order of February 2022, the respondents are non-compliant with the order. Failure of the respondents to comply with the court order and submit that the order is incorrect is untenable.

Submissions by Respondents

- [25] The respondents have opposed the application and raised some preliminary points *in limine*.
- [26] The first point *in limine* is that the first respondent is an Organ of state and the Applicant failed to serve the application in terms of the Judicial Matters Amendment Act³ (JMAA).
- [27] Secondly, to the extent that the applicant has reached a retirement age, her claims is moot. Thirdly, the applicant's claim against the respondents served has prescribed. Fourthly, the applicant's claim from February 2010 to August 2010 was dismissed by the Thoyondou High Court and is therefore *res judicata*.
- [28] On the merits, the respondents submitted that it endeavoured to appoint the Health Risk Manager for the applicant and requested her to attend to the

² Act 66 of 1995

³ Act 8 of 2017.

Tshilidzini Hospital to be assessed and she did not accept the letters with appointments information, and she directed her helper not to accept the letter when it was served. The applicant therefore never honoured the appointment to attend the examinations. The applicant did not report for work to teach the learners, and there was therefore no obligation or reason for the respondents to pay her salary hence her salary was stopped in the year 2010 and from 01 July 2015 to August 2021.

- [29] On the first point *in limine*, the Respondents submitted that Section 3 (2) of the JMAA, provides that the applicant or her legal representative after any court process institution proceedings and in which the executive authority of a Department is cited as a nominal respondent or defendant, must serve a copy of that process on the Head of Department concerned at the Head Office of the Department and within five days after the service of the process, serve a copy thereof on the office of the State Attorney operating within the area of jurisdiction of the Court from which the process has been issued.
- [30] Section 5(i)(a) of the JMAA⁴ entails that any process by which any legal proceedings contemplated in terms of section 3(i) thereof and pertaining to service of the process. The applicant has failed to comply with the provisions of the said Act and Rules of set out above in that she failed to serve the applicant in accordance with Section 3(2) of the 2017 as amended, and in accordance with the rules of this court, and this constitutes a ruling and is invalid.
- [31] On the second point *in limine*, it was submitted that the applicant has reached the age of 65 and reached her retirement age. The prayer of the applicant to direct the respondents to appoint Health Risk Managers can no longer be possible as her claim is moot and should not be considered by this court, but her application must be dismissed with costs.
- [32] On the third point *in limine* regarding prescription, it was submitted by the respondents that in terms of section 11 (a) of the Prescription Act⁵, the period

⁴ Act 8 of 2017

⁵ Act 68 of 1969

of prescription of debts are three years in respect of any debt. It was argued that section 12 (1), (2) and (3) the Prescription Act further provides that when the period of prescription begins to run, and that it commences to run as soon as the debt is due. The applicant alleged that she is owed salary for the months of February 2010 to July 2010. Therefore, the applicant's claim fell as the salaries' debt lapsed on or about 31 July 2013.

- [33] Furthermore, the applicant alleged that she was not paid salary from July 2015 to date, and this debt also lapsed on or about June 2018. The period of prescription is interrupted by the issuing and service of the notice of motion and the applicant has not served the notice of motion on the respondents in terms of the JMAA, read with Institution of Legal Proceedings against Certain Organs of State⁶, and part of her claim has prescribed on or about June 2021, and the claim must be a dismissed with costs.
- [34] The forth point *in limine* is the *res judicata*. It was submitted and argued by the respondents that on or about 23 June 2011, the Applicant issued an action at Thohoyandou High Court against the first respondent, Head of the Department and Service District Manager for Education Vhembe, seeking payments of her unpaid salaries for the months of February 2010 to July 2010. Justice AML Phatudi dismissed her claim. Her claim for the period February 2010 to July 2010 was considered and determined by the Thohoyandou High Court and was dismissed, and thus *res judicata*. Therefore, the Applicant's claim must be dismissed with costs.
- [35] In the event the points *in limine* are not upheld by this court, the respondents submitted that most of the vital information and documents could not be obtained due to the fact that the incidents in the matter are for the year 2004.
- [36] The applicant was appointed as an educator in 1977, later promoted to head of department in 1996 and deputy principal in 2004, and has never reported for duty from 01 July 2004 to August 2021. As a result, no job evaluations were conducted for her. On 01 September 2007, the applicant was transferred

⁶ Act 20 of 2002

to another school around Elim area and also never reported to the post establishment since that date.

