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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case No: C130/2023

In the matter between:

ANDILE DESHA

Applicant

and

EDUCATION LABOUR RELATIONS COUNCIL

First Respondent

JAKUES BUITENDAG N.O.

Second Respondent

WESTERN CAPE EDUCATION DEPARTMENT

Third Respondent

Heard: 3 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 13 October 2025.

JUDGMENT

DE KOCK, AJIntroduction

- [1] This matter came before the court as an application to review the arbitration award issued by the second respondent (the commissioner) in terms of section 145 of the Labour Relations Act¹ (LRA). The application was, however, filed late and the court is required to first consider the application for condonation. The applicant seeks condonation for a delay of approximately 50 days in filing the review application.
- [2] The second respondent (the commissioner) found the applicant guilty of sexually harassing a learner and ordered his summary dismissal from his position as an educator with the third respondent (WCED), a position that he had held for approximately 19 years. The award also directed that a copy be sent to the South African Council for Educators (SACE) to consider revoking the applicant's teaching certificate and declaring him unsuitable to work with children.

Factual Background

- [3] The relevant facts are largely undisputed and will be briefly summarised. The applicant was employed as an educator for approximately 19 years. He maintained a clean disciplinary record throughout his employment until the events giving rise to his dismissal.
- [4] On or about 28 February 2022, the applicant was alleged to have sexually harassed a learner (Learner A). A disciplinary inquiry was conducted before the commissioner, who is a commissioner of the first respondent (ELRC). The inquiry proceeded over several dates: 10 June 2022, 21 July 2022, 29 August 2022, 28 September 2022, and 3 November 2022.

¹ Act 66 of 1995, as amended.

- [5] The applicant represented himself at the inquiry. He pleaded not guilty to the charge. The WCED called four witnesses. The applicant testified in his own defence. A critical issue arose regarding the applicant's witnesses. The applicant indicated that he required two witnesses to be subpoenaed: the mother of Learner A (Ms N[...]) and a Mr V[...] M[...]. These witnesses were central to the applicant's defence theory that the allegations were fabricated due to a financial dispute.
- [6] On 29 August 2022, the inquiry was postponed to allow the applicant to subpoena his witnesses. On 28 September 2022, the applicant presented copies of subpoenas, but the witnesses did not attend. The applicant had incorrectly used the South African Police Service (SAPS) to serve the subpoenas. The matter was postponed again to 3 November 2022, with the commissioner giving clear directions on proper service.
- [7] On 3 November 2022, the applicant testified that he had properly served both witnesses and had even provided them with R200 transport money. However, both witnesses failed to attend. The applicant's evidence was that one witness's daughter informed him that her mother had "another commitment," and the other witness's phone went to voicemail.
- [8] The commissioner decided to proceed with the hearing despite the non-attendance of the subpoenaed witnesses. The applicant objected but was directed to close his case. On 21 November 2022, the commissioner issued his award finding the applicant guilty and imposing summary dismissal. The award was sent to the applicant via email on 29 November 2022.
- [9] In terms of section 145(1)(a)(i) of the LRA, the Applicant had six weeks from receipt of the award to file a review application. The deadline was therefore 10 January 2023. The Applicant filed his review application on or about 1 March 2023, approximately 50 days late.

- [10] The legal principles governing condonation applications are well-established. In *Melane v Santam Insurance Co Ltd*², the court held:

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. 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, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interests in finality must not be overlooked."

- [11] This court must therefore consider the degree of lateness; the explanation for the delay; the prospects of success on the merits; the importance of the case; and prejudice to the respondents.
- [12] In *Grootboom v National Prosecuting Authority and Another*³, the Constitutional Court held that the standard for considering a condonation application is "the interests of justice," which includes (but is not limited to) the nature of the relief sought; 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 intended appeal; and the prospects of success.

² 1962 (4) SA 531 (A) at 532B-F

³ [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) at para 22

[13] In *NUM v Council for Mineral Technology*⁴, the court held:

"... The approach is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated: they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is 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."

Application of the legal principles

The degree of lateness

[14] The review application was filed approximately 50 days outside the prescribed six-week period. In the context of Labour Court reviews, this delay is not insignificant and requires a good explanation for the delay and particularly strong prospects of success. Standing alone, the 50-day delay is not fatal to the application. However, it must be assessed in conjunction with the other relevant factors.

The explanation for the delay

[15] The applicant's explanation may be broken down into distinct phases:

Phase 1: 29 November 2022 to 24 December 2022 (25 days)

⁴ [1998] ZALAC 22 at para 10

- [16] The applicant states that he approached his legal insurer, Legalwise, for assistance. This is reasonable and occurred within the six-week review period. No issue arises during this phase.

