



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case no: C524/2022

In the matter between:

**SOUTH AFRICAN CLOTHING AND TEXTILE
WORKERS UNION (SACTWU)**

First Applicant

VERONICA WITBOOI AND 21 OTHERS

Second and Further Applicants

and

ABDURUMAN MOOLAJIE N.O

First Respondent

KEVIN TITUS N.O

Second Respondent

**(Cited in their capacity as the joint liquidators of
Mika Industries CC)**

PRECISION CUTTING AND TRIMS (PTY) LTD

Third Respondent

Heard: 20 November 2024

Delivered: 19 February 2025

Summary: Application for condonation for the late referral of an alleged dismissal dispute to this Court in circumstances where the CCMA issued a

joinder ruling after the elapse of 30 days following the referral of the dispute for conciliation.

JUDGMENT

GANDIDZE, AJ

Introduction

[1] The South African Clothing and Textile Workers Union (SACTWU), the first applicant herein, and the second to further applicants (applicant employees) referred an alleged automatically unfair dismissal dispute to this Court against the first and second respondents, the joint liquidators of Mika Industries CC (Mika Industries), the employer of the second and further applicants. The claim is also against Precision Cutting and Trims (Pty) Ltd (Precision Cutting), the third respondent. SACTWU and the applicant employees, collectively referred to as the applicants, are alleging that the dismissal of the applicant employees took place because of, or for a reason related to the transfer of the business of Mika Industries to Precision Cutting as a going concern, as contemplated in sections 197 and 197A of the Labour Relations Act¹ (LRA).

[2] The referral to this Court was made outside the 90-day prescribed time limit, and the applicants seek condonation.

[3] Precision Cutting opposed the condonation application but did not file heads of argument and was not in attendance when the matter was argued. The joint liquidators did not file opposing papers or a notice to abide by the Court's decision.

Legal principles applicable to condonation applications

¹ Act 66 of 1995, as amended.

[4] In *Steenkamp and Others v Edcon Limited*², the Constitutional Court stated the following:

[36] Granting condonation must be in the interests of justice. This Court in *Grootboom* set out the factors that must be considered in determining whether or not it is in the interests of justice to grant condonation:

[22] ... [T]he standard for considering an application for condonation is the interests of justice. However, the concept 'interests of justice' is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

[23] It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default. ...

[51] The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting

² [2019] ZACC 17; (2019) 40 ILJ 1731 (CC) at paras 36 – 37.

condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.”

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

[5] Therefore, the factors that are typically assessed in condonation applications are (a) the degree of lateness; (b) the explanation for the delay; (c) prospects of success; and (d) prejudice to the parties.³ The importance of the case is also a relevant consideration in some cases.

[6] In deciding a condonation application, the Court has discretion to be exercised judicially upon a consideration of all the facts, and essentially, it is a matter of fairness to the parties.⁴ It follows that each condonation application must be decided on its own facts.⁵

Degree of lateness

[7] Although the parties are *ad idem* that the referral was made late, they disagree on the extent of the delay, hence it is necessary to trace the history of the dispute.

[8] The referral to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation was made on 13 April 2021 and against Mika Industries only. The following day, the applicants brought an application to join Precision Cutting to the dispute. Before the joinder application could be determined, the CCMA set the matter down for conciliation on 11 May 2021. The applicants attended the conciliation. The first and second respondents did not.

³ *Melane v Santam Insurance Co* 1962 (4) SA 531 (A).

⁴ *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at para 10.

⁵ *South African Post Office Ltd v Commission for Conciliation Mediation and Arbitration and Others* [2011] ZALAC 16; (2011) 32 ILJ 2442 (LAC) at para 23.

[9] On 1 July 2021, the CCMA issued a ruling that joined Precision Cutting to the proceedings. This ruling alludes to an alleged transfer of a business as contemplated in section 197 of the LRA.

