



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case No: C47/2024

In the matter between:

MASETSABI SETSABI

Applicant

and

SYSPRO (PTY) LTD

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

RICHARD HEATH N.O.

Third Respondent

Heard: 13 August 2025

Delivered: 18 August 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 judgment is deemed to be 10h00 on 14 August 2025.

JUDGMENT

DE KOCK, AJ

Introduction

[1] This matter came before the court as an application to review the condonation ruling issued by the third respondent on 6 February 2024. The application for condonation, which was opposed, was determined on the papers placed before the third respondent. The third respondent dealt with the background of the matter, the degree of lateness, the reasons for the lateness, prospects of success and prejudice. The third respondent found that the delay in referring the matter is excessive (176 days late), that the applicant's explanation for the delay is neither comprehensive nor persuasive, that the applicant does not appear to have any prospects of success as she signed a settlement agreement in full and final settlement, and that taking all factors into account, including prejudice, that he is unable to grant the application for condonation. The application for condonation was therefore refused. This led to the review application before this court.

Applicable test on review

[2] The court notes that there appears to be two lines of thought regarding the applicable test where a party is seeking to review a jurisdictional ruling. In *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape and others*¹, the Labour Appeal Court held that:

¹ [2012] ZALAC 37; (2013) 34 ILJ 1427 (LAC) at para 24.

'Thus the issue before the commissioner, whether or not there had been a dismissal, was a jurisdictional issue. This means that if there was no dismissal the bargaining council did not have jurisdiction to entertain the dispute referred to it by the appellant (*SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others*; *SA Rugby (Pty) Ltd v SARPU & another*²). The question whether, on the facts of the case, a dismissal had taken place within the ambit of s 186(1)(b) involves the determination of the jurisdictional facts. A jurisdictional ruling is subject to review by the Labour Court on objectively justifiable grounds and not on the reasonableness test approach as enunciated in *Sidumo*³. The test is whether, objectively speaking, the facts which would give the GPSSBC jurisdiction to entertain the dispute existed.'

[3] In an appeal against a condonation ruling by the Labour Court, the Labour Appeal Court in *Colett v Commission for Conciliation, Mediation & Arbitration & others*⁴ reaffirmed the test adopted by the Constitutional Court in *Mabaso v Law Society, Northern Provinces & another*⁵ to decide such an appeal:

"[29] A court of appeal will not lightly interfere with the exercise of a judicial discretion by a lower court. An appellant who challenges the exercise of a judicial discretion will have to show that such discretion was not exercised judicially. More specifically the appellant will have to show that the court a quo either —

- 29.1 failed to bring an unbiased judgment to bear on the matter;
- 29.2 did not act for substantial reasons;
- 29.3 exercised its discretion capriciously or arbitrarily;
- 29.4 exercised its discretion upon wrong principle;
- 29.5 committed a misdirection of such a serious nature and degree as to justify a conclusion that it acted improperly or unreasonably.

[30] The legal position was summarized as follows by the Constitutional Court:

² (2008) 29 ILJ 2218 (LAC); [2008] 9 BLLR 845 (LAC) at para 39.

³ *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* [2007] 12 BLLR 1097 (CC)

⁴ (2014) 35 ILJ 1948 (LAC)

⁵ 2005 (2) SA 117 (CC)

'It is trite law that a court considering whether or not to grant condonation exercises a discretion. The discretion must, of course be exercised judicially on a consideration of all the facts and "in essence it is a matter of fairness to both sides". It is clear that the SCA may decide an application for condonation without considering the merits of the case, though it does so only where there is a gross and flagrant failure to comply with the rules. Ordinarily, the approach of an Appellate Court to the exercise of such a discretion is that it will not set aside the decision of the lower court "merely because the Court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'

[4] In *Bosch v Seynhaeve N.O. and others*⁶ the court held that in such reviews a court is confined to ascertaining whether the commissioner:

- a) failed to bring an unbiased judgment to bear on the matter;
- b) did not act for substantial reasons;
- c) exercised his discretion capriciously or arbitrarily;
- d) exercised his discretion upon wrong principle; or
- e) committed a misdirection of such a serious nature and degree as to justify a conclusion that it acted improperly or unreasonably.

[5] However, in *Seunane v SAPS and others*⁷ the court held that decisions on condonation were jurisdictional rulings and thus subject to a correctness test. The court said:

⁶ (159/2023) [2024] ZALCCT 25 (27 June 2024) at para 29-31 endorsed in *Chauke v Commission for Conciliation, Mediation and Arbitration and others* (JR1633/23) [2025] ZALCJHB 232 (21 May 2025).

⁷ JR1982/24, 5 March 2025 at para 10

‘It is trite that the dispute to be resolved determines the test to be applied. As a result, in a review for a jurisdictional dispute, the correctness test must be applied instead of the ‘reasonableness test’ which applies in review applications.’

[6] The first respondent argued that it is unnecessary for the court to attempt to resolve the issue in this case, as the application for review must fail regardless of which review test is applied. Both tests will therefore be considered by this court.

[7] Commissioners are required to consider the representations before them in support of and against the granting of condonation and exercise their discretion whether to grant condonation. An applicant is required to show good cause why the late referral should be condoned. It is trite that a commissioner must determine whether it is in the interest of justice to condone a late referral, and in doing so consider factors such as the degree of lateness, the explanation for the delay, prospects of success, prejudice, and public interest.

[8] This was confirmed in *Grootboom v National Prosecuting Authority and another*⁸ where the Constitutional Court held that:

‘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.’

