



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

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR 35/21

In the matter between

SOUTH AFRICAN NURSING COUNCIL (SANC)

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

COMMISSIONER TSHEPO MASHIGO N.O.

Second Respondent

NEHAWU

Third Respondent

MABHLELANDILE BIBI

Fourth Respondent

EVELYN SEGAPELO

Fifth Respondent

ELVIS MATLALA

Sixth Respondent

Heard: 15 July 2025

Delivered: 27 February 2026

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 27 February 2026.

JUDGMENT

SAUNDERS, AJ

Introduction

- [1] This matter deals with a review application and the ancillary issue of the revival of the review application. The applicant seeks an order reviving the review application and thereafter setting aside the arbitration award. Both applications are opposed.

Background to the Dispute

- [2] In November 2011 the individual members of the third respondent embarked on a protected strike. During the strike it was alleged that various members of the third respondent committed various acts of misconduct, for which they were dismissed. Seven employees were charged and seven employees were dismissed.
- [3] The dispute was referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) (the first referral) and was arbitrated over several days. The arbitration was concluded on 27 November 2014 and an award was rendered in favour of the applicant on 18 December 2014. The first referral is not the subject of this review.
- [4] The first referral was taken on review on 27 January 2015. It was prosecuted in the Labour Court and Mahosi J ultimately issued a directive that due to the incomplete record and the inability of the parties to reconstruct the matter as a result of the death of the commissioner and his mandate having been terminated prior to the conclusion of the hearing (amongst other issues), the matter should be remitted to the CCMA for a hearing *de novo*.
- [5] The applicant sought leave to appeal this directive. The leave to appeal was dismissed by Mahosi J on 23 February 2018. The applicant petitioned the

Labour Appeal Court. The petition was declined. The arbitration therefore started afresh in early 2019.

- [6] The second arbitration took place over 20 days spanning 9 April 2019 to 9 November 2020 and an arbitration award was rendered on 30 November 2020. It is this arbitration award which forms the subject of the review application.
- [7] The review application was launched on 12 January 2021. The third respondent raised the point that the review application is late by one day. This is not the case. 12 January 2021 was the last day on which the review application could be filed, counting six weeks from 30 November 2020, and excluding the first day and including the last day. This preliminary point must fail. The review was timeously referred.
- [8] On 1 April 2021, the first respondent delivered the notice in terms of rule 7A (3) of the now repealed Rules for the Conduct of Proceedings in the Labour Court (the rules) by email to the parties. The applicant responded to this email, which is attached by the third respondent as an annexure to the answering affidavit in the reinstatement application. On 6 April 2021, the first respondent issued the Rule 7A(5) notice to the parties via fax. The applicant disputes receiving this notice *albeit* admits that the fax number to which the notice was sent is the correct fax number.
- [9] The applicant states that on 5 May 2021 it approached the Labour Court to follow up on the status of the record, which it ultimately obtained on 7 May 2021. On the basis that the record was obtained on 5 May 2021 the applicant counted the 60 days for the filing of the record from 5 May 2021 and not the earlier dates in April 2021. On the applicant's version, the record was timeously filed on 29 July 2021, having counted 60 days from the date of receipt of the record.
- [10] The third respondent is of the view that the record was due on 30 June 2021, which date is 60 days from the date on which the record should have come to the applicant's attention. The record is therefore 21 court days late.

- [11] Correspondence was addressed to the applicant by the attorney for the third respondent on 10 September 2021, highlighting the issue of the deemed withdrawal. The answering affidavit in the review application also raised this point on 29 September 2021¹ and it was reiterated in the heads of argument filed by the third respondent on 19 January 2022. No reinstatement application was launched during this period.
- [12] The review application, without a reinstatement application, was set down for hearing on 6 June 2023, on which day the court, per Lallie J held that the application was deemed withdrawn in respect of the late filing of the record. It was ordered that the applicant file the application for reinstatement within 10 days of the order. The reinstatement application was filed on 20 June 2023. The matter was set down on 7 February 2024, erroneously on the unopposed roll and then again on 15 July 2025 on the opposed roll for determination.
- [13] The reinstatement application seeks reinstatement of the review application. The review application seeks a review of the arbitration award which ordered re-employment of the fourth, fifth and sixth respondents and the substitution of the award with the order that the dismissals of the fourth to sixth respondents were substantively fair.

