IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR59/2020

In the matter between:

VILASEN NAIR **Applicant**

and

TELKOM SOC LTD **First Respondent**

COMMISSIONER ELSABE HARMSE N.O. **Second Respondent**

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **Third Respondent**

Heard: 2 July 2021

Delivered: 07 December 2021 (In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 07 December 2021.

JUDGMENT

SASS AJ

Introduction

[1] The Applicant ('Mr Nair') seeks to review and set aside an arbitration award issued by the Second Respondent ('the Commissioner') dated 24 October 2019 in terms of section 145 of the Labour Relations Act No. 66 of 1995, as amended ('the LRA').

[2] In her award, the Commissioner held that the First Respondent ('Telkom') did not commit an unfair labour practice by not paying Mr Nair a Short-Term Incentive Bonus ('the STI') on 7 June 2019.

[3] The present application was filed outside of the six-week time period established by the LRA and the Applicant seeks condonation for the late filing of the Review Application.

[4] If condonation is not granted, then this Court lacks the necessary jurisdiction to consider the Review Application and the Review Application stands to be dismissed. If the condonation is granted, then I will turn to consider the merits of the Review Application.

[5] Since that question will impact on the extent of the evidence and argument before the Court, I shall deal with the Condonation Application first.

The Condonation Application

Background facts relevant to the Condonation Application

[6] The facts are recorded in the papers and there is no need to burden this judgment with a repetition of the factual background.

[7] It is sufficient to record that:

7.1 the Commissioner's award was dated 21 October but issued on 24 October 2019;

7.2 the Applicant's Review Application was served and filed on 22 January 2020;

7.3 the six-week time period referred to in section 145 of the LRA, calculated from 24 October 2019, elapsed on or about 2 December 2019;

7.4 Telkom served and filed its answering affidavit on 18 March 2020 and raised a jurisdictional challenge – contending that this Court lacked the necessary jurisdiction to determine the Review Application in the absence of condonation being granted in respect of the late filing of the review application; and

7.5 the Condonation Application was served and filed on 11 August 2020 (although Telkom contended that it was served and filed on 5 May 2020).

[8] The length of the delay was not common cause. Mr Nair contended that the delay was 28 (twenty-eight) days in light of the *dies non* period over December 2019 and January 2020. There is no *dies non* in this Court. The length of the delay was therefore 49 (forty-nine) days late (roughly seven weeks/just short of two months), as contended by Telkom (calculated from 2 December 2019 to 22 January 2021).

Applicable legal principles

Good cause, length of delay, explanation for delay, prospects of success and prejudice

[9] Turning to the substance of the Applicant's Condonation Application, it is important to first identify the legal principles applicable to condonation applications.

[10] In accordance with the provisions of section 145(1)A of the LRA, this Court may on good cause shown condone the late filing of an application in terms of section 145(1) of the LRA.

[11] The approach which the Labour Court and the Labour Appeal Court have followed in determining whether good cause has been shown, is the often referred to passage enunciated by Holmes JA in *Melane v Santam Insurance Co. Ltd*:[1]

[1] 1962 (4) SA 531 (A) at 532 C - F.

"*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, is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are inter-related; they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion ...*"

[12] In applying the *ratio* in *Melane*, the court in *Academic and Professional Staff Association v Pretorius NO and Others*,[2] summarised the principles for consideration as follows:

"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."

[13] In *Foster v Stewart Scott Inc*,[3] his Lordship Mr Justice Froneman (as he then was) stated:

"It is well settled that in considering applications for condonation the court has a discretion, to be exercised judicially upon a consideration of all the facts. Relevant considerations may include the degree of non-compliance with the rules, the explanation therefore, the prospects of success on appeal, the importance of a case, the respondent's interest in the finality of the judgment,

[2] (2008) 29 ILJ 318 (LC) at para 17 - 18.
[3] (1997) 18 ILJ 367 (LAC) at para 369.

the convenience of the court, and the avoidance of unnecessary delay in the administration of justice, but the list is not exhaustive. These factors are not individually decisive but are interrelated and must be weighed one against the other. A slight delay and good explanation for the delay may help to compensate for prospects of success which are not strong. Conversely, very good prospects of success on appeal may compensate for an otherwise perhaps inadequate explanation and long delay. See, in general, Erasmus Superior Court Practice at 360-366A."[4]

