



Not reportable

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN**

CASE NO: C31/2024

In the matter between:

SOLIDARITY OBO BRIG G VAN NIEKERK

Applicant

and

SOUTH AFRICAN POLICE SERVICES

First Respondent

**COMMISSION FOR CONCILIATION MEDIATION AND
ARBITRATION**

Second Respondent

JAMES NGOAKO MATSHEKGA N.O.

Third Respondent

Date of Hearing: 27 August 2025

Date of Judgment: 24 June 2026

Summary: (Review – condonation ruling – extensive delay – inadequate explanation of significant delays – affidavits in condonation application providing insufficient basis for condonation – prospects of success poor)

JUDGMENT

T ERASMUS A.J.Introduction

[1] This is an opposed review of the Condonation Ruling (“*the Condonation Ruling*”) handed down by the Third Respondent, a CCMA Commissioner (“*the Commissioner*”) on 14 December 2023 under case number PSSS558-23/24. The Commissioner dismissed the applicant’s application for the condonation of the late referral for conciliation of the applicant’s unfair labour practice dispute.

The material facts

[2] The applicant applied for the post 22/07/3392 of the District Commander Overberg and Post 22/07/3391 of District Commander Winelands of Levels 14 and rank of Major General.

[3] Major General M Groenewald and Major General M M Mochologi were the successful candidates.

[4] The Applicant submitted that she complied with the minimum requirements and applied for the position. The Applicant was not shortlisted nor invited for an interview, despite being the best candidate for the position.

[5] The first respondent announced the appointments on 2 November 2022.

[6] The applicant submitted a PAJA application on 6 October 2022. The information received in terms of PAJA was insufficient, the minutes indicated that the applicant’s applications were rejected, as she allegedly submitted the wrong application from page 2 and her matric certificate was not attached and her driver’s licence was unclear.

[7] The applicant lodged a grievance on 21 October 2022, which grievance remained unresolved, a mediation certificate was issued on 31 January 2023, being the date on which the internal process was exhausted in terms of the SSSBC Collective Agreement.

- [8] Solidarity on behalf of the applicant referred a dispute to the SSSBC on the 6th of February 2023, together with joinder of the successful candidates.
- [9] The Mediation Certificate confirming that the mediation process was requested and that the first respondent did not comply with the timeframe, was attached to the SSSBC referral form.
- [10] The mediation certificate was issued on 31 January 2023, and the Applicant referred the dispute to the SSSBC on 6 February 2023, within the 30-day period, prescribed by the SSSBC Collective Agreement.
- [11] The dispute was set down for Con-Arb on 13 October 2023.
- [12] The third respondent issued a ruling that the CCMA lacks jurisdiction to deal with the dispute as the dispute was referred outside the 90-day referral period prescribed by section 191(2) the Labour Relations Act, 66/1995, as amended.
- [13] The referral was made in terms of the SSSBC agreement at the time and took place prior to the withdrawal of the SSSBC's accreditation by the CCMA on 1 June 2023, at which time the dispute was transferred directly to the CCMA.
- [14] The applicant brought a Condonation Application in compliance with the third respondent's ruling.

Test on Reviews

- [15] The Court may only review and set aside an award/ruling by a CCMA Commissioner if the Court is satisfied that the decision reached is not one that a reasonable decisionmaker could have made, on the available material. In *Fidelity Cash Management Service v CCMA & Others*¹ the

¹ (2008) 29 ILJ 964 (LAC)

Labour Appeal Court, at para 100, elaborated on this test and said the following:

'The test enunciated by the Constitutional Court in *Sidumo* for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision maker could not have made in the circumstances of the case.'

[16] The test formulated above accords with later pronouncements of the LAC and SCA (see, for example, *Herholdt v Nedbank Ltd & Another* at para 25²; *Goldfields Mining SA (Pty) Ltd v CCMA & Others* at paras 14 – 15³).

The review application

[17] The Commissioner was required to establish whether to condone the applicant's referral outside of the 90-period prescribed in terms of section 191(2) of the LRA, 66/1995, of her unfair labour practice dispute to the CCMA;

[18] The applicant referred an unfair labour practice dispute to the CCMA on 6 February 2023, stating that the unfair labour practice dispute allegedly arose on 1 October 2022 (being the date on which she became aware of the act/omission).

