



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1567/2022

In the matter between:

LEBOGANG MASEMOLA

Applicant

and

NECSA (Nuclear Energy South Africa)

First Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION & ARBITRATION**

Second Respondent

COMMISSIONER ROBERT SKHOSANA

Third Respondent

Heard: 26 June 2025

Delivered: 27 October 2025

Summary: *Condonation – Late referral – internal appeal noted – attorney blamed for the delay – explanation reasonable. Commissioner dismissed condonation based on excessive delay. Arbitrator misdirected and mis-appreciated the facts before him – finding of excessive delay not aligned with the facts including date of dismissal. Employer's failure to set down the internal appeal by elevating form over substance. Failure to consider interest of justice including prejudice further misdirection. Condonation ruling reviewed and set aside.*

JUDGMENT

MOSIKILI, AJ

Introduction

- [1] The applicant, Mr Lebogang Masemola seeks, in terms of section 145 of the Labour Relations Act¹ (“the LRA”) to review, correct and/set aside the ruling of the Commission for Conciliation, Mediation & Arbitration (“**CCMA**”) (*per* Third Respondent) dated 14 April 2022 under case number GATW3123 – 22. The third respondent refused the applicant’s application for condonation of the late referral to the CCMA. The applicant also seeks an order condoning the late filing of this review application.
- [2] It is apt to mention that during the hearing of the matter, Mr. de Koker on behalf of the applicant (wisely) abandoned prayers 4 - 6 of the notice of motion, i.e. orders requesting a determination that this Honourable Court must hear the unfair dismissal on the merits (prayer 4); that the Honourable Court order that the 1st Respondent re-instate the applicant (prayer 5), and alternatively compensate the unfairness of the dismissal (prayer 6).

Facts

- [3] The salient facts relating to this application, save for aspects to which, in that context, I shall make specific reference, are not in dispute. They may be summarised as follows.
- [4] Mr Masemola was dismissed on 27 September 2021 by the first respondent, Nuclear Energy Corporation of South Africa (“**NECSA**”) for misconduct. The charge against him emanated from the evidence he gave as a witness during a

¹ No. 66 of 1995, as amended

disciplinary hearing of a co-employee. In his dismissal letter, Mr Masemola was granted a right to appeal the decision within ten (10) working days thereof.

- [5] On 06 October 2021 Mr Masemola noted an appeal against his dismissal. The letter is titled “**NOTICE OF APPEAL**” and *prima facie* contains reasons for the said appeal and it records:²

“Kindly note that we act on behalf of the abovementioned client Lebogang Masemola. It is further our instruction to note an appeal against the decision to summarily terminate our client’s employment.

...”

- [6] On 08 October 2021, in response to the letter titled “NOTICE OF APPEAL”, NECSA acknowledged Mr Masemola’s letter and recorded:

“Please be advised that we note your notice of appeal and accordingly attach an Appeal Form.

- [7] At paragraph 25 of the founding affidavit, Mr Masemola alleges that on 11 October 2021 he completed the said “Appeal Form” and he attaches same as annexure C, thereto³, *albeit* this is denied by NECSA.

- [8] On 26 October 2021 NECSA sent another letter to Mr Masemola requesting him to complete the said Appeal Form “*to enable us to arrange and schedule the appeal accordingly*”⁴. This letter was not responded to.

- [9] Upon not receiving any response to his “noted appeal”, in February 2022 Mr. Masemola referred a dispute of unfair dismissal to the CCMA, this was accompanied by a condonation application. In response, NECSA filed an opposing affidavit setting out succinct grounds of opposition. Mr. Masemola failed to file a replying affidavit dealing with issues raised in the opposing affidavit.

² Record page 165, annexure IM2,

³ Record, page 10, paragraph 25

⁴ Record, page 171Annexure IM4,

[10] On 14 April 2022, the CCMA issued a ruling dismissing the condonation - without calling parties for oral submissions.

[11] This review application concerns the above ruling, unsurprisingly, it was also filed late accompanied by a condonation application.

Principles governing condonation

[12] It is apposite to appreciate that labour disputes, by their very nature, require speedy resolution⁵. Delays undermine the primary object of legislation designed to afford expeditious outcomes to employers and employees.

