

SOUTH AFRICA / JUDGMENT

Nthuli v General Public Service Sector Bargaining Council and Others (JR1825/22) [2025] ZALCJHB 151 (25 April 2025)

[2025] ZALCJHB 151**COURT**

Labour Court Johannesburg

BEFORE

Phakedi

CASE / FILE NUMBER

JR1825/22

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Source record**THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG****Not Reportable****Case No: JR1825/2022****In the matter between:**

THOKOZILE
NTULI
Applicant
and
GENERAL PUBLIC SERVICE
SECTOR
BARGAINING
COUNCIL
First Respondent
COMMISSIONER MOHAU
NTAOPANE
Second Respondent
DEPARTMENT OF JUSTICE
AND
CONSTITUTIONAL
DEVELOPMENT
Third Respondent

Heard:

16 April 2025

Delivered: 25 April
2025
Summary: Review of
condonation ruling on grounds of unreasonableness – section 145
of LRA and review test considered –
condonation ruling

JUDGMENT

PHAKEDI, AJ

Introduction

- [1] This is an opposed application to review and set aside the condonation ruling issued by the arbitrator dated 10 July 2022 under case number GPBC385/2022. The applicant received the ruling on 12 July 2022, and the review application was filed within the prescribed period of six weeks as envisaged in section 145 of the Labour Relations Act (the LRA)[1].

The relevant background

- [2] The applicant is employed by the Department of Justice and Constitutional Development (the Department) as a Senior Admin Clerk. She started working for the Department on or about 17 June 1991, based at Kwa-Mhlanga Magistrates Court until she was transferred to Pretoria Magistrates Court.
- [3] On or during 2010, she was approached by Mr Nhlapo, a Court Manager at Atteridgeville, to request a transfer to his Court. On or about the 19th of May 2010, she was appointed Acting Court Manager for one day. She was also appointed a supervisor for various sections within the Court, although she was not being remunerated at the level of a supervisor. She made several complaints to Mr Nhlapo, but he never resolved her salary issues.
- [4] On or about 2 September 2010, she formally submitted her request to be transferred from Pretoria Magistrates Court to Atteridgeville Magistrates Court. At the time, she was holding a rank of Senior Admin Clerk on salary level 5. In her request for transfer, she stated that: “I understand that should my transfer be approved, it will be with retention of my current salary and salary level and that transfer will take place at own cost”.
- [5] She continued to make follow-ups on the salary issues, but same were never resolved until on or about the 18th of December 2016 when Mr Nhlapo told her that he was demoting her from the position of supervisor with immediate effect. No reasons were provided for such a decision, and she then lodged a grievance to the Regional Office of the Department via email. She once again submitted an email lodging a grievance on or about 12 January 2017. The grievance was never resolved until she was invited to attend a meeting with Regional Office officials on or about 16 November 2018.

- [6] She lodged another grievance on the 30th of January 2019, and her proposed solution, recorded on the form, reads “justice must prevail (I was promised to be promoted to the next level)”. She submitted another grievance dated the 20th of July 2021, and her proposed solution was once again reads “justice must prevail (I was promised to be promoted and to get a performance bonus)”.
- [7] On or about the 14th of January 2022, she then received the outcome of the grievance signed by the Acting Regional Head on 31 December 2021. In essence, the outcome was that the applicant is advised to apply for level 7 positions when there are vacant positions at any Court because she cannot be promoted from level 6 to level 7. In the same letter, she was advised to exercise her rights by referring the matter to the executive authority in terms of resolution 14 of 2002.
- [8] The applicant referred the unfair labour practice dispute to the general public service sector bargaining council on 25 March 2022. In her referral form, the applicant states that the dispute arose on the 14th day of April 2010, and her desired outcome is to be appointed as a supervisor and be paid from the date of appointment.
- [9] When the matter was brought before the arbitrator, he then directed the applicant to file an application for condonation before 22 June 2022, the Department was directed to file its answering affidavit before 29 June, and the applicant’s replying affidavit ought to have been filed on or before 2 July 2022. However, the respondent filed its answering affidavit on 5 July 2022, and the replying affidavit was filed on the same day.
- [10] The arbitrator issued the condonation ruling on 12 July 2022 and dismissed the application for condonation. The applicant was not satisfied with the outcome then launched the review application relying on the grounds stated hereunder.

