IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JR 764/18

In the matter between:

OLIVIA KOCK **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

ELSABE HARMSE *N.O.* (AS COMMISSIONER) **Second Respondent**

EVA NGOBENI *N.O.* (AS COMMISSIONER) **Third Respondent**

MORWA *N.O.* (AS COMMISSIONER) **Fourth Respondent**

HELLPAGE SOUTHERN AFRICA **Fifth Respondent**

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Heard: **29 October 2020**

Delivered: **31 May 2021**

Summary: **Review application – time limit in terms of section 145(1) considered – review application out of time with no proper condonation application – no good cause shown in any event – Court has no jurisdiction to entertain review application**

Review application – clauses 11.2.2, 11.2.3 and 11.2.7 of Practice Manual considered – applicant failed to comply with these provisions – consequently review application withdrawn, archived and / or lapsed – reinstatement and condonation required

Review application – application to reinstate review considered – application failing to comply with clause 11.2.3 and premature – application not competent

Review application – applicant failing to provide proper explanation for reinstatement of review application – applicant failing to adequately prosecute review application – Court not having jurisdiction to entertain merits of review application

Rule 11 – principles considered – employer party applied for dismissal of review – application competent – review application dismissed

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This is once again one of those unfortunate cases where the plethora of failures on the part of a review applicant has shipwrecked the review application itself, to the extent that the merits of the application have become immaterial. What makes it worse is that the applicant, when confronted with these failures, did not attempt to regularize the same, but stubbornly persisted with an application that was doomed to fail as it stood. This Court simply cannot assist such litigants.

[2] The above being said, the applicant has brought a multi-pronged review application, purportedly in terms of section 145 the Labour Relations Act[1] (LRA). This review application was filed in Court on 23 April 2018. It is appropriate from the outset to first identify the relief sought by the applicant in her review application. Despite the inelegant wording of the prayers for relief in the applicant's notice of motion, it is at least apparent that the applicant firstly seeks to review and set aside the decision by the second respondent to recuse herself

[1] Act 66 of 1995 (as amended).

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as arbitrator from the arbitration proceedings between the applicant and the fifth respondent. Secondly, the applicant seeks to review and set aside the arbitration award of the third respondent dated 10 February 2018, which award was handed down by the third respondent following the completion of arbitration proceedings between the applicant and the fifth respondent wherein the third respondent was the duly appointed arbitrator. Thirdly, the applicant seeks to review and set aside what she calls the '*conduct*' of the third and fourth respondents in conciliation proceedings conducted on 29 November 2017.

[3] The fifth respondent opposed the review application. In addition, not only has the firth respondent opposed the applicant's review application on the merits thereof, but it also filed an application in terms of Rule 11 of the Labour Court Rules,[2] seeking the dismissal of the review application as a result of what it contended was numerous failures by the applicant to comply with the time limits in the LRA, the Labour Court Rules and the Practice Manual of this Court.

[4] As alluded to in my introductory remarks, this matter falls to be decided on these procedural issues raised in the fifth respondent's Rule 11 application. I will therefore only set out the background facts relating to the Rule 11 application and relating to the procedural issues raised therein.

The relevant background

[5] This matter has as its genesis the alleged unfair dismissal of the applicant by the fifth respondent. The applicant had been employed by the fifth respondent since 18 August 2016 as a regional program manager, on a fixed term contract, the term of which was due to end on 17 July 2018. The applicant however did not make it to the end of this term. She was dismissed on 3 March 2017 at the end of her probation period for performance related issues. The applicant as a result referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), on 22 March 2017.

[6] The unfair dismissal dispute of the applicant was unsuccessfully conciliated by the CCMA on 19 April 2017, and a certificate of failure to settle was issued on that date. The applicant then referred her unfair dismissal dispute to arbitration.

[2] Rule 11 provides for interlocutory applications not specifically provided for in terms of the Labour Court Rules.

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[7] The arbitration was set down before commissioner G S Jansen Van Vuuren on 14 July 2017. The applicant represented herself in the arbitration. It must however be pointed out that the applicant is a qualified attorney. The fifth respondent attended at the arbitration accompanied by an attorney, Marius Scheepers (Scheepers). Scheepers proceeded to move an application that the fifth respondent be allowed legal representation in the arbitration proceedings. The applicant opposed the application. After hearing argument by both parties on the issue of legal representation, commissioner Jansen Van Vuuren then adjourned the proceedings in order to make a written ruling.

[8] On 21 July 2017, commissioner Jansen Van Vuuren then handed down his written ruling concerning the issue of legal representation. He considered the provisions of CCMA Rule 25(1)(c) and relevant case law on the issue. He had particular regard to the fact that the applicant was a qualified attorney. He concluded that overall considered, the fifth respondent had made out a proper case for legal representation to be allowed, and granted the application. He also directed that the arbitration be set down for arbitration before a senior commissioner.

[9] The arbitration was set down on 4 September 2017 before the second respondent, who was a senior commissioner. Both parties submitted bundles of documents, and the arbitration commenced on the merits. The first witness for the fifth respondent, Elizabeth Hughes-Chulu (Hughes-Chulu) testified in chief. She was then extensively cross-examined by the applicant. It was clear from the transcript that the second respondent was having issues with the manner in which the applicant chose to conduct her cross examination, and she then decided to adjourn the matter so the applicant could properly consider her position where it came to further cross-examining this witness. The parties agreed that the arbitration reconvene on 25 October 2017 and the arbitration proceedings were adjourned to that date.

[10] The arbitration indeed reconvened before the second respondent on 25 October 2017. The applicant continued with her cross-examination of Hughes-Chulu. Again, it is apparent from the transcript that the second respondent was still experiencing difficulties with the manner in which the applicant was conducting not only her cross-examination of Hughes-Chulu, but also with the manner in

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which she was conducting herself in general towards the second respondent as arbitrator. The conduct of the applicant caused the second respondent to be compelled to make a number of procedural rulings to bring the proceedings back into line. The cross-examination of Hughes-Chulu by the applicant continued all day on 25 October 2017 and the proceedings adjourned once again to an agreed date, being 29 November 2017.

