



Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,  
HELD AT CAPE TOWN**

**CASE NO: C436/2020**

In the matter between:

**PARLIAMENT OF REPUBLIC OF SOUTH AFRICA**

Applicant

and

**GRAHAM ALBERTYN**

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION  
AND ARBITRATION**

Second Respondent

**COMMISSIONER TARIQ JAMODIEN N.O.**

Third Respondent

**Date of Hearing: 30 June 2022**

**Date of Judgment:** 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 handing down judgment is deemed to be 10h00 on 20 June 2023.

**Summary:** Commissioner failing to determine whether he had jurisdiction when such was required – gross irregularity - in award determining that condonation was required and *mero motu* granting condonation – gross irregularity given no application for condonation and no *audi alteram partem* – award reviewed, set aside and remitted

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## JUDGMENT

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### BOSCH AJ

#### INTRODUCTION

[1] This is an application to review and set aside an arbitration award issued by the second respondent (the “arbitrator”) dated 6 October 2020. In his award the arbitrator found that the applicant’s failure to allow the first respondent to hold the position of Controller: Logistics and Transport Services 1 October 2014 to 31 July 2019 without it being subjected to a job grading process constituted an unfair labour practice.

[2] The applicant was ordered to pay the first respondent an amount of R112 467,00 as compensation.

[3] The applicant seeks, on a variety of grounds, to have the award set aside on review. However, given the nature of this matter, I need to deal with only one of them in this judgment.

## THE MERITS OF THE REVIEW

[4] In his award, the arbitrator records the following:

‘At the start of the proceedings I raised the issue of timeous referral of the dispute. It emerged during the discussions that this matter, pertaining to an alleged unfair labour practice, had been coming on since 2014. The [first respondent] had sought resolution internally for a number of years but without any success. I initially handed down an ex tempore ruling that condonation was not required based on the Human Resources Executive, Mr Mokonyana finally responding to [the first respondent] on 24 January 2020 wherein he stated the [applicant’s] position on the issue and that he regarded the matter as “now closed”. However, after assessment of the facts at conclusion of the arbitration it became clear to me that the [first respondent] would have first become aware of the unfair labour practice on 29 July 2019 when [the first respondent] was informed that there was no compensation payable to him and that he should return to his old position. Hence the 90 days’ referral period would have kicked in from that point and his referral would have had to be done on 27 October 2019. Condonation would thus have been required. I am satisfied though that the parties had addressed me sufficiently on the matter and I am persuaded that in the circumstances I accept the [first respondent’s] reasons for lateness being that NEHAWU was still in discussions with the human resources department which came to an end with Mr Mokonyane final letter on 24 January 2020. I also accept that it is in the interests of justice to have the matter heard. Given the lengthy period that the [first respondent] had engaged with [the applicant], the balance of convenience favours him. I am thus persuaded that good cause has been established for the late referral to be condoned.’

- [5] The applicant contends that the arbitrator exceeded his powers in assuming jurisdiction in the absence of a condonation application having been brought by the employee at the time of referring his dispute to the second respondent.
- [6] In my view, the arbitrator did not properly determine the issue of condonation. He did not request or entertain submissions on the issue initially. The record indicates that the issue of condonation remained in dispute despite the arbitrator's proceeding on the assumption that it was not required.
- [7] He indicates that he made an *ex tempore* ruling, but there was no ruling *per se*, nor a proper ventilation of the issue of whether condonation was required and, if so, whether it should be granted. In circumstances where it was clearly an issue for determination, the arbitrator failed to properly address the issue of whether he had jurisdiction to arbitrate the matter before him. In doing this, he committed a gross irregularity.
- [8] To make matters worse, when he applied his mind to the facts and the issue of condonation and realized that condonation was required, he *mero motu* revisited the issue, without informing the parties that he intended doing so and without an application for condonation before him. That conduct amounted to a further gross irregularity due to its disregard of the principle of *audi alteram partem*. It is by no means clear, contrary to his assumption, that the arbitrator had before him all the evidence that may have been required to determine whether condonation should be granted.
- [9] The parties should have been granted an opportunity to be heard on the issue. They, particularly the applicant, ought to have been granted the opportunity to

place further relevant material before the arbitrator. In addition, the parties should have been permitted an opportunity to make submissions on condonation.

[10] The gross irregularities described above warrant setting aside the award at issue in this case.

### **APPROPRIATE RELIEF**

[11] I appreciate that there has been significant delay in finalizing this matter and I apologise to the parties for the delay in rendering this judgment. However, given the nature of the errors committed by the arbitrator, it would not be appropriate to substitute the arbitrator's ruling and award, nor am I in a position to do so. The award must be reviewed set aside and remitted to the second respondent. Should he choose to do so, the first respondent must bring an application for condonation, in which he may argue that condonation is not required and / or set out the reasons why condonation should be granted if necessary. It is then open to the applicant to respond to such an application in the normal course. If condonation is granted the arbitrator may proceed to determine the merits of the unfair labour practice dispute.

[12] There is no reason not to follow the usual approach to ordering costs in this matter.

[13] In the premises, I make the following order:

Order

1. The arbitration award issued by the Third Respondent under case number WECT5105-20 is reviewed and set aside.
2. The matter is remitted to the Second Respondent to be determined by a Commissioner other than the Third Respondent.
3. The First Respondent must, if he elects to do so, file an application for condonation with the Second Respondent within 10 court days of this order.
4. There is no order as to costs.



**Craig Bosch**  
**Acting Judge of the Labour Court of South Africa**

**APPEARANCES:**

**Applicant:** Mr D Visagie of Webber Wentzel Attorneys

**First Respondent:** Mr M Garces instructed by Parker Attorneys.