

THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

**Not Reportable
Case no: PR 54/2021**

In the matter between:

SAKHUMZI DANIEL ZAKHE

Applicant

and

DHL SUPPLY CHAIN SA (PTY) LTD

First Respondent

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Second Respondent

Heard: 13 March 2024

Delivered: 18 March 2024

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be 18 March 2024.

JUDGMENT

PRINSLOO J

Introduction

- [1] The Applicant filed an application to review and set aside a condonation ruling dated 25 March 2021 under case number ECPE111-21. The review application was filed outside the prescribed period of six weeks and for this, the Applicant seeks condonation.
- [2] The Applicant also filed an application for condonation for the late filing of his replying affidavit, as well as an application to join the presiding arbitrator as the third respondent in this application.
- [3] The first issue to be decided is whether the Applicant should be granted condonation for the late filing of the review application, as it goes to the issue of jurisdiction.

The principles applicable to the grant of condonation

- [4] The relevant legal principles to be applied in an application for condonation are well established. This Court is required to exercise a discretion, having regard to the extent of the delay, the explanation for the delay, the prospects of success and the relative prejudice to the parties that would be occasioned by the application being granted or refused. The interest of justice will ordinarily reflect regard to all these factors.
- [5] In *Melane v Santam Insurance Co Ltd*,¹ it was held that:

‘...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, save of course that if there are no prospects of success there would be no point in granting condonation... What is needed is an objective conspectus of all the facts.’

¹ 1962 (4) SA 531 (A) at 532C - F.

- [6] In *A Hardrodt (SA) (Pty) Ltd v Behardien and others*² (*Behardien*), the Labour Appeal Court (LAC) restated the guidelines laid down in *Queenstown Fuel Distributors CC v Labuschagne NO and others*³ as *inter alia* that there must be good cause for condonation in the sense that the reasons tendered for the delay have to be convincing. In other words, the excuse for non-compliance with the six-week period must be compelling. The onus is on the applicant to satisfy the court that condonation should be granted.
- [7] In this Court, however, the principles have long been qualified by the rule that where there is an inordinate delay that is not satisfactorily explained, the applicant's prospects of success are immaterial.
- [8] The general principles applicable to deciding applications for condonation apply even more stringently when it comes to review applications. In *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) and others*⁴ (*Thilivali*), the Court held that:

'What is clear from the judgment in *Hardrodt* is that general principles applicable to condonation applications are even more stringently applied where it comes to a condonation application for the late filing of a review application. In review condonation applications, the explanation that needs to be submitted must be compelling and the prospects of success need to be strong. Where it comes to the issue of prejudice, the applicant in fact has to show that a miscarriage of justice will occur if the applicant's case is not heard. The reason for these more stringent requirements is that review applications occur after the parties have already been heard, presented their respective cases and a finding has been made. Under such circumstances, considerations of justice, fairness and expedition require that challenges of such findings must not be delayed and must be completed as soon as possible.'

- [9] The court in *Thilivali* added the following consideration when evaluating condonation applications in reviews:

² (2002) 23 ILJ 1229 (LAC) at para 3.

³ [1999] ZALAC 24; (2000) 21 ILJ 166 (LAC).

⁴ [2014] ZALCJHB 115; (2015) 36 ILJ 232 (LC) at para 22.

'It must also always be considered that the applicant for condonation actually bears the onus to prove good cause for condonation to be granted in terms of the principles set out above. 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.'⁵

- [10] The courts have held and emphasised that in applications to review and set aside arbitration awards, an applicant must necessarily act with the degree of diligence required by the Rules of this Court⁶ and the Practice Manual⁷, thus giving effect to the statutory imperative of expeditious dispute resolution.
- [11] In *Toyota SA Motors (Pty) Ltd v CCMA and others*,⁸ the Constitutional Court emphasised that one of the fundamental purposes of the Labour Relations Act⁹ (LRA) was to establish a system for the simple, quick, cheap and informal adjudication of labour disputes. When it assesses the reasonableness of a delay, the court must not lose sight of this purpose.
- [12] In *Colett v Commission for Conciliation, Mediation and Arbitration and others*,¹⁰ the LAC confirmed 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.
- [13] It is evident that the Courts have endorsed the principle that where there is a delay with no reasonable, satisfactory and acceptable explanation for the

⁵ Ibid at para 25.