[11] When the proceedings reconvened on 29 November 2017, the applicant again sought to take on the second respondent. The second respondent had earlier ruled that a finding made by commissioner Janse Van Vuuren in his legal representation ruling was not relevant (admissible) in deciding the merits of the case. The applicant raised the same issue again, stating that the ruling of the second respondent in this regard was a '*mistake*'. After hearing argument on the issue from the parties, the second respondent issued a ruling. She held that the applicant did not respect her authority as a commissioner and also disrespected the fifth respondent as her former employer, considering the manner in which she conducted herself. The second respondent held that the applicant had made a mockery of the arbitration proceedings, and her behaviour was contemptuous. The second respondent concluded that: '*I fear my further involvement in this process will inevitably taint my ability to render a fair objective and just arbitration award …*'. The second respondent then recused herself from the proceedings in terms of a written ruling prepared by her that same day.

[12] With the second respondent having recused herself on 29 November 2017, the fourth respondent then stepped into the picture. He was the senior convening commissioner. It appears that the morning of 29 November 2017 was devoted to the parties attempting to resolve the matter by way of conciliation, as facilitated by the fourth respondent. This proved unsuccessful. The fourth respondent then allocated another senior commissioner, being the third respondent, to arbitrate the matter.

[13] The arbitration then recommenced *de novo* before the third respondent, at just before 13h00 on 29 November 2017. The applicant never raised any objection to this and was satisfied that the arbitration proceed before the third respondent as arbitrator. At the commencement of the hearing, the third respondent

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confirmed with both parties that it was agreed that the hearing commence entirely *de novo* before her. The applicant specifically confirmed that she was in agreement with this. Both parties then gave opening statements *de novo*, and presented bundles of documents to the third respondent. Hughes-Chulu was again called as the fifth respondent's first witness, to give evidence from scratch. She concluded her evidence in chief and the matter adjourned to 30 January 2018.

[14] When the matter reconvened on 30 January 2018, and even though Hughes-Chulu had at the earlier sitting completed her evidence in chief, the fifth respondent's attorney, Scheepers, asked for leave that Hughes-Chulu lead further evidence in chief on further aspects and documents. After once again some debate on the issue with the applicant, the third respondent allowed this. The cross-examination of Hughes-Chulu by the applicant then followed, and was concluded. After Hughes-Chulu completed her testimony, the fifth respondent's next witness, Necodimus Chiphufa testified. The applicant elected not to cross-examine him. The fifth respondent closed its case.

[15] Strangely, and despite all that the applicant had raised in her cross examination of Hughes-Chulu, the applicant elected not to testify. She informed the third respondent that she was going to close her case. The third respondent asked her what about her own testimony. The applicant stated that she was not going to testify. The parties then moved on to closing arguments, which was also concluded on 30 January 2018. The proceedings adjourned for the third respondent to make an award.

[16] The third respondent issued an arbitration award dated 10 February 2018, in which she determined that the applicant's dismissal by the fifth respondent was fair. According to the applicant's own founding affidavit, the award was served on her on 13 February 2018. Her review application was filed on 23 April 2018, however only served on the fifth respondent on 25 April 2018. However, and considering the six weeks' time limit in terms of section 145(1) of the LRA, the review application was due by 28 March 2018. It follows that the review application was four weeks out of time, and thus condonation was required.

[17] The applicant did not bring a proper application for condonation. There is no prayer seeking condonation in her notice of motion. Instead, there is a mere

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paragraph at the end of the founding affidavit, headed '*Ad Condonation*', in which the applicant simply states that the *dies* expired on 9 April 2018 and her review application was eleven days out of time, with the cause of the delay being that she was hospitalized from 13 February to 4 April 2018.

[18] The CCMA filed the record of the proceedings consisting of two compact disks on 4 May 2018. According to the applicant, the Registrar on 9 May 2018 notified the applicant in terms of Rule 7A(5) that the record had been filed and called upon her to uplift the same. The applicant only uplifted the record of the proceedings on 21 May 2018, but does not explain why this took so long. She id say that she then obtained quotes for the transcription of the two compact disks on that same date, and that Lubbe & Meintjies quoted R15 939.00 for the transcription.

[19] The applicant stated that she accepted the quote from Lubbe & Meintjies transcribers, because it was the cheapest. They however wanted a deposit of R9 563.00 to commence with the transcription. The applicant stated that she was unemployed and unable to raise these funds. She also stated that she had to travel to Cape Town at the end of May 2018 for the funeral of her grandmother. The upshot however was that the applicant did nothing to have the record transcribed and did not file the record of the proceedings within the 60 days' time period as prescribed by the Practice Manual.

[20] On 27 August 2018, the applicant filed an application for reinstatement of her review application, and also applied for an extension of time until 15 December 2018 to file the record of the proceedings. She did this without the record even being filed. There is no explanation why the applicant waited until then to bring this application. Importantly however, the applicant conceded that she did not even try and ask the fifth respondent for an extension of time to file the record. She even suggested that the CCMA should pay the costs for the transcription because of the alleged misconduct of the second respondent. Ultimately, the sole basis for seeking the reinstatement of the review application and the extension of the deadline, was an alleged lack of funds.

[21] The fifth respondent took issue with this explanation offered by the applicant, in a Rule 11 application filed on 4 September 2018. It indicated that the applicant was operating her own attorneys' practice throughout. It was clear from the

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document the applicant sent to the CCMA on 27 October 2017 complaining about the second respondent, which was attached to her own founding in the review application, that she already had an attorneys' practice under the name of Eybers attorneys at that time.

[22] The fifth respondent also in its Rule 11 application prayed for the reinstatement application to be dismissed and that the applicant's review application itself be dismissed as it constituted an irregular step. The fifth respondent took issue with the fact that the applicant did not seek relief against the fifth respondent *per se*. The fifth respondent also complained that it was irregular for the applicant not to first approach it for an extension of time before making the reinstatement application. The fifth respondent also objected to the extension until 15 December 2018 sought by the applicant to file the record, contending there was no basis for such an extension.

