THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2511/2023

In the matter between:

SOLANI DOLLENCE NTUKWANA **Applicant**

and

THE MINISTER OF HOME AFFAIRS **First Respondent**

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL **Second Respondent**

C P BURTON *N.O.* **Third Respondent**

Heard: **28 November 2024**

Delivered: **5 December 2024**

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be 5 December 2024.

JUDGMENT

PRINSLOO, J

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Introduction

[1] The Applicant filed an application to review and set aside a condonation ruling dated 13 October 2023 and issued under case number GPBC1495/2023 in terms of the provisions of section 158(1)(g) of the Labour Relations Act[1] (LRA). The Third Respondent (arbitrator) refused to grant condonation for the late referral of the Applicant's unfair labour practice dispute.

[2] The First Respondent (Respondent) opposed the application.

[3] The Applicant received the condonation ruling on 13 October 2023 and she filed her review application on 12 December 2023. The Applicant submitted that she had brought her application within a 'reasonable time'. While section 158(1)*(g)* does not specify a time limit within which a review application must be brought, the Labour Appeal Court (LAC) has held that the application must be brought within a reasonable time, and has equated this with the six-week limit established by section 145. Any review application brought under section 158(1)*(g)*, filed later than six weeks after the impugned decision was served on the applicant, should be accompanied by an application for condonation.

[4] The six-week period within which the review application had to be filed, expired on 24 November 2023. The Applicant filed her application outside the prescribed six-week period and notwithstanding her statement that she had filed the application within a reasonable time, she filed an application for condonation, as she should have.

[5] I have considered the application for condonation and I am satisfied that a case has been made out for condonation to be granted. The delay is minimal and the explanation is reasonable and acceptable.

Material background facts

[6] The Applicant was employed by the Department of Home Affairs (Department) as a director in the Vhembe district. On 7 July 2022, she was issued with a charge sheet and the charges related to an incident of 16 September 2021

[1] Act 66 of 1995, as amended.

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where she allegedly assaulted Ms Ralulimi and an incident on 1 June 2022 where she allegedly took photographs without the permission of Ms Ndadza and Ms Ralulimi.

[7] The Applicant's disciplinary hearing was chaired by Mr Khoza and after hearing evidence, Mr Khoza found the Applicant guilty of assaulting Ms Ralulimi and not guilty on the second charge. After considering mitigating and aggravating circumstances, Mr Khoza, on 21 April 2023, recommended that *"the sanction to be imposed on Ms Ntukwana be, as an alternative to dismissal, a combination of suspension without pay for one months and a final written warning valid for the maximum period permitted under the SMS handbook".* The aforesaid sanction could only be implemented with the Applicant's consent and if she was not amenable to give her consent, the Department could impose the sanction of dismissal.

[8] On 24 April 2023, the Applicant's legal representatives addressed a letter to Mr Khoza stating that the Applicant recorded her consent to and acceptance of the recommended sanction of suspension without pay and a final written warning.

[9] On 26 April 2023, the Department informed the Applicant formally about the outcome of her disciplinary hearing and she was advised that she has no right to appeal but that she has the right to refer a dispute to the Second Respondent (GPSSBC), should she wish to do so. She was also informed that *"your sanction will be with effect from 1 May 2023 until 31 May 2023. The Final Written Warning will be with effect from 1 June 2023 until 30 November 2023, and after this period, it will be removed from your file and be destroyed".*

[10] On 24 August 2023, the Applicant referred an unfair labour practice dispute to the GPSSBC and the dispute concerned 'suspension / other disciplinary action short of dismissal'. The outcome the Applicant sought was for the one month without pay and the final written warning (which was valid for a period of six months) to be set aside and for her to be paid her month's salary, which was not paid in May 2023, as part of the sanction of suspension without pay. The Applicant also filed an application for condonation for the late referral of her

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dispute. The arbitrator refused to grant condonation and the condonation ruling is the subject of this review application.

The test for the grant of condonation

[11] The relevant legal principles to be applied in an application for condonation are well established. The court or relevant tribunal has a discretion, which must be exercised judicially on a consideration of the facts of each case and in essence, it is a matter of fairness to both sides.[2]

[12] In *Melane v Santam Insurance Co Ltd*[3] *(Melane),* it was held that:

> '…. 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… What is needed is an objective conspectus of all the facts.'

[13] Condonation for delays in all labour law litigation is not simply there for the taking. The starting point is that an applicant in an application for condonation seeks an indulgence and bears the onus to show good cause.

