



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C500/2024

In the matter between:

SOLIDARITY obo J M MATTHEWS

Applicant

and

SOUTH AFRICAN POLICE SERVICE

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

JANINE CARELSE N.O.

Third Respondent

Heard: 28 July 2026

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on Thursday, 30 July 2026.

JUDGMENT

DE KOCK AJ

Introduction

- [1] This is an application in terms of section 145, alternatively section 158(1)(g), of the Labour Relations Act¹ ('the LRA') to review and set aside an arbitration award of the third respondent, Commissioner Janine Carelse ('the commissioner'), issued under the auspices of the second respondent ('the CCMA') under case number PSSS514-22/23 on 8 November 2024 ('the

¹Act 66 of 1995.

award'). The applicant, Solidarity acting on behalf of Sergeant J M Matthews, further seeks an order correcting the award with a finding that the first respondent committed an unfair labour practice relating to promotion, and directing that Ms Matthews be promoted, retrospectively and with effect from 1 March 2022, to the post of Driver / Close Protector to the Provincial Commissioner: Western Cape at the rank of warrant officer. The successful candidate for the post was Warrant Officer Z Bhesi.

- [2] The application is opposed by the first respondent, the South African Police Service ('the SAPS'), which seeks its dismissal. Before the merits are reached, three preliminary matters arise: a point *in limine*, taken by the SAPS, that the review has been deemed withdrawn; the SAPS's application for condonation of the late filing of its answering affidavit; and its application for leave to file a supplementary affidavit in the condonation application. The applicant, for her part, objected under rule 36(2), read with rule 37(22), to the late answering affidavit.
- [3] The award is reviewed on the reasonableness standard: it will not be disturbed unless the decision the commissioner reached is one that a reasonable decision-maker could not reach on the material before her. For the reasons that follow, this Court grants condonation, admits the supplementary affidavit, dismisses the point *in limine*, and dismisses the review. There is no order as to costs.

Background

- [4] The following facts are common cause, or were not seriously disputed, and appear from the pre-arbitration minute and the record. The applicant has been employed by the SAPS since 7 January 2004. She holds the rank of sergeant and serves as an operational member of the Western Cape Flying Squad. On 2 December 2021 the SAPS advertised a number of posts for promotion, among them the post of Driver / Close Protector to the Provincial Commissioner: Western Cape at the rank of warrant officer, under reference WC02/12/2021. The filling of the post was governed by National Instruction 3 of 2015, National Instruction 6 of 2005 and SSSBC Agreement 3 of 2011.

- [5] The applicant applied, met the minimum requirements, and was one of four candidates shortlisted from among 13 who had been scored. She was interviewed by a panel chaired by Major General Voskuil, with Colonels Terblanche and Flie as members. The successful candidate, Warrant Officer Bhesi, was recommended and appointed.

- [6] The candidates were assessed in two components: a score out of 20 for qualifications, courses and experience, and an interview out of 30. The applicant scored 11 out of 20 and 19.32 out of 30, a total of 30.32; Warrant Officer Bhesi scored 10 out of 20 and 25.32 out of 30, a total of 35.32. The applicant thus scored higher than the successful candidate on the first component, but lower overall, the difference lying in the interview.

- [7] The pre-arbitration minute recorded, as common cause, that the applicant met the requirements for the post and was shortlisted and interviewed, and recorded, as in dispute, among other things, the scoring of both the applicant and the successful candidate against the relevant criteria, and whether the process adopted by the SAPS was fair. The arbitration was heard on 22 October 2024, closing arguments were filed in writing, and the award issued on 8 November 2024.

The award

- [8] The commissioner identified the issue as whether the SAPS had committed an unfair labour practice relating to promotion. She summarised the applicant's evidence (in essence, that she was the most suitable candidate and had been incorrectly scored on her courses and experience, while the successful candidate had been over-scored) and the evidence of Colonel Terblanche, a member of the panel, who explained the criteria applied and the basis on which the candidates were scored.

- [9] Applying the principles governing promotion disputes, and citing *Noonan v Safety and Security Sectoral Bargaining Council and Others*² (Noonan) and

²[2012] ZALAC 9; (2012) 33 ILJ 2597 (LAC).

