IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C 646/16

In the matter between:

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA	**Applicant**
and	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**1st Respondent**
ARTHI SINGH-BHOOPCHAND *N.O*	**2nd Respondent**
S MOHAMED *N.O*	**3rd Respondent**
CECILIA BRÜMMER *N.O*	**4th Respondent**
JOYCE NTULI	**5th Respondent**
RESPONDENTS LISTED IN ANNEXURE "A"	**6th – Further Respondents**

Heard: **13 September 2017**

Delivered: **24 April 2018**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

[1] The fifth to further respondents are employed as Researchers in the research unit of the Parliament of the Republic of South Africa (Parliament)[1]. Parliament, which is the applicant in this matter, seeks an order reviewing and setting aside a condonation ruling and an arbitration award issued under the auspices of the CCMA. The condonation ruling was issued on 16 February 2016 by the second respondent Commissioner A. Singh-Bhoopchad, wherein she had condoned the late referral of the unfair labour practice dispute to the CCMA by the Researchers. The dispute had been referred to the CCMA five years outside the time limits provided for in terms of the provisions of the Labour Relations Act (LRA).[2]

[2] The third respondent, Commissioner Mohammed issued a certificate of outcome on 23 March 2016, after condonation was granted. The matter came for arbitration before the fourth respondent, Commissioner Cecelia Brümmer. Parliament seeks an order reviewing and setting aside her arbitration award dated 2 September 2016, in terms of which it was found that Parliament had committed an unfair labour practice against the Researchers. An order was made that compensation in a sum of R38 481 366.00 (Thirty-Eight Million Four Hundred and Eighty-One Thousand Three Hundred and Sixty-Six Thousand Rand Only) be paid to all 49 Researchers. Parliament was further ordered to implement a decision to re-grade the affected Researchers.

[3] The review application is opposed by the Researchers.

Background:

[4] During 2008, Parliament through its Job Evaluation Committee (JEC) embarked on a job evaluation exercise of the grades allocated to various positions, including those of Researchers. This exercise involved Researchers having to answer questions pertaining to the content of their jobs, their roles and responsibilities. The grading of the Researchers was benchmarked at salary level C3.

[1] The Parliament of the Republic of South Africa established in terms of Chapter 4 of the Constitution of the Republic of South Africa (Act 108 of 1996)
[2] Act 66 of 1995, as amended

[5] On 19 April 2010, the JEC completed its evaluation and concluded that the position of Researchers should remain at salary level C3. A grading certificate in terms of parliament policies was then issued in April 2010. The Researchers and NEHAWU having been informed of the decision and aggrieved by it, launched an appeal with the Job Evaluation Audit Committee (JEAC) in June 2010. The JEAC confirmed the decision of the JEC.

[6] In an internal memorandum dated 9 December 2010, Ms N.P Keswa (Kwesa) the then Manager: Legislation and Oversight Division (LOD), sought approval from the then Secretary of Parliament (Dingani) to review the final grading of the Researchers.

[7] On 13 December 2010, the late Mr Coetzee, who was the then Acting Secretary of Parliament signed the internal memorandum authored by Kwesa on behalf of Dingani and indicated that the re-grading of all parliamentary research positions should be approved from C3 level to C4 level. The Researchers' contention is that this decision was communicated to them by the late Coetzee during December 2010.

[8] On 2 June 2011, Dr S Paruk the Human Resource Executive in a memorandum addressed to the Secretary of Parliament, Dingani, expressed the view that a review of a job description does not necessarily translate into a change in the job grade, but that it demonstrated a shift in the job focus. He further recorded that the shift in the job focus had been considered in the job grading process and it had not resulted in an increase in the complexity of the work specifically. In the result, his department was satisfied that due process had been followed and the position of Researchers had been graded accurately.

[9] In a letter dated 15 June 2011, Parliament addressed a letter to one of the Researchers advising them that in its view, the JEAC committee had properly applied its mind to the issue of job grading of Researchers and therefore Parliament correctly held the view that Researchers were properly graded at salary level C3.

[10] Central to the dispute between the parties is whether a decision had in fact been taken by Parliament to re-grade their salary from C3 to C4, flowing from the memorandum authored by Keswa and ostensibly approved by Coetzee. The second issue is whether Parliament as the employer had failed to implement that decision. The third is whether Parliament had committed an unfair labour practice by failing to implement the purportedly approved re-grading.

