



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

Signature

Date

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case no: JA14B/25

In the matter between:

D.S. MPANZA

First Appellant

P. MATSHELO

Second Appellant

P. SUKHRA-J-ELLY

Third Appellant

J. MATSHIDISO

Fourth Appellant

T. BODIBA

Fifth Appellant

D. PHAHLANE

Sixth Appellant

S. DLWATHI

Seventh Appellant

S. MDZEKE

Eighth Appellant

D. SEOPA

Nineth Appellant

M.D. MATODI

Tenth Appellant

L.C. MQUSHULU

Eleventh Appellant

L. TSHIDZUMBA

Twelfth Appellant

S. MTHIMUNYE

Thirteenth Appellant

and

**THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

First Respondent

MSHORO JAMES MATLALA N.O.

Second Respondent

**GENERAL PUBLIC SERVICES SECTORAL
BARGAINING COUNCIL (GPSSBC)**

Third Respondent

**THE MINISTER OF PUBLIC SERVICE AND
ADMINISTRATION OF SOUTH AFRICA**

Fourth Respondent

**PUBLIC SERVICE ASSOCIATION OF SOUTH AFRICA
THE NATIONAL EDUCATION AND HEALTH
ALLIED WORKERS UNION**

Sixth Respondent

Seventh Respondent

Heard: 27 November 2025

Delivered: 12 May 2026

Coram: Mahalelo ADJP, et Kganyago, Djaje AJA

JUDGMENT

KGANYAGO, AJA

Introduction

- [1] The dispute had a protracted history of being in and out of the bargaining council (Third Respondent) and the Labour Court. The dispute dates to 13 years ago, when the appellants referred a dispute which concerns the interpretation and application of the collective agreement to the third respondent for conciliation and

arbitration if necessary. The appellants were seeking the relief that they be translated into the Occupational Specific Dispensation (OSD). The matter was unresolved at the conciliation level and was referred for arbitration. On 10 September 2013, the commissioner (Second Respondent) issued an award which was in favour of the appellants. The first respondent instituted a review proceeding seeking to review the award, which came before the Labour Court (court *a quo*) for adjudication on 30 June 2023. Judgment was delivered on 25 June 2024, wherein the award of the second respondent was reviewed and set aside. With the leave of the court *a quo*, the appellants are appealing against the whole of the judgment and order.

Background

[2] At the beginning of 2008, the first respondent created the Civil Litigation Unit, the purpose of which was to recruit and retain advocates to conduct civil litigation on behalf of the State. Positions were advertised on 25 January 2008, and the appellants were appointed to those posts as Senior State Advocates and State Advocates. The first group of the appellants were appointed during October 2008, and others later. The key functions of the appellants were to render specialist legal representation to the State in the Constitutional Court, Supreme Court of Appeal, High Courts, Special Courts and/or tribunals, as well as other complex litigation proceedings.

[3] Prior to the appellants' appointment, on 7th February 2008, the first respondent, sixth and seventh respondents concluded Resolution 1 of 2008, which was an agreement on the implementation of OSD for the legally qualified categories of employees. The effective date of the agreement was backdated to 1 July 2007. Clauses 1 and 3 of the agreement provide as follows:

"1. INTRODUCTION

This agreement gives effect to PSCBC Resolution 1 of 2007 in providing for the development and implementation of an Occupational Specific Dispensation (OSD) for qualified legal professionals with effect from 1 July 2007.

3. SCOPE

3.1 This agreement binds-

3.1.1 the Employer,

3.1.2 the Employees of the Employer who are members of the trade union parties to this agreement; and the employees of the Employer who are not members of any trade union party to this agreement, but fall within the registered scope of the Council; and

3.1.3 who fall within the following occupational categories:

-State Attorney

-Family Advocate

-State Law Advisor

-Legal Administrator Officer

-Master

-Register

-Maintenance Officer

-Estate Officer".

- [4] However, the appellants were not included in the category for those who qualify for OSD. On 22 August 2012, the appellants lodged a grievance with the first respondent seeking to be included in the OSD. The grievance could not be resolved on the basis that the first respondent had informed the appellants that it was bound by the collective agreement and that including them would amount to unilaterally amending the collective agreement. The appellants referred their dispute to the third respondent for conciliation, and if unresolved at conciliation, to arbitration. In their referral to the third respondent, the appellants were seeking to be translated to OSD, and that their salaries be adjusted in accordance with

experience gained before 2007 and thereafter. The dispute could not be resolved at conciliation, and the appellants referred their dispute for arbitration.