*Arries v CCMA and Others*³ (*Arries*), the commissioner accepted Colonel Terblanche's evidence that the applicant, although scoring well on qualifications, courses and experience in the field, lacked experience in the function of the post, having never acted as a close protector. She found that the panel had not acted arbitrarily in reducing the applicant's experience score, and that it was entitled to have regard to its own knowledge of the post rather than to accept the applicant's curriculum vitae at face value. She dealt expressly, at paragraph 28 of the award, with the applicant's complaint that certain evidence had not been put to her in cross-examination, and concluded that it would be a miscarriage of justice to decide the matter as though that evidence stood unchallenged. She was satisfied with the scoring, found that the applicant had not discharged the onus of proving unfairness, and dismissed the claim.

The record

- [10] A word must be said about the record, which is not an ordinary one. The recording of the arbitration by the CCMA was incomplete. What was recorded and transcribed on the CCMA's behalf captured only the resumed proceedings (the re-examination of the applicant, the evidence of Colonel Terblanche, and argument) and did not capture the opening of the arbitration, the applicant's evidence-in-chief, or her cross-examination. That missing portion exists only because the applicant's representative had made his own recording; the parties agreed that it be transcribed, and it was delivered as a supplementary transcript on 12 November 2025. Both transcripts are certified only in so far as the proceedings were audible, and passages are marked inaudible.
- [11] Rule 37(27) of the Rules of this Court⁴ addresses precisely this situation, where the record has been lost, or the recording is inaudible or of such poor quality as to compromise its integrity: the applicant must take reasonable steps to reconstruct the record, the matter being referred, if necessary, to the Judge President for directions. Here the parties sensibly reconstructed the record by agreement and argued the review upon it. The evidence material to the issues

³(2006) 27 ILJ 2324 (LC).

⁴Rules for the Conduct of Proceedings in the Labour Court, GN 4775, Government Gazette 50608, 3 May 2024, with effect from 17 July 2024.

in this review (the applicant's account, the evidence of Colonel Terblanche, the interview and scoring documents, and the parties' argument) is contained in the reconstructed record, and neither party contended that it was inadequate for the determination of the review. This Court is satisfied that the review can properly be decided on the reconstructed record. The incomplete state of the original record does, however, bear directly on the point *in limine*, to which this Court now turns.

Whether the review was deemed withdrawn

- [12] In its answering affidavit the SAPS took the point *in limine* that the review had been deemed withdrawn under rule 37(15), alternatively had lapsed for want of prosecution, on the footing that the applicant had filed the transcribed record out of time. Rule 37 requires the body whose award is under review to dispatch the complete record (rule 37(2)(b)), and obliges the applicant to deliver the transcribed record within 60 days of being advised by the registrar that the record has been received (rule 37(14)), failing which the application is deemed to have been withdrawn (rule 37(15)). It is common ground that the registrar advised that the record had been received on 9 January 2025, and that the applicant delivered the transcribed record on 3 April 2025.
- [13] The point was not developed in the SAPS's heads of argument and was, properly, abandoned in argument. The period allowed by rule 37(14) is reckoned in court days: 'day', as defined in rule 1, excludes Saturdays, Sundays and public holidays, and every day in the period from 16 December to 15 January, both days inclusive. The registrar's notice of 9 January 2025 fell within that excluded period, so that the 60 court days began to run only on 16 January 2025 and had not expired when the transcribed record was delivered on 3 April 2025. The record was therefore delivered within time, and no deemed withdrawal was triggered. Counsel for the SAPS, who had initially indicated that she had no instructions to withdraw the point, correctly accepted as much once the computation was addressed. In any event, and as set out above, the record initially received was incomplete; the position where the record is incomplete is governed by rule 37(27), which the parties addressed by the agreed

reconstruction, and not by the deemed withdrawal in rule 37(15). The point *in limine* is accordingly dismissed, and the review is properly before this Court.

Condonation for the late answering affidavit

- [14] The principles governing condonation are well settled. This Court exercises a judicial discretion, upon a consideration of all the relevant factors, in the interests of justice. Those factors include the degree of lateness, the explanation for it, the prospects of success, the importance of the matter, the prejudice to the parties and the interests of finality; they are interrelated, and none is individually decisive (*Melane v Santam Insurance Co Ltd*⁵ (*Melane*)). Where the delay is not slight, the explanation must be reasonable and must cover the entire period of the delay (*Van Wyk v Unitas Hospital and Another*⁶; *eThekweni Municipality v Ingonyama Trust*⁷).
- [15] The delay was substantial. The SAPS's answering affidavit was served only on 10 March 2026, and its condonation application some six weeks later, on 22 April 2026. Its explanation, in summary, is that the record remained incomplete until the supplementary transcript was provided in November 2025; that counsel was engaged on an acting judicial appointment; that the attorney with conduct of the matter took early retirement, on 31 March 2026, necessitating the reassignment of the file; and that the answering affidavit and the condonation application were finalised in that context.
- [16] The explanation is not free of difficulty. It does not account, with precision, for every interval: the applicant computed some 50 court days between the delivery of the supplementary transcript in November 2025 and the service of the answering affidavit, and a further 28 court days before the condonation application was served, and pointed, in addition, to the late filing of the answering affidavit under rule 10. The founding affidavit was deposed to by a candidate attorney who was not involved during the relevant period and who reconstructed the chronology from the file, and no affidavit was procured from

