



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

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Reportable

Case no: PR177/22

In the matter between:

BENTELER SOUTH AFRICA (PTY) LTD

Applicant

and

**BULELANI BUSAKWE (Cited in his capacity
as the Commissioner of the Dispute Resolution
Centre for the Motor Industries Bargaining Council)**

First Respondent

**THE MOTOR INDUSTRIES BARGAINING
COUNCIL – DISPUTE RESOLUTION CENTRE**

Second Respondent

AMCU OBO LANGBOOI, CHRIS

Third Respondent

Heard: 18 February 2026

Delivered: This judgment was handed down electronically by emailing a copy to the parties on 12 June 2026. This date is deemed to be the date of delivery of this judgment.

JUDGMENT

KROON AJ

Introduction

- [1] The Code of Conduct for Legal Practitioners, Candidate Legal Practitioners and Juristic Entities¹ requires that attorneys:

“18.14 perform professional work or work of a kind commonly performed by an attorney with such a degree of skill, care or attention, or of such a quality or standard, as may reasonably be expected of an attorney;”

- [2] An attorney who entrusts to a secretary a legal function requiring the professional judgment, diligence, and supervision of the attorney himself² and who, when matters take a turn for the worse, seeks to evade responsibility by attributing the ensuing bungling of the case to the secretary, stands in no different position from a surgeon who delegates the performance of an appendectomy to a nurse, only to blame the nurse when the wrong organ is removed.³ In both instances, the fault lies not in the subordinate's failure, but in the professional's abdication of his own non-delegable duty.

- [3] It was President Harry Truman who famously said, *“the buck stops here”*.⁴ Not so, says the attorney responsible for the prosecution of the review application in this matter. For him, the buck stopped elsewhere. It stopped with an allegedly delinquent secretary who, so he said, neglected to properly monitor and supervise the file. This is a cautionary tale of an attorney who failed to prosecute

¹ promulgated under the Legal Practice Act 28 of 2014

²The masculine gender is used for the sake of conciseness. References to the masculine gender include, where appropriate, the feminine gender.

³ Cf. *Van Wyk v Lewis* 1924 AD 438 wherein the Court, dealing with a matter relating to alleged surgical negligence, discussed the question of professional oversight.

⁴ This well-known phrase expresses the principle that the person in charge is accountable. President Truman reportedly kept a carved wooden sign with this motto on his desk in the Oval Office.

a review with reasonable care and diligence and, when confronted by the predictable outworking of his conduct, the lapsing of the review application, sought to make a scapegoat, what is termed in Afrikaans a "sondebok,"⁵ of a secretary. The lesson is that, whilst many legal secretaries are highly competent and provide invaluable assistance in the administration of a legal practice, legal practitioners must be astute not to outsource to secretaries that which requires the practitioner's own independent judgment and application of mind.

- [4] It is against this backdrop that the Court adjudicates an opposed application for the reinstatement of a lapsed review application. The review application concerns an attack on an arbitration award that determined that Mr Langbooi's dismissal on 12 November 2020 for misconduct was substantively unfair and that he was to be reinstated. For ease of reference, the Applicant will be referred to as Benteler, the First Respondent as the Arbitrator, the Second Respondent as the Bargaining Council and the Third Respondent, which acted on behalf of Mr Langbooi, as AMCU.

Is the reinstatement application competent?

- [5] A feature of the reinstatement application is that the review application sought to be reinstated is itself two months out of time; yet there is no condonation application for the failure to comply with the peremptory six-week time period.⁶ This means that, even if reinstated, the review application would still not be pending before the Court. In *Cross Border Road Transport Agency v Mpato and Others*,⁷ the Court held as follows:

"The result is that the jurisdictional prerequisites for the review are non-existent in that there is no application for condonation, nor has there been service of the review. Accordingly, there is no review application that complies with the

⁵ Literally sin-goat - an innocent person who is blamed for the mistakes, wrongdoings, or misfortunes of others, and who unfairly takes the punishment or bears the burden.

⁶ In terms of Section 145(1)(a) of the Labour Relations Act No. 66 of 1995 (the LRA), a review application must be brought within six weeks.

⁷ [2003] 10 BLLR 992 (LC) at 994E-F

rules of this court. In the circumstances, there is no process pending .." (own emphasis)

- [6] In the absence of a condonation application for the late lodging of the review application, there will be no *lis* for the Court to adjudicate. The Court will have no jurisdiction to entertain the merits of the review application, even if it were reinstated.⁸ The reason is that, unlike time periods contained in the Rules, statutory time periods affect jurisdiction. Compliance with the stipulated six-week period or a successful condonation application constitutes a jurisdictional fact which must exist before the Court can consider the review application.
- [7] The natural question which arises is whether it is competent to reinstate a review application over which the Court will have no jurisdiction. The purpose of reinstating a review application is, self-evidently, to place it before the Court, i.e., to change its status from a lapsed proceeding to a pending proceeding. The predicament confronting Benteler is that, if the review application were reinstated, there would still be no pending application. Any reinstatement order would be ineffectual and hollow. Granting such an order would be an exercise in futility.⁹ In *Olivia Kock v the CCMA & Others*¹⁰ the Court found that the bringing of a reinstatement application prior to the record having been filed was "premature" and accordingly "irregular".¹¹
- [8] It was not the case that Benteler intended to apply for condonation. Even when the delay was drawn to Benteler's attention in AMCU's heads of argument, there was evidently a decision not to apply for condonation. In response to questions by the Bench about whether the absence of a condonation application presented an insurmountable hurdle to the granting of reinstatement, Ms Moyo, who appeared on behalf of Benteler, seemed, at least

⁸ Cf. *MEC for Health, Province of Eastern Cape NO and Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 (3) SA 219 (SCA) para [27]

⁹ Cf. *Festive, A Division of Astral Operations Limited v Commission for Conciliation, Mediation and Arbitration and Others* (JR1686/15) [2020] ZALCJHB 178 (31 August 2020) para [11] where the Court, albeit it in different circumstances, refused to grant an application for reinstatement, where doing so would serve no purpose.

¹⁰ Case No JR764/18 (31 May 2021)

¹¹ para [57]; See also the judgment by Tlhotlhemaje J in *City of Ekurhuleni Metropolitan Municipality v Lindiwe Khumalo and IMATU obo Peter Mabone* JR 1398/18) [2023] ZALCJHB 165 (30 May 2023) para [22]

at times, to concede as much. She, however, focused on the fact that, in the answering affidavit in the review application, there was no objection to the jurisdiction of the Labour Court to entertain the review application. Although not clear, the contention appeared to be that if there was no objection to jurisdiction then it would, for that reason alone, become a non-issue.

- [9] This submission is without merit. A judicial officer is obliged, first and foremost, to satisfy himself as to his jurisdiction, irrespective of whether the parties have raised the point.¹² When it comes to statutory time periods, unless the statute itself provides otherwise, parties are not permitted, through their conduct or by agreement, to clothe the forum hearing the matter with jurisdiction it would otherwise lack.¹³ In *Coetzee*,¹⁴ the Labour Appeal Court explained that:

“[73] *The consent of the parties cannot clothe the Labour Court with jurisdiction it does not have. ...*”

- [10] Even if it had been Benteler’s case that, on some undetermined future date, it was of the mind to bring a condonation application that could not have rescued it from the self-created legal cul-de-sac in which it now finds itself. This is because an application is to be adjudicated on the facts as they stood when the application was filed. At the time the reinstatement application was filed, there was no condonation application for the late delivery of the review application. In *Phillips v Grobler & Others*,¹⁵ the Court, referring with approval to an authority of the High Court of Zimbabwe, held as follows:

¹² *South African Maritime Safety Authority v McKenzie* 2010 (3) SA 601 (SCA); [2010] 3 All SA 1 (SCA); (2010) 31 ILJ 529 (SCA); [2010] 5 BLLR 488 (SCA) para [6]; *Makhanya v University of Zululand* (2010) (1) SA 62 (SCA) ; [2009] 8 BLLR 721 (SCA) ; [2009] 4 All SA 146 (SCA); (2009) 30 ILJ 1539 (SCA) para [29]; *Competition Commission of South Africa v Standard Bank of South Africa Ltd and related matters* 2020 (4) BCLR 429 (CC) para [200]; *Xaba v Portnet Limited* (2000) 21 ILJ 1739 (LAC) para [4,5], Zondo AJP (as he then was) stated:

“There is no substance in the appellant’s complaint because the point in limine raised by the respondent related to a matter of the jurisdiction of the industrial court and a court or tribunal is always entitled, in fact it is obliged, to satisfy itself that it has jurisdiction before it can deal with a matter.”

