



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JS 211/2024

In the matter between:

**SOUTH AFRICAN MUNICIPAL WORKERS
UNION obo MAHLANGU AND 44 OTHERS**

Applicant

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Respondent

Heard: 24 January 2025

Delivered: 31 January 2025

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 31 January 2025.

JUDGMENT

PRINSLOO, J

Background facts

[1] The individual applicants (Applicants) were employed by the Respondent and their services were terminated on different dates between 4 August and 1 September 2023. The context within which their dismissals followed was set out in a judgment (by Snyman AJ) on 18 September 2023 and I will set out a brief summary thereof.

[2] On 20 July 2023, the applicant trade union (SAMWU) sent a letter to the Respondent, requesting it to reconsider the decision not to honour the 2021 collective agreement relating to wages and conditions of employment. The Respondent, however, reiterated its position that it would seek exemption from the terms of the said collective agreement. The position adopted by the Respondent then prompted the employees to embark upon an unprotected work stoppage on 24 July 2023, which interrupted ordinary service delivery functions and resulted in the intimidation of other non-striking employees and members of the public. The Respondent disseminated a number of circulars or ultimatums to the striking employees, calling upon them to return to work and to desist from their unlawful behaviour and a final ultimatum was issued on 27 July 2023, calling upon them to resume their ordinary duties by 10:30 on 28 July 2023. The final ultimatum was not adhered to and on 28 July 2023, the Respondent approached the Labour Court for urgent relief. A rule *nisi* was issued on 28 July 2023 (by Mabaso AJ), with the return date on 13 September 2023. SAMWU anticipated the return date to 8 September 2023.

[3] The Respondent's case was that notwithstanding the Court order that was issued on 28 July 2023, the strike action continued and SAMWU did very little to intervene and to bring the strike action to an end.

[4] The Court, after considering the affidavits filed, found that the employees indeed embarked upon unprotected strike action as of 24 July 2024 and that such strike action persisted, notwithstanding the Court order of 28 July 2023. The rule *nisi* was confirmed and SAMWU and its members were ordered to pay the costs.

[5] During August 2023, the Applicants received notices of intended dismissal from the Respondent and in the notice, it was *inter alia* recorded that:

‘You are further informed of the following:

2.1 A first ultimatum was sent to the striking employees on 24 July 2023 instructing them to return to work by 15h00 on the same day.

2.2. A second ultimatum was sent to the striking employees on 26 July 2023 reminding them that their conduct was unlawful.

2.3. A final ultimatum was issued on 27 July 2023 advising all striking employees to return to work and to execute or perform their normal day to day duties by no later than 10h30 on 26 July 2023 in accordance with their employment contracts.

2.4. Despite the above ultimatum, you have engaged in conduct which is a furtherance of an unprotected and unlawful strike.

2.5. The City on 28 July 2023, obtained an urgent court interdict prohibiting and restraining employees from performing any acts of destruction of the City of Tshwane’s property and any private property or performing acts of intimidation to any of the City’s employees and/or its patrons.

Your conduct as alluded in paragraph 1 of the above, is viewed as a furtherance of an unprotected strike and is direct violation of the court interdict.

You are herewith informed that your conduct to further the aim of an unprotected strike, is in breach of clause 18 of the Disciplinary Code and Protected Collective Agreement.

You are herewith provided with an opportunity to provide written reasons why the City should not terminate your services for the reasons outlined herein.

Your written response must be submitted to the following email address: [s\[...\]](#) / [l\[...\]](#), by no later than Friday, 25 August 2023 at 11h00.’

[6] SAMWU responded to the Respondent’s invitation to provide written reasons as to why the striking employees should not be dismissed. Instead of making representations on behalf of the employees, SAMWU took issue with the procedure adopted by the Respondent, referred to the terms of the disciplinary code and insisted on strict compliance with the disciplinary procedure.