⁵1962 (4) SA 531 (A) at 532C to 532F.

⁶[2007] ZACC 24; 2008 (2) SA 472 (CC) at para 22.

⁷[2013] ZACC 7; 2014 (3) SA 240 (CC) at paras 27 to 28.

the attorney who had conduct of the matter throughout the delay. Relying on *Collett v Commission for Conciliation, Mediation and Arbitration*⁸, the applicant submitted that a flagrant or gross failure to comply with the rules may be met with a refusal of condonation without regard to the prospects of success; and, invoking *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd*⁹, she stressed the higher duty that rests on the state to respect the law and to comply with procedural requirements. These criticisms are not without force.

- [17] Weighing all of the relevant factors, however, this Court is satisfied that the interests of justice favour the grant of condonation. The higher duty on the state is real, and the SAPS is held to it; but the delay here was substantially attributable to the incomplete state of the record (a difficulty not of the SAPS's sole making, and to which the applicant's own late and incomplete record contributed) and to *bona fide* institutional transitions within the office of the State Attorney. There is no suggestion of wilful default, or of *mala fides*. Such prejudice as the applicant has suffered is limited, and capable of remedy. Of particular weight, the SAPS enjoys strong prospects of success: for the reasons given below, the review must fail. It is established that strong prospects of success may compensate for an explanation that is less than complete.¹⁰ The dispute, moreover, concerns the exercise of public power and the position of the successful candidate, and ought to be determined on its merits. Condonation is granted; and it follows that the applicant's objection under rule 36(2) does not preclude consideration of the answering affidavit.

Leave to file the supplementary affidavit

- [18] The SAPS seeks leave to file a supplementary affidavit in the condonation application, in order to place before this Court the confirmatory affidavits omitted from the original papers, to clarify the deponent's authority and the supervisory framework within which he acted, to correct an inadvertent reference to the erstwhile attorney of record having 'resigned' rather than

⁸[2014] 6 BLLR 523 (LAC), as cited in the applicant's heads of argument.

⁹[2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) at para 82.

¹⁰*Melane* above fn 5; *National Union of Mineworkers v Council for Mineral Technology* [1998] ZALAC 22; [1999] 3 BLLR 209 (LAC) at para 10, as quoted in the applicant's heads of argument.

retired, and to amplify the averments concerning prospects of success. The applicant objected that the Rules make no provision for a further affidavit. That is so; but the admission of further affidavits is a matter for the discretion of this Court, exercised in the interests of justice. The material is curative, and responsive to the very points raised by the applicant in opposition; it introduces no new cause of action; and the applicant has had the opportunity to answer it. No prejudice incapable of remedy has been shown. The interests of justice favour the admission of the material, and leave is granted.

The test on review

- [19] A review under section 145 is not an appeal, and the distinction is decisive of this application. The award will not be disturbed merely because the commissioner may have erred, or because another decision-maker might have decided differently. It will be set aside only if the decision the commissioner reached is one that a reasonable decision-maker could not reach on the material before her (*Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹¹ (*Sidumo*)), that is, only if it falls outside the band of decisions to which a reasonable decision-maker could come on the available material (*Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*¹² (*Gold Fields*)). Material errors of fact, and the weight and relevance to be attached to particular facts, vitiate the award only where their effect is to render the outcome unreasonable (*Herholdt v Nedbank Ltd*¹³). The onus rests on the applicant to bring the award outside that band.
- [20] That hurdle is the higher in the present context, because the subject-matter is a promotion. An employee has no right to promotion in the ordinary course, but only to a fair opportunity to compete for the post, and neither a commissioner nor this Court sits in appeal over the employer's selection. The employer's exercise of its discretion in the scoring and selection of candidates is not to be interfered with unless it is shown that the discretion was exercised capriciously, or for insubstantial reasons, or upon a wrong principle, or in a biased manner

¹¹[2007] ZACC 22; 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) at para 110.