¹³ *Ndlambe Municipality v CCMA & Others* (2008) 29 ILJ 2263 (LC) para [25]; *Mayedwa v General Public Service Sectoral Bargaining Council & Another* (2009) 30 ILJ 2946 (LC); *Bargaining Council for Hairdressing & Cosmetology Trade (Pretoria) v Smit t/a Hair Mistique* (2002) 23 ILJ 388 (LC) paras [7] to [12]

¹⁴ *Member of the Executive Committee of the Western Cape Provincial Government Health Department v Coetzee & Others* (2015) 36 ILJ 3010 (LAC)

¹⁵ [2020] 1 All SA 253 (WCC)

[29] In *Mbanje v Ngani*^[10], the following was stated:

“It seems to me that the process initiating action in the Court, whether it be by the issue of a writ of summons or notice of motion, has the effect of freezing the rights of the parties at the time that it is filed in the registry. So that, if at the time action was instituted, a right of action had not accrued to the plaintiff or applicant, as the case may be, then no cause of action is established by the initiating process.”

[30] *When the application was launched by the first respondent, he in my view, did not have a “complete” cause of action against the appellant. This in my view, is not a mere technical point affecting some provision of adjectival law, as it strikes at the very root of the application. ...”*

[11] *Ntoyakhe v Minister of Safety and Security and Others*¹⁶ followed *Director of Hospital Services v Mistry*¹⁷ in which Diemont JA explained that it is not permissible for a party to rely on facts that arose after the application was launched. That would be, as is often said, to seek to breathe life into a dead application. *Ntoyakhe* referred to the “*established principle*” in terms of which “... *the cause of action relied upon by a litigant must exist at the time that the proceedings are launched, ie when the papers are filed with the Registrar.*”¹⁸

[12] In the circumstances, what was required, at a minimum, was that the reinstatement application be coupled with an application for condonation of the late delivery of the review application. The failure to apply for condonation is dispositive of the reinstatement application.

The Overberg principle

[13] There is a further principle at play. In *Overberg*¹⁹ Lagrange J explained that an applicant who is seeking the reinstatement of a review application is obliged to get its house in order before bringing such an application. This is achieved by the applicant seeking an indulgence to revive a review application, actively

¹⁶ 2000 (1) SA 257 (ECD)

¹⁷ 1979 (1) SA 626 (A)

¹⁸ 264E-F

¹⁹ *Overberg District Municipality (ODM) v IMATU obo Spangenberg and Others* (C 157/18) [2020] ZALCCT 38 (10 June 2020)

doing what it can to remedy the failure which led to the review application being deemed withdrawn and taking all steps reasonably necessary to ensure that the review application will be ready for adjudication if reinstated.²⁰ Although this Judgment was overturned on appeal,²¹ it was on a different basis. It follows that guidance may still be sought from the (undisturbed) reasoning pertaining to the requirements of a successful reinstatement application, which reasoning the Court finds to be cogent and persuasive.²² The sentiments expressed in *Overberg* have, in any event, been endorsed by this Court as by the Labour Appeal Court in *National Union of Metalworkers of South Africa obo Members v Defy Appliances (Pty) Ltd and others*.²³ I quote:

"[15] As emphasised in Overberg District Municipality v Independent Municipal and Allied Trade Union on behalf of Spangenberg and others, a party seeking to revive a deemed withdrawn application must demonstrate that it has acted promptly in launching the reinstatement application and has taken bona fide steps to ensure the expeditious finalisation of the matter if reinstated."

[14] In this matter, the house of Benteler is in disarray. The decision not to bring a condonation application together with the reinstatement application is, in the Court's view, equally fatal on an application of the principle that, for want of a better expression, a litigant applying for the reinstatement of a lapsed review application is required, as far as possible, to ensure that that review application is ripe for finalisation. To compound matters, the record, belatedly filed, was materially incomplete. It comprised only the transcript of the evidence. The documentary component (the exhibits and Bargaining Council process) was omitted. AMCU pointed out this omission in the affidavit deposed to in answer to the reinstatement application. Benteler did not file a replying affidavit. Lastly, Benteler has also not timeously applied for a date within the six months prescribed by Section 145(5) of the LRA, and there is no application for

²⁰ para [38]

²¹ *IMATU obo Spangenberg and Others v Overberg District Municipality and Others* [2025] 2 BLLR 137 (LAC)

²² *Cf Skulpad and Another v Department of Health Eastern Cape and Others* [2025] 1 BLLR 70 (LC), para [13]

²³ [2026] 2 BLLR 121 (LAC)

condonation.²⁴ In all the circumstances, the application for reinstatement also falls to be dismissed applying what may be termed the *Overberg* principle.

Has Benteler demonstrated prospects of success?

[15] Even if the Court is wrong when it comes to the competency of the application and its conclusion that the reinstatement application should, in any event, fail because Benteler did not take steps to ensure that its house was in order prior to the bringing of the reinstatement application, there is a further impassable obstacle facing Benteler. It is that, by reason of the absence of a condonation application for the late delivery of the review application, it cannot be said that the review application enjoys prospects of success.

[16] A reinstatement application is akin to a condonation application. The primary obligations resting on an applicant for an indulgence of this nature are to prove both a reasonable explanation for the delay as well as prospects of success. It has been held that a heightened test applies to condonation applications in employment disputes.²⁵ At the end of the day, the Court must be satisfied that it is in the interests of justice to grant the application.²⁶ As was pointed out in the seminal case of *Melane*,²⁷ there is no point in granting condonation if there are no prospects of success. In this matter, the natural question that arises is: How can it conceivably be contended that the review application has prospects of success if the position is that, if it were reinstated, the Court would have no jurisdiction to adjudicate it?²⁸

[17] It would be to extend the practicalities to unacceptable lengths to expect the Court to grant the reinstatement application, as it were, in the dark and without knowing whether Benteler will even bring a condonation application and, if it did, what its explanation for the considerable delay would be, if indeed there

²⁴ *Department of Transport v General Public Service Sector Bargaining Council and Others* (PR 02/21) [2023] ZALCPE 7 (2 May 2023) paras [39] to [41]

²⁵ *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) and others* (2015) 36 ILJ 232 (LC) para [25]

²⁶ *Samuels v Old Mutual Bank* (2017) 38 ILJ 1790 (LAC) para [17]

²⁷ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) 532E

²⁸ Insofar as it is not clear, in the view of the Court, it is not necessary to consider the 'merits' of the review application in circumstances where an applicant has not demonstrated that the Court will have jurisdiction to entertain that application.

was such an explanation. There would also be a need for Benteler to explain the delay in the bringing of the condonation application, it being trite that a condonation application should be brought as soon as the need for one arises. As matters stand, given that the review application was launched on 3 November 2022, more than three and a half years have passed and there is still no condonation application for the late delivery of the review application. In *Aspen Holdings Pty Ltd and Another v Phelane and Another*, the Labour Appeal Court held that a decision by the Labour Court to grant condonation in the face of an unexplained 36-day²⁹ delay preceding the bringing of the condonation application (compare this to the 1,303-day delay in the current matter) was, in and of itself, fatal, rendering the granting of condonation by the Labour Court “improper”.³⁰

The explanation for the delay

Introduction

[18] In the light of the circumstance that the reinstatement application is irregular to the extent that it is procedurally fatally defective, the circumstance that Benteler failed to take the trouble to put its house in order before bringing the reinstatement application and the fact that the review application does not enjoy prospects of success, there can hardly be justification for going further and considering the explanation for the delay. However, given that this issue was canvassed at length during the hearing, the Court will do so as a courtesy to the legal representatives and because embarking on this exercise may provide some ethical guidance on the ambit and scope of the overarching duty resting on legal practitioners to exercise professional oversight when it comes to litigation for which they are responsible.

