



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case no: 390/2023

In the matter between:

THEMBAKAZI NTANGAZANA

APPLICANT

and

MEMBER OF THE EXECUTIVE COUNCIL

FOR THE DEPARTMENT OF EDUCATION,

EASTERN CAPE

RESPONDENT

Neutral citation: *Thembakazi Ntangazana v Member of Executive Council for The Department of Education, Eastern Cape* (390/2023) [2025] ZASCA 160 (23 October 2025)

Coram: MOTHLE, HUGHES, KGOELE and BAARTMAN JJA and CHILI AJJA

Heard: 03 September 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand-down are deemed to be 11h00 on 23 October 2025.

Summary: Lapsed reconsideration application in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 – inadequate delay explanation trumped by good

prospects of success – conflicting judgments an exceptional circumstance –
application for leave to appeal reconsidered – matter remitted to the high court.

ORDER

On application for reconsideration: referred by Deputy President Petse in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013:

- 1 The application for condonation is granted, and the referral for reconsideration is reinstated. The applicant is to pay the costs occasioned by the condonation and reinstatement applications, including the costs of counsel where so employed.
- 2 The order dismissing the application for leave to appeal is reconsidered and varied as follows:

‘Leave to appeal is granted to the full court of the Eastern Cape Division of the High Court, Mthatha. Costs to be costs in the appeal.’

JUDGMENT

Baartman JA (Mothle, Hughes and Kgoele JJA and Chili AJJA concurring)

[1] The Eastern Cape Division of the High Court, Mthatha (the high court), per Majiki J, upheld a special plea against the high court’s jurisdiction to entertain Ms Ntangazana’s (the applicant) claim. The high court refused leave to appeal. An unsuccessful application for leave to appeal to this Court followed. On 7 August 2023 the Acting President of this Court referred the decision dismissing the application for leave to appeal for reconsideration and, if necessary, variation. The matter serves before us in terms of s 17(2)(f) of the Superior Courts Act.¹

¹ The Superior Courts Act 10 of 2013.

[2] The facts that gave rise to the dispute are common cause. On 13 May 2016, the MEC for the Department of Education, Eastern Cape (the respondent) advertised a vacancy for an administration clerk at Upper Tabase Junior Secondary School (the school). The applicant in this case was one of several applicants for the vacancy. At the time the respondent advertised the vacancy, the applicant had been employed by the school's governing body in that position. She was unsuccessful, but initiated a dispute that disclosed irregularities in the process. The irregular appointment was reversed and the applicant was appointed. Thereafter, she sued for loss of income on the basis that she was the only suitable candidate and contended that, but for the irregularity, she would have earned a salary from November 2016.

[3] The respondent defended the action and raised an exception to the particulars of claim. Beneke AJ dismissed the exception on 22 October 2019. Thereafter, the respondent raised a special plea to the high court's jurisdiction. On 28 June 2022, Majiki J referred to the finding made by Beneke AJ, in the judgment on the exception, to uphold the special plea of lack of jurisdiction and accordingly dismissed the applicant's claim. The applicant's application for leave to appeal to the high court was dismissed on 15 November 2022.

[4] In this Court the application for leave to appeal was refused by two judges, on the basis that there was 'no reasonable prospect of success in an appeal and there is no other compelling reason why an appeal should be heard.' On 7 August 2023, when the Acting President of this Court referred this matter to be heard by this Court in terms of s 17(2)(f) of the Superior Courts Act, the section provided as follows:

'The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional

circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.’

[5] The section was amended with effect from 3 April 2024 by the deletion of the phrase ‘in exceptional circumstances’ and the substitution thereof with the phrase ‘in circumstances where a grave failure of justice would otherwise result, or the administration of justice may be brought into disrepute’. Section 17(2)(f) ‘keeps the door of justice ajar in order to cure errors or mistakes and for the consideration of a circumstance, which, if it were known at the time of the consideration of the petition, might have yielded a different outcome. It is therefore a means of preventing an injustice.’² A mere repetition of arguments already rejected will not avail an applicant; instead, the section seeks to address the situation where injustice would result if the matter is not reconsidered.³

[6] It is in issue whether there are factors present, other than those that have been dealt with in the high court and on petition by two judges of this Court, which would cause injustice if the order dismissing the application for leave to appeal is not reconsidered.⁴ Before embarking on that enquiry, the status of the appeal needs to be determined. After the Acting President had referred the application for reconsideration, the applicant’s attorneys delayed, for almost a year, in implementing the directives in the referral order. The application had lapsed, therefore the applicant sought condonation and reinstatement of the appeal as follows:

‘1. That the application for reconsideration of the order...refusing leave to appeal and the appeal be re-instated and that the applicant’s non-compliance with the timelines fixed by this

² *Liesching and Others v S* [2016] ZACC 41; 2017 (2) SACR (CC); 2017 (4) BCLR 454 (CC) para 54.