[13] Failure by parties to comply with the rules of court or directions is not of recent origin. Non-compliance has bedevilled our courts at various levels for the longest of time. Hence the obvious saying: condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default⁶.

[14] The primary principles governing consideration of a condonation applications where a party is barred from proceeding because they have failed to comply with the time limit for filing some form of legal process were confirmed in **Melane v Santam Insurance Co Ltd**⁷:

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

⁵ *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 CC para 63

⁶ *Von Abo v President of the Republic of South Africa* [2009] ZACC 15; 2009 (5) SA 345 (CC); 2009 (10) BCLR 1052 (CC) at para 20 and *Van Wyk* above n 1313 at para 22

⁷ [1962 \(4\) SA 531](#) (A), at 532C-G

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, for that would be a piecemeal approach incompatible with a true discretion, 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 for prospects of success 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 interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits."

[15] In **Grootboom v National Prosecuting Authority ("Grootboom")**⁸ the apex court confirmed that the standard for considering an application for condonation is the interests of justice. However, the concept "interests of justice" is so elastic. As Boiselo AJ puts it:

"The factors that are taken into account in the inquiry include as applied by the Constitutional Court include:

- (a) the length of the delay;*
- (b) the explanation for, or cause for, the delay;*
- (c) the prospects of success for the party seeking condonation;*
- (d) the importance of the issue(s) that the matter raises;*
- (e) the prejudice to the other party or parties; and*
- (f) the effect of the delay on the administration of justice*

⁸Grootboom v National Prosecuting Authority and Another 2014 (2) SA 68 (CC); (2014) 35 ILJ 121 (CC); [2013] ZACC 37; 2014 (1) BCLR 65 (CC) at para 22 ; 22 and 51

Although the existence of the prospects of success in favour of the party seeking condonation is not decisive, it is an important factor in favour of granting condonation”⁹.

[16] The court must be fair to both sides and must also consider the broader objects of the LRA, including the importance of expeditious resolution of employment disputes¹⁰. Whenever an appellant realises that they have not complied with a rule, they should apply for condonation without delay¹¹.

[17] The Labour Appeal Court’s approach conforms with the principles above. *In re Ngwenya v Trustees for the time being of Sishen Iron Ore Company Community Development Trust and Another*¹² LAC stated:

“[14] *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*¹³”.

[18] Amongst other things these *dicta* make it clear, apart from the factors mentioned in *Melane*, questions of prejudice and the effect on the administration of justice are also factors that should also be considered. The nature of the relief sought is also a factor bearing consideration.

⁹ Grootboom, ad paragraph 50

¹⁰ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) (*Melane*) at 532C; Grootboom above n 5 para 22; Steenkamp above n 13 para 38

¹¹ *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449G

¹² (2024) 45 ILJ 1220 (LAC)

¹³ See s 191(1)(b) and 191(2) of the LRA.

- [19] For example, in an application for condonation for the late filing of a petition for leave to appeal to the LAC against a labour court judgement reviewing an arbitration award, might warrant much greater attention being paid to the prospects of success, given that the underlying dispute has already been considered by two independent adjudicators, *albeit* in different types of proceedings.
- [20] By contrast, an application for condonation for a late referral of an unfair dismissal dispute to CCMA concerns a dispute which has never been canvassed by a completely independent adjudicator and accordingly, the aggrieved party has not yet had the opportunity to exercise that right. It must also be borne in mind that the referral is the only gateway for an employee to exercise their constitutional right to fair labour practices as provided for by the LRA. Closing that avenue means the employee is deprived of any hearing of their unfair dismissal claim. That said, the LRA still imposes time limits on an employee to launch their claim and a failure to do so timeously will prevent them from advancing their claim, unless they show good cause for ignoring their non-compliance.

Analysis

- [21] In terms of section 145 of the LRA, the applicant has six weeks from the date of the ruling to apply to the Labour Court for an order setting aside the arbitration award/ruling.
- [22] The CCMA ruling was delivered on 14 April 2022, meaning that the review application was to be launched by no later than 26 May 2022. The review application was served somewhat 31(thirty-one) days late.
- [23] What follows is an explanation proffered by Mr Masemola for the late filing of the review application. In the main, we are told that part of the delay was caused as a result of the termination of the mandate of Mr Masemola's erstwhile attorneys because he was not satisfied with their performance. The current attorneys of record, Raymond Sutton Inc were approached *post facto* - on the 30 May 2022 i.e. after due date for the filing of the review application. By way of an overview, much of the 31 days delay was spent on; consulting

with his new attorneys; his attorneys having to obtain a complete record/file of the matter from his erstwhile attorneys and ultimately from the CCMA – Pretoria, on considering the matter, obtaining further instructions and advising Mr Masemola and drafting of the current application¹⁴.