²⁹ [2025] BLLR 409 (LAC)

³⁰ para [24]

*The factual matrix*³¹

- [19] The award was issued on 29 July 2022. The review application would therefore have been due for delivery on 9 September 2022. However, it was only launched on 3 November 2022. It was thus almost two months late. As mentioned, no condonation application accompanied it. There is no explanation for the absence of a condonation application.
- [20] The notice of motion and founding affidavit in the reinstatement application were signed by an attorney previously employed by Benteler's legal representatives, Mr Johan Biggs. Mr Biggs left the employ of Benteler's legal representatives on an undisclosed date, but after it was discovered that the review application had lapsed. AMCU delivered a notice of opposition on 10 November 2022, a week after the review application was launched. After the review application was delivered, there was an eight-month delay attendant upon securing the record. The Bargaining Council filed the record on 20 January 2023. On Benteler's version, due to an email address error by the Registrar, it did not receive notification that the record was available. Yet, it took no steps to follow up during the eight-month period from the date that the record was due to be provided by the Bargaining Council³² until it received official notification from the Registrar that the record was available for upliftment. It also did not occur to Benteler to bring an application to compel the production of the record.
- [21] Benteler contends that it only received notification from the Registrar that the record was ready for upliftment on 5 July 2023. In terms of the Practice Manual of the Labour Court of South Africa (April 2013) (the Practice Manual), the record needed to be delivered by 29 September 2023. The transcript was received on 14 August 2023. Mr Biggs states that he took about a week to peruse the transcript. He does not explain why he did not peruse the exhibits or why they did not form part of the record filed. He says that sometime in the last week of August 2023, he made a decision that a Rule 7A(8) notice recording that Benteler stood by its affidavit and notice of motion should be

³¹ The Court is indebted to Ms Poppesquou, who appeared on behalf of AMCU, for her detailed heads of argument setting out, *inter alia*, the applicable chronology.

³² As per the Rules, the Bargaining Council was given 10 days to furnish the record.

delivered. He then states that, with this in mind, he sought to approach Ms Mbuli, the secretary apparently dealing with the matter, with a view to requesting her to draft the relevant Court process. She, however, was absent “on the day”. Instead of waiting for her to return, he approached another secretary, Ms Molotsi. He instructed her to file the record together with a Rule 7A(8) notice. It is not clear whether it was envisaged that Ms Molotsi’s involvement would be temporary or whether Ms Mbuli would, on her return, continue to handle the file.

[22] The Court is not informed as to what happened after the instruction was given to Ms Molotsi. All that Mr Biggs says is that Ms Molotsi subsequently communicated to him, apparently by word of mouth – Mr Biggs provides no proof of this communication – that the matter was awaiting a Court date. I quote as follows:

“14. Towards the end of September 2023, I enquired about the matter from Ms Molotsi and was informed that the matter is now pending a hearing date in the Labour Court and was placed with other files where all actions had been taken and which was awaiting a court date. This was not at all implausible as a month was ample opportunity for the record and 7A(8) to be filed, the time period for the serving and filing of any opposing papers to lapse and in the absence of opposing papers for the matter to be indexed and paginated and a court date to be applied for. I accordingly did not have any reason to suspect anything untoward with regards (sic) to this and accepted that the matter was awaiting a court date.”

[23] In making the allegation that he was under the (erroneous) impression that a Court date was awaited in order that the review application could be heard on an unopposed basis, Mr Biggs does not deal with the fact that, on receipt of the review application, AMCU had delivered a notice of opposition. That aside, it is common cause that the reality was that the status of the review application was worlds apart from that which was allegedly conveyed to Mr Biggs by Ms Molotsi. Not a single step had been taken to prosecute the review application after its lodgement. No record was filed. No Rule 7A(8) notice was filed. No court process was indexed and paginated. The Registrar was not informed in writing,

as required by clause 11.2.7 of the Practice Manual, that the matter was ripe for hearing. No application for a Court date had been made under Section 145(5) of the LRA.

[24] Had Mr Biggs taken the trouble to inspect the file, it would have been glaringly apparent to him that there was something very wrong. Mr Biggs would subsequently seek to justify his hands-off approach by insisting that he was entitled to rely on what he viewed as a foolproof 'office system' (the system) implemented by Benteler's attorneys of record. I deal with his explanation and the system on which he relied, in detail, below.

[25] The alarm was raised,³³ according to Mr Biggs, when, pursuant to an *ex parte* contempt of court application brought by AMCU, that application was subsequently served on Benteler on 27 March 2024. This caused Mr Biggs, *for the first time*, to inspect the file. On inspecting the file, it dawned on him that the prosecution of the matter had fallen into dire straits. Nothing had been done to prosecute the review application after it had been launched almost one and a half years earlier. Mr Biggs scurried around trying to put Humpty Dumpty together again. The very next day, 28 March 2024, the record and the Rule 7A(8) notice were delivered. The contempt of court application was postponed pending the outcome of the reinstatement application.

[26] Mr Biggs explains as follows:

"16. When the Applicant received the application for contempt proceedings on 27 March 2024, same was forwarded to me for the first time since the instruction to Ms Molotsi was given at the end of August 2023. I requested the file as the contempt application contained allegations which was completely at odds with the stance of the matter as was communicated to me and as updated on the system.

³³ There is an unchallenged allegation in the affidavit deposed to in answer to the reinstatement application that on 17 January 2024 a communication demanding compliance with the award was transmitted, on behalf of AMCU, to Benteler's legal representatives. It is also not disputed that there was no response thereto. Notwithstanding the fact that the allegation has not been denied, in my view it carries little evidential weight because there is no indication who transmitted the communication and neither the communication nor proof of its transmission have been attached to the answering affidavit. The Court will accordingly not hold this conclusory assertion against Benteler.

17. *It is only when the file was perused by me after the contempt of court application was received that it came to the attention of myself, and accordingly the Applicant, that the record had indeed not been filed and that the matter had been deemed to be withdrawn in terms of clause 11.2.7 of the Practice Manual.*" (own emphasis)

The system

[27] The foundation of the explanation furnished by Mr Biggs for what happened is sourced in, what he terms in his founding affidavit, the "*standard operating procedure*". Mr Biggs sought refuge in an office management system which he contends Benteler's legal representatives implemented in the conduct of litigation relating to review applications. He states that, in terms of the system, it is the responsibility of the secretary handling the matter to manage the file, to determine its status and then to keep a record of that status, a record which can then be accessed by any of the attorneys employed by Benteler's legal representatives. In this context, Mr Biggs referred to the status of each review application being captured on a "*file management system*". Ms Moyo, in her oral address, referred more informally to a "*diary*". Shorn of all elaboration, it was the version of Mr Biggs that a secretary, who was obliged to keep an accurate record of what was happening in the file, misled him about its status. She told him that the pleadings were closed and that the review application was awaiting a hearing date when the correct position was that no further steps had been taken to prosecute the review application after it had been delivered.