[14] Without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused. In this regard, in *National Union of Mineworkers v Council for Mineral Technology,*[5] the court held as follows:

"The approach is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. 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 prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused"

[15] 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 delay. The applicant for condonation must therefore provide a satisfactory explanation for

[4] See also *Melane v Santam* 1962 (4) SA 531 (A) at 532C - F; *Mansoor v CCMA & others* 2000 (1) BLLR 79 (LC) at 83, at para 18; *National Union of Mineworkers v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at 211D - 2; *Forster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC); *SA Broadcasting Corporation v CCMA and Others* (2003) 24 ILJ 999 (LC); *Achilles v HE Auto Import and Export (Pty) Ltd* (2000) 5 LLD 18 (LC); *Fortuin v CCMA & Others* (2005) 26 ILJ 96 (LC).
[5] [1998] ZALAC 22 at para 10.

each period of delay. See *NUMSA and another v Hillside Aluminium*,[6] 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.

[16] The abovementioned principles have been further adopted in numerous other cases in the Labour Court and in the Labour Appeal Court.

Grant condonation if it is in the interests of justice and refuse condonation if it is not

[17] The Constitutional Court pointed out in *Brummer v Gorfil Brothers Investments (Pty) Ltd*[7] that an application for condonation should be granted if it is in the interests of justice and refused if it is not. The Constitutional Court went on to say that the interests of justice must be determined by reference to all relevant factors outlined in *Melane*, including the nature of the relief sought, the nature and cause of any other defect in respect of which condonation is sought, and the effect of the delay on the administration of justice.[8]

[18] In *Steenkamp and Others v Edcon Limited*,[9] the Constitutional Court reaffirmed that granting condonation must be in the interests of justice and it referred with approval to its decision in *Grootboom v National Prosecuting Authority and Another*:[10]

> *[36] Granting condonation must be in the interests of justice. This Court in Grootboom set out the factors that must be considered in determining whether or not it is in the interests of justice to grant condonation:*

[6] [2005] 6 BLLR 601 (LC).
[7] 2000 (2) SA 837 (CC).
[8] 2000 (5) BCLR 465; 2000 (2) SA 837 (CC) at para 3; See also *Ndlovu v S* 2017 (10) BCLR 1286 (CC); 2017 (2) SACR 305 (CC) (15 June 2017) at paras 22 – 23; *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as amicus curiae)* 2008 (2) SA 472 (CC) at 477A-B; *SA Post Office Ltd v CCMA* [2012] 1 BLLR 30 (LAC) at para 23, where Waglay DJP (as he was then) stated that:
'In my view, each condonation application must be decided on its own facts bearing in mind the general criteria. While the rules are there to be applied, they are not inflexible but the flexibility is directly linked to and apportioned in accordance with the ***interests of justice; prejudice; prospects of success; and finally, degree of delay and the explanation thereof****. The issue of delay must be viewed in relation to the expedition with which the law expects the principal matter to be resolved'.*
[9] [2019] 11 BLLR 1189 (CC).
[10] [2013] ZACC 37; 2014 (2) SA 68; 2014 (1) BCLR 65 (CC).

"[T]he standard for considering an application for condonation is the interests of justice. However, the concept 'interests of justice' is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; 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. It is crucial to reiterate that both Brummer and Van Wyk emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors, but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.

The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice."[11]

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

[11] *Grootboom supra* at paras 22 - 23 and 51.

Condonation is not there for the mere asking

[19] Significant with a determination of such applications is that condonation cannot be had for the mere asking, and a party is required to make out a case entitling it to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay.[12] In the end, the explanation must be reasonable enough to excuse the default.[13]

Condonation application to be filed without delay

[20] Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so.[14] Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the court may take a dim view, absent a proper and satisfactory explanation for the further delays.[15]

Labour disputes to be resolved expeditiously

[21] In *Food and Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd*,[16] the Court said the following:

> *"Our courts have, on occasion, pronounced on the importance of labour disputes to be conducted with expedition. For example, in National Research Foundation the Labour Court held:*
>
> *It is now trite that there exists a particular requirement of expedition where it comes to the prosecution of employment law disputes…'"*

[22] At paragraph [38] of the *Steenkamp v Edcon supra* unanimous judgment (under the heading "Broader object of the LRA"), the Constitutional Court placed emphasis on the fact that the expeditious resolution of labour disputes is one of