[23] The applicant filed an answer to the fifth respondent's Rule 11 application on 28 September 2018. She disputed that her review application was irregular. She stated that she was entitled to challenge conduct of the second, third and fourth respondents as CCMA functionaries, without specifically asking for relief against the fifth respondent, as all she wanted was for the arbitration proceedings to be conducted *de novo*. The fifth respondent filed a relying affidavit on 3 October 2018, but this did not add anything new to the debate.

[24] Without having been granted any extension of time, the applicant then simply served and filed the transcription on 13 December 2018. There is no explanation of why it took until then to file the transcription. Worse still, the applicant did not file the documentary record of the proceedings, consisting of the bundles of documents and pre-arbitration minute submitted in the arbitration proceedings before the third respondent.

[25] On 7 March 2019, the third respondent filed its answering affidavit in terms of Rue 7A(9) to the applicant's review application. In this answering affidavit, the fifth respondent referred to earlier correspondence it had sent the applicant in January 2019, in which it specifically alerted the applicant about the defects in the record that she had filed. In particular, it was specifically pointed out in this letter that the applicant had failed to file the documentary record of the proceedings in the form of the bundles submitted by the parties. The fifth

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respondent also referred to the fact that it had never been served with a notice as contemplated by Rue 7A(8)(b), by the applicant. This letter was attached to the answering affidavit. The applicant never reacted to this letter, nor did she seek to remedy any of the defects referred to by the fifth respondent. This answering affidavit by the fifth respondent was the final pleading filed in this case.

The late review

[26] I will first deal with the late filing of the review application. It must first be said that the review application can only be considered to have been properly brought once it was both served on the respondent parties and filed in Court. Even though the review application was filed in Court on 23 April 2018, it was only served on the fifth respondent on 25 April 2018. It follows that the review application was only actually brought on 25 April 2018.

[27] The time limit of six weeks as contemplated by section 145(1) of the LRA applies from the date when the applicant received the award. On her own version, that was 13 February 2018. The six weeks' time limit is calculated based on the civil method of calculation, which includes the first day and excludes the last day, and includes weekends and public holidays. Applying this method of calculation, the review application was due on 28 March 2018. Considering it was only properly served and filed on 25 April 2018, the review application is four weeks late. Where it comes to review applications, this is bordering on becoming excessive, and certainly requires a proper explanation.

[28] In order to regularize the late filing of the review application, the applicant needed to apply for condonation. A condonation application must be brought on motion, and supported by affidavit. The requirements that must be addressed by an applicant in the supporting affidavit for condonation are trite. In the well-known judgment of *Melane v Santam Insurance Co Ltd*[3] the Court held that these requirements are the length of the delay, the explanation for the delay, the importance of the case (prejudice) and the prospects of success. These requirements are interrelated, and must be holistically considered, with the

[3] 1962 (4) SA 531 (A) at 532C-E.

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proviso that if there is no explanation for the delay, then the prospects of success may well become irrelevant.[4]

[29] In dealing with an application for condonation specifically where it came to the late filing of a review application, the Labour Appeal Court (LAC) in *A Hardrodt (SA) (Pty) Ltd v Behardien and Others*[5] referred with approval to the judgment in *Queenstown Fuel Distributors CC v Labuschagne NO and Others*[6] and said:

> 'The principles laid down in that case included, firstly that there must be good cause for condonation in the sense that the reasons tendered for the delay had to be convincing. In other words the excuse for non-compliance with the six-week time period had to be compelling. Secondly, the court held that the prospects of success of the appellant in the proceedings would need to be strong. The court qualified this by stipulating that the exclusion of the appellant's case had to be very serious, ie of the kind that resulted in a miscarriage of justice.'

It follows that the condonation requirements in the case of the late filing of a review application are applied much more stringently than normally would be the case.

[30] Finally, any application for condonation must be considered in the context of the imperative of the expeditious resolution of employment disputes. In *Food and Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd*[7] the Court said:

> '… Our courts have, on occasion, pronounced on the importance of labour disputes to be conducted with expedition. For example, in *National Research Foundation* the Labour Court held:
>
> > '[15] It is now trite that there exists a particular requirement of expedition where it comes to the prosecution of employment law disputes. …'

[31] Applying all the above *in casu*, the first difficulty the applicant has is that she did not make a proper application for condonation in the first place. Her notice of

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[4] See *Moila v Shai No and Others* (2007) 28 ILJ 1028 (LAC) at para 34; *Colett v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 1948 (LAC) at para 38.
[5] (2002) 23 ILJ 1229 (LAC) at para 4.
[6] (2000) 21 ILJ 166 (LAC).
[7] (2018) 39 ILJ 1213 (CC) at para 187. See also *National Education Health and Allied Workers Union v University of Cape Town and Others* (2003) 24 *ILJ* 95 (CC) at para 31.

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motion does not contain a prayer in terms of which she asks for condonation to be granted. The fifth respondent is thus not alerted in the notice of motion to the fact that the applicant would be seeking condonation and that the fifth respondent would be entitled to oppose such relief, which is required by Rule 7, in terms of which any application for condonation must be brought. In the absence of this, it would not be proper for this Court to decide the issue of condonation. In *Booysen Bore Drilling (Pty) Ltd v National Union of Mineworkers and Others*[8] the Court said:

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

[32] Without a proper application for condonation being made, the applicant's review application is doomed to fail on this basis alone. As held in *SA Transport and Allied Workers Union and Another v Tokiso Dispute Settlement and Others*[9]:

> '… where the steps constitutes a jurisdictional step, a time-limit, and the party is out of time then, in the absence of an application for condonation, a court cannot come to the party's assistance. …'

[33] All that the applicant did, almost in passing, is to include a paragraph at the end of her founding affidavit headed '*Ad Condonation*' in which the applicant simply states that the dies expired on 9 April 2018, her review application was eleven days out of time, and the cause of the delay was that she was hospitalized from 13 February to 4 April 2018. Being as generous to the applicant as possible, I will nonetheless consider this single paragraph in the applicant's founding affidavit as it stands as being a request for condonation.