The Reinstatement Application

- [14] It is trite that an application to revive and reinstate legal proceedings is a species of condonation application. In the matter of *NUM v Council for Mineral Technology*,² the Labour Appeal Court confirmed that the approach set in *Melane v Santam Insurance Co Ltd*³ is the approach that should be adopted in considering condonation applications. This approach is now well established. 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. The factors to be considered are the degree of lateness, the

¹ The applicant filed a notice of objection for the late filing of the answering affidavit. However, it was not incumbent on the third respondent to file an affidavit at all, in circumstances where the review had been deemed withdrawn.

² [1999] 3 BLLR 209 (LAC).

³ 1962 (4) SA 531 (A) at 532 C – F.

explanation for the delay, the prospects of success and the prejudice to both parties.

- [15] The Labour Appeal Court added a further principle to be applied, which is that 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, an application for condonation should be refused.⁴
- [16] In the matter of *Government Printing Works v Public Service Association and another*⁵ held that the interests of justice must also be considered in an assessment of any condonation application.
- [17] In the matter of *Ethekwini Municipality v Ingonyama Trust*⁶ the court held that two factors assume importance in determining whether condonation should be granted. These are the explanation furnished for the delay and the prospects of success. In a case where the delay is not a short one, the explanation must not only be satisfactory but must also cover the entire period of delay. It must be reasonable.
- [18] Furthermore, it held that the granting or refusal of condonation is a matter of judicial discretion which involves a value judgment by the court seized with a matter based on the facts of that particular case.⁷

The Delay and the Explanation

- [19] The period of delay is 21 court days or 29 calendar days. While lengthy this is not an insurmountable period. The explanation is poor. In the face of receiving and acknowledging the email of 1 April 2021, the applicant should have been alive to the fact that the 7A (5) notice was due imminently. Having not received the 7A (5) notice timeously, it was incumbent on the applicant to check the court file, which it did, one month later. No criticism can be laid at the door of the applicant at this stage. Having checked the court file, it would

⁴ Id fn 2 at para 10.

⁵ (2025) 46 ILJ 915 (LAC) at para 28.

⁶ 2014 (3) SA 240 (CC) at para 28.

⁷ Ibid at para 35.

have come to the attention of the applicant that the 7A (3) notice was sent on 1 April 2021 and the 7A (5) notice sent mere days after, and the 60-day period had started to run. The applicant should have recognized that the period had started to run and calculated accordingly. Importantly, the issue of a potential reinstatement application should have been a factor for consideration. In circumstances where the legal representatives were sufficiently familiar with the rules to object to the purportedly late filing of the answering affidavit, they would be alive to the very real possibility that the matter had been deemed withdrawn, which was the ultimate ruling of Lallie J on 6 June 2023. Had the application to revive been launched in September 2021, when the issue was first raised, it could have been disposed of simultaneously with the review in June 2023. In the alternative, the applicant was obliged to seek the extension of time. The applicant did not do this. It was not for the applicant to simply assume for itself the time periods which suited it, particularly in the face of service by fax to the correct number of the applicant.

Prospects of Success

- [20] The prospects of success warrant address. At the outset, the third respondent raises the issue that the applicant seeks substitution of the award with an order that the dismissal was fair. The applicant has elected to file only a part of the record in support of the review application, as it is entitled to do in terms of the practice of this Court.
- [21] The crux of the review is that the second respondent made an *ex tempore* ruling during the arbitration disallowing the leading of evidence on the issue of inconsistency of discipline for the seven employees originally dismissed. The applicant argues that on the basis of this ruling, the commissioner should not have made a finding in the arbitration award that the fourth to sixth respondents had been inconsistently disciplined.
- [22] On the face of it, this ground of review appears to have merit. The second respondent did make an *ex tempore* ruling to this effect. Similarly, the award directly makes a finding that the fourth to sixth respondents were disciplined in circumstances where at least four other shop stewards had not been

disciplined which speaks to issues of inconsistency. The question, therefore, is whether it is reviewable that the commissioner made a ruling disallowing the respondents from leading evidence on issues of inconsistency but then made a finding in respect of inconsistency. This appears to be a reviewable irregularity. The prospects of success therefore appear sound. However, the merits of the review cannot be considered in isolation to the relief sought.