[12] *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited* 2017 (6) SA 90 (SCA) at para 6.
[13] *Ndlovu v S* at para 31 supra at fn 3.
[14] See All Round Tooling (Pty) Ltd v NUMSA (1998) 8 BLLR 847 (LAC); Rennie v Kamby Farms (Pty) Ltd 1989 (2) SA 124 (A) at 129G where it was held:'whenever an appellant realises that he has not complied with a rule of court he should apply for condonation without delay.'
[15] See Commissioner for Inland Revenue v Burger 1956 (4) SA 446 (A) at 449G.
[16] (2018) 39 ILJ 1213 (CC) at para 187.

the primary objects of the LRA. This had important consequences, described in more detail in paragraphs [39] to [41] of the judgment, commencing with the proposition that *"time periods in the context of labour disputes are generally essential to bring about timely resolution of the disputes*". The further points made by the Court include that labour disputes by their nature require speedy resolution, and that any delay in the resolution of labour disputes undermines the primary object of the LRA. The Court also expressly gave support to that portion of the judgment in *Myathaza* (referred to in paragraph [40]) to the effect that "*employment disputes by their very nature are urgent matters which require speedy resolution*".

[23] The Constitutional Court has unanimously endorsed the approach of the Labour Courts in these matters, which expressly contemplates what may be described as a more restrictive approach to the granting of condonation because of the vital importance of expeditious dispute resolution in the dispute resolution system established by the LRA.

Conduct of representatives

[24] In *Saloojee and Another NNO v Minister of Community Development*,[17] Steyn CJ stated the following in relation to a lack of diligence on the part of an attorney and how a litigant that chose that attorney as its representative should not be absolved from the normal consequences of such a relationship, no matter what the consequences of the failure by the attorney are:

> *"I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with his attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence, or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect on the observance of the Rules of this Court. Considerations ad misericordiam should not be allowed to become an invitation to laxity. In fact, this Court has lately been burdened with an undue increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has*

[17] 1965 (2) SA 135 (A) at 141C - E.

> *chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the consequences of the failure are."*

[25] In *Fibro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein and Others*,[18] Hoexter JA also made reference to the "*oft-repeated judicial warning that there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered*."

[26] In *UTI South Africa v Pilusa and Others*[19] the applicant, through its former attorneys of record, failed to lodge the Review Application timeously and later sought condonation for the delay. The applicant blamed the negligence of its previous attorneys for the delay. However, this Court, relying on *Saloojee supra* stated that an applicant cannot solely rely on the tardiness or negligence of its legal representative in a Condonation Application to justify the delay, and condonation was refused on the basis that good cause was not shown to justify the granting of condonation. The applicant was held accountable for the lack of diligence on the part of its former attorneys of record.

[27] The Honourable Justice Nicholson AJA stated the following in the *Superb Meat Supplies CC v Maritz*:[20]

> *"In this court and the Supreme Court of Appeal there have been frequently repeated judicial warnings that there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence of the insufficiency of the explanation tendered. It has never been the law that invariably a litigant will be excused if the blame lies with the attorney. To hold otherwise might have a disastrous effect upon the observance of the rules of this court and set a dangerous precedent. It would invite and encourage laxity on the part of practitioners."*

[18] 1985 (4) SA 773 (A) at 787GH.
[19] (JR1732/12) [2016] ZALCJHB 270 (21 July 2016) at paras 11 - 15 and 22 - 24.
[20] (2004) 25 ILJ 96 (LAC) at 100H.

[28] This principle was enunciated in the *PPWAWU and Others v AF Dreyer and Co (Pty) Ltd*,[21] where the court held that:

> *"employees are not entitled to rely on the tardiness of their representative. Although the delay was caused by the negligence of the representative, there are limits to which applicants can rely on such negligence even when they are personally innocent of any tardiness."*

[29] There are therefore limits beyond which a party cannot rely on their legal representative's lack of diligence or negligence when they are themselves innocent insofar as an explanation is provided for any delay or non-compliance with time periods.

[30] I am satisfied that the above properly summarises what I am required to consider when exercising my discretion on whether or not to grant condonation for the late filing of the Applicant's Review Application, and what constitutes a proper basis upon which this Court should decide condonation.

