THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 691 / 2015

In the matter between:

SATAWU obo LEONARD MBEWE AND 171 OTHERS **Applicants**

and

BARLOWORLD LOGISTICS (EHL) **Respondent**

Heard: 18 May 2017

Delivered: 28 November 2017

Summary: Practice and procedure – failure to properly prosecute a statement of claim – principles considered – excessive delay may non suit the applicant

Practice and procedure – imperative of expeditious resolution of employment disputes – principles considered

Application for condonation – principles considered – material delay without proper explanation – application dismissed with costs

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JUDGMENT

SNYMAN, AJ

Introduction

[1] Yet again, even though it's been more than two decades into the new Labour Relations Act ('LRA')[1], this Court is confronted with a material and excessive delay occasioned by a well established trade union in prosecuting an unfair dismissal claim on behalf of its members. What makes this situation particularly sad is that the members of trade unions who are often not versed in the intricacies of employment law dispute resolution, are entirely dependent on their union, and are left without recourse against the employer when the case is sunk due to these kind of failures by the trade union. This matter is a case in point.

[2] The applicants brought a claim based on an unfair dismissal for operational requirements to the Labour Court, in terms of Section 191(5)(b) of the LRA, by way of a statement of claim filed on 19 December 2016. What makes this problematic is that the actual dismissal of the individual applicants took place as far back as 9 February 2015, which was pursued timeously to the National Bargaining Council for the Road Freight Industry, and the certificate of failure to settle was issued following a failure to resolve the dispute at conciliation, on 8 April 2015. This means that it has taken some 20(twenty) months after failure to settle to bring this dispute before the Labour Court.

[3] The applicants did apply for condonation due to this failure, which application was filed on 19 January 2017. Needless to say, it was opposed by the respondent who filed an answering affidavit on 1 February 2017.

[4] The parties conducted a pre-trial conference in terms of Rule 6(4) of the Labour Court Rules on 5 April 2017, and in this minute, the issue of condonation for the late filing of the statement of claim was reserved for determination prior to the hearing of this matter on the merits. I have been now tasked to decide the issue of condonation in this judgment.

[5] However, and before I deal with the condonation application itself, it is important to make some remarks about the essential requirement of the expeditious resolution of employment disputes, especially considering the

[1] Act 66 of 1995.

grossly excessive delay in this instance. The reality is that it is trite that there exists a particular requirement of expedition where it comes to the prosecution of employment law disputes, and any condonation application must be considered in that context.[2] Whilst there exists a plethora of judgments that specifically emphasize the need for expedition in employment law disputes, I would like to highlight three judgments of the Constitutional Court. In *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal*[3], Skweyiya J said: '… the importance of resolving labour disputes in good time is thus central to the LRA framework. ….'. Further, Jafta J in *Aviation Union of SA and Another v SA Airways (Pty) Ltd and Others*[4], held: '….Speedy resolution is a distinctive feature of adjudication in labour relations disputes ….'. And finally, in *National Education Health and Allied Workers Union v University of Cape Town and Others*[5] Ngcobo J said:

> 'By their very nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organize their affairs accordingly. They affect our economy and labour peace. It is in the public interest that labour disputes be resolved speedily …'.

[6] In the light of these clear sentiments, the applicants surely have a mountain to climb, considering the period of 20(twenty) months it took to just refer the case to this Court. This kind of delay could in itself lead to the matter being disposed of, due to the excessive nature of it.[6] Because of the imperative of expeditious dispute resolution in employment disputes, such an excessive delay would normally lead, barring truly exceptional considerations and good cause, that the referral as a matter of general principle should be disposed of for this reason alone.[7]

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[2] *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) and Others* (2015) 36 ILJ 232 (LC) at para 25.
[3] (2014) 35 *ILJ* 613 (CC) at para 42.
[4] (2011) 32 *ILJ* 2861 (CC) at para 76.
[5] (2003) 24 *ILJ* 95 (CC) at para 31. See also *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* (2010) 31 ILJ 273 (CC) at para 46; *Strategic Liquor Services v Mvumbi NO and Others* (2009) 30 ILJ 1526 (CC) at paras 12 – 13.
[6] See *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2016) 37 ILJ 313 (CC) at para 47; *Khumalo* (*supra*) at paras 68 – 69.
[7] *National Education Health and Allied Workers Union on behalf of Leduka v National Research Foundation* (2017) 38 ILJ 430 (LC) at para 17.

[7] But at least the applicants have applied for condonation. The question now is whether this condonation application is sufficient to establish the necessary exceptional circumstances and proper good cause to allow this matter to proceed on the merits thereof. I will now proceed to decide this condonation application by first setting out the relevant background facts.

Relevant background

[8] The respondent is in the business of a logistics and supply chain management solutions service provider. It had a service agreement in place with Ellerines, in terms of which it provided such services to Ellerines, and in particular at a dedicated distribution centre in Boksburg. On 12 August 2014 Ellerines went into business rescue under the Companies Act.[8] As a result of this business rescue and financial predicament of Ellerines, the Boksburg distribution centre was no longer required, and was closed.

[9] The closure of the Boksburg distribution centre naturally affected the employment of all the employees of the respondent employed in the distribution centre. As a result, the respondent commenced restructuring proceedings as contemplated by Section 189A of the LRA, considering the number of employees involved and affected by the restructuring.[9] These proceedings commenced on 13 November 2014.

