



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case No: JA35/24

In the matter between:

GOVERNMENT PRINTING WORKS

Appellant

and

PUBLIC SERVICE ASSOCIATION

First Respondent

JOHN MOJANANGA

Second Respondent

Heard: 6 November 2024

Delivered: 28 November 2024

Coram: Nkutha-Nkontwana JA, Sutherland AJA, Govindjee AJA

JUDGMENT

GOVINDJEE, AJA

Introduction

[1] Labour disputes, by their very nature, require speedy resolution.¹ Delays undermine the primary object of legislation designed to afford expeditious outcomes to employers and employees. An excessive delay in responding to a statement of case may also induce a reasonable belief that the claim has been accepted.² Adherence to the rules on the part of both parties contributes to the attainment of the broader objectives of the Labour Relations Act³ (LRA) so that prescribed time periods are significant,⁴ but they are not ironclad. A court has an inherent discretion to condone non-compliance with prescribed time-limits in the interests of justice, provided that the applicant has shown sufficient cause to obtain the indulgence.⁵

[2] There are two issues to be determined in this appeal, which is with the leave of the Labour Court. Firstly, whether the appeal ought to be re-instated, given that both the notice of appeal and the record of appeal were filed late. Secondly, whether this court should interfere with the Labour Court's decision to refuse condonation for the late filing of the appellant's response to the statement of case.

Reinstatement of the appeal

[3] Every appellant who has a right of appeal must deliver a notice of appeal within 15 days after leave to appeal has been granted.⁶ After an appeal has been noted, the appellant must serve a copy of the record of the proceedings in the Labour Court on each respondent and file four copies of the record with the registrar.⁷ The record must be delivered within 60 days of the date of the order

¹ *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 CC para 63.

² *Toyota SA Motors (Pty) Ltd v Commissioner for Conciliation, Mediation and Arbitration and others* (2016) 37 ILJ 313 (CC) (*Toyota*) para 45.

³ No. 66 of 1995.

⁴ *Toyota* above n 2 para 1.

⁵ *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC); (2014) 35 ILJ 121 (CC); [2013] ZACC 37; 2014 (1) BCLR 65 (CC) (*Grootboom*) para 23.

⁶ Rule 5(1) of the Rules for the conduct of Proceedings in the Labour Appeal Court (GN 1666 of 14 October 1996) (the Rules). The rule provides that a court may allow a longer period if good cause is shown. The newly gazette rules only commenced and came into operation on 17 July 2024 and are accordingly inapplicable: see Publication of commencement date for the Labour Court Rules and Labour Appeal Court Rules as 17 July 2024 (GN 5038 of 12 July 2024).

⁷ Rule 5(7).

granting leave to appeal.⁸ If the appellant fails to lodge the record within this period, and unless an extension of time has been sought, the appeal is deemed to have been withdrawn.⁹

[4] The Labour Court dismissed the appellant's application for condonation but granted leave to appeal against that decision on 13 December 2023. A notice of appeal was filed on 4 April 2024, some 60 days late. The appeal record was filed on 6 May 2024, 36 days late.

[5] The delay was caused as a result of the termination of the mandate of the attorneys previously representing the appellant. The file was transferred to the state attorney on 14 December 2023 and allocated to an employee (Ms Sithebe) who was on leave until 17 January 2024. For reasons unknown, the instruction only came to Ms Sithebe's attention on 29 January 2024. An instruction to brief counsel was received on 1 February 2024. Appointment of counsel was approved on 13 February 2024 and a consultation arranged on 22 February 2024. Prior to filing a notice of appeal, counsel advised that the court order granting leave needed to be uplifted. The judgment granting leave to appeal was received on 28 February 2024. Despite various attempts, Ms Sithebe was only able to obtain a court order on 12 March 2024. Notice of appeal was served on the respondents' attorneys via email that day, but acknowledgement of receipt was only received on 25 March 2024. Due to the Easter period, the notice of appeal was only filed on 4 April 2024, on which date instructions were given to transcribers to prepare the appeal record. That process was only completed early in May 2024.

[6] This court may, if sufficient cause is shown, excuse a party from compliance with any of the court's rules.¹⁰ This is an unfettered discretionary power, to be exercised where the party seeking condonation has made out a case to justify the court's indulgence in the interests of justice.¹¹

⁸ Rule 5(8).

⁹ Rule 5(17).

¹⁰ Rule 12(1).

¹¹ Section 174(b) of the LRA; *Grootboom* above n 5 paras 22–23 and 51; *Universal Product Network (Pty) Ltd v Mabaso and Others* (2006) 27 ILJ 991 (LAC) (*Mabaso*) paras 1–2.