[7] Between August and September 2023, the Applicants were dismissed and the gist of the letter of dismissal was recorded *inter alia* as:

‘As you know, on 2 August 2023, the City of Tshwane Metropolitan Municipality (“the City) issued you with a notice of intention to terminate your services. The purpose of the letter was to afford you the opportunity to provide reasons why your services should not be terminated for your failure or refusal to comply with a court order duly obtained by the City interdicting SAMWU and its members from engaging in an unprotected strike and further breaching the Disciplinary Procedures Collective Agreement.

After careful consideration of the representations made on your behalf by your trade union SAMWU, I was not persuaded with your explanation why you disregarded the court order and continued to participate in an unlawful and unprotected strike and in the circumstances, I have decided to terminate your services from your employment with the City from the date of receipt of this letter.

You have the right to declare a dispute with the South African Local Bargaining Council within a period of thirty (30) from the date of receipt of this letter regarding the termination of your services by the City.’

[8] SAMWU referred an unfair dismissal dispute on behalf of the Applicants to the South African Local Government Bargaining Council (SALGBC), indicating that the reason for dismissal was unknown.

[9] The dispute was conciliated on 28 September 2023 and a certificate of outcome was issued, indicating that the matter remained unresolved and may be referred to arbitration. The dispute was referred to arbitration and on 14 February 2023 at the commencement of the arbitration proceedings, the Respondent raised a jurisdictional point to the effect that the SALGBC did not have jurisdiction to arbitrate the dispute as the Applicants were dismissed for participating in an unprotected strike.

[10] SAMWU opposed the jurisdictional point and submitted that the SALGBC had jurisdiction to arbitrate the dispute because the Respondent failed to hold disciplinary hearings and because no reason was provided for the dismissal.

[11] The presiding arbitrator (Eva Ngobeni) recorded that there was a dispute of fact as to whether the Applicants were dismissed for reasons relating to their participation in unlawful industrial action or whether the reason for dismissal was unknown.

[12] The arbitrator issued a ruling on 10 March 2024 to the effect that the SALGBC had jurisdiction to arbitrate the dispute. This ruling was, notwithstanding the content of the letter of dismissal, as referred to *supra*, wherein it was made clear that the reason for dismissal related to the disregarding of a Court order and participation in an unlawful and unprotected strike. The Labour Appeal Court (LAC) in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others*¹ held that:

‘It is an elementary principle of not only our labour law in this country but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal.’

[13] Be that as it may, the dispute was set down for arbitration on 15 April 2024 and the Respondent insisted that the SALGBC did not have jurisdiction to arbitrate the dispute. The same arbitrator then issued a second jurisdictional ruling wherein she recorded that the Applicants were indeed aware of the actual reason for their dismissal because they were issued with letters of intention to dismiss, wherein they were required to make representations as to why their employment should not be terminated for engaging in an unprotected strike.

[14] The arbitrator further recorded that SAMWU made no representations on behalf of the Applicants but instead, raised concerns about the manner in which the dismissals were to be effected. The arbitrator found that “*having failed to make representations, the Respondent issued to all Applicants termination letters outlining the reason for which they are dismissed as that they participated in an unprotected strike. Much as the union raises the issue on non-compliance with the collective*

¹ [2007] ZALAC 12; (2008) 29 ILJ 964 (LAC) at para 32.

agreement in that the Respondent deviated from the procedural requirement, this does not diminish the reason for which Applicants were dismissed. The determining factor for jurisdiction in employment dispute, is the reason for which a dismissal was effected. Having enquired into the reason for which the Applicants were dismissed, I have satisfied myself that the Applicants were informed of the reason for which they were dismissed". The arbitrator found that the SALGBC lacked jurisdiction to arbitrate the dispute and that the dispute should be referred to the Labour Court.

[15] The Applicant filed a statement of case with the Registrar of the Labour Court on 24 April 2024 and an application for condonation for the late filing of the statement of case was filed on 22 May 2024.

[16] The Respondent opposed the application for condonation.

The test for the grant of condonation

[17] The relevant legal principles to be applied in an application for condonation are well established.

[18] 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.²

[19] In *Melane v Sanlam Insurance Co Ltd*³, 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.’

² D Harms, ‘Civil Procedure in the Superior Court’, LexisNexis at B27.6.

