



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2666/2022

In the matter between:

LUCKY PHILLIP NGOBENI

Applicant

and

ESKOM HOLDINGS SOC LIMITED

First Respondent

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Second Respondent

COMMISSIONER STEPHENS SHEMA MOLAPO N.O.

Third Respondent

Heard: 20 June 2025

Delivered: 03 September 2025

Summary: Review of arbitration award filed outside the prescribed period of six weeks – condonation for late filing of the supplementary affidavit and condonation application opposed – principles considered – discretionary powers cannot be exercised in a vacuum – application for condonation refused.

JUDGMENT

PHAKEDI, AJIntroduction

[1] The Applicant approached this Court on 29 November 2022 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 GAJB2270/21 dated 12 January 2022. The Applicant further seeks an order condoning the late filing of his review application and the late filing of his notice in terms of Rule 7A(8)(a)². These three applications are opposed by the first respondent.

Condonation application

[2] The arbitration award is dated 12 January 2022, and the Applicant received it on the same day. He then consulted with Mr Mbodi of NUMSA on 20 January 2022. During their discussions, he raised his concerns about the award and sought that it be challenged. They then agreed to seek a mandate from NUMSA to launch the review application. Mr Mbodi informed him a week later that NUMSA had agreed to launch the review application.

[3] On or about 13 July 2022, he then sent correspondence to Mr Mbodi to check the progress on the matter, but he did not respond. On 6 September 2022, he sent an email to Mr Mbodi making a follow-up, and that is when Mbodi responded, confirming that the review application was never launched. He further indicated that he had been on sick leave since June 2022.

[4] He stated further that he did not have the money to instruct an attorney to assist him with the review application. On or about 30 October 2022, he communicated with a certain Mr Mokoena, who advised that he did not handle labour

¹ Act 66 of 1995, as amended.

² GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court (repealed, effective 17 July 2024).

matters. He further advised him to raise money for a consultation so he could get assistance. He was further informed that he should obtain reasons from the Union as to why they delayed in the filing of his application.

[5] On or about 10 November 2022, he contacted NUMSA Head Office, wherein he was directed to one Mr Vivani Shexi, the Regional Legal Officer, who advised that the review application had no prospects of success and, as a result, NUMSA would not proceed with the review application.

[6] On or about 23 November 2022, he then met his current legal representatives and consulted on the same date, whereby he gave instructions for them to proceed with the review application.

[7] In respect of prospects of success, he submitted that his grounds for review be incorporated into the condonation application. On the issue of prejudice, he submitted that he will be severely prejudiced if his condonation application is not condoned, as he is currently unemployed and his dismissal was both procedurally and substantively unfair.

[8] On or about 9 June 2023, the applicant filed his supplementary affidavit and amplified his condonation application by stating that his legal representatives received a notice from the Registrar advising them that the record of arbitration was available for collection on 20 December 2022, and he duly filed the record on 17 March 2023. However, a notice in terms of Rule 7A(8) was filed out of time. His explanation for the late filing of the notice is that he did not have money to settle invoices of transcribers and his attorneys' legal fees. He was only able to settle these fees on 30 May 2023.

[9] The first respondent is opposing the condonation application on the basis that the reading of the email correspondence between the applicant and Mr Mbodi does not support his version that there was an agreement to launch the review application. It is submitted that Mr Mbodi had indicated clearly that the decision to launch the review application was not his to make, and it was to be made by the legal

department upon his finding an error with the arbitration award; as such, there was no undertaking to launch the review application.

[10] Furthermore, the first respondent submitted that a period of 140 days had passed between 23 February 2022 and 13 July 2023, and the applicant did not provide any explanation for this period.

[11] The first respondent submitted that a further period of 54 days passed between 6 September 2022 and 30 October 2022. Furthermore, the applicant did nothing for a period of nine days between 30 October and 10 November 2022, and he has not provided any explanation of what transpired during this period; as such, he failed to provide a full explanation for the delay, and the condonation application must be dismissed on this basis.

[12] The condonation application is further opposed on the basis that the applicant failed to plead and outline any prospects of success in the application. The applicant, in his replying affidavit, merely stated that he reiterates what is stated under the condonation rubric of his founding affidavit and did not respond to the averments made in the first respondent's affidavit.

[13] The Labour Court is a creature of statutes and derives its powers and jurisdiction from the LRA. In order to exercise its review powers, it must have jurisdiction to entertain the application. Furthermore, an Applicant in a condonation application has to show good cause that he is deserving of the Court's indulgence for his non-compliance with its rules and the law.

