THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: C460/2019

In the matter between:

HOSKING STEPHEN GERALD **Applicant**

and

CAPE PENINSULA UNIVERSITY OF TECHNOLOGY **First Respondent**

STEPHEN BHANA N.O **Second Respondent**

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **Third Respondent**

Heard: **20 June 2023**

Delivered: **24 July 2023**

Summary: Applicant purportedly brought a review application as one falling under s145(1)(b) of the Labour Relations Act, 66 of 1995 – whether the applicant's review application is one brought under s145(1)(a) or under s145(1)(b) of the LRA – applicant failed to allege and prove all the essential elements of the general offence of corruption against the Commissioner as contemplated in s8, under Part 2 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004 – whether a defective

condonation application without a notice of motion should be entertained by this court – a defective condonation application without a notice of motion, is considered to be brought to the notice of the opposing party if it is served on the other party and filed with the Registrar – a delay of almost eleven weeks is excessive – the applicant cannot be allowed to have a second bite at the proverbial 'legal cherry' without leave of the court – whether the applicant's failure to deliver his review application within the statutory prescribed 6 weeks should be condoned – explanation for the delay unacceptable and unreasonable – court lacks jurisdiction to entertain the review application in the absence of an order granting condonation – the review application is struck from the roll for lack of jurisdiction.

JUDGMENT

DZAI AJ

Introduction

[1] On 20 August 2019, Professor Stephen Gerald Hosking (applicant) launched an application in terms of section 145 of the Labour Relations Act[1], (LRA) for the review and setting aside of an arbitration award, dated, 23 April 2019, under case number: WECT8571-18, made by the second respondent, Mr. Stephen Bhana (Commissioner), under the auspices of the third respondent, the Commission for Conciliation, Mediation, and Arbitration (CCMA). On the same day, the applicant delivered an affidavit titled: *"Application for the Labour Court to condone the late application by Stephen Hosking for a Review of the award on the CCMA arbitration WECT 8571-18 dated 23 April 2019"* (*defective condonation application*).

[2] On 11 September 2019, the first respondent, Cape Peninsula University of Technology (CPUT) delivered its answering affidavit to the applicant's defective condonation application. On 13 September 2019, the applicant instead of replying to CPUT's answering affidavit, delivered a second

[1] Act 66 of 1995, as amended.

defective condonation application, titled: *"Supplementary (amended) application for the Labour Court to condone the late application by Stephen Hosking for a Review of the award on the CCMA arbitration WECT 8571-18 dated 23 April 2019"* (*second bite at the cherry*).

[3] On 8 November 2022, the applicant delivered his supplementary affidavit to the review application. On 1 November 2022, CPUT delivered its opposing affidavit to the review application.

[4] The applicant received the award on 23 April 2019. In terms of subsection 145(1)(a) of the LRA, he was supposed to have delivered his review application within 6 weeks after receiving the award, that is on or before 7 June 2016. Alternatively, and in terms of subsection 145(1)(b) of the LRA, within 6 weeks after he discovered an offence referred to in Part 1 to 4, or sections 17, 20 or 21 of Chapter 2 of the Prevention and Combating of Corrupt Activities Act[2] (PCCA Act).

[5] The applicant's notice of motion only refers to section 145 of the LRA and does not categorise his review application as one falling under the scope of subsection 145(1)(a) or under the scope of subsection 145(1)(b) of the LRA. Furthermore, the notice of motion is silent on the prayer for condonation, hence it is said to be defective. The condonation application is without a prayer made in a proper notice of motion. Accordingly, it is not clear from the notice of motion whether the applicant launched his review application outside the statutory prescribed six weeks period mentioned in subsection 145(1)(a) or in subsection 145(1)(b) of the LRA.

[6] At the hearing of this matter, the applicant made submissions on both condonation and review applications. However, when it was CPUT's turn to address the court on both applications, Mr. Mcaciso, representing CPUT, raised a point *in limine*, to the effect that this Court lacks jurisdiction to entertain the review application in the absence of a notice of motion seeking condonation. In support of the point *in limine* and the dismissal of the applicant's condonation application, Mr. Mcaciso relied on three judgments of

[2] Act 12 of 2004.

the Johannesburg Labour Court in: (a) *Kock v Commission for Conciliation, Mediation and Arbitration and Others*[3] *(Kock)*; (b) *Modika v CCMA Johannesburg and Others*[4] *(Modika)*; and (c) *Rustenburg Local Municipality v South African Local Government Bargaining Council and Others*[5] *(Rustenburg Local Municipality)*.

[7] At the conclusion of CPUT's submissions, I adjourned the proceedings for the determination of the point *in limine* and the defective application for condonation prior to the hearing of CPUT's submissions on the merits of the review application.

Issues for determination

[8] The first question for determination is whether the applicant launched his review application outside the statutory six weeks period prescribed in subsections 145(1)(a) or 145(1)(b) of the LRA. If I find that the applicant's review application falls in the first category, under subsection 145(1)(a), then a condonation application becomes necessary. However, if I find his review application to fall under the second category, under subsection 145(1)(b), then there would be no need for a condonation application and CPUT's point *in limine* would be without foundation and falls to be dismissed (first question).

[9] The second question is which of the two sets of affidavits in the two defective condonation applications are properly before Court (second question).

[10] The third question is whether the applicant's defective condonation application should be dismissed by this Court if I find that his review application falls under subsection 145(1)(a) of the LRA, for failure to serve and deliver a notice of motion, in other words for lack of compliance with Rule 7 of the Rules for the Conduct of Proceedings in the Labour Court[6] (Rules) (third question).

[3] [2021] ZALCJHB 101 (31 May 2021).
[4] [2021] ZALCJHB 103 (9 June 2021).
[5] [2021] ZALCJHB 265 (25 August 2021).
[6] GN 1665 of 1996.

[11] The fourth question is whether the applicant has shown good cause for an order condoning the late filing of his review application in terms of subsection 145(1A) read together with subsection 145(1)(a) of the LRA (fourth question).

[12] In the event that I decide in favour of the applicant on the third question and entertain his defective condonation application, then I would have to determine the fourth question. However, if I find against the applicant on the fourth question, then this would be the end of the enquiry, with the effect that his review application would be struck from the roll for lack of jurisdiction.

Applicable facts to the first question

[13] The applicant has identified two periods in which he had to bring his review application. The first period being less than 11 weeks counting from 23 April 2019 to 9 July 2019 and the second period being less than 6 weeks counting from 9 July 2019 to 20 August 2019. In the original affidavit for condonation, the applicant appears to be bringing his review application in terms of both subsections 145(1)(a) and 145(1)(b) of the LRA. In this regard, he avers as follows:

> '8.7.1 The annexed founding affidavit shows at para 11 that the Commissioner contrived to sweep 'under the carpet' the gross irregularity in proceedings he knew he had committed. The way he did this is in my view so dishonest that I motivate in my founding affidavit that the circumstances of the irregularity be investigated... Section 145(1)(a) and (b) make provision for a review to be applied for within six weeks of a discovery of a corrupt activity. Corrupt activities are defined in parts 1 to 4 of the Prevention and Combating of Corrupt Activities Act. I date my discovery at 9 July 2019 that there was a cover up; this being the same day I went to the Labour Court to seek a review. I have recommended in my founding affidavit that the irregularity be investigated.' [Own emphasis]