[34] Starting with the length of the delay, the applicant simply states that the delay is eleven days. This is not correct. The applicant's bald statement that the *dies*

[8] (2011) 32 ILJ 2075 (LAC) at para 13.
[9] (2015) 36 ILJ 1841 (LAC) at para 18.

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expired on 9 April 2018 is without foundation, and clearly wrong. It is also unclear how the period from 9 April to 25 April 2018 constitutes 11 days, as suggested by the applicant, when it is actually 16 days. In the end, the delay is four weeks. The manner in which the applicant dealt with the length of the delay is not a good start for the applicant where it comes to the issue of condonation.

[35] The applicant's only explanation for the delay was that she was hospitalized from 13 February 2018 (by coincidence the same day when she received the award), until 4 April 2018, and as result, she could not attend to the review application. She then attached, to her founding affidavit, what purports to be a medical certificate, in support of this contention.

[36] There are a number of difficulties with this singular explanation of the applicant. First and foremost, the medical certificate itself, on the face thereof as it stands, does not support the applicant's version. According to this document, which was only issued on 4 April 2018, the applicant was admitted to Weskoppies Hospital on 12 March 2018 and not 13 February 2018 as she alleges in her affidavit. It follows that the reference to 13 February 2018 in the founding affidavit must be false. Second, and especially considering the applicant is a practising attorney, she should know that the mere production of such a medical certificate is simply not sufficient when seeking to make out a case for condonation. She needed to provide a supporting affidavit by the medical practitioner concerned, confirming the medical certificate and indicating how the applicant's medical condition may have affected her ability to prosecute her review application. In *Mgobhozi v Naidoo NO and Others*[10] the Court dealt with an application for condonation where the explanation relied on a psychological condition (certainly comparable to the case *in casu*). The Court in *Mgobhozi* held that an affidavit had to be submitted to substantiate the explanation alluded to in the medical certificate,[11] and then concluded that a delay was unexplained in the absence of such an affidavit, reasoning as follows:[12]

> '… I cite but one example, namely that the appellant is alleged to have suffered from sane automatism for seven months. Even the most cursory research into

[10] (2006) 27 ILJ 786 (LAC).
[11] Id at para 25.
[12] Id at para 29. See also *Minya v SA Post Office Ltd and Others* (2021) 42 ILJ 141 (LC) at para 24; *HC Heat Exchangers (Pty) Ltd v Araujo and Others* [2020] 3 BLLR 280 (LC) at para 81; *Value Logistics Ltd v Basson and Others* (2011) 32 ILJ 2552 (LC) at fn 2.

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> the law reports on the topic of sane automatism and its use as a defence in criminal proceedings would reveal that it is a complex condition, requiring the assistance to the court of specialist psychiatrists, with a special interest in the field. For it to continue for seven months seems most incongruous. But that was for the appellant to explain to the Labour Court in acceptable fashion via affidavits from psychiatrists, not for the Labour Court or this court to speculate.'

[37] The applicant also did not explain what she did from 4 April 2018 until her review application was finally filed on 23 April and served on 25 April 2018. She needed to deal with this period as well. There is no explanation why, considering the content of the founding affidavit in the review application, this would reasonably take some three weeks to do, especially with the applicant knowing the review application was already late. The upshot of the above is that the entire period of time it took the applicant to bring the application, as from the date when she received the arbitration award, is in reality unexplained.

[38] As touched on above, an unexplained delay has the unfortunate consequence that the issue of prospects of success become irrelevant. As succinctly said in *NUM v Council for Mineral Technology*[13]:

> '… [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 …'

[39] I am convinced that the applicant approached the condonation application on the basis that condonation was simply there for the asking. This approach is entirely misdirected. In this regard, I can do little better than to refer what was said in *Seatlolo and Others v Entertainment Logistics Service (A Division of Gallo Africa Ltd)*[14]:

> 'It is trite law that condonation should only be granted where the legal requirements have been met and is not a default option. It remains an indulgence granted by a court exercising its discretion whilst being cognizant of the criticism emanating from the Constitutional Court and the SCA and bearing in mind the primary objective of the expeditious resolution of disputes articulated in the Act.'

[13] [1999] 3 BLLR 209 (LAC) at para 10.
[14] (2011) 32 ILJ 2206 (LC) at para 27.

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

[41] However, and in order to be complete in dealing with this matter, the issue of condonation for the late filing of the review application is not the only basis upon which the applicant is non-suited, where it comes to her review application. I will next deal with her failures where it comes to the Practice Manual of this Court.

The Practice Manual

[42] A critical component of any review application is the record of the proceedings before the CCMA. In this regard, the Practice Manual contains a number of specific prescriptions where it comes to this record. Firstly, and once the CCMA (or bargaining council if applicable) files the record of the proceeding with the Labour Court in terms of Rule 7A(2) and (3),[15] the Registrar in turn notifies the applicant party in terms of Rule 7A(5) that the record has been received.[16] Clause 11.2.1 of the Practice Manual then requires the applicant to uplift the record within seven days of being so notified by the Registrar. In addition, clause 11.2.2 requires the applicant to formally serve and the record in terms of Rule 7A(6) within 60 days of having been informed by the Registrar that the record has been received and must be uplifted.

[43] The failure to file the record within the 60 days' time limit under clause 11.2.2 has consequences. These consequences are set out in clause 11.2.3 as follows:

[15] Rule 7A(3) reads: '*The person or body upon whom a notice of motion in terms of subrule (2) is served must timeously comply with the direction in the notice of motion*'. The direction in Rule 7A(2)(b) provides for ten days to file the record of the proceedings.
[16] Rule 7A(5) provides that the Registrar must make the record available to the review applicant.

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> 'If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given. If consent is refused, the applicant may, on notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties, and answering and replying affidavits may be filed within the time limits prescribed by Rule 7. The Judge President will then allocate the file to a judge for a ruling, to be made in chambers, on any extension of time that the respondent should be afforded to file the record.'

