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(1) REPORTABLE: ~~YES~~/NO.
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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2034/2022
JR2547/2021

In the matter between:

L DE LIMA CARRIERS CC	**Applicant**
and	
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER S SITHOLE	**Second Respondent**
NBCRFLI	**Third Respondent**
SATAWU	**Fourth Respondent**

Heard: 21 August 2025

Delivered: 29 August 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for handing down judgment is deemed to be 29 August 2025.

JUDGMENT

DE KOCK, AJ

Introduction

[1] This matter came before the court as an application to have an archived file retrieved from archive, and for the review application to be reinstated. The applicant brought an application for retrieval/reinstatement under a separate case number that was allocated to the review application, i.e., under case number JR2034/2022. The application for review has been brought under case number JR2547/2021.

Background to archiving

[2] The second respondent issued a demarcation award on or about 11 October 2021 finding that the applicant and its employees fall within the registered scope of the third respondent. The applicant claims that the award was received on 12 October 2021. The applicant, on 30 November 2021, delivered an application for the review of the award. The applicant claims that the review application was delivered within the prescribed 6-week period. However, upon calculating the 6 weeks from 12 October 2021, the review application had to be delivered on or about 23 November 2021. There is no application for condonation for the late delivery of the review application.

[3] Mr. Pienaar conceded during arguments that the record of the arbitration proceedings was made available around 8 December 2021. There is no evidence before this court what specific actions the applicant took from being notified on 8 December 2021 that the arbitration record is made available other than stating that they were waiting for the transcribed record, which was provided on 19 May 2022.

[4] On 30 May 2022, a period of six months went past without the applicant taking any further steps in prosecuting the review application from the date of filing the

application. Clause 16.1 of the Practice Manual[1] states that the registrar will archive a file if no steps are taken for a period of six months. On 13 June 2022, some 14 days after expiry of the 6-month period referred to in clause 16.1, the applicant emailed notices in terms of rule 7A (6) and (8) of the previous Labour Court rules. These notices, and the supplementary affidavit, were placed in the court file on 5 July 2022. The fourth respondent disputes that the said notices and supplementary affidavit were served on them via email. The applicant failed to deliver a replying affidavit, and this court must therefore accept that the applicant failed to serve same on the fourth respondent.

[5] The fourth respondent, on 15 June 2022, delivered a notice to archive. This notice was delivered 2 days after the notices in terms of rule 7A (6) and (8) were sent via email. As stated already, the fourth respondent did not receive the email of 13 June 2022. The applicant did not challenge the request to the court for the review application to be archived. Following receipt of the notice to archive the review application, Sethene AJ ordered, on 5 August 2022, that the application is archived in terms of paragraph 16.1 of the Practice Manuel applicable at the time.

[6] The applicant, on or about 14 September 2022, delivered a rule 11-application, seeking an order that the review application be revived. The application was opposed, albeit long after the application was delivered. The application was eventually set down and heard before this court on 21 August 2025 and postponed to 22 August 2025 to allow the applicant's attorneys to properly index and paginate the court file. It is unfortunate that the rule 11-application was only allocated a date nearly three years after the application was delivered, which can only be due to the backlog of matters in the Johannesburg Labour Court. The parties cannot be blamed for this 3-year delay.

[1] Practice Manual of the Labour Court of South Africa, effective, 1 April 2013. The Practice Manual has been repealed by the new Rules of the Labour Court that came into effect on 17 July 2024.

Reasons advanced in support of rule 11-application

[7] The applicant states that they only received the transcribed records from the transcribers on 19 May 2022. The applicant served the notices in terms of rule 7A (6) and (8) via email on 13 June 2022, although the fourth respondent's version that it was not emailed to them must be accepted. No explanation is provided why it took the applicant some 25 days to send the notices via email. Had they delivered same on 19 May 2022 when they received the transcribed record, and more specifically also on the fourth respondent, the applicant would not have fallen foul of the 6-months referred to in clause 16.1.