The application for condonation:

[11] On 14 January 2016, the Researchers referred an unfair labour practice dispute to the CCMA, contending that the dispute arose on 13 December 2010. The referral was accompanied by an application for condonation, with the affidavit having been deposed to by the fifth respondent, Ms Joyce Ntuli, who made the following averments;

11.1. Because of their appeal to the JEAC being unsuccessful [in 2010], they had petitioned Parliament in or about 2010 to review both the decision of the JEC and the JEAC.

11.2. In December 2010, the matter was forwarded to the Acting Secretary to Parliament for his consideration. The Acting Secretary of Parliament agreed with the Researchers' contention that they were incorrectly graded at level C3 and further that there was merit in their review of the grading outcome. Consequently, a decision was taken to grade them at grade C4. On 13 December 2010, the LOD Manager and the Acting Secretary to Parliament approved the re-grading of the Researchers from grade C3 to C4.

11.3. The Decision to re-grade them was formally communicated to them in December 2010. They were subsequently informed that despite the re-grading and its approval, a moratorium had been placed on all C4 and C5 level positions. Despite requests, the full details of the moratorium have not been made available to them.

11.4. Since the dispute arose on 13 December 2010, their union (NEHAWU) had on numerous occasions attempted to make representation to Parliament to try resolve the impasse. It had always been their intention to resolve the internally.

11.5. They further alleged they were not familiar with dealing with matters such as the one at hand, or the time periods prescribed by the LRA.

11.6. In the alternative, they argued that the matter was not an ordinary dispute, in that it was a continuing unfair labour practice. The time periods required by the LRA would therefore not find application and condonation would therefore be unnecessary.

11.7. If condonation was deemed necessary, such lateness should be excused because non-compliance was not due to intent but rather to ignorance of the requirements of the LRA.

11.8. They submitted that they had prospects of success since the refusal by Parliament to implement the regarding constituted an unfair labour practice.

[12] Parliament had opposed the application for condonation. In the opposing affidavit deposed to by Mpumelelo Tabata, the Employee Relations Practitioner at Parliament, the following averments were made;

12.1 The degree of lateness in referring the dispute was six years which was excessive as conceded by the Researchers. Given the extent of the delay, the explanation proffered in that regard was frivolous and did not constitute grounds for condonation. There were no acceptable reasons provided by the Researchers for the delay, despite being represented by 16 NEHAWU shop stewards at all times, who ought to have been aware of the legal requirements in the LRA.

12.2 The Researchers had not provided any factual basis for contending that they had any prospects of success on the merits, and moreso,

the issue in dispute did not pertain to an unfair labour practice, and thus the CCMA lacked the requisite jurisdiction to hear the dispute even if condonation was granted.

12.3 In regard to prejudice, it was contended that the issue related to a job grading that was not approved since there was a moratorium in place in the positions at C4 and C5 levels. Thus, having to defend the matter would entail unnecessary spending of public funds and resources, and the matter had no bearing on the public interest, nor was it of importance.

The ruling and the review:

[13] This Court accepts that when considering applications for condonation, Commissioners enjoy a wide discretion[3], and the Courts should be cautious when interfering with decision arrived at by Commissioners in the light of that wide discretion[4].

[14] The applicable test before the Court can interfere with a Commissioner's discretionary decision is whether or not it can be said that the discretion was exercised "capriciously, or upon a wrong principle, or in a biased manner, or for insubstantial reasons. Thus, the test is whether the Commissioner committed a misdirection, an irregularity, or failed to exercise his or her discretion, or exercised it improperly or unfairly."

[15] In *Coates Bros Ltd v Shanker and Ors*[5], it was emphasised that a simple misdirection is insufficient, and that such misdirection must be of such a nature, degree or seriousness that shows that the discretion was not exercised at all or was exercised improperly or unreasonably[6].