[44] The timeous prosecution of review applications also has another nuance. Because of the essential requirement of expedition in employment law disputes, review applications are considered to be urgent in nature. From this, it follows that there is a further time limit that is prescribed within which review applications must be prosecuted to finality. In this respect, clause 11.2.7 provides as follows:

> 'A review application is by its nature an urgent application. An applicant in a review application is therefore required to ensure that all the necessary papers in the application are filed within twelve (12) months of the date of the launch of the application (excluding Heads of Arguments) and the registrar is informed in writing that the application is ready for allocation for hearing. Where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown why the application should not to be archived or be removed from the archive.'

[45] Turning to the matter *in casu*, the CCMA filed the record of the proceedings on 4 May 2018. On the applicant's own version, she was informed by the Registrar on 9 May 2018 to uplift the record of the proceedings. Shen the states that she only uplifted the same on 21 May 2018. This is already in contravention of clause 11.2.1 of the Practice Manual, which prescribes upliftment in seven days. This failure is not explained.

[46] The applicant obtained a quote for the transcription of the record the same day she uplifted it, being 21 May 2018. In terms of the quote, it would take five weeks

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to complete the transcription and the applicant was required to pay a deposit of R9 563.20. She did not pay the deposit at the time and she does not even say when she paid it. She must have paid it at some point, considering that a transcript was ultimately provided. She also offers no explanation of any steps she attempted to take to secure the necessary funds. In short, there are no indications provided by the applicant of what she did to ensure that the record was filed within the 60 days' time limit prescribed by clause 11.2.2.

[47] The 60 days' time limit is calculated on the basis of week ends and public holidays being excluded.[17] Therefore, this time limit in this instance expired on 2 August 2018. The applicant did not file the record by this deadline. On her own version, she also deliberately decided not to seek the consent of the fifth respondent to extend the deadline within which she could file the record. Accordingly, and as from 3 August 2018, the applicant's review application was considered to have been withdrawn. As held in *SA Municipal Workers Union on behalf of Mlalandle v SA Local Government Bargaining Council and Others*[18]:

> 'Clause 11.2.3 of the Practice Manual makes it clear that if the applicant fails to file the record of proceedings within the prescribed period of 60 days, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been granted …'

[48] On 27 August 2018, the applicant filed an application for reinstatement of her review application, also containing an application to extend the deadline within which to file the record. She offered no explanation why she waited until 27 August 2018 to file this application and did not act proactively prior to the expiring of the deadline.

[49] I have difficulty with the approach adopted by the applicant with regard to seeking to extend the deadline. Clause 11.2.3 is undoubtedly, in my view, intended to be proactive. It specifically provides for extension of time by way consent being sought from the other party and the Judge President being approached, '*during that period*', referring to the 60 days' deadline. It is simply

[17] See clause 3 of the Practice Manual.
[18] (2017) 38 ILJ 477 (LC) at para 6.4. See also *MJRM Transport Services CC v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 414 (LC) at para 15.

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not appropriate nor competent to wait until the deadline expires and then only try to extend the period. By that time, the review application is already withdrawn, and there is simply no longer an operative deadline that can be extended. All that remains is for the applicant to apply for reinstatement of the review application and condonation for her failure.

[50] The next problem is that the pre-requisite for bringing an application for extension, being that consent was first sought from the fifth respondent and this was then refused, was not adhered to. On her own version, the applicant stated that she deliberately decided not to seek the consent of the fifth respondent, because she assumed that such consent would be refused. This is simply not an acceptable stance to adopt. The subjective assumptions of the applicant, made without any foundation in fact, cannot serve as a basis to contradict the clear scheme provided for in clause 11.2.3. In short, no application for an extension of the deadline was competent until such time as the consent of the fifth respondent for such extension was first sought and refused.

[51] The final problem is the manner in which the applicant sought to bring the application to extend the time period. It simply could not be brought in the form of an ordinary motion to be dealt with in the ordinary course on the motion roll. Again, the application for extension is a proactive measure addressed to the Judge President and is then allocated to a Judge in chambers to deal with. It proactively regularizes the failure to comply with the time limit, by giving more time up front, and thus thereby avoids the deemed withdrawal of the review application in the first place. In *Zono v Minister of Justice and Correctional Services; In Re: Minister of Justice and Correctional Services v Zono and Others*[19] the Court said the following, when dealing with a record that was outstanding for more than five and a half months after the 60 days' time limit expired:

> '… Jele was clearly aware of the deadline, and his failure to meet it. What he fails to explain is why he did not have recourse to the procedure established by clause 11.2.3 as soon as he realised that the record would not be available in time. He did not seek the consent of the employee's attorneys to any

[19] [2020] 11 BLLR 1160 (LC) at para 17. See also *Mlalandle* (*supra*) at para 6.9; *MJRM Transport* (*supra*) at para 21.

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> extension of time within which to file the record, nor did he seek a directive from the Judge President. What clause 1.2.3 affords is a remedy to an applicant in a review when difficulties in filing the record timeously are encountered. All that need to be done is to seek an extension by consent, failing which the Judge President may be approached to issue any directive appropriate in the circumstances, given the particular difficulties that may have been encountered in preparing the record. It is not open to an applicant simply to ignore these remedies and continue with the preparation of the record as if the 60-day time limit did not exist. It should be recalled that in terms of the practice manual, a review application is to be treated with the same degree of urgency and diligence as an urgent application. What the facts disclose in the present instance is an approach that displays no sense of urgency or even any sense of concern that the applicant was in breach of its obligations.'

The exact same sentiments expressed in *Zono supra* apply equally to the conduct of the applicant *in casu*.

[52] It follows that there simply exists no competent and proper application to extend the time limit in terms of clause 11.2.2 in this instance. As a result, the review application was deemed to have been withdrawn as from 3 August 2018, and it remained that way even to the point when it came before me.

