



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JA155/23

In the matter between:

**SACCAWU OBO FREDDIE LETSOALO
AND MASTER PHUTI**

Appellant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER HORWITZ N.O.

Second Respondent

BID FOOD SERVICES

Third Respondent

Heard: 28 November 2024

Delivered: 30 January 2024

Coram: Van Niekerk JA, Nkutha-Nkontwana JA et Mooki AJA

JUDGMENT

NKUTHA-NKONTWANA, JAIntroduction

[1] The appellant, a trade union, launched this appeal on behalf of its members, Messrs Freddie Letsoalo (Mr Letsoalo) and Master Phuti (Mr Phuti) challenging the judgment and the order of the Labour Court which was delivered on April 2023 dismissing its condonation application for the late filing of their review application.

[2] The first hurdle confronting the appellant in these proceedings is that the notice of appeal was delivered outside of the 15-day time limit in terms of Rule 5(1) of the Rules of this Court¹ (Rules). The second hurdle to overcome is that the appeal is deemed withdrawn in terms of Rule 5(17) due to the late filing of the record of appeal. The appellant has sought condonation for the late filing of the notice of appeal and the reinstatement of its appeal by way of a reinstatement application. The third respondent opposes both applications and the appeal. Further, the third respondent seeks condonation for the late filing of its answering affidavit opposing the appellant's condonation applications.

[3] Accordingly, this Court is required to decide, *in limine*, whether to condone the late delivery of the respondent's notice of appeal; whether to reinstate the appeal; and whether to condone the late filing of the third respondent's opposing affidavit. I deal first with the preliminary points.

Preliminary points

[4] The third respondent seeks condonation for the late filing of its answering affidavit. It contends that it only became aware of the notice of appeal when it was served with the record of appeal on 3 June 2024. The appellant did not persist with its opposition. The explanation is acceptable and thus condonation is granted.

¹ GN 1666 of 14 October 1996: Rules for the Conduct of Proceedings in the Labour Appeal Court (repealed, 17 July 2024).

[5] The appellant, likewise, seeks condonation of the late filing of the notice of appeal by 24 days. The delay is attributed to the appellant's dispute with its erstwhile attorneys which led to the termination of their instructions. No further details are provided as to what transpired between 24 October 2023 and 15 November 2023. What we are told, though, is that the appellant's attorneys of record took over the matter on 15 November 2023 and duly advised the appellant that the notice of appeal was out of time.

[6] Still, there was no sense of urgency in the prosecution of the appeal as the notice of appeal was only filed on 12 December 2023. The appellant attributes the delay between 15 November and 12 December 2023 to the hardship it had experienced in securing the file and record that served before the Labour Court. We are left to speculate on the type of hardship and the actual steps taken to attend to that challenge. The third respondent is correct in its contention that the appellant could have obviated further delay by duplicating the Labour Court file.

[7] Even so, per Rule 5(8), the appellant ought to have filed the appeal record within 60 days of the date of the order granting leave to appeal, being 24 October 2023. The record was delivered on 13 May 2024, 58 days late. The appellant contends that it was awaiting the order reinstating the appeal before it could file the record of appeal. It became aware that the record had to be filed when it received a directive from the Registrar of this Court.

[8] The appellant's plea of ignorance of the Rules is untenable. The appellant is a renowned trade union and enjoyed the support of attorneys throughout this litigation. To my mind, the explanation proffered is not only irrational but seeks to make light of the appellant's conduct that is at odds with one of the dictates of the Labour Relations Act² (LRA) that labour disputes be expeditiously prosecuted. Truth be told, the appellant's overall conduct in this litigation is marked by flagrant disregard for the period prescribed in the LRA and the Rules and deserves censure.

² Act 66 of 1995, as amended.

[9] Notwithstanding, I deem it expedient to grant condonation for the late filing of the notice of appeal and to reinstate the lapsed appeal because the delay is not egregious and it is in the interest of justice that the appeal be disposed of on the merits.