³ 1962 (4) SA 531 (A) at 532C - F.

[20] 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.

[21] This Court has conventionally applied the approach that, in the absence of a satisfactory explanation for a delay, the applicant's prospects of success are ordinarily irrelevant.⁴ This principle was confirmed in *National Education Health and Allied Workers Union on behalf of Mofokeng and Others v Charlotte Theron Children's Home*⁵ where the LAC held that without a reasonable and acceptable explanation for a delay, the prospects of success are immaterial.

[22] In *NUM v Council for Mineral Technology*⁶, the LAC was very clear that in the absence of a reasonable explanation, considerations such as the prospects of success become irrelevant. It was said that:

'The approach 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 therefore, the prospects of success and the importance of the case. These facts are interrelated: they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused...'

[23] In *Colett v Commission for Conciliation, Mediation and Arbitration and Others*⁷, the LAC also confirmed that without a reasonable and acceptable

⁴ See: *NUM v Council for Mineral Technology* [1998] ZALAC 22; [1999] 3 BLLR 209 (LAC) (*NUM*).

⁵ [2004] ZALAC 9; (2004) 25 ILJ 2195 (LAC) at para 23.

⁶ *NUM supra* at para 10.

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.

[24] The onus is on the applicant seeking condonation to satisfy the court that condonation should be granted. In employment disputes, there is 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 Thilivali v Fry's Metals (A Division of Zimco Group) and Others*⁸:

'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.'

[25] The fundamental requirement of expedition is not to be ignored. In *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁹ (*Toyota SA*), the Constitutional Court emphasised that one of the fundamental purposes of the Labour Relations Act¹⁰ (LRA) was to establish a system for the quick adjudication of labour disputes. When it assesses the reasonableness of a delay, the court must not lose sight of this purpose.

[26] 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 the grant of condonation where the delay is not explained, may not serve the interests of justice. The expeditious resolution of labour disputes is a fundamental consideration.

⁷ [2014] ZALAC 1; (2014) 35 ILJ 1948 (LAC).

⁸ [2014] ZALCJHB 115; (2015) 36 ILJ 232 (LC) at para 25.

⁹ [2015] ZACC 40; (2016) 37 ILJ 313 (CC).

¹⁰ Act 66 of 1995, as amended.

[27] 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.

[28] It is in this context that the application for condonation stands to be determined.

The degree of lateness

[29] The first aspect to be considered is the degree of lateness.

[30] Section 191(11)(a) of the LRA prescribes a 90-day period for referral of a dispute to the Labour Court for adjudication. The 90-day period is calculated from the date a commissioner has certified that the dispute remained unresolved.

[31] On 28 September 2023, the SALGBC issued a ruling to the effect that the matter remained unresolved. The Applicant's dispute relating to unfair dismissal for participation in an unprotected strike had to be referred within 90 days from 28 September 2023, thus it had to be filed by 27 December 2023. The statement of case was filed with this Court on 24 April 2024, clearly outside the prescribed 90-day period.

[32] The Applicant's dispute was referred almost four months or 85 Court days late.

[33] The delay is no doubt material 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. This is even more so where the LRA provides for a period of 90 days to file a statement of case, which period is in itself generous and lengthy.

[34] *In casu*, there is a further delay that cannot be ignored and that is the fact that the condonation application was only filed on 22 May 2024, almost five months after

the statement of case was supposed to be filed and almost another month after the statement of case was indeed filed.

[35] It is trite that an application for condonation must be brought as soon as it was discovered that it would be necessary to bring such an application, and this fact should have been clear to the Applicant by 15 April 2024, when the jurisdictional ruling was issued. The condonation application was however only filed on 22 May 2024.

[36] The degree of lateness is material. The degree of lateness should however not be considered in isolation.

Explanation for the lateness

[37] A failure to comply with the generous period of 90 days, has to be explained and the reasonableness of the delay should be considered by having regard to the explanation for the delay.