[31] The various factors should of course be considered cumulatively when determining whether there is good cause for the granting of condonation. Whilst the factors should not be considered on a piecemeal basis, I address the most relevant below in turn.

The length of the delay

[32] The Review Application was served and filed 49 (forty-nine) days late.

[33] Another period of delay that is of relevance is the delay in serving and filing the condonation application. Mr Nair's legal representatives should have been aware of the need to apply for condonation when they served and filed the Review Application on 22 January 2020. They were then specifically alerted to the need for a condonation application on 18 March 2020 when Telkom served and filed its answering affidavit in the Review Application.

[34] According to Telkom, a further period of 104 days elapsed after Mr Nair was advised of this deficiency (in Telkom's answering affidavit on 18 March 2020)

[21] [1997] 9 BLLR 1141 (LAC).

without Mr Nair filing a condonation application, which period remains unexplained.[22]

[35] Elsewhere, Telkom submits that the Condonation Application was 'brought' on 5 May 2020, some 154 days late.[23]

[36] It would appear that Telkom has calculated:

36.1 the 104-day time period from 18 March 2020 to 5 May 2020; and

36.2 the 154-day time period from 2 December 2019 to 5 May 2020.

[37] Whilst the Review Application was served and filed 49 days late (2 December 2019 to 22 January 2020), the Condonation Application was served and filed approximately 48 days after Telkom informed Mr Nair of the need to apply for condonation, and approximately 104 days after the Review Application was served and filed. The Condonation Application itself is not 154 days late (the period from 2 December 2019 to 5 May 2020) as there would have been no need for Mr Nair to file a Condonation Application if the Review Application was filed on 2 December 2019.

[38] The Condonation Application should have accompanied the Review Application when it was served and filed on 5 May 2020 and Mr Nair is therefore required to explain the period of delay in filing the Condonation Application (from 22 January 2020 to 18 March 2020 to 5 May 2020). Of particular importance would be the explanation for the delay from 18 March 2020 to 5 May 2020.

<u>The explanation for the delay</u>

<u>Four-fold explanation</u>

[39] Mr Nair's explanation for the delay is four-fold. He alleges the following in this regard - firstly, he had to procure approval from his insurer; secondly, he had to obtain the record of proceedings from the CCMA; thirdly, his legal representatives had undergone various shifts in their firm; and fourthly, his legal

[22] Telkom's heads of argument; para 15, p 4.
[23] Telkom's heads of argument; para 7, p 2.

representatives had a brief closure during the contended *dies non* period over December 2019 during which he himself could also not be contacted.[24]

[40] The above explanation relates to the period from 2 December 2019 to 22 January 2020 – i.e. the delay in serving and filing the Review Application itself. Mr Nair provides no explanation whatsoever in respect of the period from 22 January 2020 to 5 May 2020 in relation to his delay in serving and filing his Condonation Application. Of particular concern is the lack of any explanation for why Mr Nair delayed from 18 March 2020 to 5 May 2020 in serving and filing a Condonation Application when he was expressly informed by Telkom of the need for him to do so. Mr Nair was legally represented at all material times and should have been informed by his legal representatives of the need to apply for condonation on at least 22 January 2020 or as soon as reasonably practicable thereafter.

[41] The difficulty with Mr Nair's explanation for the delay is ultimately two-fold: firstly, the Review Application is late and the explanation for that lateness leaves much to be desired; and secondly, Mr Nair did not apply for condonation as soon as he became aware of the need to do so (i.e. without delay) and has provided no explanation whatsoever for that delay. I turn to address these two aspects.

[42] Mr Nair having to procure approval from his insurer –

42.1 This allegation is made by Mr Nair in his founding affidavit in support of the Condonation Application. No correspondence between Mr Nair/his legal representatives and Mr Nair's insurer is attached to the Condonation Application founding affidavit. The identity of the insurer is not revealed. The condonation founding affidavit does not contain any details at all in relation to the attempts made to procure approval from an insurer.

[24] Mr Nair's heads of argument; paras 19-20, pp 28-29 / Mr Nair's Condonation Application answering affidavit; paras18-24, pp 8-9 Bundle A: Condonation Application.

