



- (1) Reportable: Yes/No
(2) Of interest to other Judges: Yes/No
(3) Revised

Signature

Date

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case No: C330/2024

In the matter between:

MULALO NEFALE

Applicant

and

UNIVERSITY OF CAPE TOWN

First Respondent

COMMISSIONER KN SAMUELS N.O.

Second Respondent

**COMMISSION FOR CONCILIATION AND
MEDIATION AND ARBITRATION**

Third Respondent

Heard: 03 July 2025

Delivered: 09 February 2026

JUDGMENT

MAPOMA, AJ

[1] This is an application in terms of section 145 of the Labour Relations Act¹ (the LRA), to review and set aside the condonation ruling of the first respondent (the commissioner) dated 21 June 2024, issued under the auspices of the third respondent, Commission for Conciliation, Mediation and Arbitration (the CCMA).

¹ Act 66 of 1995, as amended.

In the ruling, the commissioner refused to grant the applicant condonation for the late referral of her unfair dismissal dispute against the first respondent, the University of Cape Town.

- [2] In the application for condonation, the applicant sought the CCMA's indulgence for referring the dispute approximately 7 months (or 205 days) late, and thus outside the statutory timeframes of 30 days within which to lodge the dispute as prescribed by section 191(b)(i) of the LRA.
- [3] The applicant contends that by dismissing the condonation application without holding a hearing to afford the applicant opportunity to clarify her explanation for the delay in lodging her dismissal dispute, failing to consider the application as unopposed, and failing to consider the prospects of success, the commissioner committed an irregularity that rendered the condonation ruling reviewable.
- [4] The application is opposed by the first respondent. The main basis advanced for opposition is that the applicant failed to make out a case for condonation before the commissioner, and that, based on the information placed by the applicant before the commissioner, the ruling was reasonable and unimpeachable. It further contends that on the papers placed before the Court, the applicant has not established a case demonstrating that the commissioner committed misconduct, gross irregularity or exceeded his powers, and thus the commissioner's ruling is reasonable and cannot be faulted.
- [5] The central issue for determination by the Court is whether the decision of the commissioner to refuse condonation for the late lodgement of the dispute has reviewable defects that warrant the review and setting aside of the ruling. This impugned arbitration ruling arises from the factual matrix set out in the ensuing paragraph.

Background facts

- [6] On 26 January 2023, the applicant was offered by the first respondent a post-doctoral fellowship position, which she accepted, upon which she was duly assigned a supervisor. The fellowship entailed, *inter alia*, teaching students and

allowing the applicant to develop her experience academically as a doctoral fellow. The applicant commenced her work in February 2024 accordingly.

- [7] During the course of the fellowship programme, counter-accusations that compromised the working relationship arose between the applicant and her supervisor ensued. This resulted in the first respondent informing the applicant on 4 July 2023 that her contract would end on 31 July 2023, and that she would not continue with her doctoral fellowship with the first respondent thereafter. The applicant claims that she was only informed on 1 September 2023 of the termination of the fellowship programme. Nothing really turns on this issue for the purposes of this application.
- [8] On 9 May 2024, the applicant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). Coupled with the referral notice was the applicant's application for condonation of the late referral of the unfair dismissal dispute. The condonation application was made by completing the required standard affidavit as required by rule 9 of the CCMA rules, in which the applicant addressed the prescribed topics, which are requisites for condonation, namely, background, degree of lateness, reasons for lateness, prospects of success, prejudice and any other general information.
- [9] In the condonation application, the applicant stated the background as that she was dismissed on 1 September 2023, but that the dispute arose on 11 September 2023 when the University refused to reinstate her "*after all attempts to negotiate or follow other internal procedures*" failed. For what it may be worth, it is apposite to point out that the first respondent contends that the termination was on 31 July 2023, the applicant having been notified on 4 July 2023 that her post-doctoral fellowship contract would come and end on 31 July 2023 and that she would not be the first respondent's post-doctoral fellow thereafter. The notice is not denied by the applicant, save that she received the notification letter on 1 September 2023.
- [10] In addressing the degree of lateness in the referral of the dispute in the condonation application to the CCMA, the applicant stated that the referral was 205 days late, calculated from her considered date of dispute. In her explanation

of the delay, the applicant stated that on 3 May 2024, she approached the Department of Labour. No further explanation was offered in the condonation application regarding this issue.