Applicant's submissions regarding merits on review

[8] The applicant states that it has excellent prospects of success on review. The second respondent made pertinent errors in law, which renders the award reviewable. The drivers pertinent to the matter signed employment contracts with Lima Carriers CC, a registered close corporation in the Republic of Namibia, who were not cited in the arbitration proceedings. The second respondent made a factual finding that the first respondent has jurisdiction to arbitrate the dispute on fatal misdirection in law, as the drivers signed contracts with the Namibian company. The second respondent made a finding on jurisdiction with no witness testimony having been given at the *in limine*-hearing. The employees' workplace was not within the territorial boundaries of South Africa. It is alleged that it was common cause that the drivers only entered South Africa to pick up cargo, refuel and leave for their locations in various African countries. It is submitted that since the operations and work of the employees were outside of South Africa, the CCMA does not have jurisdiction.

[9] In respect of the evidence of Mr. Phiri, who was employed by the applicant in 2001, it was submitted that his evidence cannot carry any weight in determining the sector the applicant resonates under. The second respondent was further not required to make a factual finding on the employment relationship of the drivers, but to conduct a factual inquiry into the demarcation of the applicant. It is alleged

that it was never disputed that the drivers were employed by Lima CC Namibia, who has a service level agreement with the applicant whereby Lima CC Namibia provides drivers to the applicant on a labour broker basis. The provisions of the Labour Relations Act[2] (LRA) do not apply to Lima CC Namibia.

[10] It is alleged that it is common cause that the drivers were paid from Namibian bank accounts, social security and other statutory payments were paid to the Namibian government. The drivers never received work permits to work in South Africa. The only time spent in South Africa was to pick up cargo from the port in Durban, to refuel and service the trucks in Meyerton whereafter the drivers would depart to their respective destinations in Africa. The second respondent was required to conduct a factual enquiry and her decision that the applicant resonates under the scope of the third respondent was a decision that a reasonable decision-maker could not reach.

Applicant's submissions regarding delay in prosecution not excessive

[11] The applicant submits that they waited for the transcribed records and that any failure to comply with the practice manual were not *mala fide*. The review is not a paper exercise to frustrate the respondents. The rule 7A (6) and (8) notices were filed approximately one month late and therefore the delay is not excessive. The applicant submits that good cause was shown for the application to success given the good prospects of success together with a minimal delay in filing the said notices.

Evaluation

[12] The court notes firstly that the reference to the notices being filed approximately one month late must be considered within the full context of clause 16.1 of the Practice Manuel. There is no evidence placed before this court regarding the delay from 30 November 2021 to 13 June 2022. It is unsatisfactory for an applicant seeking to review an arbitration award to do nothing for more than 6 months after

[2] Act 66 of 1995

the application for review was delivered. Although it may be so that during the period the applicant obviously engaged with the transcribing company, no details are given as to when they did so and how frequently they followed up. In a nutshell, the applicant fails to give any reasonable explanation for this delay.

[13] This is not only a matter of the applicant falling foul of the 6-month period. During the said six months, the applicant was required to uplift the records filed by the first respondent and from the date that the records were uplifted, they had 60 days in which to deliver the notice in terms of rule 7A (6) and thereafter the notice in terms of rule 7A (8). The applicant fails to present any evidence in its founding affidavit regarding the failure to comply with the 60-day period. In terms of clause 11.2.3 of the Practice Manual, if the applicant fails to file the record within 60 days, the applicant will be deemed to have withdrawn the application subject to certain exceptions. None of these exceptions apply in this matter.

[14] There is a contentious issue raised by this court *mero motu* regarding when the 60-day period would have commenced. Mr. Pienaar submitted that the registrar never informed the applicant that the record was available for upliftment. There is no reason why the court should not accept this submission, as there is nothing in the court file indicating that the registrar had done so.

[15] However, the question that must be asked is whether commencement of the 60 days is entirely dependent on the notice issued by the registrar. This can surely not be the case in instances where an applicant, such as in this case, concedes that the record was made available on 8 December 2021. The 60-day period would have commenced on the date that the record was made available to the applicant. To hold otherwise would result in an absurdity in that, even though an applicant was already in receipt of the record, they did not need to worry about the requirement that the record must be delivered within 60 days.