¹²[2013] ZALAC 28; (2014) 35 ILJ 943 (LAC) at para 14.

¹³[2013] ZASCA 97; 2013 (6) SA 224 (SCA); (2013) 34 ILJ 2795 (SCA) at para 25.

(*Arries*¹⁴). The like formulations in *Department of Rural Development and Agrarian Reform, Eastern Cape v General Public Service Sectoral Bargaining Council and Others*¹⁵ and *City of Cape Town v SAMWU obo Sylvester and Others*¹⁶, on which the applicant herself relied, are to the same effect: the decision must be shown to have been arbitrary or capricious, actuated by bad faith, discrimination or some other unacceptable reason, taken for insubstantial reasons or upon a wrong principle, or in a biased manner. It follows that a mistake in the evaluation of a candidate does not, of itself, establish unfairness. The applicant must therefore surmount a twofold hurdle: she must show not only that the panel's scoring was unfair in that sense, but that the commissioner's conclusion to the contrary was one that no reasonable decision-maker could have reached. It is against that standard that her grounds must be measured.

The grounds of review

- [21] The applicant's grounds, though numerous, may conveniently be grouped under four heads: that the commissioner misdirected herself as to the applicable criterion; that she relied upon evidence not put to the applicant in cross-examination; that she failed properly to interrogate the panel's scoring of the applicant; and that she failed to deal with the scoring of the successful candidate and the asserted inconsistency in the treatment of the two candidates. This Court deals with each in turn, and has, in doing so, considered each of the passages of the record footnoted in the applicant's heads of argument.

The criterion applied

- [22] The applicant contends that the commissioner decided the matter on the basis that she had no experience 'in the post', whereas the relevant criterion was experience 'in the field of the post'. This ground cannot succeed. The minute of the shortlisting records, among the criteria, presence in or previous experience

¹⁴Id fn 3.

¹⁵(2020) 41 ILJ 1321 (LAC), as cited in the applicant's heads of argument.

¹⁶[2012] ZALCCT 40; (2013) 34 ILJ 1156 (LC), as cited in the applicant's heads of argument.

in the environment of the post; qualifications and courses relevant to the post (advanced driving, VIP, TRT and NIU courses are given as examples); and some, or no, experience in the field of the post. National Instruction 3 of 2015 lists, as criteria for the selection of candidates for promotion, not only experience gained in the field of the post, but also competence based on the inherent requirements of the job, and suitability; and its provisions governing the interview require an assessment of the candidate's ability to function in the post, and of experience in its core functions. The advertisement, in turn, required competency in the post-specific functions of the post. The applicant herself accepted, in her closing argument, that suitability (the ability to function effectively in the requirements of the post) is a criterion for promotion. The commissioner's acceptance that the applicant's want of experience in the actual functions of the close-protection post was a relevant consideration was therefore consistent with the governing instruments, and discloses no misdirection.

Evidence not put in cross-examination

- [23] The applicant contends that the commissioner relied upon evidence, in particular concerning the scoring, that had not been put to her in cross-examination. It is indeed an incident of a fair hearing that a party who intends to impugn a witness's account must put its case to that witness (*President of the Republic of South Africa and Others v South African Rugby Football Union and Others*¹⁷); the applicant pressed the same principle with reference to *Absa Brokers (Pty) Ltd v Moshwana NO and Others*¹⁸ and *Urban Africa Security (Pty) Ltd v CCMA and Others*¹⁹. The principle is not in doubt. But the record does not bear out the premise of the complaint. When the applicant's representative placed on record his concern that the panel witness might testify to matters not put to the applicant, the SAPS's representative acknowledged that she had not put certain questions, was permitted to re-open her cross-examination, and put the material points to the applicant, who dealt with them. The substantive

¹⁷[1999] ZACC 11; 2000 (1) SA 1 (CC) at paras 61 and 63.

¹⁸(2005) 26 ILJ 1652 (LAC) at paras 38 to 39, as cited in the applicant's heads of argument.

¹⁹(2012) 33 ILJ 2201 (LC) at para 19, as cited in the applicant's heads of argument.

evidence concerning the scoring was, in any event, given by Colonel Terblanche, whom the applicant's representative cross-examined. The commissioner considered this very complaint at paragraph 28 of the award and concluded that it would be a miscarriage of justice to decide the matter as though the evidence stood unchallenged. That conclusion was reasonably open to her and discloses no reviewable irregularity.