Condonation Ruling and the review application

- [11] Section 191 (1)(a) (b)(ii) of the LRA provides that:

‘If there is a dispute about an unfair labour practice, the employee alleging the unfair labour practice may refer the dispute in writing to a council, if the parties to the dispute fall within the registered scope of that council; within 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.’

- [12] The applicant referred the dispute to the Council upon receipt of the outcome of the grievance. In her condonation application, she only provides an explanation from 12 January 2017, when she first lodged a grievance by email to a certain Ashley Mjikeliso based at the Regional Office of the Department, until the grievance was finalised. Her reasons are that she wanted internal processes to be concluded first before referring the matter to the Council.

- [13] In respect of the degree of lateness, she stated that the matter arose in May 2016 when she was demoted by Mr Nhlapo from her position as a supervisor. This was, however, a contradiction to the information contained in her referral form, where she clearly stated that the dispute arose on the 14th of April 2010.
- [14] In respect of prejudice, she stated that she will be seriously prejudiced if not afforded an opportunity to be heard because she was treated unfairly by Mr Nhlapho, who demoted her in the corridors without following any procedure and without any consultation.
- [15] In respect of prospects of success, she indicated that she has high prospects of success in that she was appointed as a supervisor and she has been assessing her colleagues and signing documents as a supervisor, although she was not receiving performance benefits.
- [16] The application was decided on the papers filed by both the applicant and the Department. The applicant is aggrieved that the arbitrator ought to have disregarded the answering affidavit of the Department because it was filed late and not accompanied by any condonation application. In paragraph 19 of the award, the arbitrator noted that the answering affidavit was filed outside the date agreed upon by the parties. He correctly disregarded the email requesting an extension from the Department, as such a request did not constitute a condonation application. He further conceded that the Department had submitted that the applicant was not required to submit an application for condonation, although the application was opposed. He then concluded that:

‘... I submit that the the earlier submission appeared to be an error, however, I cannot correct the affidavit of a party. It is my view however that even if the respondent had not opposed the condonation application on the reason submitted by the applicant the condonation application should still fail.’

[17] In conclusion, the arbitrator stated:

The delay between when the applicant became aware of the dispute as defined by section 191(1)(b)(ii) of the LRA and when the dispute was actually logged its egregious and cannot be condoned. It is my view that the explanation is so unsatisfactory that I do not need to consider prospects of success.’

Applicant’s grounds for review

[18] The Applicant is challenging the ruling of the arbitrator on the basis that another reasonable decision maker would have arrived at a different decision based on the following grounds:

18.1 The arbitrator erred in taking into account and considering the Department’s answering affidavit despite the answering affidavit being filed out of time and the Department having failed to request condonation for the late filing of its answering affidavit.

18.2 The arbitrator erred in failing to take into account the fact that the Department fully agreed that there is no need for condonation.

18.3 The arbitrator erred in failing to take into account the several admissions made by the Department in its answering affidavit, as stated by the Applicant and further the contradictions it made therein.

18.4 The arbitrator erred in failing to take into account that the Applicant believed to be guided by the Grievance Rules for the Public Service for the internal grievance procedure to be exhausted, and the Applicant was waiting for the written outcome of the grievances.

18.5 The arbitrator erred in failing to take into account that the long delay was not willful by the Applicant and it was greatly caused by the Department in delaying to finalise the internal grievance procedure, of which was only finalised in December 2021 and the written outcome was [provided to the Applicant on th 14 January 2022] in which it clearly state that the dispute is now finalised and the Applicant can now refer the matter to executive authority if she is unhappy with the outcome.

18.6 The arbitrator erred in failing to take into account that there was no prejudice to the other party and that it was in the interest of justice for the condonation application to be granted in order to exercise the principle of audi alteram partem.

18.7 The arbitrator erred in failing to take into account the importance of the issue at hand and the strong prospects of success that the Applicant have on the main matter, as she provided evidentiary documentary proof of such other acting roles emanating from her appointment as a supervisor by Mr Nhlapo, e.g. acting as a Court Manager, Accountability Oath document and Assessment Reports where she assessed her colleagues, the documents of where in all instances the Applicant has signed such documents as a supervisor.

[19] The Department is opposing the review application on the basis that the applicant has failed to furnish this Court with grounds for the review application as contemplated in section 145(2) of the LRA. The Department further contends that the applicant failed to furnish a reasonable explanation for the delay, particularly between 2010 and 2016, and her failure to account for this period of delay is six uninterrupted years and there is no such thing as continuous unfair labour practice for the purposes of compliance with the applicable time limits.