[7] The standard to be attained is imprecise, requiring consideration of a range of well-known factors.¹² Relevant factors are to be determined by the circumstances and, generally, to be approached collectively.¹³ The court must be fair to both sides and must also consider the broader objects of the LRA, including the importance of expeditious resolution of employment disputes.¹⁴

[8] Whenever an appellant realises that they have not complied with a rule, they should apply for condonation without delay.¹⁵ Bearing in mind the broader objectives of the LRA, including expeditious resolution of disputes, the delay in delivering the notice of appeal is particularly lengthy, being four times in excess of what is permitted. The explanation for both this delay and the late delivery of the appeal record is reasonable, covering much of the period in question. Importantly, little of the reason for the delay may be attributed to the appellant.¹⁶ There is minimal prejudice to the respondents and, for reasons that will become apparent, there are particularly good prospects of success in respect of a matter with some broader level of importance. Considering all the relevant factors, the appellant has made out a case for the indulgence sought. As a result, it is appropriate for this court to exercise its discretion to excuse the appellant for non-compliance with the time periods applicable to the delivery of the notice of appeal and record.

[9] The appeal is reinstated in the interests of justice. Considering the circumstances, including the indulgence sought by the appellant and the reasonableness of the opposition to the application, it is appropriate that there be no order as to costs.

¹² *Grootboom* above n 5 para 22: this 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.

¹³ *Steenkamp and Others v Edcon Limited* [2019] ZACC 17; 2019 (7) BCLR 826 (CC); (2019) 40 ILJ 1731 (CC); [2019] 11 BLLR 1189 (CC) (*Steenkamp*) paras 36–37.

¹⁴ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) (*Melane*) at 532C; *Grootboom* above n 5 para 22; *Steenkamp* above n 13 para 38.

¹⁵ *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449G.

¹⁶ *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) (*Council for Mineral Technology*) para 17; Cf *Waverley Blankets Ltd v Ndima and others* (1999) 20 ILJ 2564 (LAC); [1999] 11 BLLR 1143 (LAC) at 1145I–J.

The late response

[10] The second respondent (Mr Mojananga) was employed by the appellant as a chief security officer before being moved to the position of chief administration officer. He claims that this change was caused by utterances of the Minister of Home Affairs, amounting to harassment and discrimination on arbitrary grounds. The reason proffered by the appellant was that Mr Mojananga was not registered with the Private Security Industry Regulatory Authority (PSIRA) and was therefore unauthorised to render security services.

[11] Mr Mojananga instituted proceedings against the appellant, in terms of section 6 of the Employment Equity Act,¹⁷ on 5 July 2022. The appellant's statement of response was only filed on 15 November 2022, coupled with an application for condonation, which was opposed. The response was 84 days late.

[12] In dismissing the application for condonation, the Labour Court concluded as follows:

'Despite the excessive delay in the delivery of the response to the statement of claim and what the first respondent's counsel appeared to concede is an unreasonable explanation for the delay, it was argued on behalf of the first respondent that its prospects of success in opposing the applicant's claim are so overwhelming that this militates for the granting of condonation ... In my view, the explanation given for the delay in filing the response is entirely unreasonable and unacceptable. Not only is it vague and lacking in detail, it is also not a full explanation for every period of delay. In the circumstances, the first respondent's prospects of success are immaterial regardless of how good they may be.'

[13] The appellant relies on various authorities in support of its contention that the Labour Court erred in its approach. In essence, it argues that a flexible approach is

¹⁷ No. 55 of 1998.

warranted, particularly given that Mr Mojananga had approached the court with unclean hands to pursue a meritless claim. Mr Mojananga emphasises the excessive period of delay and absence of a proper explanation for the entire period in opposing the appeal.

[14] The appeal raises various matters that are frequently argued before the courts. What is the nature of the discretion exercised by the Labour Court in deciding whether or not to grant condonation? Under what circumstances will an appeal court interfere with the exercise of the discretion? And when is it permissible for a court deciding condonation to avoid any consideration of the prospects of success, based on the extent of delay and inadequacy of the explanation?

The Labour Court's discretion: 'true' or 'loose'?

[15] The standard of interference to be applied in this appeal depends on the nature of the discretion exercised by the Labour Court.¹⁸ As *Trencon Construction (Pty) Ltd v Industrial Development Corporation of SA Ltd and Another (Trencon)* explains, two distinct types of discretion emerged during the middle of the 20th century, and are now deeply entrenched in the law regulating the link between appeal courts and courts of first instance.¹⁹ Firstly, a discretion in the 'true' sense is such that any one of a number of equally permissible courses is open to the lower court. That court makes an election, for example in respect of whether to grant a postponement or costs, and whichever option is selected is entirely permissible and can never be said to be 'wrong'.²⁰ Secondly, a 'loose' discretion, for example whether or not to grant an interim interdict, does not necessarily involve a choice

¹⁸ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of SA Ltd and another* 2015 (5) SA 245 (CC); 2015 (10 BCLR 1199 (CC) (*Trencon*) para 83. See: *SA Football Players Union and Others v Free State Stars Football Club (Pty) Ltd* (2017) 38 ILJ 1111 (LAC) (*SA Football Players Union*) para 19

¹⁹ *Trencon* above n 18 fn 66, para 83. This is not to suggest that every power fits into *Trencon*'s binary categorisation: see, for example, *De Beers Marine (Pty) Ltd v Harry Dilley (Pty) Ltd* [2023] ZASCA 110 paras 30–31.