- [37] In terms of the employment contract entered into between the respondents and the applicant as an educator, she is expected to render her teaching services and to be compensated in the form of monthly salaries and benefits. The applicant filled in sick leave forms for some days and on the other days, she was not reporting on duty with no explanation.
- [38] The applicant was advised to attend to the Tshilidzini Hospital to facilitate her examination in consideration of her alleged ill-health. It was submitted that the applicant was not cooperative and did not show up for the appointments until she exhausted all her leave days in 2008/2009. The Applicant's salary was stopped in February 2010 for failing to report to work.
- [39] The applicant wrote a letter of demand through her attorneys demanding to be paid her outstanding salaries from February to April 2010, and the HOD, Mr Boshielo instructed that the applicant's salary be paid, effective August 2010 and she was also advised that respondents would still treat her case as incapacity due to ill-health and Health Risk Manager still to be appointed to verify the extent of her alleged illness.
- [40] The Applicant's claim of salaries for the months of February 2010 to July 2010 lodged at Thohoyandou High Court was dismissed by Judge Phatudi on 03 November 2016 and the urgent application to be paid the same month salaries was also stuck off the roll, with costs. The respondents continued to unjustifiably pay the applicant's salaries whilst she continued not to report to work. As the applicant did not respond to the district officials' letters notifying her to submit the necessary documents within 10 days, her salary was stopped from July 2015 to August 2021, when she reached retirement age of 65 her contract of employment was then terminated.
- [41] The applicant was supposed to fill in Government Employment Pension Fund (GEPF) forms. She indicated that she acknowledged that she reached the retirement age, but she was not filling the pension fund forms until the issue is finalized.

Evaluation

- [42] The applicant in this matter has brought an application seeking to place the respondents in contempt of court as a result of failing to comply with an order of this Court dated 14 February 2022. The respondents in response brought a rescission application to rescind the court order with condonation application and raised four points *in limine* to the application.
- [43] The law on contempt of court is well established. Contempt of court is defined as the wilful disobedience of a Court Order and the purpose of contempt proceedings is to protect the rights of everyone to fair trials, maintaining public confidence in the judicial arm of government and upholding the integrity of Court Orders.
- [44] The primary purpose of the contempt of court proceedings is to compel compliance with the court's order. The court may impose fines or imprisonment as a means of coercing the individual or entity to comply with the order. In some cases, the court may also order the individual or entity to pay the costs associated with the contempt proceedings.
- [45] Contempt of court therefore refers to the disobedience or disregard of a court order or judgment. This can occur when an individual or entity fails to comply with a specific directive issued by the court, such as a directive to pay a certain amount of money, perform a specific action, or refrain from engaging in a particular behavior.
- [46] Contempt proceedings are fundamental to preserving the authority of the judiciary and ensuring adherence to legal processes. Therefore, respecting court orders and procedures is essential for maintaining the rule of law and the proper functioning of the South African justice system. Contempt of court is not an issue between the parties; it is rather an issue between the court and the party who has not complied with a mandatory order of court.

[47] The leading case dealing with contempt of court is *Fakie NO v CCII Systems (Pty) Ltd*⁷ (*Fakie*) where the Supreme Court of Appeal per Cameron JA held that:

“[6] It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence has, in general terms, received a constitutional 'stamp of approval', since the rule of law in terms of the value of the Constitution - 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.’”

