



LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C482/2022

In the matter between:

KIM VIEIRA

Applicant

and

CAPE TOWN CITY BALLET

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

KAREN KLEINOT N.O.

Third Respondent

Heard: 05 June 2025

Delivered: 06 June 2025

Summary: Review of arbitration award filed outside the prescribed period of six weeks – condonation principles considered - unfair labour practice relating to suspension – section 145 of LRA and review test considered – outcome and conclusions reached by arbitrator reasonable and supported by evidence – condonation refused.

JUDGMENT

PHAKEDI, AJIntroduction

[1] The Applicant is approaching this Court in terms of section 145 of the Labour Relations Act¹ (LRA), seeking to review and set aside the arbitration award issued by the third respondent under case number WECT 1155-22 dated 19 June 2022.

[2] The Applicant further seeks an order condoning the late filing of her review application. Should the condonation application be declined, this Court lacks the necessary jurisdiction to consider the merits of the application. In order to succeed with his condonation application, the Applicant has to make an application at the earliest available opportunity and show good cause that he is deserving of the Court's indulgence for his non-compliance.

Condonation application

[3] The Applicant avers that she received the arbitration award on 20 June 2022 and ought to have filed her review application on or before 1 August 2022, but she was only able to file on 02 November 2022. She approached various legal counsel to discuss her prospects of success with reviewing and setting aside the award. She could not immediately employ legal services due to financial difficulties as she had very limited financial backup. Advocate Botha, who had assisted her at the CCMA was available to assist her. However, he could not assist her in the absence of an instructing attorney. On or during September 2022, she secured the services of a junior attorneys who suddenly withdrew from her matter.

[4] She later approached Legal Aid offices and that was when she was afforded legal representation. In respect of prejudice, she submitted that she will be seriously prejudiced if her condonation application is not granted. On prospects of success,

¹ Act 66 of 1995, as amended.

she indicated that she deserves to have her dignity restored and that the settlement offer made by the First Respondent was an insult to her dignity, self-respect and self-worth during the 12 years of employment with the company. She has suffered great prejudice at the instance of her employer.

[5] The first respondent is opposing the condonation application on the basis that the review application was filed twelve weeks outside the prescribed timeframe and the applicant's prospects of success are poor. The reasons given for lateness are contrived and the information provided by the applicant that she could not afford legal fees and the availability of state-funded legal aid. The first respondent contends that all these factors to be considered in the granting of condonation application against her taking into account the substantial delay, weak prospects of success and a poor explanation for lateness and the application must be dismissed with costs.

[6] In reply, the applicant reiterated that she had prospects of success in the main review application due to the errors committed by that Commissioner. She is continuing to suffer prejudice as a result of the actions of the first respondent and the explanation she provided was reasonable in that legal aid is only available to employees who earn less than R7500.00 per month and the fact that she qualified for aid is confirmation that she did not have enough funds to fund the litigation in the Labour Court.

[7] In this matter, the applicant has to first clothe this Court with the necessary jurisdiction to determine the review application on merits. The Labour Court is a creature of statute and may only adjudicate review applications which are filed in compliance with the provisions of the LRA. This is confirmed by section 145 (1A) of the LRA, which provides that the Labour Court may on good cause shown condone the late filing of an application in terms of subsection (1).

Condonation test

[8] It is trite that in considering an application for condonation, the Labour Court exercises a discretion which must be exercised judicially premised on all the relevant factors. The decision of the Labour Court may be set aside if it is found that the

Labour Court in exercising its discretionary powers acted capriciously, upon wrong principles, in a biased manner, for insubstantial reasons, or committed a misdirection, or an irregularity or exercised its discretion improperly or unfairly.²

[9] In *Grootboom v National Prosecuting Authority and Another*,³ the Constitutional Court stated as follows:

‘The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.’

[10] The onus of showing the existence of good cause in a condonation application rests with the applicant, and this essentially entails satisfying the two well-established requirements, namely: (a) providing a satisfactory explanation for the delay and (b) showing the prospect of success in the main case. The applicant bears the burden of showing good cause. A mere allegation of good cause will not be sufficient to assist the Court in exercising its discretion whether to grant condonation or not. In other words, as stated in *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd and Others*, the applicant must “*at least, furnish an explanation of his default sufficiently full to enable the court to understand how it really came about and to assess his conduct and motives... Where there has been a long delay,*

² *Coates Brothers Ltd v Shanker and Others* [2003] ZALAC 12; (2003) 24 ILJ 2284 (LAC) at para 5.

