THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JA42/2023

In the matter between:

GOODMAN MALEPE	**First Appellant**
LAZARUS M. CHOMA	**Second Appellant**
JAN MAKUWA	**Third Appellant**
THOMAS MAIMELA	**Fourth Appellant**
JOHN SENOSHA	**Fifth Appellant**
JOHANNES KGABE	**Sixth Appellant**
ERNEST RAHLAGA	**Seventh Appellant**
PETER L. MASHEGWANE	**Eighth Appellant**
EMISSION THOKWANE	**Ninth Appellant**
BJALANA DAVID MOKWANA	**Tenth Appellant**
THEMBA ZULU	**Eleventh Appellant**

THEOPHILUS MOLALATHOKO **Twelve Appellant**

and

MEGA VOLT LODEN ELECTRICAL (PTY) LTD **Respondent**

Heard: **29 August 2024**
Delivered: **04 February 2025**
Coram: **Molahleli AJP, Musi AJA et Jolwana AJA**

JUDGMENT

JOLWANA, AJA

Introduction

[1] This appeal concerns the exercise of a court's discretion in dismissing an application for condonation. On 24 November 2021, the appellants filed a statement of claim, the main relief sought being reinstatement or re-employment. The statement of claim was filed together with a condonation application for the late filing thereof. Condonation for the late filing of the statement of claim was refused by the court *a quo*.

[2] It is the dismissal of that condonation application by the Labour Court with which the appellants are dissatisfied, hence this appeal. The appeal is with the leave of this Court.

Factual background

[3] The appellants brought an application seeking condonation for the late referral of their unfair dismissal dispute to the Labour Court for adjudication. The appellants'

case was that they were dismissed consequent upon their refusal to accept a demand relating to a matter of mutual interest. Therefore, their dismissal was automatically unfair.[1] The appellants asserted that the proximate cause of their dismissal was directly or indirectly related to a transfer in terms of section 197 of the Labour Relations Act[2] (LRA) and that such dismissal is automatically unfair in terms of section 187 (1)(g)[3] of the LRA.

[4] The context of the dismissal dispute is that the appellants were employees of Datelec and through a section 197 transfer, they became employees of the respondent. They alleged that on becoming their employer, the respondent required that the appellants sign new contracts of employment on new terms and conditions, which they refused. As a result of their refusal, the appellants were dismissed. Their dismissal was subsequent to a disciplinary process they were subjected to on 10 and 11 December 2019 on charges of leaving their workplace early and for leaving without authorisation on 26 November 2019. The appellants alleged that all of the respondent's employees had left early on 26 November 2019 but employees who agreed to the respondent's demands were given written warnings and retained their jobs whereas they were dismissed.

[5] The appellants further alleged that while the disciplinary ruling is dated 12 December 2019, they had only received it on 13 January 2020 when they returned from the December holiday period.

[6] The appellants referred their unfair dismissal complaint to the National Bargaining Council for Electrical Industry (NBCEI) for conciliation on 16 January 2020 after which the matter was set down for conciliation on 7 February 2020. Conciliation failed and a certificate of outcome was issued on 7 February 2020. The

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[1] Section 187(1)(c) of the Labour Relations Act 66 of 1995 provides that a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is due to the employee's refusal to accept a demand in respect of any matter of mutual interest between the employer and employee.

[2] Act 66 of 1995, as amended.

[3] Section 187(1)(g) provides that:

'(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is –

…

(g) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A…'

NBCEI commissioner advised the appellants to refer the matter to the CCMA for arbitration. On the same day, being 7 February 2020, the appellants referred the matter to the CCMA as advised. The matter was set down for arbitration on 11 March 2020. On 3 March 2020, the respondent filed submissions raising an issue of the late referral of the dismissal complaint.