²⁰ *Trencon* above n 18 paras 84–85.

between equally permissible options. The court is simply at liberty to have regard to a number of '*disparate and incommensurable features*' in coming to its decision.²¹

[16] The importance of the nature of the Labour Court's discretion is that it impacts directly on the standard of interference to be applied by this court. In the case of a '*true*' discretion, interference is not permitted merely because the appellate court would itself have reached a different outcome or favours a different option within a range of permissible decisions.²² Interference would only be warranted in '*narrow*' circumstances, if the court a quo failed to exercise a judicial discretion, a matter addressed in detail below. Where the lower court's discretion is '*loose*', interference is permissible on a broader basis, whenever the appellate court decides its own outcome is more appropriate based on the various factors it has considered. This is typically because the appellate court is in an equally good position as the court of first instance to assess the matter.

[17] A note on the choice of language. It is arguably the labels that are frequently attached to these two kinds of discretion that have caused some confusion. As the Constitutional Court has noted, the reference is often to a '*strict / narrow / true*' discretion, on the one hand, as opposed to a discretion in the '*broad / wide / loose*' sense, on the other.²³ The difficulty with such terminology is that a '*true*' discretion is (generally) found where the lower court has the benefit of a *wide* range of equally permissible options open to it.²⁴ This is not to be equated with the consideration of various factors prior to making a decision, or with a '*broad / wide / loose*' discretion.²⁵ There is therefore good reason, at least for present purposes, to follow *Trencon* and

²¹ *Trencon* above n 18 para 86, relying on *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) (*Knox D'Arcy*) at 3611.

²² *Florence v Government of the Republic of SA* 2014 (6) SA 456 (CC); [2014] ZACC 22; 2014 (10) BCLR 1137 (CC) (*Florence*) para 113: such appellate restraint preserves judicial comity, fosters certainty in the application of the law and favours finality in judicial decision-making.

²³ *Trencon* above n 18 fn 65. In *S v Basson* [2005] ZACC 10; 2005 (12) BCLR 1192 (CC); 2007 (3) SA 582 (CC); 2007 (1) SACR 566 (CC) (*Basson*) para 110, reference is made to a '*strong*' discretion, synonymous with a '*true*' discretion. On the incorrect naming of a '*narrow*' discretion, see *Toyota SA Marketing v Shmeizer* [2002] 12 BLLR 1164 (LAC) (*Shmeizer*) para 13.

²⁴ *Trencon* above n 18 para 85; *Florence* above n 22 para 113.

²⁵ *Commissioner for The South African Revenue Service v Nyhonyha and Others* [2023] ZASCA 69; 2023 (6) SA 145 (SCA) para 19.

utilise only the ‘true’ and ‘loose’ descriptors, or at least to avoid reference to a ‘wide’ discretion.

[18] This court has previously held that the discretion whether to condone a late referral of a dispute is ‘loose’ because of the variety of relevant considerations.²⁶ The minority judgment of Zondo J in *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* is along the same lines,²⁷ as are various decisions of the SCA dealing with condonation.²⁸ The result of such an interpretation is that the court on appeal is assumed to be in as good a position as the court a quo to decide whether or not good cause has been shown for granting condonation. As such, it may substitute its preferred decision for that of the court a quo if its own conclusion is considered more appropriate.²⁹ The powers of this court on appeal, as expressed in the LRA, have also been held to favour this interpretation.³⁰

[19] The contrary approach has now been confirmed by the Constitutional Court in *Steenkamp and Others v Edcon Ltd (Steenkamp)*. The unanimous conclusion was that the Labour Court exercised a ‘true’ discretion, not a ‘loose’ discretion,³¹ when deciding whether to grant condonation:³²

‘[30] An indicator of a discretion being “true” is when, in making the decision, “it is possible that there could be a legitimate difference of opinion as to the

²⁶ *Motloi v SA Local Government Association* (2006) 27 ILJ 982 (LAC) (*Motloi*) para 16; *Nature’s Choice Products (Pty) Ltd v Food and Allied Workers’ Union and Others* [2014] 5 BLLR 434 (LAC) para 11; *Mndebele and Others v Xstrata SA (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant)* (2016) 37 ILJ 2610 (LAC) para 4.

²⁷ *Toyota* above n 2 paras 77–79. The majority judgment also appeared to apply the standard of correctness in assessing the Labour Court’s dismissal of the review application due to excessive delay and the absence of merits: para 50.

²⁸ See, for example, *Matoto v Free State Gambling and Liquor Authority and Others* [2018] ZASCA 110 para 8.