[14] The approach that, in the absence of a satisfactory explanation for a delay, the applicant's prospects of success are ordinarily irrelevant, has been conventionally applied[4] and was confirmed in *National Education Health and Allied Workers Union on behalf of Mofokeng and others v Charlotte Theron Children's Home*[5] where the LAC held that without a reasonable and acceptable explanation for a delay the prospects of success are immaterial.

[15] In *Colett v Commission for Conciliation, Mediation and Arbitration and others,*[6] the LAC confirmed that without a reasonable and acceptable explanation for

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[2] D Harms, '*Civil Procedure in the Superior Court'*, LexisNexis South Africa at B27.6.
[3] 1962 (4) SA 531 (A) at 532C - F.
[4] See: *NUM v Council for Mineral Technology* [1998] ZALAC 22*;* [1999] 3 BLLR 209 (LAC).
[5] [2004] ZALAC 9; (2004) 25 ILJ 2195 (LAC) at para 23.
[6] [2014] ZALAC 1; [2014] 6 BLLR 523 (LAC).

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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.

[16] The onus is on the applicant seeking condonation to satisfy the court or tribunal that condonation should be granted. In employment disputes, there is an additional consideration which applies in determining whether the onus has been discharged, as was held in *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) and others*[7]:

> 'There is, however, an additional consideration which applies in employment disputes in determining whether an applicant for condonation has discharged this onus. This is the fundamental requirement of expedition. The Constitutional Court has, as a matter of fundamental principle, confirmed that all employment law disputes must be expeditiously dealt with and any determination of the issue of good cause must always be conducted against the back drop of this fundamental principle in employment law.'

[17] The fundamental requirement of expedition is not to be ignored. In *Toyota SA Motors (Pty) Ltd v CCMA and others*[8] (*Toyota*), the Constitutional Court emphasised that one of the fundamental purposes of the LRA was to establish a system for the quick adjudication of labour disputes. When it assesses the reasonableness of a delay, the court must not lose sight of this purpose.

[18] In summary: the courts have endorsed the principle that where there is a delay with no reasonable, satisfactory and acceptable explanation for the delay, condonation may be refused without considering prospects of success and that, to grant condonation where the delay is not explained, may not serve the interests of justice. The expeditious resolution of labour disputes is a fundamental consideration. This was also confirmed in *Grootboom v National Prosecuting Authority and another,*[9] where the Constitutional Court has held that:

[7] [2014] ZALCJHB 115; (2015) 36 ILJ 232 (LC) at para 25.
[8] [2015] ZACC 40; (2016) 37 ILJ 313 (CC).
[9] [2013] ZACC 37; (2014) 35 ILJ 121 (CC) at para 51.

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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.'

[19] An applicant in an application for condonation bears the onus to satisfy the court or tribunal that condonation should be granted and it is incumbent upon such applicant to provide a full explanation for every period of the delay. The explanation for the delay must be both comprehensive and persuasive and should cover every period of the delay.

[20] In *Independent Municipal & Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and others*[10], the principle was confirmed that it is not sufficient simply to list significant events that occurred during the period in question as that does not assist the court (or a tribunal) properly to assess the reasonableness of the explanation.

The condonation application

[21] In order to assess the arbitrator's findings and the ruling he ultimately issued, it is necessary to consider the evidence that was placed before him.

[22] Section 191(1)(b) of the LRA prescribes a 90-day period for referral of an unfair labour practice dispute to the relevant bargaining council for adjudication. The 90-day period is calculated from the date of the act or omission which allegedly constitutes the unfair labour practice.

[23] The Applicant received the sanction, which she alleged constituted an unfair labour practice, on 28 April 2023. The Applicant's dispute relating to an unfair

[10] [2009] ZALC 137; (2010) 31 ILJ 1413 (LC) (*IMATU*) at para 13.

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labour practice had to be referred within 90 days from 28 April 2023, thus by 27 July 2023. The dispute was only referred on 24 August 2023, clearly outside the prescribed 90-day period.

[24] The degree of lateness was to be calculated from 27 July until 24 August 2023, which is 28 days late.

[25] The explanation which the Applicant tendered for the lateness is that in May 2023 she was *"studying*, *making preparations for writing my examination and conducting research on my prior approved research topic. In June 2023 I was writing my research report and submission thereof after conducting a thorough research. On 16 May 2023 I also had to attend to new charges of misconduct levelled against me before I could even report for duty on 01/06/2023".* The Applicant further explained that she waited for the Department to provide her with certain documents she requested.