[28] The mechanics of the system were described as follows:

"8. *The standard operating procedure at the Applicants attorneys of record when it comes to review applications are strictly adhered to and entails the following:*

8.1. *When the review has been served and filed the matter file is handed over to the legal secretaries employed with Snyman Attorneys to follow up and ensure that the record of proceedings and 7A(5) is received from the court in due course;*

- 8.2. *When the 7A(5) is received, it is the duty of the legal secretaries to make the necessary arrangements for the upliftment of the record from the court and to make the necessary arrangements for the transcription of the proceedings;*
- 8.3. *When the transcription of the proceedings are received the transcription is sent to the attorney dealing with the matter to peruse and advise whether or not the Applicant will prepare and file a supplementary affidavit in terms of Rule 7A(8) or whether or not the Applicant will simply deliver a notice that it stands by its original founding affidavit herein.*
- 8.4. *If the attorney elects to file a notice to stand by the notice of motion and founding affidavit, he or she will simply instruct the legal secretaries to perform the necessary actions and the legal secretaries than draft the applicable notices in terms of Rule 7A(6) and Rule 7A(8) and have same signed by an attorney in the office and attend to the serving and filing of same.*
- 8.5. *The legal secretaries then monitor the progress of the matter, when an answering affidavit is received the matter is sent back to the attorney for action and reply and when no answering affidavit is received the legal secretaries will ensure that the file is indexed and paginated and that the court date is applied for and that the matter is set down for hearing.*
- 8.6. *Attorneys would then only get involved in a matter again when there are directives for Heads of Argument and when the matter needs to be presented and argued in court.*

9. *In order to monitor the matters and ensure that no matter falls behind, the progress of each matter is captured on the file management system by the applicable secretary who handled the matter and who completed one of the required functions therein. In this manner one can follow the progress of the matter and where there are any queries same can be looked up in an instant and feedback provided to clients and other stakeholders in any given matter.* (own emphasis)

- [29] A bird's-eye view of the system so described raises questions. Does it lie within the expertise of the secretary to make decisions on what course to follow when a record has not been filed within the ten days provided for in the Rules? Is it for the secretary to determine whether a formal letter should be written to the Bargaining Council or the CCMA as the case may be, or whether the stage has been reached for the bringing of an application to compel the production of the record? Does it fall within the expertise of a secretary to ensure the proper indexing and pagination of the Court file? Whilst there is obviously nothing objectionable about asking a secretary to perform the mechanical exercise of drawing up an index and paginating a Court file, what is not permitted is for the legal practitioner to have no involvement in this process at all. What this means, in practice, is that the legal practitioner is required, for example, to check that there are no duplicates or unnecessary documents, that no essential documents have been omitted, that the annexures have been properly described, that the documents are properly ordered, and so on.
- [30] More importantly, the persons in charge of evaluating and assessing the status of the litigation in respect of a particular review application, the '*generals*,' as it were, are, in terms of the system, the secretaries (not the attorneys). It is the secretaries who have the obligation to "... *monitor the progress of the matter*".³⁴ They perform this task without the benefit of supervision from the attorneys. Attorneys, on the other hand, would, so to speak, make cameo contributions to the respective review applications as and when requested by the secretaries. It was not made clear whether a file was assigned to a particular secretary or whether the secretaries worked jointly on all files. What does seem clear is that the respective attorneys working for the firm engaged by Benteler did not have their own secretaries.³⁵
- [31] It became apparent during argument that the system is developed in such a way that the attorney allocated to the matter is not required to have personal knowledge of what is happening in the file. It is the secretaries who are the

³⁴ para [8.5] of the founding affidavit

³⁵ It is clear from his affidavit that Mr Biggs did not have his own secretary. He would utilise the services of the secretary who had been allocated the file.

repositories of this knowledge. Ms Moyo, who appeared on behalf of Benteler, explained that it was the secretaries' function to coordinate the litigation by monitoring and supervising the progress of the files. In practice, this meant that the secretaries would draw up a diary for each matter, reflecting its status. The attorney who has been allocated the matter, or any other attorney called upon to step into the breach should the principal attorney not be available, could then rely on the diary to establish the status of the file without having to embark on the onerous exercise of opening the file and reading its contents inclusive of the Court process. She further explained that whilst a particular attorney may be allocated a matter, it was not uncommon for other attorneys (from the same firm) to take steps in the prosecution of the matter, such as signing the requisite Court documentation. The different attorneys involved in a matter, however, did not liaise with each other regarding the steps each had taken. Rather, each attorney involved in the matter would liaise with the secretary who happened to be handling it at the time. The secretary is the focal point, the one managing the file, the only person required to have firsthand knowledge of all the steps taken in the litigation. It is for the secretary (not the attorney) to identify the next step to be taken in the litigation and then to record it in the diary.

[32] The Bench posed questions regarding the implications of such a system. Was it not the duty of the attorney responsible for the file to make the discretionary decisions about the status of the matter and to decide what steps needed to be taken to protect the client's interests? Should it not be a requirement of any file management system that the attorney allocated the matter at least have direct knowledge of the contents of the file? Whilst one can understand a client relying on the say-so of his attorney that a matter was progressing appropriately, did it, on the other hand, lie in the mouth of an attorney to contend that he should be allowed to rely on the *ipse dixit* of a secretary as to the status of a file for which he was responsible?

[33] I quote from one of the exchanges below:

"COURT: And he [the attorney allocated the matter] then does not see either the notice of the filing notice for the record and he does not see the rule 7(A)(8) notice?"

MS MOYO: He will see the diary – on the – that there is a system that will show him what is the status of the matter. So he will see “await hearing date”. So we are under the impression that everything is, is done.

...

COURT: ...so someone's got to sign the application for the court date.

MS MOYO: It could have been anyone.

COURT: But there is no suggestion that Mr Biggs could not have done it. I just find it odd that the Filing Notice, the Rule 7A, the application for the court date, would he not even have seen, if it is his matter, the application for the court date...

MS MOYO: He would just look at the updates, the next update, because there is a system in place that [intervenes]

...

COURT: So he would not see the filing notice for the record, he would not see the Rule 7A(8), he would not see the application for the court date?

MS MOYO: Not necessarily.

COURT: Because those are all attorneys' responsibilities, those are not secretaries' responsibilities.” (own emphasis)

[34] In his affidavit, Mr Biggs further sought to justify his reliance on the system as follows:

¹⁵ *I also pause to mention that this is the normal process through which hundreds of review applications have successfully run and the process works as the legal secretaries are quick to engage with the attorneys on anything that is unexpected or may delay the matter.”*

[35] The immediate difficulty with this statement is that, when it comes to the conduct of litigation, it should not be the secretaries who are required to determine whether, in their view, a legal issue has arisen in a review application which deserves the attention of an attorney. It is not for a secretary to make a

judgment whether an event in the litigation qualifies as “*unexpected*” or whether a state of affairs “*may delay the matter*”. In making the statement, which he did, Mr Biggs failed to appreciate that the very act of deciding whether there is an issue with the prosecution of the review application is itself a professional judgment, something falling outside the bailiwick of a secretary.

[36] Mr Biggs, in commending the merits of the system, stated as follows:

“10. *The system has worked for the Applicants attorneys for many years, have (sic) not failed before and was a system that ensured that the running and progress of matters are not only actively and positively monitored but are centralised so that any person can effectively run with a matter in the event of an attorney being sick or unable to attend to a matter when the need arises. This being said, when an attorneys is available the function would remain with that specific attorney.*”

[37] This paragraph is problematic at several levels. Firstly, the Court cannot help but view the bald assertion by Mr Biggs that the system has “*for many years*” proven infallible, with a degree of scepticism. The person making the assertion is, after all, the same person who was ignorant of what transpired in his own file. One must then ask on what foundation he could possibly claim any authority to comment on the files of other attorneys. Secondly, the fact that a firm of attorneys may have, in the past, fortuitously so, escaped the consequences of a flawed and fragile system is neither here nor there. Thirdly, the statement that the system ensures the “*running and progress of matters*” is “*actively and positively monitored*” does not address as to who should be doing the monitoring. The nerve centre of an attorney’s practice should be comprised of the attorneys themselves. The system, however, appears to contemplate a hub of secretaries coordinating the litigation. Mr Biggs also extolled the virtues of the management of matters being “*centralised*”. But again, the Court is constrained to ask, at what point should the management of a file be “*centralised*”? Should the management of a file be centralised within a team of secretaries or should it be centred on the responsible attorney?

