



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS805/20

In the matter between:

HERMAN GROENEWALD

First Applicant

ZELDA GROENEWALD

Second Applicant

and

NATIONAL TRANSPORT MOVEMENT

Respondent

Heard: 26 October 2023

Delivered: 05 February 2024

JUDGMENT

ADAMS, AJ

[1] The Respondent has sought condonation in this matter for the late filing of its statement of defence.

- [2] In *Num v Council for Mineral Technology*¹, the Labour Appeal Court (LAC) confirmed the approach in *Melane v Santam Insurance Co Limited*² as the approach to adopt when considering condonation applications. That is, the factors to be considered are the degree of lateness, the explanation for the delay, the prospects of success and the prejudice to both parties.
- [3] It set out a further principle that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial.³ This principle was confirmed in *National Education Health and Allied Workers Union on behalf of Mofokeng and others v Charlotte Theron Children's Home*⁴, where the LAC held that, without a reasonable and acceptable explanation for a delay, the prospects of success are immaterial.
- [4] In summary: the Courts have endorsed the principle that where there is a delay with no reasonable, satisfactory, and acceptable explanation for the 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. The expeditious resolution of labour disputes is a fundamental consideration.
- [5] In *Grootboom v National Prosecuting Authority and Another*⁵ (*Grootboom*), the Constitutional Court held that the standard for considering an application for condonation is the interests of justice. It found that the concept of “*the interests of justice*” is so elastic that it is not capable of precise definition but 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.’

¹ [1998] ZALAC 22; [1999] 3 BLLR 209 (LAC).

² 1962 (4) SA 531 (A) at 532C - F.

³ *ibid* fn 1 at para 10.

⁴ [2004] ZALAC 9; (2004) 25 ILJ 2195 (LAC) at para 23.

⁵ [2013] ZACC 37; 2014 (1) BCLR 65 (CC) at para 22.

- [6] The Constitutional Court held that the ultimate determination of what is in the interests of justice must reflect due regard to all of the relevant factors, with the particular circumstances of each case determining which of them are relevant.⁶
- [7] It re-emphasised that condonation cannot be had for the mere asking and that a party seeking condonation must make out a case entitling it to the Court's indulgence, that is, it must give a full explanation for the non-compliance with the rules and the explanation must be reasonable enough to excuse the default.⁷

The extent of the delay

- [8] The Respondent's founding affidavit does not set out when the statement of defence was delivered in terms of the Rules of this Court⁸ (i.e. served and filed). This information, crucial to the Respondent's application for condonation, should have been contained in the founding affidavit. All that is set out in the founding affidavit is *"the Respondent had put its Respondents' Statement of Defence together with its Answering Affidavit to the Applicants condonation application into the Court file"*.
- [9] I attempted to ascertain from the Respondent's representative, Mr Mphahlele, during argument, what the period of delay was and how late the statement of defence had been filed, however, no proper response was given. In fact, at one stage the Respondent's representative informed me that the statement of defence was not filed late. If this were the case, however, no condonation application would have been necessary and I thus cannot expect this contention made on behalf of the Respondent.
- [10] The Applicants have contended that the Respondent's statement of defence was filed at Court on 28 November 2022. When one considers the Respondent's statement of defence attached to the application for condonation,

⁶ *Grootboom* at para 22.

⁷ *Grootboom* at para 23.

⁸ GN 1665 of 1996 Rules for the Conduct of Proceedings of Proceedings in the Labour Court.

the Labour Court stamp depicts a date of 28 November 2022 as the date that the statement of defence was filed.

[11] I therefore accept that the Respondent's statement of defence was only filed with this Court on 28 November 2022.

[12] The following time periods are therefore imperative in ascertaining the length of the delay in this regard:

12.1 the Respondent served its notice of opposition on the Applicant on 21 December 2020;

12.2 the period of 10 court days from service of the referral in accordance with Rule 6(3)(c) of the Labour Court Rules would have therefore lapsed on 4 January 2021;

12.3 the Respondent did not file its statement of defence on 4 January 2021 but, instead, only on 24 November 2022.