[7] On 9 March 2020, two days before the arbitration, the respondent sent an SMS to the appellants. In that SMS, the respondent asked the appellants to sign a contract of employment. They were also required to withdraw their arbitration referral. If the appellants signed the new contract and withdrew the matter from the CCMA, their dismissal would be reconsidered. The appellants refused. On 11 March 2020, the arbitrator issued a ruling upholding the late referral point in *limine* raised by the respondent indicating that the appellants were required to apply for condonation of the said late referral. They did so and on 7 July 2020, the appellants were granted condonation. The matter again served before a commissioner where the respondent sought and was granted a 14-day period within which to apply for the rescission of the ruling granting the employees condonation. This was said to be on the basis that there was no evidence that the respondent was served with the condonation ruling. The condonation ruling dated 7 July 2020 was rescinded on 9 November 2020 and it was indicated that the matter would have to be rescheduled for a condonation hearing.

[8] The second condonation hearing served before another commissioner on 12 December 2020. That commissioner ruled that the appellants had provided a reasonable explanation for the late referral of their dispute to the CCMA and that the CCMA was at fault in failing to process the initial condonation application which increased the degree of lateness. On these bases, the appellants were granted condonation. On 18 February 2021, there was an application for the rescission of the condonation ruling of 12 December 2020. It appears that the rescission application was made on the basis that in her ruling dated 12 December 2020, the commissioner suggested that the respondent had not opposed the condonation application whereas the respondent had opposed it. The commissioner ruled that that was an error on her part. She further ruled that it was clear that she had considered the respondent's submissions and therefore the error of suggesting that

the condonation application was not opposed was irrelevant. She thereupon refused the rescission application.

[9] On 29 April 2021, the matter again served before another commissioner. What was before the CCMA on that day was another application for the rescission of the condonation ruling of 12 December 2020. That commissioner ruled that, as the rescission application was considered by another commissioner and determined on 12 December 2020, she had no jurisdiction to determine the application, thus leaving the ruling dated 12 December 2020 in which the respondent's rescission application was dismissed extant.

[10] The matter was then set down for 25 May 2021 for arbitration. However, it was postponed and the matter was again set down for 4 June 2021. It had to be postponed again to 17 June 2021 as the respondent's legal representative took ill. On 17 June 2021, the parties were directed to conclude a pre-arbitration minute. In that pre-arbitration minute, the parties were in agreement that the CCMA had jurisdiction to determine the matter. As a result, the arbitration commenced with the respondent calling its first witness. On 14 July 2021, the arbitration proceedings continued but had to be postponed to enable the appellants to subpoena certain documents, which was done. The matter was again set down for hearing on 5 and 11 August 2021. The subpoenaed documents were only emailed to the appellants on 4 August 2021. The arbitration proceeded on 5 August 2021 but had to be adjourned to 11 August 2021 to enable the appellants to read the documents, which were voluminous.

[11] On 11 August 2021, the arbitration proceeded and during the cross-examination of the respondent's witness, the commissioner stopped the proceedings as the line of questioning by the appellants' legal representative raised concerns about the CCMA jurisdiction on the section 187 issues that arose during cross-examination. The commissioner requested submissions to be made on the jurisdiction of the CCMA to deal with the matter. The commissioner determined that on 9 November 2020, commissioner Byrne had ruled that the nature of the dispute was misconduct. However, she did not agree with that ruling as commissioner Byrne had no factual basis to enable him to make such a ruling. She accordingly ruled that

the CCMA lacked jurisdiction as the dispute fell within the ambit of section 187. She thereupon directed that the matter be referred to the Labour Court for adjudication. That ruling is dated 15 September 2021.

[12] Subsequent to this ruling, the appellants started making arrangements to consult with their attorneys of record. During that consultation, they were advised to refer the matter to the Labour Court. This necessitated consultation amongst themselves which proved to be difficult as they lived in different areas which were far apart. They ultimately agreed to refer the matter to the Labour Court. They instructed their attorneys to prepare a statement of claim referring the matter to the Labour Court which was issued together with the condonation application.