²⁹ *Motloi* above n 26 para 16; *Shepstone and Wylie and Others v Geyser* NO 1998 (3) SA 1036 (SCA) at 1044H–1045F.

³⁰ See, for example, *Shmeizer* above n 23 para 14.

³¹ *Knox D’Arcy* above n 21 at 361H–J: the statement that a court has a wide discretion means no more than that the court is entitled to have regard to several disparate and incommensurable features in coming to a decision.

³² *Steenkamp* above n 13 paras 29 – 31, 67 (references omitted); *Florence* above n 22 para 113. Also see *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) (*Khumalo*) para 40.

proper outcome of the exercise of the discretion". It is permissible for the decision maker to choose any of the options available before them. The discretion is thus "true" where the lower court "has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible".

[31] The decision to grant condonation is either yes or no: there is no wide range of available options for the decision maker as envisaged in *Trencon*. A court can either grant or deny the condonation. But the election of either option is equally permissible and is something that reasonable judges could disagree on. To grant condonation is an exercise of judicial discretion that is only fettered by being judicially explained...

[67] The Labour Court exercised a true discretion when granting condonation...'

Interference with the exercise of a 'true' discretion

[20] It is therefore accepted that the Labour Court is best placed to consider and assess the various factors and applicable legal principles.³³ Whether or not to grant condonation is discretionary, to be exercised judicially upon a consideration of all the facts.³⁴ The consequence is that this court's powers of interference with the Labour Court's refusal of an application for condonation are limited.³⁵ The decision of the Labour Court is the exercise of a '*strict or narrow discretion in its true sense*',³⁶ so that restraint must be shown before this court substitutes the decision. It is impermissible to set aside the decision of the Labour Court merely because this court would itself, on the facts of the matter before the Labour Court, have come to a

³³ *Giddey NO v JC Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) (*Giddey NO*) para 22.

³⁴ *Melane* above n 14 at 532C. This court has frequently endorsed the approach in *Melane* in determining whether a party seeking condonation has satisfied the requirement of good cause: see, for example, *Chetty v Baker McKenzie* (2022) 43 ILJ 1599 (LAC) (*Chetty*) para 9.

³⁵ *Basson* above n 23 para 110; *National Education Health and Allied Workers Union and Others v Metrofile (Pty) Ltd and Others* (2021) 42 ILJ 1914 (LAC) (*Metrofile*) para 10. Cf *Toyota* above n 2 para 50, the court seemingly assessing the correctness of the Labour Court's decision to dismiss a review application based on excessive delay.

³⁶ *SA Football Players Union* above n 18 para 20.

different conclusion.³⁷ Whether the decision is correct or not is also not the question.³⁸ *Steenkamp* borrowed from the decision in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others (National Coalition)* to explain the point:³⁹

‘[An appellate court] can only interfere where the discretion was not exercised judicially or where it had been influenced by wrong facts or principles or where the decision reached is one which “could not reasonably have been made by a court properly directing itself to all the relevant facts and principles”.’

[21] Although it appears as if three separate basis for interference are permitted, consideration of the authorities relied upon in *National Coalition* permit of a different reading, defining the very notion of ‘judicial discretion’ to encapsulate each of the other aspects mentioned in *Steenkamp*, along with additional considerations.⁴⁰ It is perhaps useful to list each of the dimensions of ‘a judicial discretion’ emanating from these authorities, given that they informed the judgments in *National Coalition* and *Steenkamp*:⁴¹

21.1 The decision must be based on substantial reasons, and not be capricious or influenced by wrong principles or material misdirection (also in respect of the facts);

21.2 The result should not be one that could not reasonably have been made by a court properly directing itself to all the relevant facts and principles;

³⁷ *Mphela and Others v Haakdoornbult Boerdery CC and Others* [2008] ZACC 5; 2008 (4) SA 488 (CC); 2008 (4) BCLR 675 (CC) para 26.

³⁸ *Giddey NO* above n 33 para 21.

³⁹ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 para 11, dealing with the discretion of an appeal court to set aside a lower court’s decision to grant or refuse a postponement, as cited in *Steenkamp* para 67. Cf *Giddey NO* above n 33 para 22 and *Notyawa v Makana Municipality and Others* (2020) 41 ILJ 1069 (CC): the exercise of the discretion will not be judicial if it is based on incorrect facts or wrong principles of law. If none of these two grounds is established, it cannot be said that the exercise of discretion was not judicial.

⁴⁰ See, for example, *Chetty* above n 34 para 7; *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd and Another* 1989 (4) SA 31 (T) at 40D. Also see *Metrofile* above n 35 para 10.

⁴¹ *R v Zackey* 1945 AD 505 at 511–2; *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 398–9; *Myburgh Transport v Botha t/a S A Truck Bodies* 1991 (3) SA 310 (NmSC) at 314H–315A; *Prinsloo v Saaiman* 1984 (2) SA 56 (O); *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A) at 152.