[26] In its opposing affidavit, the Respondent disputed the Applicant's reasons for lateness and submitted that the Applicant had accepted and consented to the sanction on 24 April 2023 to such an extent that she had complied with the sanction. She was suspended without pay in May 2023 and she did not oppose the implementation of the sanction she acceded to. The Applicant's conduct throughout demonstrated that she had no intention to challenge the sanction. Suddenly, approximately four months later, she had a change of heart and she sought to challenge the sanction imposed, which she had agreed to and by 31 May 2023, she had already served the suspension period.

[27] The Applicant made submissions on the issue of prospects of success and on the aspect of prejudice, she submitted that the final written warning was issued *"to be a base of leading to concocting other frivolous and vexatious charges of misconduct while I was still serving one month suspension without pay from 1 May – 31 May 2023. My service record will be destroyed to an extent that it will be very difficult for me to be admitted as an attorney or advocate on completion of my LLB degree at the end of 2023. I lost my one month salary with all my benefits unfairly, including May 2023 pension contribution and had to pay double payment on my GEMS medical aid".*

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[28] The Applicant was dismissed on 18 August 2023 in a separate and unrelated disciplinary process.

[29] The Respondent disputed that there were any prospects of success as the Applicant consented to the sanction and submitted that the Applicant was acting in bad faith and abused the dispute resolution process.

The condonation ruling

[30] The issue to be decided by the arbitrator was whether condonation should be granted for the late referral of the Applicant's unfair labour practice dispute.

[31] In respect of the explanation for the delay, the arbitrator summarised the reasons provided by the Applicant for the delay as *"studying, preparing, research and writing of research for her lateness. She also attended to new disciplinary charges during this time. These reasons given by the applicant show that she did not pursue the dispute diligently. The reasons that the applicant advanced is not acceptable and could not prevented her from referring the dispute in time"*.

[32] In respect of the Applicant's prospects of success, the arbitrator recorded that the Applicant did not make submissions pertaining to the prospects of success. The arbitrator referred to *Melane* where it was held that "*there is a further principle which is applied and that without a reasonable acceptable explanation for the delay, the prospects of success, no matter how good, an application for condonation should be refused*". The arbitrator concluded that the Applicant did not give any good explanation for her delay and her application for condonation was refused.

The test on review

[33] It has been confirmed on numerous occasions that the review test as laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[11] does not find application in the review of a jurisdictional ruling or finding.[12]

[11] [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at paras 78 and 79.
[12] *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others* [2008] ZALAC 3; (2008) 29 ILJ 2218 (LAC), *Member of the Executive Council, Department of Health, Eastern Cape v Odendaal*

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[34] In *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape and others*[13], the Labour Appeal Court held that:

> 'Thus the issue before the commissioner, whether or not there had been a dismissal, was a jurisdictional issue. This means that if there was no dismissal the bargaining council did not have jurisdiction to entertain the dispute referred to it by the appellant (*SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SARPU & another* (2008) 29 *ILJ* 2218 (LAC); [2008] 9 BLLR 845 (LAC) at para 39). The question whether, on the facts of the case, a dismissal had taken place within the ambit of s 186(1)*(b)* involves the determination of the jurisdictional facts. A jurisdictional ruling is subject to review by the Labour Court on objectively justifiable grounds and not on the reasonableness test approach as enunciated in *Sidumo*. The test is whether, objectively speaking, the facts which would give the GPSSBC jurisdiction to entertain the dispute existed.'

[35] This Court must decide whether the arbitrator was right or wrong and not whether the conclusion reached by the arbitrator was one that a reasonable decision maker could not reach. The question to be decided in view of the applicable test is whether the arbitrator correctly found that the Applicant did not provide a good explanation for her lateness and whether he was correct to refuse condonation, considering the applicable principles.

[36] In *Parliament of the Republic of South Africa v Commission for Conciliation, Mediation and Arbitration and Others,*[14] it was held that:

> '[13] This Court accepts that when considering applications for condonation, Commissioners enjoy a wide discretion and the Courts should be cautious when interfering with decision arrived at by Commissioners in the light of that wide discretion.
>
> [14] The applicable test before the Court can interfere with a Commissioner's discretionary decision is whether or not it can be said

and Others [2008] ZALC 161; (2009) 30 ILJ 2093 (LC), *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen and Others* [2011] ZALCCT 21; (2012) 33 ILJ 363 (LC), *Majatladi v Metropolitan Health Risk Management and Others* [2013] ZALCCT 15; (2013) 34 ILJ 3282 (LC).

[13] [2012] ZALAC 37; (2013) 34 ILJ 1427 (LAC) at para 24.