[10] The parties opted for facilitated consultations under the auspices of the CCMA, as contemplated by Section 189A(3) of the LRA, and such facilitated consultations took place over the period from 10 December 2014 to 6 February 2015, when it concluded. The applicant union, which will be referred to in this judgment as 'SATAWU', participated in all these consultations. However, and unfortunately, it was not possible to avoid the retrenchment of employees, despite these consultations, and the respondent then issued the individual applicants with notices of retrenchment on 9 February 2015.

[11] The applicants then pursued an unfair dismissal dispute to the National Bargaining Council for the Road Freight Industry, as touched on above. This

[8] Act 71 of 2008.
[9] See Section 189A(1) of the LRA.

dispute could not be resolved, and a certificate of failure to settle followed on 8 April 2015. The next step in the dispute resolution process would be to refer the dispute to the Labour Court in terms of Section 191(5)(b) of the LRA, as read with Section 189A(19). As stated, this only happened 19 December 2016.

Condonation principles

[12] In terms of Section 191(11)(a) of the LRA, the referral of any dispute to the Labour Court as contemplated by Section 191(5)(b), must be made within 90 (ninety) days after the council (as applicable *in casu*) has certified that the dispute remains unresolved. Accordingly, the referral of the applicants was due on 8 July 2015, but only followed on 19 December 2016, clearly way out of time. In terms of Section 191(11)(b), the Labour Court may condone non-observance of that time limit on good cause shown.

[13] It is trite that in order to show good cause, an applicant must apply for condonation. Where it comes to deciding condonation applications, the law in this regard is now well settled on the basis of the following principles as set out in the case of *Melane v Santam Insurance Co Ltd*[10]:

> 'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation.'

[14] The Court in *Academic and Professional Staff Association v Pretorius NO and Others*[11] applied the aforesaid *ratio* in *Melane* in the context of dispute resolution in the Labour Court, as follows:

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[10] 1962 (4) SA 531 (A) 532C-E.

[11] (2008) 29 *ILJ* 318 (LC) paras 17–18. See also *Mndebele and Others v Xstrata SA (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant)* (2016) 37 ILJ 2610 (LAC) at para 4.

> 'The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply with time frame; (c) prospects of success or bona fide defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice. …. It is trite law that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay.'

In my view, this *ratio* in *Academic and Professional Staff Association* properly and succinctly summarizes all this Court must consider when exercising its discretion whether or not to grant condonation.

[15] Dealing with the issue of the delay *per se*, I am of the view that the longer the delay, the worse it is for the applicant seeking condonation. As touched on above, a grossly excessive delay could in itself be seen to be fatal to the issue of good cause. As a general benchmark, delays in excess of two months after the expiry of the time limit can generally be described to start becoming excessive.[12]

[16] The next element to considering any condonation application in terms of the *ratio* in *Academic and Professional Staff Association* above, is that of the explanation provided for the delay. This must be a proper explanation supported by sufficient particularity, dealing with the entire period of the delay. In *Seatlolo and others v Entertainment Logistics Service* (*a division of Gallo Africa Ltd*)[13] the Court held:

> 'In order to exercise its discretion whether or not to grant condonation, this court must be appraised of all the facts and circumstances relating to the

[12] Compare *Plastics Convertors Association of SA and Another v Metal and Engineering Industries Bargaining Council and Others* (2017) 38 ILJ 2081 (LC) at para 15; *Silplat (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 1739 (LC) at para 24; *National Education Health and Allied Workers Union and Others v Vanderbijlpark Society for the Aged* (2011) 32 ILJ 1959 (LC) at para 2; *Van Dyk v Autonet (A Division of Transnet Ltd)* (2000) 21 ILJ 2484 (LC) at para 12.

[13] (2011) 32 ILJ 2206 (LC) at para 11.

> delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. See *NUMSA & another v Hillside Aluminium* [2005] 6 BLLR 601 (LC) where Murphy AJ held that an unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success.'

[17] I consider the issue of a proper explanation for the entire period of the delay to be the most critical component to any condonation application. As to how this explanation must be provided, the Court in *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others*[14] provided the following guidance:

> '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.'

[18] Next, the applicant for condonation must deal with the issue of prejudice. Often, prejudice is neglected in a condonation application and dealt with in a very cursory manner. This kind of approach is inappropriate. The applicant must set out in what manner the applicant would be prejudiced if condonation is refused, again with sufficient particularity. The prejudice the applicant would suffer should be compared to the possible prejudice the other party would suffer if condonation is granted, so as to enable the Court to make a balanced decision on this.