42.2 Mr Nair's assertions in this regard are bald and he has failed to take this Court into his confidence.

42.3 The court in *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and others*[25] held as follows:

> *"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."*

42.4 In *Du Plessis v Wits Health Consortium* (*Pty*) *Ltd*,[26] the Court held as follows:

> *"It is clear from the above and other judgments that a claim of lack of funds on its own cannot constitute reasonable explanation for the delay. In other words, when pleading lack of funds as the cause of the delay, the applicant needs to provide more than a mere claim that the reason for the delay is lack of funds. In this respect, the applicant has to take the court into his or her confidence in seeking its indulgence by explaining when, not only that he or she finally raised funds to conduct the case, but also how and when did he or she raise those funds. The 'when' aspects of the explanation are important, as it provided the courts with information as to whether there was any further delay after raising the funds and whether an explanation has been provided for such a delay."*

42.5 Either Mr Nair was awaiting approval from his insurer that it would fund his case as he did not have money to fund it himself, or alternatively, he had the funding but elected to await approval from the insurer and not to fund the case himself. Mr Nair does not explain in his Condonation

[25] (2010) 31 ILJ 1413 (LC) at para 13.
[26] [2013] JOL 30060 (LC) at para 16.

Application founding affidavit which of the two it is. If the latter, the approach would be unacceptable. If the former, a claim of lack of funds on its own cannot constitute reasonable explanation for the delay. Mr Nair provides no further detail in respect of the lack of funds. He does not take this Court into his confidence in seeking its indulgence by providing an explanation as required. The necessary detail is not provided in respect of when the funding was requested, when it was obtained, from whom it was obtained etc.

42.6 This does not amount to a reasonable, acceptable and satisfactory explanation.

[43] Mr Nair obtaining the record of proceedings from the CCMA ('the CCMA record') before launching the Review Application in order to provide the insurer with clarity on the matter –

43.1 Mr Nair sought to obtain the CCMA record prior to launching the Review Application. He contends that the delay in obtaining the CCMA record delayed the launching of the review application. He states in is Condonation Application founding affidavit that the CCMA record was requested in order to provide his insurer with clarity on the matter[27].

43.2 It is of course not necessary for an applicant to obtain the CCMA record prior to launching a review application. The wording of Rule 7A of this Court's rules are abundantly clear in relation to when a party is required to obtain the CCMA record.

43.3 The relevant provisions of Rule 7A allows an applicant to institute a basic or rudimentary review application with the CCMA record to be obtained at a later time with a supplementary affidavit once the CCMA record has been requested and obtained after the review application has been launched.

43.4 This Court has a template/pro forma review application notice of motion and founding affidavit for an applicant to complete and use to launch their

[2727] Condonation Application founding affidavit: paragraph 20

review application timeously. Mr Nair could have followed this approach and launched his review application timeously and then subsequently obtained the CCMA record to provide to his insurer (for whatever reason the insurer required the CCMA record).

43.5 There was no need for Mr Nair to obtain the CCMA record prior to launching the Review Application and to delay the launching of the Review Application as he awaited the record. Both he and his legal representatives should have been aware of that. Mr Nair was legally represented at all material times. No affidavit is provided by any attorney from Noa Kinstler Attorney and Conveyancer to explain why they saw fit, as Mr Nair's legal representatives, to delay the launching of the Review Application in order to obtain the CCMA record first.

43.6 Even though Mr Nair states in his Condonation Application founding affidavit that his legal representatives applied and continuously followed up with the CCMA in respect of the CCMA record, and that the trail of correspondence with the CCMA is enclosed with the Condonation Application founding affidavit, no such correspondence is attached as annexures to the condonation founding affidavit and therefore did not serve as evidence before this Court.

43.7 Mr Nair should have launched a basic/rudimentary Review Application timeously (i.e. before the relevant six-week period elapsed) regardless of whether the approval from the insurer had been obtained. The approval of the insurer could have been obtained subsequently once the basic/rudimentary review application had been launched without delaying the launching thereof.

43.8 This, again, does not amount to a reasonable, acceptable and satisfactory explanation.

[44] Mr Nair's legal representatives undergoing various shifts in their firm (which is explained as two office shifts and staff leaving the employ of the business) between 2 December 2019 and 22 January 2020 and/or 18 March 2020 –

44.1 Mr Nair has been represented at all material times by the following law firm: Noa Kinstler Attorney and Conveyancer. No affidavit is provided by any attorney from Noa Kinstler Attorney and Conveyancer to either confirm the contents of Mr Nair's Condonation Application founding affidavit in this regard or to provide further details in respect of the offices shifts and staff leaving. Mr Nair's allegations in this regard amount to hearsay evidence.

