



IN THE LABOUR COURT OF SOUTH AFRICA, JOAHNNESBURG

Not Reportable
Case No: JR805/20

In the matter between:

MBULE BUSSA

Applicant

and

**PUBLIC HEALTH SOCIAL DEVELOPMENT
BARGAINING COUNCIL**

First Respondent

COMMISSIONER JAMES MOTSHEKGA NO

Second Respondent

DEPARTMENT OF HEALTH (GAUTENG PROVINCE)

Third Respondent

Heard: 12 March 2025

Delivered: 14 March 2025

JUDGMENT

WHITTINGTON, AJ

[1] This is an application in which the respondent seeks condonation for the late filing of proceedings intended to set aside the findings of the second respondent as set out in his award dated 15 May 2013. The applicant avers in his founding affidavit that he received the award on 30 June 2013.

[2] In terms of the provisions of section 145 (1) of the Labour Relations Act¹ (LRA) a litigant who alleges a defect in any arbitration proceedings under the auspices of the Commission is afforded a period of six weeks from the date that the award was served on them in order to institute review proceedings.

[3] On the applicant's version the institution of review proceedings is six years seven months and twelve days late.

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

[5] Historically, the approach followed by the Court, in determining whether condonation should be granted, has been articulated in several authorities, the *locus classicus* of which is *Melane v Sanlam Insurance Co. Ltd (Melane)*², where the Court stated that:

'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion ...'

[6] Furthermore, in *National Union of Mineworkers v Council for Mineral Technology*³, the Court echoed the words of *Melane* and held as follows:

¹ No. 66 of 1995, as amended.

² 1962 (4) SA 531 (A) at 532 C-F.

³ [1999] 3 BLLR 209 (LAC) at para 10.

‘... The approach is that the Court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both sides. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated: they are not individually decisive. What is needed 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...’

[7] In employment disputes, there also exists an additional consideration, which applies in determining whether the onus has been discharged, as was held in *National Union of Metalworkers of SA on behalf of Thilivali v Fry’s Metals (A division of Zimco Group) and Others*⁴:

‘... 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.’

[8] In the case of *Toyota SA Motors (Pty) Ltd v CCMA and Others*⁵ the Constitutional Court emphasised that one of the fundamental purposes of the LRA was to establish a system for the simple, expedient and inexpensive adjudication of employment disputes. When it assesses the reasonableness of a delay, the Court must not lose sight of this purpose.

⁴ (2015) 36 ILJ 232 (LC) at para 25.

⁵ (2016) 37 ILJ 313 (CC).

[9] The Court in *Independent Municipal and Allied Trade Union obo Zungu v South African Local Government Bargaining Council and Others*⁶ 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.'

[10] Further in *Chulu-Mantsho v Business Connexion (Pty) Ltd and Others*⁷ the court held:

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

[11] In addition to the above in the matter of *Saloojee and Another, NNO v Minister of Community Development*⁸ the court held as follows:

'There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney...

A litigant, moreover, who knows, as the applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is

⁶ (2010) 31 ILJ 1413 (LC) at para 13.

⁷ (JS 1238/21) [2022] ZALCJHB 165 (3 June 2022) at para 44.

⁸ 1965 (2) SA 135 (A) at p 141.

not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney ... and expect to be exonerated of all blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself.'

[12] In the matter of *Grootboom v National Prosecuting Authority and Another*⁹, the court, *inter alia*, stated:

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

'The conduct of litigants in failing to observe rules of this court is unfortunate and should be brought to a halt. This term alone, eight of the 13 matters set down for hearing, litigants failed to comply with the time limits in the rules and directions issued by the Chief Justice. It is unacceptable that this is the position in spite of the warning issued by this court in the past. In [Van Wyk], this court warned litigants to stop the trend. The court said: "There is now a growing trend for litigants in this court to disregard time limits without seeking condonation. Last term alone, in eight out of ten matters, litigants did not comply with the time limits or the directions setting out the time limits. In some

⁹ 2014 (2) SA 68 (CC) at paras 32 to 35.

cases litigants either did not apply for condonation at all or if they did, they put up flimsy explanations. This non-compliance with the time limits or the rules of court resulted in one matter being postponed and the other being struck from the roll. This is undesirable. This practice must be stopped in its tracks. 'The statistics referred to above illustrate that the caution was not heeded. The court cannot continue issuing warnings that are disregarded by litigants. It must find a way of bringing this unacceptable behaviour to a stop. One way that readily presents itself is for the court to require proper compliance with the rules and refuse condonation where these requirements are not met. Compliance must be demanded even in relation to rules regulating applications for condonation.'

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

[13] The explanation offered by the applicant for the rather staggering delay is summed up in the heads of argument filed on his behalf which record that the applicant did his best to get his matter to court but was disappointed with the service he received by the attorneys he had approached.

[14] The explanation, such as it is, is replete with gaps of several months where the applicant appears to have been content to let the matter drift despite receiving no report from the attorneys allegedly tasked with dealing with the matter. The manifest failures which the applicant accuses his representatives of have been poorly

explained and the court is not in any position to understand the reason for the delay in order to be in a proper position to assess whether or not the explanation is a good one.

[15] In my view, the respondent has failed to advance a reasonable and acceptable explanation for the delay in filing the review.

[16] Given the length of the delay the court is entitled to expect an outstandingly good explanation and that offered by the applicant is very poor. I note that the insufficient explanation of the delay would, in and of itself, be fatal to the application.

[17] Even if the applicant's explanation is to be accepted at face value, which it should not be, it is difficult to form any other conclusion than the respondent was quite satisfied to leave the matter entirely in the hands of his attorneys and equally content with the rather nebulous reasons stated for their not attending to his matter. These nebulous allegations far exceed the limit beyond which a litigant can expect to escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered.

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

[19] Even if I were to disregard the woeful inadequacy of the explanation for the delay, the applicant's allegations regarding prospects of success are not any better.

[20] The applicant contents himself with dealing with these by stating, as a conclusion, that the explanation tendered for not attending to his patients ought to have been accepted and that the arbitrator's failure to accept his explanation renders the award unreasonable and reviewable.

[21] I am reminded that there is a distinction between matters brought on review and matters brought on appeal and the decision of the second respondent cannot be appealed.

[22] It further appears that the applicant is of the view that, because his dismissal was upheld it is clear that the second respondent paid no mind to the explanation offered to justify his conduct.

[23] The assertion is completely devoid of any merit - even the most cursory reading of the award reveals that the second respondent carefully summarises the evidence led and deals with the exact assertions the applicant relies upon before dismissing them.

[24] The applicant's rather illusory prospects of success certainly cannot operate to rescue the poor explanation of an extremely lengthy delay, and as such the application for condonation is inadequate for the reasons set out above. Accordingly, the application for condonation falls to be dismissed.

[25] In the premise the following order is made:

Order

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

D. Whittington

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

M T Ramunenyiwa

Instructed by:

Khomola Attorneys Inc.