



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

Signature

Date

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: 712/23

In the matter between:

AMOS MALULEKE

First Applicant

ERICK TEBOGO TELJOJANE

Second Applicant

and

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

First Respondent

COMMISSIONER SANDRA MATHIBELA N.O.

Second Respondent

HARMONY GOLD MINING COMPANY LIMITED

Third Respondent

Heard: 6 May 2025

Delivered: 20 May 2026

JUDGMENT

ENGELBRECHT, AJ

Introduction and background

- [1] This is an application for review under section 145 of the Labour Relations Act¹ (LRA). The applicants seek review of a ruling of the second respondent (Commissioner Mathebula) dated 6 March 2023, refusing condonation for the late filing of an unfair dismissal complaint to the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA).
- [2] The condonation application came before Commissioner Mathebula in the following circumstances:
- 2.1. Pursuant to disciplinary proceedings in which the applicants were charged with dishonesty, they were dismissed on 10 September 2022.
 - 2.2. Internal appeal and review processes followed. They all failed, and the final findings upholding the dismissal were provided to the applicants on 4 October 2022.
 - 2.3. On 26 October 2026, the applicants gave instruction to their attorney to refer an unfair dismissal dispute.
 - 2.4. He did so on 2 November 2022. However, the referral was not accompanied by the requisite proof in accordance with rule 6 of the Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA rules) that it had been served on the respondent party (Harmony).
 - 2.5. On 5 November 2022, the CCMA acknowledged receipt of the referral, but advised that condonation was to be sought.
 - 2.6. Application for condonation followed. The founding affidavit was deposed to on 9 December 2022, but in opposing the application Harmony said that it was only emailed to it on 24 December 2022, 50 days after the date for referral within the prescribed time periods had passed. That accords with an annexure to the replying affidavit of the applicants in the condonation application. Moreover, Harmony pointed

¹ Act 66 of 1995.

out that the founding affidavit merely asserted prospects of success without providing an explanation. Notably, despite bringing an application for condonation, the applicants asserted that the referral was not late.

- [3] The applicants received condonation rulings on 17 February 2023. The first was a handwritten ruling of Commissioner X Santi. It stated that no proof of service had been filed and that the matter was to remain closed until the applicants complied with CCMA rule 6. The second was the condonation ruling that is the subject of the review application.

The ruling

- [4] In Commissioner Mathebula's ruling, it was pointed out that a referral is not properly before the CCMA if certain requirements are not met, including the provision of the parties' contact details. This requirement was not complied with before 9 December 2022, some 36 days outside the 30-day prescribed period within which referral must be made. Moreover, Commissioner Mathebula pointed out that no explanation was provided for the delay and that no analysis had been offered regarding the prospects of success.
- [5] Pointing out that the applicants could not assert that they were unaware that the referral had been defective (as the CCMA had alerted them), and highlighting that there is no explanation for the delay between 5 November 2022 (when they were advised to make the correction) and 9 December 2022 (when they brought the application), Commissioner Mathebula dismissed the condonation application. The ruling was supported by reference to jurisprudence on the requirements for the grant of condonation.

The review

- [6] The review was launched on 8 May 2023. The applicants contend that Commissioner Mathebula committed misconduct in relation to her duties as an arbitrator, and that she committed a gross irregularity in the conduct of the arbitration proceedings. In essence, the applicants appear to be saying that the CCMA has email addresses for Harmony representatives, and so their

failure to provide contact details for Harmony should not have been treated as giving rise to a defective referral. They say the CCMA “concealed” information, and that Commissioner Mathebula ought to have considered the merits of the matter. They complained of the failure to call for a hearing (i.e. the decision to determine the condonation application on the papers).

- [7] On 16 May 2023, the CCMA and Commissioner Mathebula gave notice of intention to oppose. However, no answering affidavit was filed, and on 28 July 2023, notice of withdrawal of opposition was filed. Harmony did not give notice of intention to oppose.
- [8] On 26 May 2023, the CCMA gave notice in terms of rule 7A(3) of the Rules for the Conduct of Proceedings in the Labour Court² (the rules) that the record had been dispatched to the Registrar.
- [9] On 31 May 2023, the Labour Court gave notice to the applicants that the record had been received and that it was to be collected within seven days.
- [10] On 4 July 2023, a notice in terms of rule 7A(8)(b) was served on the CCMA. The applicants stated that they “*abide by their Notice of Motion*”. The Labour Court stamp affixed to the document indicates that it was filed with the Labour Court on 14 February 2024, as was the service affidavit.
- [11] On 28 August 2024, the applicants gave notice in terms of rule 22B that they had indexed and paginated the Court file and requested a set-down on the unopposed roll.
- [12] On 7 November 2024, the Labour Court issued a notice of set-down for the unopposed roll of 26 November 2024.
- [13] The matter came before Makoele AJ on 26 November 2024, but the matter was removed from the roll at that time.
- [14] A service affidavit deposed to on 27 February 2025, and filed with this Court on the same day, asserted that a notice of compliance was served on

² Repealed and replaced with the Rules Regulating the Conduct of the Proceedings of the Labour Court. Published 3 May 2024 (GN 50608). Effective 17 July 2024.