[14] (C646/16) [2018] ZALCCT 12 (24 April 2018) at paras 13 - 14.

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> 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".'

[37] In *Cowley v Anglo Platinum and others,*[15] it was held that:

> 'When a 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 will be upset on review if the applicant shows, *inter alia*, that the commissioner committed a misdirection or irregularity; or that he/she acted capriciously, or upon a wrong principle, or in bad faith, or unfairly, or that in exercising the discretion the commissioner reached a decision that a reasonable decision-maker could not reach. If it is clear that the commissioner exercised such discretion judiciously and fairly after taking into consideration all the relevant facts this Court will not interfere with the exercise of such discretion.'

Grounds for review and analysis

[38] The Applicant raised several grounds for review, which I will deal with in turn.

[39] The first ground for review is that the arbitrator correctly concluded that the Applicant had 90 days from 28 April 2023 to refer her unfair labour practice dispute to the GPSSBC. He held that her referral was 131 days late, when in fact it was only 28 days late. The arbitrator made a material error of fact when he exercised his discretion and he failed to apply his mind to the correct period of the delay.

[40] In my view, there is no merit in this ground for review. It is evident that the arbitrator was alive to the fact that the Applicant had 90 days to refer her dispute from 28 April 2023 and that her referral was late. The incorrect calculation is neither here nor there as the period of the delay remains material.

[15] [2016] JOL 35884 (LC) at para 21.

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[41] The delay of 28 days is material given the context within which labour litigation takes place and the system that is designed to ensure the effective and expeditious resolution of labour disputes. This is even more so where the LRA provides for a period of 90 days to refer an unfair labour practice dispute, which period is in itself generous and lengthy.

[42] The second ground for review is that the arbitrator failed to apply his mind to the reasons the Applicant provided for the late referral of her dispute. She further submitted that the explanation she provided was a reasonable and plausible explanation and that the arbitrator applied the wrong test in concluding that the explanation must be 'good'.

[43] There is no merit in this ground for review.

[44] A failure to comply with the generous period of 90 days, has to be explained and the reasonableness of the delay should be considered by having regard to the explanation for the delay.

[45] As the Applicant sought an indulgence and as she bore the onus to satisfy the arbitrator that condonation should be granted, it was incumbent upon her to provide a full explanation for every period of the delay. It is not sufficient simply to list significant events that occurred during the period in question as that cannot assist the arbitrator in assessing the reasonableness of the explanation.[16]

[46] The authorities are clear – the explanation for the delay has to be compelling, convincing and comprehensive and should cover every period of the delay.

[47] The relevant period of the delay is the period between when the dispute had to be referred (27 July 2023) and the date on which it was indeed referred (24 August 2023) and this is the period the Applicant had to explain. In the founding affidavit filed in support of the application for condonation, the Applicant provided an explanation for May and June 2023. There is absolutely no explanation as to what caused the delay in referring the unfair labour practice dispute between July and August 2023 and in fact, there is no reference to the

[16] See: *IMATU supra.*

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said period. The only explanation is for May and June 2023, which fell within the 90-day period and did not need to be explained as the referral was not late in May or June 2023.

[48] The Applicant made a vague and unsubstantiated statement to the effect that she had waited for the employer to provide her with certain documents. As already alluded to, the explanation has to be comprehensive and compelling. The Applicant provided no detail as to when she requested the documents, why the documents were necessary for her to complete the referral form and how this fact contributed to the delay. In argument, Mr Malatji for the Applicant submitted that to date, the documents were not provided to the Applicant. In my view this makes matters worse for her – it means that she was in a position to refer the dispute, notwithstanding the fact that the required documents were not provided and it is unclear how, if at all, this prevented the Applicant from referring her dispute in time.

[49] It is evident that the explanation tendered is bereft of any detail and lacks particularity. Material periods of the delay remained completely unexplained and the Applicant tendered no version as to what happened during the relevant period of July and August 2023.

[50] The Applicant had to provide an explanation for every period of the delay to enable the arbitrator to assess the reasonableness of the delay and the explanation for it. The Applicant dismally failed to do that and the explanation tendered is inadequate, sketchy, bereft of any substance and detail and far from compelling, convincing or comprehensive and it did not place the arbitrator in any position to understand the reasons for the delay.

[51] The events listed by the Applicant do not explain what prevented her from referring her dispute in time and even the documents she waited for, did not prevent her from referring her dispute timeously.

[52] The Applicant provided no explanation for a material period of the delay and the arbitrator was not placed in a position to understand the reasons as to why the dispute was not referred in time. The Applicant failed to discharge the onus to show good cause why the indulgence she sought should have been granted.