The panel's scoring of the applicant

- [24] The third head concerns the panel's scoring of the applicant, and it is the ground on which the review must principally stand or fall. The applicant contends that she was under-scored on her courses and her experience, such that on a proper scoring she would have been the preferred candidate. She relies, in particular, on Colonel Terblanche's concession, in cross-examination, that her SWAT 2 course could have been counted as a relevant course, and on the panel's reduction of her experience score from an initial 10 out of 10, which was scratched out on the scoring minute and replaced with a 6, a change Colonel Terblanche accepted appeared from the document. Because the reasonableness standard is central to the disposition of this ground, this Court addresses it in some detail, and asks directly whether the applicant surmounts it.
- [25] It is convenient to begin with what was, and what was not, decisive of the outcome. The assessment comprised two components: a score out of 20 for qualifications, courses and experience, and an interview out of 30. On the first component the applicant in fact out-scored the successful candidate, by 11 to 10. The difference that determined the appointment lay in the interview, in which the successful candidate scored 25.32 and the applicant 19.32. The applicant did not seriously impugn the interview scoring: she accepted that her answers had drawn mostly sixes and sevens, while an answer of the successful candidate put to her had drawn a nine, an eight and a nine. On her own calculation, she would have overtaken the successful candidate only if her score on the first component were raised from 11 to at least 17 out of 20.

- [26] That arithmetic identifies precisely what the applicant must establish. Her score on the first component comprised 3 out of 5 for her qualification (which she did not challenge), 2 out of 5 for her courses (the panel counting three courses as relevant), and 6 out of 10 for her experience. Her own evidence was that she should have scored 5 out of 5 for seven relevant courses, and 10 out of 10 for her experience, for a total of 18 out of 20. Even if she were awarded the maximum of 5 for her courses (considerably more than the single conceded omission would justify), her total on this component would rise only to 14 out of 20, short of the 17 she requires. Her case is therefore, ultimately and unavoidably, dependent upon the reversal of the reduction of her experience score from 10 to 6, alternatively upon the reduction of the successful candidate's scores, to which this Court returns below. The conceded error in the scoring of her courses, taken on its own, does not carry her over the threshold; and a solitary error of evaluation of that order does not, of itself, render the outcome unreasonable.
- [27] It is at the reduction of the experience score that the reasonableness standard bears most heavily against the applicant. The reduction reflected the panel's assessment, on the members' direct knowledge of the post, that the applicant's curriculum vitae overstated her experience in the actual functions of the close-protection post, in which she had never acted. National Instruction 3 of 2015 expressly contemplates that a candidate be assessed on her suitability, and on her experience in the core functions of the post; and it can hardly be unfair, still less irrational, for a panel to decline to accept at face value a curriculum vitae assertion of experience which its members know, from their own involvement in the post, to be overstated; for, on the contrary approach, any candidate might inflate a curriculum vitae to the prejudice of the others. Whether the panel was unduly severe, or (as Colonel Terblanche put it) unduly lenient, and whether a differently constituted panel might have scored the experience at 8 or 10 rather than 6, are matters upon which reasonable assessors could legitimately have differed.
- [28] It follows that, even on the view most favourable to the applicant, the reduction of her experience score lay within the range of reasonable evaluative judgment.

The commissioner's acceptance of it, and her conclusion that the applicant had not shown the promotion process to be unfair, accordingly fell within the band of decisions to which a reasonable decision-maker could come. That a different decision-maker might have scored the applicant's experience more generously, or might even have found in her favour, does not avail her: where more than one conclusion is reasonably open, the conclusion the commissioner reached cannot be said to be one that a reasonable decision-maker could not reach. To hold otherwise would be to convert this review into the appeal it is not.

The scoring of the successful candidate and the asserted inconsistency

- [29] The fourth head concerns the panel's treatment of the successful candidate. The applicant's evidence was that his experience in the post dated only from 2020, when he began to act in it; that his earlier association with the post was limited; and that, on a consistent approach, he ought to have scored 1 rather than 5 out of 10 for experience. On her recalculation (her own first component restored to 18, and the successful candidate's experience reduced), she would have scored 37.32 against approximately 31 for the successful candidate, and would have been the highest-scoring candidate. She contended, further, that his curriculum vitae contained no certificate for the TRT course for which he was credited, and that, after his appointment, the core driving function has continued to be performed by the erstwhile incumbent, Captain Lehaba, the successful candidate riding as the protector in the vehicle.
- [30] These complaints do not carry the review over the threshold, for four reasons. First, the premise that only the acting period could count was disputed: Colonel Terblanche's evidence was that the successful candidate's involvement in the driving and close-protection work of the office dated from 2015, some six to seven years by the closing date, and that this is what the score of 5 out of 10 reflected. The panel's view of what counted as relevant experience was, again, a matter of evaluative judgment on which reasonable assessors could differ. Secondly, the recalculation on which the applicant's arithmetic depends requires this Court to re-score both candidates in her favour at once: to restore her experience to 10, to award her the full 5 for courses, and to reduce the successful candidate's experience to 1. That is the business of an appeal

