



- (1) Reportable: NO
(2) Of interest to other Judges: Yes



Signature

09 February 2026

Date

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no: C 482/2024

In the matter between:

MARILYN ROSEMARY ANN TERRY

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER NOEL HENDRICKS

Second Respondent

**IRON TREE INTERNET SERVICES (PTY)
LTD**

Third Respondent

Heard: 4 February 2026

Delivered: 9 February 2026

JUDGMENT

LAGRANGE, J

Introduction

- [1] This is an application to review and set aside a condonation ruling issued by the second respondent ('the arbitrator') on 13 August 2024, in which the applicant's condonation application for the late referral to the CCMA referral of her alleged automatically unfair dismissal dispute based on age was dismissed. The review application itself was only launched only 27 November 2024, approximately 62 days out of time, and the applicant also seeks condonation for its late filing.
- [2] Accordingly, the Court is required to determine whether the late filing of the review application ought to be condoned; and, if so, whether the arbitrator's refusal to grant condonation for the late referral constitutes a reviewable irregularity.
- [3] Some preliminary issues arose which also need to be dealt with, namely the failure of the applicant to file her heads of argument prior to the hearing, and the admission of a supplementary affidavit submitted by the applicant at the commencement of the hearing. At the hearing rulings on these issues were deferred until all the oral argument was heard.

Preliminary issues

Applicant's failure to file heads of argument in accordance with Rule 40

- [4] Rule 40 of the Labour Court rules reads as follows:

40. Heads of argument and practice notes in motion proceedings

(1) In unopposed motions, at the applicant's request, the registrar will set down the application on the unopposed motion roll to be heard by the judge presiding in motion court. Heads of argument need not be filed unless the application is a review application.

(2) In opposed motion proceedings, the applicant must deliver heads of argument within a period of 15 days after the date on which pleadings close.

(3) The heads of argument must be clear, succinct and without unnecessary elaboration, and comply with the requirements of rule 48.

(4) The respondent must deliver heads of argument no later than 15 days prior to the hearing of an opposed application. If the applicant has failed to file heads of argument, the respondent must in any event file its heads within the above time limit.

(5) In cases where a party for whatever reason fails, neglects or refuses to file heads timeously, the court may make a punitive costs order against the defaulting party and may in certain circumstances strike the matter from the roll.

(6) Where a party is able to do so, heads of argument should, in addition to being delivered in terms of the rules, be sent by email to the applicable address:

- (a) Johannesburg: johannesburglabourcourt@judiciary.org.za;
- (b) Cape Town: capetownlabourcourt@judiciary.org.za;
- (c) Gqeberha: gqeberhalabourcourt@judiciary.org.za; and
- (d) Durban: durbanlabourcourt@judiciary.org.za.

(7) The heads must indicate, above the heading of the matter, the date on which the matter has been set down to be heard, if it is so set down.

(8) Each party must ensure that the heads of argument have been placed in the court file.

(9) A judge hearing an opposed or unopposed application may at any time direct that all or any of the parties file supplementary heads of argument on any specified issues.

(10) The failure by one party to file heads of argument shall not be a basis upon which the other party would be entitled to the postponement of the hearing, and it shall remain up to the presiding judge to determine how the matter shall be conducted in such event.

(11) All heads of argument filed in motion proceedings must comply with rule 48.

(12) The applicant or the applicant's representative must file a practice note by email in respect of any application enrolled for hearing.

(13) The practice note must comply with rule 31, with the necessary changes.

[5] The applicant's attorney of record failed to file heads of argument before the matter was heard. Counsel handed up heads in court, explaining he had only been briefed within the previous two days. No condonation application for the late submission of heads was filed.

[6] Not only had the applicant's attorney failed to file heads timeously, but after being contacted telephonically Monday 02 February and 03 February 2026 he still failed to file anything, without tendering any explanation or apology for his

non-compliance. When contacted telephonically by my secretary on 03 February 2026 to ascertain where the heads of argument were his response was that he was on his way to consult with counsel and the heads would be handed up in court on the morning of the hearing.