[3] *Motloi v SA Local Government Association* [2006] 3 BLLR 264 (LAC) para [16]
[4] *NUMSA v Fibre Flair cc t/a Kango Canopies* (2000) 21 ILJ 1079 [LAC] 1081 at G-1082A
[5] (2003) 24 ILJ 2284 [LAC]
[6] See also *Cowley v Anglo Platinum & others* JR 2219/2007; [2016] JOL 35884 (LC) at para 21, where it was held that;

> "…when the Commissioner is endowed with a discretion this court will be very slow to interfere with the exercise of that discretion. The Commissioner's exercise of discretion would be upset on the review if the applicant shows, inter alia, that the Commissioner committed a misdirection or irregularity, or that he or she acted capriciously, or on the

[16] The factors to be considered in applications for condonation are well-known as set out in *Melane v Santam Co Ltd*[7] and other subsequent authorities. In this case, the Commissioner took note of those factors, and further appreciated that she had a discretion in the matter having had regard to those factors, and the interests of justice. Having analysed how those factors were interrelated, the Commissioner concluded that;

16.1. The degree of lateness was excessive.

16.2. The delay was excusable as the Researchers were persistent in having the dispute resolved internally as evident from numerous meetings that took place between the Secretary of Parliament and the HR Executive. These meetings might have given the Researchers some sense of hope that the dispute may be resolved.

16.3. Taking into account that there was an on-going relationship between the Researchers and Parliament, the Commissioner held that it was understandable that the Researchers were keen to have the dispute resolved internally, rather than making use of external dispute resolution mechanism.

16.4. In any event held the Commissioner, the Researchers would not have been able to refer the dispute in 2010, because the definition of the term 'unfair labour practice' was different then. It was only in

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wrong principle or in bad faith or unfairly or that the exercise seeing the discretion the Commissioner reached a decision that a reasonable decision-maker could not reach."

[7] 1962 (4) SA 531 (A) at 532B-E., where it was held that

"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 it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: 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 finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits. I think that all the foregoing clearly emerge from decisions of this Court, and therefore I need not add to the ever-growing burden of annotations by citing the cases."

2013 that the Labour Appeal Court[8] expanded the meaning of the word “benefits” to include disputes relating to job grading. The CCMA therefore had jurisdiction to determine the dispute.

16.5. The Commissioner further held that the Researchers had laid out a *prima facie* case which demonstrated some prospects of success, and Parliament would not suffer any prejudice if condonation was granted, and further since it was in the interest of justice that condonation be granted.

The grounds of review and evaluation:

[17] Prior to dealing with the merits of the review application, it is important to highlight that one of the issues raised on behalf of the Researchers in opposing the review application was that of peremption. In this regard, the argument was that the condonation ruling was issued on 15 February 2016, and that since the arbitration proceedings commenced on 19 May 2016, Parliament took no steps to have the condonation ruling reviewed and set aside. It was contended that Parliament acted in a manner which reasonably induced the belief that it had acquiesced in that ruling. Reliance in this regard was placed on *NUMSA & others v Fast Freeze*[9].

[18] As correctly pointed out on behalf of Parliament in these proceedings, a defence of peremption in this instance is clearly misplaced in the light of the provisions of section 158 (1B) of the LRA, which provide that;

> ‘The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the Commission or any bargaining council in terms of the provisions of this Act before the issue in dispute has been finally determined by the Commission or the bargaining council, as the case may be, except if the

[8] *Apollo Tyres South Africa (Pty) Ltd v CCMA & others* [2013] 5 BLLR 434 (LAC); (2013) 34 ILJ 1120 (LAC)

[9] (1992) 13 ILJ 963 (LAC) at page 969 where it was held that;

> 'If a party to a judgment acquiesces therein, either expressly, or by some unequivocal act wholly inconsistent with an intention to contest it, his right of appeal is said to be perempted, ie he cannot thereafter change his mind and note an appeal. Peremption is an example of the well-known principle that one may not approbate and reprobate, or, to use colloquial expressions, blow hot or cold, or have one's cake and eat it.'

> Labour Court is of the opinion that it is just and equitable to review the decision or ruling made before the issue in dispute has been finally determined.'

[19] There is no reason in my view, why condonation rulings ought not to fall under the parameters of the above provisions. It is understandable that a ruling in terms of which condonation is granted opens the gateway for an arbitration. Even if the aggrieved party in the condonation ruling elects to partake in arbitration proceedings which may ultimately prove to be a nullity if it were to be found on review that condonation ought not to have been granted, that is a choice that a party makes, given the stringent approach of this court when determining whether it is just and equitable to entertain any such application midstream proceedings before the CCMA.