44.2 Even if the necessary factual averments were made by an attorney from Noa Kinstler Attorney and Conveyancer, this would not amount to a reasonable, acceptable and/or satisfactory explanation. The attorney/s representing Mr Nair have acted negligently. It is quite simply unacceptable for an attorney to have delayed the serving and filing of the Review Application because he/she was moving offices or because of staff departures, particularly as a rather basic/rudimentary review application could have been prepared using this Court's template/precedent which could then have been served and filed timeously.

[45] Mr Nair's legal representatives having a brief closure during the contended *dies non* period over December 2019 during which he himself could also not be contacted –

45.1 The office of the legal representatives were apparently closed from 17 December 2019 to 8 January 2020.

45.2 The firm of Noa Kinstler Attorney and Conveyancer had again acted negligently in relation to not being aware that there is no *dies non* in this Court.

45.3 Any office closure of course played no role in the Review Application not being served and filed timeously as the due date was 2 December 2019 and the office only allegedly closed on 17 December 2019. The office closure therefore only contributed to the degree of lateness.

45.4 The name/s of the relevant staff have not been provided. No confirmatory or other affidavit is provided from any attorney at Noa Kinstler Attorney and Conveyancer in this regard either. Even if a labour and employment law specialist only started on 8 January 2020, there is no reason why the Review Application should only have been served and filed more than two weeks later on 22 January 2020. It should have been filed sooner in light of the delay since 2 December 2019. No evidence is presented in respect of any attempts being made by the Mr Nair's legal representatives at any time to seek an indulgence from Telkom's legal representatives in relation to the late filing of the Review Application. It would appear that no such attempts were made.

45.5 Mr Nair also provides no details in respect of why he could not be contacted and for what period he was not contactable.

45.6 The explanation provided in this regard is unacceptable, unreasonable and unsatisfactory in a number of respects.

Mr Nair did not apply for condonation as soon as he became aware of the need to do so (i.e. without delay) and has provided no explanation whatsoever for that delay

[46] It is trite that condonation should be applied for without delay when a litigant becomes aware of the need to apply for condonation.[28] This principle has been emphasised by the Supreme Court of Appeal on numerous occasions (see *Saloojee* supra at 138H; *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 129G; and *Napier v Tsaperas* 1995 (2) SA 665 (A) at 671 B-D). This approach has also been endorsed by the Labour Appeal Court which has advocated bringing the application for condonation on the same day it is discovered to be necessary (see *inter alia Allround Tooling (Pty) Ltd v NUMSA and others* [1998] 8 BLLR 847 (LAC) at 849 para 8; *NEHAWU v Nyembezi* [1999] 5 BLLR 463 (LAC) at 464 D-F; and *Librapac CC v Fedcraw and Others* [1999] 6 BLLR 540 (LAC) at 543).

[28] *Seatlolo and Others v Entertainment Logistics Services (a division of Gallo Africa Ltd)* 2011 32 ILJ 2206 LC at para 10.

[47] Just like with the explanation for the late serving and filing of the Review Application, Mr Nair is required to provide a reasonable and acceptable explanation for the delay in serving and filing the Condonation Application and also provide a satisfactory explanation for every period of delay in serving and in filing the Condonation Application. The absence of such an explanation will, again, normally be fatal to a Condonation Application irrespective of the applicant's prospects of success.

[48] Absolutely no explanation was provided by Mr Nair in respect of the delay in serving and filing the Condonation Application. Mr Nair was legally represented at all material times. His legal representatives should have informed him of the need to apply for condonation in the first instance and then should have advised him to apply for condonation with some urgency after 18 March 2020. It appears that they failed to do so. They also then failed to assist Mr Nair in providing this Court with any explanation in respect of the period of delay subsequent to 18 March 2020 and even for the period between 22 January 2020 and 18 March 2020. I see no reason why this failure to provide any explanation should not be fatal to the Condonation Application irrespective of any prospects of success that Mr Nair might have.