In the Labour Court

Parties' submissions before the Labour Court

[13] Based on the above, the appellants contended that they were not dilatory in referring the matter to the Labour Court. What delayed their referral were the various delays encountered at the CCMA. The appellants' contention that they were lay persons did assist them as they had been advised by NBCEI, in its certificate of outcome to refer their matter to the CCMA. It was on the basis of that advice that they referred the matter to the CCMA. It should also be noted during the CCMA proceedings, they were assisted by Kagiso Ragisi Rahuba Attorneys.

[14] It was in May 2021 that the appellants realised that it had been over a year and the arbitration had still not begun. They then acquired the services of their current attorneys of record to assist them. At some stage, they were told that their file could not be found at the CCMA and they did not have copies of all the voluminous documents to provide to their new attorneys. This added to the delays. The appellants contended that they had shown good cause and had provided a reasonable explanation for the delay in referring the matter to the Labour Court. The delay after the ruling by the CCMA that it had no jurisdiction to entertain the matter was about three weeks for which they had provided an explanation.

[15] The appellants contended that they had good prospects of success in their automatically unfair dismissal dispute. They had been charged with leaving their workplace early and leaving without authorisation. However, the SMS from the respondent indicated that if they were willing to sign the new contracts the respondent would reconsider the disciplinary issues. As a result, their colleagues who signed the contracts were not subjected to disciplinary processes. They were given written warnings but the appellants were considered problematic just because they did not accede to the respondent's demand to sign new contracts of employment. This was a matter of mutual interests over which the respondent had other options to try to get them to agree to its demand. The respondent, however, decided to subject them to disciplinary processes which resulted in their dismissals while other employees, who faced the same charges, were given final written warnings. Furthermore, the respondent had agreed in the pre-arbitration minute that the CCMA had jurisdiction. It was contended that it was in the interests of justice that the dispute be heard on its merits by the granting of the condonation application. This would not be prejudicial to the respondent but they would be extremely prejudiced by the refusal of the condonation application as they would be left with no remedy. The appellants remain unemployed since they were dismissed.

[16] The respondent's case at the Labour Court was that the appellants' case was that their cause of action was based on an automatically unfair dismissal for their refusal to sign a new contract of employment and thus the appellants were claiming to have been victimized for such refusal. The respondent contended that for the very reasons the appellants based their case on, they should have referred their case to the Labour Court from the outset and have failed to explain why they did not do so. Instead, the appellants relied on having initially referred the matter to NBCEI and the CCMA due to allegedly being unfamiliar with the processes involved and the law. In this regard, the respondent argued, the appellants failed to take the Labour Court into their confidence that they were at all material times legally represented.

[17] It was argued that on the day of the misconduct hearing that led to their dismissals, the appellants consulted with a Pretoria attorney named Barry. On 29 November 2019, the attorney called the respondent's deponent requesting a meeting. That attorney was also present at the CCMA during one of the first

appearances representing the appellants. During the disciplinary hearings, the appellants were supported by their trade union, UASA and represented by Ms Sethoane, a union official.

[18] In addition to that, they had legal representation during the CCMA proceedings as indicated in the arbitration ruling dated 9 November 2020, which were before commissioner Byrne. The appellants were represented by an attorney, Ms Bareki during the CCMA proceedings. On these bases, the respondent contended that the appellants could not have been unaware of what they ought to do as they had access to legal representation and would have been informed that it was the Labour Court that had jurisdiction to adjudicate the dispute. The respondent further contended that the employees who were not dismissed had apologized for their misconduct which was regarded as a strong mitigating factor and signed their employment contracts.

[19] It was ultimately up to the appellants themselves to decide where the matter should be referred to as they are *dominus litis*. They had always said that their dismissals were automatically unfair even at NBCEI as early as 7 February 2020. Therefore, they should have referred their dispute to the Labour Court for adjudication and could not rely on the NBCEI commissioner mentioning the CCMA as having jurisdiction to arbitrate the dispute. It further contended that the offer made to the dismissed employees was done as a gesture of goodwill to give them a second chance and to try to settle the dispute.