- [7] It was left to the applicant's counsel to tender an apology for not being able to submit heads earlier on account of being briefed late. I accept the pressure counsel was placed under was not due to any dilatoriness on his part.
- [8] The applicant's attorney provided absolutely no justification for not complying with Rule 40(2) in the first place, nor for failing to comply with the direction to file the heads by no later than 09h00 on Monday 2 February. He did not even furnish an apology for not meeting that further deadline and made no attempt of his own accord to communicate with the court about his failure to comply.
- [9] The reason heads must be filed in good time serves a number of purposes. It gives the opposing party time to digest and respond directly to the arguments. This limits the possibility of matters raised by the applicant not being addressed by the respondent. Secondly, in addition to the practice note, it provides a judge reading files in advance with the core arguments they need to be conscious of when reading the pleadings and the record. It eases and enhances a judge's proper preparation for the hearing. Handing up heads of argument in court in review proceedings is no help to the other party, nor to the court. There is usually a long lead time between the closure of pleadings and the date a review is set down for argument. There is no justification for heads of argument to be still outstanding shortly before the hearing, particularly where the overdue heads are those of the applicant, which compels the respondent to file its heads without having site of the applicant's argument.
- [10] At the hearing, the court advised that an order in terms of Sub-Rule 40(5) was being contemplated, but the only concrete response was that the attorney tendered the wasted costs of the day, without any attempt to explain why the heads had not been filed timeously. There was no equivalent rule to Sub-Rule 40(5) in the old Labour Court Rules, and it was regrettably seen as a necessary addition to the new rules which were introduced on 17 July 2024. It was clearly introduced to deal with a recurrent practice of some legal practitioners simply

ignoring the time periods for filing heads. This is an appropriate instance in which it should be applied.

Request to admit a supplementary affidavit

- [11] At the commencement of the hearing, the applicant sought to file a supplementary affidavit with the aim of introducing a new piece of evidence in the form of a document that she maintains supports her claim that she was forced to retire. Unsurprisingly, the admission of the affidavit was opposed by the third respondent ('Iron Tree' or 'the company').
- [12] Uniform Rule 6(5)(e) of the High Court rules permits a court to admit supplementary affidavits at its discretion. As there is no equivalent provision in the Labour Court Rules, Rule 71 applies, in terms of which this court may adopt an appropriate rule in the Uniform Rules of the High Court. A party wishing to introduce a supplementary affidavit, must file an interlocutory application to admit the additional affidavit.
- [13] The admission of a supplementary affidavit is an exceptional step, granted sparingly and is governed by well-developed principles, namely: there must be a proper explanation for why the evidence was not placed before the court timeously; it must be necessary for the court to properly determine the issues; there must be no *mala fides* or culpable remissness on the part of the party seeking to file it; it must not unfairly prejudice the other party or the prejudice must be curable, and it must be in the interests of justice to admit it without giving a litigant a chance to make out a new case¹.
- [14] In this instance, the request was not made in the form of an interlocutory application inviting the company to file an answering affidavit. In any event, the evidence the applicant seeks to introduce is intended to influence the court's view of her prospects of success in proving her claim of automatically unfair dismissal. However, in the event that the court agrees to condone the late filing of the review application, it will then address the merits of the condonation

¹ *James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons NO 1963(4) SA 656 (A)* at 660D-H, cited with approval in *Butterworths Publishers (Pty) Limited v Jacobsens Group (Pty) Ltd and Another* [2005] 2 All SA 588 (T)

ruling. In the course of such analysis, the court cannot take account of evidence that was not placed before the arbitrator, because the essential question a court must determine on review is whether the commissioner reached a decision which no reasonable arbitrator could have reached *on the evidence before the arbitrator* or whether the arbitrator committed some other gross irregularity in the conduct of the arbitration. It would be completely antithetical to a proper assessment of the reasonableness of an arbitrator's decision to evaluate it in the light of other evidence that was not placed before the arbitrator. Had it been an application to include a portion of the arbitration record that was missing but which was part of the record placed before the arbitrator, that would have been a different matter.

- [15] Accordingly, even if the request had been properly brought as an interlocutory application and the company had an opportunity to oppose the application, the supplementary affidavit and its attachment would not have been admitted.

Substantive merits

Brief background and chronology

- [16] The applicant was employed as a general manager since 2008 and alleges that her employment terminated on 31 December 2023 on account of being told to retire.
- [17] She referred her dismissal dispute to the CCMA only on 12 April 2024, though this ought to have been done by 30 January 2024. The referral was therefore approximately 73 days late.
- [18] Subsequently, she filed an amended 7.11 referral form after been advised that the original form contained more than one dispute. The revised form was served on 19 April 2024
- [19] On 23 May 2024, a CCMA commissioner ruled that the referral was out of time and that condonation was required. The applicant filed a condonation application the following day. The application was heard on 26 July 2024, and on 13 August 2024, the arbitrator issued his ruling refusing condonation. It is this ruling which is the subject matter of the review application.

- [20] Instead of filing a review within six weeks, she only launched her review on 27 November 2024, 104 days after the ruling was issued, making it 62 days late.

