IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC Case No: 184/CAC/May20

TRIBUNAL Case No: LM263Mar19

In the matter between:

GIWUSA	**FIRST APPLICANT**
FAWU	**SECOND APPLICANT**
and	
MILCO SA (PTY) LTD	**FIRST RESPONDENT**
CLOVER INDUSTRIES LTD	**SECOND RESPONDENT**
COMPETITION TRIBUNAL OF SA	**THIRD RESPONDENT**

ORDER

'The application is dismissed with each party to pay its own costs'.

JUDGMENT

Delivered on: 4 Novembe2022

Poyo Dlwati AJA

[1] GIWUSA and FAWU (the applicants), being trade unions registered in terms of the Labour Relations Act 66 of 1995, seek an order reviewing and setting aside the Competition Tribunal's decision of 25 September 2019 approving the merger of Milco SA (Pty) Ltd and Clover Industries Ltd. They seek that the matter be remitted back to the Tribunal in order for it to consider various issues raised by the applicants. The applicants also seek condonation for the late filing of this application.

[2] On 25 September 2019 the Competition Tribunal of South Africa (the Tribunal) conditionally approved the merger between Milco SA (Pty) Ltd (the first respondent) and Clover Industries Ltd (the second respondent) in terms of s 16(2)(*b*) of the Competition Act 89 of 1998 (the Act). A merger certificate in terms of Competition Tribunal Rule 35(5)(*a*) was also issued. The merger was implemented on 14 October 2019. The reasons for the order were issued on 22 January 2020.

[3] On 14 May 2020, the applicants who had opposed the merger for various reasons, launched this review application. Their grounds of review are that the Tribunal did not consider the objections they raised prior to the merger approval as no reasons were provided for the dismissal of their objections. They contended that the decision to approve the merger on the face of their objections was irrational and not a decision of a reasonable decision maker. They contended that the decision was procedurally unfair, unreasonable and violated the standards for just administrative action contained in the Constitution.

[4] The applicants further submitted that the Tribunal erred in its finding that the first respondent's holding company's violations of international law by operating in illegally occupied Palestinian territories fell outside its adjudication jurisdiction. In their view, the Tribunal was duty bound to deal with the issue and allow the applicants to bring evidence in support of their contentions. Thus, the Tribunal failed to consider s 1(2) of the Act[1] and s 232 of the Constitution which states that 'customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.

[5] In their submissions concerning the condonation for the late filing of the application, the applicants averred that their first contact with their attorney was at the end of October 2019. There is no explanation as to why this was the case and what the cause of the delay in contacting their attorney was. According to the applicants, their attorney conducted research and contacted the Tribunal on 19 November 2019 and requested a full record of the proceedings. The record of the proceedings was received by the applicants on 9 January 2020. On 27 January 2020, the applicants' attorney tried securing the services of counsel. A consultation was held with counsel on 10 March 2020 and the papers were drafted. This was a delay of another month on the applicants' side which was not explained. The founding affidavit was commissioned on 11 May 2020. There is no explanation for the delay of two months between the consultation and having the affidavit commissioned.

[6] The application for condonation appears in the notice of motion dated 13 May 2022. There is no full and reasonable explanation provided by the applicants covering the entire period of the delay which amounts to approximately four

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[1] Section 1(2) of the Act reads:
'(2) This Act must be interpreted –
(*a*) in a manner that is consistent with *the Constitution* and gives effect to the purposes set out in section 2; and
(*b*) in compliance with the international law obligations of the Republic.'

months. As held in *Grootboom v National Prosecuting Authority and Another*[2] an application for condonation is not for the mere asking. An applicant seeking condonation is required to explain the entire period of the delay and the explanation given must be reasonable.[3] It is not sufficient for an applicant to set out a 'number of generalised causes without any attempt to relate them to the time-frame of its default or to enlighten the court as to the materiality and effectiveness of any steps taken by the applicants' legal representatives to achieve compliance with the rules of the court at the earliest reasonable opportunity[4]'.

[7] Rule 23(2)(*b*) of this court contemplates a review being filed within 15 business days after the date of the decision or order that is the subject of the review. The applicants have failed to provide a detailed and comprehensive explanation as to why there was non-compliance with this rule. Furthermore, the applicants only filed a non-confidential version of the record on 22 December 2020. There is no explanation for this seven months delay. There was nothing further from the applicants for almost 14 months thereafter until the Registrar of this court enquired from the applicants as to whether they were still pursuing the application or whether it could be accepted that the application was withdrawn. It was only then that further action seemed to have taken place culminating in the matter being set down for hearing.

