



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case No: C191/2024

In the matter between:

GERIDA HOUGH

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER ANELE MGUBASI N.O.

Second Respondent

THE STILBAAI GOLF CLUB

Third Respondent

Heard: 4 September 2025

Delivered: 16 September 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 16 September 2025.

JUDGMENT

DE KOCK, AJ

Introduction

- [1] This matter came before the court as an application to review the rescission ruling issued by the second respondent (Mgubasi) in terms of section 145 of the Labour Relations Act¹.

Background

- [2] The applicant (Hough) was issued with a final written warning valid for 12 months. Dissatisfied with the final written warning, she referred an unfair labour practice to the first respondent (CCMA). The dispute could not be resolved at conciliation and was referred to arbitration. Hough and her attorney failed to attend the arbitration proceedings, which led to Mgubasi dismissing the dispute. An application for rescission of the dismissal ruling was delivered, albeit late and condonation was sought for the late delivery of the application. Mgubasi granted condonation for the late delivery of the application for rescission but declined the application for the dismissal ruling to be rescinded. Hough then delivered an application to this court to review the ruling in which Mgubasi declined to rescind the dismissal ruling.

Rescission ruling

- [3] Mgubasi found as follows in the rescission ruling:

“The parties were promptly sent the set down which contained the date and time of the hearing. The application for legal representation was not

¹ Act 66 of 1995, as amended.

required as the dispute relates to an alleged unfair labour practice. As stated in the dismissal ruling, an application (condonation, joinder, venue etc.) remains an application, i.e. a request. It is trite that granting of an application is not a right, but an indulgence granted by the CCMA or the Court in the exercise of a judicial discretion. Parties must not take it for granted that an application shall be granted and simply stay away from a scheduled matter. In reality, a pending application is one of the more reasons to attend a matter, in order to bring or argue such in front of the presiding officer. Failure to attend an arbitration under the circumstances, particularly where a party is legally represented, was self-destructive on the part of the employee party and willful. Both the employee and her attorney failed to attend the scheduled hearing knowing very well that they had not been advised otherwise by the CCMA but opted not to attend. Having read the documents and having considered the matter, I do not find any good cause for the rescission to be granted.”

Grounds of review

- [4] The applicant challenges the arbitration award on the basis that:
- a. Mgubasi misdirected himself when he made two contradictory findings on the same evidence.
 - b. The reasoning is devoid from the result in that Mgubasi failed to apply the correct test for rescission.
 - c. The finding is void of reason on the same facts.

Review Test

- [5] In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,² the Court held that “*the reasonableness standard should now suffuse section 145 of the LRA*”, and that the threshold test for the reasonableness of an award was: “... *Is the*

² (2007) 28 ILJ 2405 (CC); 2008 (2) SA 24 (CC).

*decision reached by the commissioner one that a reasonable decision maker could not reach?...³. In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*⁴ the Court applied this reasonableness consideration as follows:*

“In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.”

[6] This test has thus been applied as a two-stage review enquiry. Firstly, the review applicant must establish that there exists a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. Secondly, if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure, that is equally the end of the review application. In short, in order for the review to succeed, the error or failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable.

[7] Further, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome of the arbitrator arrived at can nonetheless be sustained as a reasonable outcome,

³ Id at para 110.

⁴ (2013) 34 ILJ 2795 (SCA); [2013] 11 BLLR 1074 (SCA) at para 25.

even if it may be for different reasons or on different grounds.⁵ This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, it would only be if the outcome arrived by the arbitrator cannot be sustained on any grounds, based on the material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, then the review application would succeed.⁶

- [8] In *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA & Others*⁷ the Labour Appeal Court further explained the reasonableness test in the following terms:

“[15] A ‘process-related review suggests an extended standard of review, one that admits the review of an award on the grounds of a failure by the arbitrator to take material facts into account, or by taking into accounts facts that are irrelevant, and the like. The emphasis here is on process and not result. Proponents of this view argue that where an arbitrator has committed a gross irregularity in the conduct of the arbitration as contemplated by s145(2), it remains open for the award to be reviewed and set aside irrespective of the fact that the decision arrived at by the arbitrator survives the Sidumo test. I disagree. What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by Sidumo. The gross irregularity is not a self-standing ground insulated from or standing independent of the Sidumo test. That being the case, it serves no purpose for the reviewing court to consider and analyse every issue raised at the

⁵ *Fidelity* at para 102.

⁶ See *Campbell Scientific Africa (Pty) Ltd v Simmers & others* (2016) 37 ILJ 116 (LAC); [2016] 1 BLLR 1 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer & others* (2015) 36 ILJ 1453 (LAC); [2015] 4 BLLR 394 (LAC) at para 12.