[14] CPUT's Director: Employee Relations, Ms. Nashira Abrahams (Ms. Abrahams), the deponent to the answering affidavit correctly pointed to the fact that the applicant made unsubstantiated allegations against the Commissioner's conduct. Ms. Abrahams' affidavit prodded the applicant in the

right direction and made the applicant concede at paragraph 33.1 of his supplementary affidavit as follows:

> 'I did not make any application under section 145(1)(b) because I have no evidence of Commissioner corruption. Section 145(1)(b) only makes provision for a review to be applied for within six weeks of a discovery of a corrupt activity. Corrupt activities are defined in parts 1 to 4 of the Prevention and Combating of Corrupt Activities Act.' [Own emphasis]

[15] Despite making the above concession, the applicant still attempts to bring his review application within the scope of subsection 145(1)(b) of the LRA, by contending as follows in his supplementary affidavit:

> 'I have recommended in my founding affidavit that the circumstances be investigated in which the Commissioner made a ruling that did not relate to the matter on which the ruling was applied for. His act of making a ruling related to an absolution from the instance' application when he insisted I submit arguments related to a First Respondent in limine application is a misdemeanour. It gives rise to a suspicion. Were my discovery of the Commissioner's misdemeanour to be accommodated under 'good cause' provision for condonation, under the same terms a discovery of a corrupt Commissioner activity would, I would have had six weeks grace from 9 July 2019 act to apply for a review. That period of grace would have terminated on 20 August 2019, i.e., my filing would not have been deemed late.'[7] [Own emphasis]

[16] In the supplementary affidavit, the applicant reiterates that on 9 July 2019, he uncovered: (a) the Commissioner's misdemeanour; (b) overwhelming evidence pointing at the Commissioner's misconduct; and (c) a cover-up of an irregularity (misdemeanour) by the Commissioner.

Applicable Legislative Framework to the first question

[17] Subsection 145(1) of the LRA provides that:

[7] At paras 33.2 to 33.3.

'(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award –

(a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in Part 1 to 4, or section 17, 20, or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or

(b) if the alleged defect involves an offence referred to in paragraph (a), within six weeks of the date that the applicant discovers such offence.'[Own emphasis]

[18] Section 1 of the PCCA Act defines a *"judicial officer"* to mean, amongst other things: *"...any arbitrator, mediator or umpire, who in terms of any law presides at arbitration or mediation proceedings for the settlement by arbitration or mediation of a dispute which has been referred to arbitration or mediation*".

[19] In Chapter 2, Part 1 and 2, of the PCCA Act, the legislature sets out the meaning of a general offence of corruption in section 3[8] and in section 8[9]

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[8] '3. General offence of corruption. — Any person who, directly or indirectly—
(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or
(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner—
(i) that amounts to the—
(aa) illegal, dishonest, unauthorised, incomplete, or biased; or
(bb) misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation; constitutional, statutory, contractual or any other legal obligation;
(ii) that amounts to—
(aa) the abuse of a position of authority;
(bb) a breach of trust; or
(cc) the violation of a legal duty or a set of rules;
(iii) designed to achieve an unjustified result; or
(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corruption.'

[9] '8. Offences in respect of corrupt activities relating to judicial officers. —
(1) Any—
(a) judicial officer who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

which deals with offences relating to corrupt activities pertaining to judicial officers.

Analysis of the facts pertaining to the first question

[20] The Commissioner in *casu* falls under the definition of a judicial officer as defined in section 1 of the PCCA Act. In *S v Selebi,*[10] *(Selebi),* the Supreme Court of Appeal (SCA) dealt with an appeal by a former public officer, Mr Jacob Sello Selebi (Mr. Selebi), who was the National Commissioner of Police and former Head of Interpol. Mr. Selebi was convicted of corruption in contravention of subsection 4(1)(a) under Part 2 in Chapter 2 of the PCCA Act. The offence described in subsection 4(1)(a) of the PCCA Act to which Mr. Selebi was convicted is similar to the offence described in section 8(1)(a) of the PCCA Act, which applies to offences committed by judicial officers. Mr. Selebi was the recipient of a gratification contemplated in subsection 4(1)(a), in that he accepted money and clothing from Mr. Agliotti.

[21] Without going into the details on the *Selebi* judgment, it is sufficient for present purposes that I only list the essential elements of the general crime of

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(b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a judicial officer, whether for the benefit of that judicial officer or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner—
(i) that amounts to the—
(aa) illegal, dishonest, unauthorised, incomplete, or biased; or
(bb) misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
(ii) that amounts to—
(aa) the abuse of a position of authority;
(bb) a breach of trust; or
(cc) the violation of a legal duty or a set of rules;
(iii) designed to achieve an unjustified result; or
(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corrupt activities relating to judicial officers.
(2) Without derogating from the generality of section 2 (4), "to act" in subsection (1) includes—
(a) performing or not adequately performing a judicial function;
(b) making decisions affecting life, freedoms, rights, duties, obligations, and property of persons;
(c) delaying, hindering, or preventing the performance of a judicial function;
(d) aiding, assisting, or favouring any particular person in conducting judicial proceedings or judicial functions;
(e) showing any favour or disfavour to any person in the performance of a judicial function; or
(f) exerting any improper influence over the decision making of any person, including another judicial officer or a member of the prosecuting authority, performing his or her official functions.'[Own emphasis]

[10] [2011] ZASCA 249; 2012 (1) SA 487 (SCA).

corruption as contemplated under Part 2 of the PCCA Act. With regards to subsection 4(1)*(a)* and in order for the public official to act in a manner envisaged in s 4(1)*(a)*(i) of the PCCA Act. The SCA listed the essential elements of the general crime of corruption committed by a recipient to be as follows:

> '(a) the acceptance; (b) of a gratification (payment or some other benefit); (c) in order to act in a certain way (the inducement); (d) unlawfulness; and (e) intention. Although 'unlawfulness' is not expressly mentioned in the definition of the crime, commentators are of the view that it must nevertheless be read into it. It connotes that the act (in this case the acceptance of payment) should be unjustified as this is a requirement of every crime. In general, 'unlawfulness' means 'contrary to the good morals or the legal convictions of society'. The same applies to 'intention'. Therefore, it has to be considered even though it is not specifically mentioned.'[11] [Footnotes omitted]

[22] In order for the applicant to be afforded the six weeks' leeway from the discovery of an offence contemplated in subsection 145(1)(b), he must have at least alleged the essential elements of the general offence of corruption as stated in *Selebi*. The applicant ought to have alleged that on 9 July 2019, he discovered for the first time that the Commissioner directly or indirectly, accepted or agreed to accept any gratification from CPUT or from CPUT's representatives, whether for his benefit or the benefit of another person in order to intentionally act in a manner that is, amongst other, dishonest, biased and amounts to an abuse of his position as an arbitrator. The applicant further had to show, on a balance of probabilities, that the conduct complained of amounts to unlawfulness and to an offence, as contemplated in section 8 of the PCCA Act read with subsections 145(1)(a) and (b) of the LRA.

[23] The applicant appears to equate the alleged "*misdemeanour or the alleged cover up*" to an "*offence*" as contemplated in subsection 145(1)(b) read with section 8, under Part 2 in Chapter 2 of the PCCA Act. This is evident from his unsubstantiated allegations of dishonesty, bias, abuse of power and the following statement: *"[w]ere my discovery of the Commissioner's*

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[11] *Selebi* at para [8].

misdemeanour to be accommodated under 'good cause' provision for condonation, under the same terms a discovery of a corrupt Commissioner activity would, I would have had six weeks grace from 9 July 2019 act to apply for a review. That period of grace would have terminated on 20 August 2019, i.e., my filing would not have been deemed late".[12]

[24] According to the applicant's misinterpretation and misapplication of the statutory provisions, if his alleged misdemeanour or cover up is considered as an offence as contemplated in subsection 145(1)(b) of the LRA and was considered to be on the same level as the corrupt activity of a judicial officer as contemplated in section 8 of the PCCA Act, he would be entitled to a six weeks grace from 9 July 2019, as the date on which he uncovered the Commissioner's alleged misdemeanour/offence, to deliver and file his review application on 20 August 2019 without the need for having to apply for condonation.