[38] As the Applicant seeks an indulgence from the Court and as they bear the onus to satisfy the Court that condonation should be granted, it is incumbent upon the Applicant 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.¹¹

[39] The explanation for the delay has to be compelling, convincing and comprehensive and should cover every period of the delay. In the founding affidavit filed in support of the application for condonation, the Applicant provided the following explanation for the delay: After receipt of the certificate of outcome on 29 September 2023, SAMWU applied for arbitration and the matter was allocated to Eva Ngoben to arbitrate and she made a ruling that the SALGBC had jurisdiction to

¹¹ See: *Independent Municipal & Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others* [2009] ZALC 137; (2010) 31 ILJ 1413 (LC).

adjudicate the unfair dismissal dispute. It was only on 15 April 2024 that Eva Ngobeni *'changed her mind'* and ruled that the SALGBC did not have jurisdiction to adjudicate the dispute and that it ought to be referred to the Labour Court. The matter was then referred to the Labour Court on 24 April 2024.

[40] After the Respondent's legal representatives raised a number of issues in the statement of response, SAMWU sought legal assistance. On 16 May 2024, the Applicant was informed that there was a need to apply for condonation to explain why the matter was not referred to the Court when the Applicant had received the certificate of outcome.

[41] The deponent to the Applicant's application, Ms Moloko, a SAMWU shop steward, provided three main reasons for the late referral of the matter to the Labour Court. First, she submitted that had it not been for the jurisdictional ruling of 10 March 2024 *"which clothed the Bargaining Council with jurisdiction"* the referral could have been made within the prescribed timeframes.

[42] Second, she did not know that when the certificate of outcome was issued on 28 September 2023, the Respondent would object to the jurisdiction of the SALGBC.

[43] Third, the Applicant opposed the Respondent's jurisdictional point because the notice of intention to terminate the Applicant's employment made certain allegations which required evidence to be led. This is so *"in order to prove that indeed one Mahlangu was guilty of the allegations of contravening Municipal Bylaws"*.

[44] I already alluded to the fact that the Applicant should provide a compelling and convincing explanation for the delay.

[45] The explanation tendered by Ms Moloko is not convincing or compelling. I say so for the following reasons:

[46] Section 191(5) of the LRA provides that if a dispute remains unresolved after conciliation, the dispute must be referred to the Labour Court if the reason for

dismissal is the employee's participation in a strike that does not comply with the provisions of Chapter IV. The LRA has been in place since 1995 and the provisions of section 195 are not new – on the contrary, it is by now trite that a dismissal for participation in unprotected strike action is to be adjudicated by the Labour Court. The Applicants are represented by SAMWU, a well-established and experienced trade union.

[47] As far back as 2010, the Labour Court considered the status of a certificate of outcome and in *Bombardier Transportation (Pty) Ltd v Mtiya NO and Others*¹² (*Bombardier*), it was held that:

'In other words, a certificate of outcome is no more than a document issued by a commissioner stating that, on a particular date, a dispute referred to the CCMA for conciliation remained unresolved. It does not confer jurisdiction on the CCMA to do anything that the CCMA is not empowered to do, nor does it preclude the CCMA from exercising any of its statutory powers. In short, a certificate of outcome has nothing to do with jurisdiction. If a party wishes to challenge the CCMA's jurisdiction to deal with an unfair dismissal dispute, it may do so, whether or not a certificate of outcome has been issued. Jurisdiction is not granted or afforded by a CCMA commissioner issuing a certificate of outcome. Jurisdiction either exists as a fact or it does not.'

[48] Ms Moloko's submission that had it not been for the jurisdictional ruling of 10 March 2024 "*which clothed the Bargaining Council with jurisdiction*" the referral could have been made within the prescribed timeframes, is without merit. The jurisdictional ruling cannot and did not 'cloth' the SALGBC with jurisdiction. This was confirmed by this Court on many occasions and in many reported authorities, as an example I referred to *Bombardier supra*.

[49] The SALGBC never had jurisdiction to adjudicate a dispute about the fairness of a dismissal for participation in unprotected strike action. It is irrelevant and of no moment that Ms Moloko did not know that, when the certificate of outcome was

¹² [2010] ZALC 34; (2010) 31 ILJ 2065 (LC) at para 14.

issued on 28 September 2023, the Respondent would object to the jurisdiction of the SALGBC. The SALGBC's lack of jurisdiction is obvious.

