DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

27/10/2023
DATE

[redacted]

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JS430/21

In the matter of:

KEITH LEGH IVASEN **Applicant**

and

ZEDA CAR LEASING (PTY) LTD T/A AVIS FLEET **Respondent**

Heard: 19 September 2023

Delivered: 27 October 2023

JUDGMENT

WHITTINGTON, AJ

[1] This is an application in which the respondent seeks condonation for the late delivery of its statement of response. I shall refer to the parties as they are referred to in the main proceedings.

[2] The statement of case was originally filed by the applicant on the 11th of May 2021. The response was due within 10 days of the date on which the statement of claim was delivered.

[3] The respondents, instead of filing a statement of response, brought an exception (which they are at liberty to do) which exception was dismissed on the 21st of October 2021. The statement of response was therefore due on the 5th of November 2021. No response was filed.

[4] Due to the failure of the respondent to file a response, the applicant applied for default judgment. At the hearing of the application for default judgment on the 8th of February 2022, a representative appeared on the respondent's behalf and a statement response may have been handed up on the same day.

[5] The upshot is that an order was granted on the 8th of February 2022 in terms of which the respondent was to deliver an application for condonation for the late filing of the response within 5 days. By my calculations, the application for condonation ought to have been filed on the 15th of February 2022. The respondents failed to file an application for condonation as required by the order.

[6] Again, and due to the fact that the statement of response was not properly before the court in the absence of an application for condonation, an application for default judgment was made on 15 March 2023 which application was set down to be heard during June 2023. This, it would appear, may have precipitated the almost simultaneous filing of the applicant's condonation application.

[7] In summary, the statement of response was filed out of time by three months and four days and the respondent's condonation application was filed one year and twenty court days after the date on which it ought to have been filed in terms of an order of court.

[8] Given the lengthy delays referred to above, and particularly due to the fact that an order of court was not complied with, the court is entitled to expect an excellent explanation from the respondent.

[9] The reasons for the late filing of the response are very briefly outlined in the founding affidavit to the condonation application. Essentially the respondent's attorney, Mr Mila, states that he had been diagnosed with ADHD. I assume from

the allegations that Mr Mila attributes the failure to deliver the statement of response in time to his condition.

[10] It appears that the allegations regarding Mr Mila's condition are meant to explain the delay in the delivery of the statement of response and no attention is given to the delay in filing the condonation application. The Notice of Motion which accompanies the application for condonation refers to the late delivery of the statement of response only.

[11] In support of the allegations regarding his condition, Mr Mila attaches what appears to be a medical certificate.

[12] I'm not without sympathy for Mr Mila's condition however the picture which is painted in the founding affidavit appears to suggest that Mr Mila only became aware of his condition fairly recently in the context of these proceedings, on the 9th of January 2023.

[13] If one reads the content of the medical certificate however it is clear that Mr Mila has been receiving treatment for his condition since September 2022. This of course raises the question as to whether Mr Mila took any steps to bring his condition to the attention of his employer or to ensure that he was adequately supported ensuring that his clients were not prejudiced as a result of the symptoms of his condition.

[14] The founding affidavit begs the question, once the condition was diagnosed, what steps were taken to address any lapses which may have been occasioned. The question remains unanswered.

[15] There are simply no facts pleaded that predate September 2022, which is several months after the court order compelling the delivery of the application for condonation, nor do we have any insight into events after Mr Mila's initial diagnosis.

[16] The medical certificate itself is unfortunately terse stating only that Mr Mila has been diagnosed with ADHD and what symptoms are generally associated with the condition. There are no details regarding Mr Mila's particular symptoms,

how these were managed, for what period they lasted or how any symptoms might have affected Mr Mila's ability to perform his day-to-day functions. Moreover, neither the medical practitioner nor Mr Mila placed any facts before the court regarding what impact (if any) his condition had on these proceedings.

[17] Indeed, the explanation offered by Mr Mila poses more questions than it provides answers and is a far cry from being sufficiently full to enable the court to understand exactly how the delay in filing both the statement of response and the application for condonation actually came about.

[18] The application for condonation does not purport to deal with the failure to comply with the order of 8 February 2022 and it appears that no condonation is sought in this regard at all.