The application to condone the late filing of the review application

- [21] The delay in filing the review application was very considerable. It took more than twice the time it should have. The applicant had instructed an attorney to file the application.
- [22] The explanation for the delay this time may be summarized as follows:
- [23] The applicant herself acted promptly in obtaining her file from her erstwhile attorney within two days of receiving the condonation ruling. She consulted with her current attorney on 20 August, who advised her she could try and set aside the ruling by bringing a review application. As far as she knew he was going to start drafting the review application.
- [24] However, some 44 days later, on 3 October, he advised her that he was in discussion with counsel and instructed him to attend to the review application. Further she was advised that the advocate had agreed to charge per hour on completion of the work, so it appears there was no need for her to pay a deposit for the drafting upfront.
- [25] She was told that the attorney and counsel decided she needed to attend a consultation with counsel on 11 October. At the meeting counsel undertook to have the application drafted within a week.
- [26] However, counsel never drafted the papers, despite weekly promises to do so. Her attorney did not file a confirmatory affidavit, so I can only assume this is what she was advised. She states in the vaguest terms that she was told counsel appeared to be busy with other matters and he had unspecified personal issues he had to attend to which led to the delay.
- [27] In any event, owing to counsel not doing what he had undertaken to, the instruction for him to draft the review application was withdrawn on 30 October.
- [28] This necessitated another consultation with the attorney on 8 November and it took the applicant two weeks to raise enough funds to appoint another counsel

on 18 November. It was only more than a week later that the application was filed on 27 November. This delay accounted for a further 19 days.

- [29] The applicant argues that she acted promptly and the delay was no fault of her own.
- [30] I note that in this instance there is no confirmation the affidavit by the applicant's current attorney of record confirm the interactions with counsel.
- [31] The company disputes the veracity of the applicant's account and rightly criticizes the lack of corroborative material to support her narrative, such as correspondence or details of communications between her counsel and attorney.
- [32] The explanation is far from comprehensive, though the company is not in a position to dispute any of the events mentioned. I agree also that the question of the applicant's lack of funds is only mentioned in a superficial manner. She does not set out her financial position at the time or how she managed to acquire the funds to brief counsel during the two week period she mentions. It is not sufficient to merely outline these developments without providing details of the amounts needed, why she did not have enough at the time and how she was able to come up with the necessary funds when she did.
- [33] The applicant also does not explain why her attorney could not at least have drafted the founding papers himself. An applicant in review proceedings does not need to commit themselves to a final version of their grounds of review when they launch the application. Because that version can be amended and augmented when the supplementary affidavit is filed under Rule 37(20)(a), an applicant in review proceedings can rectify any errors in the founding papers. Yet all too often, the initiation of review proceedings is unnecessarily portrayed as a matter of complexity necessitating counsel's expertise as if the founding papers will caste the review case in stone.
- [34] In summary, the explanation for the lengthy delay, while not inherently implausible nor attributable to the applicant, lacks sufficient detail and is a poor one.

- [35] The next enquiry is whether the prospects of success are such that they might offset the paucity of the explanation and the extent of the delay. In other words, is there some prospect that the condonation ruling should be set aside?

Prospects of success of the review application

- [36] The grounds of review of the condonation ruling are set out and discussed below.
- [37] Firstly, the applicant claims the arbitrator disregarded evidence of her physical and psychological state at the time and immediately after her dismissal.
- [38] As mentioned already, the applicant's account of her physical and psychological state is pleaded in the vaguest terms. Even on her own version, there is no evidence to suggest that her *petit mal* epilepsy seizures had any connection with, or resulted from, the termination of her service. There is no evidence that she sought medical attention arising from the termination of her employment. Insofar as she suggests the arbitrator ignored evidence of incapacity, which was supposedly so serious that she could not even begin to take initial steps to challenge her alleged dismissal, the evidence to support such a conclusion was not placed before the arbitrator.
- [39] Secondly, it is argued the arbitrator did not give due consideration to the applicant's lack of knowledge of CCMA rules.
- [40] It is true the arbitrator did not specifically mention her lack of knowledge of the CCMA rules. The applicant stated that she was a lay person without any knowledge of CCMA processes and timelines. In this respect, her position is no different from most employees. However, it cannot be ignored that she was a general manager of a sizeable business with several years' experience. It is difficult to conceive it would have been beyond her personal capabilities to have made initial inquiries about the procedures to follow either online or by visiting the CCMA. Even when she instructed her erstwhile attorney by 27 February, that did not accelerate the referral. It was nearly six weeks later that the referral was made. Arguably though, that lapse of time is attributable to his dilatoriness.
- [41] Thirdly, it is claimed the arbitrator did not give consideration to the fact that she could not get assistance of a trade union.