[20] It was submitted that the CCMA had to deal with the preliminary points that were raised which were due to the appellants' late referral and their unreasonable delay in applying for condonation at the CCMA. This was because those who represented the appellants were tardy in applying for the relief they sought there. Commissioner Sithole stopped the proceedings on 11 August 2021 after it was put to its deponent that the appellants' case was that their dismissal was because they refused to sign their contracts of employment. That issue had formed the basis of a referral of a dispute relating to a matter of mutual interest. When that dispute was conciliated, it was settled at that stage on the basis that it would be negotiated at

workplace level. Those negotiations took place on 26 November 2019 and the dispute of the employees' failure to sign the contracts of employment was settled.

[21] There was no reasonable and acceptable explanation for the 17 or 18 months delay in referring the matter to the Labour Court. The delay was excessive. The appellants failed to explain the entire period of the delay. It was argued that the appellants were instructed not to leave work early and they refused to comply with that instruction and to work according to the respondent's rules. It was this misconduct that resulted in the disciplinary hearings and appellants' dismissal. They were not charged with refusing to sign their contracts of employment. The issue of being required to sign contracts of employment related to health and safety legislation and regulations which required all employees to have signed contracts of employment.

[22] The respondent contended that it would suffer undue prejudice as a result of the delay as at the time the matter was referred to the Labour Court, it was already two years since the incident which led to the appellants' dismissal. It argued that another two years would have elapsed by the time the matter was heard by that court. Based on all of this, it argued that the condonation application should be dismissed. It was not in the interests of justice for the appellants to be granted condonation as their conduct in delaying the matter was prejudicial to it. They should have referred the dispute to the Labour Court within the stipulated time as their case was throughout one of an automatically unfair dismissal. Therefore, they have not made a proper case to be granted condonation.

[23] The appellants filed a replying affidavit in which they said that at the CCMA, the respondent never objected to the jurisdiction of the CCMA. Ms Bareki, their attorney, made an application at the CCMA for the commissioner to make a ruling on the issue of jurisdiction. In the proceedings at the CCMA, commissioner Byrne was requested to make a ruling on the nature of the dispute which would impact on jurisdiction. He ruled that the CCMA did in fact have jurisdiction to determine the dispute. In doing so, he conferred jurisdiction on the CCMA. The jurisdiction of the CCMA prevailed until 15 September 2021 when commissioner Sithole ruled that the

CCMA did not have jurisdiction. The appellants contended that both rulings were binding on the parties.

[24] They also relied on what the commissioners said when they said that the matter should proceed to arbitration. They could not raise the issue of being dismissed for refusing to agree to changes to their working conditions as they were not charged with that. They were low-grade electricians with no formal qualifications and had no knowledge about the workings of the CCMA and the Labour Court. The respondent was equally to blame for the matter being dealt with at the CCMA initially as it failed to object to the jurisdiction of the CCMA. If all along it knew that the CCMA was a wrong forum, the respondent should have objected to it in line with its contention that the appellants' case has always been one of an automatically unfair dismissal.

Labour Court judgment

[25] The Labour Court dealt with the matter on the basis that the 17 or 18 months delay in referring the dispute for adjudication calculated from 7 February 2020, being the date on which the NBCEI issued the certificate of outcome, was excessive. It said that not only was the delay excessive but also the appellants had provided various explanations for their lateness which were in any event incomplete as the whole period had not been accounted for. There was therefore no reasonable explanation for the delay. Finally, the Labour Court felt that the appellants' explanation for the delay kept on changing from an unfair dismissal dispute to an automatically unfair dismissal dispute. For those reasons, the Labour Court dismissed the condonation application.