- [24] The explanation proffered by Mr Masemola's legal team for the delay is not exemplary in that it lacks full explanation on the everyday account of events since first consultation with him on 30 May 2022 as one would have expected. Be that as it may, the explanation is reasonable and the 31 days delay in the circumstances of this case is not overly excessive.
- [25] I put significant weight on the fact that Mr Masemola, *albeit* for various reasons, was not afforded an opportunity to appeal / have his case heard by an independent adjudicator. Further refusal by this court to grant indulgence, will be tantamount to shutting the door of justice on his face, this to me, would lead to untenable miscarriage of justice which infringes on Mr Masemola's constitutional rights conferred in section 23 and 34 of the Constitution. These rights, though not sacrosanct, are palpably entrenched.
- [26] I am mindful of the nature of the preferred charges against Mr Masemola, i.e. that "he provided false testimony during a hearing of a co-employee", that on its own deserves a second consideration by an independent adjudicator. A proposition that a witness who testified for a co-employee automatically gave false testimony in the event of a guilty finding of that co-employee is far-fetched. *Prima facie* the conviction of Mr Masemola was based on circumstantial evidence. Meaning that the prospects of success cannot be said to be so hopeless that condonation should be denied.
- [27] In the circumstances I am inclined to condone the late filing of the review application. I now turn to the commissioner's ruling.

¹⁴ Record page 13, Founding Affidavit paragraphs 38 – 51

The Commissioner's ruling

- [28] In a rather terse ruling, and where no parties were invited for oral submissions, the commissioner dismissed the condonation application for reasons set out in summary below.
- [29] Unsurprisingly, he found that the delay of 134 days to be excessive. This was premised on a finding that Mr Masemola was dismissed on 14 September 2021 and his referral was only noted on 04 March 2022. As it would be clear below, these dates are disputed. He finds that the fact that Mr Masemola was assisted by an attorney exacerbated the situation.
- [30] He also finds that the prospects of success are "tentative". That being assisted by legal practitioner, Mr Masemola was expected to give more convincing submissions on his prospects of success.
- [31] Regrettably, to say that the ruling is poorly reasoned would be an understatement, it is woefully lacking in reasoning and substance.

Standard of review of condonation ruling

- [32] In ***Nature's Choice Products (Pty) Ltd v Food & Allied Workers Union & others***¹⁵ the LAC confirmed that :

[11] The consideration of a request for condonation involves the exercise of a judicial discretion which has been described as a 'wide discretion', or a discretion 'loosely so called'. In *Motloi v SA Local Government Association*, McCall AJA summarized the position on appeal as follows:

"In my judgment the discretion conferred on the court of first instance in deciding whether or not to grant condonation for the late referral of a dispute is a wide discretion or a discretion "loosely so called". The court of first instance is required to arrive at a decision "in the light of all relevant considerations" such as the length of the delay, the prospects of success in the main application, the possible prejudice to the parties and

¹⁵ (2014) 35 ILJ 1512 (LAC).

the blame attaching to the parties (cf the Knox D'Arcy Ltd case at 362B-C). The court on appeal is in as good a position as the court a quo to decide whether or not good cause has been shown for granting condonation, and, that being so, it may substitute its decision for that of the court a quo if "it considers its conclusion more appropriate" (see the Bookworks (Pty) Ltd case at 805A-D).'

[12] It is thus established in the Motloi case that on appeal, this court may substitute its decision for that of the court a quo if it considers its conclusion to be more appropriate.

[33] In an appeal against a condonation ruling by the Labour Court, the LAC in **Colett v Commission for Conciliation, Mediation & Arbitration & others**¹⁶ reaffirmed the test adopted by the Constitutional Court in *Mabaso v Law Society, Northern Provinces & another*¹⁷ 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:

¹⁶ 2014) 35 ILJ 1948 (LAC)

¹⁷ 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. (Footnotes omitted)".