[48] The test for when disobedience of a civil order constitutes contempt has come to be stated as to whether the breach was committed deliberately *and mala fide*. A deliberate disregard is not enough, since the non-complier may genuinely, *albeit* mistakenly, believe that he or she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. These requirements, that the refusal to obey should be both willful and *mala fide*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt.

[49] At para 42, Cameron in *Fakie*, succinctly set out the requirements for contempt. The Supreme Court of Appeal held that an applicant must prove all the requirements for contempt: existence of the order; service of the order; non-compliance; willfulness and *mala fides*, and all these elements must be proved beyond reasonable doubt. The applicant bears the onus to prove that the respondent is guilty of contempt. However, once the applicant has proven the existence of the order, service or notice of the order, and non-compliance, then the respondent bears an evidential burden in relation to willfulness and *mala fides*.

[50] If the respondent fails to advance evidence that establishes reasonable doubt as to whether the non-compliance was willful and *mala fide*, then contempt will have been established beyond reasonable doubt. The Constitutional Court

⁷ 2006 (4) SA 326 (SCA) at para 6.

revisited the issue of contempt of court proceedings in *Pheko and others v Ekurhuleni City*⁸. The court endorsed the findings in *Fakie*, and confirmed that “civil contempt”, a form of relief sought through civil proceedings, relates to conduct *ex facie curiae apropos*, a willful disregard of order of court. The court also confirmed that because civil contempt is a criminal offence, it may also be determined through criminal proceedings, the object of which would be punitive. The court held that civil contempt may be both punitive and coercive, but usually it is only coercive (upholding the dignity of court by coercing compliance with the court order). The Court further held that:

“The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.”

- [51] An applicant in a contempt application must therefore establish (1) the Court Order, (2) service or Notice of the Court Order, (3) non-compliance with the terms of the Order and (4) wilfulness and *mala fides* but once the applicant has proved, (1) the Court Order, (2) service or Notice of the Court Order, and (3) non-compliance with the terms of the Order, the Respondent bears an evidentiary burden in relation to (4), i.e. wilfulness and *mala fides*.
- [52] However, for the contempt proceedings to succeed, the above mentioned requirements must still be met. Once the applicant proves the order, its service and non-compliance, the onus shifts to the respondent prove that the non-compliance was not wilful, reckless or in bad faith.
- [53] I will first deal with those points in *limine* raised by the respondents before the rescission application and its condonation as well as the merits if necessary. It

⁸ 2015 (5) SA 600 (CC)

is common cause that there is an order issued by this Court on 14 February 2022, and the respondents have conceded to that in its rescission application.

- [54] However, the respondents raised the first point *in limine* in respect of the service of the order. It was contended by the respondents that the applicant failed to serve the contempt application in terms of the provisions of section 3 (2) of the JMAA, which provides that the applicant or the legal representative after any court process institution proceedings and in which the executive authority of a department is cited, as a nominal respondent or defendant has been issued, must serve a copy of that process on the Head of Department concerned at the Head Office of the Department and within 5 days after the service of the process, serve a copy thereof on the office of the State Attorney operating within the area of jurisdiction of the Court from which the process has issued.
- [55] The practice in this Court is that an applicant who seeks an order finding the respondent guilty of contempt must comply with the provisions of rule 58(2) (d) of the Rules Regulating the Conduct of the Proceedings of the Labour Court⁹ (the Rules). The Rules require personal service of the order on the Head of Department, the respondent to file an explanatory affidavit explaining to the court why he should not be found guilty of contempt and that the respondent despite having filed this affidavit, must still attend court on the date stated in the court order.
- [56] The applicant in this matter has only shown the first leg of the test for contempt of court, namely, that an order was granted against the respondents including the MEC of Limpopo Department of Education and the Head of Department on 10 January 2023 and again in August 2023. The correspondences mentioned by the applicant with the court order were sent to the respondents' attorneys, the State Attorneys' to emails of several officials of the State Attorneys. At no stage has the Applicant submitted that the personal service of the Court order was also made on the Head of the Department of Education, Limpopo.