[38] As mentioned above, Ms Moyo explained, in line with what was stated in the affidavit deposed to by Mr Biggs, that there can be no guarantee that the same attorney will consistently be involved in the management of a file. In terms of the system, the identities of the attorneys who play a role in the litigation pertaining to a particular file are left to fate. Immediate availability in the form of physical presence in the office is the determining factor. It was conveyed to the Court by Ms Moyo that it was not an infrequent occurrence for an attorney to be out of the office, with the result that, instead of waiting for the attorney to return to the office or communicating by way of telephone or email with that attorney, the matter was then passed on to another attorney who then had to step into the shoes of the attorney conducting the litigation. In terms of the system, contrary to trite professional standards, there was no obligation on the attorney allocated the matter to acquaint himself with developments in the file upon his return to the office. Ms Moyo further explained that the different attorneys required to deal with a particular matter did not liaise with each other or, for that matter, with the attorney who had been allocated to the matter. As mentioned earlier, the various attorneys liaised with the secretary handling the matter. That the system allowed for this type of interchangeability of attorneys constituted a further reason why Mr Biggs could not be faulted for not knowing what was going on in his own review application, so ran the reasoning. The arrangement embraced by the system is irreconcilable with the principle that an attorney is not permitted to rely on the fact that he is working "*under pressure*" or is out of the office attending to other matters to explain a failure to properly supervise the prosecution of an application for which he is responsible.³⁶ This is in addition to the fact that the lack of coordination amongst attorneys would, in the Court's view, inevitably serve to further diffuse professional responsibility.

[39] Looking at the system as a whole, the reader may be forgiven for gaining the impression that the system, so described by Mr Biggs and as propounded by Ms Moyo in her address, exhibits characteristics of a production plant with an assembly line, where cases are mechanically moved from one stage to the next under the direction and supervision of secretaries. The consequence may be,

³⁶ Cf *Kgobane and Another v Minister of Justice* 1969 (3) SA 365 (AD) 369B

as was borne out in this case, that while the file moves along, the case does not. There is, self-evidently, nothing wrong with a firm of attorneys implementing a system that is efficient and fosters maximum productivity. Indeed, a properly maintained diary system is a *sine qua non* and is indispensable to the efficient operation of an attorney's firm, particularly in an era of extensive regulation. The jurisprudence of labour law occupies a distinct position within the broader legal landscape. The statutory objective of the effective and thus expeditious resolution of labour disputes is reflected in a procedural framework characterised by compressed time periods. Against this backdrop, it is incumbent upon attorneys' firms to ensure that administrative systems are implemented which place practitioners in a position to monitor and safeguard compliance with those time periods. However, it is not permissible to allow the pursuit of productivity, or more accurately profit, to serve as a basis for creating a system implemented *at the expense* of professional oversight. No administrative system should handicap, or worse, disable attorneys from complying with their ethical duties and, in particular, their duty to prosecute cases with reasonable care and diligence. In developing a system which utilises administrative staff to assist with diarisation and file management, it should be borne in mind that the prosecution of a claim itself is not a clerical or administrative matter. Ordinarily, the taking of each step in litigation requires the exercise of an independent discretion by the legal practitioner in charge of the file. Whilst it is not the place of a Court to be prescriptive as to the type of system that needs to be implemented, it would venture to suggest that, in this matter, it would have gone a long way to averting the ensuing failure to prosecute the review application if it had been a requirement of the system that the secretary update the diary *in consultation* with the attorney responsible for the file. That way the responsible attorney, having had an opportunity to give due consideration to the contents of the file, would be in a position to endorse, vary or substitute the assessment of the secretary as to the status of the file.

- [40] The Court is not so naive as to be ignorant of the possibility that, for self-serving reasons, Mr Biggs may have simplified, even misrepresented, how the system worked and thus exaggerated the lack of participation of attorneys to shield his

conduct from scrutiny.³⁷ The more the secretaries are required, in terms of the system, to accept responsibility for overseeing a file, the more scope Mr Biggs has to contend, albeit disingenuously, that he, personally, was not at fault. The difficulty, however, is that when Mr Biggs left the employ of Benteler's legal representatives, and the matter was taken over by another attorney, there was no attempt to correct or even clarify what is contained in the founding affidavit regarding the description of the system and how it worked. The opposite occurred. The heads of argument reaffirmed, indeed entrenched, the position taken in the founding affidavit by Mr Biggs, as did Ms Moyo in her address.

Analysis of the explanation

[41] The reinstatement application was mistakenly formulated in that it erroneously referred to clause 11.2.7 of the Practice Manual. The review application, however, lapsed because of the operation of clause 11.2.3 of the Practice Manual, which was triggered by the record being filed outside the mandatory 60-day time period. There was a six-month delay when it came to the filing of the record, which delay must be assessed against the pattern of dilatory conduct accompanying the prosecution of the review application, inclusive of the tardiness accompanying the bringing of the review application (it was brought substantially out of time *sans* a condonation application) and the subsequent failure to diligently seek the production of the record.

[42] In assessing the six-month delay, it is important to bear in mind that non-compliance with the 60-day period only came to light because AMCU instituted contempt of court proceedings. This was not a case of Benteler identifying and rectifying its own shortcomings. Had AMCU not launched the contempt proceedings, it is impossible to know how long the failure to prosecute the review application would have remained undetected. This is so because, on Benteler's version, it laboured under the impression that the matter was ripe for hearing, and that there was nothing further to be done other than to await the allocation of a hearing date by the Court.

³⁷ Documentation in the file, as signed by Ms Moyo, suggested that, contrary to what was stated by Mr Biggs, attorneys do get involved at the stage of indexing and pagination.

- [43] There was no explanation as to how and why the secretary, Ms Molotsi, could have made a mistake of this magnitude. In response to questions posed by the Court, Ms Moyo, from the Bar, speculated that it was because she was “new”. For this reason she may not have understood how the system worked. If it is true that Ms Molotsi was newly appointed and still in the process of familiarising herself as to how the system worked, then all the more reason would it have been imperative for Mr Biggs to have exercised close and continuous supervision over the file, the principle being that the degree of supervision required depends on the known ability of the employee to whom work is delegated.
- [44] Mr Biggs states that he investigated the cause of the failure to prosecute the review application. As mentioned, he says that it was only when he conducted the investigation that he, for the first time, inspected the file and concluded that he had been misled by Ms Molotsi. The problem he faced in his investigation, so he said, was that Ms Molotsi had “resigned”, apparently unlawfully, in that after taking annual leave in December 2023, she, without notice, informed Benteler’s legal representatives that she would not be returning to work. There was thus, in the words of Mr Biggs, no “*handover of matters*”. This, in turn, meant that he could not furnish the Court with an explanation as to why he had been given the “*incorrect information*”. For reasons which are not clear, Mr Biggs did not, as part of his investigation, ask Ms Mbuli, to whom the file had initially been allocated and presumably returned, whether she could shed any light on the reasons for the failure. He also did not make any attempt to contact Ms Molotsi for an explanation.
- [45] The investigation by Mr Biggs was, in any event, beside the point and in truth a red herring. If anyone should have been the subject of an investigation, it was the one conducting it, Mr Biggs himself. Mr Biggs’ focus on what was, at best, a secondary issue (the conduct of the secretary) bears comparison to the proverbial rearrangement of deck chairs on the Titanic. The fundamental source of the difficulty, the issue which loomed over the matter, was the absence of any professional oversight. The last person who should have been investigating a failure to prosecute a review application where the problem was a lack of

professional oversight, would be the attorney who was himself responsible for the lack of professional oversight.

[46] I return to the crux of the explanation furnished by Mr Biggs. He contends that, relying on a representation made to him by a secretary, he was under the impression that the prosecution of the review application was on track and that a court date was awaited. He formed this impression without verifying whether the record had been filed. He formed this impression without verifying whether a Rule 7A(8) pleading had been filed. He formed this impression without verifying whether the Court process had been properly indexed. He formed this impression without verifying whether there had been a notification to the Registrar in terms of clause 11.2.7 of the Practice Manual. He formed this impression without verifying whether there had been an application for a court date. It was submitted that there was nothing untoward with Mr Biggs relying solely on a representation made by a secretary regarding the status of a file under his control. This was because the system contemplated that the task of overseeing the litigation pertaining to a review application for which a particular attorney was responsible was not that of the attorney, but rather that of the secretary.

