THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1117/2024

In the matter between:

VAN DER VYVER TRANSPORT (PTY) LTD **APPELLANT**

and

THE MINISTER OF LABOUR **FIRST RESPONDENT**

THE COMPENSATION COMMISSIONER **SECOND RESPONDENT**

THE DIRECTOR-GENERAL OF THE

DEPARTMENT OF LABOUR **THIRD RESPONDENT**

Neutral citation: *Van der Vyver Transport (Pty) Ltd v The Minister of Labour and Others* (1117/2024) [2026] ZASCA 58 (24 April 2026)

Coram: MAKGOKA, MBATHA and HUGHES JJA and BASSON and KGANYAGO AJJA

Heard: 24 February 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 24 April 2026 at 11h00.

Summary: Administrative law – Promotion of Administrative Justice Act 3 of 2000 – extension of the period for launching review application where no explanation provided for delay - Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA).

ORDER

On appeal from: Western Cape Division of the High Court (Binns-Ward, Slingers and Nziweni JJA sitting as court of appeal):

1 The appeal is dismissed with costs, including costs of two counsel where so employed.

2 The Chief Registrar of this Court is directed to bring this judgment to the attention of:

2.1 the Auditor-General; and

2.2 the Public Protector.

JUDGMENT

Kganyago AJA (Makgoka, Mbatha, Hughes JJA and Basson AJA concurring):

[1] This is an appeal against an order of majority of the full court Western Cape Division of the High Court (the full court) dismissing an appeal by the appellant against the respondents. The appeal before the full court was against an order of the high court, which dismissed the appellant's review application relating to the tariff used to calculate the amounts the appellant contributed annually to the Compensation Fund (the Fund). The high court also dismissed the appellant's application for leave to appeal, which was subsequently granted by this Court to the full court. The majority of the full court dismissed the appeal, while the minority would have upheld the appeal. This appeal is with the special leave of this Court.

The parties

[2] The appellant, Van der Vyver Transport (Pty) Limited (Van der Vyver) is a private transport company registered with the second respondent as an employer in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1994 (COIDA). COIDA is a social security legislation that provides for compensation of work-related injuries and diseases arising out of employment. The Fund is a statutory body established for this purpose.

[3] The first respondent, nominally cited, is the Minister of Labour (the Minister), who is the National Executive of the Department of Labour, and under which COIDA is administered. The second respondent is the Compensation Commissioner (the Commissioner), appointed in terms of s 2(1)*(a)* of COIDA to manage and administer the Fund. The third respondent, the Director-General of the Department of Labour (the Director-General), is the accounting authority of the department. Where reference is made to the respondents collectively, I refer to them as 'the department'.

Relevant legislative provisions

[4] In terms of s 83 of COIDA, employers are obliged annually to pay an assessment amount to the Fund. These payments form part of the Fund established in terms of s 15 of COIDA. The annual assessments are calculated by applying sector-based tariffs to employees' earnings. The Director-General sets standard assessment rates for different sectors of economic activity. Section 85 of COIDA empowers the Director-General to vary those tariffs by way of rebates or loadings based on an employer's accident and claims record relative to comparable employers. The Director-General may apply a lower tariff of assessment if in his or her opinion, an employer's business is run in such a manner which is calculated to minimise workplace accidents, which in turn will

decrease claims against the Fund. Such an employer may be given a ‘rebate’ on its assessment in terms of s 85(3).

[5] Conversely, the Director-General may apply a higher tariff to an employer whose accident record is, in his or her opinion, higher than that of comparable employers. This is known as a ‘loading’ of the tariff. In other words, the higher the accident rate, the higher the tariff, and vice versa. The provision is therefore designed to reward employers with a low accident rate and punish those with a higher accident rate. These assessments are done on a three-year cycle.

Factual background

[6] In 2000, the Director-General imposed a 20% loading on Van der Vyver in terms of s 85(2) of COIDA due to its poor accident and claims record. This position remained until 2003. When Van der Vyver’s accidents did not improve but instead increased and the Director-General in turn increased the loading to 40%. According to Van der Vyver, from 2006 onwards, its accident and claims record materially improved. As a result, from 2009 to 2019 its contributions to the Fund consistently exceeded the claims paid to employees by the Fund.