⁹ GN 4775 of 3 May 2024 (effective 17 July 2024).

- [57] Furthermore, section 3 (2) of the JMAA, provides that the applicant or her legal representative after any court process institution proceedings and in which the executive authority of a Department is cited as a nominal respondent or defendant, must serve a copy of that process on the Head of Department concerned at the Head Office of the Department and within five days after the service of the process, serve a copy thereof on the office of the State Attorney operating within the area of jurisdiction of the Court from which the process has been issued.
- [58] The applicant has failed to show proof of the second leg of contempt, which in this instance is specifically personal service of the application upon the respondents, the MEC and the Head of the Department in compliance with the provisions of rule 58(2) (d) of the Rules and section 3 (2) of the JMAA. The applicant has therefore failed to show that there was proper personal service of the Court orders 10 January 2023 and August 2023 on the respondents and that the incumbents had knowledge of the court orders prior to the institution of these proceedings. The contempt application was certainly served on the State Attorneys, as the legal representative of the MEC of Education Limpopo and HOD of Education Limpopo.
- [59] Once it has been established that there is no proof of the proper service on the respondents in terms of the Court Rules and the JMAA, there cannot be a question of non-compliance with the terms of the court order and wilfulness or *mala fides*.
- [60] A court order must be complied with for as long as it has not been set aside, stayed or varied by the Court, provided there has been proper service. The applicant has failed to show that the respondents are in contempt of Court of 14 February 2022 due to lack of proper personal service on the MEC of Education Limpopo and HOD Education Limpopo, who have been cited as first and second respondents in this matter.
- [61] The application stands to be dismissed on this ground alone. It becomes an academic exercise to consider the other points *in limine* raised by the respondents.

Condonation and Rescission applications

- [62] In April 2024, the respondents made an application for rescission of the order granted by this Court on 14 February 2022 with condonation.
- [63] The condonation application shall be determined on the submissions made by the parties regarding the following factors: the length of the delay; the explanation or cause for the delay; the prospects of success for seeking condonation; the importance of the issue(s) that the matter raises; the prejudice to the other party or parties; and the effect of the delay on the administration of justice.
- [64] The respondents submitted that the Court order came to its attention on 21 February 2024 when the contempt application was served as it was attached thereto. It took time to identify the legal officer dealing with the matter as it did not have the reference number. It was only established on 28 February 2024 that the matter was allocated to Mr Masindi, and after consulting with the respondent it held the preliminary view to oppose the application and consider to set aside the court order. Consultations between Mr Masindi and Mr Masete took place on 14 March 2024, the answering affidavit prepared and settled on 27 March 2024, and it was only finalised on 02 April 2024.
- [65] The respondent did not receive the correspondence from the applicant's attorneys dated 16 February 2021 and 29 March 2021 as Ms Makhamathe was on maternity leave.
- [66] It was submitted by respondents that the rescission application was attended to in anticipation that it would be served on 09 April 2024, which was 29 days since the applicant served the application for contempt with the court order, and the application was made within a reasonable time giving sufficient explanation for the delay.
- [67] The applicant opposed the condonation application and submitted that the Court order was served in 2023 on the State Attorney and specifically with Mr Masete and Ms Makhamathe via emails which are valid, and the respondents

decided to do nothing about them. It was denied that the Court order was brought to the attention of the respondents in January 2023 and August 2023.

- [68] It was further submitted that the respondents ignored the Court order and even the times frames given in the urgent application even after being given an opportunity to defend the matter in 2021. The respondents' conduct cannot be a conduct deserving the Court's indulgence.
- [69] There are no prospects of success for defence raised by the respondents. The respondents' version illustrates that the respondents did not take its own policies into regard and also the Court's orders. The matter has dragged since the year 2015 and the respondents is using its resources to fail to comply with legislation. The respondents have not done anything for two years after being ordered to file the notice to oppose and answer the affidavits. The Court order is clear and enforceable. The respondents filed the answering affidavit months after the matter was finalised without a condonation application. The respondents have trampled upon the applicant's rights to a fair hearing and speedy resolution and therefore it was prayed that the application for condonation be dismissed with costs.
- [70] The requirements that must be satisfied to succeed in an application for condonation are well-known¹⁰. An applicant in a condonation application must set out the degree of the delay and show good cause for the delay; further,

