



**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable  
**Case no: C268/2021**

In the matter between:

**SOUTH AFRICAN POLICE SERVICES ("SAPS")**

Applicant

and

**POPCRU obo PETER ARTHUR JACKS**

First Respondent

**SAFETY AND SECURITY BARGAINING COUNCIL  
("SSSBC")**

Second Respondent

**MAUREEN DE BEER N.O.**

Third Respondent

**Heard: 22 June 2023**

**Delivered: On 7 July 2023, electronically via email, publication on the Labour Court's website and release to SAFLII.**

**Summary:** Condonation for the late filing of the review application – a delay of five weeks is substantial – explanation for the delay unacceptable and unsatisfactory – SAPS's nine weeks delay in making a decision to review the award due to its internal policy, unacceptable and unreasonable – Court lacks jurisdiction to entertain the review application in the absence of an order granting condonation – the review application is dismissed for want of compliance with subsection 145(1)(a) of the LRA.

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**JUDGMENT**

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**DZAI AJ**

## Introduction

- [1] This is an application in terms of section 145 of the Labour Relations Act, 66 of 1995 (**"LRA"**) for the review and setting aside of an arbitration award, dated, 3 March 2021, under case number: PSSS224-18/19, by Ms. Maureen De Beer (**"Commissioner"**), under the auspices of the Safety and Security Bargaining Council (**"SSSBC"**). The review application is accompanied by a condonation application.
- [2] Mr. Peter Arthur Jacks (**"Mr. Jacks"**) was employed by the South African Police Services (**"SAPS"/"applicant"**), since 4 January 1991. He was dismissed five years ago, on 2 July 2018 for misconduct relating to sexual harassment of Captain Alida Johanna Van Der Westhuizen (**"complainant"**). At the time of his dismissal, Mr. Jacks held the position of a Captain within the SAPS. On 9 July 2018, he referred an unfair dismissal dispute to the SSSBC, assisted at the time by his union, POPCRU.
- [3] On 3 December 2020, the arbitration was set down for hearing for the third time. The applicant's representative, Captain Theo Kruger (**"Captain Kruger"**) failed to arrive at the arbitration hearing due to him being double booked for the day. During the arbitration he called in and made an application for a postponement. The Commissioner exercised her discretion and refused to grant the applicant a postponement and proceeded with the arbitration in the absence of the applicant's representative.
- [4] On 3 March 2021, the Commissioner issued her award and found the dismissal of Mr. Jacks to be substantively unfair and ordered the applicant to reinstate Mr. Jacks retrospectively and further ordered the applicant to pay him, R356 379.00 as back pay. The applicant is unhappy with the Commissioner's decision refusing the postponement and proceeding with the arbitration in its absence, hence these proceedings.

### **Issues for consideration**

- [5] The applicant filed its review application outside the six weeks period allowed in subsection 145(1)(a) of the LRA. Consequently, the applicant seeks condonation for the late delivery and filing of its application. Subsection 145(1A) of the LRA empowers this Court to grant condonation for the late filing of a review application upon good cause shown. Accordingly, if I grant condonation, I will then have to determine whether the Commissioner's award is assailable on the grounds advanced by the applicant.
- [6] However, if I refuse condonation, this Court will lack jurisdiction to determine the merits of the review application, with the result that the review application will be dismissed for lack of jurisdiction.

### **Principles applicable to condonation applications**

- [7] The principles applicable to condonation applications are trite law now and the basic principle was set out by Holmes JA in *Melane v Santam Insurance Co. Ltd*,<sup>1</sup> ("Melane") 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*

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<sup>1</sup> 1962 (4) SA 531 (A).

*success may tend to compensate for a long delay. And the respondent's interest in the finality must not be overlooked...*<sup>2</sup> Own emphasis.

- [8] In addition to the basic principle laid out in *Melane*, the Labour Appeal Court in *National Union of Mineworkers v Council for Mineral Technology*,<sup>3</sup> ("**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 good the explanation for the delay, an application for condonation should be refused."*<sup>4</sup>

### **Applicant's degree of lateness**

- [9] It is common cause that the applicant received the award on 9 March 2021. The applicant's review application ought to have been filed on or before 20 April 2021 in terms of subrule 145(1)(a) of the LRA, but was filed, five weeks and 1 day later on 27 May 2021.
- [10] The applicant underplayed its delay and computed it to be 25 days instead of the five weeks delay. Counsel for the applicant, Adv. Bernstein, submitted that the applicant's degree of lateness is not substantial. I, however, disagree with counsel for the applicant and hold the view that a five weeks delay is substantial considering the provisions of subrule 145(1)(a) of the LRA, which requires the review application to be delivered within six weeks from the date of receipt of the award.