[19] The issue of prospects of success must also be considered. In this regard, it is not necessary to decide whether the applicant would be successful in the applicant's case and whether that case is true. All that is necessary to

[14] (2010) 31 *ILJ* 1413 (LC) para 13.

consider is whether, if the claim as advanced in the statement of claim of the applicant is true, the applicant would succeed.[15]

[20] However, and where it comes to considering the issue of prospects of success, there is a rider. It is this rider that illustrates the critical importance of the explanation for the delay. Where an applicant fails to provide an explanation for the delay or material parts of the delay, the issue of prospects of success in fact become an irrelevant consideration.[16] In particular, in *NUM v Council for Mineral Technology*[17] the Court held:

> 'There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused …'

[21] Finally, and despite all the normal condonation considerations of length of the delay, explanation for the delay, prejudice, and prospects of success, and especially in employment law disputes, there is one final consideration. This is the consideration of the interests of justice.[18] What this entails is that in the particular case, there must be some very unique or exceptional circumstance that necessitates the Court to consider the case on the merits, because it is in the interest of justice to do so. A prime example is the judgment in *National Education Health and Allied Workers Union on behalf of Mofokeng and Others v Charlotte Theron Children's Home*,[19] where the Court considered a case of a policy of an employer that only white house mothers were allowed to look after white children, with the policy being a continuous and ongoing practice. Even though the appellant in that case had not made out a proper case for

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[15] See *Nature's Choice Products (Pty) Ltd v Food and Allied Workers Union and Others* (2014) 35 ILJ 1512 (LAC) at para 21*; National Union of Metalworkers of SA and Others v Crisburd (Pty) Ltd* (2008) 29 ILJ 694 (LC) at para 8; *Dial Tech CC v Hudson and Another* (2007) 28 ILJ 1237 (LC) at para 38; *Gaoshubelwe and Others v Pie Man's Pantry (Pty) Ltd* (2009) 30 ILJ 347 (LC) at para 27.

[16] See *Mziya v Putco Ltd* (1999) 3 BLLR 103 (LAC) at para 9; *Moila v Shai NO and Others* (2007) 28 ILJ 1028 (LAC) at para 34; *Universal Product Network (Pty) Ltd v Mabaso and Others* (2006) 27 ILJ 991 (LAC) at para 20; *Colett v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 *ILJ* 1948 (LAC) at para 38; *Mgobhozi v Naidoo NO and Others* (2006) 27 *ILJ* 786 (LAC) at para 34.

[17] (1999) 3 BLLR 209 (LAC) at para 10.

[18] See *MJRM Transport Services CC v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 414 (LC) at para 22; *Sasol Infrachem v Sefafe and Others* (2015) 36 ILJ 655 (LAC) at para 29; *Thiso and Others v Moodley NO and Others* (2015) 36 ILJ 1628 (LC) at para 7; *SA Post Office Ltd v CCMA and Others* (2011) 32 *ILJ* 2442 (LAC) at para 17.

[19] (2004) 25 ILJ 2195 (LAC) at paras 24 and 26.

condonation on the traditional condonation considerations referred to above, the Court in *Charlotte Theron Children's Home* nonetheless held:[20]

> 'It is clearly in the interests of justice that this kind of case be heard, particularly when appellants are able to support their submissions regarding the prospects of success with a statement of respondent's policy given on affidavit and which appears to confirm that the policy is saturated with a racist outlook.'

Evaluation

[22] Applying the aforesaid considerations, I shall firstly deal with the length of the delay. As I have already said above, the delay is grossly excessive. It is excessive to the extent that it infringes on a fair and just determination of the matter. The delay in bringing the dispute to Court was some 17(seventeen) months after expiry of the deadline, and if the allowed period of 90(ninety) days is added to it, some 20(twenty) months after proceedings concluded in the council. This vastly exceeds the period allowed. Some comparisons in the case law bear mentioning. In *Makuse v Commission for Conciliation, Mediation and Arbitration and Others*[21] the Court described an 8(eight) month delay as 'egregious'. The Court in *Moila v Shai NO and Others*[22] described a delay of just more than a year as 'an excessive delay', as did the Court in *Maseko v Commission for Conciliation, Mediation and Arbitration and Others*[23] for a delay of 18(eighteen) months.[24] In *Khumalo*[25] the Court was in fact seized with a similar delay of 20(twenty) months as is the case *in casu*, and said it was 'unreasonable' and 'significant'. In the end, and as said in *Police and Prisons Civil Rights Union v Ledwaba NO and Others*[26]:

> 'The delay of some two years, as matters currently stand, especially considering the short time-limits imposed by the Labour Court Rules and the

[20] Id at para 25. The Court went on to say this was a dispute of an 'exceptional nature' at para 26 of the judgment.
[21] (2016) 37 ILJ 163 (LC) at para 15
[22] (2007) 28 ILJ 1028 (LAC) at para 27.
[23] (2017) 38 ILJ 203 (LC – para 15
[24] See also *Transport and Allied Workers Union of SA and Others v Unitrans Fuel and Chemical (Pty) Ltd* (2015) 36 ILJ 2822 (LAC) at para 34 where the Court dealt with a delay of a year, and *GIWUSA on behalf of Heyneke v Klein Karoo Kooperasie Bpk* (2005) 26 ILJ 1083 (LC) at para 14 where the delay was a 11 months.
[25] (*supra*) at paras 50 and 68.
[26] (2016) 37 ILJ 493 (LC) at para 21.

> Practice Manual, is grossly excessive and unpalatable. The situation is contrary to the important interest of finality of litigation.'

[23] The next issue to be considered is the explanation for the delay. Because of the excessive delay, this explanation must, for the want of a better singular description, be exceptional. In general terms, in the founding affidavit, the explanation is based on what is described by SATAWU as being the application of a 'protocol', which seems to have led to problems. In terms of this 'protocol', difficult cases go from the local office, to the provincial office and then to the head office of the union. In line with this protocol, the case of the individual applicants started off in the local office, after which it was referred to the provincial office, and then finally to the legal department at head office.