[25] The applicant's plea that this Court should accept his late discovery of an alleged misdemeanour or suspicious cover up as significant, is without foundation and merit. The applicant intentionally misinterpreted and misapplied the abovementioned statutory provisions, with the sole intention of bringing his late review application under the scope of subsection 145(1)(b). The applicant wanted to do away with an application for condonation. This is clearly evident in paragraph 33.3 of his supplementary affidavit as set out above and in paragraph 8.7.3 of his condonation founding affidavit, when he says that: *"an application dated 19 August would be in time".*

[26] From the aforegoing, the applicant has failed to allege and prove, on a balance of probabilities, all the essential elements of the offence of corruption against the Commissioner in order to bring his review application within the scope of application and consideration under subsection 145(1)(b) of the LRA. The applicant has conceded in his papers that he has no evidence substantiating his allegations of corrupt activity on the part of the Commissioner. Accordingly, unsubstantiated allegations of a "*misdemeanour*

[12] Applicant's supplementary affidavit at para 33.3.

or suspicious cover-up" against the Commissioner are not adequate to bring his review application within the scope of subsection 145(1)(b).

[27] In the premise and on the first question, I find the applicant's review application to be one contemplated in subsection 145(1)(a) of the LRA, meaning that he ought to have brought his review application within six weeks after he received the award, that is on or before 7 June 2019. My finding in this regard is supported by the applicant in his own words, when he says at paragraph 8.7.2 of his founding affidavit that:

> 'I have no evidence that this cover up is related to corrupt activity. At this stage, all I can say is that this cover up is a suspicious act. There is a public interest and judiciary interest in investigating suspicious acts of senior CCMA commissioners.'

[28] Furthermore, at paragraph 33.1 of his supplementary affidavit, the applicant puts the analysis of the first question to rest when he says:

> 'I did not make any application under section 145(1)(b) because I have no evidence of Commissioner corruption.'

Applicant's degree of lateness

[29] It is common cause that the applicant received the award on 23 April 2019. However, he failed to bring his review application within six weeks of receipt of the award as contemplated in section 145(1)(a) of the LRA. He only delivered his review application, almost eleven weeks later, on 20 August 2019 purporting to bring it under subsection 145(1)(b) of the LRA.

[30] Since I have found the applicant's review application to be one contemplated in subsection 145(1)(a) of the LRA, a condonation application is necessary having regard to the applicant's excessive degree of lateness in delivering his review application. Accordingly, the applicant is obliged to show good cause why his excessive lateness should be condoned and for this Court to be vested with the necessary jurisdiction to determine the merits of the review application.

Facts and submissions pertaining to the second question

[31] In condonation applications, there are generally three sets of affidavits, namely: (a) a founding affidavit by the applicant; (b) an answering affidavit by the respondent; and (c) a replying affidavit by the applicant. The filing of a fourth affidavit in motion proceedings can only be done with the leave of the court.

[32] The applicant delivered his first affidavit on 20 August 2019. As already stated above, on 11 September 2019, CPUT delivered its answering affidavit to the applicant's first affidavit. The applicant failed to deliver a replying affidavit. However, on 13 September 2019, the applicant opted for a second bite at the cherry by delivering a second affidavit, which purported to amend and replace his original affidavit for condonation. Accordingly, this Court has to decide which of the two sets of affidavits in the two defective condonation applications is properly before court, i.e. the one filed on 20 August 2019 or the second one filed on 13 September 2019.

[33] The applicant made no attempt to deliver an application for leave to supplement, amend, or replace his original affidavit. The applicant also offered no satisfactory explanation as to why this Court should accept the second affidavit or why the additional information contained in the second affidavit was not part of the first affidavit for condonation. Paragraph 6 of the applicant's second affidavit, indicates that he acted as if he was entitled to replace and file a further affidavit, when he says:

> 'This affidavit amends and replaces the application for condonation of late filing in the light of the Respondent's Answering Affidavit in Re Condonation, which challenges at paras 23 – 31, in effect, that the applicant's original condonation application provided inadequate explanation for each and every delay.' [Own emphasis]

[34] The applicant's conduct in changing the rules applicable to motion proceedings is similar to the conduct of the applicant in *Stone and Allied Industries (Pty) Ltd v Khabu and Others,*[13] *(Khabu)*, wherein Prinsloo J, was

[13] [2022] ZALCJHB 242.

faced with a rescission application where the applicant failed to deliver a replying affidavit and instead elected to deliver a supplementary affidavit without the leave of the court to do so. Prinsloo J restated the general rule applicable to affidavits in motion proceedings as follows:[14]

> 'The ordinary rule is that three sets of affidavits are allowed, namely a founding, answering and replying affidavit. The Court may in its discretion permit the filing of further affidavits and the relevant authorities indicate that leave will be granted for filing further affidavits only in 'exceptional circumstances' or in 'special circumstances' or if the court considers it advisable.'

[35] Prinsloo J, mindful of the *Plascon-Evans Rule*,[15] explained that it was important for the applicant to file a replying affidavit if he wanted to dispute the averments made by the respondent in the answering affidavit or if he intended to provide the court with an alternative or different version to the one in his founding affidavit. Prinsloo continued and said:

> 'Instead, a supplementary affidavit was filed, which does not purport to answer *ad seriatim* to the averments made by the Respondent, but clearly stated that the purpose was to bring certain facts to the Court's attention. Not only was the supplementary affidavit filed out of proper sequences of affidavits in motion proceedings, there was also no effort made to seek leave from this Court to permit a supplementary affidavit or explain why the filing of

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[14] *Khabu* at para [39].

[15] In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C, the Court held that: 'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances, the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine, or *bona fide* dispute of fact... If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court... and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks... Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers...' [Own emphasis]

a supplementary affidavit, in the absence of a replying affidavit, should be permitted.'[16]

[36] In his submissions, Mr. Mcaciso conceded that the applicant is not a trained legal practitioner, however, he submitted that the applicant was a sophisticated person who occupied the role of a Professor at an institution of higher learning, specialising in conducting research. He further submitted that no satisfactory explanation has been tendered by the applicant for the excessive delay and that the applicant is an experienced litigator who was aware of the litigation processes that governs time frames for review applications.

[37] True to Ms. Abrahams' unrefuted averments and Mr. Mcaciso's submissions that the applicant is a well-educated and a sophisticated man, who is well-versed at researching the law and the applicable rules, the applicant in the second affidavit, challenged CPUT's answering affidavit as follows:

'7. The First Respondent's challenge is with reference to a Case Law interpretation of what constitutes 'good cause', as referred to in the Labour Relations Act number 66 of 1995. The particular case law of reference is that specified in the judgement 33 years before the LRA was passed, viz. in the 1962 case Melane v Santam Insurance Co Limited 1962 (4) SA 531. These factors are:

7.1 the extent of the delay

7.2 the reasons for the delay

7.3 the prospects of success of the main action

7.4 the importance of the matter

7.5 the prejudice to the parties

The extent of the delay

8. As the learned legal practitioner representing the First Respondent in this matter will be only too well aware, there is no case reference on a

[16] *Khabu* at para [41].