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<sup>2</sup> *Melane* at pg. 532 B – E.

<sup>3</sup> (JA94/97) [1998] ZALAC 22.

<sup>4</sup> *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].

- [11] In addition subsection 145(5) of the LRA goes further and provides that a party who brings a review application must apply for a date for the matter to be heard within six (6) months of the delivery of the application. Paragraph 11.2.7 of the Labour Court Practice Manual ("**LC Practice Manual**") provides that a review application by its nature it's an urgent application. In *Motseto v Minister of Police and Others*,<sup>5</sup> ("**Motseto**") Prinsloo J, held that a delay of almost six weeks was material having regard to subsection 145(5) of the LRA and paragraph 11.2.7 of the LC Practice Manual.<sup>6</sup>

#### **Applicant's explanation for the delay**

- [12] Captain Kruger, is the applicant's Legal Admin Officer in the Legal and Policy Services within the SAPS. He was the applicant's representative at the arbitration proceedings which is the subject of this review application. He deposed to the applicant's founding affidavit *in casu*.
- [13] Captain Kruger's explanation for the delay is threefold: **First**, he relies on the applicant's internal policy relating to the review of awards; **Second**, he relies on the State Attorney's procurement procedures pertaining to the briefing of counsel; and **Third**, he relies on various public holidays including Easter weekend as the main reasons that contributed to the applicant's five weeks delay in bringing the review application.
- [14] Captain Kruger mentions that he had to draft a Note summarising the issues and motivating for the award to be taken on review. His Note had to pass through many various heads of departments before it was sent for final approval to the National Commissioner. He then lists steps/stages that the applicant took from 31 March 2021 up until he received the final confirmation from the National Commissioner's Office on 18 May 2021. He further mentions that it was only on 18 May 2021, that the State Attorney was briefed

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<sup>5</sup> (JR 134/2019) [2021] ZALCJHB 193 (23 July 2021).

<sup>6</sup> *Matseto* at para [24].

to deal with the matter, however the State Attorney also had to obtain the services of counsel through its internal procedures which requires counsel to first provide a quotation before being appointed and counsel needed to obtain a tax clearance certificate before being appointed. After counsel was appointed, he only consulted with counsel on 24 May 2021 in the afternoon.

- [15] On the other hand, Mr. Jacks submits that the applicant's explanation amounts to the listing of events which do not offer a reasonable and acceptable explanation. He further submits that the 25 days delay should weigh heavily against the applicants request for condonation. However, he concedes that he has no knowledge of the applicant's internal procedures.

### **Analysis of the applicant's explanation for the delay**

#### **Failure to attach substantiating documents**

- [16] Adv. Bernstein, submitted that the applicant furnished a detailed and satisfactory explanation for the delay and that it was largely caused by the SAPS's policy to refer matters to review and the State Attorney's procurement policy. On the other hand, counsel for the respondent, Adv. Filand, submitted that the applicant's explanation amounts to nothing more than a record of the dates. I tend to agree with counsel for the respondent for the reasons that follow.
- [17] I reiterate that Captain Kruger is the applicant's Legal Admin Officer. He received the award on 9 March 2021. He understood that the prescribed six weeks period for the filing of the review application would expire on 20 April 2021. Despite this knowledge, Captain Kruger failed to provide any reasons why it took him **three full weeks**, from 9 March to 31 March 2021, to draft a Note summarising the issues and motivation for the award to be taken on review, in circumstances where he was the person that represented the applicant at the arbitration proceedings and was aware as early as 3

December 2020 that the Commissioner dismissed his application for a postponement and proceeded with the arbitration in his absence.

[18] Captain Kruger mentions that his Note was only signed by his department head, Colonel JN van der Westhuizen, a Section Commander: Labour Litigation, on 31 March 2021. However, he failed to annex his Note to the founding affidavit in support of condonation. Furthermore, the SAPS's internal policy relating to the review of awards and the State Attorneys procurement procedure for the appointment of counsel is not attached to the application for condonation substantiating his allegations.