¹⁰ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A). In *Grootboom v National Prosecuting Authority and another* (2014) 35 ILJ 121 (CC) at para 50, the Constitutional Court stated that the factors that are to be considered, in the interests of justice, in determining a condonation application include the following:

- '(a) the length of the delay;
- (b) the explanation for, or cause for, the delay;
- (c) the prospects of success for the party seeking condonation;
- (d) the importance of the issue(s) that the matter raises;
- (e) the prejudice to the other party or parties; and
- (f) the effect of the delay on the administration of justice.'

The Constitutional Court went on further to state at para 51 that: '*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 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.*'

the applicant must deal with the prospects of success on the merits and prejudice to the Respondent. It is trite that condonation is not for the mere asking. An applicant for condonation seeks an indulgence from the Court and is to show sufficient cause to succeed in the grant of condonation by the Court.

- [71] *In Allround Tooling (Pty) Ltd v NUMSA and Others*¹¹, the Labour Appeal Court (LAC) restated the well-established principle that a condonation application must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. This did not occur in the present case.
- [72] The reasons advanced by the respondents for the delay to file the rescission are very lame. In the first instance the respondent's failed to file the answering affidavit when ordered by the Court clearly demonstrated that the respondents did not take the matter seriously and did not prioritize it. It is clear from the respondents' submissions has not given valid reasons why the rescission application was not filed on time.
- [73] The manner the respondents took time deal with the matter and time it has taken is indicative that it did not treat the matter with the urgency it deserved. The Respondent already failed to rescind the judgment of this Court of 21 August 2018. The respondents were directed by the Court an opportunity to file the notice to defend the matter and the answering affidavit for but failed to comply with the directive for a period of more than two years with no valid reason. Even though Ms Makhamathe was on maternity leave, the applicant has been able to show that there were email correspondences with the other officials of the State Attorney on the matter. If the respondent complied with the directive of Court to file the papers, the applicant would not have proceeded to set the matter down on an unopposed roll and obtain default order on 14 February 2022.
- [74] If the respondents' submission is to be accepted that the Court order of 14 February 2022 came to its attention on 21 February 2024 as claimed, then the respondents have not accounted for the whole period of delay, as every

¹¹ [1998] 8 BLLR 847 (LAC) at para 8.

period of the delay remained unexplained. The respondents submitted that after it established that the matter was allocated to Mr Masindi on 28 February 2024, it was then that consultation took place. The period between from 29 February 2024 February to 15 March 2024 has not been properly accounted. Again the period 15 March 2024 to 27 March 2024 when the affidavit was prepared has also not been accounted. Besides indicating that there were holidays until 02 April 2024, the rescission application was only filed around 24 April 2024. Yet again, this period of delay was also not accounted for. The respondent chose to explain only some periods of delay in a rather staggered manner.

- [75] The respondents have therefore failed dismally in the founding affidavit in the condonation application to make out a case for condonation and to show good cause for the delay. The reasons for the delay are unsound and amount to no reasons. It is now accepted that in the absence of any reasons for the delay, the prospects of success are immaterial. In terms of Rule 46 (2) of the Labour Court Rules, a party within 15 days of acquiring knowledge of the order of judgment, must apply to set aside the order or judgment on good cause shown.
- [76] In *Melane v Santam Insurance Co Ltd*¹², the following was said about the factors that will be taken into account when considering a condonation application:

‘In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both parties. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good

¹² 1962 (4) SA 531 (A) at 532.

explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked'.