Applicable legal principles

[14] Section 145(1A) of the LRA provides that '*the Labour Court may on good cause shown condone the late filing of an application in terms of subsection (1).*'

[15] 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 such as good cause, length of delay, explanation for delay, prospects of success, interests of justice and prejudice.

[16] 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*³, 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, the court should require the party in default to satisfy the court that the relief sought should be granted*”.⁴

Evaluation

[17] The Applicant submitted that although the degree of lateness for both condonation applications is long, the explanation is reasonable and covers the full period, and the Applicant enjoys strong prospects of success in the review application. The reasons for the delay are merely that the Applicant had financial constraints, and this led to the late filing of his review application and the notice in terms of Rule 7A (8) together with the supplementary affidavit.

[18] As stated above, the first respondent submitted that the Applicant failed to provide a reasonable and acceptable explanation for the period of delay between 23 February 2022 and 13 July 2023; 6 September 2022 and 30 October 2022, and 30 October and 10 November 2022. The Applicant, in his replying affidavit, chose not to deal with the issues raised, and as such, the averments and allegations made by the first respondent in its answering affidavit remain unchallenged.

³ 2000 (3) SA 87 (W) at para 12.

⁴ *Aspen Holdings Pty Ltd and Another v Phelane and Another (Aspen Holdings)* [2025] 4 BLLR 409 (LAC) at para 14.

[19] The first respondent also rejects the applicant's submission that he launched his review application outside the prescribed timeframes as a result of a lack of funds. In his condonation application, the Applicant merely claims that he did not have money to instruct attorneys, and he did not approach Legal Aid South Africa because he thought they only dealt with criminal matters. The Applicant did not take the Court into confidence and paint a full picture of his finances.

[20] The Applicant also failed to at least explain why he could not approach friends and relatives to assist with payment of his legal fees seeing that he was dismissed as a result of his failure to disclose that his daughter was in charge of a company which belonged to his family member, and it was doing business with the first respondent, albeit not within his area of jurisdiction.

[21] In *Du Plessis v Wits Health Consortium (Pty) Ltd*⁵, the Labour Court per Molahlehi J (as he then was) explained what is expected of an applicant who seeks condonation from the Court on the basis of financial constraints and held:

'[16] It is clear from the above and other judgments that a claim of lack of funds on its own cannot constitute reasonable explanation for the delay. In other words, when pleading lack of funds as the cause of the delay, the applicant needs to provide more than a mere claim that the reason for the delay is lack of funds. In this respect, the applicant has to take the court into his or her confidence in seeking its indulgence by explaining "when" not only that he or she finally raised funds to conduct the case but also how and when did he or she raise those funds. The "when" aspects of the explanation is important as it provided the courts with the information as to whether there was any further delay after raising the funds and whether an explanation has been provided for such a delay.

[17] In the present case, the applicant does not take the court into her confidence by providing a full and proper explanation as how and when did she raise the funds. She also does not explain why she could not use the money she received from the retrenchment package to pay her attorneys. If

⁵ [2013] JOL 30060 (LC).

she needed to use that money for other purposes, she does not explain why could she not pay her attorneys or other attorneys to assist her only with the drafting of the statement of case...'

[22] Although the delay is not fully explained and it is not insignificant, the Court is further required to consider the prospects of success and related factors.

[23] The basic principle in our jurisprudence is that in order to properly deal with condonation applications, the Court must consider all the factors, including the degree of lateness and explanation thereof, prejudice, the interests of justice, prospects of success, as well as the importance of the case to both parties.

[24] In his application for condonation, the Applicant submitted that he has strong prospects of success in the review application. He did not specifically outline those strong prospects, and the Court had to consider the review application in order to determine on what basis he is alleging that the arbitration award is reviewable on any of the grounds advanced.

[25] The Applicant stated that the Arbitrator committed a gross irregularity by failing to take into account that he was not aware that his daughter was appointed director of MTK following the passing of his cousin. It was further submitted that the arbitrator failed to determine the fairness of the sanction of dismissal, and he could have done this by ensuring a proper balance between the aggravating factors submitted by the First Respondent against the mitigating factors submitted by him. He also failed to consider whether the employment relationship had irretrievably broken down or not.

[26] The First Respondent submitted that what is sufficient is that the Applicant was given an opportunity to state his case and challenge the evidence submitted by the First Respondent. It was submitted further that the Applicant was required to declare that his daughter had taken over as the new director of MTK following the passing of his cousin. His daughter was listed as a beneficiary on his medical aid, and this demonstrates that they had a close relationship. The applicant was

dismissed for breaching the policy of the First Respondent, and the conclusions reached by the commissioner fall within the bands of reasonableness.