[19] In *Nair v Telkom*, the Labour Court was faced with an application for condonation where the applicant, like the applicant *in casu*, failed to take the court into his confidence by failing to attach the correspondence substantiating his allegations pertaining to the procurement of an insurance cover/approval. In this regard, the Court said:

*"...No correspondence between Mr Nair/his legal representatives and Mr Nair's insurer is attached to the Condonation Application founding affidavit... The condonation founding affidavit does not contain any details at all in relation to the attempts made to procure approval from an insurer. ...Mr Nair's assertions in this regard are bald and he has failed to take this Court into his confidence."*<sup>7</sup>

[20] In *Nair v Telkom* the Court continued and stated that it was very important for an applicant in a condonation application to fully explain the reasons for his delay in order for the court to be placed in a better position to determine whether or not the explanation is a good one. The Court held as follows:

*"This in my view requires an explanation which covers the full length of the delay. The mere listing of significant events which took place during the period in question without an explanation for the time that lapsed between these events*

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<sup>7</sup> *Nair v Telkom* at paragraphs [42.1] – [42.3].

*does not place a court in a position properly to assess the explanation for the delay. This amounts to nothing more than a recordal of the dates relevant to the processing of a dispute or application, as the case may be.*<sup>8</sup>

*Vague excuse pertaining to public holidays and Easter weekend*

- [21] Captain Kruger blames various holidays for the delay. However, in the period between 9 and 31 March 2021, which is the period he drafted his Note, there was only one national public holiday in March, that is the Human Rights day on 22 March 2021. No satisfactory explanation is given as to why his motivation was not done sooner taking into consideration that he was the person who represented the applicant at the arbitration before the SSSBC and his knowledge that the review application was supposed to be launched within six weeks of receipt of the award.
- [22] Captain Kruger also blames the Easter weekend, which commenced on Easter Friday, 2 April 2021 and ended on Easter Monday, 5 April 2021. He mentions that on 6 April 2021, Major General FM Mbeki, the Provincial Head: Legal and Policy Services, signed his Note and that on 8 April 2021, his Major General Fick, the Acting Deputy Provincial Commissioner: Human Resources Management agreed that the matter should be taken on review. However, he fails to explain why he did not follow up on his Note in the period between 9 and 20 April 2021. In the period between 9 and 20 April 2021 there was no Easter Holiday. It allegedly took the Provincial Head of Litigation and Administration, Major General Groenewald and the Divisional Commander: Legal and Policy Services, Lieutenant General A Khan, a full week to sign Captain Kruger's alleged Note in circumstances where it was possible for the following Officials to sign the alleged Note within days of each other:

- [22.1] Colonel JN van der Westhuizen who is the section Commander: Labour Litigation, allegedly signed the Note on 31 March 2021;

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<sup>8</sup> Zungu at para [13].



[22.2] Brigadier Mel Jojo, Section Head: Litigation and Administration: Legal and Policy Services, allegedly signed the Note on 31 March 2021;

[22.3] Major General FM Mbeki, allegedly signed the Note on 6 April 2021;

[22.4] Major General Fick, concurring on 8 April 2021 that the matter should be reviewed; and

[22.5] Major General TE Patekile, Acting Provincial Commissioner: SAPS, allegedly signed the Note on 9 April 2021.

[23] The period between 20 April 2021 to 5 May 2021 is also unaccounted for and Captain Kruger does not mention any attempts done by him in following up on the approval. He only states that between 20 April and 7 May 2021 Major General T De Wit, Acting Divisional Commissioner Human Resource Management also signed off on the Note but failed to date when he signed. He also mentions that on 5 May 2021, Lieutenant General FN Vuma, the Deputy National Commissioner: Support Services supported the application for review and that on 7 May 2021, the final approval Officer, being the National Commissioner: SAPS, General Sithole consented to the review application being brought.

[24] However no explanation is furnished as to what happened within the period between 7 and 18 May 2021 when the Office of the State Attorney was instructed to bring a review application. He also did not follow up on the final approval in the period between 7 and 18 May 2021. It further took a full unexplained week for the Office of the State Attorney to be briefed.

[25] Captain Kruger alleges that previously he had to obtain the consent of the Provincial Commissioner before proceeding with a review application and now he has to obtain the consent of the National Commissioner before any matter can be referred to review. However, no satisfactory explanation is provided

why Captain Kruger's alleged Note had to pass through all the above-mentioned 9 Officials.

- [26] From the reading of the applicant's founding affidavit, the State Attorney's procurement internal litigation procedures took only three days, that is from Tuesday, 18 May 2021 up until Friday, 21 May 2021 to brief counsel and to set up an appointment for the consultation that took place on Monday, 24 May 2021. Captain Kruger's founding affidavit was commissioned on Wednesday, 26 May 2021. It only took the State Attorney and counsel to prepare and file the review application two (2) days. In contrast, it took Captain Kruger and the other applicant's Officials **an unreasonable nine weeks** to make up their mind to bring a review application and to brief the State Attorney.