[19] The third respondent ("the Commissioner") issued a Jurisdictional Ruling on the 13th of October 2023, that the CCMA lacked jurisdiction to adjudicate the dispute, as the referral took place outside of the 90-day period.

² 2013 (6) SA 224 (SCA)

³ [2014] 1 BLLR 20 (LAC)

- [20] The applicant brought a condonation application on 1 November 2023.
- [21] The applicant should have referred the dispute to the CCMA by 30 December 2022, being 90-days from the date of the act/omission or when the applicant became aware of the act/omission.
- [22] The Commissioner found that the applicant's referral was 282 days late, applicant's union representatives, Solidarity stated that they were mistaken with the calculation of the 90-day period and argued that the referral was in time in the light of the Ruling under case number: PSSS410-22/23.
- [23] The third respondent found that the applicant failed to make any submissions in support of merits of success and failed to show good cause for lateness, as no reasons were advanced on behalf of the applicant in explanation for the lateness of the referral.
- [24] The third respondent found that the application must fail both on grounds of degree of lateness and lack of prospects of success.
- [25] The applicant in her argument in support of her application for the review of the third respondent's condonation ruling, placed emphasis on the assertion that the third respondent erred in his summary that the applicant referred her unfair labour practice dispute to the CCMA, instead of to the SSSBC, before their accreditation was withdrawn.
- [26] It is argued on behalf of the applicant that a different time frame applied in terms of the SSSBC, with which time frames the applicant complied. On 1 June 2023 when the CCMA withdrew the SSSBC's accreditation, the dispute was referred to the CCMA.
- [27] The applicant disputes the third respondent's finding that she failed to deal with the prospects of success in her founding affidavit in the condonation application. She submits that she dealt with the prospects of success and

clearly indicated that she complied with the minimum requirements for the position.

- [28] The advertisement did not require a matric certificate, and the alleged unclear drivers' licence is unjustified and arbitrary.
- [29] The applicant submitted that the third respondent erred in his finding that she failed to deal with the reasons for lateness in her condonation application, in that she referred to grievance procedure, the mediation certificate and the SSSBC process that was complied with. The applicant submits that the late referral was a bona fide mistake.
- [30] The applicant argues that the third respondent erred in his finding that the 90-day period must be calculated from 1 October 2022, instead of from the date of the mediation certificate, 31 January 2023.
- [31] The third respondent erred in that he failed to consider that the SSSBC followed a different approach prior to the withdrawal of the SSSBC's accreditation by the CCMA.
- [32] The first respondent, SOUTH AFRICAN POLICE SERVICE's opposition was based on the following:
- 32.1 the applicant was not shortlisted because she completed the incorrect application form, she failed to annex her drivers' licence and matric certificate, which were both requirements for the position.
- 32.2 The first respondent disputed that the internal process was only exhausted on 31 January 2023, when the medication certificate was issued.

Legal principles and analysis

- [33] Section 191(2) of the LRA is a statutory requirement, therefore an unfair labour practice dispute must be referred to the CCMA or relevant Bargaining Council within 90 days from the date of the act/omission or from the date when the applicant became aware of the act/commission.
- [34] It is common cause the applicant referred an unfair labour practice dispute to the CCMA on 6 February 2023, whilst the applicant was aware of the act/omission constituting an unfair labour practice dispute on 1 October 2022 whereafter she lodged a grievance on 21 October 2022.
- [35] It is common cause that the mediation certificate required in terms of the SSSBC's rules was issued on 31 January 2023.
- [36] The applicant averred in her referral to the SSSBC on 6 February 2023 that the dispute arose on 31 January 2023 when the mediation certificate was issued.
- [37] This is in direct conflict with the applicant's own evidence that she lodged a grievance on 21 October 2022, because she was not shortlisted for the position.
- [38] Therefore, the applicant should have referred her unfair labour practice dispute to the relevant Bargaining Council or the CCMA by no later 30 December 2022, within the 90-day period prescribed in terms of section 191(2) of the LRA.
- [39] The applicant brought an application for condonation on 1 November 2023, which was severely late. The applicant provided no explanation for the late referral other than to provide a detailed explanation of the SSSBC's rules, which provides for a referral to the SSSBC within 30-period after a mediation certificate has been issued.
- [40] It is common cause that the SSSBC's accreditation was withdrawn by the CCMA on 1 June 2023.

