



IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C298/2023

In the matter between:

FRANZ HOFLINGER

Applicant

and

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

First Respondent

COMMISSIONER RICHARD HEATH N.O.

Second Respondent

BRITISH AMERICAN TOBACCO SA (PTY) LTD

Third Respondent

Date of hearing: 5 and 6 November 2025

Date of delivery: 12 August 2026

Summary: Late referral of unfair labour practice dispute to the CCMA –
condonation refused by CCMA Commissioner – no proper explanation for

inordinate delay given by Applicant – decision refusing condonation reasonable and not reviewable.

JUDGMENT

A OOSTHUIZEN AJ

- 1 The Applicant in this matter was previously employed by the Third Respondent. His employment was terminated on 31 October 2021, pursuant to a Voluntary Termination Agreement concluded between the Applicant and the Third Respondent in September 2021 (*“the Termination Agreement”*). Up until 31 October 2021 (*“the Termination Date”*), Applicant received his salary, fringe benefits and certain other incentive and similar bonuses.
- 2 In March 2023, Applicant referred an unfair labour practice to the CCMA. The details of the dispute are set out in the prescribed Form 7.11. In the Summary of Facts of the dispute which forms part of this document, Applicant alleges as follows: *“I was targeted, victimised, intimidated, bullied and ridiculed in front of peers when Employer went on agenda to exit Employee in my team. Conduct towards me was so bad I became extremely afraid out of losing my job so I went for VSP out of fear”*. The relief sought by the Applicant, in relation to this alleged unfair labour

practice, was “*compensation for being bullied which forced me to take a VSP although I was not ready to leave the company at that point in my career*”.

- 3 The referral was approximately 19 months and 19 days out of time. It accordingly became necessary to apply for condonation, which the Applicant did. Condonation was refused by the Second Respondent (“*the Commissioner*”). Applicant seeks to review that refusal.
- 4 It is well established that a tribunal, when granting or refusing condonation, exercises a discretion which is to be exercised judiciously. The facts relevant to the exercise of that discretion are the degree of lateness, the explanation advanced by the party seeking condonation, the prospects of success and the importance of the case. These factors are not individually decisive, and the weight to be accorded to each of them depends on all the relevant circumstances (**Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (AD) at 532C-E**).
- 5 On appeal, the exercise of a discretion by a tribunal of first instance will only be overturned if it can be shown that the discretion was exercised capriciously or in an arbitrary fashion. This being a review, the test is even more stringent. The Applicant has to establish that the decision made by the Commissioner in the review before me was unreasonable to the extent that no reasonable commissioner could, on the relevant facts and material, have arrived at such a decision.

6 As pointed out in the award of the Commissioner, the degree of lateness was considerable. Section 191(1)(b)(ii) requires an unfair labour practice dispute to be referred within ninety of the date of the act or omission which allegedly constitutes the unfair labour practice or, a later date within ninety days of the date on which the employee became aware of the act or omission. The unfair labour practice alleged by the Applicant consists of bullying and harassment, and it can hardly be contended that the Applicant would not have been aware of these at the time that they were perpetrated. That would have been before the conclusion of the Termination Agreement in September 2021. The delay in referring the dispute to the CCMA is therefore an inordinately lengthy one.

7 In a condonation application, a party is required to provide a reasonable, satisfactory and sufficiently detailed explanation for the delay (**Chetty v Baker McKenzie (2022) 3 ILJ 1599 (LAC)** at **paras 8 – 10**). The degree of detail required of a party seeking to explain a delay was considered in **Uitenhage Transitional Local Council v SA Revenue Services 2004 (1) SA 292 (SCA)** at **para 6**, where the Court said the following:

“... condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that if the non-compliance is time-related then the date, duration and

extent of any obstacle on which reliance is placed must be spelled out.”