[34] In **Bosch v Seynhaeve NO**¹⁸ the court held that,

"It follows that a review of an arbitrator's condonation ruling must not be assessed on a less stringent standard. In reviewing the ruling of an arbitrator exercising a flexible discretion in the application of the multi-factor test applicable to condonation rulings, a court needs to be mindful that the review is confined to the ambit of the abovementioned grounds for interfering with the exercise of a wide discretion".

¹⁸ (159/2023) [2024] ZALCCT 25 (27 June 2024)

Grounds of Review

[35] Mr. Masemola attacks the commissioner's ruling arguing for a number of reasons that it is one no reasonable commissioner could reach. For the purposes of the judgment it is not necessary to regurgitate the grounds verbatim.

[36] In summary, the main grounds of review raised by the applicant can be formulated as thus –

36.1 The commissioner failed to properly apply his mind to the facts of the matter.

36.2 The commissioner failed to appreciate the fact that the reason for lateness is that Mr Masemola followed NECSA's internal appeal procedures by noting an appeal – this version cannot be seriously disputed.

36.3 The noted appeal provided plausible and reasonable explanation for the late referral in that, to date, according to Mr Masemola, NECSA has failed to schedule a date for the appeal.

36.4 The commissioner failed to appreciate and apply his mind to the nature of the charges in that Mr Masemola was dismissed on the conduct of another employee. This alone, should have created "curiosity" which in essence suggested a good prospects of success, or so the argument by Mr Masemola went.

36.5 It is also submitted that NECSA failed to produce evidence in support of a guilty verdict, as the sole source of evidence was Mr Masemola's own statement.

36.6 That the commissioner placed undue weight on the degree of lateness and failed to consider other factors such as fairness to all parties.

Evaluation

[37] Bearing in mind the narrow scope of the review inquiry in this case, I will focus on the alleged fundamental misdirection of the arbitrator.

Misdirection of facts

[38] While the "Termination Letter" is dated 14 September 2021, it is common cause that same was only provided to Mr Masemola on the 27 September 2021. Accordingly, the commissioner misconstrued the facts by finding that the dismissal occurred on 27 September 2021, when in fact it took place on 14 September 2021. In addition to that, it would seem that the date of the referral was 10 February 2022¹⁹, however, the commissioner refers to an incorrect and later date of 04 March 2022. Perhaps the commissioner was short-changed by lack of oral submissions which could have cured this error.

[39] Informed by an incorrect date of the dismissal (and possibly referral date as well), the commissioner miscalculated the degree of lateness to reach a conclusion that the degree of lateness was excessive.

[40] But it would seem to me that even if the commissioner captured the dates referred to above correctly, the most egregious misdirection of facts was that he failed to appreciate that it was common cause that Mr Masemola took steps to exercise his right of appeal in that on 06 October 2021 when he noted an appeal against his dismissal. The commission is taciturn on this fact. Acknowledging the noted appeal would have also been relevant in the determination of the lateness of the referral.

[41] While NECSA acknowledged Mr Masemola's noted appeal, it injudiciously argues that Mr Masemola failed to lodge an appeal, this is so because he failed to complete the prescribed "Appeal Form" (to NECSA's satisfaction). Accordingly, he showed no interest to pursue the appeal, so the argument runs. But this proposition by NECSA is difficult to discern because in their

¹⁹ Referral form, annexure D, on page 59 of the Record.

letter dated 08 October 2021, NECSA unequivocally notes the appeal, *albeit*, it provided prescribed appeal form.

- [42] In a follow up letter dated 26 October 2021, NECSA states that the “appeal form” was required *“to enable us(NECSA) to arrange and schedule the appeal accordingly”*. The contents of this letter does not support a proposition that no appeal was noted as NECSA forcefully wants me to find.
- [43] On the facts of this case, to hold that no appeal was lodged because a prescribed form was not completed (not to NECSA’s satisfaction), would be elevating form over substance, a principle which our legal system bemoans. An appeal noted and in reality, nothing stood in NECSA’s way to schedule a hearing date for the appeal.
- [44] Had the commissioner appreciated these basic yet crucial facts above, he would have realised, at best that an appeal was somehow pending, or at least that, while the appeal was noted it was incorrect to calculate the so-called degree of lateness from 14 September 2021 as he did. In essence, NECSA was complicit in the delayed referral in that it failed to deal with the noted appeal meaningfully and decisively.
- [45] Apropos, I am satisfied that the commissioner misdirected himself in the condonation inquiry, by not properly appreciating the uncontroverted facts alluded to above. The conclusion that the referral was excessively late is devoid of facts and fails to appreciate the reasons for such lateness.