Failure to attach confirmatory affidavits

- [27] No confirmatory affidavits have been filed by all the 9 Officials who allegedly signed Captain Kruger's Note supporting the award to be taken on review. Furthermore, Captain Kruger's allegation that on 7 May 2021, the National Commissioner consented to the review application being brought, is not confirmed by an affidavit from the National Commissioner. In this regard, it is important to note that Captain Kruger is well acquainted with section 3 of the Law of Evidence Amendment Act, 45 of 1988 ("**Evidence Act**") and has quoted the entire section in his annexure "**TK6**" which was an application at the arbitration proceedings to have the complainant's statement submitted in terms of subsection 3(1)(c) of the Evidence Act. Of importance *in casu*, is section 3 of the Evidence Act which provides that:

*"(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless – (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings; (b) the person whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or (c) the court having regard to the factors listed at (i) to (vii), is of the opinion that such evidence should be admitted in the interests of justice."*

- [28] The applicant failed to make an application for the admission of hearsay evidence in these proceedings. The application for condonation is opposed and no agreement exist for the admission of hearsay evidence. The applicant failed to file confirmatory affidavits of all the above-mentioned Officials who allegedly participated in the decision making process to take the award on review as contemplated in subsection 3(1)(b) of the Evidence Act. Furthermore no reasons were furnished by the applicant as to why the confirmatory affidavits were not given by the above-mentioned Officials as contemplated in subsection 3(1)(c)(v) of the Evidence Act.
- [29] Accordingly, the allegations pertaining to the signing and approval of the alleged Note by the applicant's Officials and the alleged final consent by the National Commissioner on 7 May 2021, amount to inadmissible hearsay evidence and it is not in the interests of justice to admit such hearsay evidence without a substantiated application to that effect.
- [30] With regards to the applicant's internal procedures as the reason for the delay, this Court in *Public Servants Association v GPSSBC*,<sup>9</sup> was dealing with a condonation application for the late filing of a statement of case. Van Niekerk J, held that:

*"To the extent that the applicant relies on **internal approval controls as a reason for delay, this is not an acceptable explanation.** The union must have been aware of the applicable time limit and any need to meet internal approval controls must necessarily have been addressed timeously. The union is a registered and recognised trade union and well versed in the review process. **The union has been handling this dispute from inception and must have been cognisant of the existence of a time limit, and the importance of compliance with that time limit. In the absence of an acceptable explanation for an excessive delay, that is the end of the enquiry. The applicant's prospects of success are irrelevant.**"* Own emphasis.

<sup>9</sup> JR 1354-2018 (unreported) at para [7].

[31] In *Steenkamp and Others v Edcon Limited*,<sup>10</sup> (“Edcon”) the Constitutional Court, per Basson AJ, referred to its earlier decision in *Toyota*,<sup>11</sup> wherein it accepted that the primary object of the LRA was the expeditious resolution of disputes.<sup>12</sup> In *Toyota*, the Constitutional Court held that:

*“Time periods in the context of labour disputes are generally essential to bring about timely resolution of the disputes. The dispute-resolution dispensation of the old Labour Relations Act was uncertain, costly, inefficient and ineffective. The new Labour Relations Act (LRA) introduced a new approach to the adjudication of labour disputes. This alternative process was intended to bring about the expeditious resolution of labour disputes which, by their nature, require speedy resolution. Any delay in the resolution of labour disputes undermines the primary object of the LRA. It is detrimental not only to the workers who may be without a source of income pending the resolution of the dispute but, ultimately, also to an employer who may have to reinstate workers after many years.”*<sup>13</sup>

[32] From the foregoing, I find the applicant’s alleged nine weeks decision making process when it comes to the review of arbitration awards to be wholly unreasonable taking into consideration that subsection 145(1)(a) of the LRA prescribes only six weeks from the date of receipt of the award to bring a review application.

[33] I further find the applicant’s five weeks delay to be substantial and the explanation for the delay to be inadequate and unsatisfactory and ‘undermines the primary object of the LRA’.

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<sup>10</sup> (CCT29/18) [2019] ZACC 17; 2019 (7) BCLR 826 (CC); (2019) 40 ILJ 1731 (CC); [2019] 11 BLLR 1189 (CC) (30 April 2019) at para [39].