[24] According to the explanation provided, the local office sent a letter to the Gauteng provincial office on 27 June 2015, requesting assistance with the referral of the matter to the Labour Court. There is no explanation of any kind as to what was done on the matter between the date of failure to settle on 8 April 2015 and the writing of this letter on 27 June 2015, a period in excess of two and a half months.

[25] Then, and for what is referred to in the founding affidavit as an 'unknown reason', there was a delay in transferring the matter to the head office from the provincial office. All that is explained is that on 3 August 2015 a letter is sent to head office by the provincial office legal department, requesting what is described as 'urgent intervention' in getting the matter referred to the Labour Court. It also clear from the letter that all the documents relating to the matter was attached to the letter. This leaves a delay of more than a month equally unexplained.

[26] As to the interaction between the local office, where the matter originated, and the head office having now been seized with the matter, there is only one instance of such interaction. It appears that all the local office did to follow up on the matter at head office is a single letter sent on 29 September 2015.

[27] The matter was attended to by one Vusi Shongwe ('Shongwe') at the head office, once transferred there. It is never explained when he became seized with the matter, or what he actually did about it, other than a single reference to him obtaining a case number from the Labour Court in September 2015.

[28] Shongwe resigned in May 2016, and after his resignation was charged for fraud, which included defrauding members of the union by taking their settlement payments for himself. Lebogang Tooka ('Tooka') was then employed by SATAWU on 1 August 2016, and took over Shongwe's cases. According to Tooka, he had a number of other pressing issues to deal with first and then attended to the matter *in casu* on 6 September 2016, by requesting a meeting with the individual applicants. Significantly, and in a letter dated 6 September 2016, Tooka writes to the provincial and local offices of the union, recording that the dispute is way out of time, that the head office official who dealt with the matter only applied for a case number and did nothing thereafter, and an urgent meeting needed to be held with at least five individual members to prepare the statement of case and condonation application.

[29] Despite this need for expedition as conveyed by Tooka, a meeting was only arranged for 16 September 2016, but was postponed to 20 September and again to 4 October 2016. These postponements were all due to other commitments by the various parties involved.

[30] The meeting then took place on 4 October 2016, attended by some of the individual applicants, where the matter was discussed. In this meeting, it was also agreed that Martha Nhlapo ('Nhlapo') one of the individual applicants and a former shop steward, would immediately send Tooka all the necessary information to draft the statement of case. Nhlapo did not do so, and following e-mail reminders by Tooka on 6, 10 and 12 October 2016 to her, Nhlapo finally provided all the information by 20 October 2016.

[31] Tooka undertook in writing on 21 October 2016 to immediately start drafting the statement of case. It is then explained that due his 'work load', however, he had other matters to attend to. Nothing was done, and on 10 November 2016, Tooka requested another meeting with Nhlapo, which was then scheduled only for 23 November 2016 because Nhlapo had other 'training'. It

is not said whether this meeting actually happened and there is no explanation as to why the statement of claim is then only filed on 19 December 2016.

[32] Turning then to the individual applicants themselves, the explanation is sparse. There is a reference to one of the individual applicants, Leonard Mbewe ('Mbewe') e-mailing the local branch following up on the matter, on 30 August and 9 September 2015. Mbewe also followed up by e-mail on 10 November 2016. Then there is another reference to Nhlapo following up on the status of the matter on 23 and 25 February 2016 by e-mail. It is immediately apparent that this follow-up communication, so to speak, is few and far between.

[33] As to all the other individual applicants, there are two general explanations submitted. The one is that the individual applicants 'continuously telephonically' contacted SATAWU about the status of the matter, and tried to but were unable to come into contact with Shongwe. The second explanation seems to contradict the first one, in that it is said that because the individual applicants had been dismissed, it was difficult for them to get funds to continuously contact the union. No other particulars are provided.

[34] The above constitutes the sum total of the explanation provided. As said above, considering the excessive delay, the explanation must be exceptional. Is this explanation exceptional? In my view, far from it. To call it poor is an understatement. In fact, for the reasons to follow, the vast majority of the delay was either simply unexplained, or the explanation submitted was completely unacceptable.

[35] Starting with the most obvious part of the explanation first, the individual applicants squarely found their case for condonation on the delinquency of SATAWU. It their argument, it is suggested that it was all Shongwe's fault, who could be seen to be a miscreant, and they should not be blamed for it. What is in the end undeniable is that Shongwe did absolutely nothing on the matter from September 2015 when he obtained a case number until May 2016 when he resigned and left, a total period of about 9(nine) months. But this simply cannot serve to exonerate the individual applicants. The Courts have been consistently making it clear to all litigants that as a general proposition, a litigant stands or falls by the conduct of his or her chosen representative and

the representative's conduct should be imputed on the litigant.[27] In the context of employment law, this would include the case where the representative is a trade union, especially such a large and long established trade union such as SATAWU.[28] In *National Education Health and Allied Workers Union and others v Vanderbijlpark Society for the Aged*[29] it was held:

> 'The LRA has been in existence for more than 15 years, and the time-limits governing referrals have not changed in that time. It is reasonable to expect that trade unions ought to be well aware of the need to act timeously in the interests of their members and to adapt their internal procedures to accommodate those time-limits, not vice versa. The scale of an organisation cannot serve as a justification for delays. On the contrary, it is reasonable to expect that larger organisations, be they trade unions or businesses, ought to be able to see to it that they are organised to deal with disputes of this nature in a systematic manner to ensure that they do not fall foul of the time-limits in the LRA. Where handling such disputes is a core function of the organisation, this should go without saying.'