⁷ (JA 2/2012) [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) (4 November 2013).

arbitration and regard failure by the arbitrator to consider all or some of the issues albeit material as rendering the award liable to be set aside on the grounds of process-related review.”

and

“[20] To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in section 138 of the LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly. This is also confirmed in the decision of CUSA v Tao Ying Metal Industries. Failing to consider a gross irregularity in the above context would mean that an award is open to be set aside where an arbitrator (i) fails to mention a material fact in his award; or (ii) fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute; and/or (iii) commits an error in respect of the evaluation or considerations of facts presented at the arbitration. The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator’s decision one that another decision-maker could reasonably have arrived at based on the evidence?”

and

“[21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an

unreasonable outcome (see Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts may potentially result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable - there is no room for conjecture and guesswork”

- [9] The Labour Appeal Court in *Head of the Department of Education v Mofokeng and Others*⁸ provided the following exposition of the review test:

“[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator’s conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether

⁸ (JA14/2014) [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC) (1 October 2014).

a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator, however, must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.”

- [10] The court will now proceed to consider the review application against the above principles and the test applicable to review applications.

Condonation application

- [11] The rescission ruling subject to these review proceedings was delivered on 27 March 2024. The review application had to be delivered within six weeks, i.e., on or before 8 May 2024. The review application was delivered on 24 May 2024, resulting in a delay of 16 calendar days beyond the prescribed period.
- [12] The explanation for the delay is that Hough sought advice from legal counsel, through her attorney of record, who assured her attorney that the review application would be prepared and filed within the prescribed period. Hough states that she relied on this advice in good faith and had no reason to believe that the matter was not being attended to diligently. She was not informed of any difficulties or delays, and she trusted that the necessary steps were being taken. The attorney of record, who is still the attorney of record in these review proceedings, deposed to a confirmatory affidavit. All that is stated in the confirmatory affidavit, by the attorney of record, is that he read the contents of the founding affidavit in support of the application for condonation and confirm the correctness of the facts therein insofar as they relate to him. No explanation whatsoever is given by the attorney as to why the review application was not delivered within the six-week period.

- [13] The review application was delivered 16 days late. However, Hough had six weeks before the delay of 16 days to deliver the application. No reason whatsoever is given why the attorney and counsel failed to deliver the application before expiry of the six-week period. No explanation is forthcoming from the attorney as to why it took another 16 days from expiry of the six-week period to deliver the application. To make things worse, the newly appointed counsel, on 2 September 2025, reviewed the papers and it only became apparent at that stage that the review application was delivered outside the prescribed six-week period. The application for condonation was only delivered on or about 2 September 2025, i.e., some 15 months after the late delivery of the review application. Again, there is no explanation from the attorney as to why he failed to realise, when the review application was delivered, that the application was late.
- [14] There is therefore, based on the pleadings before this court in support of the application for condonation, no explanation whatsoever why the review application was delivered late other than Hough stating that she was assured by counsel, through her attorney, that the application would be prepared and filed within the prescribed period. As stated already, the attorney of record, despite having deposed to a confirmatory affidavit, fails to address the reason for his failure, together with counsel, to deliver the review application within the six-week period.
- [15] The requirements for seeking condonation are trite. The Labour Court in *Novo Nordisk (Pty) Ltd v CCMA & Others*⁹ gave a particular helpful exposition of the principles governing condonation applications:

“Principles governing condonation

- [23] This Court has in several of its judgments stated that the principles governing the requirement for granting or refusal of condonation are well established in our law. In terms of these principles the Court has a discretion which is to be exercised judicially after taking

⁹ (JR214/01, JR2498/08) [2009] ZALC 93 (18 September 2009)

into account all the facts before it. The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame, (b) the explanation for the lateness or the failure to comply with time frames, (c) prospects of success or bona fide defense in the main case; (d) the importance of the case, (e) the respondent's interest in the finality of the judgement, (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice. See *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC).

- [24] There is also clear authority that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly strong prospects of success may compensate the inadequate explanation and the long delay.
- [25] In an application for condonation, good cause is shown by the applicant giving an explanation that shows how and why the default occurred. There is authority that the court could decline the granting of condonation if it appears that the default was willful or was due to gross negligence on the part of the applicant. In fact, the Court could on this ground alone decline to grant an indulgence to the applicant.
- [26] The prospects of success or bona fide defence on the other hand mean that all what needs to be determined is the likelihood or chance of success when the main case is heard. See *Saraiva Construction (PTY) Ltd v Zulu Electrical and Engineering Wholesalers (PTY) Ltd* 1975 (1) SA 612 (D) and *Chetty v Law Society* 1985 (2) SA at 765A-C.