<sup>11</sup> *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* [2015] ZACC 40; (2016) 37 ILJ 313 (CC); 2016 (3) BCLR 374 (CC) (*Toyota*).

<sup>12</sup> *Edcon* para [39].

<sup>13</sup> *Toyota* at para [1].

### Prospects of success in the review application

- [34] In the heads of argument, the applicant made a sweeping submission that: ***“the degree of lateness is not substantial when regard is had to the prospects of success as set out in the application.”*** However, the applicant’s submission is not supported by its founding and supplementary affidavits. In the founding affidavit, Captain Kruger does not deal at all with the applicant’s prospects of success in the review application. This point is confirmed by Mr. Jacks in his answering affidavit, wherein he states that: *“It is further submitted that the Applicant has not, in its founding affidavit, presented any grounds to establish a good prospect of success to support the application for condonation.”*
- [35] Despite Mr. Jacks submission that the applicant did not deal with prospects of success, the applicant failed to deliver a replying affidavit to allegations made in the answering affidavit. Accordingly, on the papers filed of record, it remains undisputed that the applicant failed to deal with prospects of success in its application for condonation.
- [36] The approach to the determination of an applicant’s prospects of success in a review application was dealt with by Van Niekerk J in *Public Servants Association v GPSSBC*, as follows:
- “... In regard to prospects of success, it is not necessary for an applicant to prove that he or she will succeed when the merits of the matter [is] considered; it is necessary only to provide a basis to establish that the applicant has a good chance of succeeding when the matter is heard. This requires an elucidation of the prospects of success beyond a broad and sweeping statement to the effect that the applicant has good prospects – the averment must be substantiated. ...”*<sup>14</sup> Own emphasis.

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<sup>14</sup> *Public Servants Association v GPSSBC* at para [5].

- [37] Notwithstanding the fact that the applicant failed to properly deal with its prospects of success in the review application, I will proceed to consider the applicant's prospects of success by evaluating its background facts together with its grounds of review.

*Applicant's grounds for review*

- [38] The applicant's main ground of review is that the Commissioner committed a gross irregularity, alternatively, misconduct by failing to apply her mind to the facts and evidence before her when she decided to refuse a postponement and proceeded with the arbitration in the absence of the applicant, with the result that the Commissioner arrived at an unreasonable result. The applicant's main ground of review is further amplified by issues raised under the following subheadings, namely that:

[39.1] the matter was previously postponed and no witnesses were present (First issue);

[39.2] the applicant's representative failed to postpone the matter (Second issue);

[39.3] the applicant's representative failed to make arrangement for the *in camera* proceedings (Third issue);

[39.4] the applicant had no intention of finalising the matter (Fourth issue) ;

[39.5] the matter has been coming for a long time (Fifth issue); and

[39.6] the Commissioner and Mr. Jacks had been waiting all day (Sixth issue).

- [39] Accordingly, I am called upon to determine whether, the Commissioner exercised her discretion judiciously in refusing to grant the applicant a postponement on 3 December 2020.

Commissioner's ruling on the 3 December 2020 postponement

[40] It is best to set out in detail the Commissioner's ruling on the postponement as follows:

*"The day prior to the hearing (2 December 2020), I was contacted by Kruger, who informed me that he was in contact with the applicant's representative. They had arranged to start the matter later, since he had an arbitration hearing with Commissioner Nzombane at the same time. I indicated to Kruger that I will go to the venue (being POPCRU Workers' Life, Bellville) at 09:00. They must then inform me when they are ready to proceed. Visser arrived at about 10:00 and indicated that Kruger has informed him that he will be there at 11h00. At 11h00 Kruger was not there. He contacted Visser and informed him that he will be at the arbitration at 13:00; should he not be able to make it, he will send a colleague. At 13h00 Kruger was not there. Visser tried to get hold of him but his phone was then on voicemail. I then decided to proceed with the arbitration. During the arbitration Kruger called Visser. He was then put on speaker phone. He indicated that he was still busy with other matter and that he can come to our case at about 16h00 to do one witness. **Kruger had not made the arrangement for the in camera hearing.** I enquired as to why he had not informed Council that he had two matters and that one should be postponed. He indicated that Commissioner Nzombane insisted on 12 November 2020 their matter must proceed on 3 December 2020. He did not want to postpone this case as he wanted it to proceed. He informed me that I must take into account that the applicant was dismissed for serious misconduct. The applicant's representative objected to the matter being postponed again and indicated that he leaves the decision in my hands. **I found that previously the matter was also postponed. No witnesses were present then.** The respondent had sufficient time to make arrangements with Council to have this matter postponed due to a double booking. Kruger failed to do so and further failed to make arrangements for the in camera proceedings. The respondent had no intention to finalise the matter. Myself and the applicant party waited almost the entire day for the respondent. The matter has been coming on for very long. I then decided to proceed with the arbitration in the absence of the respondent."*<sup>15</sup>

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<sup>15</sup> Award at para [5].