Inconsistency

- [23] It appears uncontentious that approximately 80 – 90 employees took part in the strike. There appear to have been approximately seven shop stewards but only three were disciplined. It is also clear that the pre-arbitration minutes set out nothing in respect of inconsistency. However, the pre-arbitration minutes set out nothing of substance in respect of the issues for the commissioner to decide. It simply states that the Commissioner must decide “*whether or not the dismissal of the applicants for misconduct allegedly committed during a protected strike was procedurally and substantively fair*”. It was therefore incumbent on the commissioner to establish for himself what the issues in dispute were.
- [24] The third respondent, in opposition to the review, highlights that the issue of inconsistency was apparent from as early as the disciplinary enquiry and was an issue before the disciplinary enquiry chairperson. The record filed illustrates that the third respondent may have raised this issue in the opening statements of the arbitration. The applicant should have filed this aspect of the record to confirm the truth of this statement.
- [25] The bundle of documents used in the disciplinary enquiry and the arbitrations is similarly not before the Court. The indexed and paginated bundle in this review refers only to the variety of ancillary disputes before the CCMA. It includes the various jurisdictional arguments and documents which do not speak to the merits of the dispute. It does not deal with the substance of the dismissal at all. The bundle which supports the merits appears to exist because it is referenced in the pre-arbitration minutes. The record also

indicates the witnesses speaking to bundles which go up to “G1”. These documentary bundles appear to run to many hundreds of pages.

- [26] Of importance, particularly on the issue of consistency, is that the first arbitration award specifically references the allegation of inconsistency in at least two points. This accords with the position of the third respondent that inconsistency was raised and prosecuted by the employees from as early as the first arbitration (and possibly the disciplinary enquiry based on the affidavit of the third respondent.)
- [27] It is trite that an employer bears the onus to prove procedural and substantive fairness. However, it is incumbent on an employee to raise an issue of inconsistency in the application of discipline at the outset of a process.
- [28] The three shop stewards in question were all charged with acts of “*concerted and collective misconduct*.” This is clear from the recordal of the charge sheet (as no copy of the charge sheet was included in the record before the Court). It also appears uncontentionous that there are several shop stewards, some of whom were not charged. This election to charge or not charge the shop stewards would have been made at the time of the misconduct. The employer would have chosen to charge three of the purported seven at a specific moment in time during the institution of discipline of the three. It was incumbent on the employer to illustrate why such a decision was made in respect of those shop stewards who were charged and not those who were not charged. This would form part and parcel of the onus resting on the employer at the time of the misconduct and at the time of the disciplinary process and the arbitrations, particularly if this is raised by the charged employees at the time of the disciplinary enquiry, alternatively the arbitration.

The Record

- [29] When a party elects to file only that part of the record that it deems relevant to the hearing of the matter, particularly when that part of the record goes to the merits of the dispute in the main, and does not only refer to a crisp point of law, it is incumbent on the party to file all the parts of the record which relate to this issue. Similarly, it must also file those parts of the record which do not

support the case in question.⁸ To the extent that an applicant fails to do this, it is then for the respondent to raise this issue in answer in order for the applicant to remedy the situation. The respondent did raise the issue in the answering affidavit to the review application, and the applicant failed to take any steps to either answer the allegations in reply, or to supplement the record.

- [30] In order for this Court to substitute, a full conspectus of the record is required, including those parts of the record which are detrimental to the applicant's case. The third respondent has raised what appears to be a very likely possibility that the issue of inconsistency was before the applicant from as early as the disciplinary enquiries but certainly from as early as the first arbitration. The applicant's own record illustrates that it may have been raised in the opening statements made by the third respondent. The applicant failed to file these opening statements. On this basis, the respondent knew that this was a case which had to be met.
- [31] The commissioner, therefore, should not have made the ruling that he made, and the issue of inconsistency did warrant a finding by the commissioner as an issue in dispute.
- [32] In order to substitute, an assessment of the evidence of the fourth to sixth respondents was required. Only the evidence of the fourth respondent was included in the documentation before Court. Similarly, the case for the applicant must be before Court. It is not.
- [33] The obvious corollary was that the applicant's ability to meet the case was hampered by the commissioner's ruling. It is not apparent the extent to which the case was hampered, in the absence of the full record. While argument in the record references that the applicant would have led a different case, the documentary record may have illustrated that the issue had been disposed of at a different point. There is also the possibility that the applicant would wish for the matter to be referred back to the CCMA for a hearing *de novo*, to discharge the onus in respect of any alleged inconsistency. However, given

⁸ *Lubbe v Roop NO and Others* (2012) 33 ILJ 1695 (LC) at para 7.

the lapse in time, which would be in excess of 14 years, the value of that evidence would be severely diminished.