> precise period of delay that would exclude an application for condonation of lateness in filing. For this reason, there is no precedent available to the Labour Court to apply, on whether a period of lateness meets 'the extent of delay' criterion. If filing is late, then it is late – be it one day or ten weeks. The extent is of delay criterion is, by default, captured (incorporated) in the reasonableness criterion for condoning a late filing. The longer the day, the more time periods applicant has to account for to satisfy the reasonableness criterion for the delay.'

[38] As already stated above, the applicant's second affidavit is a second attempt at biting the proverbial 'legal cherry' after an answering affidavit had been delivered to him in answer to his case. In his original affidavit, he failed to address all the elements listed in the *Melane v Santam Insurance Co Ltd*[17] (*Melane*) judgment. The information he seeks to introduce in addressing the requirements in *Melane* is information that was available to him at the time he deposed to his original affidavit. Furthermore, his second affidavit does not respond seriatim to CPUT's answering affidavit and having read its contents does not even take his explanation for the delay further nor does he properly address his prospects of success in the review application. For instance, in the second supplementary or replacement affidavit, the applicant tries to build more on his injured feelings. However, he reveals that as early as 24 April 2019, he refused to comply with CPUT's instructions and referred Prof. Pellisier to information that was overlooked by the Commissioner. His refusal had conditions attached to it, it was either CPUT met his demands alternatively he waited patiently for CPUT to press charges of gross insubordination or for CPUT to treat him fairly and allow him to participate in DEA's research like the other academic staff.

[39] Furthermore, as early as 25 April 2019, the applicant was of the view that CPUT was pursuing the matter based on selected paragraphs of the award, but made a deliberate and educated choice not to challenge CPUT by taking the award on review. He instead elected to play a cat-and-mouse game with CPUT and its staff members, not that he was ignorant of the time periods applicable to review applications as he earlier contended in his original

[17] 1962 (4) SA 531 (A).

affidavit. In his own words, the applicant says he saw no relevance in time limits for applications for any follow-up legal actions. The burning concern at the time was the cat-and-mouse game to see if he was going to be challenged on his refusal to comply with the request from Prof. Pellisier and whether CPUT would bring disciplinary proceedings against him for insubordination. When CPUT and its representatives did not give him the desired results. The applicant decided it was time to change the playfield and brought the cat-and-mouse game to this court:

39.1 First, he purported to bring a review application under subsection 145(1)(b) of the LRA, by pretending to be a lay person who did not know how the law and time periods applied to review applications and who just happened to discover overwhelming evidence on 9 July 2019 which pointed at the Commissioner's alleged misdemeanours or alleged covered up which amounted to corrupt activities. He deliberately dated his discovery to be 9 July 2019 in order for his review application, dated 19 August 2019 to fall within the time period prescribed in subsection 145(1)(b);

39.2 Second, he was aware he had no evidence of corrupt activities on the part of the Commissioner, hence he took a cautionary step and applied for condonation for failing to comply with subsection 145(1)(a), albeit with a defective application;

39.3 Third, when CPUT pointed out to him that the allegations of alleged misdemeanours and cover up against the Commissioner were unsubstantiated and that he failed to tender a reasonable, full and sufficient explanation to justify this Court condoning his excessive delay, the applicant decided not to deliver and file a replying affidavit to CPUT's answering affidavit and instead decided to take a second bite at the cherry by attempting to change the rules of the game and purporting to do away with his initial application for condonation and replacing it with new affidavit titled: *"Supplementary (amended) application for the Labour Court to condone the late application by*

Stephen Hosking for a Review of the award on the CCMA arbitration WECT 8571-18 dated 23 April 2019".

39.4 Fourth, in the supplementary affidavit, he clarifies that his review application is one under subrule 145(1)(a) and at paragraphs 7 – 8 and at subparagraphs 7.1 to 7.5, he demonstrates his knowledge of the applicable law to condonation applications, hence the sudden need to now fully comply with the elements of condonation as stated in *Melane* by attempting to amend and replace his original affidavit without;

39.5 Fifth, the purported amendment and replacement of the original application for condonation was done without following the rules applicable to amendments and to the filing of affidavits in motion proceedings and the applicant failed to bring an application for leave of the court in filing the supplementary affidavit purporting to replace the original condonation application.

[40] The applicant's second attempt at justifying the excessive delay does not take his explanation further, he still talks about his personal feelings of distress and shock upon receipt of the award. He did not consciously consider taking the matter on review and he saw no relevance in time limits for applications for any follow-up legal actions. Contrary to what the applicant had stated in his original affidavit that on 9 July 2019 he woke up to the realisation of overwhelming evidence pointing at the Commissioner's misconduct, he now changes his initial approach and states that on 24 April 2019 a representative of CPUT Professor René Pellissier (Prof. Pellissier), nastily requested him to furnish her with a copy of the award and instructed him to deliver copies of the confidential work he submitted to the DEA under the MOU. In response to Prof. Pellissier, he politely referred CPUT to information that the Commissioner overlooked and refused to comply with CPUT's request until CPUT met his demands alternatively he waited patiently for CPUT to press charges of gross insubordination or for CPUT to treat him fairly and allow him to participate in DEA's research like the other academic staff. Furthermore, these allegations are not supported by annexures of the communication referred to in the supplementary affidavit.

[41] The applicant further avers that he also contacted Mr. Mcaciso on 25 April 2019 via email with the purpose of finding out whether CPUT was pursuing a dispute with him over which the CCMA had arbitrated. He further pointed out to Mr. Mcaciso that CPUT was pursuing the matter based on selected paras of the award.

[42] Most of the applicant's supplementary or replacement affidavit is spent complaining about CPUT's lack of fairness and blaming Mr. Mcaciso for not responding to his email and informing him that CPUT had not closed the matter and contends that if Mr. Mcaciso had respondent to his email, he would have considered other options than attempting to leave the matter to rest. He then says he experienced a surge of resentment at the end of the second term for not having received justice he had expected to receive at the CCMA and was reasonable entitled to change his mind and bring a review application.

[43] Based on the surge of resentment he experienced at the end of the second term, it was then that the applicant changed his mind on 9 July 2019 about exploring his options of contesting the award. In this regard he says: *"When my exploration uncovered that the arbitration proceedings and award pointed almost overwhelmingly to a Commissioner misconduct, and so were reviewable, that sealed the matter. Accordingly, on 9 July 2019 I did the next reasonable thing. I went to Cape Town Labour Court and requested advice".*

[44] From the aforegoing, it would be unfair for this Court to allow the applicant another bite of the proverbial 'legal cherry' in circumstances where he made no attempt to apply for condonation for the purported amended supplementary affidavit and the information he seeks to introduce was available to him at the time he deposed to his original affidavit. Furthermore, CPUT would be severely prejudiced as it didn't have an opportunity to deliver an answering affidavit to the second affidavit. I elaborate more on the applicant's failure to deliver a replying affidavit and his failure to apply for leave of the court for filing a further affidavit, under prospects of success below.

[45] In the premise, I find the applicant's second defective condonation application not properly before this Court and will not be considered in the determination of the fourth question ('good cause').

Facts and submissions pertaining to the third question

[46] As already stated above, before I can commence to determine the fourth question (good cause), I first have to determine whether the applicant's first defective condonation application should be entertained by this Court having regard to CPUT's point *in limine* and the applicant's non-compliance with Rule 7.