Harmony on 14 February 2025. That accords with the contents of an email attached to the affidavit.

[15] A notice dated 4 March 2025 stated that the Court file had been paginated and indexed, and that applicants had complied with rule 7A(8)(b). Re-enrolment on the opposed roll was sought.

[16] On 11 March 2025, notice of set-down on the unopposed roll for 6 May 2025 was sent to all the parties.

Harmony's position

[17] On 27 March 2025, Harmony's attorneys wrote to the applicants' attorneys.

17.1. They made reference to the provisions of the Practice Manual of the Labour Court (Practice Manual) in force at the time of the launch of the review, which provided in paragraph 11.2.7:

"A review application is by its nature an urgent application. An applicant in a review application is therefore required to ensure that all the necessary papers in the application are filed within twelve (12) months of the date of the launch of the application (excluding Heads of Arguments) and the registrar is informed in writing that the application is ready for allocation for hearing. Where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown why the application should not to be archived or be removed from the archive."

17.2. Based on this, they asserted that the applicants had been required to take all steps, including informing the Registrar that the matter was ready for allocation, by no later than 8 May 2024, in circumstances where the review had been launched on 8 May 2023.

17.3. Since the applicants only notified the Registrar that the matter was ready for allocation on 28 August 2024, the matter was archived for non-compliance. The effect, they asserted, was as envisaged in paragraph 16.3 of the Practice Manual:

“Where a file has been placed in archives, it shall have the same consequences as to further conduct by any respondent party as to the matter having been dismissed.”

17.4. Raising further complaints of non-compliance relating to the service of the review, the record and the notice in terms of the then rule 7A(8)(b) and attempts to add evidence shortly before the hearing, the attorneys asked for confirmation that the matter would be removed from the unopposed roll, referring to the judgment in *Macsteel Trading Wadeville v Van der Merwe NO and others*,³ holding that this Court did not enjoy jurisdiction to hear a “*lapsed application*” in the absence of a substantive review application.

[18] The matter came before this Court on 6 May 2025.

Can this Court entertain Harmony’s objection?

[19] Although Harmony had not opposed the review, its representative, Mr Kruger, appeared before me. His aim was to bring the “*jurisdictional*” issue to the attention of the Court.

[20] The Labour Court is a creature of statute that may only exercise jurisdiction conferred upon it by law.⁴ Even if a review is unopposed, the Court must first satisfy itself that it has jurisdiction. Indeed, Courts are required to raise and determine the issue of jurisdiction on their own initiative, even if the parties do not raise it.⁵ Jurisdiction is determined by the law and the facts pleaded, not by the parties’ conduct or consent.⁶ This Court cannot assume jurisdiction simply because an application is unopposed; it must actively determine whether it has the power to hear the matter. The Constitutional Court has held that, where the Labour Court grants default judgment without the statutory preconditions for jurisdiction having been met, the judgment is erroneously granted and susceptible to rescission.⁷

³ (2019) 40 ILJ 798 (LAC) at para 27.

⁴ See: *Gcaba v Minister for Safety and Security and others* 2010 (1) SA 238 (CC).

⁵ See: *Standard Bank of South Africa Ltd and others v Mpongo and others* 2021 (6) SA 403 (SCA).

⁶ See: *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC).

⁷ See: *September and others v CMI Business Enterprise CC* (2018) 39 ILJ 987 (CC).

[21] However, although the Labour Appeal Court (LAC) expressed non-compliance with the Practice Manual using the language of “*jurisdiction*”, compliance with the Practice Manual, in my view, was not a true jurisdictional fact in the strict sense that the Labour Court had no adjudicative power at all where there was such non-compliance.

21.1. The Practice Manual described the consequences of various forms of non-compliance as lapsed, archived, deemed withdrawal or abandonment, and prescribed the need for reinstatement. What was provided was a strong procedural bar, but that is not necessarily the same as a lack of subject-matter or adjudicative jurisdiction.

21.2. The LAC, as Courts sometimes do, used the language of jurisdiction broadly to describe a bar to entertaining proceedings, even though the question might more readily have been described as a one of procedural competence or the status of the application.

[22] That said, the guidance of the LAC in *Macsteel* is clear: if there was non-compliance with the Practice Manual leading to archiving and the matter deemed lapsed, it is not open to this Court to deal with the merits of the application. The matter must be struck from the roll.

[23] For these reasons, even though Harmony has not formally opposed the application, this Court must address the question raised by Mr Kruger on Harmony’s behalf – not because Harmony raised it, but because the failure to do so would render this judgment susceptible to upset on appeal, as was the case in *Macsteel*.