[16] In this regard, the Labour Appeal Court in *Macsteel Trading Wadeville v Francois van der Merwe N.O and Other*[3] (*Macsteel*) affirmed the Labour Court's residual discretion to apply and interpret the provisions of the Practice Manual, contingent on the merits of each case. This court as such accepts that the 60-day requirement in which the record had to be transcribed commenced on the day that the applicant was provided with the record, i.e., on 8 December 2021.

[17] The issue of non-compliance with the 60-day period is directly relevant to an application for revival insofar as the explanation for the delay of more than 6 months is concerned. It is not only a matter of the applicant not doing anything for more than 6 months in terms of prosecuting the review, but also that they failed to comply with the 60-day requirement regarding delivery of the record of the arbitration proceedings. This non-compliance, on its own, led to the review application being deemed to have been withdrawn even before the expiry of the 6-month period based on which the review application was archived. There is no application before this court in respect of the deeming provision contained in clause 12.2.3 of the Practice Manual and on this score alone, the application for revival must fail and the review application is deemed to have been withdrawn.

[18] Clause 11.2.7 of the Practice Manual states that good cause must be shown by a party why an archived file should be removed from the archives. The Labour Appeal Court in *Samuels v Old Mutual*[4] *(Old Mutual)* held that there is therefore no doubt that showing good cause is a requirement for a file to be removed or retrieved from the archives. The court held further that, 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, timeframes 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 shows 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. The court noted, however,

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[3] (2019) 40 ILJ 798 (LAC) (*Macsteel)*
[4] (2017) 38 ILJ 1790 (LAC) at para 16

that it is not a requirement that the applicant must deal fully with the merits of the dispute to establish reasonable prospects of success. It is sufficient to set out facts which, if established, would result in his/her success. In the end, the decision to grant or refuse condonation is a discretion to be exercised by the court hearing the application which must be judiciously exercised.[5]

[19] The Labour Appeal Court in *City of Tshwane Metropolitan Municipality v SALGBC, T Makhubele, SAMWU obo Members and IMATU obo Members*[6] (*City of* Tshwane) held that the purpose of the Practice Manual, and pertinently, clauses 11.2.3, 11.2.7 and 16.1, is to give effect to the primary object of the LRA and the Rules, which is the expeditious resolution of labour disputes. Hence, the tardiness in the prosecution review applications has serious consequences.[7]

[20] This court must therefore determine the application for revival or reinstatement of the review application in accordance with the case law applicable to condonation applications, and as guided by what the Labour Appeal Court held to be the test in *Old Mutual*.[8] The requirements in relation to an application for condonation are trite and this court does not need to restate the test. It is trite that, in the absence of a reasonable explanation for the delay, this court does not have to consider prospects of success. This court already found that the explanation for the delay is poor if not non-existent. The applicant failed to take the court into its confidence in explaining the delay as from the date that the record was made available to it. Other than what was already stated above regarding the applicant's failure to address the deeming provision in respect of the 60-day period, the absence of any explanation in respect to the 6-month period and the delay thereafter must lead this court to the conclusion that the revival application must fail.

[21] This court will, however, address the applicant's submission that it has excellent prospects of success. This court has considered the submissions made with

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[5] *Id* at para 17
[6] JA57/2024 heard in the Labour Appeal Court on 15 May 2025, and judgment delivered on 12 August 2025
[7] *Id* at para 12. See also *Samuels v Old Mutual* fn 2
[8] See fn 3

regards prospects of success and does not share the applicant's view that they have excellent prospects of success.

[22] The third respondent states in their answering affidavit that the applicant has no prospects of success. The applicant is trying to obscure the true nature of the employment relationship. The second respondent considered the issues relating to the employment contracts and correctly determined that the "substance of the employment relationship supersedes the form". The applicant was determined to be the employer. It is also denied that the employer was not cited as a party to the dispute. The applicant, who was found to be the employer, was cited in the dispute. The second respondent considered the submissions regarding the first respondent's jurisdiction and came to the correct conclusion.

[23] The third respondent submits that the applicant's business is operated from South Africa. The services performed outside of the Republic are performed for the applicant's clients and the drivers are subject to the control and direction of the applicant. The second respondent further considered section 200A of the LRA in terms of which employees earning below the threshold are deemed or presumed to be an employee of the employer if one or more of the factors listed in section 200A are present. The applicant failed to rebut the presumption and admitted to factors which clearly demonstrated that the applicant is the true employer.

[24] The third respondent submits that the second respondent did indeed conduct a factual enquiry into the demarcation of the applicant and its employees and arrived at the correct conclusions. The applicant has dismally failed to demonstrate good cause for the revival of the review application and is attempting to delay the inevitable. It is to be noted that the applicant failed to file a replying affidavit to the third respondent's answering affidavit.

[25] The fourth respondent states in their answering affidavit that the second respondent considered the evidence and correctly concluded that the applicant falls within the jurisdiction of the third respondent, as the applicant's operations are within the borders of South Africa. Reference is made to Mr. Phiri's evidence that

he was employed at the applicant's offices in Meyerton, Gauteng. He testified that he reported for duty at the same address and he performed duties with trucks and trailers that were registered in South Africa. He also testified that in his 20 years of service to the applicant he has never reported for work in Namibia. He also led evidence that he gets paid by the South African ABSA bank with a local branch code and in South African rands, and that he was one of ten drivers for whom the applicant got work permits in 2009. Since then, Mr. Phiri has renewed his permit twice whilst employed by the applicant. The second respondent looked at all the evidence collectively and came to the correct conclusion. Again, this court notes that the applicant failed to deliver a replying affidavit to the fourth respondent's answering affidavit.

[26] Having considered the parties' respective affidavits, and more specifically the arbitration award, this court finds that the applicant's prospects of success are not excellent, as alleged. The second respondent applied the correct test to determine whether the applicant was the true employer of the employees and her finding in this regard, based on the evidence presented, was *prima facie* correct. Much of the applicant's allegations in support of its professed excellent prospects of success are denied with reference to documentary evidence. The evidence of Mr. Phiri in this regard is crucial to the conclusion arrived at by the second respondent.

[27] The court notes that the test of review in this demarcation matter is not based on the "reasonableness test", but on the "correctness test". From the evidence placed before the second respondent, it appears *prima facie* that she arrived at the correct conclusion with a well-reasoned award. The court therefore finds that the applicant's prospects of success in the review application are not sufficient to show good cause for the review application to be revived and/or reinstated, especially given the unexplained delay between 30 November 2021 and 13 June 2022.

[28] The LRA places a premium on the speedy and effective resolution of labour disputes. The Practice Manual provided specific timelines for especially review applications, which must be complied with. As stated already, it is mostly

unfortunate that a 3-year delay occurred before this revival application was set down. The delay caused by the backlog of cases is not, however, relevant to the responsibilities of litigants to comply with prescribed periods in the previous Labour Court rules and in the Practice Manual applicable at the time. But for the non-compliance by the applicant, the review application could potentially have been heard. If the application for review was to be revived, another extensive delay would be experienced before the review application can be heard given the backlog of cases.

[29] It is not in the interest of speedy and effective resolution of disputes, nor in the interest of justice to further delay a matter where the arbitration award was issued during 2021. The last issue that this court considered is the fact that the review application was clearly delivered late, despite the applicant's contention that it was delivered within the 6-week period. Any revival of the review application will result in the applicant having to now seek condonation for the late delivery of the review application nearly four years after the review application was delivered. In the absence of an application for condonation, the review application cannot be determined by this court.

[30] For the reasons stated above, this court finds that the applicant failed to show good cause for the revival or reinstatement of the review application and that the application must be dismissed.

Costs

[31] The dispute in this matter is a demarcation dispute between the applicant and the third respondent. The dispute is not one of an employment relationship between two parties. The third and fourth respondents requested this court to award costs against the applicant. This court can find no reason why the applicant should not be ordered to pay costs.

[32] In the premises, the following order is made:

Order

1. The application for revival or reinstatement of the review application is dismissed.

2. The third and fourth respondents are entitled to have the award certified, if this was not already done, and upon certification, the award will be enforceable as if it were an order of the Labour Court.

3. The applicant is ordered to pay the third and fourth respondents' costs in respect of this application only.

C. de Kock

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	M Pienaar
Instructed by:	Helena Strijdom
For the Third Respondent:	L Hutchinson
Instructed by:	Tricker Inc.
For the Fourth Respondent:	N Masondo from S Mabaso Inc.