[20] Peremption has its origin in policy considerations similar to those of waiver and estoppel. The question of acquiescence does not however involve an enquiry into the subject of state of mind of the person alleged to have acquiesced in a judgment or order. It involves a consideration of the objective conduct of such person and the conclusion to be drawn therefrom[10].

[21] In a case such as the one before the Court, a party that elects to wait until the arbitration proceedings have been finalised even if aggrieved by a condonation ruling cannot however objectively be accused of having acquiesced in that ruling, simply because steps were not taken immediately after the ruling was issued. Other than the restrictive provisions of section 158 (1B) of the LRA, a condonation ruling like other interlocutory rulings does not necessarily bring an end to the main dispute for the purposes of a defence of peremption, which usually involves a final court order, compelling a party to do certain things. Thus, a party that elects not to contest a condonation ruling at the CCMA pending the finalisation of the arbitration proceedings is protected by the provisions of section 158 (1B) of the LRA for the purposes of challenging that ruling at a later stage.

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[10] See *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* 2013 (3) SA 315 (SCA) at 318.

[22] In regard to the ruling itself, Parliament takes issue with the approach of the Commissioner in condoning the late referral, contending that the ruling was unreasonable and ought to be set aside upon a consideration of the factors that the Commissioner ought to have considered.

[23] In regard to the degree of lateness, it was pointed out on behalf of Parliament that the referral of the dispute was five years late since it arose on 13 December 2010 and the matter was brought to the CCMA initially on 1 December 2014.

[24] The Commissioner agreed that the delay was excessive. This however was not the end of the matter, as in my view, the delay was excessive in the *extreme*. In those circumstances, a reasonable and acceptable explanation was required of the Researchers, failing which that would have been the end of the matter, even upon a consideration of the interests of justice[11]. This principle is premised on *inter alia*, the objectives of the LRA, which call for expeditious resolution of labour disputes, and the prejudice caused by the delay in referring disputes.

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[11] See *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) at para 50 - 51, where Zondo J (as he then was) in a dissenting judgment held that;

> 'Although the existence of the prospects of success in favour of the party seeking condonation is not decisive, it is an important factor in favour of granting condonation.
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> 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'

See also *Moila v Shai N.O and Others* (2007) 28 ILJ 1028 (LAC) at para 34, where it was held that;

> 'I do not have the slightest hesitation in concluding that this is a case where the period of delay is excessive and the appellant's purported explanation for the delay is no explanation at all. I accept that the case is very important to the appellant. However, the weight to be attached to this factor is too limited to count for anything where the period of delay is as excessive as is the case in this matter and the explanation advanced is no explanation at all. If ever there was a case in which one can conclude that good cause has not been shown for condonation without even considering the prospects of success, then this is it. Where, in an application for condonation, the delay is excessive and no explanation has been given for that delay or an "explanation" has been given but such "explanation" amounts to no explanation at all, I do not think that it is necessary to consider the prospects of success.'

[25] Just to re-emphasise the above point, the Labour Appeal Court in *Colett v Commission for Conciliation, Mediation & Arbitration & others*[12] held as follows;

> "There are overwhelming precedents in this court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success. In NUM v Council for Mineral Technology [[1999] 3 BLLR 209 (LAC) at para 10], it was pointed out that in considering whether good cause has been shown the well-known approach adopted in Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A) at 532C–D should be followed, but — "[t]here is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused"[13].

And,

> "The submission that the court a quo had to consider the prospects of success irrespective of the unsatisfactory and unacceptable explanation for the gross and flagrant disregard of the rules is without merit."[14]

[26] Considering that an application for condonation is effectively a request for an indulgence, in instances where a delay in referring a dispute is excessive in the extreme as in this case, other than the fact that a reasonable and acceptable explanation must be given, there is a further requirement on a party to give a full account of each period of the delay[15].