Principles applicable to postponements

- [41] In *Psychological Society of South Africa v Qwelane and Others*,<sup>16</sup> (“Qwelane”) the Constitutional Court, restated the principles applicable to postponements as follows:

*“Postponements are not merely for the taking. They have to be properly motivated and substantiated. And when considering an application for a postponement a court has to exercise its discretion whether to grant the application. It is a discretion in the true or narrow sense – meaning that, so long as it is judicially exercised, another court cannot substitute its decision simply because it disagrees. The decision to postpone is primarily one for the first instance court to make.*

*In exercising its discretion, a court will consider whether the application has been timeously made, whether the explanation for the postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed. All these factors will be weighed to determine whether it is in the interests of justice to grant the postponement. And, importantly, this Court has added to the mix. It has said that what is in the interests of justice is determined not only by what is in the interests of the immediate parties, but also by what is in the broader public interest.”<sup>17</sup> Footnotes omitted.*

First issue: Previous postponement and no witnesses present

- [42] In the founding affidavit, Captain Kruger concedes that the matter was previously postponed on 24 February 2020. He states that: “Although it is correct that the matter was previously postponed **there was no need for my witnesses to be present as I had to bring an application for the proceedings to be heard in camera** and was only set down for two hours of which we only ran one hour.” In his supplementary affidavit, he states that: “Having regard to the record it is now clear that although the Commissioner

<sup>16</sup> (CCT226/16) [2016] ZACC 48; 2017 (8) BCLR 1039 (CC) (14 December 2016).

<sup>17</sup> Qwelane at paras [30] – [31].



*suggested in her award that I had no witnesses on the previous occasion this is not correct... I did have witnesses present on the first occasion that this matter was heard as is apparent from what I said at the hearing (Transcript page 7 lines 11 – 16)."* The transcript of 24 February 2020 reads as follows:

*Commissioner: Do you have any other witnesses here?*

*Captain Kruger: Commissioner?*

*Commissioner: Do you have other witnesses present here today?*

*Captain Kruger: Today, yes. I excused the witness that I arranged, Commissioner, because I see the time is already past 15:00 and the matter was set down from 13:00 till 15:00.*

[43] The transcript of 3 December 2020 reads as follows:

*Captain Kruger: What I would also like to raise is the issue that there has been two previous postponements in this matter due to a witness that indicated to being able to be here and then on the date could not be here. So there were already two previous postponements. I do not think we ever had a request for a postponement in this matter previously, Commissioner.*

*Commissioner: So whose witness? The applicant's witness.*

*Captain Kruger: [Indistinct] request for leave for this special witness.*

*Commissioner: Yes, but that was your witness.*

*Captain Kruger: Correct, Commissioner.*

[44] Captain Kruger's statement that: **"there was no need for my witness to be present as I had to bring an application for the proceedings to be heard in camera"**, suggests that there were no witnesses present at the arbitration proceedings on 24 February 2020. This fact did not need to be established by the transcript of the proceedings. Captain Kruger knew he did not have witnesses on 24 February 2020. Furthermore, the transcript for 3 December 2020 confirms that Captain Kruger did not have witnesses present on 24 February 2024 and in actual fact confirms his statement in the founding affidavit. When Captain Kruger received the transcript he was confronted with the false excuse he had given to the Commissioner on 24 February 2020

when he was required to call a witness that was not subject to the request for the *in camera* proceedings and he did not have a witness hence he came up with the excuse that he had excused the witnesses because he could see the time was already past 15:00. Accordingly I cannot find fault with the Commissioner's finding that the matter was previously postponed and the applicant did not have witnesses present then.

*Third and fourth issue: Failure to make arrangement for the in camera hearing and Applicant's lack of intention to finalising the matter*

- [45] With regards to Captain Kruger's failure to make arrangements for the in camera proceedings, the transcript captures his responses as follows:

*Commissioner: **You have also said now that you have not made arrangements for the in camera. Why have you no done that?***

*Captain Kruger: **I have not done that for the simple reason that the matter should have been set at the court. That is what we normally do for in camera testimony.***

*Commissioner: **Okay. But that duty was on you to arrange. That is what I decided in my ruling,*** that you should have made arrangements with the Council for the matter to be heard at Wynberg Court.