[19] Assuming for a moment that Mr Mila is entirely blameless for the delays occasioned (and for the purpose of argument only), the explanation begs the question as to why Mr Mila's client – the respondent - faced with lengthy delays in the matter and in the face of a court order compelling the filing of an application for condonation within five days of the 8th of February 2022, took no steps to follow up with Mr Mila. To the extent that the respondents were not able to obtain assistance from Mr Mila there are no facts to show that the matter was escalated either.

[20] There is not a single iota of evidence in the founding papers, the reply or even in the heads of argument placed before the court on the respondent's behalf which deals with any steps by the respondents themselves to cure their non-compliance.

[21] The failure to deal with the respondent's conduct has consequences which have been highlighted in a number of decided cases which I deal with below.

[22] A further contention advanced by Mr Mila, as a conclusion and without any supporting facts, is that the "*proper administration of justice*" compels the granting of the application for condonation.

[23] Given that the case law has repeatedly noted the importance of avoiding unnecessary delays and that disputes ought to be dealt with expeditiously the proper administration of justice is a factor against the respondent in this matter.

[24] It is telling that in the founding affidavit, in paragraph twenty-two thereof, Mr Mila appears to acknowledge a degree of negligence on his part.

[25] There are several important unanswered questions which arise after reading the founding affidavit and the reply include at least the following salient issues:

25.1. When did Mr Mila become aware that the matter had "*slipped through the cracks*"?

25.2. After the mistake was discovered, what steps were taken to ensure that no further delays were occasioned?

25.3. Why was the application for condonation not filed simultaneously with the answering papers?

25.4. What steps were taken after the 8th of February 2022 relating to the application for condonation?

25.5. When was the failure to comply with the court order discovered?

25.6. What steps were taken by the respondent to remedy the contempt of the order?

[26] Worryingly, even when it was pointed out by the applicants in their answering affidavit to the condonation application that the founding papers had failed to deal with the period between the filing of the response and the condonation application, Mr Mila merely pointed in reply to the founding affidavit and the statements relating to his diagnosis. Unfortunately, even if this were to be accepted, this does not deal at all with the period from September 2022 to the date on which the condonation application was eventually filed.

[27] When it was noted in court to the respondent's representative that the explanation provided in the papers was severely lacking, the response from the bar was to the effect that the respondent's representatives had been unable to

contact Mr Mila due to the fact that he had left the firm and that no one else at the firm had been involved in the matter until shortly before the hearing. This raises yet further questions including to what extent the respondent itself would be able to provide further information.

[28] It was pointed out that any difficulties faced by the respondent's representatives relating to the lack of information ought to have been set out in a supplementary affidavit in order for the court to understand these. This is particularly so as the respondents had not complied with the time periods allowed for in the order by Dean AJ. No explanation was provided as to why this was not done.

[29] It was furthermore conceded by the representative for the respondents that on the papers attested to by Mr Mila, the explanation provided was severely lacking. The representative for the respondent made the submission that the court ought to take into consideration facts which appear for the first time in the heads of argument and supplementary heads of argument in order to bolster the explanation provided by Mr Mila. This of course overlooks the fundamental problem that allegations which are made in heads of argument have not been attested to and do not constitute evidence. I am disinclined to accede to this request. Even if I were to do so, the further allegations in the heads of argument do very little to bolster the explanation provided by Mr Mila.

[30] A further argument advanced by the respondent only in its heads of argument relates to the application of clause 16 of the practice manual[1].

[31] The rule referred to by the respondent notes that the registrar will archive a file when a period of six months has elapsed from the date of delivery of a statement of case without any steps being taken by the referring party from the date on which the statement of claim was filed or the date on which the last process was filed.

[32] In this matter, given the chronology set out above, I must assume that the respondent is relying on the date on which the last process was filed – this certainly appears to be the case made out in the heads of argument.

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[1] Practice Manual of the Labour Court of South Africa, effective 1 April 2013.

[33] The argument advanced by the respondent is that, as a consequence of the applicant's failure to take any steps to further advance the proceedings between the 8th of February 2022 and the 15th of March 2023, the file has become archived, and the argument goes, the matter is regarded as lapsed unless good cause is shown why the application should not be revived.

[34] The respondent relies on its heads of argument on the findings in the matter of *E Tradex (Pty) Ltd t/a Global Trade Solution v Finch and others*[2].

[35] To my mind, there are several features which distinguish this matter from the matter referred to by the respondent.

