



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D304/24

Not Reportable

In the matter between:

Ithala Development Finance Corporation

Applicant

and

Walter Mveli Zuma

First Respondent

Commission for Conciliation Mediation and Arbitration.

Second Respondent

Commissioner P Naidoo NO

Third Respondent

Heard: 24th April 2025

Delivered: 01st October 2025

JUDGMENT

MM Govender AJ

INTRODUCTION

[1] This is an application to review the Condonation Ruling issued by the Third Respondent under the auspices of the second respondent. The ruling 2nd April 2024 granted condonation of the late filing of the Arbitration referral by the First Respondent.

It is noted that the arbitration hearing that proceeded subsequent to said ruling was still in progress and was incomplete at the time of this referral .

RELIEF SOUGHT

[2] The Applicant indicated the relief it seeks as follows :

- (i) Condonation of the the applicant's failure to institute the review application within the prescribed 6 weeks after the arbitration award was issued.
- (ii) Review and Set Aside of the arbitration award made by the Third Respondent.
- (iii) Substitution of the award made by the Third Respondent with an order dismissing the application for condonation of the late arbitration referral.
- (iv) A Costs Order against the Respondent if the review application is opposed.

THE LAW

[3] The fundamental question is whether or not it is just and equitable for this court to grant this application noting that it was brought whilst the Arbitration hearing was on going.

[4] A condonation ruling that is reviewed (whilst the arbitration is on going) must meet the requirements of S158(1B) of the Labour Relations Act (66 Of 1985) 'LRA' . A commissioner may not do so unless the Court is convinced that it is ' just and equitable' to do so.

[5] This is a stringent test .

The review applicant must show that the Commissioner committed a material error of law or fact that resulted the Condonation ruling that is the subject of the Review application.

[6] For a considerable period the popular authority on condonations was the judgment in **Melane v Santam Insurance Company Ltd¹** . The noun ‘conspectus’ used in the judgment has peppered many condonation rulings and judgements thereafter and perhaps rightly so . Courts are required to balance an overview of factors in applying its discretion in determining its decision. An excellent explanation for the delay may for instance counterbalance a lengthy delay.

[7] Our apex court in **Grootboom v NPA and another²** Zondo J (as he was then) said that ‘ the standard for considering an application for condonation emphasized the over arching importance of the interests of justice. After all the factors are balanced the court must determine whether it is in the interests of justice to grant the condonation

FACTUAL PRECIS’ (as discerned from the papers)

[8] The first respondent was employed by the Applicant as an Assistant Administrator.

[9] On or about November 2022 the first Respondent was charged with various counts of misconduct. A disciplinary hearing was held. The first respondent elected not to lead any evidence in his own defence or to call any witnesses to testify on his behalf.

[10] After the disciplinary enquiry on 19th April 2023 the first respondent was found guilty and was dismissed by the Applicant.

[11] On 28th April 2023 the first respondent referred a conciliation dispute to the CCMA.

The Conciliation was held on 26th May 2023 after which the Commissioner issued a certificate of outcome indicating that the dispute remained unresolved.

[12] The first respondent submitted a 7.13 Arbitration referral with a condonation application to the CCMA on 6th November 2023.

[13] The Applicant filed its answering affidavit opposing said condonation application on 8th November 2023.

The first respondent filed its replying affidavit on 19th January 2024.

[14] Condonation was granted by the Third Respondent on 2nd April 2024.

[15] This Review application filed slightly late itself seeks condonation for said delay and seeks to review and set aside the Condonation ruling.

The Condonation Application

[16] The condonation application indicated that the referral was 19 days late.

The reason for said delay (in the referral to the CCMA) was simply :

“The commissioner Mr Mbatha advised that he was going to put my application for arbitration”

The third respondent's ruling

[17] The salient aspects of the ruling :

- (i) the commissioner's acceptance that the 7.13 CCMA arbitration referral was in fact 73 days late ;
- (ii) His determination that said degree of delay was ' excessive' ;

- (iii) His acceptance of the first respondent's explanation that the the delay was occasioned by the first respondent's averment that Commissioner Mbatha had undertaken the responsibility of referring the matter to arbitration as connoted in the following paragraph of the Ruling

*" I accept that the explanation as it is probable that he could have
Been erroneously advised by the Commissioner."*

- (iv) On the matter of prospects of success the Commissioner says
" ..there appears to be dispute of facts which must be further ventilated in the interests of justice'.

- (v) The only aspect dealt with on ' Prejudice' was
" I do not believe that the respondent will be severely prejudiced".

ANALYSIS OF THE RULING AND ASSESSMENT

[18] Firstly the applicant's failure to institute the review application within the prescribed 6 weeks after the arbitration award was issued was a very slight delay and is condoned.

[19] In terms of Rule 18 (CCMA Rules of Conduct)³ the arbitration referral has to be submitted within 90 days of the completion of the Conciliation.

[20] It is trite that CCMA days are counted as calendar days not court days and therefore includes public holidays and weekends.

[21] The certificate of outcome of the Conciliation was issued by the CCMA on 26th May 2023. In terms of CCMA Rule 18 the Arbitration referral should have been submitted within 90 days (ie) by 26th August 2023.

The Arbitration referral was submitted on 6th November 2023.

[22] The referral was technically 72 days late but indicated by the commissioner as 73 days late. This is not significant.

[23] The first matter to dispense with is the disparity in the calculations of the extent of the delay.

The First Respondents representation is that the 7.13 referral was 19 days late.

The Applicants representation is that the 7.13 referral was 73 days late.

This is correct by calculation of the calendar days between 26th August 2023 and 6th November 2023.