The Arbitration Award

- [5] The second respondent found that the crisp issue which he was called upon to determine was whether the appellants were entitled to be translated to OSD in terms of Resolution 1 of 2008. Further, he had to first establish whether the appellants and the respondents are bound by the collective agreement (GPSSBC Resolution 1 of 2008). The second respondent found that the appellants were not members of the trade union, but were employees of the first respondent, and also fell within the registered scope of the Council, and therefore, the appellants and the respondents were bound by Resolution 1 of 2008. In his award, the second respondent concluded that the appellants were entitled to be translated into OSD and have their salaries adjusted in accordance with experience gained before 2007 and thereafter retrospectively. The first respondent was ordered to translate and adjust the appellants' salaries in accordance with the award. The second respondent's award was issued on 10 September 2013. Aggrieved by the outcome of the arbitration award, the first respondent brought a review application seeking to review and set aside the second respondent's award. Before the matter could finally be heard in the Labour Court, this matter was going back and forth in both the Labour Court and the third respondent

Labour Court

- [6] On 15 October 2015, the review application in this matter came before Basson J. By consent between the parties, Basson J ordered that the matter be postponed *sine die*, and directed that the appellants approach the fourth respondent with a view to request the third respondent to convene a meeting of all interested parties to the collective agreement, including the appellants. The purpose of that meeting was to discuss the inclusion of the appellants in Resolution 1 of 2008.

- [7] On 2nd August 2016, the review application came before Van Niekerk J. There was a no-show by both parties, and Van Niekerk J dismissed the review application. That led to the appellants bringing an application in terms of section 158(1)(c) of the *Labour Relations Act*¹ (LRA), seeking to make the award an order of the Court. On 2 June 2017, the review and section 158 applications came before Lagrange J. Lagrange J ordered the first respondent to file a rescission application and also a condonation application for the late filing of the rescission application. The first respondent filed only the rescission application, but failed to file a condonation for the late filing of the rescission application.
- [8] On 25 April 2018, the review, section 158 and rescission applications came before Nkhutha-Nkontwana J, who remitted the matter back to the third respondent. Nkhutha-Nkontwana J directed that the parties were to convene at the third respondent's chambers to discuss the possible inclusion of the appellants in the Resolution 1 of 2008. Further, the parties were to report to the Labour Court the outcome of their discussion. On 10 July 2018, the secretary of the third respondent reported to the Labour Court that the outcome of the meeting was that the matter would be tabled before the GPSSBC for consideration.
- [9] On 19 August 2018, the appellants instituted contempt of court proceedings in the Labour Court against the secretary of the third respondent. On 30 November 2018, the parties entered into a settlement agreement, which was made an order of court. The terms of the settlement agreement were that (i) the appellants withdrew their contempt of court application against the secretary of the third respondent; and (ii) the third respondent would use its best endeavours to convene a meeting before the end of February 2019 between all the parties, including the trade unions and the fourth respondent. The meeting would be convened outside the provisions of the third respondent's constitution, and its objective would be to resolve the dispute between the Department and the appellants by identifying a process that would allow the dispute between the Department and the appellants to get on the agenda of the third respondent.

¹ Act 66 of 1995

- [10] The secretary of the third respondent reported to the Labour Court that a meeting was held between the parties, and the parties could not reach an agreement on the issues in contention, but that it was agreed that the appellants may approach the Public Service Coordinating Bargaining Council (PSCBC). The appellants referred their dispute to PSCBC, and on 26 July 2022, the commissioner of PSCBC found that although the appellants were bound by Resolution 3 of 2010, it cannot be held that they were parties to the agreement. Furthermore, the appellants in their personal capacities do not have a right to refer their dispute to the PSCBC, and they lack the necessary *locus standi* to refer their dispute about the interpretation of the Resolution. The commissioner ruled that the bargaining council lacks jurisdiction to determine the appellants' dispute. The appellants did not bring an application to review and set aside this ruling.
- [11] On 30 June 2023, the three applications (review, section 158 and rescission) came before the court *a quo*. The court *a quo* found that although the first respondent had failed to file a condonation application as previously ordered, it was necessary for it to entertain condonation without any formal application. The court *a quo* held that it was unacceptable that, having been ordered by the court to file a condonation application, the first respondent had not bothered to do so. There is simply no excuse whatsoever for not complying with the court order. This was strictly contemptuous conduct. The court normally would lack jurisdiction to deal with the matter in the absence of a condonation application. However, despite these damning findings, the court *a quo* concluded that when it looked at the facts of the case, the importance of the issue at hand, the parties involved and the fact that the dispute, primarily the review application has been so protracted, the interest of justice dictate that the first respondent's non-compliance be condoned in the first place and secondly condone the late filing of the rescission application. The court *a quo* granted the first respondent condonation for the late filing of their rescission application, proceeded to grant the rescission application, and thereafter reviewed and set aside the award of the second respondent. The appellants, with the leave of the court *a quo*, are appealing against the whole of the judgment and orders of the court *a quo*.