[50] The Applicant opposed the Respondent's jurisdictional point at the arbitration stage. It is evident from the jurisdictional ruling of 15 April 2024 that this was done because the Applicant persisted with its stance that the reason for dismissal was unknown. This was opportunistic as it was evident from the notice of intention to terminate employment wherein the Applicants were invited to make submissions as to why their services should not be terminated for participation in an illegal and unprotected strike, as well as the notice of termination that the Applicants' services were terminated because they participated in an unprotected strike and had made no submissions as to why their services should not be terminated. The Applicant was well aware of the reason for dismissal and it was misleading and opportunistic to proceed on the basis that the reason for termination was not known. Ms Moloko's explanation that the notice of intention to terminate the Applicant's employment made certain allegations which required evidence to be led is not substantiated or supported by the evidence placed before this Court. She averred that evidence was necessary *"to prove that indeed one Mahlangu was guilty of the allegations of contravening Municipal Bylaws"*. This is not an acceptable explanation – the matter was referred on behalf of 45 individuals, not only Mr Mahlangu and the allegations made in respect of Mr Mahlangu had no bearing on the dismissal of the other Applicants. If it had, the Applicant failed to place those facts before this Court.

[51] Ms Moloko's submission that had it not been for the jurisdictional ruling of 10 March 2024, the referral could have been made within the prescribed timeframes ignores the facts and the applicable timeframes and is made without due consideration thereof. On the Applicant's own version, the certificate of outcome was issued in September 2023 and the statement of claim had to be filed by 28 December 2023. The jurisdictional ruling was issued long after the expiry of the prescribed 90-day period and was not the reason for not complying with the said period.

[52] It is implausible that the Applicant did not know the reason for their dismissal, as it was clearly articulated and communicated to them. The Applicants were at all

material times represented by SAMWU, an experienced trade union, who ought to have known that the dispute must be referred to the Labour Court for adjudication after conciliation failed and a certificate of outcome was issued.

[53] The Applicant had to provide an explanation for the delay to enable this Court to assess the reasonableness of the delay and the explanation for it. The Applicant's explanation is not compelling or convincing but rather, displays a failure on the side of SAMWU to assist and advise its members in an acceptable and fair manner.

[54] The Applicant failed to discharge the onus to show good cause why the indulgence they seek should be granted.

Prospects of success

[55] Having found that the delay is inordinate and the explanation tendered not compelling or adequate, it leaves the issue of prospects of success.

[56] 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.

[57] *In casu* and in light of the said authorities and given the fact that the Applicant did not provide a comprehensive, compelling or convincing explanation for a material period of delay, the prospects of success are immaterial, and thus need not be considered.

[58] The excessive delay called for a detailed and acceptable explanation, which the Applicant failed to give. In the absence of a reasonable and convincing explanation for the delay, that is the end of the matter.

Prejudice

[59] The Applicant submitted that the Respondent will not be prejudiced if the late filing of the statement of claim is condoned. On the other hand, the Applicants will be

'seriously prejudiced' should the late referral not be condoned as they were dismissed without being afforded an opportunity to be heard and this is a violation of their rights to a fair hearing.

[60] The Respondent disputed that it would not be prejudiced and submitted that any prejudice suffered by the Applicant is self-created.

[61] Although I am not deciding the merits of this case or determining the prospects of success, I have to say something about the expectation of having lengthy disciplinary hearings and extensive processes to deal with allegations of misconduct.

[62] This Court has bemoaned the approach adopted in disciplinary enquiries on several occasions and it continues to express concern regarding the manner in which disciplinary hearings are conducted. As far back as 1992, the LAC held in *Anglo American Farms t/a Boschendal Restaurant v Komjwayo*¹³ that:

'In *Khanum v Mid-Glamorgan Area Health Authority* 1978 IRLR 215 it was held that there are only three basic requirements of natural justice which have to be complied with during the proceedings of a domestic disciplinary enquiry, viz:

- (a) the person should know the nature of the accusation against him;
- (b) he should be given an opportunity to state his case;
- (c) the tribunal should act in good faith.