[20] In respect of prospects of success, the Department submitted that there is no provision for verbal appointments in the public service and further that the applicant failed to provide evidence supporting his appointment and/or demotion by Mr Nhlapo.

Principles applicable in applications for condonation

[21] Section 191(2) of the LRA provides that:

‘If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired.’

[22] Lekhesa: In re Ngwenya v Trustees for the time being of Sishen Iron Ore Company Community Development Trust & another[2] it was stated:

‘The grant of condonation involves the exercise of a discretion, with a decision to condone a party's non-compliance with the rules of the court or directions constituting an indulgence granted by the court. Such an application should be granted if, having regard to the particular circumstances of the matter, it is in the interests of justice to do so, and refused if it is not. To reach a decision, regard is to be had to factors including the nature of the relief sought, the extent and cause of the delay, the reasonableness of the explanation for the delay, the importance of the issue to be raised, issues of prejudice and the prospects of success. As a general proposition, the factors to be considered are not individually decisive of an application for condonation but are all considered to determine what is in the interests of justice.’

[23] The LAC restated the above-mentioned condonation principles in SACCAWU obo Letsoalo and Another v Commission for Conciliation, Mediation and Arbitration and Others[3] where it was held that:

‘[18] It is well accepted that condonation cannot be had for the mere asking but a plea for the court's indulgence to excuse the non-compliance with the prerequisite time limits in terms of the prescripts on sufficient cause shown. The yardstick is the interest of justice which entails a consideration of all the relevant factors, including the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. Ultimately, the particular circumstances of each case will determine which of these factors are relevant.

[19] Added to the general principles, in Steenkamp and Others v Edcon Ltd, the Constitutional Court endorsed the Labour Law - specific factors and considerations which are premised on one of the primary

objects of the LRA to have labour disputes resolved expeditiously. Since labour disputes are inherently urgent, the LRA imposes strict time limits within which various applications and referrals must be launched to give effect to the primary object of the LRA. As a result, and pertinent to the case at hand, condonation in a case of disputes over individual dismissals will not readily be granted unless, inter alia, the explanation for non-compliance is compelling..’

[24] The Court in Independent Municipal & Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council & others[4] held:

‘In explaining the reason for the delay, it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay. The mere listing of significant events which took place during the period in question without an explanation for the time that lapsed between these events does not place a court in a position properly to assess the explanation for the delay. This amounts to nothing more

than a recordal of the dates relevant to the processing of a dispute or application, as the case may be.'

[25] The SCA in *Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd and others* held that: 'in order for the adjudicator to exercise his or her discretion whether or not to grant condonation, he or she must be appraised of all the facts and circumstances relating to the delay. Condonation cannot be had for the mere asking, and a party is required to make out a case entitling it to the commissioner's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay.'[5]

Evaluation and analysis

[26] It is trite that when the Court is dealing with a jurisdictional issue, the applicable test is that of correctness, the Court is required to interrogate whether the decision of the arbitrator was right or wrong, as opposed to the reasonableness test as enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[6]. The Department submitted that the applicant has failed to make out a case demonstrating that the condonation ruling is reviewable on any grounds envisaged in section 145(2) of the LRA.

[27] In *PSA obo Mackay and others v Department of the Premier Western Cape and others*[7], the Labour Court found that to non-suit an applicant who had pleaded the wrong review test amounted to an overly technical approach, out of kilter with the primary objects of the LRA, when, in instituting the review application, the applicant had made it clear that it considered the award to be wrong. The Court stated that implicit in the allegation of unreasonableness was the fact that the applicant considered the award to be wrong, given that unreasonableness amounted to a more stringent threshold since an unreasonable award could not be correct.

[28] I have considered the applicant's grounds of review and the fact that she submitted that the arbitrator committed various errors of the law, as such, I am of the view that the correctness test must find application based on her pleadings. It is further in the interests of justice and within the purport of the LRA that this matter must be disposed of, taking into account that the dispute between the parties is more than 15 years old.

[29] I have also considered submissions made by both parties in this application and I do not find any fault with the arbitrator's

findings that they failed to provide a full explanation for the delay in referring her dispute to the Bargaining Council. I have considered that in her referral form, she indicated that the dispute arose on 14 April 2010 and she was demoted on 18th of December 2016. However, in her application for condonation, she stated that the dispute arose in May 2016 when she was demoted. Despite her inconsistencies, the applicant demonstrated that she knew the date when the dispute arose and she ought to have referred the dispute within 90 days from that date.