[47] The applicant's affidavit to the original condonation application is not accompanied by a notice of motion, however, it was delivered together with his review application's notice of motion in terms of section 145 of the LRA. This notice of motion is silent on the prayer for condonation and simply reads as follows:

> 'PLEASE TO TAKE NOTICE THAT APPLICATION is here made to the above Honourable Court for an order in the following terms:-
>
> 1. That the arbitration award dated 23 April 2019 under Case no WECT8571-18 be reviewed and set aside;
> 2. That the costs of this application be paid by the Respondent; Each pay own costs;
> 3. Further and/or Alternative relief.'

[48] During his address, Mr. Mcaciso referred the Court to CPUT's Notice of intention to oppose (Notice), dated 23 August 2019, which did not form part of the Court File. The applicant produced the paginated Notice in Court during Mr. Mcaciso's address. The Notice reads as follows:

> 'BE PLEASED TO TAKE NOTE that the First Respondent in this matter hereby wishes to oppose the application for review and accompanying condonation application filed by the Applicant.

KINDLY TAKE NOTICE that the First Respondent will file its Answering Affidavit to the condonation application, within 10 days from receipt of the Applicant's Notice of Motion.

KINDLY TAKE NOTICE FURTHER that the First Respondent will file an Answering Affidavit in response to the Applicant's Founding Affidavit in respect of the Review Application within 10 days from the date of receipt of the Applicant's Rule 7A (8) Notice, within 10 days from receipt of the Applicant's Notice of Motion.'

[49] At the hearing of these proceedings, I pointed out to the applicant that his notice of motion was silent on condonation and that in accordance with CPUT he was advised as early as August 2019 that he needed to deliver a notice of motion for the condonation application. In response the applicant conceded that he indeed received CPUT's Notice in August 2019 and submitted that since CPUT filed its answering affidavits on both the first condonation and the review applications, there was no need for him to deliver a notice of motion as requested in the Notice because CPUT was aware that he had brought a condonation application and had responded to his application despite its defectiveness. On the other hand, Mr. Mcaciso submitted that the answering affidavit to the defective condonation application was only delivered by CPUT as a precautionary measure and not in any way condoning the applicant's failure to deliver his notice of motion in the condonation application.

Analysis of the third question

[50] CPUT placed heavy reliance on the *Kock* Judgment, however, the facts of the *Kock* judgment are distinguishable to the facts of this case. In *Kock*, just like in *casu*, the applicant as well did not seek an appropriate relief in a notice of motion. She simply added *"Ad Condonation"* at the end of her founding affidavit to the review application and stated that the dies expired on 9 April 2018 and her review application was eleven days out of time, with the cause of the delay being that she was hospitalized from 13 February to 4 April 2018.[18] In this regard, Snyman AJ said:[19]

[18] *Kock* at para [17].

"Applying all the above in casu, the first difficulty the applicant has is that she did not make a proper application for condonation in the first place. Her notice of motion does not contain a prayer in terms of which she asks for condonation to be granted. The fifth respondent is thus not alerted in the notice of motion to the fact that the applicant would be seeking condonation and that the fifth respondent would be entitled to oppose such relief, which is required by Rule 7, in terms of which any application for condonation must be brought. In the absence of this, it would not be proper for this Court to decide the issue of condonation. In *Booysen Bore Drilling (Pty) Ltd v National Union of Mineworkers and Others*[20] the Court said:

> 'Insofar as the application for condonation is concerned, this could only be entertained by the Labour Court on notice to the appellant. The notice was necessary in the light of the wording of the application for condonation and the failure by the respondents to comply with rule 7(e) of the rules that regulate proceedings in the Labour Court or to call upon the appellants to file their opposition, if any, to the application within a given time …' [Own emphasis]

[51] In *casu*, the applicant dedicated an entire affidavit dealing with condonation despite the fact that he did not make an appropriate relief in a notice of motion. It is important to note that in *Kock*, Snyman AJ considered the applicant's simple paragraph relating to condonation and found the applicant to have failed to provide a proper explanation for her delay and in actual fact her explanation was found to be false. The Court did not simply dismiss her application on technicality because she did not make the appropriate relief in a notice of motion. This is evident in the following paragraph:

> 'As a result of the reasons set out above, the applicant thus faces two insurmountable obstacles. First, her review application was out of time, and she failed to properly apply for condonation, as required in law. Second, and even if what is contained in her founding affidavit is considered to have constituted at the very least some kind of condonation application, then the applicant has failed to provide any proper explanation for the delay which is in itself not immaterial. Worse still, her explanation is actually false. This makes

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[19] Kock at para [31].
[20] (2011) 32 ILJ 2075 (LAC) at para 13.

prospects of success irrelevant, and the applicant's review application must fail on this basis alone.'[21] [Own emphasis]

[52] In my view, to literally apply the paragraph: *"... the first difficulty the applicant has is that she did not make a proper application for condonation in the first place. Her notice of motion does not contain a prayer in terms of which she asks for condonation to be granted."* in the *Kock* judgment, as invited by CPUT, would mean dismissing the applicant's defective condonation application on a technicality without having regard to the merits of his defective condonation application and the interests of justice. As already stated above, the applicant delivered his review application together with the condonation application made on an affidavit and without a notice of motion alternatively without seeking an appropriate relief in the review application's notice of motion, however, the title of his original affidavit as set out above, clearly brings the point home, that he is seeking a condonation for the late delivery of his review application.

[53] Accordingly, I partially agree with the applicant that when CPUT delivered its answering affidavit to the defective condonation application, contrary to its Notice directing the applicant to first deliver a notice of motion before it could deliver its answering affidavit, it knew that the applicant sought condonation for the late filing of his review application as contemplated in subsection 145(1A) of the LRA. My partial agreement with the applicant in this regard, is supported by Ms. Abrahams's statement when she states that: "*On 20 August the Applicant served the Respondent with a Notice of Motion with accompanying founding affidavit to have the Award reviewed and set aside (Review Application). This Review Application is accompanied by a condonation application (Application).*[22]

[54] In *Minster of Police and Another v Phungula,*[23] (*Phungula*), Dippenaar J, was faced with a rescission application filed out of time together with a condonation application made in the applicants' founding affidavit for the

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[21] *Kock* at para [40].

[22] Opposing affidavit *re* condonation, at para 8.

[23] [2022] ZAGPJHC 550 (12 August 2022).

rescission application without the appropriate relief being sought in the notice of motion.[24] Despite the apparent defect, Dippennar J, did not dismiss the applicant's condonation application holding that it was in the interests of justice to grant the applicants condonation and to consider their application on the merits.

[55] Accordingly, I am of the view that a condonation application made in an affidavit without an appropriate relief being made in a notice of motion is not in itself fatal in that the Court is precluded from considering such a condonation application. Where an applicant has delivered a defective application which somehow deals with the essential requirements for condonation, a Court ought to entertain such an application in the interests of justice, particularly when such relief was brought on notice to the opposing party notwithstanding the fact that such relief was only made in an affidavit. In *Mbatha v Lyster NO and Others,*[25] *(Mbatha)*, the Labour Court held that: *"In order to be brought on notice it must clearly be served on the other parties as required in terms of the Rules. And, of course, it must be filed with the Registrar".*[26]

[56] I understand the Court in *Mbatha* to mean that an application for condonation although defective in the sense that it is only made in a founding affidavit without an accompanying notice of motion, it would be considered to be brought to the notice of the opposing party if it is served on the other party and filed with the Registrar.