³ *The Lion Match Company (Pty) Ltd v Commissioner, South African Revenue Service* [2025] ZASCA 112.

⁴ See *Bidvest Protea Coin Security (Pty) Ltd v Mabena* [2025] ZASCA 23; 2025 (3) SA 362 (SCA) following *Motsoeneng v South African Broadcasting Corporation Soc Ltd and Others* [2024] ZASCA 80; 2025 (4) SA 122 (SCA).

Court in the order dated 7 August 2023 be condoned. Granting the costs of this application against the applicant on unopposed basis.’

[7] The requirements for condonation and reinstatement are well established.⁵ These include a reasonable and full explanation for the entire period of the delay. The prospects of success in the appeal are also relevant. Recently,⁶ this Court confirmed that weak prospects of success may trump a full and satisfactory explanation for the delay, while good prospects of success may, in appropriate circumstances, excuse an inadequate explanation for the delay.

[8] The applicant proffered the following explanation for the delay: in December 2022, the applicant sought leave to appeal from the high court against its dismissal of her claim by upholding the special plea of jurisdiction. The application for leave to appeal was refused by the high court and on 30 March 2023, this Court dismissed the application for leave to appeal against that refusal. Thereafter, the applicant approached the President of this Court in terms of s 17(2)(f) to have the dismissal of her application for leave to appeal reconsidered. The applicant had, in compliance with the rules of this Court, appointed a correspondent attorney and relied on the latter to give feedback on the progress of the application for reconsideration.

[9] From 7 August 2023, when the Acting President referred this matter for reconsideration to May 2024, the correspondent attorney intermittently advised that no communication had been received from the registrar of this Court, in respect of the application for reconsideration. Therefore, on 30 May 2024, the applicant’s attorney contacted the registrar of this Court to complain about the

⁵ *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others* [2013] ZACC 48; 2014 (5) SA 138 (CC); [2013] 2 All SA 251 (SCA) para 11.

⁶ *National Director of Public Prosecutions v Victor NO and others* [2025] ZASCA 31; 2025 (1) SACR 561 (SCA) paras 8 and 15.

delay. The registrar advised that the order had already been granted on 7 August 2023, nine months earlier (the reconsideration order).

[10] Remarkably, the applicant alleges that on the same day he contacted the Registrar of this Court, he received a copy of the reconsideration order from the correspondent attorney. It was apparent from the order that the Acting President had on 7 August 2023 referred the matter for reconsideration in terms of s 17(2)(f) of the Superior Courts Act. That order directed the applicant to, among others, file six copies of the initial application for leave to appeal within one month of the reconsideration order and file the record within three months of the reconsideration order. None of the prescribed periods were complied with as the applicant only obtained the reconsideration order nine months after it was granted.

[11] The applicant's attorney lays the blame for the delay in obtaining the order at the door of his correspondent attorney, whom he had contacted almost weekly for feedback. However, the applicant's attorney indicated neither the dates nor the method of this communication with his correspondent attorney. Moreover, no affidavit from the correspondent attorney has been filed to explain when the latter received the order. Instead, the applicant's attorney excused his own complacency by alleging that he thought the delay at this Court might have been due to a transition, as the previous President of the Court had been elevated to the Constitutional Court. The attorney claims diligence in that he served the application for condonation and reinstatement on the respondent within one day of receipt of the reconsideration order and three days later, on 7 June 2024, delivered six copies of the application to his correspondent for filing at this Court.

[12] Counsel for the applicant submitted that a reasonable explanation for the nine-month delay had been offered and that the prospects of success were good.

The respondent's counsel, correctly in my view, submitted that the delay was inordinate and not fully explained. It was insufficient to merely allege that the applicant's attorney had made regular contact with his correspondent attorney without the dates on which he had contacted his correspondent attorney, or how the contact had been made. Compounding the inadequacy of the explanation, is the absence of an affidavit from the correspondent attorney explaining what had happened to the order in nine months.

[13] The applicant has not provided a full and frank explanation for the delay. In *National Director of Public Prosecutions v Victor N.O and Others*,⁷ this Court dealt with a situation where leave to appeal had been granted on 3 July 2023; the appellant should have filed the record on 3 November 2023 but instead, only filed on 20 March 2024. The explanation was unsatisfactory. In refusing to reinstate the appeal, this Court said that '[t]he NDPP, therefore, has not established any prospects of success, let alone strong prospects of success in the appeal, that might otherwise have trumped its unsatisfactory explanation for the delay'⁸.

[14] I have found the explanation for the inordinate delay lacking. It follows that the appeal can only be reinstated if the applicant has strong prospects of success on appeal. The applicant alleges good prospects of success in the appeal. I turn to that enquiry. As indicated above, Majiki J dismissed the application for leave to appeal with reference to the Beneke AJ judgment. The latter judgment is not the subject of an appeal in this application. The issue is whether reliance on the Beneke AJ judgment in the circumstances of this matter was correct.

[15] The applicant approached the high court with a claim for loss of income. It was in issue whether the claim was one based on the Labour Relations Act⁹

⁷ *National Director of Public Prosecutions v Victor N.O and Others* fn 6 above.

⁸ *Ibid* para 15.

⁹ Labour Relations Act 66 of 1995.

(LRA), on contract, or on delict. It appears that the claim was dismissed without reference to *Baloyi v Public Protector*,¹⁰ where the Constitutional Court held that the high court's jurisdiction depended on whether the claim was such that the LRA or the Basic Conditions of Employment Act¹¹ (BCEA) conferred exclusive jurisdiction on the Labour Court. The Constitutional Court found that a litigant with a claim in terms of the LRA may prefer to base his/her claim on breach of contract instead of pursuing remedies in terms of the LRA. It appears that this decision was not brought to the attention of the high court, despite the allegation that the applicant's pleaded case did not fall within the exclusive jurisdiction of the Labour Court in terms of s 157(1) of the LRA. The high court appears not to have considered that in *Makhanyana v University of Zululand*, this Court held that:¹²

'Some surprise was expressed in *Chirwa* at the notion that a plaintiff might formulate his or her claim in different ways and thereby bring it before a forum of his or her choice but that surprise seems to me to be misplaced. A plaintiff might indeed formulate a claim in whatever way he or she chooses - though it might end up that the claim is bad. But if a claim, as formulated by the claimant, is enforceable in a particular court, then the plaintiff is entitled to bring it before that court. And if there are two courts before which it might be brought then that should not evoke surprise, because that is the nature of concurrent jurisdiction. It might be that a claim, as formulated, is a bad claim, and it will be dismissed for that reason, but that is another matter.' (Footnotes omitted)

[16] It is apparent, from the limited record before this Court that the applicant holds good prospects of success in the appeal being considered. In the circumstances of this matter, the threshold for reinstatement of the appeal has been met. It follows that condonation should be granted. I turn to consider

¹⁰ *Baloyi v Public Protector and Others* [2020] ZACC 27; 2022 (3) SA 321 (CC); 2021 (2) BCLR 101 (CC); [2021] 4 BLLR 325 (CC); (2021) 42 ILJ 961 (CC); paras 32, 48-50, as referred to by this Court in *National Prosecuting Authority and Others v Public Servants Association and Others* [2021] ZASCA 160; 2022 (3) SA 409 (SCA); [2022] 2 BLLR 174 (SCA); [2022] 1 All SA 353 (SCA); (2022) 43 ILJ 350 (SCA).

¹¹ Basic Conditions of Employment Act 75 of 1997.

¹² See *Makhanya v University of Zululand* [2009] ZASCA 69; 2010 (1) SA 62 (SCA); [2009] 8 BLLR 721 (SCA); [2009] 4 All SA 146 (SCA); (2009) 30 ILJ 1539 (SCA) para 28.

whether there are exceptional circumstances to reconsider the order dismissing the application for leave to appeal.

[17] As indicated above, two judgments, that of Majiki J on the special plea on jurisdiction and that of Beneke AJ on the exception raised, are at issue, but only one is before this Court. It appears, from the limited information before us, that the two judgments are possibly conflicting, dealing with the same issues and applying the law differently. That presents an exceptional circumstance for this Court to reconsider the refusal of the application for leave to appeal.¹³ The applicant has good prospects of success for the appeal to be heard, in respect of the two judgments, one of which is not before this Court. In the circumstances of this matter, I conclude that it is in the interest of justice to grant leave to appeal to the full bench of the high court.

[18] The applicant sought an indulgence and should bear the costs of the condonation and reinstatement application, as her counsel correctly conceded. The respondent requested the costs of two counsel. Despite the facts in this matter reading like a kafkaesque¹⁴ story and the inexplicable waste of scarce judicial resources, the matter does not justify the costs of two counsel.

[19] The following order is made:

1 The application for condonation is granted, and the referral for reconsideration is reinstated. The applicant is to pay the costs occasioned by the condonation and reinstatement applications, including the costs of counsel where so employed.

2 The order dismissing the application for leave to appeal is reconsidered and varied as follows:

¹³ *Makhanyana v University of Zululand* ft 12 above this Court held para 29. 'Jurisdictional challenges will be raised either by exception or by a special plea, depending on the grounds upon which the challenge arises...'

¹⁴ Kafkaesque is a situation that is almost surreal, typical of a Franz Kafka novel.

‘Leave to appeal is granted to the full court of the Eastern Cape Division of the High Court, Mthatha. Costs to be costs in the appeal.’

E BAARTMAN
JUDGE OF APPEAL

Appearances

For the appellant:

Z Z Matebese SC

Instructed by:

Caps Pangwa and Associates, Mthatha
Bokwa Attorneys Incorporated,
Bloemfontein

For the respondent:

F Pretorius and L Mati

Instructed by:

Changfoot, Van Breda Incorporated
Symington de Kok Attorneys,
Bloemfontein.