



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 1633/23

In the matter between:

MKHACANI NYIKO CHAUKE

Applicant

and

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER LEANNE J. ALEXANDER

Second Respondent

SASKO AEROTON – PEPSICO

Third Respondent

Heard: 20 May 2025

Delivered: 21 May 2025

Summary: Review application of a condonation ruling in terms of section 158(1)(g) read together with section 145 of the LRA — Condonation ruling by the Commissioner — test on review – whether the Commissioner failed to act judicially in her exercise of her wide discretion to refuse condonation — the applicant failed to make out a case warranting this Court’s interference with the Commissioner’s exercise of her discretion — review application dismissed.

JUDGMENT

CITHI, AJ

Introduction

[1] The Applicant instituted these review proceedings in terms of section 158, read together with section 145 of the Labour Relations Act¹ (LRA) seeking to review and set aside a condonation ruling dated 24 July 2023 issued by the Second Respondent (Commissioner) under case number GAJB14160, acting under the auspices of the First Respondent (CCMA). In terms of the Ruling, the Commissioner refused condonation for the late referral of the Applicant's dismissal dispute to the CCMA. The review application is unopposed.

Relevant chronology

[2] The Applicant commenced his employment with the Third respondent (Company) on 1 May 2010. At the time of his dismissal, the Applicant was employed as a supervisor earning a gross salary of R16 700.00 per month. On 10 March 2023, the Applicant was dismissed on sexual harassment-related allegations.

[3] On 26 June 2023, the Applicant referred an alleged unfair dismissal dispute in terms of section 191 of the LRA to the CCMA for conciliation, failing that, arbitration. The Applicant's referral was accompanied by a condonation application since his referral was filed outside the 30-day period prescribed in the LRA. His referral was filed 78 days late. The Company did not oppose the Applicant's condonation application.

¹ Act 66 of 1995, as amended.

[4] In his founding affidavit, the Applicant alleges that the reason for the delay was because he was waiting for the Company to decide on the outcome of his appeal that was submitted to the Human Resources department on 24 March 2023. In dealing with prospects of success, the Applicant stated that *'the company failed to bring enough witnesses on their behalf and the evidence of the inquiry was not considered while making a final decision'*. Addressing the question of prejudice, the Applicant stated that *'my rights will be taken for granted as a South African citizen'*.

Condonation Ruling

[5] In her Ruling, the Commissioner referred to the relevant leading cases on condonation at paragraphs 20, 21, 22 and 23 of the Ruling. The Commissioner observed that the Applicant's delay of 78 days in referring his dispute to the CCMA was excessive. At paragraph 23 of the Ruling, the Commissioner found that the Applicant failed to provide a reasonable, plausible and compelling explanation for the late referral. In essence, the Commissioner found that the Applicant's explanation that he was waiting for his appeal to be decided on does not account for the period between 10 March to 26 June 2023. The Commissioner found that the Applicant failed to demonstrate that he was actively pursuing his dispute after submitting his appeal.

[6] In assessing the Applicant's prospects of success, the Commissioner found that the Applicant failed to provide sufficient evidence and/or grounds demonstrating that he has prospects of success in his dismissal dispute, other than alleging that the Company failed to call enough witnesses and the evidence was not properly considered in making the final decision.

[7] Ultimately, the Commissioner reasoned at paragraph 25 of her Ruling that the Applicant's condonation application ought to fail on account of the Applicant's failure to provide a reasonable explanation for the excessive delay in referring his dispute to conciliation. The Commissioner, in arriving at her conclusion that condonation must be refused, relied on relevant judgments of the Labour Appeal Court (LAC). The Commissioner further found that the Applicant failed to allege sufficient facts to demonstrate that he has prospects of success in defending the allegations of sexual

harassment levelled against him. In the circumstances, the Commissioner concluded that without a good explanation and prospects of success, the Applicant's condonation application must fail. It is this conclusion that is the subject of these review proceedings.

Grounds of review

[8] The Applicant assailed the Commissioner's ultimate conclusion on numerous grounds including, *inter alia*, that the Commissioner failed to take into account that he is a layperson and not fully familiar with the requirements of law; that the Commissioner relied too much on his version regarding prospects of success even though it was clear that he was not an expert on law; that the Commissioner failed to appreciate that he was dismissed on evidence of unreliable witnesses and that dismissal was not an inappropriate sanction because he had no previous disciplinary record.

General principles applicable to granting a condonation application

[9] It is trite that the granting of condonation by the CCMA fundamentally involves the exercise of judicial discretion.² This means that the CCMA is not obliged to grant condonation simply because an application is lodged. Put differently, condonation is not there for the taking.³ A party seeking condonation before the CCMA must make out a case for the indulgence sought and bears the onus to satisfy the commissioner that condonation should be granted. In general, the commissioner is required to exercise his/her discretion having regard to the extent of the delay, the explanation provided for that delay, the prospects of success and prejudice to both parties, the circumstances presented in the application and then make a fair and just decision. This discretionary power allows the commissioner to balance the need for procedural fairness and the expeditious resolution of labour disputes with the specific context of each individual case.

² *Nature's Choice Products (Pty) Ltd v Food & Allied Workers Union and Others* (2014) 35 ILJ 1512 (LAC) para 11; *Bosch v Seynhaeve NO* (159/2023) [2024] ZALCCT 25 (27 June 2024) at para 17.

³ *NUMSA and Another v Hillside Aluminium* [2005] 6 BLLR 601 (LC); *Grootboom v National Prosecuting Authority and Another* [2014] 1 BLLR 1 (CC).

[10] The LAC has indeed, to some extent, refined the approach commissioners ought to adopt in assessing the factors relevant to the consideration of a condonation application such as those mentioned in *Melane v Santam Insurance Co Ltd*⁴ (*Melane*), which emphasized the significance of a satisfactory explanation for the delay and prospects of success as weighty factors in assessing whether condonation should be granted. The LAC has held that if there is an inordinate delay that is not explained, the applicant's prospects of success become immaterial.

[11] Further in this regard, a good explanation cannot save the condonation application if the applicant's prospects of success are poor.⁵ In essence, while the *Melane* principle suggests a weighing of all factors, the LAC has established a hierarchy where a reasonable and acceptable explanation for the delay or prospects of success can, circumstances depending, serve as crucial thresholds for granting a condonation.

[12] A commissioner's exercise of discretion in granting or refusing a condonation application may confer or deprive the CCMA of jurisdiction to entertain disputes that are referred outside the prescribed timeframes. Consequently, if this discretion is improperly exercised and condonation is granted in error, it may result in the CCMA hearing a case that lacks the necessary procedural compliance. Similarly, the improper exercise of this discretion may undermine the CCMA's statutory obligations to provide fair and effective dispute resolution – effectively preventing it from hearing matters that it is legally entitled and obligated to adjudicate upon.

Test applicable in a review of condonation ruling

[13] This Court is generally reluctant to substitute its own discretion for that of the commissioner unless there is a compelling reason to do so. In *Cowley v Anglo*

⁴ 1962 (4) SA 531 (A).

⁵ See: *Novo Norsdisk (Pty) Ltd v CCMA and Others* [2011] 10 BLLR 957 (LAC) at para 28; *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC); *Colett v Commission for Conciliation, Mediation and Arbitration* [2014] 6 BLLR 523 (LAC); and *Moila v Shai NO and Others* [2007] 5 BLLR 432 (LAC).

*Platinum and others*⁶, the threshold for this Court to interfere with a commissioner's wide discretion in granting condonation was explained as follows terms:

'When a commissioner is endowed with a discretion this court will be very slow to interfere with the exercise of that discretion. The commissioner's exercise of discretion will be upset on review if the applicant shows, inter alia, that the commissioner committed a misdirection or irregularity; or that he/she acted capriciously, or upon a wrong principle, or in bad faith, or unfairly, or that in exercising the discretion the commissioner reached a decision that a reasonable decision-maker could not reach. If it is clear that the commissioner exercised such discretion judiciously and fairly after taking into consideration all the relevant facts this Court will not interfere with the exercise of such discretion.'

[14] In sum, to succeed in a review application impugning a condonation ruling, the applicant party must demonstrate that the commissioner, in exercising their discretion, failed to act judicially. This can be shown by proving that the commissioner acted arbitrarily, capriciously, *mala fide*, or based on a wrong appreciation of the law. Furthermore, the applicant must illustrate that the commissioner did not properly consider all the relevant factors, reached a decision that no reasonable commissioner could have reached⁷, or committed a material error of law and/or facts that prejudiced the applicant. Ultimately, the applicant bears the onus of proving that the commissioner's exercise of discretion was flawed to the extent that it warrants the intervention of the reviewing Court.

Analysis

[15] The main thrust of the Commissioner's reasoning in finding that the Applicant failed to provide a reasonable, plausible and compelling explanation for the late referral is that the Applicant failed to explain the period of the delay between 10 March to 26 June 2023. The explanation provided by the Applicant that he was waiting for the outcome of his appeal, which he submitted on 24 March 2023, was

⁶ [2016] JOL 35884 (LC) at para 21.

⁷ See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at para 110.

found to be wholly inadequate to explain this extended period of lateness. In essence, the Commissioner was looking for a complete and coherent narrative of the delay, not just the initial action of filing the appeal on 24 March 2023.

[16] The Applicant needed to bridge the gap in the timeline and provided a justifiable reason for the complete period of inactivity following the filing of the appeal on 24 March 2023. The Applicant failed to do so. In my view, this information was crucial in the Commissioner's exercise of her wide discretion. The Applicant's failure to provide this information to close the gap in the timeline was, in my view, a weighty factor that the Commissioner considered when exercising her discretion to refuse condonation. In *Independent Municipal & Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others*⁸, a judgment that the Commissioner relied on in her award, it was found that it was simply unhelpful to list significant events that occurred during a period of delay, as that does not assist the decision maker in exercising his/her discretion judicially.

[17] The Applicant's contention that, as a layperson, he could not adequately progress his condonation application rings hollow in light of his failure to provide a reasonable explanation for the period of inactivity following the filing of his appeal on 24 March 2023. The Commissioner's observations correctly highlight this critical gap in the Applicant's account. In my view, simply claiming layperson status does not absolve the Applicant of the responsibility to, at the very least, account for the subsequent delay after filing his appeal and demonstrate what steps, if any, were taken or why no action was possible during that time.

[18] The Applicant afforded himself almost four times what the LRA permitted him to refer a dispute to conciliation. In my view, without any data or explanation for this significant portion of the delay, the assertion of being unable to act as a layperson lacks persuasive force and does not go anywhere to demonstrate that the Commissioner exercised her wide discretion improperly.

⁸ (2010) 31 ILJ 1413 (LC).

[19] The Applicant's further contention that the Commissioner erred by relying on his own version of events, as presented in the founding affidavit, when assessing the prospects of success, is equally unconvincing and ought to be rejected. The duty to outline facts to demonstrate reasonable prospects of success lies squarely with the Applicant. It would have been irregular for the Commissioner to rely on facts not outlined in the Applicant's founding affidavit when exercising her discretion to grant and/or refuse condonation.

[20] Furthermore, the Commissioner could not have made any preliminary findings in respect of the quality of evidence in circumstances where the Applicant failed not allege sufficient facts in his founding affidavit to establish *prima facie* prospects of success or to show that the quality of the evidence weighed in his favour. This was a critical consideration in the exercise of the Commissioner's discretion. Accordingly, the conclusion that the Commissioner reached on this score cannot be faulted.

[21] In the final analysis, the Applicant has not disclosed grounds justifying this Court's interference with the Commissioner's condonation ruling. The Ruling shows that the Commissioner exercised her discretion judicially in dismissing the Applicant's condonation application. Accordingly, the conclusion reached by the Commissioner is a decision which could have reasonably been made by a commissioner properly exercising her/his discretion on the same facts.

[22] In conclusion, given that the application is unopposed, the issue of costs does not arise for determination.

[23] Accordingly, I make the following order:

Order

1. The application for review is dismissed.

D Cithi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	In person
Instructed by:	No appearance

LABOUR COURT