[57] From the aforegoing, I find the applicant brought a condonation application on notice to CPUT as contemplated in the *Mbatha* judgment, albeit defective. I further find that it must be entertained by this Court in the interests of justice despite the applicant's failure to deliver a notice of motion seeking

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[24] See *Phungula* at para [15] wherein the court held that: 'Significantly, the applicants did not in their notice of motion seek condonation for the late launching of the rescission application. The issue was however addressed in their founding affidavit under headings of: (1) degree of lateness; (ii) the reasons for the lateness; (iii) any prejudice to the other party and (iv) any other relevant factors. I deal with the basis of the application later. Suffice it to state at this stage that at common law, a rescission application must be brought within a reasonable time of the applicants becoming aware of the judgment'.

[25] [2000] ZALC 5.

[26] *Mbatha* at para [18].

condonation. Accordingly, the third question has been decided in favour of the applicant and CPUT's point *in limine* fails.

[58] I now move to the fourth question to determine whether the applicant has shown good cause for an order condoning the late delivery and filing of his review application.

Principles applicable to condonation applications

[59] The principles applicable to condonation applications are trite law now and the basic principle was set out by Holmes JA in *Melane*[27] as follows:

> 'In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the facts and, in essence, is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are inter-related; they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in the finality must not be overlooked…'[28] [Own emphasis]

[60] In addition to the basic principle laid out in *Melane*, the Labour Appeal Court (LAC) in National *Union of Mineworkers v Council for Mineral Technology,*[29] *(Council for Mineral Technology)*, confirmed a further principle, namely that:

> 'without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how

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[27] 1962 (4) SA 531 (A).
[28] *Melane* at pg. 532 B – E.
[29] (JA94/97) [1998] ZALAC 22.

good the explanation for the delay, an application for condonation should be refused.'[30]

Applicant's explanation for the excessive delay

[61] The applicant states that his initial view upon receiving the arbitration award On 23 April 2019 was one of shock from a layman's point of view. He tried to walk away and forget as fast as he could, but that did not work for him because certain CPUT's staff members did not wish to leave matters that way and continued to deny him his legal rights of access to funds in cost centre B353 and excluded him from performing research for the Department of Environmental Affairs (DEA) under the MOU. He then decided to make a layman's assessment on the injustice and the Commissioner's conduct and award.

[62] Two months and couple of days later, in July 2019, the applicant was able to put pieces together and discovered evidence that pointed overwhelmingly to the Commissioner's misconduct and that there was a legal remedy available to him.

[63] On 9 July 2019, he approached the Registrar of this Court for advice. The Registrar advised him to submit a review application together with other relevant documents. He was given a case number by the Court staff. He discussed the lateness problem with the Registrar but she did not think it too serious.

[64] The applicant says he did not go to a lawyer because he was very conscious of costs as he was near retirement. He compiled the founding affidavit himself between other tasks and it took him much longer than he thought it would. This was probably because he was unprepared to pay the high cost of getting someone legally trained to do this job for him. He then had to first work out the difference between applying for an appeal and for a review. He goes on and says his '*excuse*' for submitting his application late is: (a) a laymen's

[30] *Council for Mineral Technology* at para [10]. These additional principles have been confirmed by the *LAC in Colett v Commission for Conciliation, Mediation and Arbitration and others* (2014) 35 ILJ 1948 (LAC) at para [38] and in *Nair v Telkom SOC Ltd and Others* (JR59/2020) [2021] ZALCJHB 449 (7 December 2021) *(Nair v Telkom)* at para [14].

ignorance of the administrative timelines in law; and (b) the outcome of the award is too difficult to live with. He feels hard done by it. He did about two and a half years after hours' contract work for the DEA on behalf of CPUT. The work was considered useful by the DEA. The DEA happily paid CPUT what he proposed CPUT should pay him to do this work overtime as an extra. The CCMA award has left the door open to CPUT to maintain barriers. He can no longer negotiate to perform contract research for the DEA anymore. CPUT denied him access to the funds in the cost centre even though he is the one that raised them.

Analysis of the applicant's explanation for the delay

[65] The applicant's explanation is twofold, namely, an 'excuse': (a) of a layman's ignorance; and (b) that the outcome of the award was too difficult to live with. In *NTEU obo Moeketsi v CCMA and Others*[31] *(Nteu),* Moshoana J held as follows:[32]

> '... where an explanation is required, such an explanation must be about the delay and it must be *bona fide*. It is one thing to give an excuse and it is another thing to provide an explanation. What Moeketsi provided is an excuse. Effectively he says ignorantly, he interpreted section 191 (1) (b) (ii) of the LRA to mean the 90 days commences to run after the last grievance step. *Ignorantia juris non excusat* – ignorance of the law is not an excuse. If a person holds a wrong legal view, such is not factual. Where an explanation is given, such an explanation must be factual. It is important to emphasise that a party is required to explain the delay and not to express a view. Explaining a delay requires a detailing of the facts that caused the delay. Each day of the delay ought to be explained. The Supreme Court of Appeal in *Mulaudzi v Old Mutual Life Insurance Company (SA) and others*,[33] had the following to say:
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> > "...A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess responsibility..." [Own emphasis]

[31] [2022] ZALCJHB 226.
[32] *Nteu* at para [35].
[33] 2017 (6) SA 90 (SCA) at para [26].

[66] Ms. Abrahams on behalf of CPUT correctly refutes the applicant's excuse of a layman's ignorance. She states that at the Arbitration proceedings the applicant represented himself eloquently with reference to case law which he had himself researched and that the applicant was aware of his subsequent rights should he not be successful at the CCMA and further his rights were explained to him at the CCMA. Ms. Abrahams further states that the applicant had all the necessary resources to obtain information but he simply failed to do so. The applicant's ignorance of the law is not justifiable considering his position in society.

[67] Ms. Abrahams further avers that the applicant is a well-educated and sophisticated man and that he is not the first timer in legal proceedings. She submits that CPUT should not be prejudiced by the applicant's failure to pursue his matter timeously and diligently and that the applicant has failed to tender a reasonable, full and sufficient explanation to justify this Court condoning his excessive delay.

[68] Ms. Abrahams further states that any prejudice that would be suffered by the applicant would be his own making and such prejudice should be outweighed by the prejudice being suffered by CPUT in having to contend with an unnecessary defence of a dispute that has no prospects of success and that should have been dealt with expeditiously and timeously. She further states that CPUT has already suffered financially having to defend the dispute that had not merit at the CCMA. Ms. Abrahams further submits that justice between man and man demands that the applicant cannot profit from his own dilatory conduct at the expense of CPUT.

[69] As I have already stated above, the applicant failed to deliver a replying affidavit refuting Ms. Abrahams averments and submissions.

[70] In the premise and upon the consideration of all the facts in the applicant's original defective condonation application and CPUT's answering affidavit thereto, I find the applicant's excuse for the excessive, almost 11 weeks delay to be lacking bona fides, unsatisfactory, unreasonable, and undermines the primary object of the LRA.