[53] This leaves the reinstatement part of the application. It is of course true that a reinstatement application to revive a review application deemed to be withdrawn under clause 11.2.3 can be brought at any time. This application takes the form of a condonation application. As held in *Zono supra*[20]:

> 'An application for reinstatement of a review application deemed to have been withdrawn is, in essence, an application for condonation. It is incumbent on the applicant to show good cause why, in this case, the record of the proceedings under review was not filed within the prescribed time limit. Condonation is not there merely for the asking, nor are applications for condonation a mere formality …'

[54] Because the reinstatement application is in essence a condonation application, the applicant's reinstatement application brought on 27 August 2018 faces what is in my view an insurmountable difficulty. When the application was brought,

[20] Id at para 17.

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the record still had not been filed. Surely, condonation is sought to show good cause why an action taken in contravention to a legal prescript should be allowed. It must follow that the action must already have been taken in order to condone it. *In casu*, it must mean that the record has already been filed and the condonation is intended to validate this action because it was done out of time. It is impossible to ask for condonation for the late filing of the record where the record has still not been filed.

[55] I will illustrate by way of an example. As dealt with above, a review application must be brought within six weeks from the handing down of the arbitration award. Surely a review applicant cannot file a condonation application after seven weeks, seeking to condone the late filing a review application which at that point had still not even been filed. To take the example further, the condonation application filed after seven weeks can only explain the delay until the point when the condonation application was brought. How can this application serve to explain the delay where the review application, for example, is filed only four months after the condonation application itself?

[56] The point is simple. The condonation application provides the required explanation for the delay until the point when the applicant has done what was supposed to have been done earlier. The condonation application cannot be brought to explain a delay that may happen in the future, when it cannot even be said with certainty what the period of this further delay may be and what the explanation for it is.

[57] It is therefore my view that the applicant should only have brought her reinstatement application once she had filed the record. She would then be in a position to provide a proper and substantiated explanation for the entire period it took for her to do so. The Court would also then only be in a position to consider the real extent of the delay, and what prejudice may have resulted therefrom. The reinstatement application brought on 27 August 2018 is therefore premature, and as a result irregular.

[58] However, and even if the applicant's application for reinstatement is considered on the merits thereof, it dismally fails to make out any case as to why such relief should be granted, for the reasons to follow.

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[59] Notwithstanding the fact that it was not competent to do so, for the reasons discussed above, what the applicant wanted was in essence a four months' extension to middle December 2015. The applicant makes out no case why such an excessive extension, which is double the period already allowed, should be permitted. She simply asks for the extension as if it is a matter of right and is there for the mere asking. This completely undermines what is sought to be achieved in clause 11.2 of the Practice Manual, and cannot be allowed.

[60] The only real explanation the applicant did offer is that she was '*in the process of starting*' her own legal practice, and '*things were happening slowly*', resulting in a lack of funds for her to able to file the record. The first problem with this explanation is that it was in my view once again false. The applicant, as has been referred to above, had already started her legal practice at least by October 2017, and she thus could not still be in the process of '*starting it*' as at August 2018, as she alleges. Secondly, the explanation is vague and completely lacking in particularity. She provides no particularity of what income she was generating in the practice, what her expenses were, and why she was unable to afford to simply pay a deposit of just short of R10 000 to get the transcription going. She does not take the Court into her confidence by providing any detail with regard to her personal circumstances. The explanation provided is therefore simply not a proper, nor acceptable, explanation. It was, as described in *Mtshwene v Glencore Operations SA (Pty) Ltd (Lion Ferrochrome)*[21], a '… *nonchalant threadbare explanation for the delay*'.

[61] Even considering the bare essentials of the explanation, being that of a lack of funds, it has been held on numerous occasions in this Court that barring exceptional circumstances, this is no explanation at all.[22] In fact, a lack of funds is surely commonplace with all employees pursuing cases where they have been dismissed. There is nothing unique or exceptional about it. Most litigants, despite such lack of funds, manage to prosecute their disputes within the time

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[21] (2019) 40 ILJ 507 (LAC) at para 15.
[22] See *Jonker v Wireless Payment Systems CC* (2010) 31 ILJ 381 (LC) at paras 16 – 18; *Harley v Bacarac Trading 39 (Pty) Ltd* (2009) 30 ILJ 2085 (LC) at para 8; *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another* (2016) 37 ILJ 2840 (LC) at para 37.

limits prescribed. I consider the following *dictum* from the judgment in *Du Plessis v Wits Health Consortium (Pty) Ltd*[23] as apposite:

> '… a claim of lack of funds on its own cannot constitute reasonable explanation for the delay. In other words, when pleading lack of funds as the cause of the delay, the applicant needs to provide more than a mere claim that the reason for the delay is lack of funds. In this respect, the applicant has to take the Court into his or her confidence in seeking its indulgence by explaining "when" not only that he or she finally raised funds to conduct the case but also how and when did he or she raise those funds. The "when" aspects of the explanation is important as it provided the Courts with the information as to whether there was any further delay after raising the funds and whether an explanation has been provided for such a delay.'

[62] It follows from all of the above that when the applicant filed the record of the proceedings on 13 December 2018, being some four months later, her review application was still withdrawn, with no proper or legitimate attempt to revive it. She should have, at this point, filed a reinstatement and condonation application. In this application, the applicant should then fully and comprehensively explain the entire delay from 21 May 2018 when she uplifted the record, and until 13 December 2018 when she actually filed it, together with addressing all the other condonation principles already discussed above.[24] Her failure to do so meant that the review application always remained withdrawn. In *Zono supra*[25] the Court held:

> '… when a review application lapses, is deemed withdrawn or dismissed in terms of clauses 11.2.3, 11.2.7 or 16.3 respectively, it remains so unless and until the applicant succeeds in an application to reinstate or retrieve the application, thus restoring its status as a pending application …'

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[23] [2013] JOL 30060 (LC) at para 16. See also *Transport & Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd and Others* (2019) 40 ILJ 827 (LAC) at para 23.
[24] See *Ralo v Transnet Port Terminals and Others* (2015) 36 *ILJ* 2653 (LC) at para 11; *MJRM Transport* (*supra*) at para 22.
[25] Id at para 9.