- 8 The Commissioner found that the Applicant had failed to provide a persuasive explanation for every period of the delay and that there were long periods for which no explanation was provided by the Applicant. The question is whether this finding is so unreasonable that it warrants this court's interference on review. In my view, the Commissioner's finding is reasonable and in fact supported by the evidentiary material before the Commissioner.
- 9 Factors requiring emphasis are, firstly, that the Applicant was a senior managerial employee of Third Respondent, and not some low level and unskilled employee. It is, to my mind, inconceivable that the Applicant would not have known that steps could be taken by a party who had been coerced into signing an agreement or, alternatively, that the Applicant would not at the very least have sought advice into his rights in respect of such agreement, concluded under duress. One searches the papers in vain for an objectively reasonable explanation for his failure to take steps to resile from the Agreement, soon after he had been forced into concluding same. The only remotely sensible explanation on the papers is that the Applicant appears to have waited until he had received payment of all that was due to him under the Agreement, before commencing legal steps in respect of his allegedly being coerced into concluding the Agreement. That kind of opportunistic manoeuvring cannot constitute an acceptable explanation for

a delay and, furthermore, the doctrine of election held the Applicant bound to the terms of the Agreement in such a case.

- 10 There is some ill-defined attempt by Applicant to argue that his involvement as a potential witness in a case which a fellow employee was bringing against Third Respondent, arising out of the termination of that fellow employee's services, provides an explanation for Applicant's delay in referring his own dispute to the CCMA. The circumstances and fate of that fellow employee's legal proceedings cannot excuse Applicant's failure to timeously take steps in respect of Applicant's own dispute.
- 11 In any event, Applicant attempts to explain away long periods of the delay with cryptic and somewhat nonsensical references to Applicant's involvement in the dispute between his fellow employee and Third Respondent. For example, the Applicant's chronology notes that on 11 May 2022 he had a meeting with the fellow employee "*to discuss the contradictions on the reason given by the business*" and that he thereafter had consultations (he does not specify with whom), apparently in relation to his giving evidence in the fellow employee's CCMA arbitration. There is a period of approximately two months during which he notes that he continued working "*on my witness statement letters*". Why the time spent by him on working on his witness statement in respect of his fellow employee's dispute should excuse him from timeously taking steps in respect of his own dispute is nowhere explained.

- 12 According to the Applicant's chronology, on 7 September 2022 he had what he describes as "*a full consultation session with lawyers to get directions on the steps I can take*". Notwithstanding that "*full consultation*", he delayed for a further six months before referring his dispute to the CCMA. There is no cogent explanation in respect of that six month delay.
- 13 There is a second leg to Applicant's condonation application, which relates to his prospects of success. The Commissioner found that such prospects were poor. I am unable to fault that conclusion. Applicant's dispute referral form indicates that he seeks compensation because he was allegedly victimised, intimidated and bullied into signing the Voluntary Severance Package Agreement "*out of fear*". That complaint, to the extent that it is cognisable, does not appear to fall within the definition of the term "*unfair labour practice*" in Section 186 of the LRA, and it is difficult to understand on what basis, if any, the matter could be deal with by the CCMA as opposed to the High Court. The CCMA is statutorily created. It has repeatedly been held, most recently in **Prudential Authority v Jaijai [2025] ZAGPPHC 1148**, that a body created by statute has no jurisdiction to determine disputes not falling within the ambit of the powers vested in such statutory body. Furthermore, if the matter were to be referred to the High Court, the Applicant would face the difficulty that he has not sought to resile from the Agreement, but seeks to claim compensation, the nature whereof is not stipulated, as a result of allegedly being bullied or victimised. If the High Court were to hear the matter, it could only award damages in respect

of patrimonial loss and no details are given of any patrimonial loss suffered by Applicant.

- 14 In the circumstances, the Applicant has failed to put up facts indicating that the Commissioner's award does not meet with the reasonableness threshold. Accordingly, I am not persuaded that there are any grounds for the review of the Commissioner's condonation ruling.
- 15 The application before me is therefore dismissed with costs, including the costs of the hearing on 5 and 6 November 2025.



AC OOSTHUIZEN A.J.

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Franz Hoflinger

Instructed by: In Person

For the Respondents: Leila Moosa

Instructed by: Cliffe Dekker Hofmeyr Inc.

LABOUR COURT