[27] It was further submitted that the failure by the Applicant to declare this relationship is akin to dishonesty, and the sanction of dismissal was appropriate. Having regard to submissions by both parties, this Court comes to the conclusion that the application for condonation must not be granted.

[28] I have considered the prospects of success advanced by the Applicant in this matter, and I do not believe that there is a need to interfere with the arbitration award. The conduct of the Applicant is akin to what is stated in *Impala Platinum Ltd v Jansen and Others*⁶ where the Labour Appeal Court (LAC) held that:

‘The commissioner rightly found that Jansen’s conduct went to the root of the employment relationship deserving of the severest sanction. This cannot be faulted. In fact, it would be unfair to expect the appellant to retain Jansen in its employ where Jansen had not only displayed gross misconduct in failing to comply with statutory regulations but also contravened the duty to act in good faith by promoting his wife’s business to appellant’s service providers thereby compromising fairness and honesty within the appellant’s business relationships. In the circumstances, there was no need to lead any evidence of a breakdown in the relationship, as it was obviously the case. ...’

Condonation principles

[29] The LAC in *Govender v Others v Commission for Conciliation, Mediation and Arbitration and Others*⁷ expanded the above-mentioned principles and held that:

‘[57] ... The factors relevant in the consideration of the grant or refusal of condonation include the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. And in certain cases, the interest of justice may play a role.

[58] Added to the factors applicable to condonation applications is the consideration that employment disputes should be dealt with expeditiously as

⁶ (2017) 38 ILJ 896 (LAC) at para 20.

⁷ [2024] 5 BLLR 453 (LAC).

a delay in the resolution of labour disputes undermines the object of the LRA and “any determination of the issue of good cause must always be considered against the *backdrop of this fundamental principle*” and further that review applications are by their nature, urgent and must be treated with a degree of diligence and promptness.’

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

[31] The LAC further restated the above-mentioned condonation principles in *SACCAWU obo Letsoalo and Another v Commission for Conciliation, Mediation and Arbitration and Others*⁹ where it was held that:

‘[18] It is well accepted that condonation cannot be had for the mere asking but a plea for the court's indulgence to excuse the non-compliance with the prerequisite time limits in terms of the prescripts on sufficient cause shown. The yardstick is the interest of justice which entails a consideration of all the relevant factors, including the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the

⁸ (2024) 45 ILJ 1220 (LAC) at para 14.

⁹ (JA 155/23) [2025] ZALAC 12 (30 January 2025).

intended appeal; and the prospects of success. Ultimately, the particular circumstances of each case will determine which of these factors are relevant.

[19] Added to the general principles, in *Steenkamp and Others v Edcon Ltd*, the Constitutional Court endorsed the Labour Law-specific factors and considerations which are premised on one of the primary objects of the LRA to have labour disputes resolved expeditiously. Since labour disputes are inherently urgent, the LRA imposes strict time limits within which various applications and referrals must be launched to give effect to the primary object of the LRA. As a result, and pertinent to the case at hand, condonation in a case of disputes over individual dismissals will not readily be granted unless, inter alia, the explanation for non-compliance is compelling. What is more, a higher threshold has been set where the delay is attributed to the internal processes and procedures of trade unions.

[20] ...

[21] In *Government Printing Works*, this Court likewise was confronted with the Labour Court's refusal to condone the late delivery of the statement of opposition against a claim of unfair discrimination. The Labour Court opined that, given the extent of the delay and the unreasonable explanation, it was not enjoined to consider the prospects of success. The approach followed by the Labour Court to condonation was rejected as it is at odds with the broad and balancing approach that has emerged in our jurisprudence which is characterised by proportionality and flexibility. The following observations are pertinent:

“[28] The endorsement of these sentiments in *Steenkamp* highlights its significance. *Steenkamp*'s single-sentence synthesis of the majority and minority expressions in *Grootboom* appears to put the settled approach beyond doubt:

“All factors should therefore be taken into account when assessing whether it is in the interests of justice to grant or refuse condonation.”

[29] The effect is that an approach which completely ignores the prospects of success on the merits whenever there is an unsatisfactory, unreasonable or unacceptable explanation for a delay, requires explication. There does come a time in any case where a party's disregard for procedure and delay in pursuing a matter is so extensive that they will be penalised irrespective of the

merits of the case. The SCA has confirmed that an assessment of prospects of success is a relevant factor in the exercise of a discretion regarding condonation, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation 'obviously unworthy of consideration'. It is in cases of 'flagrant', 'gross' breaches of the rules, especially in the absence of an acceptable explanation, that condonation may be refused regardless of the merits of the appeal, even where the blame lies solely with the legal representative. In this court, it has been acknowledged that excellent prospects of success lead to the granting of condonation even when the delay is substantial and the explanation inadequate.