[80] The Labour Appeal Court in *NUM V Council for Mineral Technology*¹³, said the following:

"The approach is that the Court has a discretion to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are degree of lateness, the explanation, the prospects of success and the importance of the case. These factors are interrelated. They are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial and without prospects of success, no matter how good the explanation for the delay is, an application for condonation application should be refused."

[81] A similar view was held in the matter of *United Plant Hire (Pty) Ltd v Hills and others*¹⁴, where the court stated the position succinctly as follows:

"It is well settled that, in considering applications for condonation, the Court has a discretion to be exercised judicially upon a consideration of all the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the relevant Rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive. These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong".

¹³ [1999] 3 BLLR 209 (LAC) at para 10.

¹⁴ 1976 (1) SA 717 (A) at 720 E-G.

- [82] In *Nair v Telkom SOC Ltd and Others*¹⁵, the Court held that significant with a determination of such applications is that condonation cannot be for the mere asking, and a party is required to make out a case entitling it to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay; and in the end the explanation must be reasonable enough to excuse the default.
- [83] The respondents have also not demonstrated *prima facie* prospects of success to defend the matter. No articulation of prospects of success has been made in this application. The respondents in its own affidavit conceded that it has stopped the applicant's salary, which decision was reversed by the then Head of Department Mr Boshielo. Despite being aware that the respondent has a right to charge the applicant for failing to comply with the lawful instructions to attend to medical examinations, the respondent failed to do so but continued to stop the applicant's salary repeatedly.
- [84] This court is obliged to consider the reasonableness and adequacy of the explanation for the delay, in conjunction with other factors in making an order that would achieve fairness to both parties.
- [85] Prospects of success in the action is an important factor in determining whether condonation should be granted in the present matter. It is trite that the applicant will have to make out a case for condonation. In order to assess the strength of his prospects of success, traversing the merits to some extent, is necessary. In the condonation application, the respondents have not at all demonstrated *prima facie* prospects of success to defend the matter. No articulation of prospects of success has been made in this application. The respondents in its own affidavit conceded that it has stopped the applicant's salary, which decision was reversed by the then Head of Department Mr Boshielo. Despite being aware that the respondent has a right to charge the applicant for failing to comply with the lawful instructions to attend to medical examinations, the respondent failed to do so but continued to stop the applicant's salary again. The respondents instead raised several points *in*

¹⁵ (JR59/2020) [2021] ZALCJHB 449 (7 December 2021).

limines as a defence to the applicant's claim rather than to put a valid defence against the claim.

- [86] The prejudice to the Applicants is obvious. The respondents have been tardy in the way it has dealt with the matter and the Court tends to agree with the applicant that it lacked the appreciation of the authority of this Court.
- [87] Justice unnecessary delayed as a result of the conduct of the party to litigation undoubtedly causes prejudice to the other litigant of the case. Finality is an important part of litigation without which the party who did not cause the delay suffers prejudice not only on the delay for relief but, also being denied to put the matter to rest on time and more with the challenges of life.
- [88] In view of the afore-going, the condonation application for the late filing of the rescission application falls to be dismissed.

Costs

- [89] It is a rule of practice that costs following the result does not apply in labour matters, however the Court retains its wide discretion in respect of costs in consideration of the requirements of the law and fairness.
- [90] In my view, this is a case where the interests of justice will be best served by making an order as to costs against the respondents, in particular in the manner the respondents dealt with the matter and its lack of appreciation of the orders of the court. This matter dates back to 2017 and 2018, and throughout the proceedings, the respondents have not shown any interest in dealing with the matter as expeditiously as possible, to the extent that it even failed to abide by the Court's directive to file its notice to oppose and answering affidavit.

- [91] In the premises, the following order is made:

Order

1. The contempt application is dismissed.
2. The condonation application is dismissed.

3. The respondents are ordered to pay the costs of this application on the scale as between attorney and client, jointly and severally, the one paying the other to be absolved

G. Mafa-Chali

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Mr I N Risenga of Risenga Attorneys

For the Respondents : Adv M N Kgare

Instructed by : The State Attorney

LABOUR COURT