The negligence of Mr Nair's legal representatives and the consequences thereof for Mr Nair

[49] As is apparent from the *Saloojee, Fibro Furnishers, UTI South Africa*, *Superb Meat Supplies* and *PPWAWU* cases *supra* (paragraphs 24 to 28 above), there are limits beyond which a party cannot rely on its legal representative's lack of diligence or negligence when they are themselves innocent insofar as an explanation is provided for any delay or non-compliance with time periods. There is therefore a limit beyond which the Applicant cannot escape the results of the lack of diligence of its attorneys in serving and filing the Review Application timeously. This is unfortunately for Mr Nair, such a matter.

[50] The length of the delay is long although probably not excessive. Notwithstanding this, Mr Nair is required to provide a reasonable and acceptable explanation for the delay. In the absence of such an explanation,

the prospects of success are immaterial. An unsatisfactory explanation for any period of delay will normally be fatal to a condonation application irrespective of the applicant's prospects of success. This holds true for the explanation for the late filing of the review application and the explanation for the delay in filing the condonation application.

Prospects of success

[51] All things considered, Mr Nair has offered an acceptable, reasonable and satisfactory explanation in respect of certain periods of the delay and no explanation at all in respect of other periods of the delay. He has failed to advance a compelling explanation for the delay.

[52] That in itself should mean the end of the Condonation Application, without requiring a consideration of the prospects of success as it is trite that in the absence if a reasonable and satisfactory explanation, there is no need to consider the issue of prospects of success. In *National Union of Mineworkers v Council for Mineral Technology*,[29] the Labour Appeal Court established this principle – i.e. given the extent of the delay and the poor explanation for the delay, it was not necessary to consider the applicant's prospects of success in the main application.

[53] This was affirmed more recently in *Collet v Commission for Conciliation, Mediation and Arbitration*,[30] where the Court stated as follows:

> *"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. In NUM v Council for Mineral Research [1999] 3 BLLR 209 (LAC) at para 10, it was pointed out that tin considering whether good cause has been shown the well-known approach adopted in Melane v Santam Insurance Co. Ltd. 1962 (4) SA (A) at 532 C-D should be followed but: 'There is a further principle which is applied and that is without a reasonable and acceptable explanation for*

[29] [1999] 3 BLLR 209 (LAC).
[30] [2014] 6 BLLR 523 (LAC) para 38 - 39.

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.' The submission that the court a quo had to consider the prospects of success irrespective of the unsatisfactory and unacceptable explanation for the gross and flagrant disregard for the rules is without merit."

[54] In *Seatlholo & others v Entertainment Logistics Service (a division of Gallo Africa Ltd),*[31] the Court held as follows:

"[36] …..The essence of the judgment is that the delay of more than two years in referring the two disputes was egregious: that the applicants failed to advance a compelling explanation for the various periods of delay by largely extricating their union from the scene, and that in these circumstances the prospects of success would have to be overwhelming. It is moreover incorrect that the court a quo reformulated the legal test for condonation by failing to have regard to the prospects of success. It is apparent that these were considered and weighed up against the lengthy and unexplained delays.

[38] On the authorities cited by the court a quo the prospects of success were held to be irrelevant in the absence of an acceptable explanation for the delay…….. It is trite that the prospects of success would have to be overwhelming to assist applicants in circumstances where their explanation is found to be so inadequate as to constitute a complete lack of an explanation. This approach is consistent with the authorities cited and it cannot be contended that the incorrect legal test was applied or that the issue of whether good cause has been shown was not properly determined, or that the decision was inconsistent with the jurisprudence of the Labour Appeal Court or the Supreme Court of Appeals."

[55] It is apparent from the foregoing that the Courts have endorsed the position that the failure to provide a reasonable and acceptable explanation for the delay renders prospects of success immaterial.

[56] The Court is required to make an assessment of an applicant's prospects of success in a condonation application as one of the factors relevant to the

[31] (2011) 32 ILJ 2206 (LC) at para 24.

exercise of its discretion, 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. This would be in circumstances where there was flagrant breach of the rules, excessive delays, and where no acceptable explanation was forthcoming.

[57] In *casu*, the delay is long but not necessarily excessive. The explanation for the delay in filing the Review Application is unsatisfactory. Furthermore, no explanation has been tendered or is forthcoming for the delay in applying for condonation.