[30] Assuming that there remains some scope to ignore the prospects of success completely, doing so requires careful and deliberate analysis. Borrowing from the language supported in Steenkamp, it is first necessary to conclude, with due deliberation, that the delay is 'unacceptably excessive'. Secondly, and accepting that the reference to 'no explanation for the delay' is not to be construed literally, consideration must still be given to whether the explanation offered is tantamount to an absence of a full and reasonable (acceptable, sufficiently cogent) explanation for the delay. It should be clear, when considering the explanation offered, that the non-observance of the rule is 'flagrant and gross' before the inquiry into the prospects of success may be jettisoned. Thirdly, and noting the usual reluctance to do so, the court must exercise a discretion to refuse condonation without any consideration of the prospects of success." [Own emphasis]

[22] *Government Printing Works* aptly expounded the applicable general principles for condonation and dealt with a misconception that once an applicant fails to proffer a reasonable explanation for the excessive delay, prospects of success are of no consequence and could be automatically discounted. ...'

[32] In *Grootboom v National Prosecuting Authority and Another*¹⁰, the Constitutional Court stated as follows:

¹⁰ (2014) 35 ILJ 121 (CC) at para 51.

'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.'

Conclusion

[33] The Applicant has not succeeded in showing good cause entitling him to be pardoned for his failure to comply with the period prescribed for the filing of review applications. As such, the Labour Court does not have jurisdiction to consider the review application on the merits.

Costs

[34] The first respondent sought costs in the event that the application is dismissed. It is trite that the awarding of costs in the Labour Court is discretionary as envisaged in section 162 of the LRA. The Constitutional Court in *Long v South African Breweries*¹¹ held as follows:

[27] It is well accepted that in labour matters, the general principle that costs follow the result does not apply. This principle is based on section 162 of the LRA, which reads:

“(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.

¹¹ 2019 (5) BCLR 609 (CC).

(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account —

- (a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and
- (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.”

[28] The relationship between the general principle of costs and section 162 was considered and settled by this Court in *Zungu*:

“In this matter, there is nothing on the record indicating why the Labour Court and Labour Appeal Court awarded costs against the applicant. Neither court gave reasons for doing so. It seems that both courts simply followed the rule that costs follow the result. This is not correct.”

[35] The Constitutional Court in *Booi v Amathole District Municipality and Others*¹², dealt with the issue of costs in the Labour Court and held as follows:

‘However, this is a labour matter and this Court’s jurisprudence is settled: the ordinary rule that costs follow the result does not apply in labour matters. Rather, what emerges from the provisions of the LRA and the jurisprudence is that courts, when awarding costs in labour disputes, must consider what fairness demands and err on the side of not discouraging parties from approaching the courts for the peaceful resolution of labour disputes. Further, if costs are to be awarded in labour matters, there must be reasons that justify a court’s decision to depart from the position that a losing party should not be mulcted in costs in labour disputes.’

[36] The above-mentioned principle was clearly espoused in *Member of the Executive Council for Finance, KwaZulu-Natal v Dorkin N.O and another*¹³ where the Court held:

‘In making decisions on cost orders this Court should seek to strike a fair balance between, on the one hand, not unduly discouraging workers,

¹² (2022) 43 ILJ 91 (CC) at para 60.

¹³ 2008 (29) ILJ 1707 (LAC) at para 19.

employers, unions and employers' organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to court. That is a balance that is not always easy to strike but, if the court is to err, it should err on the side of not discouraging parties to approach these courts with their disputes. In that way these courts will contribute to those parties not resorting to industrial action on disputes that should properly be referred to either arbitral bodies for arbitration or to the courts for adjudication.'

[37] Based on the above authorities, this court comes to the conclusion that it is in the interests of the law and fairness that each party be burdened with its own costs.

[38] In the result, the following order is made:

Order

1. The application for condonation of the late filing of the review application is dismissed.
2. There is no order as to costs.

GC Phakedi

Acting Judge of the Labour Court of South Africa.

Appearances:

For the Applicant:	S Mabaso of S Mabaso Inc Attorneys
For the Respondent:	Adv V Mndebele
Instructed by:	Tembe Kheswa Nxumalo Incorporated