[36] Firstly, the applicant has on two occasions attempted to bring the matter to finality by means of applications for default judgment - the last of these being the application on 15 March 2023. I accept, however, that there is a delay between the date on which the respondent's condonation application became due and the latest application for default judgment.

[37] To the extent that reliance is placed on the date on which the last process was filed, it appears to me that the last process filed was either the application for condonation (which was filed on the 16th of March 2023) or, to the extent that any of the documents filed in response to the application for condonation can be described as a "*process*", the replying affidavit which was filed on 4 April 2023.

[38] To my mind, the time for the respondent to raise the argument that the matter had lapsed would have been at the hearing of the application for default judgment as a point *in limine*. Had that approach been adopted, save for the aspect of the failure to comply with an order of court, the correct approach might have been for the court to strike the matter from the roll alternately to afford the applicant an opportunity to bring a Rule 11 application for the reinstatement of the matter. See in this regard *Macsteel Trading Wadeville v Van der Merwe NO & others*[3] at paragraph 26.

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[2] (2022) 43 ILJ 2727 (LAC); [2022] ZALAC 106.
[3] (2019) 40 ILJ 798 (LAC); [2018] ZALAC at para 26.

[39] As the respondents have elected to file a further process and seek condonation for the late filing of their statement of response and condonation application I am inclined to deal with the application before me on the basis that this constitutes the last process filed.

[40] There is a further difficulty with the approach adopted by the respondent in that it ignores the fact that an order was handed down which compelled them to file the application for condonation within 5 days of 8 February 2022. I am further inclined to deal with whether the failure to comply with the order of [illegible] has been adequately explained before I deal with any further issues.

[41] It is acknowledged that the court may, on good cause shown, condone the late filing of an application.

[42] Historically, the approach followed by the Court in determining whether condonation should be granted, has been articulated in several authorities, the *locus classicus* of which is *Melane v Santam Insurance Co. Ltd (Melane)*[4], where the Court stated that:

> '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, for that would be a piecemeal approach incompatible with a true discretion ...'

[43] Furthermore, in *National Union of Mineworkers v Council for Mineral Technology*[5], the Court echoed the words of *Melane* and 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 sides. 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

[4] 1962 (4) SA 531(A); [1962] 4 All SA 442 (A) at 532 C-F.
[5] [1998] ZALAC 22; [1998] JOL 3074 (LAC) at para 10.

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...'

[44] In employment disputes, there also exists an additional consideration, which applies in determining whether the onus has been discharged, as was held in *National Union of Metalworkers of SA on behalf of Thwali v Arrys Metals (A division of Zimco Group) and Others*[6]:

'... There is, however, an additional consideration which applies in employment disputes in determining whether an applicant for condonation has discharged this onus. This is the fundamental requirement of expedition. The Constitutional Court has, as a matter of fundamental principle, confirmed that all employment law disputes must be expeditiously dealt with and any determination of the issue of good cause must always be conducted against the back-drop of this fundamental principle in employment law.'

[45] In the case of *Toyota SA Motors (Pty) Ltd v CCMA and Others*[7] the Constitutional Court emphasised that one of the fundamental purposes of the Act was to establish a system for the simple, expedient and inexpensive adjudication of employment disputes. When it assesses the reasonableness of a delay, the Court must not lose sight of this purpose.

[46] The Court in *Independent Municipal and Allied Trade Union obo Zungu v South African Local Government Bargaining Council and Others*[8] 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

[6] (2015) 36 ILJ 232 (LC); [2014] ZALCJHB 115.
[7] (2016) 37 ILJ 313 (CC); [2016] 3 BLLR 217 (CC).
[8] (2010) 31 ILJ 1413 (LC); [2009] ZALC 137 at para 13.

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.'

[47] Further in *Chulu-Mantsho v Business Connexion (PTY) Ltd and Others*[9] the court held:

'The applicant has to provide an explanation for every period of the delay, to enable this Court to assess the reasonableness of the delay and the explanation for it...'

[48] In addition to the above in the matter of *Saloojee and Another, NNO v Minister of Community Development*[10] at page 141 the court held as follows:

'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 upon 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 and 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...

A litigant, moreover, who knows, as the applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a 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 the insufficiency should be overlooked merely because he has left the matter entirely in the hands of

[9] [2022] ZALCJHB 165 at para 44.
[10] 1965 (2) SA 135 (A); [1965] 1 All SA 521 (A).

his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself.'