Fairness, prejudice and interest of justice

- [46] It is apparent that the commissioner omitted to consider the question of fairness, prejudice and interest of justice. At the very least, he ought to have weighed up the prejudice to NECSA in allowing the matter to proceed to arbitration against the prejudice to Mr. Masemola were his claim not be permitted to go further. It goes without saying that an employee will always be prejudiced if they are refused condonation and consequently denied an opportunity to have their unfair dismissal claim adjudicated.

- [47] This does not mean the employee's interest in exercising that right is a trump card which will always supersede the interest of the employer. Where the employee adopts a dilatory approach to exercising a right which should be exercised expeditiously and cannot justify their dilatoriness, the employee is at risk of being denied the remedy.
- [48] I have already found that upon his dismissal, Mr Masemola took steps to prosecute his appeal, he was not dilatory in noting his appeal on 06 October 2021.
- [49] Had the commissioner considered the noted appeal, it might have tipped him to exercise his discretion in the favour of Mr Masemola. In particular, I have also made a finding that NECSA was seized with the appeal, all it had to do was to schedule a hearing date, to simply wait for the completed "appeal form" was being overly tactical and this contributed to the delay of the prosecution of this matter.
- [50] In addition, it is necessary for the court to reconsider the application taking account of the finding that the commissioner should have also considered the nature of the changes and the evidence (or lack thereof) which was used in finding Mr Masemola guilty. By mere cursory glance of the ruling, this exercise was not conducted by the commissioner.

Substitution

- [51] What the court is dealing with is an applicant who was dismissed for allegedly giving evidence during a hearing of a co-employee. He has raised grounds why his dismissal ought to be found unfair which, if proven, he ought to succeed, though not necessarily in every respect. He has a plausible case to pursue.
- [52] The internal enquiry seems to have been sketchy, the case seems to be that because he testified for a co-employee who was eventually found guilty, his testimony of being an *alibi* for a co-employee was false. Mr Masemola alleges

that the employer's surveillance cameras could have been used to deal with this aspect of the case. This crucial question remains unanswered.

- [53] If there was a sense of delay, it cannot seriously be suggested that Mr Masemola obviously dragged his heels and had not shown a clear intention to dispute his dismissal with the initial support of his erstwhile attorney. The primary question is whether the delay should be excused given all the other relevant factors, including the need for expeditious dispute resolution. In regard to the latter, it bears noting that the delay occasioned by the applicant originally has been eclipsed many times over by the time taken up with the review application.
- [54] Upon consideration of the nature of the dispute, the length of the delay, *albeit* poor explanation for it, the fact that there are *prima facie* prospects of success if Mr Masemola can prove his contentions, the limited prejudice the delay could have caused NECSA, the need for expeditious dispute resolution, and the interests of fairness to both parties, then in my view, condonation should be granted.
- [55] Both parties seek costs order against each other, considering the results, I am not persuaded that it would be in the interest of justice to warrant any cost order.
- [56] In any event, I must mention that I agree with NECSA that, Mr Masemola's attorneys, Raymond Sutton Inc. have recklessly filed a voluminous review application which includes an alleged reply to the opposing affidavit in the CCMA. This stratagem by Raymond Sutton Inc. is lamentable and borders on abuse of court process and ordinarily deserves censorship, and for this reason, despite the perceived success, Mr Masemola would not be entitled to any costs order.

Order

1. The condonation of the late filing of the review application is condoned.
2. The condonation ruling of the third respondent under case number GATW3123 – 22 dated 14 April 2022 is reviewed and set aside.
3. The applicant's unfair dismissal dispute must be enrolled by the second respondent for conciliation, within 30 days of receipt of this judgment.
4. There is no order as to costs.

T Mosikili

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. DMC de Koker

Instructed by: Raymond Sutton Inc.

For the Third Respondent: Adv BT Moeletsi

Instructed by : Semenya Gwangwa Inc