⁶ GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court

⁷ Practice Manual of the Labour Court of South Africa, effective 2 April 2013.

⁸ [2015] ZACC 40; (2016) 37 ILJ 313 (CC).

⁹ Act 66 of 1995, as amended.

¹⁰ [2014] ZALAC 1; [2014] 6 BLLR 523 (LAC).

delay, condonation may be refused without considering prospects of success and to grant condonation where the delay is not explained, may not serve the interests of justice.

- [14] Condonation for delays in all labour law litigation is not simply there for the taking. The starting point is that an applicant in an application such as the present seeks an indulgence and bears the onus to show good cause and a proper case should be made out before the indulgence could be granted.
- [15] It is in this context that the application for condonation stands to be determined.

The degree of lateness and the explanation tendered

- [16] The first issue to be considered is the degree of lateness.
- [17] In the founding affidavit, addressing the issue of condonation, the Applicant indicated that the degree of lateness was four days. In my view, the Applicant's calculation of the degree of lateness is incorrect.
- [18] *In casu*, the condonation ruling was issued on 25 March 2021 and the review application had to be filed within six weeks, thus by 6 May 2021. The review application was filed with the Registrar on 18 May 2021, thus eight days late.
- [19] In its answering affidavit to the review application, the First Respondent (DHL) took issue with service and submitted that the review application was not served on DHL and that it only became aware of the review application when a copy thereof was received via email from the Applicant's attorneys on 20 July 2022.
- [20] The Applicant has not filed a service affidavit, as required by the Rules and the Practice Manual, confirming when the review application was served on the First and Second Respondents. Ms van Staden, for the Applicant, referred this Court to printouts from emails that were transmitted as proof of service. Service by email is not provided for in the Rules of the Labour Court and the

Directive from the Judge President which permits service of court process on parties by email, became effective only on 5 January 2022. In terms of the said directive, the party who effected service by email must file an affidavit confirming that the address to which the email was sent is the correct address, confirm which documents were attached and state that the party to whom the email was addressed, telephonically confirmed receipt of the email. Even if I were to take a lenient approach to the issue of service, there is no proof before this Court that the review application was properly served on DHL or the CCMA. There is nothing to rebut DHL's version that it only became aware of the review application on 20 July 2022.

- [21] The question is whether the review application was made on 18 May 2021 when it was filed with the Registrar or 20 July 2022 when it was sent to the Respondents via email.
- [22] A similar question was considered in *Mbatha v Lyster and others*¹¹ (*Mbatha*) where the issue was whether the application was made on 17 March 1999 when the notice of motion and the annexure thereto were delivered to the registrar of the court or whether it was made when the third respondent received its copy of the papers.
- [23] The Labour Appeal Court (LAC) held in *Mbatha* that the provisions of sub-rule (1) of Rule 7A put the matter beyond question. In terms of Rule 7A(1), the applicant in a review application is obliged to "*deliver a notice of motion to the person or body and to all other affected parties*". It follows, reading Rule 7A together with the effect of the definition of 'deliver' in Rule 1, that an application is made within six weeks of the publication of the award only if it is delivered to all the respondents and filed with the registrar of the Labour Court within such period.
- [24] This application was not filed with the Registrar within the prescribed six-week period and it was not served on the Respondents and DHL specifically before 20 July 2022. Considering the *dicta* of *Mbatha*, the review application was filed more than 14 months late.