In *Zungu*[30] the Court added:

> 'Trade unions exist for the very reason of looking after the interests of their members. When employees join a trade union they entrust responsibility for issues relating to their employment and the termination thereof to the trade union. In the circumstances of this relationship I believe that there is an even greater limit on the extent to which trade union members can escape the results of their trade union's lack of diligence. Trade unions have a vested interest in the processing and outcome of disputes referred on behalf of their members. Their very existence is about acting in the interests of their members. Members for their part are happy to entrust their labour relations affairs to their union. This case is a good example of where the trade union has been involved with the dispute from the inception. … In these

[27] See *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141C-E; *Old Mutual Life Assurance Co SA Ltd v Gumbi* (2007) 28 ILJ 1499 (SCA) at para 20; *Universal Product Network* (*supra*) at para 18; *Superb Meat Supplies CC v Maritz* (2004) 25 ILJ 96 (LAC) at para 16; *Frans Meintjies New Tyre Manufacturers v Bargaining Council and Others* (2012) 33 ILJ 1725 (LC) at para 36.
[28] *Food and Allied Workers Union v Ngcobo and Another* (2013) 34 ILJ 1383 (SCA) at para 46.
[29] (2011) 32 *ILJ* 1959 (LC) at para 9. See also *Thilivali* (*supra*) at paras 31 – 32; *SA Revenue Services v Ntshintshi and Others* (2014) 35 ILJ 255 (LC) at para 16; *BHP Billiton Hotazel Manganese Mines (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 2857 (LC) at para 16.
[30] (*supra*) at para 25.

> circumstances a member such as Mr Zungu would have to put up good reasons as to why he should be allowed to escape the consequences of the union's lack of diligence …'

[36] The task that was entrusted to SATAWU was not a difficult one. All it had to do was to file a statement of case with the Labour Court within 90 (ninety) days. It dismally and completely failed in this task. As said in *Food and Allied Workers Union v Ngcobo and Another*[31]:

> 'In our view the mandate given to FAWU was a relatively simple one — it was to take such steps as were necessary to have the respondents' labour dispute with their employer determined in accordance with the provisions of the LRA. That it could easily have done. FAWU committed breaches of its mandate. It did so in the first place by failing to timeously refer the respondents' dispute with Nestlé to the Labour Court (LC) and in the second place by failing to secure condonation for that failure. In both instances it failed to act honestly or diligently. When the dispute remained unresolved and a certificate to that effect was issued by the CCMA on 18 June 2002, the respondents acquired an unconditional right to approach the LC to have that dispute resolved. FAWU well knew that the respondents' dispute had to be referred to the LC within 90 days of the issuance by the CCMA of its certificate. That much emerges from its own correspondence to the respondents and Nestlé. FAWU, moreover, failed to inform the respondents that the matter had not been referred within the requisite 90 days or to keep them apprised of the progress of their case (because, one suspects, there was none) …'

The exact same considerations apply *in casu*.

[37] There can be no doubt that the conduct of Shongwe, which accounts for 9 (nine) months of the total delay, is grossly negligent, shows a complete lack of diligence and can even be described as recklessly remiss. If this is then imputed onto the individual applicants, it is simply an explanation that cannot be accepted.[32] In *National Union Of Metalworkers of SA on behalf of Nkuna*

[31] (2013) 34 ILJ 1383 (SCA) at para 46. The judgment was upheld by the Constitutional Court in *Food and Allied Workers Union v Ngcobo NO and Another* (2013) 34 ILJ 3061 (CC).
[32] See *Arnott v Kunene Solutions and Services (Pty) Ltd* (2002) 23 ILJ 1367 (LC) at paras 30 – 32.

and Others v Wilson Drills-Bore (Pty) Ltd t/a A and G Electrical,[33] where the Court said the following:

> 'In *Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd* 1975 (1) SA 612 (D), the court held that good cause is shown by the applicant giving an explanation that shows how and why the default occurred. It was further held in this case that the court could decline the granting of condonation if it appears that the default was wilful or was due to gross negligence on the part of the applicant. In fact, the court could on this ground alone decline to grant an indulgence to the applicant.'

In short, an explanation based on the inaction of Shongwe is no explanation at all. The Court in *Catering Pleasure and Food Workers Union v National Brands Ltd*[34] said:

> 'There is no proper reason why the referral was out of time, other than the inaction of the union's attorneys which inaction does not amount to an acceptable explanation.'

[38] But Shongwe is not the only union functionary that failed. It must be considered that there a period of about two and a half months (8 April to 27 June 2015) from when the certificate of failure to settle was issued until the matter was referred to the provincial office for attention, which is completely unexplained. Then there is a further delay of more than a month (to 3 August 2015) where the provincial office does nothing, which is said to be for an 'unknown reason', which equally is no explanation at all. Accordingly, there is a total delay of close on 4 (four) months occasioned in the local and regional offices of SATAWU which is entirely unexplained.