Prospects of success in the review application

[71] In his original affidavit for condonation, the applicant does not deal at all with prospects of success, however, he submits that it will be in the public interest to review the Commissioner's award because he committed a gross irregularity when he accepted a second point *in limine* from CPUT and tried to sweep his conduct under the carpet when he knew he committed a misconduct and by so doing he acted dishonestly. This submission was dealt with by this Court, per Lagrange J's judgment, dated 15 August 2022. This Court had this to say about the unsubstantiated allegations of alleged misdemeanour and cover up levelled at the Commissioner:

> 'Firstly, he claims that the arbitrator "accepted" two in limine objections by the university, which appear to have related to jurisdiction. The only two in limine rulings referred to in the award concerned objections by the university to his jurisdiction to determine the applicant's claims as benefits. From the arbitration award and it appears that the arbitrator decided that he could not make a final ruling on either of the objections until the evidence had been heard. As it turned out he found he did have jurisdiction to determine the applicant's claims on the basis that they were claims for benefits, accordingly the objections were decided in the applicant's favour. His objection was not so much to the rulings themselves but that the Commissioner actually entertained the second in limine objection despite his vociferous opposition to it being considered. It appears from the applicant's account that the arbitrator adopted and unnecessarily rushed procedure for hearing the objection. Be that as it may, the only party disadvantaged by the arbitrator's ruling was the university, so it is difficult to see what prejudice the applicant suffered as a result of thereof and I see little basis for him to rely on them as grounds of review.'[34]

[72] Although Lagrange J considered the applicant's ground of review on a less onerous test for the demonstration of the prospects of success as set out in paragraph 2 of the applicant's review application, he was of the *prima facie* view that the second, fourth and fifth grounds might possibly necessitate

[34] Lagrange's judgment at para [23].

setting aside the award, however, he had this to say with respect to the three grounds:[35]

> 'Secondly, the applicant makes reference to the exclusion of evidence from his own document bundle B, which he claims was done without motivation leading him to apprehend that the arbitrator might have been biased against him. This evidence he claimed showed that the other staff were receiving remuneration for overtime work in terms of secondary contracts they concluded. He argued that there was no reason why his position as a person having a secondary contract in respect of a research project, should be seen differently from theirs and except that by parity of reasoning he ought also to have been able to obtain a benefit from the three year research project agreements that he entered into as secondary contracts. Although the applicant does take issue with the arbitrator's finding that none of other professors working on the same project claimed additional money, he does so on the basis that Prof Philander never came to testify on this issue and was not part of the project in any event. However, he does not explain why the evidence of Pellisier as summarised by the arbitrator in paragraphs 39 of the award did not support this finding of the arbitrator, nor did he dispute the accuracy of the arbitrator's account of that portion of her evidence. The cogency of this ground of review is difficult to assess without knowing precisely what evidence was excluded and without knowing how much of the content of the other contracts the applicant wants to rely on was common cause.'
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> 'Fourthly, the applicant claims also that the effect of the award was to add to his duties in conflict with the terms of his letter of appointment. In effect he argues that the arbitrator's finding that his core duties included research was one that no reasonable arbitrator could have concluded. In so far as this finding is reviewable it could alter the outcome of the arbitration.'
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> 'Fifthly, he claims the arbitrator unreasonably found that there was no contract research policy provisions to support the applicant's benefit claims and that the university had no discretion to grant such benefits. Most of the submissions the applicants in this regard concern the proper interpretation of the contract research policy. Like the last discussed ground, if this finding

[35] Lagrange's judgment at paras [24]; [26] and [27].

could not be justified on any reasonable interpretation of the policy the award could be reviewable.' [Own emphasis]

[73] On the other hand, Ms. Abrahams made the following statements and submissions regarding the applicant's lack of prospects of success in the answering affidavit, namely that:

73.1 The applicant has no prospect of success in challenging the outcome of the award. His review application is based on an alleged misconduct committed by the Commissioner. His complaint is mainly based on the Commissioner allowing CPUT to raise two point in limine at the arbitration. However, the applicant does not demonstrate how the considerations of a point in limine rendered the award unreasonable, save for making unsubstantiated allegations against the Commissioner's conduct;

73.2 The grounds of review relied on by the applicant in his review application demonstrated that the applicant simply dissatisfied with the outcome of the CCMA irrespective of its reasonableness. Upon closer look at the applicant review application, reveals that it is based on grounds of appeal brought under the guise of review. The applicant's grounds of review are indicative of applicant's disagreement with the correctness of the award and the reason given as opposed to its reasonableness and fairness and it is on this basis that CPUT contends it is an appeal disguised as a review application;

73.3 The applicant's review application is extremely vexatious;

73.4 The applicant has failed to place full and sufficient facts before this Court to be able to make an assessment itself on whether he has any prospects of success in the review application;

73.5 This Court cannot make the assessment that the applicant's prospects of success are excellent or that there are any.

[74] Other than the challenge relating to the two *in limine* objections, which Lagrange J said it holds little prospects of success, the applicant failed to deal

with the prospects of success in the review application, in his original affidavit for condonation. Accordingly, I agree with Ms. Abrahams statements above, that the applicant's complaint is mainly based on the Commissioner allowing CPUT to raise two points *in limine* at the arbitration and does not demonstrate how the considerations of a point *in limine* rendered the award unreasonable and also taking into consideration that the Commissioner dismissed CPUT's point in limine and further taking into consideration Lagrange's finding that: "*the only party disadvantaged by the arbitrator's ruling was the university, so it is difficult to see what prejudice the applicant suffered as a result of thereof and I see little basis for him to rely on them as grounds of review*".

[75] In *Grootboom v National Prosecuting Authority and Another,*[36] *(Grootboom)* Zondo J (as he was then) said:

> 'The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.'

[76] Although, in his legal arguments the applicant made submissions to the effect that he has prospects of success in the review, his submissions however are not supported by evidence made in his original affidavit before this Court. In *Motseto v Minister of Police and Others,*[37] *(Motseto)* Prinsloo J dealt with a condonation application where the applicant just made a sweeping statement in his affidavit that he had prospects of success in the review application. The

[36] [2013] ZACC 37; 2014 (2) SA 68 (CC) at para [51].
[37] [2021] ZALCJHB 193.

Court said this was not acceptable, more was required from an applicant in a review application. The court had this to say:

> '[44] This is wholly inadequate and is of no assistance to this Court. The Applicant seeks an indulgence and has to make out a case for the indulgence he seeks. A vague averment to the effect that the prospects of success appear from the review application does not assist this Court at all.
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> [45] This is so for a number of reasons. Firstly, the review application sets out the facts of the case and the grounds of review. It does not deal with prospects of success and such prospects do not automatically 'appear' from the application.
>
> [46] It seems as if the Applicant has an expectation that this Court would embark on a 'prospects of success finding mission' to find what his prospects of success are, without being told by the Applicant what those prospects are.
>
> [47] Secondly, the application is opposed, and the averments made in respect of the reviewability of the arbitration award, are disputed by the Respondent. It follows that this Court cannot simply have regard to the contents of the review application, as filed by the Applicant, and conclude that there are prospects of success on review. More is needed.' [Own emphasis]

[77] From the aforegoing, I find that the applicant has failed to show this court that he has prospects of success in the review application which would justify this court to condone his failure to timeously file his review application.

Prejudice

[78] The applicant's condonation application does not deal with prejudice. On the other hand Ms. Abrahams on behalf of CPUT states that any prejudice to be suffered by the applicant is his own making. The applicant has delayed the finalisation of the matter by failing to follow the processes prescribed by law. The applicant is the master of his demise. CPUT will be prejudiced for having

to defend a dispute that should have been dealt with expeditiously and one which is also extremely vexatious with absolutely no prospects of success.

[79] In the absence of a replying affidavit to the contrary from the applicant and having regard to the *Plascon-Evans Rule*, I find the applicant has failed to show prejudice that he will suffer in the event he is not granted condonation, however, CPUT make averments that it is severely prejudiced in defending an applicant that has no merits and incurring legal costs in so doing.