¹¹ [2000] ZALC 5; (2001) 22 ILJ 405 (LAC).

- [25] A delay of more than 14 months is no doubt material, excessive and inordinate given the context within which labour litigation takes place and the system that is designed to ensure the effective and expeditious resolution of labour disputes. The Practice Manual expressly states that a review application is by its nature an urgent application. Section 145(5) of the LRA provides that an applicant for review must apply for a date for the matter to be heard within 6 months of the delivery of the application. In this context, a delay of more than 14 months is not insignificant.
- [26] I have to consider the reasonableness of the delay by having regard to the explanation for the delay. As the LAC has held, the explanation has to be compelling and convincing.
- [27] As the Applicant seeks an indulgence from the Court and bears the onus to satisfy the Court that condonation should be granted, it is incumbent to provide the Court with a full explanation for every period of the delay. It is not sufficient simply to list significant events that occurred during the period in question as that does not assist the Court properly in assessing the reasonableness of the explanation.¹²
- [28] In short: the explanation for the delay must be comprehensive, convincing and compelling and should cover every period of the delay.
- [29] The explanation tendered for the delay, as it appears from the founding affidavit, is as follows:
- [30] The Applicant's erstwhile attorney, Mr Vambe, received instructions to assist on or before 4 April 2021, the Applicant struggled to raise money to cover Mr Vambe's fees. The notice of motion was dated 23 April 2021, however, the founding affidavit was only signed on 17 May 2021 because the Applicant was out of town and at his parent's home in King Williams Town. Mr Vambe tried to contact him but could not get hold of him due to the lack of network. When the Applicant got back, the papers were already drafted and he attended to

¹² See *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and others* [2009] ZALC 137; (2010) 31 ILJ 1413 (LC).

the signature and commissioning thereof on 17 May 2021. The application was filed the following day.

- [31] The question is whether this constitutes a comprehensive, convincing and compelling explanation.
- [32] In my view, it does not at all. The Applicant should provide a full explanation for every period of the delay, and it is evident that no explanation is tendered for the period between May 2021, when the review application should have been served on the Respondents and July 2022, when it was received by DHL via email. This is a material and substantial period of delay which remained unexplained in its entirety.
- [33] Instead of providing an explanation that would assist this Court to understand the reasons for the delay, the Applicant provided no explanation for the delay between May 2021 and July 2022 and it is impossible to understand the timeframe of the delay. The 'explanation' tendered *in casu* is bereft of any substance and is wholly inadequate, in circumstances where the Applicant bears the onus to show that there is good reason for condonation to be granted. The Applicant failed dismally in this regard.
- [34] There is a further delay which cannot be ignored by this Court and that is the delay in bringing the condonation application. DHL raised the issue regarding the late filing of the review application in its answering affidavit of 20 December 2022. The condonation application was only filed on 6 February 2023, another six weeks later.
- [35] It is trite that an application for condonation is to be made as soon as a party becomes aware of the need to apply for condonation. *In casu*, the Applicant waited a further six weeks since he became aware of the need to apply for condonation to file such an application, a period which also remained unexplained.
- [36] Mr Makoele for DHL submitted that the Applicant has, throughout all the litigation relating to this matter, been legally represented. It is evident that all the papers in this matter were indeed drafted and filed by the Applicant's legal

representatives. I am mindful of the fact that Legal Aid SA was only appointed as the Applicant's attorneys of record in February 2024 and that Ms van Staden had the difficult task of arguing a matter on papers that were drafted prior to Legal Aid's appointment as attorneys of record and that she was bound by what had been filed and submitted (or omitted) on behalf of the Applicant by his previous legal representatives.

Prospects of success

- [37] Having considered the period of the delay and the explanation tendered for the delay, it leaves the issue of prospects of success.
- [38] In the authorities referred to *supra*, the courts have endorsed the position that the failure to provide a reasonable and acceptable explanation for the delay renders prospects of success immaterial.
- [39] This was also confirmed in *Grootboom v National Prosecuting Authority and another*,¹³ where the Constitutional Court has held that:

'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.'