Phase 2: 24 December 2022 to 24 January 2023 (31 days)

- [17] This is the most problematic period. The applicant states that Legalwise referred him to attorneys on their panel (Parker Attorneys) on 24 December 2022, but the attorneys were unable to make contact with him because he had "lost his cell phone and awaited contact from the legal insurer by e-mail."
- [18] Several difficulties arise from this explanation. The statutory deadline expired on 10 January 2023. This means that for 14 days after the deadline had passed (from 10 to 24 January), the applicant was still unreachable due to his lost phone. The applicant's own affidavit reveals that he had email access throughout this period, as he eventually contacted the attorneys via email on 24 January 2023. If he had email access, why did he wait 31 days (14 of which were past the deadline) to make contact?
- [19] The matter was of critical importance to the applicant – involving the loss of a 19-year career, his teaching certificate, and a finding that he is unsuitable to work with children. In such circumstances, a reasonable person would have obtained a new phone or SIM card immediately (easily done within days); used email proactively to contact the attorneys; borrowed someone else's phone to make contact; visited the attorneys' offices in person; or taken other reasonable steps to preserve his rights.
- [20] The applicant offers no explanation for why none of these steps were taken during the 31-day period, and particularly during the 14 days after the deadline had expired. This Court finds this explanation falls short of what is required in the circumstances. The "lost phone" excuse might explain a delay of a few days, but not a delay of 31 days, particularly when the applicant had alternative means of communication available.

Phase 3: 26 January to 6 February 2023 (11 days)

- [21] On 26 January 2023, the applicant consulted with his attorneys. On 27 January 2023, a condonation application was drafted and submitted to the ELRC rather than to this Court. This was a fundamental error. The ELRC has no jurisdiction to grant condonation for the late filing of a review application in the Labour Court. By this stage, the applicant had legal representation, and his attorneys ought to have known that the statutory deadline had expired 16 days earlier; that the matter needed to be brought before the Labour Court, not the ELRC; and that urgent steps were required to preserve the applicant's rights.
- [22] On 6 February 2023, the ELRC responded, correctly advising that they had no jurisdiction and that the matter should be brought before this Court. This represents a further 11 days of delay pursuing a legally misconceived remedy. While it demonstrates that the applicant was taking some action, it also demonstrates inadequate legal advice and a lack of urgency.

Phase 4: 9 February to 23 February 2023 (14 days)

- [23] The attorneys requested urgent cover from Legalwise on 9 February 2023. Cover was only granted on 23 February 2023 – 14 days later. While this Court accepts that funding considerations are a legitimate concern, several problems arise. No explanation is provided for why Legalwise took 14 days to grant cover for an urgent matter. No explanation is provided for what steps, if any, were taken to expedite the decision. The applicant could have preserved his rights by filing a notice of intention to review while awaiting funding confirmation. The applicant could have filed the review application and sought cover simultaneously, explaining the urgency to the insurer. By this stage, the Applicant was 30+ days past the deadline and had legal representation. Greater urgency was required.

Phase 5: 23 February to 1 March 2023 (6-7 days)

- [24] A consultation was arranged with counsel who drafted the review and condonation application. This period of 6-7 days for drafting is reasonable.

Overall Assessment of the Explanation

- [25] When viewed holistically, the explanation reveals a pattern of inadequate urgency and poor decision-making. From 29 November to 10 January (deadline): 42 days, of which only 25 were productively used. From 10 January (deadline) to 1 March (filing): 50 days, with multiple periods of inaction or misdirection. The "lost phone" explanation is particularly weak given the availability of email and the 14-day period after the deadline. The ELRC application represents 11 days wasted on a jurisdictionally incompetent application. The funding delay of 14 days is inadequately explained.
- [26] While this Court accepts that the applicant was initially unrepresented and may not have known the precise deadline, this cannot excuse the late filing of the review application given the 31-day period of non-communication when email was available; the misdirected ELRC application after attorneys were appointed; the inadequately explained funding delay; or the overall lack of urgency given what was at stake. While this Court is sympathetic to an unrepresented litigant's initial challenges, the appointment of attorneys on 26 January 2023 should have resulted in immediate corrective action.
- [27] This Court therefore finds the explanation for the delay to be weak and largely unsatisfactory.

Prospects of success on the review

- [28] This is the decisive factor in this application for condonation. As *Melane* states, "if there are no prospects of success there would be no point in granting condonation." Similarly, *Grootboom* makes clear that even where a delay is short and a matter is important, condonation may be refused if prospects of success are poor.

[29] The applicant advances two grounds of review. In respect of procedural unfairness, he relies on the failure to secure attendance of subpoenaed witnesses. In respect of substantive unfairness, he relies on the unreasonable evaluation of the evidence.

[30] This Court must consider whether the applicant has established reasonable or arguable prospects of success. This Court does not decide the review finally but must assess whether there is a realistic prospect that the review will succeed.