- [42] The applicant vaguely avers that she could not reach her union officials telephonically to consult with them due to changes in physical location and telephone service providers which she only learned of later. No detail about the alleged changes in location (presumably a reference to the location of the union's offices) and telephone numbers was provided to support her account. Moreover, her alleged attempts are completely lacking in any relevant dates and there is no explanation why it was only in February the following year that she sought alternative legal assistance.
- [43] Fourthly, it is argued the arbitrator failed to consider the unavailability of her attorney until 18 March.
- [44] It is true the arbitrator does not specifically mention this in his ruling. However, her affidavit is bereft of any claim that the attorney she contacted was only available then. She did not explain when she first attempted to get hold of the attorney and why he was unavailable until that date. Moreover, this submission is contradicted by her own averment and email correspondence that the attorney already contacted the company at the end of February. Such a glaring inconsistency raises more questions than it answers, and plainly undermines this complaint.
- [45] Fifthly, the applicant contends the arbitrator failed to consider the evidence on which the application was based.
- [46] Apart from anything else this is merely a bald assertion unsupported by evidence and carries no weight. The mere fact such a claim is made also demonstrates a failure by the applicant's attorney to appreciate what legitimate grounds of review are and the distinction between an appeal and a review. In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others*² the Labour Appeal Court emphasized the difference thus:

'[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

² (2014) 35 ILJ 943 (LAC)

produce an unreasonable outcome (see *Minister of Health & another NO v New Clicks SA (Pty) Ltd & 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.’

(emphasis added)

[47] Sixthly, the applicant contends the arbitrator’s reasoning that the extent of the delay and lack of proper explanation outweighed the prospects of success was irrational.

[48] Can a consideration of the prospects of success of the applicant’s case compensate for the absence of an acceptable explanation for the delay? In the oft-cited Labour Appeal Court decision in *NUM v Council for Mineral Technology*³, the court emphasised the established principle that:

“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”⁴

[49] Since then, the Constitutional Court held, *Grootboom v National Prosecuting Authority & another*⁵:

³ [1999] 3 BLLR 209 (LAC)

⁴ At paragraph 10.

⁵ (2014) 35 ILJ 21 (CC)

'[51] The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances.' For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is .

(emphasis added)

- [50] Despite the weakness of the first five grounds of review, I am not persuaded that the arbitrator should have been so ready to dismiss the condonation application without regard to the merits of the matter, for the reasons discussed below. In the circumstances, I am not persuaded he exercised his discretion judicially in this respect.
- [51] Assessing the applicant's prospects of success on the substantive merits of her case, raises something of a conundrum.
- [52] In essence, her case is that the company took the initiative and told her she had to resign and she duly completed all the documentation. The company by contrast stated that she applied for '*normal retirement*'. An affidavit signed by the managing director, Mr S Porter, on 27 May 2024, could support different interpretations of what transpired. In that affidavit he speaks of an initial discussion with the applicant '*on the back of an off-the-cuff discussion with one of the original founders about retirement*'. There was an agreement to have a face-to-face discussion with the applicant at the company premises. He then states he had a face-to-face discussion with her on 31 October on MS Teams following on from the initial conversation with her the day before. He comments that the conversation on 31 October was '*with no negative feedback*' from the applicant. The same day a follow-up conversation took place with the Metrofile HR team around the IronTree HR policy document as signed by her. On 4

December 2023 a retirement letter and package was '*presented*' to her and '*retirement was acknowledged by signing the retirement letter*'.

- [53] On this affidavit, it is not clear that the applicant initiated the retirement discussion. Nowhere does he state that she retired because she had reached the normal or agreed age of retirement for a person employed in her capacity, which is the basis for refuting an automatically unfair dismissal claim based on age in terms of s 187(2)(b) of the LRA.
- [54] In the circumstances the parties are substantially at odds over the true character of the factual scenario which gave rise to her retirement, which is critical to the determination of her claim. In the circumstances, I cannot say the applicant has no prospects of success or nor arguable case. It seems to me that only a trial can resolve this dispute⁶ and given the importance attached to dismissal for a prohibited reason the applicant should be given the opportunity to proceed with her claim despite the poor explanation for the various delays.
- [55] In light of the analysis above, it would be in the interests of justice to condone the late referral of the review application and to review and set aside the condonation ruling of the arbitrator.

Order

1. The late filing of the Applicant's review application is condoned.
2. The condonation ruling of the Second Respondent on 13 August 2024 under case number WECT 6449-24 is reviewed and set aside and substituted with a ruling that the Applicant's late referral of her dispute to the First Respondent is condoned.
3. If the Applicant intends to proceed with her case of automatically unfair dismissal, she must file her referral within 30 days of this judgment.

⁶ See *Smith Capital Equipment (Pty) Ltd v Mergui* (2022) 43 ILJ 649 (LAC) concerning the treatment of substantial disputes of fact in condonation applications at paragraph 25.

4. The Applicant's attorney of record may not charge the Applicant any fees for his attendance at court on 4 February 2025, or for any professional services rendered by him to the Applicant on that day,



R Lagrange

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

---D Zantsi

Instructed by:

---K Govender Attorneys

For the Respondent:

--- E Geldenhuys from Macgregor Erasmus Attorneys Inc.