Background

[10] The appellant instituted a review application to set aside and review the arbitration award issued by the second respondent on 15 May 2017 in which the dismissal of Messrs Letsoalo Phuti was found to be substantively and procedurally fair. The review application was delivered on 28 August 2019, outside the prescribed period in section 145(1)(a) of the LRA³, and accompanied by a condonation application.⁴

[11] The delay was 791 days, or more than two years. The blame for the delay is attributed to the appellant's internal ordeals; in essence, the abandonment of the union official who was allocated the matter and the highly contested election of Regional Leadership during a Special Congress Staff on 21 July 2019 where Mr Mavuso emerged as the Regional Secretary. Mr Mavuso appeared on behalf of Messrs Letsoalo and Phuti at the CCMA, however, it was his evidence that he had handed over the matter to the Regional Office and was never apprised of the further processes. Even when he, Mr Mavuso, took over as the Regional Secretary, he was never made aware of this matter. Apparently, the matter came to light on 12 August 2019 when Messrs Letsoalo and Phuti visited the appellant's offices.

[12] The Labour Court found the delay egregious and the explanation inadequate and unreasonable. Moreover, it opined that Messrs Letsoalo and Phuti showed no interest in the matter as they visited the appellant's offices for the first time on 12

³ Section 145(1)(a) provides:

'(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award –

(a) within six weeks of the date that the award was served on the applicant... [Own emphasis]

⁴ Section 145(1A) – provides that the Labour Court may, on good cause shown, condone the late filing of an application in terms of subsection (1).

August 2019, two years after the sitting of the arbitration and delivery of the arbitration award.

[13] Still, the Labour Court considered the prospects of success. Mr Letsoalo was employed as a delivery driver, while Mr Phuti was a delivery assistant. They were dismissed on 20 September 2016 for gross negligence and dereliction of duty. The charges stemmed from the incident of 18 August 2016 in which they failed to ensure that the R293.50 they had collected was duly dropped into the drop-safe at the end of their shift per the policy.

[14] Messrs Letsoalo and Phuti conceded that they were aware of the drop-safe policy and that failure to comply was a dismissible offence which had been executed in similar cases before. However, their defence was that they committed an honest mistake by failing to drop the cash on the day it was collected. It was only when Mr Phuti was confronted by the third respondent on 26 August 2016 that the outstanding amount was found inside the truck's cubbyhole. The third respondent's evidence was that failure to comply with the drop-safe policy amounted to gross misconduct. It was adamant that a sanction of dismissal was warranted because of the nature of its business. The drivers and their assistants were entrusted with the appellant's cash and had to act accountably.

[15] The commissioner found that the dismissal was procedurally and substantively fair as deviation from the policy in the context of the third respondent's business operations was inexcusable and that a stern warning had to be sent as a deterrent to other drivers. The Labour Court held a different view as it was convinced that Messrs Letsoalo and Phuti had made an honest mistake. As such, the appellant had good prospects of success.

[16] Notwithstanding, the Labour Court refused condonation and remarked as follows:

[53] However, without an adequate and reasonable explanation for the delay, the prospects of success are immaterial.

[54] All the other factors such as the extent of the delay which is egregious, the prejudice to the third respondent, which in these circumstances outweighs

the prejudice to the applicant and their members, and importantly, the interests of justice weigh against condonation being granted. In particular, the interests of justice cannot, in these circumstances get the applicant past the hurdle of its inadequate and unreasonable explanation for the extreme delay.

[55] The applicant's failure to diligently prosecute the review application and its failure to explain the delay with the requisite detail expected has unfortunately resulted in my judicial discretion being exercised against the applicant, and consequently Mr Letsoalo and Mr Phuti by refusing condonation.'

[17] Accordingly, the appeal turns on two issues. Firstly, whether prospects of success may be taken into account in condonation applications if the explanation for the delay is found to be unsatisfactory. Secondly, whether the Labour Court exercised its discretion judicially by refusing to grant condonation despite having found that the appellant had good prospects of success in the review application.

The legal principles and application

[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.⁵ 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.⁶ Ultimately, the particular circumstances of each case will determine which of these factors are relevant.⁷

⁵ See: *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A) at 532B - E.

⁶ See: *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC) (*Brummer*) at para 3; *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC) (*Grootboom*) at paras 22 - 23; *Steenkamp and Others v Edcon Ltd* [2019] ZACC 17; (2019) 40 ILJ 1731 (CC) (*Steenkamp*) at paras 36 - 37.