³ [2013] ZACC 37; (2014) 35 ILJ 121 (CC) at para 51.

the court should require the party in default to satisfy the court that the relief sought should be granted".⁴

Evaluation and analysis

[11] The Applicant stated that the legal counsel who represented her during arbitration proceedings has always been available to assist her but could not do so in the absence of an instructing attorney. I am not convinced that the unavailability of an instructing attorney is a reasonable excuse for the applicant's failure to ensure that her review application was filed within the prescribed timeframe as she could have filed the application herself. Section 161(1)(a) of the LRA provides that '*in any proceedings before the Labour Court, a party to the proceedings may appear in person or be represented only by a legal practitioner*'. The applicant's advocate could have simply assisted her with drafting the application and having same filed while she was searching for an instructing attorney.

[12] In order to condone the applicant's delay and non-compliance with the prescribed timeframes, the Court has to be convinced that the explanation is reasonable and acceptable. In *NUMSA and another v Hillside Aluminium*⁵, the Labour Court held that an unsatisfactory explanation for any delay would generally be fatal to an application, irrespective of the applicant's prospects of success. In *Van Wyk v Unitas Hospital and Another*⁶, the Constitutional Court held that:

"An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable."

[13] Having regard to the facts of this matter, and in particular, the fact that the review application was filed thirteen weeks outside the prescribed timeframe, I agree with the first respondent that the period of delay is excessive and applicant has failed to provide acceptable and reasonable explanation for her delay. The extent of the

⁴ *Aspen Holdings Pty Ltd and Another v Phelane and Another*⁴ (*Aspen Holdings*) (JA 71/23) [2025] ZALAC 4; [2025] 4 BLLR 409 (LAC) (23 January 2025) at para 14

⁵ [2005] ZALC 25; [2005] 6 BLLR 601 (LC) at para 6.

⁶ [2007] ZACC 24; 2008 (4) BCLR 442 (CC) at para 22

delay is unacceptably excessive. Absent a good and reasonable explanation I do not believe that there is a need to consider the prospects of success.

[14] In this matter, the applicant failed to make out a case demonstrating that she has good cause in her founding papers by providing a satisfactory explanation for the delay and showing that she has prospects of success in the main case. In respect of prospects of success, the applicant merely submitted that she has overwhelming good prospects of success on the merits and that she deserves to have her dignity, self-respect and self-worth restored by this Court. The LAC in *Aspen Holdings Pty Ltd and Another v Phelane and Another*⁷ (Aspen Holdings) held that “... the applicant must also show that prospects of success exist in the main claim. The applicant has to satisfy the requirements of good cause by making out the case in the founding affidavit supporting the condonation application.”

[15] The LAC in *Lekhesa: In re Ngwenya v Trustees for the Time being of Sishen Iron Ore Co Community Development Trust and another*⁸ it was stated:

‘The grant of condonation involves the exercise of a discretion, with a decision to condone a party’s non-compliance with the rules of the court or directions constituting an indulgence granted by the court. Such an application should be granted if, having regard to the particular circumstances of the matter, it is in the interests of justice to do so, and refused if it is not. To reach a decision, regard is to be had to factors including the nature of the relief sought, the extent and cause of the delay, the reasonableness of the explanation for the delay, the importance of the issue to be raised, issues of prejudice and the prospects of success. As a general proposition, the factors to be considered are not individually decisive of an application for condonation but are all considered to determine what is in the interests of justice.’

[16] The Constitutional Court in *Booi v Amathole District Municipality and Others*⁹ emphasized that condonation is not merely there for the taking. The Court confirmed that condonation should be granted if it is in the interests of justice to do so, which

⁷ Aspen Holdings at para 15

⁸ (2024) 45 ILJ 1220 (LAC); [2024] 6 BLLR 585 (LAC) at para 14.

⁹ [2021] ZACC 36; [2022] 1 BLLR 1 (CC) at para 27.

has to be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the effect on the administration of justice, prejudice and the reasonableness of the explanation for the delay. In this matter, I am not convinced that it is in the interests of justice to grant the application for condonation due to the applicant's failure to demonstrate good cause as prescribed in section 145(1A) of the LRA.

Legal costs

[17] Section 151(1) of the LRA provides that the Labour Court is established as a Court of law and equity. To award costs against litigants who are exercising their constitutionally entrenched rights to fair labour practices will defeat the primary purpose of the LRA.

[18] With regard to costs, based on the discretion afforded in terms of section 162 of the LRA and considerations of fairness and equity, I have concluded that this is a matter in which there should be no order as to costs. In the result, the following order is made:

Order

1. Condonation for the late filing of the review application is refused.
2. There is no order as to costs.

G C Phakedi

Acting Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: Adv Botha

Instructed by: Legal Aid South Africa

For the Respondent: M Wagener of Michael Wagener Chambers