- [34] On this basis, and in the absence of the full record, it is impossible to substitute a finding in favour of the applicant.

Interests of Justice

- [35] In accordance with the judgment of *Government Printing Works v Public Service Association and another*⁹ it is incumbent on the Court to consider the interests of justice. The incidents underpinning this misconduct took place in November 2011. In the reasons for rejecting the leave to appeal handed down on 23 November 2018 Mahosi J quoted, with approval, the matter of *Martin And East (Pty) Limited v National union mineworkers and Others*¹⁰ which held as follows:

‘Before I conclude there is a further comment I wish to make. I indicated that the events in this case took place in 2010. The Labour Relations Act was designed to ensure an expeditious resolution of industrial disputes. This means that courts, particularly courts in the position of the court a quo, need to be cautious when leave to appeal is granted, as should this Court when petitions are granted.

There are two sets of interests to consider. There are the interests of the parties such as appellant, namely who are entitled to have their rights vindicated, if there is a reasonable prospect that another court might come to a different conclusion. There are also the rights of employees who land up in a legal “no-man’s-land” and have to wait years for an appeal (or two) to be prosecuted.

This was a case which should have ended in the labour court. This matter should not have come to this court. It stood to be resolved on its own facts. There is no novel point of law to be determined nor did the Court a quo misinterpret existing law. There was no incorrect application of the facts; in particular the assessment of the factual justification for the dismissals/alternative sanctions.

⁹ (2025) 46 ILJ 915 (LAC).

¹⁰ (CA23/2012) [2013] ZALAC 35; (2014) 35 ILJ 2399 (LAC) (10 March 2013)

I would urge labour courts in future to take great care in ensuring a balance between expeditious resolution of a dispute and the rights of the party which has lost. If there is a reasonable prospect that the factual matrix could receive a different treatment or there is a legitimate dispute on the law, that is different. But this kind of case should not reappear continuously in courts on appeal after appeal, subverting a key purpose of the Act, namely the expeditious resolution of labour disputes.'

- [36] The reasons for the lateness are poor. Although the prospects may have merit, the issue of inconsistency appears to be one which the employer was alive to from as early as the first arbitration. This was, therefore, not an issue of ambush. Even if the prospects of success are sufficiently high for the review to be granted, it is impossible to substitute without the full conspectus of evidence before this Court and it is not in the interests of justice, nor practical or feasible for the matter to be remitted to the CCMA for a third arbitration some 14 years later.
- [37] The interests of justice also warrant finality to the matter. The strike in question took place over 14 years ago. The dismissals shortly thereafter. Whatever breakdown may have been occasioned between the parties has long since dissipated. The individuals involved in this dispute, whether guilty or innocent, have had more than a decade to dilute any feelings of distrust, assuming the participating or affected protagonists even remain in the employ of the applicant.
- [38] The prejudice to the fourth to the sixth respondents is profound. They have been in limbo since as early as their initial dismissals, but certainly since 2020 when their re-employment was ordered. The applicant is also prejudiced. There is a very real possibility that a different case would have been presented, but this appears to have been an issue with which the applicant was seized as early as 2012. It was incumbent on the applicant to put forward sufficient evidence from what appears to have been a voluminous record, to illustrate the substantive fairness of the dismissal and to allow for a substitution. It failed to do so.
- [39] On this basis, the application for revival of the review application must fail.

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

Order

1. The application for reinstatement is dismissed.
2. There is no order as to costs.

S. Saunders

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Adv Brendan Roode

Instructed by: Maponya Inc

For the Third and further Respondents: Adv Nikhiel Deeplal

For the Third and further Respondents: Thaanyane Attorneys