⁷ Id.

[19] Added to the general principles, in *Steenkamp and Others v Edcon Ltd*⁸, 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.⁹ 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.¹⁰ 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. What is more, a higher threshold has been set where the delay is attributed to the internal processes and procedures of trade unions.¹¹

[20] The appellant concedes that the delay of more than two years is reprehensible and that its explanation was conspicuously inadequate. Its main impugnation is, however, that the Labour Court failed to exercise its discretion judicially by automatically discounting the prospects of success in its deliberation. To fortify this contention, we were referred to this Court's recent judgment in *Government Printing Works v Public Service Association & 1 another*¹² (*Government Printing Works*) penned by Govindjee AJA that was delivered on 28 November 2025, after the hearing of this matter. The parties were allowed to file brief supplementary written submissions addressing the dictum in *Government Printing Works* and they duly obliged.

[21] In *Government Printing Works*, this Court likewise was confronted with the Labour Court's refusal to condone the late delivery of the statement of opposition against a claim of unfair discrimination. The Labour Court opined that, given the extent of the delay and the unreasonable explanation, it was not enjoined to consider the prospects of success. The approach followed by the Labour Court to condonation was rejected as it is at odds with the broad and balancing approach that

⁸ *Steenkamp supra* at para 40.

⁹ *Id.*

¹⁰ See: *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus and Others* [2016] ZACC 49; 2018 (1) SA 38 (CC) at para 33, referred to with approval in *Steenkamp*.

¹¹ *Steenkamp supra* at para 40.

¹² *Government Printing Works v Public Service Association & one other* (JA35/24) [2024] ZALAC 63 (28 November 2024).

has emerged in our jurisprudence which is characterised by proportionality and flexibility.¹³ The following observations are pertinent:

[28] The endorsement of these sentiments in *Steenkamp* highlights its significance. *Steenkamp's* single-sentence synthesis of the majority and minority expressions in *Grootboom* appears to put the settled approach beyond doubt:

“All factors should therefore be taken into account when assessing whether it is in the interests of justice to grant or refuse condonation.”

[29] The effect is that an approach which completely ignores the prospects of success on the merits whenever there is an unsatisfactory, unreasonable or unacceptable explanation for a delay, requires explication. There does come a time in any case where a party's disregard for procedure and delay in pursuing a matter is so extensive that they will be penalised irrespective of the merits of the case. The SCA has confirmed that an assessment of prospects of success is a relevant factor in the exercise of a discretion regarding condonation, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation ‘obviously unworthy of consideration’. It is in cases of ‘flagrant’, ‘gross’ breaches of the rules, especially in the absence of an acceptable explanation, that condonation may be refused regardless of the merits of the appeal, even where the blame lies solely with the legal representative. In this court, it has been acknowledged that excellent prospects of success lead to the granting of condonation even when the delay is substantial and the explanation inadequate.

[30] Assuming that there remains some scope to ignore the prospects of success completely, doing so requires careful and deliberate analysis. Borrowing from the language supported in *Steenkamp*, it is first necessary to conclude, with due deliberation, that the delay is ‘unacceptably excessive’. Secondly, and accepting that the reference to ‘no explanation for the delay’ is not to be construed literally, consideration must still be given to whether the explanation offered is tantamount to an absence of a full and reasonable (acceptable, sufficiently cogent) explanation for the delay. It should be clear, when considering the explanation offered, that the non-observance of the rule

¹³ Id at paras 27 and 31.

is 'flagrant and gross' before the inquiry into the prospects of success may be jettisoned. Thirdly, and noting the usual reluctance to do so, the court must exercise a discretion to refuse condonation without any consideration of the prospects of success.'¹⁴ [Own emphasis]

[22] *Government Printing Works* 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. Then again, as correctly accepted by the parties, the general principle that various factors are to be considered collectively and that no individual factor would ever be possibly definitive remains intact.¹⁵

[23] Even so, the third respondent is correct in its contention that the present instance is distinguishable. Unlike in *Government Printing Works*, the Labour Court, duly deliberated on all the factors, including the prospects of success. It explicitly found the delay of more than two years egregious and the explanation unreasonable as it was deficient and unacceptable. The Labour Court cannot be faulted for rejecting the appellant's assertion that the respondent employees had no funds to make a follow-up on their matter for two years. The appellant employee seemingly had odd jobs that kept them busy for two years hence they did not contact the appellant. Clearly, funds to make a call, at least, could not have been a problem.