The Test for Review

[31] The test for reviewing an arbitration award under section 145 of the LRA is well-established. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁵, the Constitutional Court held that the question is:

"Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?"

[32] In *Herhold v Nedbank Ltd*⁶, the Supreme Court of Appeal clarified:

"... 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 only of any consequence if their effect is to render the outcome unreasonable."

[33] In *Head of Department of the Department of Education v Mofokeng and Others*⁷, the Labour Appeal Court held:

⁵ [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BLLR 158 (CC) at para 110

⁶ [2013] ZASCA 97; 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA) at para 25

⁷ [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC) at para 33

"... 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 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." (footnotes excluded)

- [34] This "but for" test is critical. The applicant must show not merely that an irregularity occurred, but that but for the irregularity, the outcome would have been different.

4.3.2 The Procedural Ground: Non-Attendance of Witnesses

- [35] The applicant argues that the commissioner committed a gross irregularity by proceeding with the hearing on 3 November 2022 despite the non-attendance of the applicant's two subpoenaed witnesses. This court accepts that these witnesses were potentially relevant to the applicant's defence. His defence theory was that the allegations were fabricated by the learner's mother due to a financial

dispute, and the mother's testimony would have been critical to testing this theory.

- [36] However, several factors militate against a finding that the procedural ground has reasonable prospects of success. First, the commissioner gave the applicant multiple opportunities to secure his witnesses. On 29 August 2022, the matter was postponed specifically to allow the applicant to subpoena witnesses. On 28 September 2022, when the witnesses did not attend (because the subpoenas were improperly served via SAPS), the matter was postponed again, with clear directions on proper service. On 3 November 2022, when the witnesses again failed to attend despite proper service, the commissioner decided to proceed.
- [37] This was not a case where the commissioner refused to grant any postponement. Rather, it was a case where two postponements had already been granted, and the witnesses were actively avoiding attendance.
- [38] Second, the witnesses' non-attendance was not due to any failure by the commissioner, but rather due to the applicant's initial failure to serve properly (using SAPS instead of Sheriff); and the witnesses' deliberate choice not to attend despite being properly served and even provided with transport money.
- [39] A commissioner has wide discretion to manage proceedings and cannot be expected to postpone indefinitely in pursuit of recalcitrant witnesses. The decision to proceed after two postponements and in circumstances where the witnesses were clearly avoiding attendance falls within the range of reasonable procedural decisions available to the commissioner.
- [40] Third, and most importantly, the "but for" test is not satisfied. The critical question is: would the outcome have been different if the witnesses had testified? Having reviewed the record of proceedings, this Court is not persuaded that there is a realistic prospect of showing that the witnesses' testimony would have resulted in a different outcome. The evidence against the applicant was very strong. Learner A provided detailed, specific testimony about the incident. Learner B (the

complainant's sister) corroborated the account. Debbie (the aunt) testified about the children's immediate complaint and distress. The evidence was consistent across multiple witnesses and multiple hearings. The applicant admitted being at the house.

[41] This Court finds that the applicant's defence theory was highly improbable. It required believing that a mother would coach her daughter to fabricate detailed allegations of sexual assault; that she would involve both daughters in this fabrication; that she would take the matter to police, to the school, and through a formal arbitration; that she would maintain this false story for over eight months; all to avoid repaying a debt of unknown amount for which no documentation exists. The mother's likely evidence would not have assisted the applicant:

41.1 If she admitted fabricating the allegations, as she would have exposed herself to criminal charges (perjury, child abuse).

41.2 If she denied fabricating the allegations as this would harm the applicant's case by confirming the allegations were genuine.

41.3 Most likely, she avoided attending precisely because she did not want to be placed in this position.

[42] Mr Mphango's evidence was of limited relevance, as he could only testify about events while he was present; the alleged assault occurred after Mr Mphango, and the applicant left the house together (when the applicant allegedly returned); and his evidence therefore could not directly contradict the core allegations.

[43] In these circumstances, this Court is not satisfied that there are reasonable prospects of establishing that but for the non-attendance of these witnesses, the outcome would have been different. The balance of probabilities, based on the evidence that was actually led, strongly favoured a finding of guilt. The applicant bears the onus of demonstrating that the outcome would probably have been different, and on the evidence before this Court, that onus has not been discharged.

- [44] A commissioner's decision to proceed with a hearing after multiple postponements, where witnesses are avoiding attendance and where their evidence is unlikely to change the outcome, is a procedural decision within the commissioner's discretion and does not constitute a reviewable irregularity.