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[53] What is peculiar is the fact that the Applicant referred her unfair labour practice dispute (in August 2023), wherein she seeks to challenge a sanction of one month's suspension without pay and a final written warning valid for six months, almost three months after she had already served the sanction of suspension without pay (in May 2023) and after a material portion of the period of the final written warning had already expired. It appears that the Applicant's subsequent dismissal on 18 August 2023 triggered the referral of an unfair labour practice dispute after the employment relationship had already been terminated.

[54] Considering the facts that were placed before the arbitrator, he was correct in finding that *"the reasons that the applicant advanced is not acceptable and could not prevented her from referring the dispute in time".*

[55] The third ground for review is that the arbitrator was wrong in concluding that she did not deal with the prospects of success and that there was no need for him to deal with the prospects of success because she did not provide a reasonable and acceptable explanation for the delay. The Applicant's case is that the arbitrator's conclusion that he was not required to consider the prospects of success is unreasonable, irrational and an indication of his failure to apply his mind.

[56] There is no merit in this ground for review. Not only does reasonableness find no application but the arbitrator's conclusion is in accordance with the applicable principles and authorities.

[57] The arbitrator effectively found that without a reasonable explanation for the delay, the Applicant's prospects of success are immaterial. In the authorities referred to *supra,* the courts have endorsed the position that the failure to provide a reasonable and acceptable explanation for the delay renders prospects of success immaterial.

[58] *In casu,* the delay was material and the explanation for the delay was far from compelling or comprehensive and the courts have endorsed the position that where the delay is material, the failure to provide a reasonable and acceptable explanation for the delay renders prospects of success immaterial. The fact that

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the arbitrator did not consider the Applicants' prospects of success, after finding that the explanation was not compelling, does not render the ruling reviewable.

[59] The last ground for review is that the arbitrator is silent on the issue of prejudice. The Applicant's case is that the severe prejudice she would suffer because her dispute would not be heard was ignored by the arbitrator.

[60] The result of the refusal to condone the late referral of the unfair labour practice will be that the Applicant will be denied the opportunity to pursue her case before the GPSSBC. However, the Applicant did not pursue her matter diligently and she not only failed to comply with the prescribed periods, but she also failed to explain her failure to do so when she applied for condonation.

[61] The notion that litigants will be denied access to a court or other tribunal to ventilate their case cannot be examined within a paradigm that ignores the interests of the adversary, nor of the ordinary dynamics of litigation, more especially, because the reality is that litigation is a process in which adversaries make choices. If the consequences of choices that are made, or the consequences of inaction and tardiness are that opportunities to pursue the matter are forfeited, it does follow that there is a failure of justice. The litigation system affords litigants a process within which they must navigate their own routes and it is no failure of justice if their journey culminates in a dead end.[17]

[62] The Constitutional Court, in the opening paragraph of *Toyota*[18] 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

[17] See: *Edcon Ltd v Steenkamp and Others* [2019] ZACC 17; (2018) 39 ILJ 531 (LAC) at para 34.
[18] *Toyota supra.*

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dispute but, ultimately, also to an employer who may have to reinstate workers after many years.'

Conclusion

[63] I have to consider the grounds for review within the context of the test this Court must apply in deciding whether the arbitrator's decision is reviewable. The arbitrator exercised his discretion and he refused condonation. No case has been made out that the exercise of his discretion was not done judicially or fairly.

[64] The ultimate question is whether holistically viewed, the decision taken by the arbitrator was wrong based on the evidence placed before him. I have considered this question and I conclude that the arbitrator's findings are correct based on the evidence that was placed before him and are not to be interfered with on review.

Costs

[65] In so far as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

[66] In *Zungu v Premier of the Province of KwaZulu-Natal and Others,*[19] the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand, allowing those parties to bring to this Court (or oppose) cases that should not have been brought to Court (or opposed) in the first place.

[67] This is a case where the interests of justice will be best served by making no order as to cost. In any event, Mr July did not seek a cost order in favour of the Respondent.

[19] [2018] ZACC 1; (2018) 39 ILJ 523 (CC) at para 24.

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

Order

1. The late filing of the review application is condoned;

2. The application for review is dismissed;

3. There is no order as to costs.

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Connie Prinsloo

Judge of the Labour Court of South Africa

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Appearances:

For the Applicant:	Mr K R Malatji
Instructed by:	Macrobert Inc Attorneys
For the First Respondent:	Mr S July from Werksmans Attorneys

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