In its Founding affidavit the First Respondent indicates that the days were calculated by using 'court' days. This is erroneous as CCMA referral days are calculated using calendar days. This might well (at least partially) explain the disparity.

[24] Be that as it may the commissioner accepted that the referral was 73 days and that said delay was 'excessive' . In line with established criteria the criteria this delay would have had to be accompanied by a convincing explanation . This explanation is also required to cover the whole period.

[25] The First Respondent did not present a proper convincing explanation to the Commissioner for said delay. In point of fact the explanation for said extensive delay was placed at the door of the Conciliation Commissioner Mbatha.

[26] The Third Respondent seems to have framed his decision around the acceptance that Conciliation Commissioner Mbatha did tell the First Respondent that (commissioner) would attend to the 7.13 referral.

[27] This is an extraordinary averment as it is trite that it is not the ordinary duty of the Conciliation Commissioner to attend to said administrative task which is the prerogative of the First Respondent. It also makes little sense - after a unsuccessful Conciliation process it is the First Respondent who makes a decision of whether or not to refer the matter to arbitration.

[28] The Conciliation Commissioner simply does not have the authority or duty to do so. There is also no supporting evidence for this assertion in the form of an affidavit or other oral evidence.

The third respondent simply accepted the probability that the first respondents' averments were probably correct and that he did attempt the engagements with the CCMA .

[29] In its answering affidavit at point 12.4 the first respondent suggests that the onus was on the applicant to rebut its averments in its condonation application. This is a misunderstanding of the onus.

He who avers must prove is a time worn adage of evidence.

The first respondent bore the onus of proving its averments orally or in writing – it is only thereafter that a onus to rebut might have moved to the applicant.

[30] The Third Respondent would not only have required a credible explanation he would also have required an extensive explanation that covered the whole period of the delay accepted by the third respondent as ' excessive'.

[31] The Constitutional Court held in **Van Wyk v Unitas Hospital and Another** ³ :
"An applicant for condonation must give a full explanation for the delay. And, what is more, the explanation given must be reasonable.

[32] It is a well established principle that an application for condonation may be refused without a reasonable and acceptable explanation for the delay, irrespective of good prospects of success.

This principle was affirmed in **Colett v CCMA** ⁴ and others in which the LAC held :
There are overwhelming precedents in this Court, The SCA and the Constitutional Court that where there is a flagrant or gross failure to comply with the rules of Court Condonation may be refused without considering the prospects of success.

[33] The failure in the Conciliation Commisioners decision is futher exacerbated not only by the absence of any proper explanation (for the delay) and then even further by no proper explanation for the whole period of the delay.

[34] The first respondent's averment at Paragraph 10 of its replying affidavit refers to the attempts he made to reach Conciliation Commissioner Mbatha but avers that he had not been able to do so.

The third respondent accepted this averment. This was not reasonable.

If the first respondent had intended to enquire about the status of the arbitration he would have done so with the administration of the CCMA which is generally required to be accessible to members of the public. If the first respondent had followed this process he would have realised very early in the process that his matter had in fact not been referred to arbitration and would have been able to lodge his arbitration within the 90 day period allowed by Rule 18 of the CCMA rules.

[35] The third respondent also dealt with the first respondent's prospective merits very briefly and simply stated that the conflicting versions should be ventilated at the arbitration.

This court notes that ordinarily an arbitration is a hearing '*de novo*'. This court however notes also that the first respondent challenged the substantive fairness of his dismissal at the internal hearing and confirmed in his answering affidavit at paragraph 13.2 that he did not testify or lead any witnesses at said disciplinary hearing. The third respondent ought to have determined at least a '*prima facie*' indication of the first respondent's prospective merits.

It is noteworthy that the first respondent's representations that the applicant did not provide any evidence against the first respondent (at the internal hearing) is not consistent with the internal chairpersons report. At page 12 of the report (page 95 of the applicant's pleadings).

"The employees through their representatives indicated that they were not calling witnesses including not allowing the employees they were representing to take the witness stand since they believed that the employer did not present sufficient (own emphasis) evidence. As chairperson I took it upon myself to caution the representatives of the implications.....they still maintain their position.....thus made an application for absolution from the instance".

[36] The first respondent also determined that the applicant would not be severely prejudiced but did not provide proper substantiation for said determination.

[37] In terms of S158(1B) of the Labour Relations Act (66 Of 1985) 'LRA' . this Court may not review and set aside a Condonation Ruling whilst an Arbitration is in process unless convinced that it is ' just and equitable' and in the interests of justice to do so.

[38] On the basis of a conspectus of all the relevant factors - It is just and equitable and in the interests of justice to do so.

CONCLUSION

1. The applicant's failure to institute the review application within the prescribed 6 weeks (after the arbitration award was issued) is a minor delay and is condoned.
2. The ruling issued by the third respondent is reviewed and set aside.
3. The court finds no basis on which to award costs .

ORDER

- (a) The applicant's failure to institute the review application within the prescribed 6 weeks (after the arbitration award was issued) is condoned.**
- (b) The Condonation Ruling issued by the Third Respondent is reviewed and set aside.**
- (c) The Ruling issued by the Third Respondent is substituted with an order refusing Condonation of the late referral and is substituted with an order dismissing the application for condonation of the late arbitration referral.**

(d) No Costs order

MM Govender

Acting Judge of the Labour Court of South Africa

Appearances

Applicant : Adv M N Xulu instructed by Zuma and Partners Inc Attorneys

Respondent: Mr P Shangase Attorney. AP Shangase & Associates Attorneys

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1. **1962(4) SA531(A) 532 C-E**
 2. **2014 35 ILJ 121 CC**
 3. **2007 ZACC 24**
 4. **2014 6 BLLR 523 LAC**