Submissions on appeal

[26] The grounds of appeal relied upon by the appellants are mainly that the Labour Court misdirected itself on the facts. The appellants relied on the fact that in their founding affidavit, they had adequately explained the entire period of delay with reference to the various hearings and CCMA rulings all of which accounted for the entire period of the delay. Furthermore, they had referred the matter to the Labour

Court within three weeks of the jurisdictional ruling of the CCMA and had provided reasons for the three-week delay. Their prospects of success were also not considered as it was common cause that in the pre-arbitration minute, it was clear that their dismissal was for their refusal to agree to changed working conditions following the section 197 transfer. They also raise the fact that the court *a quo* was wrong in not finding that the respondent contributed to the delay. The dispute was clarified to be related to the section 197 transfer. They further raise the fact that the prejudice to them if condonation was not granted was not weighed against that of the respondent if it was granted. The last main ground of appeal was that the court *a quo* failed to also consider the length of the delay together with the reasonable explanation and the prospects of success.

[27] It was submitted that the Labour Court did not exercise its discretion properly and was influenced by wrong principles or factual misdirection. This, so went the submission, warranted interference by this Court. It was submitted that in the main, the condonation application was dismissed on the basis of an excessive delay; that there was an inadequate explanation for the delay; and that the appellants' case kept on changing. It was argued that the court *a quo* did not apply the well-established legal principles on condonation applications. These are that the discretion of the court had to be exercised with regard being had to the extent of the delay; the explanation therefor; the prospects of success and prejudice to both parties if condonation was granted or refused. Finally, interests of justice were in the foreground on the basis of which these principles had to be applied. It was argued that the court *a quo* therefore failed to exercise its discretion judicially in the circumstances as it also failed to have regard to the importance of the matter to the appellants.

[28] The respondent's case on appeal is, principally, that the appellants' explanation for the delay in referring their statement of claim to the Labour Court is not reasonable and is unacceptable resulting in their condonation application being unmeritorious. This submission is based on the allegation that it has always been the appellants' case that they were dismissed because of their refusal to sign the new contracts of employment. It was submitted that at all material times, the appellants were represented by a trade union official even before the disciplinary hearing in

December 2019 and during the negotiations relating to the section 197 transfer in November 2019. They were represented by attorneys since the referral of the dispute in January 2020 and should have known from 9 March 2020 at the latest that their claim was based on alleged automatically unfair dismissal. Therefore, arbitration was not the correct route to follow after the issuing of the certificate of outcome at conciliation stage.

[29] Therefore, the allegation that they only found out during the cross-examination of Mr De Wet on 11 August 2021 about the real reason for their dismissal was unfounded. The respondent further contends that Mr De Wet, in any event, never testified that the appellants were dismissed for failing to sign a new contract of employment. His evidence was that they were dismissed for misconduct in refusing to work according to the respondent's conditions of employment and for leaving the workplace without authorisation on 29 November 2019. Commissioner Sithole, who dealt with the matter on 11 August 2021, intervened due to the line of questioning of the appellants' attorney who suggested to Mr De Wet that the appellants were dismissed for their refusal to sign the contracts of employment, which Mr De Wet denied. It was at this stage that the commissioner raised concerns about the CCMA's jurisdiction in a matter implicating section 187 (1) (c) of the LRA. Based on all the above, the respondent contends that absent a reasonable and acceptable explanation for the delay, which was not provided, the appellants' prospects of success were immaterial. Therefore, the court *a quo* exercised its discretion correctly in dismissing the application.

[30] Lastly, the respondent contends that it is entitled to finality. The appellants were dismissed in December 2019. It will frustrate the broader objects of the LRA if the appellants succeed and condonation is granted as they will be entitled to proceed with their automatically unfair dismissal claim. Since December 2019, a period in excess of four years has elapsed and a further period of 18 to 24 months may elapse before the matter goes to trial. All of this will be immeasurably prejudicial to them. This, in circumstances in which the appellants are the authors of their own misfortune in that they caused the delay throughout. In all the circumstances, so contends the respondent, it will not be in the interests of justice to grant condonation.

Discussion

[31] Central to this appeal is whether it is open to this Court to interfere with the exercise of the discretion by the Labour Court and the standard of such interference. This depends on whether the Labour Court was exercising a discretion in the true sense or the loose sense. The explanation of and the distinction between these two types of discretions and the permissible extent of interference by an appeal court has been eloquently explained by the Constitutional Court in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*[4] from which I quote liberally. In that matter, Khampepe J explained the legal position as follows:

> '[83] In order to decipher the standard of interference that an appellate court is justified in applying, a distinction between two types of discretion emerged in our case law. That distinction is now deeply rooted in the law governing the relationship between appeal courts and courts of first instance. Therefore, the proper approach on appeal is for an appellate court to ascertain whether the discretion exercised by the lower court was a discretion in the true sense or whether it was a discretion in the loose sense. The importance of the distinction is that either type of discretion will dictate the standard of interference that an appellate court must apply.
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> [84] In *Media Workers Association* the court defined a discretion in the true sense:
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> "The essence of a discretion in [the true] sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him."
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> [85] A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this court in many instances, including matters of costs, damages and in the award of a remedy in terms of s 35 of the Restitution of Land Rights Act. It is true in that the lower court has an election of which

[4] [2015] ZACC 22; 2015 (5) SA 245 (CC) at paras 83 – 86 and 88.

option it will apply and any option can never be said to be wrong as each is entirely permissible.

[86] In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. Instead, as described in *Knox*, a discretion in the loose sense –

"mean[s] no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision."

….

[88] When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised –

'judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'

An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court.'

[32] It is so that the court *a quo* was exercising a discretion in the true sense when it dismissed the condonation application, as it could either dismiss it or grant it, both options being available to it. Regrettably, however, the Labour Court did not deal with the explanation for the delay which was tendered by the appellants. It merely said, as a matter of conclusion, that the explanation for the lateness was incomplete in that the whole period of delay was not accounted for. What the court did not do is to deal with the explanation itself – the period accounted for and the period that it felt was not accounted for. A close examination of the Labour Court's reasons for dismissing the condonation application leaves one still wondering which part of the 17 or 18 months delay period was not accounted for. The importance of this lies in the fact that a court is not entitled, in the exercise of its discretion, to merely pronounce, as a matter of conclusion, that the condonation application must fail with not even a scant elaboration on how that decision was arrived at. This offends against the principle that courts must provide reasons for the decisions they make. I do not understand how it can be said that the explanation is incomplete or that some

of the period is not accounted for without reference to the explanation that was given.

[33] In the founding affidavit, the appellants say that when the matter was conciliated on 7 February 2020, the commissioner informed them that they should refer the matter to the CCMA for arbitration. They followed that advice, resulting in the matter being set down for arbitration on 11 March 2020. In preparation for the arbitration, the respondent filed submissions on 3 March 2020 relating to the said arbitration. In those submissions, the respondent took issue with the late referral for arbitration. However, and before the arbitration sat, the respondent sent an SMS to the appellants on 9 March 2020, two days before the date of arbitration, indicating that if the appellant withdrew the matter from arbitration and signed the new contracts, they should report to the respondent's office by 11:00 on 10 March 2020. In the period of a little more than one year from 11 March 2020, the matter became embroiled in no less than seven hearings and rulings by various commissioners of the CCMA on one issue or the other.

[34] Two rulings are of some significance, one being that of commissioner Byrne on 9 November 2020. What was before commissioner Byrne was the issue of legal representation. The second issue was an application for the rescission of an earlier condonation ruling. The last issue which is also very important was that the appellants wanted to make submissions on the nature of the dispute. This ruling was issued some 10 months or so before commissioner Sithole's ruling on 15 September 2021 that the CCMA had no jurisdiction to arbitrate the matter. Commissioner Sithole's reason for that ruling was that in terms of section 187 read with section 191 of the LRA, the dispute was about an automatically unfair dismissal which ought to be adjudicated by the Labour Court. The commissioner Sithole ruling, which was preceded by the commissioner Byrne ruling of 9 November 2020, was the direct obverse of the earlier ruling of 9 November 2020. Commissioner Byrne ruled that the nature of the dispute was that of a dismissal due to misconduct.