Grounds of Appeal

- [12] The appellants' grounds of appeal are that the court *a quo* erred in finding that the fact that the appellants were not a party to the collective agreement and therefore Resolution 1 of 2008 did not have *locus standi* to refer a section 24 dispute to the arbitrator and the GPSSBC, and that the award was therefore a nullity which stood to be reviewed and set aside. The court *a quo* erred in not taking into consideration the existing determination by the fourth respondent, wherein the fourth respondent had determined that the OSD was applicable to all legally qualified employees who were employed in terms of the Public Service Act, 1994, retrospectively to 1 April 2007. The court *a quo* erred in finding that the arbitrator had incorrectly interpreted and applied the Resolution to include the appellants. The court *a quo* erred in granting the order condoning the late filing of the first respondent's rescission application in the absence of an application, despite Lagrange J having ordered them to file such an application. The court *a quo* erred in granting an order reviewing and setting aside the award, and failing to consider the appellants' section 158(1)(c) application.

Evaluation

- [13] The court *a quo* has correctly held that, normally, it would have lacked jurisdiction to deal with the matter in the absence of the condonation application. The first issue this Court must determine is whether it was competent for the court *a quo* to have entertained a condonation application which the first respondent never applied for. The test for granting a condonation application is not based on sympathy or feeling sorry for the applicant. The factors which a court must consider when exercising its discretion whether to grant condonation includes the degree of lateness, explanation for the delay, prospects of success, degree of non-compliance with the rules, the importance of the case, the respondent's

interest in the finality of the judgment of the court below, prejudice to any of the parties and avoidance of unnecessary delay in the administration of justice.²

[14] In *Grootboom v National Prosecuting Authority and Another*³ Bosielo AJ said:

“[22] I have read the judgment by my colleague Zondo J. I agree with him that, based on *Brummer* and *Van Wyk*, the standard for considering an application for condonation is the interest of justice. However, the concept “interest of justice” is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interest of justice must reflect due regard to all the relevant factors but is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

[23] It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must [my emphasis] make out a case entitling it to court’s indulgence. It must show sufficient cause. This requires a party to give full explanation for the non-compliance with the rules or court’s directions.” [my emphasis]

[15] The *Brummer*, *Van Wyk* and *Grootboom* cases have extended the test for the granting of a condonation application, which now includes the interest of justice. A party applying for condonation is seeking indulgence from the court for its failure to comply with the court’s rules or directives. That party must set out a case entitling it to the court’s indulgence in an application supported by an affidavit. The court hearing the application will be able to deduce from the facts

² See *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] 2 All SA 251 (SCA) at para 11.

³ [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] BLLR 1 (CC); (2014) 35 ILJ 121 (CC) (21 October 2013) at para 22 and 23

placed before it by the party seeking indulgence whether it is in the interest of justice to grant condonation. Sufficient cause is not made out of the vacuum; there must be facts placed before the court to enable it to properly exercise its discretion. It will not be assumed that, where non-compliance was due to the neglect of the appellant's attorney, condonation will be granted⁴. The applicant should set forth briefly and succinctly such essential information as may enable the Court to assess the applicant's prospects of success. If the explanation for such non-compliance is manifestly inadequate or absent, the prospects of success need not be considered.