- [40] In view of my finding that the delay is excessive and material and the explanation tendered not satisfactory and inadequate and in view of the authorities referred to *supra*, the Applicant's prospects of success are immaterial and thus need not be considered.

¹³ [2013] ZACC 37; (2014) 35 ILJ 121 (CC) at para 51.

Prejudice

- [41] In his founding affidavit in the application for condonation, the Applicant made no averments as to the issue of prejudice if condonation is not granted.
- [42] DHL on the other hand submitted that it would suffer prejudice if condonation is granted as it only became aware of the review application in July 2022, more than a year after it was filed and this application for condonation was brought almost two months after the Applicant was informed that his review application was filed late. DHL submitted that the Applicant's lack of diligence and failure to follow up with his legal representatives had delayed this matter and excessively so.
- [43] DHL further submitted that it had to spend unnecessary time and money on this matter when the Applicant has a habit of failing to act in accordance with the prescribed rules and time frames.
- [44] The result of the refusal to condone the late filing of the review application will be that the Applicant will be denied the opportunity to pursue this case before Court. However, it is evident from the facts before this Court that the Applicant did not pursue its case diligently.
- [45] The notion that litigants will be denied access to a court to ventilate their case cannot be examined within a paradigm that ignores the interests of the adversary, nor of the ordinary dynamics of litigation, more especially, because the reality is that litigation is a process in which adversaries make choices. If the consequences of choices that are made, or the consequences of inaction and tardiness are that opportunities to pursue the matter are forfeited, it does follow that there is a failure of justice. The litigation system affords litigants a process within which they must navigate their own routes and it is no failure of justice if their journey culminates in a dead end.¹⁴

¹⁴ See: *Edcon Ltd v Steenkamp and others* [2017] ZALAC 81; (2018) 39 ILJ 531 (LAC) at para 34.

- [46] The Constitutional Court, in the opening paragraph of *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*,¹⁵ held that:

‘Time periods in the context of labour disputes are generally essential to bring about timely resolution of the disputes. The dispute-resolution dispensation of the old Labour Relations Act was uncertain, costly, inefficient and ineffective. The new Labour Relations Act (LRA) introduced a new approach to the adjudication of labour disputes. This alternative process was intended to bring about the expeditious resolution of labour disputes which, by their nature, require speedy resolution. Any delay in the resolution of labour disputes undermines the primary object of the LRA. It is detrimental not only to the workers who may be without a source of income pending the resolution of the dispute but, ultimately, also to an employer who may have to reinstate workers after many years.’

- [47] This Court has a discretion, which must be exercised judicially on a consideration of the facts of each case and in essence, it is a matter of fairness to both sides. While the refusal to condone the late filing of the review application will result in the Applicant being denied the opportunity to pursue its case before this Court, the Respondent’s prejudice outweighs the Applicant’s prejudice. The Applicant’s dispute dates back as far as January 2021 and by March 2024 this matter is not one step closer to finality.

- [48] I have to endorse the aim of the LRA, namely to resolve labour disputes speedily and without delay. Granting condonation in a case like this would not be in the interest of justice as it would undermine the statutory purpose of expeditious dispute resolution.

- [49] On an objective conspectus of all the facts, the Applicant’s application for condonation falls hopelessly short of the mark. The Applicant did not discharge the onus to show good cause and to provide an acceptable and

¹⁵ [2015] ZACC 40; (2016) 37 ILJ 313 (CC) at para 1.

plausible explanation for the delay. For the above reasons, it will not be in the interests of justice that the application for condonation be granted.

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

Order

1. The application for condonation for the late filing of the review application is dismissed;
2. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms E van Staden from Legal Aid SA

For the First Respondent: Mr R Makoele from De Beer Makoele Inc Attorneys