[49] In the matter of *Grootboom v National Prosecuting Authority and Another*, the court, *inter alia*, stated:

"I need to remind practitioners and litigants that the rules and court's directions serve a necessary purpose. Their primary aim is to ensure that the business of our courts is run effectively and efficiently. Invariably this will lead to the orderly management of our courts' rolls, which in turn will bring about the expeditious disposal of cases in the most cost-effective manner. This is particularly important given the ever increasing costs of litigation, which if left unchecked will make access to justice too expensive. Recently this court has been inundated with cases where there has been disregard for its directions. In its efforts to arrest this unhealthy trend, the court has issued many warnings which have gone largely unheeded. This year, on 28 March 2013, this court once again expressed its displeasure in *Thekwini* as follows:

'The conduct of litigants in failing to observe the rules of this court is unfortunate and should be brought to a halt. This term alone, eight of the 13 matters set down for hearing, litigants failed to comply with the time limits in the rules and directions issued by the Chief Justice. It is unacceptable that this is the position in spite of the warning issued by this court in the past. In [Van Wyk], this court warned litigants to stop the trend. The court said: "There is now a growing trend for litigants in this court to disregard time limits without seeking condonation. Last term alone, in eight out of ten matters, litigants did not comply with the time limits or the directions setting out the time limits. In some cases litigants either did not apply for condonation at all or if they did, they put up flimsy explanations. This non-compliance with the time limits or the rules of court resulted in one matter being postponed and the other being struck from the roll. This is undesirable. This practice must be stopped in its tracks. 'The statistics referred to above illustrate that the caution was not heeded. The court cannot continue issuing warnings that are disregarded by litigants. It must find a way of bringing this unacceptable behaviour to a stop. One way that readily presents itself is for the court to require proper compliance with the rules and refuse condonation where these requirements are not met. Compliance must be demanded even in relation to rules regulating applications for condonation.' [Footnotes omitted.]

> The language used in both Van Wyk and eThekwini is unequivocal. The warning is expressed in very stern terms. The picture depicted in the two judgments is disconcerting. One gets the impression that we have reached a stage where litigants and lawyers disregard the rules and directions issued by the court with monotonous regularity. In many instances very flimsy explanations are proffered. In others there is no explanation at all. The prejudice caused to the court is self-evident. A message must be sent to litigants that the rules and the court's directions cannot be disregarded with impunity. It is by now axiomatic that the granting or refusal of condonation is a matter of judicial discretion. It involves a value judgment by the court seized with a matter based on the facts of that particular case. In this case, the respondents have not made out a case entitling them to an indulgence. It follows that their application must fail.'

[50] In my view, the respondent has failed to advance a reasonable and acceptable explanation for the delay in filing the statement of response and has failed to deal with the lack of compliance with the order of Dean AJ entirely.

[51] In addition to this, the papers before me - both those attested to and presented as evidence as well as the heads of argument - are completely silent on the issue of the respondent's own conduct as opposed to the conduct of the respondent's representatives. I am thus unable to determine whether, in spite of the several failings highlighted above, the respondent took any steps further than to leave the matter entirely in the hands of their attorneys.

[52] In accordance with the case law, an evaluation of the prospects of success is therefore immaterial and the application for condonation ought therefore to be dismissed.

[53] The applicant seeks a punitive cost order against the respondent.

[54] To my mind, there is no information regarding the conduct and motives of the respondent as it relates to the failings set out above. Whilst I cannot, due to this failure, properly assess the conduct of the respondents in order to bolster the application for condonation I am in like manner unable to take their conduct into account for the purposes of evaluating a punitive cost order.

[55] From the papers before me it would appear that Mr Mila has accepted at least some responsibility for the delays however due to the fact that he is not before the court to address me on the aspect of punitive costs I am not disposed to grant a cost order against Mr Mila.

[56] The application for condonation is inadequate for the reasons set out above. The penalty for this is that the application may be dismissed. I am not inclined to attribute any *mala fides* to the respondent based solely on the length of the delay.

[57] Accordingly, I make the following order:

Order

1. The application for condonation is dismissed;
2. There is no order as to costs.

[redacted]

D Whittington

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Malesale Letwaba
Instructed by:	Cliffe Dekker Hofmeyer Inc
For the Repondent:	N Mkhize
Instructed by:	Mkhize Attorneys