[58] This is therefore a matter wherein the cumulative effect of the other relevant factors is such that, in my assessment, it renders the application for condonation unworthy of being granted. In the absence of an acceptable explanation for an excessive delay, that is the end of the enquiry. The Applicant's prospects of success are irrelevant.

[59] In light of the aforesaid authorities and given that the Applicant has not provided a comprehensive, compelling or convincing explanation for the delay, when the delay was excessive, the prospects of success are immaterial and thus need not be considered.

Prejudice

[60] Mr Nair's prejudice relates to him not being able to pursue the Review Application against Telkom and as a consequence of that, he would not be in a position to have the arbitration award in respect of the unfair labour practice dispute reviewed and set aside.

[61] Mr Nair is not, however non-suited or remedy-less.

[62] Mr Nair could possibly pursue a claim against his legal representatives responsible for, *inter alia*: (i) the delay in filing the condonation application and the review application; (ii) filing the condonation without a reasonable and acceptable explanation for the delay; and (iii) filing a condonation application in which parts of the delay are not explained at all.

[63] Further, and if the dispute arose in and during May or June 2019, then Mr Nair could potentially also pursue a possible contractual claim against Telkom if he is of the view that he had a contractual right to the payment of the bonus, bearing in mind the applicable three-year prescription period.

Summation

[64] Condonation is not simply there for the asking and, as Mr Nair himself submits in his heads of argument, condonation for individuals should not be readily granted. In this regard he cites *A Hardrodt (SA) (Pty) Ltd v Behardien and Others*[32].

[65] A proper case must be made out for condonation. On an overall conspectus of all the facts, good cause has not been shown for the granting of condonation and it would not be in the interest of justice to grant condonation. There was a long delay in filing the review application and an even longer delay in filing the condonation application, coupled with an explanation that was not reasonable and acceptable and which failed to explain significant periods of the delay – consequently, the prospects of success were immaterial. Unfortunately, in the absence of any explanation for some of the periods of the delay in issue, it is not possible to grant condonation. Mr Nair's legal representative responsible for preparing the Review Application and the Condonation Application, and having it filed timeously, were negligent, and unfortunately for Mr Nair there is a limit beyond which he cannot escape the lack of diligence of his legal representatives, and certainly not to the detriment of Telkom.

[66] In all the circumstances, I am satisfied that Mr Nair has not established that there is good cause for the granting of condonation. He has not made out a proper case for the granting of condonation and the granting of condonation would not be in the interests of justice as, *inter alia*, condonation is not there for the mere asking and condonation applications must be filed without delay and each part of the delay must be explained (which explanation must also be reasonable and acceptable).

[32] (2002) 23 ILJ 1229 (LAC

[67] The condonation application does therefore stand to be dismissed.

The Review Application

[68] This Court has no jurisdiction to entertain the Review Application, which was filed outside the statutory time period in the absence of condonation being granted.

[69] Condonation has not been granted for the reasons as set out above.

[70] None of Mr Nair's contentions in respect of the merits of his Review Application matter because this Court simply has no jurisdiction to entertain the Review Application in the first place. Accordingly, Mr Nair's Review Application must be dismissed for want of jurisdiction.

Costs

[71] In terms of the provisions of section 162(1) of the LRA, which regulates orders for costs in this Court, I have a wide discretion when it comes to the issue of costs, having regard to the requirements of the law and fairness after taking account all of the relevant facts and circumstances.

[72] In exercising this judicial discretion, the Constitutional Court in *Long v South African Breweries (Pty) Ltd and Others*[33] reaffirmed the principle set in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[34] with regard to costs in employment disputes and stated that '*when making an adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties.*'

[73] Taking account of all the relevant facts and circumstances and having regard for the requirements of the law and fairness, I do not consider it appropriate to make a costs order, and I exercise my discretion as to costs accordingly.

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

[33] (2019) 40 ILJ 965 (CC) at para 30.
[34] (2018) 39 ILJ 523 (CC) at para 25.

Order

[75] The condonation application is dismissed.

[76] In the absence of condonation being granted, the review application is dismissed for want of jurisdiction of this Court to consider that application.

[77] There is no order as to costs.

M Sass

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate Ed Coleman Instructed by Noa Kinstler Attorney and Conveyancer
For the First Respondent:	Mr N Mbuyisa of Maserumule Inc.