against the panel's assessment, not of a review of the commissioner's award. Thirdly, the applicant in fact out-scored the successful candidate on experience, 6 to 5, and on the first component as a whole, 11 to 10; the asserted inconsistency, even if it were established, did not produce the appointment. What produced the appointment was the interview, which the applicant did not seriously impugn. Fourthly, the evidence that the successful candidate does not perform the driving function was disputed by Colonel Terblanche, who testified that he does drive; and the manner in which the post has been performed after the appointment is, in any event, not the measure of the fairness of the selection process that preceded it. The commissioner did not deal expressly with each of these contentions; but an award is not reviewable merely because every submission is not separately traversed. The question remains whether, on the totality of the evidence, the conclusion reached is one a reasonable decision-maker could reach, and it is.

- [31] The applicant pointed, finally, to the fact that the successful candidate, although a party to the arbitration, did not give evidence. He was not obliged to. The case the applicant had to meet was the fairness of the panel's process and scoring, and the appropriate witness on that question was a member of the panel, Colonel Terblanche, who testified and was cross-examined at length. No adverse inference arose from the successful candidate's silence that could render the award unreasonable.
- [32] The applicant has therefore failed to surmount the hurdle imposed by section 145. Her remaining complaints (as to the relevance of the successful candidate's degree and courses, the completeness of his application under National Instruction 3 of 2015, and the inferences she submitted should have been drawn from the evidence as a whole²⁰) are of the same evaluative character, and, whether taken singly or cumulatively, do not render the outcome unreasonable. Viewed holistically, the award is one that a reasonable decision-maker could reach on the material before the commissioner. The review must fail.

²⁰*South African Post Office Ltd v De Lacy and Another* 2009 (5) SA 255 (SCA) at para 35, as cited in the applicant's heads of argument.

Joinder and relief

- [33] Two matters raised at the hearing should be recorded. The first is the position of the successful candidate, Warrant Officer Bhesi, who, although joined as a party at the arbitration, was not cited in the review. When this was raised, the applicant explained that the review impugns the conduct of the employer and the reasonableness of the commissioner's award, and not the suitability of the successful candidate, and that he was not joined for that reason. Whether, that explanation notwithstanding, the successful candidate (a party to the arbitration, with a direct and substantial interest in an award that the applicant sought to have set aside and corrected) ought to have been joined is a question on which it is unnecessary to express a concluded view, since the review fails in any event. The second is that the applicant disclosed, in argument, that Ms Matthews has in the meantime been promoted to the rank of warrant officer with effect from 4 February 2026, so that, had the review succeeded, the relief could not have extended to her appointment to the post, but would at most have been confined to compensation for the period of non-promotion up to that date. As the review fails, neither the question of relief, nor the exceptional remedy of substitution (*Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*²¹), arises for decision.
- [34] Finally, nothing in this judgment detracts from the acknowledgement, by Colonel Terblanche and, implicitly, by the commissioner, that the applicant is an experienced and capable member of the Service. The question was never her merit in the abstract, but whether the promotion process had been shown to be unfair. It was not.

Costs

- [35] In terms of section 162 of the LRA, costs are awarded according to the requirements of the law and fairness, and do not follow the result as a matter of course. The parties remain in an ongoing employment relationship; and it was, moreover, the first respondent's own delay that necessitated the

²¹[2015] ZACC 22; 2015 (5) SA 245 (CC) at paras 42 and 47.

condonation application on which it has succeeded. Having regard to the requirements of the law and fairness, this Court makes no order as to costs.

Order

[36] In the premises, the following order is made:

1. Condonation is granted for the late filing of the first respondent's answering affidavit.
2. The first respondent is granted leave to file the supplementary affidavit in the condonation application.
3. The point *in limine* that the review application has been deemed withdrawn is dismissed.
4. The review application is dismissed.
5. There is no order as to costs.



C de Kock
Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant:	I Stockenström of Solidarity
For the first respondent:	Adv P Magona-Dano, instructed by the State Attorney, Cape Town