21.3 The lower court should bring their unbiased, honest judgment to bear upon the matter, and make an order that court considers to be fair and just.

[22] If none of these grounds are established, it cannot be said that the exercise of the discretion was not judicial and, in those circumstances, the claim for interference on appeal must fail.⁴² The rationale for interference is to ensure a lawful and just outcome, the appeal court imposing fidelity to the law.⁴³ A court may not interfere on appeal '*unless it is clear that the choice the court [a quo] has preferred is at odds with the law*'.⁴⁴

Judicial discretion and the prospects of success

[23] Against that backdrop, was the Labour Court entitled to completely ignore any consideration of the prospects of success in refusing condonation?

[24] This court has previously noted the principle that the prospects of success are immaterial without a reasonable and acceptable explanation for the delay (the *Western Holdings* principle).⁴⁵ This applies even where the blame lies solely with the legal practitioner.⁴⁶

[25] Despite these sentiments, the failure to provide a proper explanation for a delay has not been an absolute bar to condonation.⁴⁷ A measure of flexibility has

⁴² *Metrofile* above n 35 para 10.

⁴³ *Florence* above n 22 para 114.

⁴⁴ *Florence* above n 22 para 113.

⁴⁵ *National Union of Mineworkers and Others v Western Holdings Gold Mine* (1994) 15 ILJ 610 (LAC) at 613E, relying on the test for rescission in *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 768A–C; Also see *Council for Mineral Technology* above n 16 paras 10, 18: the explanation for delay must be '*sufficiently cogent*' to warrant a consideration of the prospects of success. See, for example, *National Education Health and Allied Workers Union obo Mofokeng and Others v Charlotte Theron Children's Home* (2004) 25 ILJ 2195 (LAC) (*Mofokeng*) para 23 and *Chetty* above n 34 para 10.

⁴⁶ *Saloojee and another v Minister of Community Development* 1965 (2) SA 135 (A) at 141C–E; *Tshivhase Royal Council and Another v Tshivhase and Another*; *Tshivhase and Another v Tshivhase and Another* 1992 (4) SA 852 (A); [1992] ZASCA 185 at 859E–F. Cf *Chetty v Law Society, Transvaal* above n 45: although the court decided that it was, strictly speaking, unnecessary to make consider the merits due to an unsatisfactory and unacceptable explanation for default, it referred to certain aspects in the interests of fairness to the appellant: at 768C–D.

⁴⁷ *Shmeizer* above n 23 para 15; *Mofokeng* above n 45 paras 24 and following; *SA Post Office Ltd v Commissioner for Conciliation, Mediation and Arbitration and others* (2011) 32 ILJ 2442 (LAC) (*SA Post Office Ltd*) para 20.

been applied where required in the interests of justice. In *National Education Health and Allied Workers Union obo Mofokeng and Others v Charlotte Theron Children's Home*, for example, it was held that the interests of justice demanded that the case be heard given that the policy in question (namely, that only white housemothers could supervise white children) was seemingly '*saturated with a racist outlook*' and was causing ongoing racism.⁴⁸ The circumstances were described as exceptional, so as to justify less focus than normal on an unexplained delay.⁴⁹ In *Toyota Marketing v Shmeizer*, a case involving alleged gender discrimination, the proper administration of justice compelled the granting of condonation because the case had been pleaded in a fashion that made it difficult to formulate a fair and effective order. Barring that issue, the court was minded to refuse condonation purely based on the inadequacy of the explanation for delay.⁵⁰

[26] Judicial discretion involves a value judgment based on the facts of the case.⁵¹ The Labour Court must be fair to both sides.⁵² It must also consider the broader objects of the LRA, including the importance of expeditious resolution of employment disputes.⁵³ The factors that must be considered in determining whether or not it is in the interests of justice to grant condonation, and the appropriate approach, have now been resolved as follows:⁵⁴

'[22] ... [T]he concept "interests of justice" ... 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

⁴⁸ *Mofokeng* above n 45 para 25.

⁴⁹ *Mofokeng* above n 45 para 26.

⁵⁰ *Shmeizer* above n 23 para 16.

⁵¹ *Grootboom* above n 5 paras 20, 35; *Giddey NO* above n 33 para 20.

⁵² *Ibid.*

⁵³ *Melane* above n 14 at 532C; *Grootboom* above n 5 para 22; *Steenkamp* above n 13 para 38. The LRA gives effect to s 23 of the Constitution, which guarantees the right to fair labour practices for everyone. Any person applying the LRA must interpret its provisions (a) to give effect to its primary objects; (b) in compliance with the Constitution; and (c) in compliance with the public international law obligations of the country. One of the primary objects of the LRA is to promote the effective resolution of labour disputes.

⁵⁴ *Steenkamp* above n 13 para 36, quoting from both the majority and minority judgments in *Grootboom*, including the earlier decision's reliance *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (5) BCLR 465; 2000 (2) SA 837 (CC) (*Brummer*) para 3 and *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC); [2007] ZACC 24; 2008 (4) BCLR 442 (CC) (*Van Wyk*) para 20.

explanation for the delay; the importance of the issue...; and the prospects of success. It is crucial to reiterate 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.

