



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR1401/21

In the matter between:

SAMWU obo K SHONGWE & 45 OTHERS

Applicant

and

ERIC MYHILL N.O.

First Respondent

**THE COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

Third Respondent

Heard: 16 October 2024

Delivered: 16 October 2024

Reasons: 7 May 2025 (This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 7 May 2025.)

REASONS FOR ORDER

PHEHANE, J

Introduction

[1] The background to this dispute has a long history, which is succinctly captured in the third respondent's heads of argument.¹ Thus, it is unnecessary to repeat the detailed protracted history in this judgment, other than to provide a very brief summary, which follows below.

Background

[2] In 2008, employees in the Johannesburg Metropolitan Police Department (JMPD) participated in strike action.

[3] A settlement agreement was concluded between the South African Municipal Workers Union (SAMWU) and the third respondent on 28 June 2008 to end the strike action. The settlement agreement, which related to payments being made to the JMPD employees, was implemented once-off on 1 July 2008.

[4] Five years later, in May 2013, the applicants, who were not employed in the JMPD but in the Corporate Services Department of the third respondent, referred a dispute relating to the interpretation and application of the settlement agreement in terms of section 24 of the Labour Relations Act² (LRA) to the South African Local Government Bargaining Council (SALGBC). The applicants alleged that they were excluded from the settlement agreement.

[5] On 15 May 2013, the SALGBC determined that it lacked jurisdiction to determine the referral.

¹ See: third respondent's heads of argument at paras 3.1 to 3.7, 3.8, 3.11, 3.13 to 3.18.

² Act 66 of 1995, as amended.

[6] On 28 June 2013, the applicants referred the dispute to the Commission for Conciliation, Mediation Arbitration (CCMA), incorrectly claiming that their dispute arose on 15 May 2013. The CCMA ruled on 10 October 2013 that the applicants lacked *locus standi* to refer the dispute.

[7] On 15 October 2013, SAMWU, on behalf of the applicants, referred the dispute to the CCMA, stating, once more incorrectly, that the dispute arose on 10 October 2013. The third respondent raised a preliminary point on prescription.

[8] On 6 February 2014, the CCMA ruled that the applicants' claim had prescribed. SAMWU took this ruling in review. The review application was dismissed by this Court. This Court's decision was overturned on appeal on 28 February 2021, and the dispute was remitted to the CCMA for determination.

[9] In 2021, SAMWU referred its dispute in terms of section 24 of the LRA to the CCMA. The third respondent raised a preliminary point that the referral was out of time. SAMWU filed a condonation application,³ but disputed that condonation was necessary. The third respondent opposed the applicant's condonation application.⁴ No replying affidavit was filed by the applicant.

[10] On 7 June 2021, the first respondent dismissed the condonation application.

[11] Of relevance to the review application before this Court, is that the applicant launched an application to review and set aside a condonation ruling by the first respondent dated 7 June 2021, wherein the first respondent refused to grant the applicant condonation for the late referral of its dispute to the second respondent, the CCMA, relating to the interpretation of a collective agreement in terms of section 24 of the LRA and accordingly determined that the CCMA lacked jurisdiction to determine the dispute.

[12] On 16 October 2024, this Court issued an order dismissing the review application with costs.

³ Record, pp 20 to 45.

⁴ Record, pp 95 to 121.

[13] Brief reasons for the order follow below.

Reviews of decisions on condonation

[14] The grant of condonation is a discretionary remedy⁵, and accordingly, the scope for the review of a decision to grant or refuse condonation is limited.

[15] Our Courts have held that the exercise of the discretion to grant or refuse condonation is not to be interfered with lightly and is only assailable on review where the commissioner did not exercise his discretion judiciously or fairly.⁶ Thus, the test relating to the review of jurisdictional rulings, referred to as the correctness test,⁷ is more stringent than the ordinary and well-known *Sidumo*⁸ test, commonly referred to as the reasonableness test.

[16] In *Cowley v Anglo Platinum and Others*⁹, this Court, in dismissing a review application against the refusal by the CCMA to grant condonation for the late referral of an unfair dismissal dispute, summarised the legal position as follows:

'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.'

(Own emphasis).

⁵ *A Hardrodt (SA) (Pty) Ltd v Behardien and Others* (2002) 23 ILJ 1229 (LAC) at para [5].

⁶ *Wood v Potane NO and Others* [2004] 7 BLLR 722 (LC) at paras [7] to [8].

⁷ *Phaka and Others v Bracks NO and Others* (2015) 36 ILJ 1541 (LAC) at para [29].

⁸ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC).

⁹ [2016] JOL 35884 (LC) at para [21].

[17] The applicant can, therefore, only seek to review the ruling insofar as compelling reasons are established to interfere with the commissioner's exercise of his discretion, with reference to the applicable law and the evidence before the commissioner.

The issue of jurisdiction

[18] In arriving at the decision to refuse condonation, the first respondent also ruled logically that the CCMA lacked jurisdiction to determine the dispute. The ruling reads:

'100. The application for condonation is refused.

101. The CCMA does not have jurisdiction to determine this dispute.'¹⁰

[19] The applicant's review application relies to a great extent on a semantic analysis of the commissioner's decision relating to why the CCMA lacks jurisdiction. The applicant's interpretation of jurisdiction in *general* does not take into consideration the real issue relating to jurisdiction that was before the CCMA: the real issue before the first respondent related to a preliminary point that was raised by the third respondent that the late referral of the dispute was out of time. Thus, the first respondent was confronted with an application for condonation, which he was required to determine in terms of the trite legal principles relating to condonation. The applicant incorrectly contends that the CCMA will *always* have jurisdiction to determine a dispute in terms of section 24 of the LRA and, therefore, there was no need for it to apply for condonation for the late referral.¹¹

[20] The applicant submits that the third respondent was involved in a protracted dispute with it over a period of nine years and because the CCMA *always* has jurisdiction in disputes in terms of section 24 of the LRA, the third respondent submitted to the jurisdiction of the CCMA and the first respondent misdirected himself in determining that the late referral of the dispute pertains to an issue of jurisdiction.

¹⁰ Pleadings, p 60.

¹¹ Founding affidavit at para 92.4 on pp 33 to 34.

Issue before the first respondent

[21] After setting out the history of the matter, in his ruling, the first respondent records that the issue that was before him to determine was a preliminary point raised by the third respondent that the applicant failed to refer its dispute to the CCMA within a reasonable time and therefore, the applicant was required to bring a condonation application. The applicant opposed the point *in limine* firstly, on the basis that its referral was not late, and secondly, the third respondent was not entitled to raise the preliminary point at a late stage after it had engaged in protracted litigation with the applicant over a number of years.

[22] The first respondent considered the submissions by the parties for and against condonation. In a well-reasoned ruling, the first respondent determined the date when the dispute arose and determined that the dispute arose on 2 July 2008. He determined that for a period of five years, the applicant did not do anything in relation to their dispute. He determined that the applicant did not produce any evidence of protracted negotiations between themselves/SAMWU and the third respondent relating to the dispute regarding the 2008 settlement agreement – the third respondent denied that such negotiations took place, and this was not refuted by the applicants. The first respondent determined that although section 24 of the LRA does not set out the time frame within which to refer a dispute on the interpretation and application of a collective agreement, the yardstick of a reasonable time within which to refer such dispute is provided in section 191 of the LRA, as has been determined by our Courts.¹² The first respondent emphasises, and correctly so,

¹² In this regard, see para 55 of the ruling on p 52, where the first respondent deals in his analysis, with the decision in *Health & Other Services Personnel Trade Union of South Africa obo Tshambi v Department of Health, KwaZulu-Natal* [2016] 7 BLLR 649 (LAC) (*Tshambi*), where the Labour Appeal Court stated as follows at para [32] in relation to referring a dispute within ‘a reasonable time’ in the context of a dispute in terms of section 24 of the LRA:

‘... what constitutes a reasonable time within which to refer a true labour dispute is dictated by the expectations to be derived from the LRA not from civil litigation... The use of analogy must be tempered by an appreciation of the context and functionality of the procedures and remedies provided in the LRA. In true labour disputes, the provisions of section 191(1) of the LRA are a more obvious general yardstick to test what is a reasonable time for a referral. The absence of a prescribed period does not automatically license a longer period than is the norm for other labour disputes to be referred. In labour disputes, expedition is the watchword, not because that is simply a good idea, but because the prejudice of delay in matters concerning employment often is not capable of remedial action. This applies to both employees and employers. The appropriate enquiry is into the history of the engagement between the parties about the controversy, and the elapse of time since

that the ethos of the LRA is expedient dispute resolution. He finds the delay egregious and finds that no sound reason is proffered for the delay. The first respondent considers the prejudice to the third respondent should condonation be granted, and deals extensively with such prejudice in his ruling. He considers that the prospects of success and determines in the end, that it would not be in the interests of justice to grant condonation.¹³

[23] The consequences of a late referral of a dispute is that the CCMA does not have jurisdiction to determine the dispute, which can only be cured by the grant of condonation.