[39] This brings me to Tooka. He became seized with the matter beginning August 2016. But he was too busy and could only get to it on 6 September 2016. By 21 October 2016 he says he will draft the statement of case, but again he is too busy and does nothing to 10 November 2016. All this must be seen in the context of Tooka already knowing in September 2016 that the matter is materially late and urgent intervention was required. Finally, and inexplicably,

[33] (2007) 28 ILJ 2030 (LC) at para 16.
[34] (2007) 28 ILJ 1064 (LC) at para 26.

it takes him from middle November to 19 December 2016 to file the statement of claim, with no explanation at all for this period. In my view, this indicates that for the period of 5 (five) months from when Tooka was seized with the matter, a period of about two months is completely unexplained, and the most of the remaining period is explained on the basis of Tooka being too busy with other matters which in itself is an unacceptable explanation. As held in *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) and Others*:[35]

> 'In effect, the basis of the explanation is to place all blame on the fact that the union official tasked with this matter was too busy with all kinds of other attendances to get to this matter and on this basis the individual applicant should be exonerated. The fact that this kind of explanation is simply not acceptable per se is already dealt with above …'

[40] This then only leaves the consideration of what the individual applicants themselves did about prosecuting their matter, despite entrusting SATAWU to attend to it. The reason why this must be considered is because of the principle that a litigant could possibly escape being visited with the consequence of the failure of his or her chosen representative to properly prosecute the claim, if it can be shown that the litigant did all he or she could to ensure that the matter was properly prosecuted. This would include regularly following up with the representative on the progress in the matter, and the taking of remedial action if it becomes apparent that matters are taking much too long. In *Saloojee and Another NNO v Minister of Community Development*[36] the Court articulated the principle as follows:

> 'If, as here, the stage is reached where it must become obvious also to layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney and expect to be exonerated of all blame; and if, as here, the explanation offered to this court is patently insufficient, he cannot be heard to claim that insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he realises upon the aptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself. …'

[35] (2015) 36 ILJ 232 (LC) at para 29.
[36] 1965 (2) SA 135 (A) at 141E-H.

[41] The above ratio in *Saloojee* has been consistently applied in this Court.[37] In particular, and in *Superb Meat Supplies CC v Maritz*[38] the Court held as follows:

> '.... I also am of the judgement that the appellant through the agency of its member Schreiber was negligent in not monitoring progress of its case … The court has not been informed of any communication and it can be inferred that the appellant took no active interest in its own litigation, a further reason to conclude that it was negligent.
>
> As I have indicated Trengove AJA held in the De Wet case that disinterest and failure to keep in touch with an attorney barred relief. Attorneys cannot be blamed and the appellants - as in this matter - were the authors of their own problems. The present respondent has not erred and it would be inequitable to visit him with the prejudice and inconvenience flowing from such conduct. …'

And in *Thilivali*[39] the Court said:

> '… the court has on numerous occasions made it clear that an individual applicant can simply not sit by without regularly following up on its litigation and the progress therein, even after tasking a representative to deal with the matter …'

[42] Considering the aforesaid, did the individual applicants do enough themselves? Unfortunately, and in my view, they did even less than the bare minimum. The allegation that the individual applicants regularly telephoned SATAWU to follow up on the matter is vague, bald and entirely unsubstantiated, and completely lacking in any particularity. It not sufficient to make a two line statement that the individual applicants telephoned SATAWU 'regularly'. It must be explained who telephoned, who at the union was spoken to, and when this happened. It must then be indicated, so as to excuse the individual applicants from themselves taking positive intervening

[37] See *Silplat* (*supra*) 32 ILJ 1739 (LC) at para 54; *Zungu* (*supra*) at paras 24 – 25; *Van Niekerk v Zondi NO and Another* (2001) 22 ILJ 1202 (LC) at para 27; *Parker v V3 Consulting Engineers (Pty) Ltd* (2000) 21 *ILJ* 1192 (LC) at para 17.
[38] (2004) 25 ILJ 96 (LAC) at para 27.
[39] (supra) at para 28

action, that they were assured that the matter was well in hand and were informed as to the status of the matter at that point. If for example they were misled by the union official as to the status of the matter, then the Court may well have sympathy for their plight. The individual applicants however submitted no explanation in these terms. This explanation is thus woefully inadequate.

[43] The explanation on behalf of the individual applicants is further bedevilled by the fact that it is contained in an affidavit deposed to by Tooka, who only became employed in August 2016 and would simply not know what had happened earlier. There is no confirmatory affidavit by Shongwe or any of the individual applicants (other than Nhlapo and Mbewe). This means that even the veracity of the minimal explanation submitted is in question.

[44] In fact, the explanation offered by the individual applicants is self-defeating. The founding affidavit records that the individual applicants regularly tried to contact Shongwe, but could not get hold of him at all. Considering the individual applicants were dismissed as far back as February 2015, this should have set alarm bells loudly ringing. The individual applicants could not just leave matters there. At least by the beginning of 2016, they must have realized that there could be serious problems in the prosecution of their case, and they should have then taken the necessary effort to ensure that SATAWU takes immediate action by way of allocating another official or briefing attorneys or whatever. But they did absolutely nothing.