[24] The Labour Court also found that the prejudice to the third respondent, in the circumstances, outweighs the prejudice to the appellant and the respondent employees. It was the third respondent's unrefuted evidence that the business, Bidvest Foodservice (Pty) Limited, ceased to exist after the unbundling and separate listing between Bidvest Limited and Bid Corporation Limited; and that the management and the witnesses in this matter have left the employment of the appellant. The effect of the delay on the interests of the third respondent is self-evident. Messrs Letsoalo and Phuti were dismissed eight years ago, yet the dispute has not reached finality.

¹⁴ Id at paras 28 - 30.

¹⁵ See: *Brummer* supra fn 6 at para 3, referred with approval in *Grootboom* in para 50.

[25] Despite these gaping deficiencies in the appellant's case, it persists with the contention that condonation ought to have been granted solely on the strength of the Labour Court's view that it has good prospects of success. In my view, the Labour Court's finding that "*without an adequate and reasonable explanation, the prospects of success are immaterial*", understood within the context of this matter, can only mean that the prospects of success are inconsequential in light of the other factors.

[26] This being a dispute over the individual dismissal, the test for condonation is stringent.¹⁶ The explanation for non-compliance had to be compelling and the case for attacking the flaws in the proceedings had to be of a kind which would result in a miscarriage of justice if it were allowed to stand.¹⁷ Conversely, the explanation proffered by the appellant for the delay is not compelling. Markedly, Messrs Letsoalo and Phuti conceded wrongdoing in failure to comply with the drop-safe policy. The only impugn was the appropriateness of the sanction of dismissal and, in light of the review test of reasonableness, I do not believe that justice would suffer ruination because the award is allowed to stand.

[27] In addition, it is well accepted that an excessive delay in the prosecution of a litigation may engender a reasonable belief that the order or award had been acquiesced and therefore unassailable; particularly to a victorious party.¹⁸ That notion applies with full force in this instance, particularly since labour disputes are, by very nature, inherently urgent. Hence, the Labour Court cannot be criticised for upholding the object of the LRA concerning the expeditious resolution of labour disputes in circumstances where even the interests of justice yardstick has not been met.

[28] Resultantly, I find no reason to interfere with the exercise of true discretion by the Labour Court in the present instance as it was exercised judicially.¹⁹ To my mind, this is a typical case where, having considered all the factors, the Labour Court was

¹⁶ See: *Queenstown Fuel Distributors CC v Labuschagne NO and others* [1999] ZALAC 24; (2000) 21 ILJ 166 (LAC) at paras 24 - 25, referred to in *Steenkamp* supra at para 41.

¹⁷ *Id.*

¹⁸ *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2015] ZACC 40; (2016) 37 ILJ 313 (CC) at para 45.

¹⁹ See *Steenkamp* supra at paras 76; *Government Printing Works* supra at paras 15 - 22.

not convinced that the good prospects of success could tilt the scale in favour of granting condonation.

Conclusion

[29] In all the circumstances, the Labour Court's order refusing condonation for the late delivery of the review application is unassailable. The appeal accordingly falls to be dismissed. The respondent did not pursue costs as it was not legally represented.

[30] The following order is made:

Order

1. Condonation for the late filing of the appellant's notice of appeal is granted.
2. The lapsed appeal is reinstated.
3. Condonation for the late filing of the third respondent's answering affidavit opposing the appellant's condonation and reinstatement applications is granted.
4. The appeal is dismissed.
5. There is no order as to costs.

Nkutha-Nkontwana JA

Van Nierkerk JA *et Mooki AJA* **concur.**

Appearances:

For the appellant:

Adv Riaz Itzkin

Instructed by

Dockrat Inc

For the respondent:

Ms Fanisa Nkuna