[35] For almost a year from October 2020 to 15 September 2021, confusion reigned as to the nature of the dispute with different commissioners arriving at different conclusions on the same issue. It is therefore fair to say that of the 17 or 18

months delay that the Labour Court referred to, almost a year thereof was mired in controversy with two contradictory rulings on the same subject matter by the CCMA commissioners. It was not argued before the Labour Court or before this Court that commissioner Byrne's ruling should have been ignored by the appellants. In fact, it was the appellants' argument that they had to deal with the CCMA rulings. A significant portion of the delay period that the Labour Court referred to is punctuated by CCMA preliminary rulings on different issues. It is clear that the appellants were not sitting idly or being supine. They were actively pursuing their dismissal dispute based on what they were advised, rightly or wrongly, was the correct route to follow by either their union or one or other legal representative.

[36] The argument that, because the appellants were at all material times represented either by a union official or legal representatives, while it sounds attractive, ignores the fact that even where a person has been legally represented, it does not necessarily follow that condonation will always be refused. In fact, the interests of justice may very well point to the granting of a condonation application being in the interests of justice even where a litigant was legally represented and had the benefit of legal counsel. In *Saloojee and Another, NNO v Minister of Community Development,*[5] Steyn CJ said:

> 'This Court has on a number of occasions demonstrated its reluctance to penalise a litigant on account of the conduct of his attorney. A striking example thereof is to be found in *R v Chetty* 1943 AD 321. In that case there was an even longer delay than here, and the excuses offered by the attorney concerned were clearly unsatisfactory, but the Court nevertheless granted condonation. Feetham JA remarked…:
> "So far, however, as appeared from the papers before us, the applicant himself was not responsible for the delays which have occurred, save in so far as he continued to allow his case to remain in the hands of an attorney who had shown himself unworthy of his confidence, and, in view of the serious nature of the conviction recorded against the applicant, and of the fact that he was given leave to appeal by the Transvaal Provincial Division, the application for condonation is now granted."

[5] 1965 (2) SA 135 (A) at 140 H to 140H-141.

In *Regal v African Superslate (Pty) Ltd* 1962 (3) SA 18 (AD) at p.23 also, this Court came to the conclusion that the delay was due entirely to the neglect of the applicant's attorney, and held that the attorney's neglect should not, in the circumstances of the case, debar the applicant, who was himself in no way to blame, from relief.'

[37] On the issue of the prospects of success, the Labour Court again, regrettably, did not express a view on the appellants' prospects of success on the merits. The court merely made a fleeting reference to prospects of success without any indication that it evaluated the appellants' prospects. How it evaluated where the interests of justice lay is therefore impossible to tell. It seems to have relied on the fact that because in its view there was no reasonable explanation for the delay, that was the end of the matter.

[38] Some of the history of this matter which incidentally, is nicely captured in the Labour Court's judgment, is that there was a merger between the appellants' former employer, Datelec with the respondent in July 2019. That process led to the appellants' employment being transferred to the respondent in terms of section 197 of the LRA. This was followed by an engagement between the respondent and the appellants about proposed changes to working conditions. There was a dispute about working conditions including proposed changes to working hours as a result of which the appellants refused to sign the new employment contracts. The respondent then referred that dispute to NBCEI which was conciliated on 21 November 2019 with the conclusion being that the parties would further engage in negotiations and that referral was withdrawn. On 26 November 2019, the appellants' union official, Ms Sethoane, and the respondent's representative, Mr De Wet, held a meeting to discuss the issues. It transpired that the union shop stewards and Ms Sethoane had no mandate from the appellants resulting in the failure of that attempt at resolving the dispute. The agreement though was that the first appellant would be assisted with transport to visit the various sites of the respondent to seek a mandate. The respondent did not provide the transport as promised and therefore no mandate about the proposed changes was obtained.