[23] 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. ...

[51] 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.'

[27] This description evokes a balancing approach, characterised by proportionality and flexibility. The general principle remains that the various factors are to be considered collectively, and not mechanically, in determining the interests of justice.⁵⁵ While no single factor is ever likely to be decisive, the prospects of success in favour of the party seeking condonation is usually an important factor to be considered.⁵⁶ Only in exceptional circumstances would a party's disregard for delay and delay in pursuing a matter justify completely overlooking the merits of the

⁵⁵ *Grootboom* above n 5 para 51.

⁵⁶ *Brummer* above n 54 para 3, as cited in *Grootboom* above n 5 para 50.

case.⁵⁷ The *Western Holdings* principle is, in a sense, less exacting and now appears to have been overtaken by the approach of the Constitutional Court. In the words of Zondo J, 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' (own emphasis).⁵⁸ The prospects remain relevant, it seems, even '*where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party*'.⁵⁹

[28] The endorsement of these sentiments in *Steenkamp* highlights its significance.⁶⁰ *Steenkamp*'s single-sentence synthesis of the majority and minority expressions in *Grootboom* appears to put the settled approach beyond doubt:⁶¹

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

[29] The effect is that an approach which completely ignores the prospects of success on the merits whenever there is an unsatisfactory, unreasonable or unacceptable explanation for a delay, requires explication.⁶² There does come a time in any case where a party's disregard for procedure and delay in pursuing a matter is so extensive that they will be penalised irrespective of the merits of the case.⁶³ The

⁵⁷ See the minority judgment of Wallis AJ in *Toyota* above n 2 para 191. Also see *Von Abo v President of the Republic of South Africa* [2009] ZACC 15; 2009 (10) BCLR 1052 (CC); 2009 (5) SA 345 (CC) para 19, considering both the explanation for the delay and the prospects of success. In *Van Wyk* above n 54, for example, the delay was inordinate and there was no explanation for a delay of 11 months. In *Grootboom*, although the periods of delay may not have been excessive, the legal representatives had inexcusably '*adopted a trend of flagrantly, if not recklessly, failing to comply with directions of the Court*' for which there was no explanation: above n 5 paras 23–27, 29. Cf *Council for Mineral Technology* above n 16 para 10.

⁵⁸ *Grootboom* above n 5 para 51, as cited in *Steenkamp* above n 13 para 36. Also see *SA Post Office Ltd* above n 47 para 20.

⁵⁹ *Ibid.*

⁶⁰ Cf *CSARS v Van der Merwe* 2016 (1) SA 599 (SCA) (*Van der Merwe*) para 19.

⁶¹ *Steenkamp* above n 13 para 37. Also see *A Hardrodt (SA) (Pty) Ltd v Behardien and Others* (2002) 23 ILJ 1229 (LAC) para 5; *Govender and others v Commission for Conciliation, Mediation and Arbitration and others* (2024) 45 ILJ 1197 (LAC) (*Govender*) para 81.

⁶² See, for example, *National Union of Mineworkers and others v Western Holdings Gold Mine* (1994) 15 ILJ 610 (LAC) at 613D–E; *Council for Mineral Technology* above n 16 para 10; *Chetty* above n 34 paras 10, 29. In any event, that approach cannot be inflexible: *SA Post Office Ltd* above n 47 paras 22–23. Cf *Steenkamp* above n 13 para 41, in relation to condonation in the case of employer delays in disputes over individual dismissals.

⁶³ See the minority judgment of Wallis AJ in *Toyota* above n 2 para 191.

SCA has confirmed that an assessment of prospects of success is a relevant factor in the exercise of a discretion regarding condonation, 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*'.⁶⁴ It is in cases of '*flagrant*', '*gross*' breaches of the rules, especially in the absence of an acceptable explanation, that condonation may be refused regardless of the merits of the appeal, even where the blame lies solely with the legal representative.⁶⁵ In this court, it has been acknowledged that excellent prospects of success lead to the granting of condonation even when the delay is substantial and the explanation inadequate.⁶⁶

[30] Assuming that there remains some scope to ignore the prospects of success completely, doing so requires careful and deliberate analysis. Borrowing from the language supported in *Steenkamp*, it is first necessary to conclude, with due deliberation, that the delay is '*unacceptably excessive*'. Secondly, and accepting that the reference to '*no explanation for the delay*' is not to be construed literally, consideration must still be given to whether the explanation offered is tantamount to an absence of a full and reasonable (acceptable, sufficiently cogent) explanation for the delay. It should be clear, when considering the explanation offered, that the non-observance of the rule is '*flagrant and gross*'⁶⁷ before the inquiry into the prospects of success may be jettisoned.⁶⁸ Thirdly, and noting the usual reluctance to do so, the court must exercise a discretion to refuse condonation without any consideration of the prospects of success.⁶⁹

⁶⁴ *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) (*Rennie*) at 131H–J.