[24] It is trite that jurisdiction can be raised at different stages of proceedings. In *Bombardier Transportation (Pty) Ltd v Mtiya and Others*¹⁴, this Court stated as follows regarding jurisdiction:

‘...[t]he only true jurisdictional questions that are likely to arise at the conciliation phase are whether the referring party referred the dispute within the time-limit prescribed by s 191(1)(b), whether the parties fall within the registered scope of a bargaining council that has jurisdiction over the parties to the dispute to the exclusion of the CCMA, and perhaps whether the dispute concerns an employment related matter at all. The distinction to be drawn is one between facts that the legislature has decided must necessarily exist for a tribunal to have the power to act (and without which the tribunal has no such power) and facts that the legislature has decided must be shown to exist by a party to proceedings before the tribunal, the existence of which may be determined by the tribunal in the course of exercising his statutory powers...’

[25] Therefore, whether the CCMA has the power to determine a dispute that, on the facts, is filed out of time is a jurisdictional challenge.¹⁵ The CCMA is clothed with

engagement to resolve the controversy ceased. Self-evidently, the ultimate decision on reasonableness has to be fact-specific’.

¹³ See: third respondent’s heads of argument at paras 8.1 to 8.10 and 9.1 to 9.3.

¹⁴ [2010] ZALC 34; (2010) 31 ILJ 2065 (LC) at para [13].

¹⁵ See: *Member of The Executive Council: Police, Roads and Transport, Free State Provincial Government v Public Service Co-ordinating Bargaining Council and Others* ([2022] ZALAC 94; (2022) 43 ILJ 1628 (LAC) at para [56].

jurisdiction only where the condonation is granted by it for the late filing of the referral. Where condonation is refused, it follows that the CCMA lacks jurisdiction to determine the dispute.

[26] In view of the afore-going, faced with a condonation application before him which required determination, the first respondent correctly applied the trite principles¹⁶ relating to the determination of a condonation application. Thus, in my view, he exercised his discretion judiciously. His ruling is unassailable.

[27] Therefore, the first and second grounds of review, that the first respondent misdirected himself in holding that the CCMA lacks jurisdiction and misdirected himself in categorising the delay requiring condonation as a jurisdictional issue, are without merit.

[28] The third ground of review that the first respondent misdirected himself in holding that it was open to the third respondent to object to the late filing of the dispute is also without merit, as jurisdiction can be raised at any time in the proceedings. This is trite, as I have already mentioned. In circumstances where the first respondent was not faced with only a jurisdictional point but a condonation application in reaction to the jurisdictional point, he was enjoined to determine the condonation application before him, which he did and correctly applied the legal principles in so doing.

[29] The fourth ground of review, as with the afore-going, also lacks merit. It is trite that an applicant in a condonation application must show good cause for the delay. Simply put, the applicant bears the onus to satisfy the Court that condonation should be granted. In so doing, the applicant must meet the requirements to succeed in the grant of condonation.¹⁷

¹⁶ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532 C-F, where the Court held: '...Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. ... What is needed is an objective conspectus of all the facts.'

¹⁷ *Ibid.*

[30] The fifth and sixth grounds of review equally lack merit. Seized with a condonation application, the first respondent had regard of relevant authorities, correctly applied the relevant legal principles and exercised his discretion judicially in determining the condonation application.

[31] The seventh ground of review lacks merit. The first respondent took into account the relevant considerations and evidence in determining the condonation applications and set out what he took into consideration in great detail in his ruling.

[32] The eighth ground of review is unmeritorious. The first respondent made no pronouncement on what he '*believed*' the 2008 agreement entailed. He could not have made such a pronouncement as he ruled that the CCMA lacked jurisdiction to determine the dispute as the condonation application failed.

Costs

[33] Section 162(2)(b) of the LRA provides as follows:

'When deciding whether or not to order the payment of costs, the Labour Court may take into account –

...

- (b) the conduct of the parties –
 - (i) in proceeding with or defending the matter before the Court; and
 - (ii) during the proceedings before the Court.'

[34] The scheme of the LRA is to regulate the speedy resolution of disputes. The delay in the present matter was egregious. The decision in *Tshambi*¹⁸ clarifies the legal position in determining the reasonable time within which disputes in terms of section 24 of the LRA should be referred to the CCMA. As stated above, the first respondent exercised his discretion judicially in determining the condonation application that was before him. All of the grounds of review lack merit, and this application was nothing but frivolous.

¹⁸ Fn 12 *supra*.

[35] In the circumstances, in view of the conduct of the applicant in proceedings with this frivolous application, I exercised my discretion to order the applicant to pay the cost of this application.

[36] In view of the afore-going, the abovementioned order was made.

M. T. M. Phehane
Judge of the Labour Court of South Africa

Appearances:

For the applicant:	Adv. LP Mkhize SC
Instructed by:	Madela Gwebu Mashamba Inc.
For the Third Respondent:	Adv. F. Boda SC
Instructed by:	Salijee Govender Van Der Merwe Inc.