[8] The issues for determination by this court therefore are:

(a) whether the applicants ought to be condoned for the late filing of their application; and

(b) whether the Tribunal dealt with all the issues/objections raised by the applicants in its reasons of 22 January 2020.

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[2] *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) para 23.
[3] *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) para 22.
[4] *Uitenhage Transitional Local Council v South African Revenue Services* 2004 (1) SA 292 SCA para 7

[9] Adv *Desai*, who appeared *pro bono* on behalf of the applicants, submitted that the applicants raised constitutional issues which is of public interest and that as they have good prospects of success, condonation ought to be granted. He submitted that the Tribunal committed an error of law when it disavowed itself of the jurisdiction to deal with the matter. He submitted that the prejudice to be suffered by the respondents if condonation is granted is outweighed by the commercial interest in the matter and the effect the decision would have on the country if it remained unchallenged.

[10] Adv *Wilson SC* on behalf of the respondents submitted that the delay was inexcusable and that the applicants had not shown good cause for the delay, especially when regard is had of the fact that merger proceedings are by nature urgent. He referred this court to *Ethos Private Equity Fund IV v Tsebo Outsourcing Group (Pty) Ltd*[5] where it was held that consideration of legal certainty in merger control and the need for an approach to merger control that accords with economic and commercial reality must be adhered to.

[11] Furthermore, it was submitted on behalf of the respondents that one of the parties in the merger, the second respondent, had since been liquidated. Under such circumstances, so went the submission, the interests of justice did not justify granting the condonation sought.[6]

[12] One of the factors to be taken into account in an application for condonation is the prospects of success.[7]However, as held in *Madinda v Minister*

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[5] *Ethos Private Equity Fund IV v Tsebo Outsourcing Group (Pty) Ltd* (30/LM/Jun03) [2003] ZACT 51 (3 October 2003).
[6] *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC) para 3.
[7] *Van Wyk v Unitas Hospital* para 20 and *eThekwini Municipality v Ingonyama Trust* 2014 (3) SA 240 (CC) para 25.

of Safety and Security[8], good cause usually comprehends the prospects of success on the merits of a case, for obvious reasons…The court must decide whether the applicant has produced acceptable reasons for nullifying, in whole, or at least substantially, any culpability on his or her part which attaches to the delay in serving the notice timeously.

[13] In *Darries v Sheriff, Magistrate's Court, Wynberg and Another*[9] Plewman JA held that where non- observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be. In my view, this court need not even consider the prospects of success as prejudice to be caused to the respondents due to delays in launching this application far outweighs the applicants' prospects. To grant condonation after such an inordinate delay and in the absence of a reasonable explanation, would undermine the principle of finality and cannot be in the interest of justice[10]. Accordingly, the application for condonation must fail.

[14] During argument, submissions were made from the bar that the applicants relied on *pro bono* services in pursuing this application and therefore ought not be mulcted with the costs if they were unsuccessful. The applicants' application raised genuine constitutional issues albeit hopelessly out of time and for that reason their application cannot be labelled as frivolous or vexatious or manifestly inappropriate.[11] The applicants sought to assert a constitutional right on behalf of their members and sought to make the Tribunal accountable for its decision. In such circumstances, the appropriate costs order will be the one of each party to bear its own costs.

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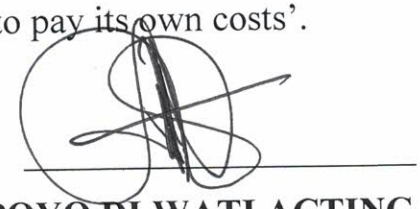
[8] *Madinda v Minister of Safety and Security* 2008 (4) SA 312 SCA para 12
[9] *Darries v Sheriff, Magistrate's Court, Wynberg and Another* 1998 (3) 34 SCA at 41D
[10] See *Van Wyk* above para 31
[11] *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC) para 24.

Order

[15] Accordingly, I make the following order:

'The application is dismissed with each party to pay its own costs'.



POYO DLWATI ACTING

JUDGE OF APPEAL

VALLY JUDGE OF APPEAL

KUBUSHI ACTING JUDGE OF APPEAL

APPEARANCES

Date of Hearing	: 18 October 2022
Date of Judgment	: 4 November 2022
Counsel for Appellant	: Adv Mohammed Desai
Instructed by	: Yousha Tayob Attorney
Counsel for Respondent	: Adv Jerome Wilson SC
Instructed by	: Herbert Smith Freehills South Africa