⁶⁵ *Ferreira v Ntshingila* 1990 (4) SA 271 (AD) (*Ferreira*) at 281J–282A;

⁶⁶ *Govender* above n 61 para 81. Also see *Moodley v Department of National Treasury and Others* (2017) 38 ILJ 1098 (LAC) para 52.

⁶⁷ *Van der Merwe* above n 60 para 19, *Ferreira* above n 65 at 281J–282A.

⁶⁸ *Van Wyk* above n 54 paras 22–34. In this matter the delay was inordinate, the explanation incomplete, 'superficial and unconvincing' and unreasonable and the main issue had become moot. Even though the prospects of success were said to 'pale into insignificance', so that 'not much weight' could be attached to this', given the extreme nature of the other circumstances, the court appears to have considered the prospects before deciding not to express any opinion on that dimension in refusing condonation.

⁶⁹ For example, *S v Sayed* 2018 (1) SACR 185 (SCA) para 23: although faced with a case where condonation 'could justifiably be refused irrespective of the merits of the appeal', the prospects of success were assessed by the SCA. Also see *Rennie* above n 64 at 132A–B.

[31] Considering these dimensions, it is evident that a court may only rarely avoid any assessment of the prospects of success based on the extent of delay and quality of the explanation. This accords with the broad approach to delay and condonation that has emerged in our jurisprudence, also in respect of legality and administrative reviews.⁷⁰ It is so that one of the primary objects of the LRA is to promote the effective resolution of labour disputes, so that procedural expeditiousness is desirable. The overall approach must nonetheless accord with the interests of justice, including fairness to both parties, in the context of an enquiry that naturally lends itself to a holistic consideration of interrelated factors to enable an objective value judgment.

[32] A response to a statement of claim must be delivered within 10 days of the date on which the statement of claim is delivered.⁷¹ In the present circumstances, the response was delivered 84 days late. The Labour Court cursorily determined that this period was excessive. Although there may be little guidance on what precisely constitutes an excessive delay in delivering a statement of response in the Labour Court, let alone what is '*unacceptably excessive*' or '*flagrant*', the court is expected to grapple carefully with each of the relevant considerations. If the delay is to be assessed as excessive to the point that the court contemplates ignoring the prospects of success completely, this needs to be properly justified. It is insufficient, and at odds with the law, to simply arrive at the conclusion as if the extent of the delay speaks for itself. The exercise of a judicial discretion requires the decision to be based on substantial reasons, not merely a set of conclusions attached to each relevant factor. That approach is whimsical and the antithesis of a court directing itself properly to each of the relevant facts and principles.

⁷⁰ Even if the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in the light of all the relevant circumstances), it remains open to the court to exercise its discretion to overlook the delay if factors including the prospects of success warrant this: *Gqwetha v Transkei Development Corporation Ltd and Others* [2005] ZASCA 51; 2006 (2) SA 603 (SCA) para 33, cited with approval in *Khumalo* above n 32 para 49 and *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) para 48.

⁷¹ Rule 3(c) of the Labour Court Rules. 'Deliver' is defined to mean service on the other parties and filing with the registrar of the Labour Court: Rule 1 of the Rules for the Conduct of Proceedings in the Labour Court (GN 1665 of 14 October 1996).

[33] The result is that the Labour Court failed to exercise a judicial discretion, so that this court is at liberty to interfere with the decision to refuse condonation following fresh consideration of the relevant factors in determining the interests of justice.

Should condonation be granted?

[34] Giving expression to a court's assessment of the extent of a period of delay is not a straightforward exercise. Simply noting the number of days in excess of that permitted by law presents an incomplete perspective. The position must be influenced, at least to some degree, by the period of time permitted for the step in question. To make the point, a delay of 84 days in lodging a claim for unfair discrimination is less serious than the same delay in advancing a claim for unfair dismissal and far less serious than the identical period of delay in responding to a statement of claim in the Labour Court. This is because each of these processes is time-bound to a different period.⁷² By way of example, a delay of even a few minutes might be considered excessive in responding to an emergency call, whereas a delay of some weeks in receipt of a shipment of goods might be considered par for the course. In the present circumstances, the appellant exceeded the permitted time-frame eight-fold. Bearing in mind the broader objectives of the LRA, including the emphasis on expeditious dispute resolution, this is certainly lengthy and probably excessive. Considering the realities of litigation involving the state as well as the typical periods of delay countenanced in labour disputes,⁷³ the delay falls short of being egregious in my view.

[35] That being the case, it remains necessary to consider all the remaining relevant factors, including the prospects of success.⁷⁴ The explanation for the delay is that the appellant was in the process of appointing a legal services panel at the time it received the statement of claim during July 2022. The panel was approved

⁷² *SA Post Office Ltd* above n 47 para 18.