[13] Accordingly, I accept that the statement of defence was filed one year and eleven months late, in terms of days, 689 calendar days and 490 court days.

[14] Insofar as the actual condonation application is concerned, same was brought by the Respondent on 25 November 2022. This is also a period of approximately one year and eleven months late.

[15] I find the delay to be excessive.

The explanation for the delay

[16] It would seem from the application delivered by the Respondent that the Respondent is of the view that condonation is simply there for the taking and that it was not required to set out adequate (let alone any) grounds in demonstrating good cause for condonation to be granted.

[17] I state this as the Respondent's application is materially lacking insofar as the necessary averments are concerned, with a founding affidavit comprising of a

mere three pages and lip service only being paid to the requirements, with hardly any factual allegations having been made by the Respondent in support of the relief claimed.

- [18] The Respondent simply contends that the reason for lateness was that “*the Respondent complied and filed the said Respondent’s Statement of Defence as soon as the papers from the Applicants representatives were received*”.
- [19] The Respondent does not deal with the order of this Court dated 14 October 2022 (which I deal with hereunder), it does not set out an explanation for the delay in filing its statement of defence, it does not set out an explanation for the delay in bringing the condonation application.
- [20] I cannot accept the Respondent’s contentions insofar as its reasons for the delay are concerned, namely that it filed its statement of defence as soon as the papers from the Applicants’ representatives were received. There is nothing before this Court to demonstrate this fact when one considers what has been set out above.
- [21] In the matter of *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and others*⁹, the Court 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.’

⁹ [2009] ZALC 137; (2010) 31 ILJ 1413 (LC) at para 13.

- [22] It is trite that there exists a particular requirement of expedition when it comes to the prosecution of employment law disputes, and any condonation application must be considered in that context.¹⁰
- [23] Dealing with the issue of the delay *per se*, the longer the delay, the worse it is for an applicant seeking condonation. An excessive delay could in itself be seen to be faced with the issue of good cause. As a general benchmark, delays in excess of two months after the expiry of the time limit can generally be described to start becoming excessive.¹¹
- [24] What is also trite is that where condonation is needed, it is essential that condonation be applied for either immediately upon or at least as expeditiously as possible after the applicant party becomes aware or reasonably should have become aware that condonation was required.¹²
- [25] The failure to expeditiously apply for condonation and the resulting delay would be considered to add to the length of the delay, and the failure to properly justify and explain this further delay may of its also lead to the refusal of a condonation.¹³
- [26] In the matter of *SA Commercial Catering and Allied Workers Union on behalf of Members v Entertainment Logistics Service (A division of Gallo Africa Ltd)*¹⁴, it was held that:

‘It is incumbent on a party to apply for Condonation as soon as possible upon becoming aware of the default. This point has been repeatedly emphasized by the Supreme Court of Appeal... an approach strongly endorsed by the Labour Appeal Court. Indeed the LAC has held that an Application for Condonation ought to be launched on the same day that the default is discovered...’

¹⁰ *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (a division of Zimco Group) and Others* [2014] ZALCJHB 115; (2015) 36 ILJ 232 (LC) at para 25.

¹¹ *Van Dyk v Autonet (a division of Transnet Ltd)* (2000) 21 ILJ 2484 (LC) at para 12.

¹² *A Hardrodt (SA) (Pty) Ltd v Behardien and others* (2002) 23 ILJ 1229 (LAC) at para 18.

¹³ *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281C - F.

¹⁴ [2010] ZALC 126; (2011) 32 ILJ 410 (LC) at para 12.

[27] In the matter of *National Union of Metalworkers of SA on behalf of Nkuna and others v Wilson Drills-Bore (Pty) Ltd t/a A&G Electrical*¹⁵, the Courts held as follows:

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

[28] When one considers the Respondent’s application, there is absolutely no explanation for the delay in filing its statement of defence.