[10] Thereafter, on 7 September 2021, the applicants requested the CCMA to arbitrate the dispute, and the matter was scheduled for arbitration on 25 January 2022.

[11] The arbitration did not commence as scheduled, with the Commissioner finding that the CCMA lacked jurisdiction to arbitrate the matter given that the dismissals were for operational requirements involving more than one employee, the employer employed more than 10 employees, and that such disputes are subject to adjudication by this Court. The relevant jurisdictional ruling is dated 3 February 2022.

[12] Before the issue of the jurisdictional ruling, on 25 January 2022, the applicants brought to the attention of the Commissioner that they were not issued with a certificate of outcome following the conciliation meeting on 11 May 2021. The Commissioner issued a certificate of outcome dated 25 January 2022. None of the respondents attended the CCMA on 25 January 2022.

[13] The referral to this Court was made on 13 May 2022⁶, accompanied by a condonation application. Precision Cutting responded to the statement of case outside the 10-day prescribed time limit and also sought condonation for the late filing of the response. It would have been ideal for the two condonation applications to be determined simultaneously, and it is not apparent from the Court file why this request was not made to the Registrar, with the consequence that the only application before the Court is one for the late filing of the statement of case. In light of the order granted below, Precision Cutting's application for condonation for the late filing of its response may result in further delays in the finalisation of a matter

⁶ The applicants contend that the statement of case was filed on 3 May 2022, whereas the stamp of the Court acknowledging filing is dated 13 May 2022. Precision Cutting contend that the statement of case served on it was unsigned and not accompanied by the annexures referred to in the document. The statement of case forming part of the paginated pleadings bundle is indeed unsigned, however, the Court file contains a signed version also stamped by the Court on 13 May 2022. The Court hearing Precision Cutting's condonation application for the late of its response can resolve these disputes of fact as necessary.

that has been ongoing since 2021, which is unfortunate given that labour disputes ought to be resolved expeditiously.

[14] Returning then to the condonation application before the Court and as recorded above, the parties disagree on the degree of lateness.

[15] On the one hand, in their application for condonation, the applicants submitted that the referral to this Court was made seven days late as the 90 days is calculated from 25 January 2022, when the certificate of outcome was issued. However, in their heads of argument, the applicants somewhat reluctantly pointed out that ordinarily, the 90 days for referring the matter to this Court is calculated from when the 30 days lapses after the referral was made to the CCMA for conciliation, but added that in this case, there were intervening events which impact the date from which the 90 days must be calculated. The intervening events will be referred to when the explanation for the delay is examined.

[16] On the other hand, it is Precision Cutting's submission that the applicants should have referred the matter to this Court within 30 days, calculated from 11 May 2021, when conciliation was held and a certificate of outcome issued. This point can easily be disposed of. The document relied upon cites only the applicants, it does not cite the respondent party, nor does it indicate what matter was conciliated and when, and the outcome of that conciliation process. It has also not been signed by a commissioner and is not dated. Bluntly put, it is a 'draft' document that cannot be construed as a certificate of outcome, and it is unclear where Precision Cutting obtained this document from, given that it did not attend the conciliation on 11 May 2021. In contrast, the certificate of outcome issued on 25 January 2022 contains all the information missing from the draft referred to above. This is the only certificate of outcome issued in the matter.

[17] But is the date of issue of the certificate of outcome determinative of when the matter ought to have been referred to this Court on the facts of this matter? The answer lies in section 191(1) of the LRA, which provides that alleged unfair dismissal

and unfair labour practice disputes may be referred to the CCMA for conciliation. After failed conciliation, what happens next is dealt with in these provisions:

‘191 Disputes about unfair dismissals and unfair labour practices

...

(5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved –

(a) the council or the Commission must arbitrate the dispute at the employee's request if –

...

(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is –

(i) automatically unfair.

...

(11) (a) The referral, in terms of subsection (5) (b), of a dispute to the Labour Court for adjudication, must be made within 90 days after the council or (as the case may be) the commissioner has certified that the dispute remains unresolved.’

[18] Interpreting the above provisions, the Labour Appeal Court (LAC) in *SA Municipal Workers Union on behalf of Manentza v Ngwathe Local Municipality and Others*⁷ (*Manetza*) stated as follows:

‘[28] ... On a proper interpretation, s191(5) of the LRA entitles an employee to refer an unresolved unfair dismissal or unfair labour practice dispute for arbitration to the CCMA or a bargaining council, in terms of subsection (a) thereof, or for adjudication to the Labour Court, in terms of subsection (b) thereof, upon the occurrence of either of two events: the issue of a certificate of non-resolution of the dispute or the expiry of the 30 day period from either the CCMA's or the bargaining council's receipt of the referral. The effect of

⁷ [2015] ZALAC 26; (2015) 36 ILJ 2581 (LAC) at paras 28 - 30. See also *NUMSA v Driveline Technologies (Pty) Ltd and Another (Driveline Technologies)* [1999] ZALC 157; [2000] 1 BLLR 20 (LAC), and *Premier of Gauteng and Another v Ramabulana NO and Others (Ramabulana)* [2007] ZALAC 16; [2008] 4 BLLR 299 (LAC).

this interpretation is that the occurrence of either of these two events entitles an employee to request the bargaining council concerned or the CCMA to arbitrate the dispute in terms of s191(5)(a) of the LRA or to refer the dispute to the Labour Court for adjudication in terms of s191(5)(b) thereof.

[29] Section 191(5) of the LRA provides for the occurrence of either of the events: the issue of a certificate or expiry of 30 days from receipt of the referral as an objective fact which founds the employee's right to proceed to arbitration or adjudication. The employee's entitlement to refer the matter to arbitration or adjudication as contemplated in s191(5)(a) and (b) of the LRA respectively, does not arise from any election on the employee's part as contended for by the appellant, but rather from whichever of the two jurisdictional events occurs first in sequence of time. Thus, where conciliation takes place under the auspices of the CCMA or a bargaining council within the 30 day period contemplated in s191(5) of the LRA, and a certificate of non-resolution is issued within that period, the employee's right to refer the dispute to arbitration or adjudication will be triggered by the issue of the certificate as the jurisdictional event conferring this right. In this case, the subsequent expiry of the 30 day period will play no role in founding the employee's right to refer the dispute to arbitration or adjudication.

[30] Similarly, where the 30 day period contemplated in the subsection lapses without the holding of a conciliation proceeding and the CCMA or a bargaining council certifying that the dispute remains unresolved, the lapse of the 30 day period will form the jurisdictional trigger entitling the employee to refer the dispute to arbitration. This right, having accrued to the employee upon the lapse of the 30 day period contemplated in s191(5) of the LRA will not be affected by the convening of any subsequent conciliation proceedings or the issue of a certificate of outcome consequent thereupon. As correctly pointed out by the Municipality, in the latter scenario, the issue of the certificate would have no effect in law as it would be superfluous to the employee's right to refer the unfair dismissal or unfair labour practice dispute to arbitration since this right would have already accrued to the employee on the lapse of 30 days.' [Own emphasis]

[19] Therefore, the 90-day period for referring the matter to this Court, in terms of *Manetza*, is triggered by the earlier of either the elapse of 30 days from the date of the referral to the CCMA, or the issue of the certificate of outcome. In this case, the 90-day period is calculated from when 30 days elapsed since the referral was made to the CCMA. As the referral to the CCMA was made on 13 April 2021, 30 days elapsed on 13 May 2021, with the consequence that the 90 days for referring the matter to this Court is calculated from 14 May 2021. Therefore, the referral to this Court should have been made on or about 11 August 2021. It was made on 3 May 2022. That is almost ten months late, and that delay is substantial.