[41] Section 191(2) contains a statutory prescription and cannot be overruled by the rules of a Bargaining Council.

[42] In *IMATU OBO JEFFREY KHOZA vs GREATER GIYNAI LOCAL MUNICIPALITY*⁴:

'Employer raised a point in limine that the unfair labour practice dispute was referred to the SALGB prematurely in that the employee did not lodge a grievance and exhaust all three steps before referring the matter to the SALGBC. The Commissioner found that there is no duty on the employee to exhaust all internal remedies before referring the matter to the Council.'

[43] In *IMATU obo Mythic Matthys & others vs City of Tshwane Metropolitan UNIV*⁵:

'The Commissioner ruled that there is no requirement for party to first exhaust internal processes before referring an unfair labour practice dispute to the bargaining council. The Commissioner at paragraph 20 stated the LRA does not state that an ULP must be referred to the council once the parties have exhausted internal processes. It would defeat the intent and spirit of the LRA.'

[44] The Applicant could have referred the alleged unfair labour practice dispute to the Council, although the internal process was still underway. There was nothing preventing the Applicant to refer the dispute to the Council/CCMA timeously.

[45] However, insofar as her claim only concerns an unfair labour practice relating to promotion, this court has held that such disputes are of a discontinuous nature and arise at the time the appointment is made. See for example *Eskom Holdings SOC Ltd v NUM*, where employees had referred to an unfair labour practice dispute relating to promotion, their argument was that the 90-day limit did not apply as from the date of the alleged unfair act by the employers because the dispute was likewise of a

⁴ LPD051909- 7 OCT 2019

⁵ GMD031809 -26 SEPT 2019

continuous nature. The court decided that disputes even where non promotion amounts to an unfair labour practice, it cannot be said that the employer continues to commit it on a month to month basis until the dispute is referred to the CCMA, because that *'would render the 90-day time limit under section 191(1)(b)(ii) completely valueless'*.

- [46] The prescribed 90-day time period in terms whereof an employee must refer an unfair labour practice dispute to the Council as prescribed by section 191 (1) (a) of the LRA 66/1995, is calculated from the dated of the act/omission **or** the date on which the Applicant became aware of the act/omission, in this case being the 30 June 2021. Therefore, the referral should have taken place before or on the 30th of December 2022. The referral was 282 days late.
- [47] The third respondent correctly took the time periods prescribed in terms of section 191(2) of the LRA into account and the explanation provided by the applicant for the lateness of the referral amounted to nothing other than the denial of the lateness.
- [48] The referral was extremely late, and under the circumstances where the lateness is seen to be severe, the Commissioner does not have to consider the merits of success.
- [49] The third respondent did however find that there was no explanation of the merits, other than a denial that the matric certificate and drivers' licence was a requirement and that she met all the requirements of the position.
- [50] Having considered all the facts, and submissions, I accept the commissioner's findings that the delay is excessive, the explanation was weak and failed to cover the entire period of the delay. In addition, I agree that the applicant's prospects of success are slim to non-existent. Accordingly, I find that the commissioner was correct to dismiss the application for condonation.

Costs

[51] As it appears that the applicant was simply misguided by her union representative's incorrect calculation of the applicable time period in case of an unfair labour practice dispute, mistakenly believing that the rules of the SSSBC overruled the statutory requirement laid down by section 191 (1) of the LRA. I am disinclined to make a cost order against her.

Order

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

T ERASMUS A.J.

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms T du Preez

Instructed by: Solidarity

For the First Respondent: Adv. K Ngqata

Instructed by: State Attorney, Cape Town

For the Third Respondent: N.A.

Instructed By: N.A.

LABOUR COURT