*Captain Kruger: **Yes, that is correct, Commissioner. But I first had other work to do before we can go to court for an in camera. That is part of my problem.***

*I must, what I can do is come through to POPCRU quickly and just...[indistinct – signal breaking up]. If it is not allowed then it will...[indistinct – signal breaking up].*

*When one of my colleagues now drives to the office, it is going to be the same.*

*Commissioner: But that is why I am saying it is too late. They should have been here by 13:00 already. We cannot wait now for them to come now and ask for a postponement. We are on record now and he have got you on the phone, so why do you want a postponement? Why can you not proceed with this case.*

*Captain Kruger: Commissioner, **my colleagues is not in a position to lead evidence. I have consulted yesterday with the witness.** So I am prepared to move the witness. I cannot be [indistinct – signal breaking up].*

*Commissioner: But still on the question, the Council has sent you long ago the date. You have known about both cases that you have. Why did you not make the necessary arrangements?*

[46] I already found that Captain Kruger had no witnesses present on 24 February 2020. Captain Kruger's first excuse was that he excused witnesses that were not present to begin with. On 3 December 2020 he and his witnesses were not present at the arbitration proceedings. The transcript evidences that he knew that he had the duty to arrange an *in camera* proceedings for his witness but had not done so, hence the matter was still at Bellville's POPCRU Offices and not at Wynberg Court as he had indicated in his application. Despite not arranging the *in camera* proceedings he also failed to timeously apply for a postponement when he knew as early as 12 November 2020 that he had another arbitration scheduled to take place on the same day. Furthermore his excuse that his colleagues was **not in a position to lead evidence as he had consulted with his witness the previous day, was his own doing and is indicative that Captain Kruger paid little regard to the proceedings before the Commissioner.**

[47] All the above-mentioned factors taken together indicates that the applicant lacked the intention to finalise the matter. **First**, had the applicant had the intention to finalise the matter, its witnesses would have been present at the arbitration hearing on 24 February 2020 and would have been excused by the Commissioner at the end of the proceedings. **Second**, Captain Kruger would have arranged an in camera proceedings way in advance for the proceedings to be conducted at Wynberg Court. **Third**, Captain Kruger would have alerted his Office as early as 12 November 2020 that he was double booked and needed assistance. **Fourth**, Captain Kruger alternatively another representative from the applicant's Office would have been present at the hearing on 3 December 2020. Accordingly, I do not find fault with the Commissioner's finding that the applicant had no intention of finalising the matter.

Second; Fifth and Sixth Issues: Failure to postpone the matter; Matter coming a long time; and Commissioner and Mr. Jacks had been waiting all day

- [48] Captain Kruger contacted the Commissioner the previous day, 2 December 2020 seeking the matter to stand down until 11:00 on 3 December 2020. It is not in dispute that at 11h00 Captain Kruger was not there. It is further not in dispute that he contacted Mr. Visser informing him that he will be at the arbitration at 13:00. It is further not in dispute that at 13h00 Captain Kruger was still not there and that when Mr. Visser tried to call him his phone was on voicemail.
- [49] Despite the numerous chances given to Mr. Kruger to be present at the arbitration hearing on 3 December 2020, he failed to appear. Furthermore, despite being aware of his unavailability as early as 11h00 when he failed to appear at the agreed time he also failed to arrange for assistance from his colleagues. Accordingly, it is true that Captain Kruger, kept the Commissioner and Mr. Jacks waiting for the whole day in circumstances where this situation could have been avoided. What is more concerning is Captain Kruger's failure to postpone the matter timeously when he knew as early as 12 November 2020 that Commissioner Nzombane insisted that their matter must proceed on 3 December 2020.
- [50] Mr. Jacks was dismissed on 2 July 2018 and he referred an unfair dismissal dispute as early as 9 July 2018 to the SSSBC and by the time the matter was heard on 3 December 2020, it had already been two years and five months since the dismissal and referral. It is true that the first postponement was caused by a previous commissioner that resigned. However, at the second hearing the applicant did not lead evidence on 24 February 2020 as it did not have witnesses present and the matter had to be postponed as a result. On 3 December 2020, it would have been the third time that the matter would have been postponed. These were the factors that were taken into consideration by the Commissioner in arriving at a finding that the matter has been coming a long time and I cannot fault her finding having regard to the Constitutional

