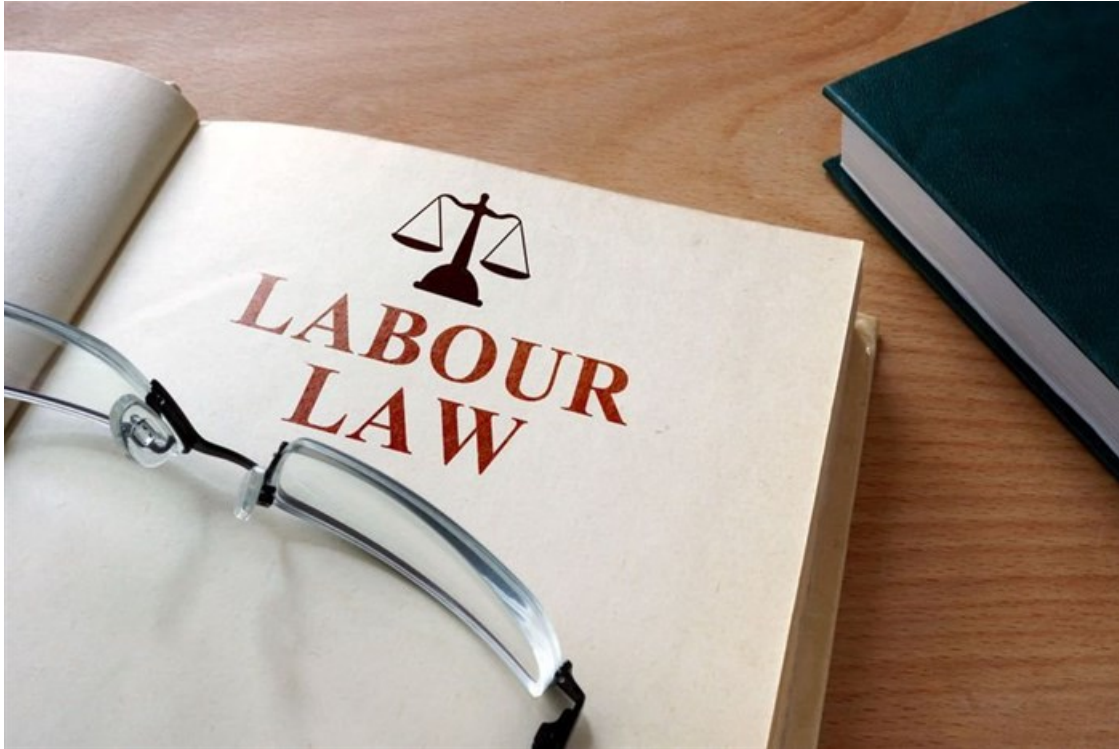


# Can the Labour Court determine review proceedings of a liquidated company?

By [Nivaani Moodley](#), [Shane Johnson](#), [Cameron Rajoo](#), [Julian Jones](#) and [Caellyn Eedes](#)

6 May 2021

In a recent judgment, *Joseph v Killarney Engineering (Pty) Ltd and Others* (18 February 2021), the Labour Court found that it did not have jurisdiction to determine review proceedings for a liquidated company if the person who instituted the legal proceedings failed to deliver the necessary notice to the liquidators.



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An employee dismissed by Killarney Engineering for poor work performance while on probation approached the Metal and Engineering Industries Bargaining Council (MEIBC) for relief. On 23 February 2018, the MEIBC Commissioner found that the dismissal of the applicant was substantively and procedurally fair. The employee launched an application to review and set aside the decision of the Commissioner on 4 May 2018. However, Killarney Engineering was liquidated on 1 July 2019 and the matter was only heard before the Labour Court on 18 February 2020.

The Labour Court noted that the key issue for determination was whether the court could adjudicate the matter, given that the company had been liquidated.

The case turned on an interpretation of Section 359(2)(a) of the old Companies Act 61 of 1973 (which still applies). Section 359(2)(a) states that any person seeking to institute or continue with legal proceedings against a company for a claim that arose before the winding-up must provide the liquidators with notice before commencing legal proceedings.

The Labour Court noted that only section 359(1)(a) of the old Companies Act refers to civil proceedings against the company, while the rest of the section deals with legal proceedings against the company. This differentiation is significant as it confirmed the legal position that a review application constitutes legal proceedings before the Labour Court. The purpose of these provisions is to prevent the liquidators from being inundated with legal proceedings without being given sufficient time to consider whether the company should resist them. They are also intended to prevent the company's financial status from worsening due to the costs of legal proceedings.

The Labour Court found that the liquidator's reliance on section 359 was not an absolute defence as section 359(2)(b) of the old Companies Act allows the court to direct that the relevant proceedings should not be considered to have been abandoned. Therefore, if the applicant in the legal proceedings intends to continue, the applicant is required, four weeks after the appointment of the liquidators, to provide them with at least three weeks' notice (in writing) before continuing or commencing with the legal proceedings. A condonation application will then be necessary for the court to direct otherwise.

In this case, the employee failed to provide the liquidators with the required notice and condonation was not sought from the Labour Court. Furthermore, the Labour Court held that it lacked jurisdiction even to entertain the condonation application, because that falls within the Companies Act, not the Labour Relations Act 66 of 1995. This is in line with the previous decision of the Labour Court in the case of *Direct Channel KwaZulu-Natal (Pty) Ltd v Naidu and Others*.

In the circumstances, the application was dismissed due to lack of jurisdiction. No order was made on costs.

## ABOUT THE AUTHOR

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