Non-compliance with Rule 7A

[63] The problems of the applicant do not end with the failure to comply with clauses 11.2.2 and 11.2.3 of the Practice Manual. As matters stand, the applicant has still not complied with Rule 7A(6) in that she has still not filed a proper record. All that the applicant has filed is the transcript of entire arbitration proceedings, which even includes the transcript of the arbitration proceedings before the second respondent who recused herself. What however needed to be filed by the applicant, and which she never filed, was the bundles of documents submitted by the parties in the arbitration. A consideration of the transcript of the arbitration proceedings before the third respondent shows that these documents were extensively dealt with in evidence, and referred to by both parties. These documents thus form a critical part of the record of the proceedings in this case.

[64] What makes matters worse is that the fifth respondent, upon being served with the record containing only the transcript as aforesaid, specifically made it clear to the applicant that the record was defective in that she did not file the documentary evidence. Instead of taking this warning to heart, the applicant spurned the same by not even answering the fifth respondent and pushing forward with her application unabated, as it stood. Despite this failure again being raised by the first respondent in its answering affidavit filed on 7 March 2019, the applicant did nothing to remedy this obvious and material defect, by simply filing the documentary evidence. This remained the position until this matter was ultimately set down before me.

[65] Therefore, and when this matter came before me, there was still not a complete record filed, and still no compliance with Rule 7A(8), by the applicant. This then brings clause 11.2.7 of the Practice Manual into play. In terms of this clause, the applicant was required to have filed all the '*necessary papers*' for the prosecution of the review application, within 12 months of the filing of her review application. These '*necessary papers*' in my view include a proper and complete record, as well as the supplementary affidavit in terms of Rule 7A(8)(a) or at least notice as contemplated by Rule 7A(8)(b).[26] Obviously, and *in casu*, the 12

[26] This is a notice filed by the applicant after the record has been filed, to the effect that the applicant stands by its notice of motion and founding affidavit.

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months' period has expired without the applicant having filed these necessary papers. It follows that the applicant's review application must be considered to have been archived and lapsed. This has the same effect as the matter being dismissed.[27] Once again, that was still the case when the matter came before me.

[66] There was no application by the applicant to try and regularize the above state of affairs. It is trite that a failure to comply with clause 11.2.7 of the Practice Manual also requires an application to reinstate the review, which is also in all material respects similar and related to an application for condonation.[28] In *Samuels v Old Mutual Bank*[29] the Court held:

> 'In essence, an application for the retrieval of a file from the archives is a form of an application for condonation for failure to comply with the court rules, time frames and directives. Showing good cause demands that the application be bona fide; that the applicant provides a reasonable explanation which covers the entire period of the default, and show that he/she has reasonable prospects of success in the main application, and lastly, that it is in the interest of justice to grant the order. …'

[67] The applicant has failed to apply for condonation and / or the reinstatement of her review application where it comes to this failure to comply with clause 11.2.7, in line with the *dictum* in *Samuels supra*. This has the consequence, as described in *Macsteel Trading Wadeville v Van der Merwe NO and Others*[30] as follows:

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[27] See clause 16.3 of the Practice Manual, which provides '*Where a file has been placed in archives, it shall have the same consequences as to further conduct by any respondent party as to the matter having been dismissed*.'

[28] See clause 16.2 of the Practice Manual, which reads: '*A party to a dispute in which the file has been archived may submit an application, on affidavit, for the retrieval of the file, on notice to all other parties to the dispute. The provisions of Rule 7 will apply to an application brought in terms of this provision'*. See also *Matsha and Others v Public Health and Social Development Sectoral Bargaining Council and Others* (2019) 40 ILJ 2565 (LC) at para 24; *Mthembu v Commission for Conciliation, Mediation and Arbitration and Others* (2020) 41 ILJ 1168 (LC) at para 10.

[29] (2017) 38 ILJ 1790 (LAC) at para 17.

[30] (2019) 40 ILJ 798 (LAC) at para 25.

> 'As indicated, the review application was archived and regarded as lapsed as a result of NUMSA's failure to comply with the Practice Manual. There was also no substantive application for reinstatement of the review application, and no condonation sought for the undue delay in filing the record. As contended for by Macsteel, the Labour Court was, as a matter of law, obliged to strike the matter from the roll on the grounds of lack of jurisdiction …'

[68] The end result of all of this is that as matters now stand, the applicant's review application has been archived and has lapsed. The applicant has not applied for condonation, nor attempted to show good cause, in order to have her review application reinstated and properly placed before this Court for determination. As such, there is no review application properly before this Court to consider, and this Court has no jurisdiction to entertain the same.

Conclusion

[69] Based on all the reasons as set out above, the applicant's review application is fatally flawed. In sum, the reasons for this are: (1) the review application has been brought out of time, without a proper application for condonation; (2) even if the applicant's founding affidavit is considered to advance an application for condonation, the applicant has nonetheless failed to make out a case for condonation and thus condonation must be refused; (3) the applicant has failed to comply with clauses 11.2.2, 11.2.3 and 11.2.7 of the Practice Manual resulting in the review application being considered withdrawn and / or lapsed and / or archived; (4) the applicant has failed to make proper application for the reinstatement of her review application; and (5) the applicant has in any event not shown good cause as to why her review application should be reinstated and / or removed from archives.

[70] Holistically considered, it is my view that the conduct of the applicant *in casu* is indicative of a litigant that remained inactive for lengthy periods, acted when it suited her and how it suited her, with complete impunity where it comes to the LRA, the Rules of Court, the Practice Manual and the interests of the other party.[31] In this regard, the following *dictum* from the judgment in *Moraka v*

[31] See *National Education Health and Allied Workers Union on behalf of Leduka v National Research Foundation* (2017) 38 ILJ 430 (LC) at para 43; *Zono* (*supra*) at para 25.