Evaluation of the grounds of review

⁸ [2013] ZACC 37; (2014) 35 ILJ 121 (CC) at para 51.

[9] The applicant's main ground of review is that the third respondent committed a gross irregularity in that he misconstrued evidence and failed to apply his mind to the material facts, whilst assuming allegations without fact as accurate. The applicant alleges that the commissioner failed to have regard to the full complement of evidence, which resulted in him arriving at an unreasonable conclusion. Had the third respondent understood the evidence and the question of law before him, he would have come to a different conclusion.

[10] A major difficulty faced by the applicant is that she is bound by the evidence placed before the third respondent when he considered the application for condonation. The applicant introduced new evidence in her founding affidavit filed in support of the review application, which was never placed before the third respondent. The new evidence cannot be relied on in support of this review application.

[11] The court notes the increasing number of review applications before this court where applicants, especially laypersons, are aggrieved that they were not invited to a hearing to argue the application for condonation. In this case, the applicant completed the application for condonation without assistance and guidance in anticipation of being called to a hearing. This, however, never materialised and she received the condonation ruling after it was considered on the papers.

[12] It may be necessary for the CCMA to reconsider the determination of condonation applications on paper, especially in instances where an employee is unrepresented and clearly failed to adequately address the relevant factors to be considered. The application for condonation that was submitted to the CCMA, by the applicant, is a typical example of an application which requires more input and explanation. It may cause substantial prejudice to applicants for condonation, who are laypersons and who are unable to properly explain themselves on the form provided for applications for condonation, to place such an application before a commissioner and for rulings to be made without affording the employees the opportunity to attend an *in*

limine process where the employee will be afforded the right to advance the reasons why condonation should be granted.

[13] The failure to have an *in limine* hearing then results in review applications before this court where employees advance further reasons in support of an application for condonation. Although it is noted that the CCMA has budgetary constraints and a backlog of cases, by not providing employees with the right to attend an *in limine* hearing, this court's workload is similarly increased by having to set down review applications where employees raise concerns that they were never invited to a hearing before a decision was made.

[14] Be that as it may, the court will refrain from determining this review application on the basis that the applicant was not afforded an opportunity to attend in person and further advance the reasons why condonation should be granted. Such a ground of review may potentially in other review applications be favourably considered, as an employee could be prejudiced by being held to what they stated in the application for condonation, which was completed without a clear understanding of the importance of an application for condonation.

[15] In *National Education Health and Allied Workers Union (Nehawu) v Metrofile (Pty) Ltd*⁹ the Court said:

'To grant condonation is an exercise of judicial discretion that is only fettered by being judicially explained. The test is whether the court whose decision is challenged on appeal has exercised its discretion judicially. The exercise of the discretion will not be judicial if it is based on incorrect facts or wrong principles of law or where the court of first instance acted capriciously, or in a biased manner, or committed a misdirection or an irregularity, or exercised its discretion improperly or unfairly. If none of these grounds is established, it cannot be said that the exercise of discretion was not judicial.'

⁹ (2021) 42 ILJ 1914 (LAC) at para 10. See also *Chetty v Baker McKenzie* (2022) 43 ILJ 1599 (LAC) at para 7.

[16] The third respondent, in the condonation ruling, correctly captured the applicant's version in respect of the factors considered by him to refuse the application for condonation. It is undoubtedly so that a late referral of some 176 days is excessive. The applicant's explanation for the delay, as stated in the CCMA application for condonation and as repeated in this court, is not a satisfactory explanation. The third respondent correctly found this to be the case. The applicant allegedly visited the CCMA offices in Cape Town three times only to be informed on every occasion that she does not have a case, as she signed a voluntary severance package agreement. The applicant then visited her father in Bloemfontein and went to the Bloemfontein CCMA offices where she opened a case, which was transferred to Cape Town. The explanation for the delay is, as correctly stated by the third respondent in his condonation ruling, neither comprehensive nor persuasive and does not cover every period of the delay.

[17] The third respondent's finding in respect of prospects of success cannot be faulted either, as he based his conclusion on the undisputed fact that the applicant signed a full and final settlement agreement. The signing of such an agreement brings into question whether the CCMA, and the third respondent had the required jurisdiction in the first place to even consider an application for condonation. The applicant concedes that she never applied for the settlement agreement to be set aside. The third respondent, however, decided to refer to the settlement agreement under prospects of success, rather than to dispose of the matter based on the CCMA's lack of jurisdiction. In this regard, the court is of the opinion that the commissioner was correct in doing so, as no jurisdictional issue was taken by the parties and the third respondent was not required to determine the jurisdiction issue. It would not have been appropriate for the third respondent to dismiss a referral based on the existence of a full and final settlement agreement until such time that the applicant was afforded the opportunity to make submissions in that regard. The court will therefore limit the review application to the issue that the third respondent was required to determine, which is the application for condonation. In respect of prejudice, the third respondent states that the applicant alleges that she "doesn't know".

[18] The third respondent, looking at his ruling and comparing the ruling with the evidence placed before him, came to both the correct and a reasonable decision and he exercised his discretion fairly and objectively save for noting the potential prejudices that an unrepresented employee may be subjected to if applications for condonation are heard on paper.

[19] In the premises, the following order is made:

Order

1. The application for the condonation ruling to be reviewed and set aside is dismissed.
2. The first respondent did not ask for costs and no order is therefore made as to costs.

C. de Kock

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: In Person

For the First Respondent: C Bosch

Instructed by: Da Silva Attorney