Conclusion

[80] I have objectively considered all the facts applicable to this matter. The applicant has failed to provide a full, satisfying, and reasonable explanation consisting of all the facts that caused the excessive delay in bringing both the condonation and review applications.

[81] The applicant further failed to demonstrate to this Court that he has prospects of success in the review application. Accordingly, in the exercise of my discretion, granting the applicant condonation will not be in the interests of justice and such would be prejudicial to CPUT.

Costs

[82] CPUT prays for an order for the dismissal of the applicant's defective condonation application with costs. On the other hand, the applicant in his original affidavit says he did not use the services of professional legal advisers because he was closer to retirement. In his heads of argument, he submits that an award for costs would be asymmetrical in impact and therefore unfair. He goes on and says CPUT should not be encouraged to use costs as a weapon to intimidate employees from seeking workplace justice.

[83] On the other hand, Ms. Abrahams in the answering affidavit, says the applicant has been vexatious in instituting these proceedings against CPUT and that it would be in the interests of justice for this Court to send a clear message to the applicant, and those alike, that condonation is not just there

for the taking. Respect should be afforded to the LRA and the principle that parties must pursue their disputes timeously.

[84] With regards to the applicant's submissions for failure to appoint professional advisers because he was closer to retirement, I engaged the applicant at the hearing of this matter and directed him to the Commissioner's award where he said: *"the applicant is a professor in the faculty of Business and Management Sciences as well as the head of the Graduate Centre Management with an annual salary of R1.1 million".* The applicant said he did not want to waste his retirement funds on legal costs. I also asked him why he then did not seek *pro bono* legal services, he responded and said he did not know such existed.

[85] To the Court, it appeared as though the applicant intentionally wanted to conduct his own litigation because he was capable to do so and not because he would be tapping at his retirement funds. Furthermore, at the time he launched his review and condonation applications he was still employed and receiving his salary.

[86] Mr. Mcaciso, submitted that this Court should take a dim view to the applicant's heads of argument where he argues that costs are: *"not as significant for the First Respondent because they are already budgeted for at an average projected cost to company level – in one form or another – and ultimately they are paid for by the tax-payer, not the particular member of First Respondent staff who elected to unfairly impose punitive disciplinary measures on the Applicant".*

[87] In his written oral submissions before Court, the applicant repeated this line of argument and argued as follows:

> 'The applicant prays the Honourable Judge will award that each party bear their own legal costs related to this case. The Applicant doubts if the First Responded has incurred has incurred significant extra real costs because of his late filing. It was the Applicant who had to pay for the transcribing, printing and deliveries of the record. Ultimately the government and students pay the cost of Mr. Mcaciso's services. The Applicant take his cost out of his retirement income.'

[88] In *MEC for Finance: Kwazulu-Natal and Another v Dorkin NO and Another*,[38] *(Dorkin)* Zondo JP (as he was then) held as follows:

> 'With regard to costs I have been tempted to award costs against the second respondent because the second appellant has had to come to court to seek to alter the sanction imposed upon the second respondent but, I think that, having obtained a sanction of final written warning which was not his decision but that of the first respondent – he was entitled to come to Court and seek to defend it. Indeed, he was successful in the Court below. The rule of practice that costs follow the result does not govern the making of orders of costs in this Court. The relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that cost orders are not made unless those requirements are met. In making decisions on cost orders this Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court. That is a balance that is not always easy to strike but, if the Court is to err, it should err on the side of not discouraging parties to approach these Courts with their disputes. In that way these Courts will contribute to those parties not resorting to industrial action on disputes that should properly be referred to either arbitral bodies for arbitration or to the Courts for adjudication.'[39]

[89] In *Dorkin*, the second respondent had a legitimate right to defend the decision of the first respondent and he was successful at the Labour Court for doing so, however, that cannot be said about the applicant *in casu*. As can be seen from the body of this judgment, the applicant is an intelligent professor and was appointed as such by CPUT in the Faculty of Business and Management Sciences as well as the head of CPUT's Graduate Centre Management, who has demonstrated to this Court that he is able to prosecute and defend his case.

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[38] [2007] ZALAC 34; [2008] 6 BLLR 540 (LAC).

[39] *Dorkin* at para [19].

[90] The applicant has researched extensively legal judgments dealing with the merits of his case and was able during argument in Court to direct the Court to all the documents he was referring to. He knew from the very beginning that he had no evidence supporting his allegations against the Commissioner to justify a review application in terms of subsection 145(1)(b) of the LRA, but proceeded anyway.

[91] When he was called into order by Ms. Abrahams in the answering affidavit, he decided to apply his own rules and attempted to replace his original condonation affidavit with a new one, which affidavit showed that he had no intention in the beginning to seek a review of the award but was more interested in a cat-and-mouse game with CPUT, seeking a reaction from it and its staff members.

[92] When the applicant was not afforded the desired reaction, he woke up at the end of the second term experiencing a surge of resentment, which surge of resentment led to the discovery of alleged overwhelming evidence pointing at the Commissioner's alleged misdemeanours or alleged covered up which amounted to corrupt activities justifying a review application in terms of subsection 145(1)(b) of the LRA. The date for his alleged discovery was conveniently, 9 July 2019 making his review application, dated, 19 August 2019 in time and in compliance with the six weeks period prescribed in subsection 145(1)(b) of the LRA.

[93] When the applicant was called to order, he then sought a second bite at the cherry by attempting to allege information that ought to have been available at the time he deposed to his original condonation application. The second bite at the cherry lacked bona fides on the part of the applicant as he sought to deal with his earlier bald excuse of an explanation viz. alleged ignorance of the law and difficulty to live with the award.

[94] The applicant further failed to show this Court that he has any prospects of success in the review application. Furthermore, the applicant's submissions pertaining to legal costs would send a wrong message that an employee with no prospects of success and with no reasonable explanation for the delay can

just wake up one day and decide to drag his employer to court because he is experiencing a surge of resentment over his employer on trump up serious allegations pertaining to corrupt activities against a presiding officer. That cannot be right and fair.

[95] Furthermore, for a wrong message would be sent to the public, if an employee can be allowed to bring meritless proceedings to court on the basis that such costs would be paid by a taxpayer or in this case by the taxpayer and the students. Such conduct amounts to an abuse of court processes and I agree with the LAC that, a *"Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court"* as was held in *Dorkin*.

[96] From the aforegoing, I find the conduct of the applicant to be indeed vexatious against CPUT and warrants some form of a costs order against him having regard to his submission regarding his retirement.

[97] In the premise, I make the following order:

Order

1. The first respondent's point *in limine* is dismissed with no order as to costs.

2. The applicant's condonation application for the late filing of the review application is refused.

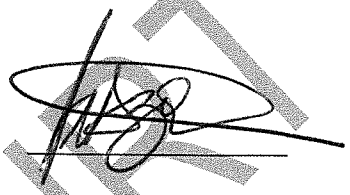
3. The review application is struck from the roll for lack of jurisdiction occasioned by the applicant's non-compliance with subsection 145(1)(a) of the LRA.

4. The applicant shall pay the costs of the first respondent limited to:

4.1 the filing of the answering affidavit to the first defective condonation application, dated 20 August 2019;

4.2 one day's costs in preparation for the hearing of the condonation application; and

4.3 one day's costs for the appearance at the hearing on 20 June 2023.



Liziwe Dzai

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: In person

For the Respondent: Mr. Zola Mcaciso

Instructed by: Mcaciso Stansfield Incorporated