[16] There was a valid court order by Lagrange J, which had directed the first respondent to file a rescission application and a condonation application for the late filing of the rescission application. At the time when the matter came before the court *a quo*, that order was still valid and enforceable. Basson J, Nkutha-Nkontwana J and Van Niekerk J's orders did not amount to an abandonment or waiver of the original proceedings as argued by counsel for the first respondent. If there was an abandonment or waiver, the first respondent would not have proceeded with its rescission application, as that application was emanating from Lagrange J's order. This shows that Lagrange's order was still extant and was not affected by the other orders. However, the first respondent chose to partially comply with the order by filing only the rescission application. No explanation was given to either the court or the appellants why it had failed to file a condonation application.

[17] A court order, whether good or bad remains valid and enforceable until it has been set aside by a court of competent authority. In *Pheko and Others v Ekurhuleni Metropolitan Municipality (No2)*⁵ Nkabinde J said:

"The starting point is the Constitution. It declares its own supremacy and this supremacy pervades all laws. Section 165 vouchsafes judicial authority. It provides that courts are vested with judicial authority and that no person or organ of state may interfere with the

⁴ *Beweging vir Christelik-Volksise Onderwys and Others v Minister of Education and Others* [2012] ZASCA 45; [2012] 2 All SA 462 (SCA).

⁵ [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (7 May 2015) at para 26.

functioning of the courts. The constitution explicitly enjoins organs of state to assist and protect courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. In order to ensure that courts' authority is effective, section 165(5) makes an order of court binding on "all persons to whom and organs of state to which it applies". These obligations must be fulfilled. It is significant that this subsection specifically mentions organs of state, for "justiciability and powers of constitutional review make sense only if non-judicial authorities cannot and do not undo court orders and/or their consequences". These sections, read alongside the interpretive injunction of the supremacy clause, demonstrate why continual non-compliance with court orders and decisions would, inevitably, lead to a situation of constitutional crisis".

[18] The first respondent was aware of Lagrange J's order, and at no stage did it take any initiative to challenge it. Since the first respondent has not challenged that order and was also aware of it, it was bound to comply with it. It could not have simply ignored or hand-picked which part of the order to comply with without any plausible explanation. If it had problems in complying with the order, it had to seek indulgence from the Court by giving a full explanation of what made it impossible for the first respondent not to comply with the order. The court *a quo* has found that the first respondent, despite being ordered to file a condonation application, did not bother itself to do so, and there was no excuse whatsoever for not complying with the court order. Furthermore, the conduct of the first respondent was contemptuous. The court *a quo*, by finding that the conduct of the first respondent was contemptuous, implies that its actions were deliberate, wilful and *mala fide*. The first respondent had therefore flagrantly disregarded a valid court order without any justifiable reasons. It is mind-boggling that despite such an adverse finding against the first respondent, the court *a quo* still deemed it fit to come to the rescue of the first respondent.

[19] The appellants when they argued the appeal in this court have submitted that the court *a quo* did not give them an opportunity to address it on the process it was about to follow of entertaining the condonation application despite the first

respondent having failed to file it. In *Road Accident Fund v Taylor and other matters*⁶ Van der Merwe JA said:

“In circumstances, the age-old principle of audi alteram partem required that the affected persons be afforded reasonable prior notice and opportunity to state the cases. In *Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlathuzana Civic Association intervening)* 2002 (1) SA 429 (CC) para 11, the following was said with particular reference to s 34 of the Constitution:

‘This s 34 fair hearing right affirms the rule of law which is the founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where reasonably possible to do so, in a way that would render the proceedings fair. It is a crucial aspect of our law that court orders should not be made without affording the other side a reasonable opportunity to state their case...’”

[20] The appellants were appearing in person in the court *a quo* and also in this court. This court is mindful of the fact that the appellants are legally qualified and their job description entails handling legal matters, but they will be treated as unrepresented parties. As unrepresented parties, it was the duty of the court *a quo* to explain to them the procedure it was about to follow, and to afford them sufficient opportunity to prepare their case on the procedure which the court was about to follow and not just ambush them. The manner in which the court *a quo* dealt with the condonation application was not fair to the appellants, as they were not forewarned and were not afforded ample opportunity to prepare for the procedure which the court *a quo* followed.

[21] The court *a quo* granted an order which the first respondent had never applied for or asked for. In *Fischer v Ramahlele*⁷ Theron and Wallis JJA said:

⁶ [2023] ZASCA 64 (8 May 2023) at para 33

“It is not for the court to raise new issues not traversed in pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to the case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend the pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court [my emphasis]. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with the matters other than those they have formulated in the pleadings or affidavits”.