(See *Twala v ABC Shoe Store* (1987) 8 ILJ 714 (IC) at 716D-F.)

This court is satisfied that, in the present case, all three of those basic requirements were met in the proceedings, both before the disciplinary enquiry and on appeal. ... Moreover, at disciplinary hearings presided over by laymen, it cannot be expected that all the finer niceties which a formal court of law would adopt will always be observed.'

¹³ (1992) 13 ILJ 573 (LAC) at 587B – F.

[63] In the LRA, the statutory requirements for a fair procedure are clearly spelt out in the Code of Good Practice: Dismissal¹⁴ and those were elaborated on in *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration and Others*¹⁵ where it was held that:

'To some extent, chapter VIII of the Labour Relations Act represents a codification of the jurisprudence that preceded it. The Act itself is silent on the content of any right to procedural fairness, it simply requires that an employer establish that a dismissal was effected in accordance with a fair procedure. The nature and extent of a right to fair procedure preceding a dismissal for misconduct is spelt out in specific terms in the Code of Good Practice: Dismissal in schedule 8 to the LRA.

Item 4 of the code provides:

"(1) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and a language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision." (Emphasis added.)

It follows that the conception of procedural fairness incorporated into the LRA is one that requires an investigation into any alleged misconduct by the employer, an opportunity by any employee against whom any allegation of misconduct is made, to respond after a reasonable period with the assistance of a representative, a decision by the employer, and notice of that decision.

This approach represents a significant and fundamental departure from what might be termed the 'criminal justice' model that was developed by the Industrial Court and applied under the unfair labour practice jurisdiction that evolved under the 1956 Labour Relations Act. That model likened a

¹⁴ Schedule 8 of the LRA.

¹⁵ [2006] ZALC 44; (2006) 27 ILJ 1644 (LC) at 1651B -

workplace disciplinary enquiry to a criminal trial, and developed rules and procedures, including rules relating to bias and any apprehension of bias, that were appropriate in that context.

The rules relating to procedural fairness introduced in 1995 do not replicate the criminal justice model of procedural fairness. They recognize that for workers, true justice lies in a right to an expeditious and independent review of the employer's decision to dismiss, with reinstatement as the primary remedy when the substance of employer decisions is found wanting. For employers, this right of resort to expeditious and independent arbitration was intended not only to promote rational decision making about workplace discipline, it was also an acknowledgment that the elaborate procedural requirements that had been developed prior to the new Act were inefficient and inappropriate, and that if a dismissal for misconduct was disputed, arbitration was the primary forum for determination of the dispute by the application of a more formal process.

The balance struck by the LRA thus recognizes not only that managers are not experienced judicial officers, but also that workplace efficiencies should not be unduly impeded by onerous procedural requirements. It also recognizes that to require onerous workplace disciplinary procedures is inconsistent with a right to expeditious arbitration on merits. Where a commissioner is obliged (as commissioners are) to arbitrate dismissal disputes on the basis of the evidence presented at the arbitration proceedings, procedural requirements in the form that they developed under the criminal justice model are applied ultimately only for the sake of procedure, since the record of a workplace disciplinary hearing presented to the commissioners at any subsequent arbitration is presented only for the purpose of establishing that the dismissal was procedurally fair. The continued application of the criminal justice model of workplace procedure therefore results in a duplication of process, with no tangible benefit to either employer or employee.

The signal of a move to an informal approach to procedural fairness is clearly presaged by the explanatory memorandum that accompanied the draft Labour Relations Bill. The memorandum stated the following:

'The draft Bill requires a fair, but brief, pre-dismissal procedure... [It] opts for this more flexible, less onerous, approach to procedural fairness for various reasons: small employers, of whom there are a very large number, are often not able to follow elaborate pre-dismissal procedures; and not all procedural defects result in substantial prejudice to the employee.'