[47] The explanation furnished by Mr Biggs misconceives the nature of a practitioner's professional obligations. Whilst purely administrative or mechanical tasks may permissibly be performed by support staff, the responsibility for ensuring compliance with the Rules and the applicable practice directives remains solely that of the practitioner. Delegation does not absolve responsibility; still less does it justify an attempt to shift blame to a subordinate member of the support staff for tasks that remained, throughout, the legal practitioner's responsibility. To put it bluntly, although Mr Biggs may not have realised as much, what he was really saying was that, the secretary did not properly perform the job that he (Mr Biggs) was supposed to do. The stance of Mr Biggs was akin to a pilot entrusting the operation of an aircraft to a flight attendant, and when the aircraft meets its doom, the pilot disclaims responsibility on the basis that he was not the one who was at the controls at the time of the crash.

[48] Attorneys are required to perform their work with proper assiduity and expedition. This entails ensuring that sufficient time and all necessary care and attention are devoted to the competent performance of the work. Competent performance includes exercising such supervision as may be necessary where a legal practitioner leaves the performance of work to employees.³⁸ In dealing with the delegation of work to employees, Lewis states as follows:

*“If a practitioner leaves the performance of any work to employees he is bound to ensure competent performance by exercising such supervision as may be necessary to achieve it and failure to do so is the reverse of assiduous. The degree of supervision required depends upon the known ability of the employee. ... It is to be observed that a particular error on the part of practitioner, though negligent, might not be misconduct, whereas the same error in precisely similar circumstances on the part of his unqualified employee who was left in charge of the matter might confront the practitioner with an allegation of misconduct on the ground that supervision was lacking. This, though curious, is not illogical. As an eminent judge remarked (not ex cathedra): ‘Make your own mistakes, don’t leave it to the clerks.’”*³⁹

[49] Thus, the principal attorney handling the matter should always satisfy himself that the file is in order, that the litigation is progressing as it should, and, in particular, that there has been compliance with the Rules. It has repeatedly been held that it is unprofessional for a principal attorney to delegate the management of a file to a candidate attorney and to leave that candidate attorney unsupervised.⁴⁰ Delegating the responsibility of running a matter to a secretary amounts to an even greater abdication of professional responsibility.

[50] There are two further aspects which, in the Court’s view, exacerbate matters. Firstly, Mr Biggs did not explain why, if there was no “*handover of matters*” given the manner in which Ms Molotsi exited her employment, he did not then, at that

³⁸ Lewis E.A.L. *Legal Ethics: A Guide to Professional Conduct for South African Attorneys* (Juta: Cape Town, 1982)

³⁹ *Legal Ethics* 120

⁴⁰ *MEC for Health Eastern Cape v A.S obo S.S* (842/2023) [2025] ZASCA 2 (15 January 2025) para [21] in terms of which the Supreme Court of Appeal castigated an attorney for leaving the prosecution of an appeal in the hands of a candidate attorney who was unsupervised and where the principal attorney was in a different office. *Mavundla v MEC: Department of Co-Operative Government and Traditional Affairs KwaZulu-Natal and Others* 2025 (3) SA 534 (KZP) paras [40], [46] and [54].

point, as the attorney responsible for the file, inspect it. That would have been the obvious thing to do. Secondly, Ms Mbuli did not depose to an affidavit, notwithstanding AMCU's contention in its affidavit deposed to in answer to the reinstatement application, that the allegations regarding her conduct in the matter constituted inadmissible hearsay. Had Ms Mbuli deposed to an affidavit, she could have informed the Court what happened to the file when she returned, having been absent on the day Mr Biggs allegedly gave her an instruction to serve and file the record and the Rule 7A(8) notice. She would probably also have been in a position to disclose to the Court what happened to the file when Ms Molotsi abruptly left the employ of Benteler's attorneys at the end of 2023 and, if that was when she took over the file, she could have told the Court what she discovered and what she told Mr Biggs.

[51] Insofar as it may be contended that Benteler should not be penalised for the negligence of its legal representatives, it is trite that there is a limit beyond which a litigant cannot escape the consequences of his attorney's lack of diligence or the insufficiency of an explanation tendered. In *P E Bosman Transport Works Committee v Piet Bosman Transport*⁴¹ the Court found that even where "virtually all the blame can be attributed to the Applicant's Attorneys, condonation ought not ... to be granted".⁴² The ratio was that the negligence and dilatoriness on the part of the attorneys was of such a gross nature, a lack of blameworthiness on the part of the client could not salvage the application. The reasoning applies with equal force to this matter. Added to this is the circumstance that there is no indication that Benteler showed any interest in the conduct of the review application, maintained close contact with its attorneys or *bona fide* believed that its attorneys were competently prosecuting the review application.⁴³ No person from Benteler deposed to an affidavit in support of the reinstatement application.

[52] All things considered, in my view, the degree of Benteler's non-compliance with the time limits was flagrant and gross. The matter falls in the category of

⁴¹ 1980 (4) (SA) 794 (A).

⁴² 799H. See also *Blumenthal v Thomson* 1994 2 (SA) 118 (A) 121I-J; *Saloojee & another NNO v Minister of Community Development* 1965 (2) SA 135 (A) 141B-H.

⁴³ Cf *Fuller v Megacor Holdings (Pty) Ltd* [2003] 7 BLLR 711 (LC) para [18]

condonation applications where the explanation for the substantial delay is so poor that the prospects of success are rendered irrelevant.⁴⁴

[53] Even after the failure to prosecute the review application was discovered, Benteler's attorneys did not pay the matter the attention it deserved. One would have thought that after having discovered the catastrophic failure to prosecute the review application, the matter would have received special attention. This was not to be. No steps were taken to remedy the absence of the condonation application for the late delivery of the review application. Nothing was done about the fact that, on the face of it, the founding affidavit in the review application, as deposed to by Mr Biggs, was irregular and possibly invalid for the reasons set out below. To aggravate matters further, the heads of argument submitted on behalf of Benteler were *pro forma* in nature and failed to provide any substantial analysis of the relevant legal and factual issues (see below).

Prejudice

[54] The prejudice to Mr Langboo is obvious. He was dismissed more than half a decade ago. He has been alienated from the fruits of an award issued in his favour almost four years ago, on 29 July 2022. He was entitled, in the light of the lapsing of the review application to assume, as per the sentiments of Sutherland JA in *South African Police Services v Coericius and Others*,⁴⁵ that the review application had been "abandoned" and that Benteler was no longer seeking the relief in the review application.⁴⁶

[55] The answer to any contention by Benteler that it would be prejudiced were it to be considered to have forfeited its right of review is that the predicament in which it finds itself is of its own making. It cannot credibly complain when, by virtue of settled legal principles, the law attaches consequences to its inaction.

⁴⁴ *Van Wyk v Unitas Hospital & Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC) paras [31] to [34]; *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) para [29]; *National Education Health and Allied Workers Union obo Mofokeng & Others v Charlotte Theron Children's Home* (2004) 25 ILJ 2195 (LAC) para [23]; *Collett v Commission for Conciliation, Mediation and Arbitration* (2014) 6 BLLR 523 (LAC) paras [38] and [39]; *Chetty v Baker McKenzie* [2022] ZALAC 12; (2022) 43 ILJ 1599 (LAC); [2022] 8 BLLR 693 (LAC) para [8].

⁴⁵ [2023] 1 BLLR 28 (LAC)

⁴⁶ para [9]

The common law has long recognised the principle that the law assists the vigilant, not those who sleep upon their rights (*vigilantibus non dormientibus iura subveniunt*). Moreover, adherence to the principle of legality and the rule of law requires that there be consequences for undue delay in asserting rights. As the Constitutional Court recognised in *Khumalo v Member of the Executive Council for Education, KwaZulu-Natal*,⁴⁷ challenges to administrative action (which would include the issuance of an arbitration award) should not be unduly delayed. These principles would apply all the more so where the lifeblood of the labour dispute resolution framework is that of expedition and economy.⁴⁸ To hold otherwise would undermine certainty, finality, and the orderly administration of justice in the legal landscape where the need for these imperatives is most acute, i.e., labour law dispute-resolution.