⁷³ See, for example, C Bosch and A Myburgh 'Systematic delays and penalty reviews: *Govender and Others v CCMA and Others* (2024) 45 ILJ 1197 (LAC); (2024) 45 ILJ 1475.

⁷⁴ *Van Wyk* above n 54 para 22; *Grootboom* above n 5 para 23. Also see *Mabaso* above n 11 para 48 and *Govender* above n 61 paras 80–81.

during August and attorneys selected, briefed and consulted before the end of that month. The balance of the delay in responding to the statement of claim is effectively placed at the door of the appellant's legal representatives. To make matters worse, while the founding affidavit in the application for condonation was signed before a commissioner of oaths on 18 October 2022, the application and statement of response was only delivered almost a month later. There is no explanation whatsoever for this additional period of delay.

[36] The explanation offered for the delay between 19 July 2022, when the response was due, and the end of August, is reasonable and acceptable. It is the further delay of approximately 50 days that is problematic. The cause of this can only be attributed to the appellant's legal representatives, both in respect of the explained and unexplained portions. The hyperbolic suggestion that the explained part of the delay was necessitated by the voluminous nature of the papers is far-fetched and borders on an attempt to mislead the court. The filed response was a mere 13 pages and supported by a single attachment. The explanation offered fails to cover the entire period of delay. It is neither full nor reasonable.⁷⁵

[37] There is little on the papers to justify any comment on the effect of the delay on the respondents or the administration of justice. On the merits, the Private Security Industry Regulation Act, 2001⁷⁶ (the Act) establishes PSIRA to regulate the private security industry and to exercise effective control over the practice of the occupation of security service providers in the public and national interest.⁷⁷ Section 20(1)(a) provides as follows:

'No person, except a Security Service contemplated in section 199 of the Constitution, may in any manner render a security service for remuneration, reward, a fee or benefit, unless such a person is registered as a security service provider in terms of this Act.'

⁷⁵ *Grootboom* above n 5 para 23; Cf *South African National Roads Agency Ltd v City of Cape Town* [2016] ZASCA 122; 2017 (1) SA 468; [2016] 4 All SA 332 para 81.

⁷⁶ Act 56 of 2001.

⁷⁷ Section 3 of the Act.

[38] The Act binds the State.⁷⁸ Correspondence from PSIRA indicates that the appellant's premises were subject to an inspection and that two unregistered security officers, including Mr Mojananga, had been employed by the appellant in contravention of the Act. PSIRA had therefore corresponded with the appellant to rectify the situation. The result was Mr Mojananga's removal from his position as a chief security officer, the appellant relying on various binding rules contained in the Code of Conduct for Security Service Providers, 2003⁷⁹ to justify its conduct.

[39] The respondents offered only a bare denial in response.⁸⁰ Considering the Act, the basis for the claim and what appears on the papers, the only conclusion is that the appellant's prospects of success are excellent.⁸¹ It must also be accepted that the full ventilation of the dispute is important to the appellant and, given the legislative framework and the rationale behind the registration obligation, to broader society. The appellant's concern that it will be forced to contravene the Act by employing Mr Mojananga as a security service provider cannot be ignored.

[40] On balance, the appellant has succeeded in proving that there is good cause to grant the indulgence sought.⁸² The uncontested prospects of success, in particular, coupled with the importance of the issue, are such that these factors compensate for the excessive delay and complete inadequacy of part of the explanation. Considering the relevant factors in their totality, the interests of justice and fairness are best served by granting condonation.

[41] The following order is made:

Order

⁷⁸ Section 42 of the Act.

⁷⁹ GNR.305 of 28 February 2003.

⁸⁰ In opposing the application for condonation of the late filing of the notice of appeal and for the reinstatement of the appeal, Mr Mojananga suggested, without any substantiation or engagement with section 42 of the Act, that as a state employee he was not required to register with PSIRA.

⁸¹ *Khumalo* above n 32 para 68: the 'strength of the merits' is a factor to be considered; *Toyota* above n 2 para 74: the concept of 'excellent prospects' may be used in the sense that this may make up for what is considered a long delay or to make up for what may be seen as an inadequate explanation. Also see *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC) at 369E.

⁸² S 158(1)(f) of the Labour Relations Act, 1995 (Act 66 of 1995) (the LRA); *Grootboom* above n 5 para 22. Rule 12(3): Labour Court Rules.

1. The appeal is reinstated and upheld.
2. The order of the court below is set aside and substituted with the following:
 - ‘1. *The application for condonation for the late filing of the response to the statement of case is granted.*
 2. *There is no order as to costs.’*
 3. There is no order as to costs.

Govindjee AJA

Nkutha-Nkontwana JA et Sutherland AJA concur.

Appearances

For the appellant:	M Nguta and MM Mbewu
Instructed by	State Attorney, Johannesburg
For the respondent:	T Ntshebe of Ntshebe Attorneys