[7] Despite this sustained improvement, the 40% loading remained unchanged for more than a decade. From 2014 onwards, Van der Vyver and its agent, Workers Compensation Assistance (WCA) made various attempts for the department to either reduce or remove the loading on its assessment tariff rate. These efforts were either ignored or met with responses indicating that s 85 processes were suspended, that the claim costs data were unavailable, and that no timelines could be provided due to audits and systemic failures within the Compensation Fund. In 2015, WCA lodged a complaint with the Public Protector.

In the high court

[8] As no meaningful response was forthcoming from the department, on 25 May 2020, Van der Vyver launched a review application in the high court seeking a declaratory order that the failure by the Director-General to take a decision to re-assess and reduce or remove the loading of Van der Vyver's tariff payable was an unlawful administrative action within the meaning of s 6(2)*(g)* of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Van der Vyver further sought ancillary orders: (a) reassessing the tariff payable by Van der Vyver from 40% to 0% for the years 2015 to 2019; (b) declaring that Van der Vyver overpaid its assessment for the years 2015 to 2019, and that it be reimbursed the overpaid assessment, alternatively that it be given a rebate equivalent to the overpayment which it estimated to be R8 540 259.33; and (c) to condone the delay in bringing review application insofar as it may be necessary.

[9] On 19 November 2020, after it had received the department's record in terms of Rule 53 of the Uniform Rules of Court, Van der Vyver amended its notice of motion to adjust the relief sought. The alleged overpayment was reduced from R8 540 259.33 to R5 524 563.03.

[10] The department opposed the application and justified the legality of the assessments on the basis that they had been properly made in terms of s 83 and 85 of COIDA. Therefore, the tariff was based on a lawful assessment and within the purview of COIDA. In addition to the substantive defence, the department raised two preliminary points. First, that Van der Vyver delayed in bringing the review application. Second, that Van der Vyver had failed to exhaust internal remedies. The department contended that these two points in limine were fatal to the review application.

[11] Regarding the first point, the department noted that Van der Vyver's complaints traversed the period between 2010 and 2019, and the review application was only brought in May 2020. The department averred that Van der Vyver had failed to explain why its application was brought outside the 180-day period required by s 7(1) of PAJA. This found favour with the high court, which held that Van der Vyver had brought the application outside the 180-day period as required by s 7(1) of PAJA, without an application for extension of that period in terms of s 9 of PAJA. The high court dismissed Van der Vyver's application without considering the merits of the application.

Before the full court

[12] As mentioned, the full court was not unanimous.[1] The majority dismissed Van der Vyver's appeal on the basis that the review application was brought outside the 180-days period without an application for an extension of this prescribed period, in addition there was a failure to exhaust internal remedies as required by s 91 of COIDA before instituting the proceedings.

[13] The minority would have upheld the appeal on the basis that condonation for the late filing of the review application was justified in the interests of justice. Regarding the exhaustion of internal remedies, the minority concluded that s 91 was not applicable in the circumstances of this case. The complaint by Van der Vyver was about the Director-General's failure to exercise the discretion vested in him under s 85 of COIDA. Therefore, reasoned the minority, there was no decision by the Director-General to be considered on appeal.

[1] Slingers and Nziweni JJ constituted the majority, whilst Binns-Ward J was the minority.

In this Court

[14] Being a threshold jurisdictional point, the issue concerning Van der Vyver's late review application had to be determined first. Van der Vyver submitted that, because it seeks to review a failure to take a decision, it is unclear when the 180-day period in terms of s 7(1) of PAJA would commence. While there is some force in this submission, it cannot be a licence for an applicant in these circumstances to remain supine. There must be a point at which its inaction should attract the 180-day period.

Discussion

[15] It is common cause that by March 2015, WCA, on behalf of Van der Vyver, had lodged a complaint with the Public Protector concerning the department's failure to reconsider the impugned assessment rate. As of September 2018, three years later, without any positive response from the department, the WCA advised Van der Vyver to consider legal action. At that point it would have been clear to Van der Vyver that a dead end had been reached in its efforts to engage the department on the assessment rate.

[16] During the debate, counsel for Van der Vyver fairly accepted the proposition that the 180-day period started running from that point. Van der Vyver therefore had at the very latest by March 2019, to bring a review application. It only did so in May 2020, some 20 months later. In terms of s 9 of PAJA, the 180-day period may be extended by the court on application where the interests of justice so required. Counsel for Van der Vyver submitted that, notwithstanding the lateness of the application, the period should have been extended.

[17] There was some debate about whether Van der Vyver had applied for an extension of the period. In its notice of motion, Van der Vyver sought, in prayer

7, an order 'condoning the delay in bringing this application to review and set aside the decisions insofar as it may be necessary'. Apart from this, there is no factual basis in the founding affidavit to support this prayer. In its answering affidavit, the department squarely raised the issue of delay and sought the dismissal of the review application on that basis. This afforded an opportunity to Van der Vyver to deal with the issue, albeit in its replying affidavit, however, it elected not to do so. Thus, what was before the high court was merely a prayer to condone the delay, without an explanation for the delay between September 2018 and May 2020.

[18] Applications for an extension of the 180 days under s 9 of PAJA have been treated by our courts essentially as condonation applications. The principles relating to condonation applications are trite. They were restated by the Constitutional Court in *Van Wyk v Unitas Hospital* (*Van Wyk*)[2] as follows: the standard for considering such applications is the interests of justice. Each case must be decided on its own facts. The interests of justice enquiry encompasses, among other things: (a) the nature of the relief sought; (b) the extent and cause of the delay; (c) the effect of the delay on the administration of justice and other litigants; (d) the reasonableness of the explanation for the delay; (e) the importance of the issue to be raised in the intended appeal and (f) the prospects of success.[3] An applicant for condonation must provide a full explanation for the delay, covering the entire period of delay and being reasonable.[4]

[19] In the present case, Van de Vyver does not come out of the starting stalls. It provides no explanation at all for the entire 20-month period of delay. Counsel

[2] *Van Wyk v Unitas Hospital and Another* (*Open Democratic Advice Centre As Amicus Curiae*) [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC).
[3] Ibid para 20.
[4] Ibid para 22.

for Van de Vyver contended that despite this, we should nonetheless consider prospects of success, which, he submitted, could compensate for the lack of explanation for the delay. In addition, to also consider that the founding affidavit sets out all the steps taken by Van der Vyver to engage the department.

[20] In *Van Wyk*, the Constitutional Court observed that 'prospects of success pale into insignificance where . . . there is an inordinate delay coupled with the absence of a reasonable explanation for the delay'.[5] In that case, despite an important constitutional right of access to information arising, the Constitutional Court held that this in itself was no reason to come to the assistance of a litigant who has been dilatory in the conduct of litigation. It accordingly refused condonation and gave little weight to the prospects of success.

[21] The Constitutional Court considered a 20-month delay with no explanation for it – a similar position to the present, in *Khumalo v MEC for Education: KwaZulu-Natal* (*Khumalo*).[6] The MEC challenged the lawfulness of her own department's employment decisions. The issue raised a matter of public importance and interest, concerning the legality of the appointment of personnel in public administration, which, in the words of Skweyiya J, 'raises the enforcement of the rule of law . . .'. Despite indications of strong merits, the Court declined to condone the delay and reasoned:

'The nature of the application and the strength of the merits do not favour overlooking the delay. The delay was unreasonable and unexplained, and although we might ameliorate the consequences of a possible finding of unlawfulness in remedy, the nature of the claim does not warrant condoning the delay.'[7]

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[5] Ibid para 33.

[6] *Khumalo and Another v MEC for Education, KwaZulu Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC).

[7] Ibid para 68.

[22] Van der Vyver is in a weaker position compared to the applicants in *Van Wyk* and *Khumalo*, respectively. Apart from the fact that it provided no explanation at all for its inordinate delay, the issue it raises in the review application neither implicates any constitutional rights, as was the case in *Van Wyk*, nor the rule of law, as was the case in *Khumalo*. Its interest is purely financial, as the ultimate goal is the reimbursement of what it considers a surplus resulting from an overpayment. Van der Vyver does not allege that there are similarly placed employers whose cases hinge on the outcome of the present case. It is also noteworthy that even the minority judgment would have dismissed this part of Van der Vyver's relief.

[23] It is also by no means clear that Van der Vyver has demonstrated strong merits in the review application. It seeks a rebate for what it considers to be a surplus due to 'overpayment'. A rebate is, in terms of s 85(3) only available to an employer whose accident record is more favourable than those of other employers in comparable businesses. There is no provision in COIDA for the payment of a rebate based on any other ground than a comparatively favourable accident record in the same type of business.

[24] There are two further considerations. The first relates to the nature of the discretion exercised by the high court. The second concerns prejudice. As regards the first, the Constitutional Court in *Cape Town City v Aurecon*[8] reaffirmed the exercise of a narrow discretion when a lower court refuses to grant condonation.[9] Thus, the Full Court could only interfere with the High Court's discretion if it was not judicially exercised.[10] Having regard to the

[8] *Cape Town City v Aurecon SA (Pty) Ltd* [2017] ZACC 5; 2017 (6) BCLR 730 (CC); 2017 (4) SA 223 (CC) para 52.
[9] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 88.
[10] *Psychological Society of South Africa v Qwelane* and Others [2016] ZACC 48; 2017 (8) BCLR 1039 (CC) para 42.

judgment of the high court and the reasons underpinning it, there is no suggestion that it did not exercise its discretion judiciously. The full court thus had no basis to interfere with the high court's discretion.

[25] With regard to prejudice, the Constitutional Court aptly observed in *Khumalo* that:

'[T]he passage of a considerable length of time may weaken the ability of a court to assess an instance of unlawfulness on the facts. The clarity and accuracy of decision-makers' memories are bound to decline with time. Documents and evidence may be lost, or destroyed when no longer required to be kept in archives. Thus, the very purpose of a court undertaking the review is potentially undermined where, at the cause of a lengthy delay, its ability to evaluate fully an allegation of illegality is impaired.'[11]

[26] In the present case, the department asserted that it is not possible to recover documents dating back more than five years, thereby precluding review of the information before the Director-General for the years 2010-2018. The department further stated that the only available documents are for 2019. There is nothing to gainsay the department's assertions.

[27] For all these reasons, I find that the majority of the full court was correct to dismiss the appeal. The appeal in this Court must meet the same fate. Given this conclusion, it is not necessary to consider whether Van der Vyver failed to exhaust internal remedies. Costs must follow the result. Given the issues involved, the department's employment of two counsel is warranted.

[28] Before concluding, it is necessary to comment on the state of affairs at the Compensation Commissioner and the conduct of the Director-General. As explained, COIDA is a social security legislation enacted for compensation of workplace injuries, diseases or deaths resulting from such injuries or diseases.

[11] *Khumalo* fn 8 para 48.

The Fund was established in terms of s 15 of COIDA. In terms of s 16(1) of COIDA, the Fund falls under the control of the Director-General. The Fund is the vehicle to compensate injured employees or their dependents in case of death, in the line of duty. Thus, the Fund plays a critical role for the affected employees or their dependents.

[29] Section 195 of the Constitution of the Republic of South Africa, 1996 enshrines basic values and principles governing public administration. These include a high standard of professional ethics; efficiency; impartial, fair, equitable and unbiased provision of services; responsiveness; accountability; and transparency. These principles and values apply to administration in every sphere of government, organs of state, and public enterprises, and thus, the department is enjoined to apply them.

[30] Given the Fund's important legislative mandate and the constitutional injunction of s 195, the disarray and lack of responsiveness in its administration, so clear from the record in these proceedings, are particularly concerning. We deem it necessary for independent bodies to consider investigating its affairs to ensure that the Fund discharges its mandate efficiently and serves the purpose for which it has been established. The Auditor-General and the Public Protector are eminently suited to do so.

[31] The following order is made:

1 The appeal is dismissed with costs, including costs of two counsel where so employed.
2 The Chief Registrar of this Court is directed to bring this judgment to the attention of:
2.1 the Auditor-General; and

2.2 the Public Protector.

MF KGANYAGO

ACTING JUDGE OF APPEAL

Appearances:

For appellant:	SC Kirk-Cohen SC (with him K Reynolds)
Instructed by	Johann Marais & Associates, Stellenbosch Hill, McHardy & Herbst Attorneys, Bloemfontein
For respondents:	MH Mhambi (with him Y April)
Instructed by	State Attorney, Cape Town State Attorney, Bloemfontein.