Conclusion

[56] In conclusion, in the light of the reservations the Court has about whether the reinstatement application was competent in the first place, the fact that Benteler failed to ensure that its house was in order before bringing the reinstatement application, the fact that the review application does not enjoy prospects of success because it falls to be struck from the Roll for want of jurisdiction should it be reinstated and the fact that there is, in any event, no reasonable explanation for the substantial delay, the reinstatement application was destined to fail.

Costs

[57] In the Court's view, the application was misconceived and procedurally reckless. It should have been manifestly apparent to the legal representatives of Benteler that applying for reinstatement before bringing a condonation application for the late delivery of the review application was to put the proverbial cart before the horse in a fatal manner. There can be no doubt that this case falls within the class of cases where law and fairness demand that costs be awarded against the losing party. Benteler has sought a substantial

⁴⁷ [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC) para [73]

⁴⁸ *Toyota SA Motors (Pty) Ltd v CCMA and others* (2016) 37 ILJ 313 (CC) para [1]

indulgence in a matter where the application was doomed from the outset. AMCU requested that a costs order be made on an attorney-and-client scale. Having carefully reflected on the matter, in my view, a punitive costs order of this nature is more than warranted for the reasons set out below.

[58] As mentioned, the case presented on behalf of Benteler was untenable and unarguable. The Court twice asked Ms Moyo whether, in light of its concerns that the review application was out of time and that there was no condonation application, her client nonetheless wished to proceed with the application. She indicated that it did. This stance was adopted at Benteler's peril. If there was going to be any hope for Benteler, a more constructive and sensible approach would have been for Benteler to have reviewed and reconsidered its position, to have withdrawn the reinstatement application and then to have brought a fresh application coupled, *inter alia*, with an application for condonation for the late lodging of the review application. But even then, it is difficult to see how the application could have been salvaged, given that the explanation for the delay was clearly untenable.

[59] The explanation tendered on behalf of Benteler for the delay and the litany of procedural missteps and omissions, exhibits a profound lack of appreciation for the professional standards to which legal practitioners are required to adhere. Mr Biggs contrived, in a manner which would have made Pontius Pilate blush, to wash his hands of all accountability by contending that a secretary should shoulder responsibility for his lack of professional oversight. What is of concern to the Court is the lack of candour in the explanation furnished by him. Mr Biggs is intentionally unclear as to what actually occurred after he signed the notice of motion. In an obfuscatory vein, he does not say that he was, in fact, unavailable to participate any further in the prosecution of the review application. The Court cannot *mero motu* assume that this was the case. Had Mr Biggs, albeit remarkably so, been unavailable on each occasion when a step would have been required to have been taken in the litigation, then he should have stated as much on oath, and he should have furnished the reasons for such unavailability. The Court fails to understand why Mr Biggs felt it necessary to be evasive in his affidavit about the events which led to the scuppering of the

review application. Added to the fact that Mr Biggs does not say that he was unavailable to sign Court process after the launching of the review application, he, importantly so, also does not expressly say that he laboured under the mistaken impression that other attorneys took all the necessary steps, after the launching of the review application, to ensure that it was ripe for hearing. On a charitable reading of his affidavit, he appears to have cheerfully assumed that other attorneys (he does not know who they are) had effectively taken over the prosecution of the review application, for which he was responsible. Although it is unnecessary for the Court to make a finding on whether Mr Biggs is telling the truth given the fact that, on his own version, he conducted the litigation in a manner which was reckless (and for that reason his explanation falls to be rejected out of hand), the failure by Mr Biggs to take the Court into his confidence, when it comes to these critical facts, casts serious doubt on his allegation that he was genuinely misled as alleged. As has often been said, when it comes to seeking an indulgence of this nature, what is required is an explanation containing sufficient particulars to place the Court in a position where it can properly assess the conduct and motives of the applicant.⁴⁹ Allied to this requirement is the truism that witnesses who seek to mislead the Court will provide as narrow a front as possible for fear of detection or contradiction.⁵⁰

[60] The shortcomings in the explanation furnished by Mr Biggs do not end there. On his own version, he failed to utilise the very system that lies at the heart of his justification for the conduct in question. Mr Biggs does not expressly allege that, the conversation with Ms Molotsi aside, he took the time, to access the diary himself. Even during his investigation, there is no indication that he bothered to check what the diary actually recorded. The high-water mark of his justification for his conduct is that, in circumstances which are not elaborated on, Ms Molotsi verbally misled him.⁵¹ For all one knows, the discussion which allegedly occurred between Mr Biggs and Ms Molotsi took place, *en passant*, at the water cooler in an office corridor. Stripped of all embroidery, the fact is that Mr Biggs uncritically accepted, as authoritative, an unsupported

⁴⁹ *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) 353A

⁵⁰ *Cf. South African Legal Practice Council v Bobotyana* [2020] 4 All SA 827 (ECG) para [71]

⁵¹ para [22] of this judgment

representation made by a newly appointed secretary, that the review application was unopposed and ripe for hearing, this notwithstanding the fact that a notice of opposition had been delivered. He did so in circumstances where he had not seen the diary, had no substantive knowledge of the file or its procedural history post the launching of the review application. Outrageously, he did so in circumstances where he had taken no independent steps to verify the account given to him by the newly appointed secretary.

[61] Attempts made by legal practitioners to deflect responsibility onto staff are, rightly so, viewed as aggravating, particularly where candour is lacking. The disingenuous explanation, coupled with the lack of candour apparent from the decision by Mr Biggs not to take the Court into his confidence, drives the Court to the conclusion that there has been a calculated attempt to muddy the waters and to sidetrack the Court by diverting its attention from the real issue, which is whether Benteler's attorneys exercised professional oversight in the prosecution of the review application. The strategy employed by Benteler took the form of a refrain in terms which there were repeated attempts to invoke the system as a vehicle to obscure professional responsibility. The case advanced fails to appreciate that, in the final analysis, attorneys are not permitted to transfer professional responsibilities to secretarial staff under the guise of office procedure. The explanation for the sorry state of affairs is, at its core, so contrived that it can scarcely be regarded as having been presented as a *bona fide* one.

[62] In the wake of the manifest neglect of the prosecution of the review application, what was required, upon its discovery, was a degree of soul searching, an honest reckoning. Benteler did not take advantage of what was an occasion for introspection. What it offered up was a reactive response which took the form of an exercise in defensive manoeuvring where blame was impermissibly shifted onto a secretary. In *Grootboom* the Constitutional Court commented on the importance of legal practitioners acknowledging ineptitude and remissness where this occurs, of expressing contrition where circumstances demand:

"[27] ... However, as the official in charge of the office [the attorney] has offered her apologies to this Court for the inconvenience. This evinces her

appreciation for her duty and responsibility to the Court, her clients and other parties to the litigation.”

[63] It is the attorney, not the secretary, who owes a fiduciary duty to the client to fulfil the litigation mandate with reasonable skill. Mr Biggs, being the responsible attorney, should have acknowledged, in Truman-esque fashion, that when it comes to the litigation which was to be conducted under his watch, the buck stopped with him. The circumstances of this matter demand more than an acknowledgement of wrongdoing and an expression of remorse. The Court has detailed the host of respects in which professional standards were not met. These include the inexplicable failure to apply for condonation for the late delivery of the review application, the failure to take steps to secure the timeous production of the record and, most egregiously, the complete failure to manage and oversee the legal proceedings relating to the review application. I emphasise that the history of the matter reflects a wholesale dereliction in the prosecution of the review application, an effective abandonment of it. This is not a matter where there was merely a minor or isolated error made in the context of an otherwise valid and functioning system. The complete failure of oversight leads, inexorably, indeed ineluctably, to the foundering of the reinstatement application. The upshot is that Benteler has forfeited its right to challenge the arbitration award. It must now comply with it. That being so, the question of an apology aside, the ethically appropriate course to follow would be for Ms Moyo, who the Court understands has taken the matter over from Mr Biggs, to make her client (Benteler) aware that it has the recourse, if so minded, of seeking independent legal advice on whether a claim against Benteler's legal representatives may exist arising out of the professional misconduct described in this judgment.