[39] On 29 November 2019, the respondent's employees including the appellants left their workplace according to the usual Datelec arrangements at 13h00. This led to the suspension of the appellants and other employees on 4 December 2019. Apparently, despite there being no mandate, Ms Sethoane had agreed that the employees would accept the respondent's new conditions of employment. This led to the employees being charged with misconduct for refusing to work in accordance with the respondent's conditions of employment by leaving the workplace early and without authorisation on 29 November 2019. The employees who had also been charged but had agreed to the new terms and conditions of employment and signed the new contracts of employment were not subjected to the disciplinary process. They were just given final written warnings. The appellants were subjected to a disciplinary process on 10 and 11 December 2019 and were all found guilty and dismissed.

[40] It is clear from the above summary that the appellants were charged with misconduct and dismissed. It is equally clear that the misconduct complained of was related directly or indirectly to their refusal to accept the new terms and conditions of employment subsequent to a section 197 merger between Datelec and the respondent. That is part of the dispute that must be adjudicated by the Labour Court. The referral form to the NBCEI for conciliation completed by the first appellant indicates that the nature of the dispute was dismissal, misconduct, unknown reason and section 197 transfer. They also summarise the facts as being a refusal to work according to the respondent's conditions of employment. It is clear that the NBCEI, the CCMA and the attorney/s who represented the appellants played some role in the predicament that the appellants found themselves in, in issuing the statement of claim and thus referring the matter to the Labour Court for adjudication as late as they did.

[41] In all these circumstances the question is, what do the interests of justice require? It is trite that the court has a discretion which must be exercised judicially upon consideration of all the facts. The facts to be considered include the degree of lateness, the explanation for the delay, the prospects of success and the importance of the case. These are to be considered conjunctively and not disjunctively. The Labour Court does not appear to have observed these trite principles. Axiomatically,

the question is whether the court exercised the discretion it enjoyed judiciously in the circumstances. I do not think so far the reasons already adumbrated above. It is clear that while the court exercised a discretion in the true sense, it did so influenced by wrong principles and a misdirection on the facts when it concluded baldly that the explanation for the delay was inadequate. That being the case, the Labour Court did not exercise its discretion judicially as it misdirected itself on facts and the misapplication of the legal principles involved. This entitles this Court to interfere with the discretion exercised by the Labour Court.

[42] In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*[6], the court expressed the principle of interference by the appeal court as follows:

'A court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the Court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'

[43] Finally, as the court said in *Grootboom v National Prosecuting Authority and Another*[7], the standard for considering an application for condonation is the interests of justice. It said:

> '[The interests of justice include] 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.'

[44] It seems to me that the interests of justice call for the granting of the condonation application. This is so, *inter alia*, because, there is such a close nexus

[6] [1999] ZACC 17; 2000 (2) SA 1 (CC) at para 11.
[7] [2013] ZACC 37; 2014 (2) SA 68 at para 22.

between the alleged misconduct for which the appellants were charged and dismissed and the issue of them being allegedly required to abide by newly imposed conditions of employment subsequent to a section 197 transfer. Section 197 transfer process is so fundamental and affects so many employees in different sectors of the economy and industries that it should not easily be allowed, without due consideration, to be a basis for the dismissal of employees without proper ventilation of the issues that played out. The considerations of the issue of the prejudice the respondent complains of are far outweighed by the automatically unfair dismissal issues the appellants intend to raise at the trial. In all these circumstances, the appeal must succeed.

[45] In consideration of the issues involved, the law and the requirements of fairness, together with the fact that the costs granted by the Labour Court have been abandoned by the respondent (and correctly so), I find that the costs in the appeal should not be granted to either party.

[46] In the result, the following order is issued:

Order

1. The appeal is upheld.
2. The order of the Labour Court is set aside and substituted with the following order:

‘1. The application for condonation is granted with no order as to costs.’

3. There is no order as to costs.

M.S. JOLWANA

Molahleli AJP and Musi AJA concur.

Appearances:

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COUNSEL FOR THE RESPONDENT: H. Gerber SC

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