The Substantive Ground: Evaluation of Evidence

- [45] The applicant's substantive ground essentially challenges the commissioner's credibility findings and evaluation of the evidence. The applicant argues that the commissioner failed to find the applicant's version reasonable; failed to treat the children's evidence with appropriate caution; failed to appreciate that the children's "very similar" evidence indicated coaching; and failed to consider that one child did not actually see the incident.
- [46] These arguments face a fundamental obstacle: they require this Court to re-assess credibility, re-weigh evidence, and substitute its own view for that of the fact-finder. As the Labour Appeal Court held in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*⁸:

"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

⁸ [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at para 20

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?"

- [47] This Court, in applying these questions, finds that the applicant was given a full opportunity to testify and present his case. The commissioner clearly understood the dispute: whether the applicant sexually harassed a learner. The commissioner dealt with the merits, assessing the evidence of multiple witnesses and the applicant's defence. The critical question: Was the decision one that another decision-maker could reasonably have arrived at?
- [48] In this Court's view, the answer is clearly yes. The commissioner heard detailed testimony from the complainant; heard corroborating testimony from the sister and aunt; observed the witnesses and assessed their demeanor; noted the consistency of their accounts; considered the applicant's defence theory and found it implausible; and made credibility findings in favour of the complainant.
- [49] These are classic fact-finding and credibility assessment functions. Another commissioner might conceivably have reached a different conclusion, but that does not make this conclusion unreasonable. The applicant's complaints about children's evidence needing caution (but caution was applied), evidence being "too similar" (consistency usually supports credibility, not undermines it), one child not seeing the incident (but providing corroborative circumstantial evidence) are essentially invitations to re-weigh the evidence and reach a different credibility conclusion.
- [50] This is not the function of a review court. As *Herhold* makes clear, "material errors of fact, as well as the weight and relevance attached to particular facts are not in themselves sufficient for an award to be set aside." This Court is therefore not satisfied that the applicant has reasonable prospects of success on the substantive ground.

Overall Assessment of Prospects

[51] Having considered both grounds of review, this Court finds that the applicant's prospects of success are poor. While not entirely hopeless, the prospects are weak enough that, coupled with the unsatisfactory explanation for delay, condonation should not be granted. The procedural ground faces the obstacle that multiple opportunities were already given, and the "but for" test is unlikely to be satisfied. The substantive ground is essentially a disguised appeal seeking re-assessment of credibility findings.

[52] A reviewing court is not a court of appeal. The question is not whether the commissioner got it right, but whether he got it so wrong that no reasonable arbitrator could have reached his conclusion. That threshold is not met here.

Importance of the matter

[53] This Court accepts that this matter is important to the applicant. He faces loss of employment of 19 years; loss of his teaching certificate; a referral to SACE with the potential consequence of being declared unsuitable to work with children severe reputational damage; and at his age and with these findings, likely inability to pursue alternative employment in education. These are serious consequences, and Courts must be alive to the impact on an individual's livelihood and dignity.

[54] However, importance alone cannot override weak prospects of success and an inadequate explanation. As *Grootboom* recognises:

"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."

[55] The converse must also be true: despite the importance of the matter, condonation may be refused where the prospects are weak, and the explanation is inadequate. Moreover, there are important interests on the other side, which

are WCED's interest in finality; the interest of learners in being protected from sexual harassment; the public interest in ensuring that disciplinary processes are respected; and the interest in not using scarce judicial resources on weak cases.

Prejudice to the Respondents

- [56] The applicant argues that WCED will not be prejudiced as they have already filed an answering affidavit. While it is true that WCED has engaged with the matter, several forms of prejudice still exist. The award was issued on 21 November 2022. This application was heard on 3 September 2025. The WCED is entitled to finality and to move on from this matter. If the matter were to be remitted for a hearing de novo (as the applicant alternatively seeks), witnesses may no longer be available, memories may have faded, and the children (who were learners at the time) may have moved on with their lives. The WCED will have to defend a review with weak prospects, incurring legal costs and diverting resources from its educational mandate.
- [57] While these prejudices are not overwhelming, they are not negligible either. When coupled with weak prospects and a poor explanation, they tip the balance against condonation being granted.

Public interests

- [58] The public interest in protecting learners from sexual harassment and ensuring finality in disciplinary proceedings affecting child safety is particularly weighty. While every litigant deserves their day in Court, weak cases involving serious allegations against vulnerable persons must meet a higher threshold for disturbing concluded proceedings.

Balancing of factors

- [59] This Court finds that the degree of lateness is not insignificant; the explanation for the delay is poor; and that the applicant's prospects of success in the review

application are weak. The importance of the matter to the applicant, and the prejudice to the parties are considered as neutral factors. Condonation is not there for the mere asking. It is a judicial discretion, exercised upon a conspectus of all relevant factors, and is grounded in fairness to both parties. This Court therefore finds that it will not be in the interest of justice to grant condonation for the late filing of the review application.

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

Order

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

C. de Kock

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: A Isaacs from Parker Attorneys

For the Third Respondent: A de Wet

Instructed by: State Attorney