Heads of argument

[64] Heads of Argument are important because Judges usually read them first to obtain a roadmap of what the case is about. Properly drafted, they may serve as a template for a judgment. Heads of argument should engage fairly with the evidence and the material issues requiring determination. They are indispensable to the proper administration of justice because they assist the

Court in coming to the correct decision.⁵² Their preparation is an exacting and labour-intensive task. It requires time, analysis and much reflection.⁵³ When legal practitioners do not draft heads of argument which assist the Court, the burden of identifying and distilling the issues falls on the Court and compels it to perform work that should properly have been undertaken by the legal representatives.

[65] The Court afforded Ms Moyo an opportunity to make representations on whether Benteler's attorneys should be precluded from levying a fee for the heads of argument as occurred in *Early Bird Farm (Pty) Ltd v Food and Allied Workers Union and Others*⁵⁴. This opportunity was given because the document styled as heads of argument was generated almost entirely by copying and pasting, literally *verbatim*, the affidavit deposed to by Mr Biggs. The exercise was undertaken with such a lack of care that even the pronouns and other references appropriate only to the affidavit were left unaltered. The result was that the heads of argument read like a first-person statement of evidence. The only cognisable difference between the affidavit and the heads of argument was that, tacked onto the end of the purported heads of argument, were a handful of authorities which made reference to general principles applicable to reinstatement applications. There was no indication as to how the general principles applied to the peculiar facts of the matter. The heads of argument did not address the material issues arising from the points raised in the answering affidavit, such as the fact that the review application was out of time, the allegation that the record is materially incomplete, and the allegation that Mr Biggs failed to exercise reasonable care in the matter.

[66] Ms Moyo signed the heads of argument. When the Court enquired from her why they took the form which they did, she, remarkably, sought to distance herself from them. She explained that the heads of argument were drawn by a "*junior attorney*", Mr Wesley Perrin. She conceded that she had done no more than

⁵² *S v Ntuli* 2003 (4) SA 258 (W) para [16]

⁵³ *Cf Heads of argument in courts of appeal* by LTC Harms, Deputy President of the Supreme Court of Appeal as published in *The Advocate* December 2009 where the Learned Judge recorded as follows: "...heads, like good wine, have to mature. Leave them for a few days, print them, and with a red pen revise them. If time permits revise again. And again"

⁵⁴ (2004) 25 ILJ 2135 (LAC) paras [50] and [51].

rubber-stamp them even though it was apparent that the errors therein were so obvious that they ought to have been detected and corrected on a cursory view of the document. Ms Moyo appeared to contend that, for this reason itself (the fact that she had not applied her mind to the content of the heads of argument before signing them), she should not be held responsible for their content. A legal practitioner, by signing a Court document, confirms that he understands the document, has applied his mind to it and stands by it. He is not permitted to sign a legal document and then, in response to uncomfortable questions from the Bench, put forward a disclaimer. If a practitioner is not prepared to stand by a document, the proper course would be for that practitioner not to sign it and withdraw it or to seek leave to amend or amplify it. As mentioned elsewhere, practitioners have an overarching duty to the Court, and this includes, at all material times, exercising independent professional judgment; disowning signed heads suggests a failure of that duty. The failure by Ms Moyo to properly apply her mind to the heads of argument drafted by the junior attorney, and to amend, amplify or supplement where necessary, constitutes yet a further manifestation of the lack of supervision and professional oversight which has plagued this litigation from inception to completion.

Misrepresentation by Mr Biggs in his affidavit

[67] It was hoped that the discussion about the inadequacy of the heads of argument would mark the end of this troublesome matter. Unfortunately, it does not. There is a further matter of some gravity which needs to be addressed. The Court, again *sua sponte*, enquired as to how it came to be that the deponents to the respective affidavits in the review and reinstatement applications, bore identical names. Both affidavits were signed by Johan Biggs⁵⁵ but in different capacities. In the reinstatement application, Mr Biggs described himself as a "... *practicing (sic) attorney at Snymans Attorneys, the legal representatives for the Applicant*". In the review application, Mr Biggs described himself as "*an adult female and human resources manager employed with the Applicant*".

⁵⁵ For the sake of completeness, I note that, in the affidavit deposed to in support of the review application the deponent is identified as Johan Ernst Abraham Biggs whilst in the affidavit deposed to in support of the reinstatement application, the deponent is identified as Johan Biggs

[68] Whilst this curious state of affairs may theoretically have been explained away as a remarkable coincidence, what raises suspicion and concern is that, leaving aside that Mr Biggs is not a female as recorded in the affidavit deposed to in support of the review application, the signatures of Mr Johan Biggs, the attorney, and Mr Johan Biggs, the human resources manager, appear, on the face of it, to match each other. Screenshots of the respective signatures are juxtaposed against each other below:

The signature of Mr Biggs
in the review the application

The signature of Mr Biggs in
reinstatement application

[69] The initials of Mr Biggs on the individual pages of the two affidavits were also similar to each other and an analysis of the other documentation signed by Mr Biggs such as the Rule 7A(8) notice provides further *prima facie* proof that the signature of Mr Biggs, the Human Resources Manager, and Mr Biggs, the attorney, resembled each other. Confronted by this unusual state of affairs, the Court was compelled to ask how Mr Biggs came to depose to the two affidavits in different capacities, one as the attorney conducting the litigation and one as the human resources manager of the client. Ms Moyo, who had apparently not applied her mind to this issue when preparing for the case, appeared not to know the true identity of her client's representative (the human resources manager). She was able only to vaguely speculate that the signing of the affidavit in support of the review application by Mr Biggs was the result of some unspecified "*mistake*". Such an explanation is singularly unhelpful. A false representation concerning one's employment status is not readily explicable as

an innocent error or an oversight, particularly where one is dealing with an attorney who has made a sworn statement. It is implausible, in the extreme, to suggest that an Officer of the Court could, under oath, accidentally misrepresent that he was the human resources manager of a global company based in Kariega (formerly Uitenhage) when, in truth, he was a labour law attorney practising in Johannesburg.

[70] One possibility, I put it no higher than that, is that the affidavit to be deposed to in support of the review application was initially prepared for signature by Benteler's human resources manager, who is a female. The deponent is described in both the body of the affidavit and the wording of the oath administration as female. For reasons not disclosed, the human resources manager did not depose to the affidavit that had been prepared for her and the attorney conducting the litigation (Mr Biggs) took it upon himself to insert his name into the affidavit and to sign it, effectively impersonating the human resources manager. In this regard, the Court notes that the affidavit deposed to in support of the review application was commissioned in the proximity of Benteler's attorneys, and not in Kariega (formerly Uitenhage), where the client was situated. Another possibility is that, as occurred when Ms Moyo signed the heads of argument, a junior attorney had drafted the affidavit to be deposed to in support of the review application and Mr Biggs, without reading it or applying his mind to it, signed it and had it commissioned. In ruminating on this baffling, but concerning, state of affairs, the Court acknowledges that it has travelled into the province of speculation. In the Court's view, this is a serious matter. It invites scrutiny as to whether perjury has been committed. The Court has not, however, heard from Mr Biggs. It would accordingly be unwise and unfair to make a finding on this issue. It is a matter for the Legal Practice Council.⁵⁶

Order:

1. The application to reinstate the review application is dismissed.

⁵⁶ In the Court's view, given the conduct described in this judgment, a referral to the LPC is obligatory in terms of Article 16(1) of the Judicial Code of Conduct.

2. The Applicant is to pay the costs of the application on an attorney and client scale.
3. The Applicant's attorneys are ordered not to charge any fees in connection with the heads of argument signed by Ms Moyo.
4. The issues described in paragraphs 18 to 70 of this judgment are referred to the Legal Practice Council (the LPC) and the Registrar is directed to bring this judgment to the attention of the Gauteng Provincial Office of the LPC for that purpose.



P N KROON

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms Moyo of Snyman Attorneys

For the Third Respondent: Ms Poppesqou of Futchter & Poppesqou Incorporated