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National Bargaining Council for the Chemical Industry and Others[32] is most apposite *in casu*, where the Court said:

> 'A significant consideration in deciding whether or not to dismiss this review application is the casual approach adopted to the litigation by the applicant which indicates that he viewed it as a matter that could be returned to from time to time when he or his representatives chose to do so. Such long periods of inactivity cannot be reconciled with the conduct of a party that has a consistent interest in pursuing a case and takes the necessary steps to do so without undue delay.'

[71] As a result of the aforesaid, this Court has no jurisdiction to entertain the applicant's review application. That being the case, the next question is where to now? *In casu*, the fifth respondent has brought an application in terms of Rule 11 to finally dismiss the review application based on all these failures referred to above. There is no reason why this relief cannot be granted. As held in *Macsteel supra*[33]:

> 'Macsteel had raised NUMSA's undue delay in prosecuting the review application in its answering affidavit in the review application, but since that application had in effect lapsed and been archived, the Labour Court had no jurisdiction to determine the issue of the undue delay raised there. In the circumstances, Macsteel would have been required to bring a separate rule 11 application for the review application to be dismissed or struck from the roll on the grounds of NUMSA's undue delay in prosecuting it. But a rule 11 application was not a prerequisite for the Labour Court, in this particular instance, to consider whether, on the grounds of undue delay, the review application should be dismissed or struck from the roll.'

[72] I also wish to address a number of issues which in my view should equally propel the applicant's review application into deserved extinction. First, the applicant seeks to review and set aside the decision of the second respondent to recuse herself. One must immediately ask to what end this should be done. As I raised with the applicant, and which she simply could not answer, even if one sets aside the recusal ruling, this leaves is still a complete *de novo*

[32] (2011) 32 ILJ 667 (LC) at para 20.
[33] (2019) 40 ILJ 798 (LAC) at para 24. See also *Mthembu* (*supra*) at paras 10.3 – 10.4; *Matsha* (*supra*) at para 24.

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arbitration before the third respondent as a totally new senior commissioner, which happened with the agreement of the applicant herself. There is simply no point to burden this Court by requiring it to consider the decision of the second respondent to recuse herself. It is an exercise in futility.

[73] The applicant's application to review and set aside the 'conduct' of the fourth respondent in attempting to conciliate the matter on 29 November 2017 is equally ill fated. The fourth respondent was the convening commissioner who simply tried to settle the matter before allocating a new commissioner after the second respondent recused herself.[34] He did not make any determination where it came to the merits of this matter. In the end, all that the fourth respondent did, after he was unable to resolve the matter, was to allocate a new senior commissioner, being the third respondent, to deal with the matter. There can be nothing wrong with this conduct. There is simply no review case to consider in this regard, as this has zero impact on any ultimate outcome.

[74] This leaves only the arbitration award of the third respondent dated 10 February 2018. The applicant challenges this award on a number of spurious grounds. One of these is that the third respondent wrongly described the fifth respondent in the award. This is nothing but grasping at straws, and is simply not the kind of error that has any impact on the validity of the award. The applicant's statement in her founding affidavit that the third respondent is '*put to the proof of whose award it is and who the parties in the said award are*', is entirely facetious and uncalled for. The applicant is well aware that the award was made in the unfair dismissal dispute between her and her former employer (the fifth respondent), pursuant to an arbitration conducted before the third respondent.

[75] The applicant's refusal to testify in the arbitration before the third respondent also did not do her any favours. The end result is that she did not put up a version. Also, none of the propositions she put to Hughes-Chulu as being her version and case was never substantiated in evidence. It is thus unlikely that any factual findings made by the third respondent could be seen to be unreasonable. But even if it can be said that the applicant had an arguable case in where it comes to the award of the third respondent against her, on the merits

[34] It is permitted by the LRA to revert to conciliation even if arbitration proceedings have been convened – see section 138(3).

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thereof, it is my view that the following *dictum* in *Ferreira v Die Burger*[35] would find application:

> 'I am sympathetic to the fact that the applicant may have a case but, were we to grant this application, this court would subvert a crucial principle in matters which deal with personal relationships, namely labour relations, that these disputes have to be dealt with expeditiously and finalized as quickly as possible. Where in a case such as this, there has been so flagrant of violation of the rules, then, as Myburgh JP correctly decided, a lack of any explanation at all shrugs off other considerations.'

[76] In conclusion, and in the end, none of the applicant's contentions on the merits of her review application matter, because this Court simply has no jurisdiction to entertain the same in the first place. Accordingly, the applicant's review application must be dismissed for want of jurisdiction.

Costs

[77] This then leaves only the issue of costs. In terms of the provisions of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. Reference is also made to what the Constitutional Court said with regard to costs in employment disputes as expressed in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[36]. In exercising this judicial discretion, the same Court re-affirmed the principle set in *Zungu supra* and stated that '*when making an adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties.*'[37]

[78] In exercising my discretion, I do believe the current state of affairs was caused by the applicant herself.[38] I did consider making a costs award against the applicant for her approach to, and attitude during, the prosecution of her review application, especially considering she is a practising attorney. Overall considered, the applicant did conduct herself in an unacceptable manner. Whilst the fifth respondent did ask for a costs order, it did not strongly motivate the request. I have also considered the applicant's personal circumstances. In my

[35] (2008) 29 ILJ 1704 (LAC) at para 8.
[36] (2018) 39 ILJ 523 (CC) at para 25.
[37] *Long v South African Breweries (Pty) Ltd and Others* (2019) 40 ILJ 965 (CC) at para 30.
[38] See *Ralo* (*supra*) at para 12.

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view, the scales where it comes to costs are equally balanced, and as such, the ordinary principle as set out in *Zungu supra* should carry the day. Overall considered, my sense of fairness in this case leaves me convinced that no order as to costs is appropriate.

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

Order

1. The fifth respondent's application in terms of Rule 11 of the Labour Court Rules is granted.

2. The applicant's review application is dismissed for want of jurisdiction of the Labour Court to consider the application.

3. There is no order as to costs.

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S. Snyman

Acting Judge of the Labour Court of South Africa

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Appearances:

For the Applicant:	In person
For the Fifth Respondent:	Mr M Scheepers of Marius Scheepers & Co Attorneys

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