- [22] The court *a quo*, having found that the first respondent had failed to file its condonation application, and that normally it would have lacked jurisdiction to deal with the matter in the absence of the condonation application, should have brought that to the attention of the parties, and heard from them how they intend to deal with the matter, and not for it to decide for them. It is correct that this matter had long been pending, and there had to be finality. However, that was not a good ground to decide for the parties in the name of the interest of justice. The court *a quo* had already found that the first respondent had been wilful, deliberate and mala fide in not complying with the court order. Since there was flagrant disregard of the court order, the interest of justice favoured the dismissal of the first respondent's application for rescission. This was a matter that was not worthy of the first respondent's application being struck off the roll, as they were already given ample opportunity by way of a court order to file a condonation application, and they failed to do so, and deliberately failed to advance any

⁷ [2014] ZASCA 88 (4 June 2014) at para 14

reasons why they chose to file only the rescission application, and not both applications as per the court order.

[23] It was therefore not competent for the court *a quo* to have dealt with the condonation application without the first respondent, who had flagrantly disregarded a court order, applying for it formally. A party applying for condonation is required to give a full, detailed account of the cause of the delay. It will be a recipe for disaster for courts to expect other parties to comply with general known test for the granting of condonation, whilst on the other hand, another party may be granted condonation without having to apply for it. I am alive to the fact that each case is decided according to its own merits, but the merits of the current case do not deserve a deviation from the general known test. There had to be jurisprudential coherence. The court *a quo* should have dismissed the first respondent's rescission application.

[24] Having dismissed the first respondent's rescission application, it was now open to the court *a quo* to have dealt with the appellant's section 158 application. In terms of section 158(1)(c) of the LRA, the Labour Court is empowered to make any arbitration award or settlement agreement an order of the Court. The court *a quo* did not deal with the appellant's section 158 application. In my view, there is sufficient evidence that places this Court in a good position to determine whether the award issued by the second respondent on 10 September 2013 should be made an order of court. Therefore, it will serve no purpose to remit the matter back to the Labour Court.

[25] It is correct that the appellants are not a party to the collective agreement and/or Resolution 1 of 2008. When this Resolution was signed and implemented, the unit to which the appellants were ultimately appointed was not yet operational, but still in the process of being established. At that stage, there were no employees described as Senior State Advocates and State Advocates, hence they could not have been included in the category of employees whom OSD will cover. Clause 3.1.2 of the Resolution states that the agreement also binds

employees of the employer who are not members of any trade union party to the agreement, who fall within the registered scope of the Council. Clause 1 of the agreement states that OSD is applicable to legally qualified legal professionals. The third respondent in her letter addressed to the Minister of Safety and Security, attaching her ministerial determination, which clarifies certain issues in the Resolution, had stated that OSD was applicable to all legally qualified employees who were employed in terms of the Public Service Act 1994, with retrospective effect from 1 July 2007.

- [26] The appellants are all legally qualified employees; they are not members of any trade union which is a party to the agreement, and they fall within the registered scope of the Council. The appellants have been employed in terms of the Public Service Act, 1994. When the Resolution was signed on 7 February 2008, their unit was not yet established. Their unit was only established and became operational in October 2008 after the agreement had been signed. However, they meet the criteria to fall under the scope of the employees who are covered by OSD. Therefore, there is nothing to fault the second respondent for arriving at his conclusion. The decision reached by the second respondent is the one that a reasonable decision maker could have reached. The award of the second respondent issued on 10 September 2013 stands to be made an order of court in terms of section 158(1)(c) of the LRA.

Costs

- [27] With regard to costs, this Court has broad discretion under section 179 of LRA to make orders for payment of costs, according to the requirements of the law and fairness. In my view, these requirements will be best satisfied by each party bearing their/its own costs.

Order

1. The appeal is upheld with no order as to costs, and the order of the court *a quo* is set aside and substituted with the following:

- 1.1. The applicant's rescission application is dismissed.
- 1.2. The arbitration award made by the arbitrator, under the auspices of the General Public Service Sectoral Bargaining Council ("GPSSBC"), dated 10 September 2013, is made an order of court.
2. Each party to pay their/its own costs.

M.F. Kganyago AJA
Acting Judge of the Labour Appeal Court

Mahalelo ADJP and Djaje AJA concur.

APPEARANCES:

For appellants: In person

For respondents: Adv DT Skhosana SC, instructed by the State Attorney,
Pretoria