[11] Regarding the reasons for the delay, the applicant's explanation for the delay was as follows:

'In my case, various factors contributed to delays: personal and psychological stress, unforeseen circumstances, legal and procedural challenges, and exhaustive attempts to resolve the issue internally. I entrusted the institution's name that its management cannot spend much time focusing on a problem than coming up with an actionable amicable resolution. Despite all my efforts, the acting Vice Chancellors refusal to me exacerbated the situation, hindering progress and causing additional harm.'

[12] In the paragraph where the applicant was required to address the prospects of success, the applicant did not make any averments before the Commissioner.

[13] Where the applicant was required to explain the prejudice to the other party, the applicant explained as follows:

'Unable to proceed with my career. My right to education is violated as a result of unfair treatment that tarnished my name. I believe prejudice influenced my case's handling, despite my efforts to resolve it internally amidst personal stress, unforeseen challenges and legal hurdles. However, my attempts were obstructed by the Acting Vice Chancellor's refusal to engage, hindering resolution and worsening the situation's impact. I fear bias against me undermined fair treatment, impeding my ability to defend my rights effectively.'

[14] It is noteworthy that in the founding affidavit for the review application, the applicant made elaborate factual averments under what she referred to as background to the dispute. These factual averments in question are new facts that were not placed before the commissioner in the application for condonation when the impugned commissioner's ruling was made.

[15] It is trite that the court, determining whether the impugned decision is reviewable, the Court considers the matter based on the information that was

placed before the decision maker at the relevant time. It follows that it is impermissible for the applicant to introduce in the review proceedings new information that was not placed before the commissioner when the impugned decision was made. The Court will therefore determine the review of the commissioner's impugned ruling based on the facts that were placed before the commissioner when the latter made the ruling.

The Test for Review

[16]The test for review of the arbitration award is well pronounced by the Constitutional Court, per Navsa AJ, in what is popularly known as the *Sidumo* test.² The test is whether, based on the facts placed before the commissioner, the decision reached by the commissioner is one that a reasonable decision-maker could not reach.³ Applying the test to the instant case, the question is whether, on the facts placed by the applicant in the application referred to above, the decision is one that a reasonable arbitrator could not have made.

[17]The apex court in *Sidumo* found that section 145 of the LRA is suffused by reasonableness and that it must be read to ensure that administrative action by the CCMA is reasonable.⁴ It is worth noting, however, that the fact that reasonableness suffuses section 145 does not mean that the grounds listed therein were obliterated, because review can still be brought on the grounds set out in section 145 of the LRA.⁵

[18]Whilst the applicant did not set out succinctly in her founding affidavit the review grounds, what the Court could decipher is that the impugned ruling is attacked on the ground that the commissioner committed gross irregularity in not granting the condonation that was not opposed; that the commissioner failed to set the matter down for hearing of the condonation application; and that the commissioner failed or neglected to reasonably consider the reasons proffered by the applicant for the delay.

² *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC).

³ *Sidumo* (supra) at para 110.

⁴ Myburgh et al – Reviews in the Labour Court, 34.

⁵ *Fidelity Cash Management Services v CCMA and Others* [2008] 3 BLLR 197 (LAC) at para 101.