[27] It is important to point out that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused. See *Melane v Santam Insurance Co Ltd*, 1962 (4) SA 531 (A) at 532C-F. It has also been held by the courts that the applicant should bring the application for condonation as soon as it becomes aware of the lateness of its case.

[28] A proper explanation entails, explaining for each period of the delay and the disclosure of all the details relevant to the delay. In explaining why the delay, the applicant needs to include the stage at which he or she became aware of the lateness in the referral. If the application was not made immediately or soon after becoming aware of the lateness the applicant needs to provide an explanation for that. And more importantly the applicant needs to take the Court into its confidence.”

[16] Molahlehi J, after considering the application for condonation, dismissed the application for condonation for the late filing of the purported reconstructed record of the arbitration proceedings. *Novo Nordisk* applied for leave to appeal, which was duly granted, and the Labour Appeal Court subsequently dismissed the appeal.¹⁰

[17] Jappie JA, at para [13], held that condonation of the non-compliance or non-observance of the rules or directives of a court is by no means a mere formality. The Court referred to *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC) at 369 (C-E) where the Court stated the following:

“It is well settled that in considering applications for condonation the court has a discretion, to be exercised judicially upon a consideration of all the

¹⁰ *Novo Norsdisk (Pty) Ltd v CCMA and Others* (JA94/2009) [2011] ZALAC 10 (6 June 2011)

facts. Relevant considerations may include a degree of non-compliance with the rules, the explanation therefor, the prospects of success on appeal, the importance of a case, the respondent's interest in the finality of the judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice, but the list is not exhaustive. These factors are not individually decisive, but are interrelated and must be weighed one against the other."

- [18] A major consideration in applications for condonation is that condonation is not there for the taking. An applicant for condonation must provide this court with *inter alia* an acceptable explanation for the delay. In the absence of an explanation for the delay, the other factors such as prospects of success, prejudice, and importance of the matter become irrelevant. In this matter, despite Mr. Jansen's argument that the explanation is slim, there is no explanation whatsoever. It is not a matter where the explanation is weak and where good prospects of success may serve as an overriding factor. The explanation is, simply put, completely absent.
- [19] The case law is also clear that an applicant for condonation cannot hide behind the tardiness of their attorneys. In this case, the court cannot even determine the level of the attorney's tardiness given the complete failure to give an explanation. The fact that the delay is 16 days is neither here nor there, as even when a matter is late by one day, good cause must be shown. And as stated already, this court cannot ignore the fact that, before the delay of 16 days, Hough had six weeks in which to deliver an application for review.
- [20] In the absence of any explanation for the delay, and in accordance with well-established case law in respect of the requirements for an application for condonation, this court finds that good cause was not shown for the late delivery of the review application to be condoned. The other factors are irrelevant under these circumstances.

[21] In any event, even if this court was to consider the prospects of success in the review application, i.e., Hough's prospects of successfully reviewing the rescission ruling, the prospects are very weak. Both Hugh and her attorney, despite being aware of the date of arbitration, decided not to attend the arbitration. They made this decision knowing that their previous correspondences to the CCMA were not responded to, and that their application for a postponement was never granted. Again, the case law is clear. A party is not entitled to accept no response as a favourable response. Until such time that the CCMA confirmed that the arbitration has been postponed, the arbitration will proceed on the scheduled date.

[22] Rule 23(5) of the CCMA Rules states that:

"There is no right to postponement and arbitration will proceed as scheduled unless the Commission or commissioner notifies the parties that the matter has been postponed."

[23] In *Free State Gambling and Liquor Authority v Motane and Others*¹¹ the Labour Court held:

"[15] In *Carephone (Pty) Ltd v Marcus NO and Others*, Froneman DJP (as he then was) reiterated that an application for postponement was not a matter of right. It is an indulgence granted by the court to a litigant in the exercise of a judicial discretion. With regards to proceedings before the CCMA, Froneman DJP further held that:

"There are at least three reasons why the approach to applications for postponements in arbitration proceedings under the auspices of the commission under the LRA is not necessarily on a par with that in courts of law. The first is that arbitration proceedings must be

¹¹ (JR1130/16; J23/15) [2017] ZALCJHB 88 (10 March 2017)

structured to deal with a dispute fairly and quickly (s 138(1)). Secondly, it must be done with 'the minimum of legal formalities' (s 138(1)). And thirdly, the possibility of making costs orders to counter prejudice in good faith postponement applications is severely restricted. . . ”

[16] Emanating from the above and other jurisprudence, it is apparent that:

- a) postponements at arbitration hearings are not to be readily granted.
- b) postponements in arbitrations should be granted on “less generous basis.” This approach is informed by the recognition that the LRA requires that labour disputes need to be resolved expeditiously and thus arbitrators have a wide discretion in granting or refusing to grant a postponement.
- c) where fundamental fairness and justice justifies a postponement, the arbitrator may in appropriate cases, allow such an application even if it was not timeously made.
- d) the Labour Court sitting in review will adopt a stringent and restricted approach to interfering with the refusal to grant postponements by arbitrators.
- e) it is only when a compelling case has been made for interfering with the exercise of the discretion of the arbitrator, will the court interfere with the refusal to grant a postponement. This can be in instances where the arbitrator was influenced by wrong principles or misdirection on the facts, or where the decision reached could not reasonably have been made by an arbitrator properly directing him/herself to all the relevant facts and principles.”

- [24] In *National Police Service Union & Others v Minister of Safety and Security & Others*¹² it was held that:

“The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the Court. Such postponement will not be granted unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the Court and cannot be secured by mere agreement between the parties. In exercising that discretion this Court will take into account a number of factors, including (but not limited to): whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice”

- [25] Hough states in her affidavit that she was only advised some 35 minutes before the start of the arbitration proceedings that the arbitration will proceed. Despite being so advised, Hough decided not to travel to Riversdale, which is some 30 minutes from where she stays, to attend the arbitration. She decided to simply stay away. This being the case, Hough can hardly criticise Mgubasi for dismissing the referral on the day and, thereafter in the application for rescission, finding as follows:

“11. ... Both the employee and her attorney failed to attend the scheduled hearing knowing very well that they had not been advised otherwise by the CCMA but opted not to attend.”

- [26] Section 144 of the LRA states that a commissioner may rescind an arbitration award or ruling on the following grounds:

¹² 2000 (4) SA 1110 (CC) at 1112F.

- a. Erroneously sought or erroneously made in the absence of a party affected by it.
- b. Ambiguity, obvious error or omission, but only to the extent of that ambiguity or error.
- c. Mistake common to the parties to the proceedings.
- d. Made in the absence of a party, on good cause shown.

[27] Where rescission is sought, the applicant must establish:

- a. No willful default. In other words, the failure to attend the arbitration proceedings was not deliberate or negligent.
- b. Reasonable explanation in that the absence must be adequately explained.
- c. Prospects of success. The applicant must show a *prima facie* case, though not necessarily dealing with the full merits.¹³

[28] This court cannot fault Mgubasi's decision to refuse to rescind the dismissal ruling based on the evidence that was presented to him in the application for rescission. Hough and her attorney made a conscious decision to ignore the fact that the arbitration was set down and to stay away. They cannot, after the fact, complain about the conscious decision that was taken to disregard the set down. The prospects of success in succeeding with the review application to review the rescission ruling are poor.

¹³ See *Shoprite Checkers (Pty) Ltd v CCMA & Others* (PA5/05) [2007] ZALAC 7; [2007] 10 BLLR 917 (LAC); (2007) 28 ILJ 2246 (LAC) (29 June 2007) at para 38 and *Northern Training Trust v Maake & Others* (JR268/ 02) [2005] ZALC 111; [2006] 5 BLLR 496 (LC); (2006) 27 ILJ 828 (LC) (2 December 2005) at para 28.

[29] Insofar as prejudice is concerned, the third respondent (Stilbaai Golf Club) duly attended the arbitration with their representative. They were prejudiced by Hough's decision not to attend and again prejudiced in having to oppose the subsequent rescission application, which was also delivered late but condoned by Mgubasi. They are also now prejudiced in having to oppose the review application.

[30] Insofar as Hough's prospects of success in the unfair labour practice are concerned, the final written warning has already expired. Hough is still in the employ of Stilbaai Golf Club, and the relationship is ongoing. Even if this court was to review the rescission ruling, Hough will have to pursue an unfair labour practice dispute where the issuing of the final written warning has become a moot point. The delay in this matter was caused by Hughes and her attorney and to now allow a matter regarding a final written warning to be arbitrated years later and after it has already expired is not in the interests of justice, nor in the interest of the speedy and effective resolution of unfair labour practice disputes. This is over and above the mootness of such a dispute given the expiry of the final written warning.

[31] And finally, it is necessary to note that a review application delivered late without explanation cannot be condoned, and a rescission refusal premised on a party's conscious absence from arbitration is not unreasonable."

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

Order

1. The application for the late filing of the review application to be condoned is refused.
2. The application to review the rescission ruling is dismissed.
3. No order is made as to costs.



C. de Kock

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

A Jansen

Instructed by:

BDP Attorneys (Garden Route)

For the Third Respondent:

W van Romburgh from AHI Employers Organisation