On this approach, there is clearly no place for formal disciplinary procedures that incorporate all of the accoutrements of a criminal trial, including the leading of witnesses, technical and complex 'charge-sheets', requests for particulars, the application of the rules of evidence, legal arguments, and the like.'

[64] The LRA did not envisage the disciplinary process adopted by many employers and abused by some employees. On the contrary, in its simplest terms, the LRA introduced a process that requires an investigation into any alleged misconduct, an opportunity by any employee against whom any allegation of misconduct is made to respond after a reasonable period with the assistance of a representative, a decision by the employer, and notice of that decision. Considering the number of cases challenging either the institution, continuation or outcome of internal disciplinary hearings, or processes related thereto that end up in this Court, it is evident that employers, trade unions and legal practitioners (and any other relevant role player) took little note of the provisions of the LRA and the judgments of and concerns raised by this Court. Instead, they are still inclined to agree to retain the criminal justice model by way of contracts of employment, employment policies and practices or collective agreements.

[65] The result of the refusal to condone the late filing of the statement of case will be that the Applicant will be denied the opportunity to pursue this case before Court.

[66] 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.¹⁶

[67] *In casu*, there are 45 employees before Court, seeking retrospective reinstatement from their dates of dismissal in 2023, as per their statement of case. The Practice Manual¹⁷ previously provided and Rule 24 of the Labour Court Rules¹⁸ expressly provides that where the issue in dispute concerns the dismissal of 10 or more employees who seek reinstatement and a notice of intention to defend is filed, it must be brought to the attention of the Judge President, who may then appoint a Judge immediately to undertake the case management of the file, to ensure an expeditious hearing. This is to allow for hearing on an expedited basis where the matter involves a large number of applicants and where the relief sought is reinstatement, as the consequences and prejudice, if such a matter is only dealt with years later and reinstatement is ordered, are severe and obvious.

[68] The delay is even more prejudicial considering that Rule 24 provides for an expeditious hearing when a large number of applicants seek reinstatement. *In casu*, the Applicants were dismissed in August or September 2023 and in January 2025, this matter is not one step closer to finality.

[69] The Constitutional Court, in the opening paragraph of *Toyota SA*¹⁹ 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

¹⁶ See: *Edcon Ltd v Steenkamp and Others* [2017] ZALAC 81; (2018) 39 ILJ 531 (LAC) at para 34.

¹⁷ Practice Manual of the Labour Court of South Africa (repealed).

¹⁸ GN 4775 of 2024: Rules Regulating the Conduct of the Proceedings of the Labour Court.

¹⁹ *Toyota supra* at para 1.

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.’

[70] 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 statement of case will have the result that the Applicant will be denied the opportunity to pursue their case before this Court, the Respondent’s prejudice outweighs the Applicant’s prejudice.

[71] Most importantly, 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.

[72] In *Grootboom v National Prosecuting Authority and Another*²⁰, 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.’

[73] 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 plausible explanation for

²⁰ [2013] ZACC 37; (2014) 35 ILJ 121 (CC) at para 51.

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

Costs

[74] The last issue to be decided is the issue of costs.

[75] In so far as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of law and fairness.

[76] Mr Mer for the Respondent submitted that the cost should follow the results as this application is an abuse of process. Mr Mer conceded that there is an ongoing relationship between SAMWU and the Respondent, but submitted that SAMWU failed to represent its members properly. Mr Nkobyane for the Applicant left the issue of cost in the hands of this Court.

[77] Although this is a case where a cost order will not be inappropriate, I am of the view the interest of justice will be best served by making no order as to costs.

[78] This is a case where SAMWU steered the vessel in the wrong direction, despite efforts from the Respondent to raise a jurisdictional point, which was opposed, they cannot come to Court to lament the fact that they have reached a destination which could have been avoided and where their members are left destitute. In my view, SAMWU has a lot to answer to the Applicants in this matter.

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

Order

1. The application for condonation for the late filing of the Applicant's statement of case is dismissed;
2. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Nkobyane from Phakedi Attorneys Inc

For the Respondent: Mr D Mer from Lawtons Inc Attorneys

LABOUR COURT