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[12] (2014) 35 ILJ 1948 (LAC); [2014] 6 BLLR 523 (LAC)
[13] At para 38
[14] At para 39
[15] See *NUMSA & another v Hillside Aluminium* [2005] 6 BLLR 601 (LC) at para 12, where it was held that;

> "Additionally, there should be an acceptable explanation tendered in respect of each period of delay. Condonation is not there simply for the asking. Applications for condonation are not a mere formality. The onus rests on the applicant to satisfy the court of the existence of good cause and this requires a full, acceptable and ultimately reasonable explanation. One of the primary purposes of the Labour Relations Act is to

[27] The explanation proffered by the Researchers before the Commissioner as correctly pointed out on behalf of Parliament is unsatisfactory and amounts to no explanation at all. The explanation was three-pronged. The first was that attempts were being made by the Researchers through their Union to resolve the matter and that they were hopeful that a resolution would be found based on those attempts and meetings held between the Secretary of Parliament and the HR Executive. The Researchers had also relied upon some letters sent to the Secretary of Parliament and reference was made to Annexure 'A', which is correspondence from NEHAWU. A copy of this correspondence is not legible, but it is apparent that it was sent sometime in 2013. As far as the application for condonation before the Commissioner was concerned, this was the only copy or proof of any attempts being made to resolve the matter internally. Nothing else was placed before the Commissioner. There was no indication in the founding affidavit to explain what those attempts were, when they were made and whether they had any outcome to the extent that the Commissioner and the Researchers formed a firm believe that a resolution would be found. The Commissioner could only deal with what was presented before her and based on the averments made in the founding affidavit, and in the absence of a replying affidavit, it is apparent that her conclusions that the Researchers were persistent in their attempts to resolve the dispute amicably were not based on discernible facts placed before her.

[28] The evidence of 'numerous meetings' was equally not placed before her, and the fact that there was an on-going relationship between the parties was hardly a factor to be relied upon in hoping that a resolution would be found or in concluding that the excessive delay was excusable. It follows that the

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ensure that disputes are resolved expeditiously, especially dismissal disputes. The intention is that disputes alleging unfair dismissal should be referred to conciliation within 30 days of the dismissal (section 191(1)(b)(i) (Act 66 of 1995)); that the conciliation process be completed within 30 days (section 191(5) (Act 66 of 1995)) and that disputes for adjudication by the Labour Court should then be referred within 90 days of the end of the conciliation process. For a variety of reasons, these time periods are often not complied with in practice. Nevertheless, to do justice to the aims of the legislation, parties seeking condonation for non-compliance are obliged to set out full explanations for each and every delay throughout the process. An unsatisfactory and unacceptable explanation for any of the periods of delay will normally exclude the grant of condonation, no matter what the prospects of success on the merits…"

Researchers had not even come close to giving a full account of the delay, and the Commissioner's conclusions in this regard were predicated on unsubstantiated reasons.

[29] A second explanation which the Commissioner failed to address was that the Researchers were not familiar with the time statutory time periods. This excuse was fatal to the Researchers' case, as it was made in circumstances where they were represented by NEHAWU, a reputable union which is well familiar with the requirements outlined in the LRA throughout their dispute internally. It is trite that ignorance of legal requirements especially in circumstances where employees are represented by a union or a firm of attorneys can hardly pass as an excuse. This explanation or excuse amounts to no explanation at all, and the Commissioner for some strange reason conveniently failed to deal with it. Had she done so, it is unlikely that she would have found that the delay was excusable.

[30] A third excuse if it may be called that was that the dispute between the parties was not one involving an 'ordinary unfair labour practice' but 'a continuing unfair labour practice' and therefore the time periods were not applicable, making it unnecessary to seek condonation. The Commissioner equally failed to deal with this lame explanation.

[31] There is nothing called a 'continuing unfair labour practice' for the purposes of compliance with applicable time limits. The provisions of section 191 (1) (b) (ii) of the LRA requires a dispute to be referred within 90 days of the date of the act or omission which allegedly constitute the unfair labour practice, or if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence. Thus, even if conduct or a dispute is on-going, it must have some form of conception from which the 90 days can be calculated. A dispute cannot simply be on-going from nowhere.

[32] The Commissioner also appears to have been persuaded in her conclusions by the Researchers' contentions that prior to the decision in *Apollo Tyres South Africa (Pty) Ltd*, the Researchers would not have in any event been able to refer the dispute as the definition of unfair labour practice at the time

was restrictive. This contention is a misapplication of the law. A dispute for the purposes of compliance with applicable time limits does not gain traction or impetus from a new or different interpretation of the law by the Labour Appeal Court. It defies logic to contend that an alleged unfair labour practice dispute that was not referred for resolution five years ago can now be referred simply because of a different interpretation of the law. A new or different interpretation of the law does not resuscitate old disputes. Other than this absurdity, the Commissioner nonetheless still failed to consider the failure to explain the delay between February 2013 when the judgment relied upon was delivered and January 2016 when the dispute was ultimately referred.

[33] Other than the unexplained delays, it was common cause that the Researchers had initially referred the same dispute in December 2014 and withdrew it. They had again referred the dispute in November 2015 and as it was defective it was not determined. No attempt was made to explain the reasons the initial referral was not pursued with the same vigour as the new one and again, the Commissioner omitted to take these factors into account. There is therefore merit in Parliament's contentions that the Researchers' approach was not akin to serious litigants who genuinely required the assistance of our dispute resolution institutions, and the Commissioner sadly failed to appreciate this lackadaisical approach.

[34] In the light of the above, it follows that on the authorities referred to elsewhere in this judgment, there was no need for the Commissioner to even determine whether the Researchers had any prospects of success on the merits. In circumstances where a delay in referring a dispute is excessive in the extreme, a further important consideration is that of prejudice to the parties. The Commissioner rejected Parliament's contentions that it would suffer prejudice should condonation be granted. This was in circumstances where the Researchers had simply stated in the founding affidavit in support of the application that '*the prejudice which will be suffered by myself together with other applicants far outweighs that which will be suffered by the Respondent'*. Clearly there is an even greater duty to explain the alleged

prejudice instead of simply making an allegation in that regard in broad and vague terms. Parliament had specifically contended that the issue related to a job grading that was not approved since there was a moratorium in place in the positions of C4 and C5, and that having to defend the matter would have entailed unnecessary spending of public funds and resources, as the matter had no bearing on the public interest, nor was it of importance.

[35] The nature of the dispute as found by the Commissioner is not the only consideration of whether a party would suffer prejudice if delays were to be condoned or not. The issue is whether compelling Parliament to defend a matter which was five years old, and which the Researchers had not shown any seriousness in pursuing would have caused prejudice to it, and whether it would have been in the interests of justice not to grant condonation in those circumstances. The answer should have been a resounding yes, especially in circumstances where the Researchers had *inter alia*, not explained the nature of the prejudice they stood to suffer if condonation was refused. As it turned out, because of the delays in referring the dispute, Coetzee, who purportedly signed off the approval for re-grading has since passed on, and to further expect Parliament to have put up a defence to the Researchers' claim in circumstances where they were the authors of the delay would have been unreasonable and unfair.

[36] On a consideration of all the facts before the Commissioner at the time, it follows that the most reasonable outcome upon a consideration of the overall interests of justice would have been to refuse to grant condonation. It therefore follows that in exercising her discretion to grant condonation, the Commissioner committed a misdirection which is of such a nature, degree and seriousness that shows that her discretion was exercised not only improperly, unfairly and unreasonably, but also upon wrong principles and for insubstantial reasons. In the circumstances, it follows that the condonation ruling ought to be set aside, and I am satisfied that upon the material that was placed before the Commissioner, the Court is in a position to substitute that ruling. No purpose would be served by remitting the matter back to the CCMA for reconsideration. My conclusions and approach

therefore imply that the CCMA would have lacked jurisdiction to determine the main dispute. This therefore makes the subsequent award of Commissioner Brümmer a nullity, making it unnecessary for the court to determine the merits of its review application.

[37] I have further had regard to the requirements of law and fairness, which in my view dictates that a cost order should not be warranted in this case. Accordingly, the following order is made;

Order:

1. The applicant is absolved from furnishing security in respect of the review application.

2. The condonation ruling issued by the second respondent under case number WECT705-16 dated 15 February 2016 is reviewed, set aside and substituted with the following order;

   'The application for condonation for the late referral of an alleged unfair labour practice dispute brought by the Employees/Researchers is dismissed, and the Commission for Conciliation, Mediation and Arbitration lacks jurisdiction to determine the main dispute.'

3. The arbitration award issued by the fourth respondent under case number WECT705-16 dated 2 September 2016 is set aside on the grounds of it being a nullity.

4. There is no order as to costs.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	P. Kennedy SC
Instructed by:	Haffegee Roskam Savage Attorneys
For the 5th, 6th – Further Respondents:	Adv. M. Ngumbela
Instructed by:	Mvana van Rensburg & Associates