- [30] The applicant complained that the arbitrator committed a reviewable irregularity by considering opposing papers filed by the Department outside the prescribed timeframe and without a condonation application. The arbitrator already concluded that the condonation application stood to fail even if no opposing papers were filed. And I am of the view that the consideration of the opposing affidavit of the Department did not affect the fair determination of the applicant's condonation application. Section 138(1) of the LRA enables commissioners to arbitrate disputes in a manner they consider appropriate in order to determine them fairly and quickly with the minimum of legal formalities.
- [31] The main reason provided by the applicant for her failure to refer the dispute to the Council is that she wanted to exhaust internal remedies. The Bargaining Council is a creature of statute and derives its jurisdiction from the LRA. None of the provisions of the LRA confer employees with the right to lodge a grievance first before referring a dispute to the CCMA/ relevant Bargaining Council. Section 191 (1) (a)(b) (ii) of the LRA gives an employee an opportunity to refer a dispute on the date of the incident or, if the referral is made later, on the date the employee becomes aware of the incident involving an unfair labour practice. Furthermore, the applicant who fails to refer a dispute within the prescribed period is afforded an opportunity to show cause as to why his/her non-compliance should be condoned. In this case, the arbitrator concluded that the applicant failed to show good cause and dismissed her referral.
- [32] The arbitrator concluded that, due to the applicant's failure to provide a satisfactory explanation for her failure to refer the dispute on time, there was no need to consider her prospects of success.
- [33] In *Government Printing Works v Public Service Association and Another*[8] aptly expounded the applicable general principles for condonation and dealt with a misconception that once an applicant fails to proffer a reasonable explanation for the excessive delay, prospects of success are of no consequence and could be automatically discounted. I am therefore required to make a determination whether the arbitrator was correct in his decision to disregard the applicant's prospect of success as placed before him.

Prospects of success

- [34] The applicant submitted that she has high prospects of success in that she was appointed as a supervisor and she has been assessing her colleagues and signing documents as a supervisor although she was not receiving performance benefits. The applicant further submitted that Mr Nhlapo was always happy with her performance and promised her that she would receive payment of merit, increased salary notches and performance benefits. In order to consider whether the applicant had prospects of success, one has to go into the merits of her complaint of unfair labour practice.

[35] Section 186(2)(a) of the the LRA provides that “unfair labour practice means an unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee”. The applicant is alleging that she was verbally promoted to a position of supervisor and subsequently demoted from a position of

supervisor, but she has not provided any supporting evidence except her letter of appointment as Acting Court Manager for one day on 19 May 2010.

[36] The Department is a government entity and has a duty to follow the policies prescribed for the promotion of employees. It is not the applicant’s case that there was a vacancy advertised, she met the requirements of the position, she applied, she was subsequently shortlisted and interviewed, but later overlooked, although she was the most suitably qualified incumbent. The LAC in *Mashaba v University of Johannesburg and Others*[9] held that “a promotion is a process commencing with the advertisement of the post followed by shortlisting and interviews...”.

[37] This Court, in considering the condonation application on the merits, comes to the same conclusion that the Applicant failed to give an adequate explanation for the delays in referring the dispute to the Council and does not have prospects of success regarding the alleged unfair labour practice. The condonation ruling is therefore upheld and the review application stands to be dismissed.

[38] In the premises, I make the following order:

Order

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

GC Phakedi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv L Maake

Instructed by: Malale Nthapeleng Attorneys

For the Respondent: Adv K Moloisane

Instructed by: State Attorneys Johannesburg

[1] Act 66 of 1995, as amended.

[2] (2024) 45 ILJ 1220 (LAC); [2024] 6 BLLR 585 (LAC) at para 14.

[3] [2025] ZALAC 12.

[4]

(2010) 31 ILJ 1413 (LC); [2009] ZALC 137 at para 13.

[5] 2017

(6) SA 90 (SCA); [2017] ZASCA 88 at para 6.

[6]

[2007] ZACC 22; 2008 (2) SA 24 (CC).

[7] Unreported judgment under case no: C153/2019 delivered 15 September 2022 at para 20.

[8] [2024] ZALAC 63; [2025] 2 BLLR 112 (LAC).

[9] [2022] ZALAC 116; (2023) 44 ILJ 156 (LAC) at para 18.

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