[29] During argument of the matter, Mr Mphahlele attempted to argue that because the Applicants had sought condonation for the late filing of their statement of claim, and that same was granted, the Respondent should be granted condonation too. This is not the test applied by this Court, nor is condonation merely there for the taking, as per the authorities already addressed above.

[30] What is further noteworthy is that the Respondent did not address the basis for only bringing the condonation application at the stage that it did. This is also fatal to its case.

[31] In fact, this Court made an order on 14 October 2022, in the following terms:

- ‘1. the late referral of the matter to the Labour is condoned (with reference to the Applicants’ statement of claim);
2. the Respondent is ordered to deliver a Statement of Opposition together with an explanation for the late delivery thereof within ten days of the date of this Order;
3. Costs are reserved.’

¹⁵ (2007) 28 ILJ 2030 (LC) at para 16.

- [32] Even with an order having been granted by this Court, the Respondent ignored same, did not file its statement of defence within ten days as required by the order, and failed to address the reason for the delay despite having been ordered to do so.
- [33] This in itself is demonstrative of the Respondent's wilfulness in this matter.
- [34] It is evident that the explanation tendered for the period of delay is bereft of any detail and lacks particularity. Material periods of the delay have remained completely unexplained, and the Respondent has tendered no version as to what happened during those periods, especially when one considers the delay insofar as the bringing of the condonation application was concerned.
- [35] The Respondent 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. The Respondent failed dismally to do that, and the explanation tendered is inadequate and far from compelling, convincing, or comprehensive and does not place this Court in any position to understand the reasons for the delay.

Prospect of success

- [36] Having found that the delay is inordinate, and the explanation tendered not compelling or adequate, it leaves the issue of prospects of success. In light of the authorities referred to *supra* and given the fact that the Respondent has not provided a comprehensive, compelling, or convincing explanation for the material period of delay, the prospects of success are immaterial and thus need not be considered.

Prejudice

- [37] The Respondent has simply contended, insofar as prejudice is concerned, that "*the Respondent would suffer prejudice, and be unable to prove to the above Court that its decision had no malice.*"

[38] The Applicants have contended that they will be prejudiced as they were dismissed without any fair procedure having been followed and are being prejudiced by the further delay in the finalization of the matter due to the inordinate delay by the Respondent and the “*present [fictitious] Application which has no merit at all*”.

[39] The refusal to condone the late filing of the rescission application will have the result that the Respondent will be denied the opportunity to pursue its defence case before Court. However, it is evident that the Respondent has not pursued this matter diligently and tendered no reasonable explanation as to why it waited until November 2022 to file both its statement of defence and condonation application, when that should have been done much earlier.

[40] In the matter of *Grootboom*¹⁶, the Constitutional Court 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.’

[41] Perhaps, most importantly, I am required to endorse the aim of the Labour Relations Act¹⁷, namely, to resolve disputes speedily and without delay. I do not believe that granting condonation in a case like this would be in the interest of justice as it would undermine the statutory purpose of expeditious dispute resolution.

[42] The Respondent has not discharged the onus to show good cause and to provide an acceptable and plausible explanation for the delay. For reasons

¹⁶ *Grootboom supra* at para 51.

¹⁷ Act 66 of 1995, as amended.

supra, it will not be in the interests of justice that the application for condonation be granted.

[43] At the hearing of the matter, the Applicants requested that I grant default judgment in their favour in the matter in the event that condonation is refused. Due to the fact that it was only the condonation application that had been set down before me, the necessary processes in accordance with the Rules and Directives of this Court need to be followed by the Applicants in terms of their default judgment application as I am unable to make a ruling on such application with it not being the application that was before me.

[44] In the premise, the following order is made:

Order

- 1 The condonation for the late filing of the Respondent's statement of defence is refused and the Respondent's application for condonation is dismissed;
- 2 There is no order as to costs.

R Adams

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicants:

Adv R Venter

Instructed by:

Nel & De Wet Attorneys

For the respondent:

Ephraim Mphahlele (Union official)

Instructed by: