



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

Signature

Date

13 March 2026

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no: C443/2024

In the matter between:

DEBRA WININI

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

RICHARD HEATH N.O.

Second Respondent

TRAN-ATLANTIC CONSTRUCTION AND PROJECTS

Third Respondent

Heard: 10 March 2026

Delivered: 13 March 2026

Summary: (Review application – principles relevant to condonation restated – arbitrator failed to consider all relevant principles and did not have regard to all relevant material before him – arbitrator must exercise his discretion judiciously and fairly after taking into consideration all the relevant facts - condonation ruling reviewed and set aside and corrected with a ruling that condonation is granted)

JUDGMENT

MAY, AJ

Introduction

- [1] This is an unopposed application to review and set aside an arbitration award in which the second respondent (the arbitrator) refused an application for condonation made by the Applicant.

Background

- [2] Applicant referred a dispute to the First Respondent, through her legal representatives at the time, on 27 June 2024. In the referral she alleges that she was dismissed on 27 June 2024, which is the date of the referral, for reasons unknown to her. The matter was scheduled for con/arb on 26 July 2024. No objection to con/arb was received and the arbitrator, Commissioner Reagan Jacobs at the time, proceeded in default.
- [3] Whilst allowing the Applicant to give evidence, it became apparent to Commissioner Jacobs that the date of dismissal was not 27 June 2024 but, according to the Applicant, 15 January 2024. He subsequently issued a ruling on 2 August 2024 that the Applicant had filed the referral outside of the time allowed in terms of section 191 (1)(b)(ii) of the Labour Relations Act¹ (LRA) and thus directed the Applicant to apply for condonation.
- [4] The Applicant applied for condonation on 8 August 2024 and an *in limine* hearing on the papers was scheduled for 7 October 2024 before the arbitrator.
- [5] The applicant contended that she was dismissed on 6 December 2023, that she referred the matter on 27 June 2024 and that her referral was therefore six

¹ Act 66 of 1995, as amended.

months late. The reasons she gave were that she was in contact with her employer throughout the time period and that she was led to believe that she would be called back.

- [6] She contended that she had prospects of success as she was dismissed without any fair reason or procedure being followed. As to prejudice she stated that she remained unemployed and as such was unable to meet her responsibilities as a breadwinner. She further contended that the Third Respondent (the employer) contended that she signed an independent contractor's agreement which she disputes and contended that the signature had been copied and pasted onto the document.
- [7] The employer opposed the application and contended that there was no dismissal but that the Applicant was an independent contractor whose contract ended on 31 January 2024. The employer disputed that the contract was not signed by the Applicant and contended that she had audio evidence that proved that she knew and understood the terms of her appointment.

The award

- [8] The arbitrator relied on *McCann Worldgroup SA (Pty) Ltd v Landman and others*² and stated that the Courts have endorsed the principle that where there is a delay with no reasonable, satisfactory and acceptable explanation for such delay, condonation may be refused without considering prospects of success, to grant condonation where the delay is not explained, may not serve the interests of justice, that the expeditious resolution of labour disputes is another fundamental consideration, concluded that it is more probable than not that the applicant had committed the misconduct complained of, that it constituted dishonesty, that the penalty of dismissal falls within a band of reasonableness and consequently held the dismissal to be substantively and procedurally fair.
- [9] The arbitrator was of the view that because the Applicant was legally represented there was a greater onus upon her to ensure that the referral was

² (JR 48/19) [2020] ZALCJHB 194

made timeously. He was of the view that the delay was excessive, and the reasons preferred were not comprehensive nor persuasive.

- [10] On prospects, he acknowledged that there was a dispute of fact and that it was not appropriate for him to prefer one version above the other without the benefit of oral evidence on the issue yet strangely indicated that on the papers the respondent's version is more probable.
- [11] The most concerning finding however is that the referral was only made on 8 August 2024 and that this was indicative to him of the fact that the Applicant did not consider urgency at all.

Grounds of review and evaluation

- [12] When the jurisdiction of an arbitrator is in question, the issue for determination is whether he or she objectively had jurisdiction in law and fact because a finding that the arbitrator had jurisdiction, because he or she might reasonably have assumed as much, "*is wholly untenable in principle*". In other words, the question of the reasonableness of the Commissioner's decision does not arise and in effect, the Commissioner's decision is of no real consequence. The Court must decide the issue of jurisdiction *de novo* on the basis of the record filed in the review proceedings.³
- [13] In *Parliament of the Republic of South Africa v CCMA and Others*⁴ it was held that:

"This Court accepts that when considering applications for condonation, Commissioners enjoy a wide discretion, and the Courts should be cautious when interfering with decision arrived at by Commissioners in the light of that wide discretion. The applicable test before the Court can interfere with a Commissioner's discretionary decision is whether or not it can be said that the discretion was exercised "capriciously, or upon a wrong principle, or in a biased

³ See: *Moses v Commission for Conciliation, Mediation and Arbitration and Others* (2019) 40 ILJ 2371 (LC) at paras 11 and 12 citing *SA Rugby Players' Association and Others v SA Rugby (Pty) Ltd and Others* (2008) 29 ILJ 2218 LAC at para 39 and *Phaka and Others v Bracks NO and Others* (2015) 36 ILJ 1541 (LAC) at paras 29 and 31.

⁴ (C646/16) [2018] ZALCCT 12 (24 April 2018) at para 13.

manner, or for insubstantial reasons. Thus, the test is whether the Commissioner committed a misdirection, an irregularity, or failed to exercise his or her discretion, or exercised it improperly or unfairly.”

[14] In *Cowley v Anglo Platinum and Others*⁵, it was held that:

“When a Commissioner is endowed with a discretion this court will be very slow to interfere with the exercise of that discretion. The commissioner’s exercise of discretion would be upset on the review if the applicant shows, inter alia, that the Commissioner committed a misdirection or irregularity, or that he or she acted capriciously, or on the wrong principle or in bad faith or unfairly or that the exercise seeing the discretion the Commissioner reached a decision that a reasonable decision-maker could not reach. If it is clear that the commissioner exercised such discretion judiciously and fairly after taking into consideration all the relevant facts, this court will not interfere with the exercise of such discretion.”

[15] It is apparent that the arbitrator did not have the full facts available to him or perhaps did not have the First Respondent’s file before him when he made the condonation ruling. He makes no reference to the fact that a con/arb was scheduled and held on 26 July 2024 nor of the jurisdictional ruling made on 2 August 2024 by Commissioner Jacobs.

[16] His finding therefore that the Applicant had no urgency is patently incorrect on the facts before this Court and thus before him. The referral was made on 27 June 2024 on an incorrect dismissal date of 27 June 2024. This is a layperson’s error, and the correct consideration would have been to assess whether a reason is given for the late referral. The Applicant says that she was in communication with the employer and had submitted a host of WhatsApp messages as proof of this. Whilst not satisfactory in all material respects, she had given a reason for the late referral. She only received the ruling from Commissioner Jacobs on 2 August 2024 and applied for condonation on 8 August 2024. That is neither an unreasonable nor excessive delay.

⁵ [2016] JOL 35884 (LC) at para 21.

- [17] The arbitrator's assessment of prospects is contradictory and thus incorrect. As he held initially, the assessment of which version is to be preferred is best left to an arbitrating commissioner who can assess the evidence and make a determination. Once again, the arbitrator clearly did not consider the uncontested evidence of the Applicant that was led before Commissioner Jacobs. His findings on prospects are therefore incorrect. The Applicant does have prospects of success; the employer has not addressed any of the other factors relevant to the consideration of whether condonation ought to be granted.
- [18] The grant or refuse of condonation is a discretionary power that has to be exercised with circumspection and only in exceptional circumstances because of a litigant's constitutional rights in terms of section 34 of the Constitution of the Republic of South Africa, 1996 (the Constitution), to have any dispute that can be resolved by application of law decided in a fair public hearing before a Court. In the exercise of that discretion therefore, a Court or Tribunal cannot consider a delay in a vacuum but in light of all of the relevant facts including the prejudice to the parties, the possible consequences of granting, or of not granting the relief sought in respect of the merits, the prospects of success and ultimately the interests of justice.⁶
- [19] The factors a Court must consider are the length of the delay; the explanation for, or cause for, the delay; the prospects of success for the party seeking condonation; the importance of the issue(s) that the matter raises; the prejudice to the other party or parties in granting or not granting the relief requested and not considering the merits of the dispute; the effect of the delay on the administration of justice; the litigant's rights in terms of section 34 of the Constitution to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court; and ultimately the interests of justice⁷.

Application

⁶ *SAMWU obo Shongwe and Others v Moloi N.O. and Others* [2021] 5 BLLR 464 (LAC) at para 26.

⁷ *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC).

[20] The Applicant's insufficient reasons aside, she has good prospects of success, will be prejudiced should condonation not be granted, the issue is of some importance to her and deals once again with whether an independent contract came to be which in any event on a simple perusal of same does not contain a fixed period arguably or whether an agreement of employment came to be or can be deemed to exist (another factor the arbitrator fails to grapple with). It is without doubt that refusing condonation closes the door on the Applicant permanently as far as the alleged dismissal is concerned. On a conspectus of all of the facts therefore this Court is in a position to decide the issue *de novo* on the basis of the record filed in the review proceedings and is of the view that a proper case for condonation has been made out.

[21] In the Court's view, it is apparent that the arbitrator did not exercise his discretion judiciously and fairly after taking into consideration all the relevant facts and there is no material connection between the arbitrator's findings and the evidence and the result, and the result is therefore not reasonably supported by the evidence. As such the award is incorrect and the application for review should be granted, the jurisdictional ruling set aside and corrected.

Costs

[22] The most appropriate order as to costs is that both parties remain responsible for their own costs.

[23] In the premise the following order is made:

Order

1. The condonation ruling issued by the Second Respondent is reviewed and set aside.
2. The Applicant is granted condonation for the late filing of the referral to the First Respondent.

3. The First Respondent is directed to reschedule the matter for arbitration before a Commissioner other than the Second Respondent.
4. There is no order as to costs.


C. May

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Applicant in person

For the first respondent : No appearance

LABOUR COURT