Court's judgment in *Edcon*, in particular where the Court said: "*This alternative process was intended to bring about the expeditious resolution of labour disputes which, by their nature, require speedy resolution.*"<sup>18</sup>

- [51] Although in her ruling the Commissioner does not refer to any applicable CCMA Rules, in the *Rules of the CCMA and the Labour Court with explanatory notes*,<sup>19</sup> the author states that:

*"If the need for a postponement arises shortly before the arbitration date and it is in consequence not possible to deliver the application 14 days or more before the arbitration date, the applicant applying for postponement may consider bringing an urgent application in terms of Rule 31(8) or apply for postponement at the commencement of the proceedings, in which case condonation will have to be applied for."*

- [52] In the supplementary affidavit, Captain Kruger concedes that he was supposed to have brought a substantive application for a postponement in November 2020. Accordingly, from 12 November 2020, Captain Kruger had 14 days before the hearing of the arbitration on 3 December 2020, to bring an application for a postponement but he elected not to do so.

- [53] I was referred to the decision in *Masstores (Pty) Ltd t/a Builders Warehouse v CCMA and Others*,<sup>20</sup> ("*Masstores*") as authority to the applicant's ground of review that the Commissioner committed misconduct in failing to grant a postponement. However, the reliance in *Masstores* is misplaced. The Court in *Masstores* found the Commissioner therein to have committed misconduct because he/she did not allow the other side to make submissions on the postponement before ruling on it. In this regard, the Court said: "*In the transcript of the proceedings it is manifestly clear that the second respondent would not hear the reaction of the third respondent to the application for*

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<sup>18</sup> Supra.

<sup>19</sup> 4<sup>th</sup> Edition by Marion Fouché.

<sup>20</sup> (JR412/04) [2006] ZALC 32; [2006] 6 BLLR 577 (LC); (2006) 27 ILJ 1182 (LC) (31 January 2006).

*postponement.*" In *casu*, the Commissioner allowed both parties to make representations on the need for a postponement.

### **Finding on the prospects of success**

- [54] As can be seen above, the Commissioner was faced with a belated application for a postponement in circumstances where the applicant had ample time to bring a postponement application. The explanation for the delay was not full and satisfying. The prejudice that the applicant would suffer was its own making. The applicant lacked the intention to finalise the matter. Mr. Jacks opposed the granting of the postponement and was since without a job since 2 July 2018.
- [55] In the result, I find that the Commissioner exercised her discretion judiciously in refusing to grant the postponement.
- [56] From the foregoing, I find that the applicant has failed to demonstrate to this Court that it has good prospects of success in the review application. Accordingly, it will not be in the interests of justice to grant the applicant condonation.

### **Prejudice**

- [57] In the condonation application, the applicant failed to deal with prejudice that will be suffered by either party if condonation is not granted or if granted.
- [58] With regards to prejudice, Mr. Jacks states that he is currently unemployed and every month of unemployment he continues to suffer financially and submits that condoning the applicant's delays will undermine the very purpose of the LRA, which guarantees the speedy resolution of labour disputes. He pointed out that at the time it was almost three (3) years since he was unfairly dismissed on 2 July 2018. To date it is five years since Mr. Jacks was dismissed by the applicant.

[59] As already stated above, the applicant failed to file a replying affidavit. Accordingly, Mr. Jacks statement that he was unfairly dismissed on 2 July 2018 remains undisputed.

### **Conclusion**

[60] Having considered all the facts in this application, I come to the conclusion that Mr. Jacks will suffer prejudice if I were to grant condonation to the applicant in circumstances where the applicant failed to provide an acceptable and satisfactory explanation for its delay in bringing the review application and in circumstances where the applicant has no prospects of success in the review application.

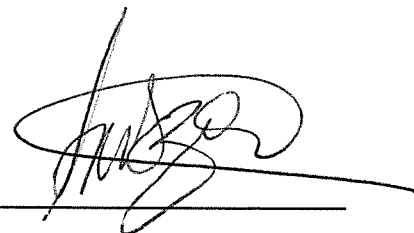
[61] In the premise, I make the following order:

### **Order**

[1.] Condonation for the late filing of the review application is refused.

[2.] The review application is dismissed for lack jurisdiction occasioned by the non-compliance with subsection 145(1)(a) of the LRA.

[3.] No order as to costs.



**Liziwe Xoliswa Dzai**

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

### **Appearances**

**For the Applicant:            Adv. J. Bernstein**

**Instructed by:** State Attorney, Cape Town

**For the Respondent:** Adv. D. Filand

**Instructed by:** A. Louw & Associates

LABOUR COURT