[19] It is trite that condonation is not granted on mere asking.⁶ It is indulgence granted by the court upon plausible explanation for the delay being made. A party seeking condonation must make out a case entitling it to the court's indulgence. Thus, it is incumbent upon the applicant to provide satisfactory explanation for the delay not only in timeous prosecution of the matter but also for delay in seeking condonation for indulgence. The court has discretion, which must be exercised judicially, upon consideration of all the facts holistically, whether to grant or refuse condonation.⁷

[20] In this case, with a view to enabling guidance to the parties on the relevant issues to be addressed by a party seeking condonation, the CCMA developed a standard affidavit that guides the applicant for condonation. This was in accordance with Rule 9 of the CCMA Rules, which requires that an application for condonation for late referral of the dispute be supported by an affidavit or a written statement, wherein the applicant is required to explain the requirements mentioned above, namely: a) how late the referral is; b) why it is late; c) why the applicant believes she or he has a good case; d) how the lateness may prejudice (negatively affect) the other party, and e) any other relevant factors.

[21] The genesis of the above requirements is the judgment in *Melane v Santam Insurance Co Ltd*⁸. These requirements are long standing and have been consistently applied by the courts in considering whether to grant condonation or not. The requirements are interrelated and must be weighed together. For instance, a weak point on the condonation application may be complemented by the stronger. In the final analysis, the overriding standard consideration is the interest of justice.

[22] Crucially, it is incumbent upon the applicant to provide a reasonable explanation for the delay and show that she did not wilfully disregard the prescribed timeframes and thus justify the default. Essentially, in this case, the applicant was obliged to satisfy the commissioner by a detailed explanation that there was

⁶ *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) at para 6.

⁷ *National Union of Mineworkers v Council of Mineral Technology* [1999] 3 BLLR 209 (LAC).

⁸ 1962 (4) SA 531 (A).

good cause to excuse her for non-compliance with the statutory provisions of the LRA.

[23] In my view, the delay of 205 days was excessive and required a satisfactory explanation. Despite this requirement, the explanation provided by the applicant for the delay of approximately 7 months was less than satisfactory. She simply mentioned what she referred to as a 'various factors contributed to delays' without providing any explanation at all as to what precisely those factors were, how they caused such a delay, and why the commissioner should grant the indulgence sought. She did not provide any explanation at all on the prospects of success in the dispute, nor did she deal adequately with prejudice caused by the delay to the other party.

[24] The applicant contends that she was expecting the CCMA to set the matter down for hearing and be afforded the opportunity to elaborate on her explanation during the hearing. She further contends that the application was not opposed by the other side, and as such, the commissioner should have granted the condonation sought. In light of these factors, the applicant contends that by failing to hold a hearing of an unopposed condonation application before making the impugned ruling, the commissioner committed a gross irregularity that rendered the ruling reviewable.

[25] There is no requirement in the LRA, nor in the CCMA rules, for the CCMA to hold a physical hearing for every condonation application relating to late referral. Rule 9 of the CCMA rules requires that condonation for late referral should be applied for in terms of rule 31, which was done by the applicant. The CCMA has the discretion to decide whether to determine the condonation by either holding a hearing or by considering the application on papers that are based on the standard affidavit or written sworn statement. In this case, the CCMA determined the condonation on papers. In my view, the process followed by the commissioner is in accordance with the CCMA rules and does not constitute any irregularity.

[26] It is the Court's view that the information provided by the applicant for the indulgence sought for the delay was inadequate to pass muster the standard

threshold for a condonation application. As such, the decision of the commissioner to refuse the condonation application cannot be faulted in the circumstances of this case, for it is within the bounds of reasonableness. This is so because the impugned ruling is that which a reasonable decision-maker could make. In the circumstances, the application stands to fail.

[27] Regarding costs, I take the view that it will not be in the interest of justice to deviate from the normal practise of this Court, namely granting an order with no order costs.

[28] In the result the following order is made:

Order

1. The review application is dismissed.
2. There is no order as to costs.

Z.L Mapoma

Acting Judge of the Labour Court of South Africa

Appearances:

Counsel for the Applicant : Adv S Khoza

Instructed by : Mohau Romeo Tsutsi Law Inc, Cape Town

Counsel for the First Respondent : Adv B Joseph SC

Instructed by : Fairbridges Wertheim Becker, Cape Town

LABOUR COURT