Analysis: Non-compliance with the Practice Manual

[24] There is no doubt that the applicants did not inform the registrar that the review was ready to be enrolled within 12 months of its launch: the review was brought on 8 May 2023, but the request for enrolment followed only on 28 August 2024, i.e. one and a half years outside the 12-month period employed in paragraph 11.2.7 of the Practice Manual.

[25] In consequence, the file:

25.1. entered the strange world of limbo “*without ever being formally dismissed and from which the file may never emerge unless a properly motivated revival application . . . enters to rescue it from a shadowy netherworld*” as described by Bank AJ in *Edcon (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others: In re Thulare and others v Edcon (Pty) Ltd*,⁸ or even

25.2. fell to be treated as “*dead as a doornail*”, as contemplated in *Overberg District Municipality v Independent Municipal and Allied Trade Union on behalf of Spangenberg and others*.⁹

[26] I am mindful of the judgment of my sister Justice Nkutha-Nkotwana in *Ndlela v Department of Correctional Services: In Re: Department of Correctional Services v Ndlela and Others*¹⁰ where it was stated:

“In my view fairness, which is a ‘[a] key purpose of the LRA, if not one of the foundational values it espouses’, dictates that the review application be dealt with and disposed of on the merits rather than technicalities”.

[27] However, I am bound by *Macsteel*, and therefore constrained to order that the matter be struck from the roll.

[28] I must also highlight other difficulties of non-compliance beyond the obvious non-compliance with the Practice Manual.

28.1. The rules that were in place at the time the review was launched, required of an applicant to “*furnish the registrar and each of the other parties with a copy of the record*” in the review (rule 7A(6)), followed within ten days by a notice as contemplated in rule 7A(8)(b) that it stand by its notice of motion, or an amendment of the notice of motion and supplementary affidavit (rule 7A(8)(a)). Only once the applicant had done so was the obligation of a party intending to oppose

⁸ (2016) 37 ILJ 434 (LC).

⁹ (2021) 42 ILJ 1283 (LC) .

¹⁰ [2022] ZALCJHB 133 (9 June 2022) at para 26.

triggered: it had to file an answering affidavit within ten days of the receipt of a notice under either subrule 7A(8)(a) or (b).

28.2. The notice of motion in the review, correctly, indicated that this was the process. It thus made clear that a respondent did not have to respond to the application before it had received both the record and the documents contemplated under rule 7A(8)(a) or (b).

28.3. In the present case, the service affidavits in respect of the rule 7A(8)(b) compliance notice asserted that:

28.3.1. *“On the 04th of July 2023, I served a copy of the first and second Applicants’ notice of compliance at the offices of the first and second respondents”.*

28.3.2. *“On the 14th February 2025, I served a copy of the first and second Applicants’ notice of compliance on the third respondent on the following emails ...”.*

28.4. In other words, on the applicants’ own version, the rule 7A(8)(b) notice was served on Harmony only by 14 February 2025, when it ought to have been done within ten days of the registrar making the record available, which occurred already on 31 May 2023 – almost two years before. On that basis, Harmony had not been required to file an answering affidavit before the end of February 2025. And indeed, in the absence of condonation for the applicants’ failure to have complied with the rules, they could legitimately say that they were not required to file an answer even then.

28.5. What all of this means is that, when the first application for enrolment was made in August 2024, it could not have been asserted that the matter was ready to be enrolled. Plainly, it was not, because the applicants had not yet served the rule 7A(8)(b) notice on Harmony; Harmony accordingly had no obligation to file an answer yet, and, in any event, the applicants had not sought condonation for their failure to

serve the rule 7A(8)(b) notice within the time period contemplated by the rules.

28.6. By the time the second enrolment notice was filed, the applicants had still not filed an application for condonation for the late service of the rule 7A(8)(b) notice.

[29] Not only did the applicants not comply with the Practice Manual; they also failed to comply with the rules. The effect was a significant delay in the prosecution of the review.

[30] In light of all matters considered, any re-enrolment would, in my view, face considerable obstacles. Not only would the applicants have to bring an application to revive the review, they would also have to seek condonation for non-compliance with the rules. Only if both those applications were successful would Harmony be called upon to file an answer. But that's just as an aside.

[31] I will not make a costs order in this application. There is no point in saddling the applicants with a costs order in favour of Harmony. In any event, Harmony's opposition was not formalised.

[32] Finally, I apologise for the delay in rendering this judgment, which is due to an administrative error on my part. It is unacceptable that the parties have had to wait this long for the outcome of a fairly simple debate.

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

Order

1. The application is struck from the roll.
2. There is no order as to costs.

M. Engelbrecht

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : T Matswiki

Instructed by : Ndaba Attorneys

For the third Respondent : A. Kruger of Webber Wentzel

LABOUR COURT