[45] Finally, I turn to the individual explanations by Nhlapo and Mbewe. Instead of makings things better, it makes it even worse. It appears that these two individual applicants were the ones responsible for driving the case on behalf of the other individuals. Considering their explanations at it stands, what it shows is that for a total period of some 20(twenty) months, there were a total of five e-mail enquiries as to the status of the matter, but with no contact at all between at least end September 2015 and beginning February 2016, as well as between March 2016 and September 2016. These are huge gaps, totalling more than 10 (ten) months, in which there is no contact. In *Moraka v National*

Bargaining Council for the Chemical Industry and Others[40], the Court said the following when deciding to dismiss a review application:

> 'A significant consideration in deciding whether or not to dismiss this review application is the casual approach adopted to the litigation by the applicant which indicates that he viewed it as a matter that could be returned to from time to time when he or his representatives chose to do so. Such long periods of inactivity cannot be reconciled with the conduct of a party that has a consistent interest in pursuing a case and takes the necessary steps to do so without undue delay.'

In my view, there is no reason why this same approach could not equally be applied to the inactivity of Nhlapo and Mbewe, and the condonation application *in casu*.

[46] Therefore, I do not believe that the individual applicants came close to doing enough to ensure that they are not visited with the consequences of the failure by SATAWU. This means that in effect, they have no explanation for the delay as well, and must suffer the same fate as a result. I consider the matter *in casu* to be quite comparable to the judgment in *Seatlolo*[41], with the following *dictum* being particularly apposite:

> 'The applicants have failed to advance a compelling explanation for the egregious delays of more than two years. There are lengthy periods of delay and sheer inactivity that are unexplained involving the applicants themselves; there is no explanation from SACCAWU of the persistence with the flawed joinder application and consequent delay of two years; there is no explanation for the delays in bringing the condonation application. If SACCAWU was a party its failure to explain the second and third aspects would result in the application being dismissed. …. Indeed a trade union is not an independent legal representative acting as an agent to the detriment of a client. It is a collective embodiment of its members and is akin to a curator at litem in civil proceedings - in other words, it is 'the institutional embodiment of the several members involved in the dispute': Manyele & others v Maizecor (Pty) Ltd & another (2002) 23 ILJ 1578 (LC); [2002] 10 BLLR 972 (LC) at para 13. The trade union is its members and thus the applicants cannot escape the

[40] (2011) 32 *ILJ* 667 (LC) at para 20.
[41] (*supra*) at para 26.

> consequences of their decision to be members of SACCAWU and act collectively under its auspices.'

And in *National Education Health and Allied Workers Union on behalf of Leduka v National Research Foundation*[42] the Court said:

> '… It was squarely in the hands of the applicants to ensure that this case was properly prosecuted, and if they failed in this respect the nature of the case cannot save them. I must further emphasise that if this case was so important, and had the kind of impetus and consequences the applicants now suggest, it is simply inexplicable that they allowed it to in effect lay dormant for years. This argument is actually self-defeating.'

[47] As touched on above, there is also the contradiction in the individual applicants' explanation, being that on the one hand it is said that they regularly contacted SATAWU, and on the other it is said that they did not have money because of their dismissal to regularly contact SATAWU. In *Chemical Energy Paper Printing Wood and Allied Workers Union and Others v Metal Box t/a MB Glass*[43] the Court said the following, which in my view similarly describes the conduct of the applicants *in casu*, in this respect:

> 'It is abundantly clear from the self-contradictions in the explanation for the delay that the applicants and/or their attorneys had unfortunately not been candid with this court. It is obvious also on the papers, that the applicants have been as lax as their legal representatives in the prosecution of their claim.'

[48] In sum, and where it comes to the explanation offered by the applicants, a total period of about 6 (six) months of the delay is completely unexplained. The explanation offered for a further period of delay of about 12 (twelve) months is simply unacceptable and should be viewed to be no explanation at all. Added to this, the individual applicants themselves failed to follow up on their matter, and take positive action to intervene when it must have become clear that there was an undue delay with nothing happening about their case.

[42] (2017) 38 ILJ 430 (LC) at para 46.
[43] (2005) 26 ILJ 92 (LC) at para 8.

There is simply nothing that convinces me that the individual applicants should not fall because of the failures by SATAWU, their chosen representative.

[49] Because of the fact that there is no explanation for such a material part of what is an excessive delay, this should be the end of the matter for the applicants. In line with the principles as set out above, the issue of prospects of success has become an irrelevant consideration, and thus need not even be considered. As said in *Colett v Commission for Conciliation, Mediation and Arbitration and Others*[44]:

> 'There are overwhelming precedents in this court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success. …'

[50] Only one last consideration remains. Would it be in the interest of justice to nonetheless grant condonation? I do not consider this to be the case. A consideration of the common cause facts and issues in dispute in the pre-trial minute makes it clear that the matter concerns a stock standard, for the want of a better description, Section 189A retrenchment dispute. In terms of the pre-trial minute, it was common cause that Ellerines decided to close the particular distribution centre, which on face value justifies the rationale for the retrenchment. Further it was common cause that a proper Section 189(3) notice was issued and facilitated consultation took place under the auspices of the CCMA, in which SATAWU participated. There was also never an application brought by SATAWU in terms of Section 189A(13) to challenge the restructuring process, which means that procedural fairness is actually an irrelevant consideration in these proceedings.[45] The applicants make out no case concerning the employment status of the individual applicants after dismissal.[46] To sum up, there is nothing exceptional about this case which could serve to override the normal condonation principles. Even if the

[44] (2014) 35 *ILJ* 1948 (LAC) at para 38.
[45] See *National Union of Metalworkers of SA and Others v SA Five Engineering and Others* (2004) 25 *ILJ* 2358 (LC)*; Banks and Another v Coca-Cola SA — A Division of Coca-Cola Africa (Pty) Ltd* (2007) 28 *ILJ* 2748 (LC); *National Union of Metalworkers of SA on behalf of Members v General Motors of SA (Pty) Ltd* (2009) 30 *ILJ* 1861 (LC); *National Union of Mineworkers v Anglo American Platinum Ltd and Others* (2014) 35 ILJ 1024 (LC).
[46] *Vanderbijlpark Society for the Aged* (*supra*) at para 22.

applicants' retrenchment case may have some merit, it is my view that the following *dictum* in *Ferreira v Die Burger*[47] would find application *in casu*, where the Court said

> 'I am sympathetic to the fact that the applicant may have a case but, were we to grant this application, this court would subvert a crucial principle in matters which deal with personal relationships, namely labour relations, that these disputes have to be dealt with expeditiously and finalized as quickly as possible. Where in a case such as this, there has been so flagrant of violation of the rules, then, as Myburgh JP correctly decided, a lack of any explanation at all shrugs off other considerations.'

[51] Even the applicants' case of prejudice is nothing exceptional. There is a general contention of prejudice to the individual applicants if they cannot pursue the merits of their case. But this would be the obvious result in any condonation application that is refused. The applicants say they are not to blame for what happened, which contention, in the light of what has been discussed above, does not have substance. It is also alleged that once Tooka became seized with the matter, things happened expeditiously, which contention is once again not accurate based on what is discussed above. In *Seatlolo*[48] the Court said the following, which in my view would equally apply *in casu*:

> 'I am cognizant of Mr Boda's plea that the doors of justice should remain open to litigants who are laypersons and reliant solely on their union and who genuinely believed they were in safe hands. However, there are at the same time limits beyond which the doors of justice cannot but be closed - in these circumstances where they themselves are to blame for not holding their union accountable and where the Act is premised on expedition and the employer is likely to be prejudiced by permitting the matter to proceed on the merits. ….

[52] The individual applicants would in any event have a damages claim against SATAWU, considering what is set out above, to ameliorate their prejudice.[49]

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[47] (2008) 29 *ILJ* 1704 (LAC) at para 8.
[48] (2011) 32 ILJ 2206 (LC) at paras 25 – 26.
[49] See *Food and Allied Workers Union v Ngcobo* (*supra*) at para 45.

[53] Insofar as it may be suggested by the applicants that they have such a good case that all other considerations must be considered to be subordinate and in effect shrugged off, I cannot agree with such a proposition. Condonation is not just there for the asking, no matter what the case may be. In *Seatlolo*[50] the Court held:

> 'It is trite law that condonation should only be granted where the legal requirements have been met and is not a default option. It remains an indulgence granted by a court exercising its discretion whilst being cognizant of the criticism emanating from the Constitutional Court and the SCA and bearing in mind the primary objective of the expeditious resolution of disputes articulated in the Act.'

I agree with these sentiments. Overall, the following *dictum* in *Leduka*[51] aptly describes the conduct of the applicants *in casu*:

> 'Overall, the conduct of the applicants in casu is indicative of a litigant that remains inactive for lengthy periods, acts when it chooses and how it chooses, and acts with complete impunity where it comes to the rules of court and the interests of the other party.

[54] For all the above reasons, the applicants' condonation application is doomed to fail. The grossly excessive delays without any explanation for most of it, trumps all else. There is simply no basis to depart from the normal and accepted principle that in such circumstances, the matter must now be brought to an end, once and for all, by way of the refusal of condonation.

Conclusion

[55] In all the circumstances as set out above, the applicants have failed to make out a case for the granting of condonation. The case has become stale to the point that it must be finally disposed of, no matter what the merits thereof may be. It is in the interest of justice and in line with the requirement of the

[50] (*supra*) para 27. See also *3G Mobile (Pty) Limited v Raphela NO and Others* [2014] JOL 32479 (LC) at para 33.
[51] (*supra*) at para 44.

expeditious resolution of employment dispute that this matter must be finally dismissed. The applicants' condonation application thus falls to be dismissed.

[56] This only leaves the issue of costs. I have a wide discretion where it comes to the issue of costs, having regard to the provisions of Section 162(1) of the LRA. In this instance, I believe a costs order is indeed appropriate. It must have been clear to the applicants that the application had no merit, especially after the filing of the answering affidavit. The applicants made no effort to explain most of the delay, and simply approached this matter on the basis that they are entitled to be heard above all else. This approach was always fatally flawed, especially considering what this Court has said over and over again about lengthy delays, poor explanations and the requirement of expedition. I however believe this is a case where only the trade union, SATAWU should bear the costs, considering that it was the principal cause for the failure and has let down its members badly.

Order

[57] For all of the reasons as set out above, I make the following order:

1. The applicants' condonation application is dismissed.

2. The applicants' claim is consequently dismissed.

3. The applicant union, South African Transport and Allied Workers Union, is ordered to pay the respondent's costs.

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S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicants:	Mr Lebogang Tooka – Union Official
For the Respondent:	Mr S Dube of Bowmans Inc Attorneys