The explanation for the delay

[20] The events that unfolded after the matter was referred to the CCMA were related above, with dates. An application to join Precision Cutting as a respondent party was made a day after the matter had been referred to the CCMA. The matter was initially scheduled for conciliation on 11 May 2021, and the joinder application was determined on 7 July 2021. The applicants requested arbitration on 7 September 2021. The matter was scheduled for arbitration on 25 January 2025 but did not proceed as the Commissioner found that the CCMA lacked jurisdiction to determine the matter. A certificate of outcome was issued on the same date, and a jurisdictional ruling was issued on 3 February 2022.

[21] The applicants contend that the union official who handled the matter was under the impression that the CCMA could arbitrate the matter. The referral for conciliation refers to a liquidation. The joinder ruling issued in July 2021 refers to a dispute relating to a transfer of a business as a going concern. A cursory reading of the LRA would have alerted the union official dealing with the matter that the CCMA lacks jurisdiction to arbitrate such disputes.

[22] In argument, Mr Haffeggee, for the applicants, submitted that the applicants acted reasonably in awaiting the outcome of the joinder application before taking further steps given what the Constitutional Court found in *Intervale National Union of*

*Metalworkers of South Africa v Intervolve (Pty) Ltd and Others*⁸ (*Intervolve*) that employer parties can only be cited in subsequent proceedings if they had been served with the referral for conciliation and must have been made aware that unless the matter is resolved, there might be an ensuing legal process.⁹ The submission was well made. Until the CCMA issued a ruling joining Precision Cutting to the dispute referred for conciliation, it could not be said that Precision Cutting had been properly served with the referral to conciliation. The applicants would have been precluded from pursuing any alleged unfair dispute against Precision Cutting without proof that Precision Cutting had been served with the referral for conciliation.

[23] The joinder ruling could have been issued sooner, and it is unclear why it took the CCMA from April 2021 to July 2021 to issue that ruling. The fact that the joinder ruling was issued in July 2021 does not alter how the 90 days for referring the dispute to this Court is calculated. That a joinder ruling was awaited only explains the delay from May until July 2021, and a referral to this Court at that point would have been made timeously. The applicants did not refer the matter to this Court at that stage.

[24] Following the issue of the joinder ruling, the applicants made the referral for arbitration only in September 2021, and the CCMA set the matter down for hearing only in January 2022. Had an earlier arbitration date been allocated, it would have been realised sooner that the CCMA could not arbitrate the dispute.

[25] In January 2022, the Commissioner informed the applicants that the CCMA lacked jurisdiction to determine the dispute relating to dismissals for operational requirements involving more than one employee and an employer with more than ten employees.

[26] Until this point, I am persuaded that the applicants pursued the matter with interest and took the necessary steps to progress it, albeit that they were at the

⁸ [2014] ZACC 35; 2015 (2) BCLR 182 (CC) at para 40.

⁹ *Ibid* at para 53.

wrong forum and were already out of time to refer the matter to this Court by the time they were informed of this in January 2022.

[27] Once the Commissioner had been allocated to handle the arbitration on 25 January 2022 and informed the applicants that the CCMA lacked jurisdiction to arbitrate the dispute, one would have expected the applicants to act with haste to ensure that the matter was referred to this Court without delay. It is unclear when the applicants briefed their current attorneys of record to refer the matter to this Court, and one expected the attorneys drafting the condonation application to have reflected this information in the founding affidavit, but it is not there. This information is essential because when instructed in the matter, it would have been apparent to the attorneys that the referral to this Court was already out of time, given what the LAC stated in *Manetza*. What is pleaded is that the Statement of Case was due on 26 April 2022 and was filed late because, between 18 and 29 April 2022, the attorney dealing with the matter was severely ill with what appeared to be COVID-19 and after COVID-19 had been ruled out, the attorney remained severely ill. What is not explained is why, given this attorney's illness, another attorney could not have attended to the matter in the meantime, given that the 22 April 2022 deadline for filing the Statement of Case was, according to the applicants' attorneys, impending.

[28] It is also pleaded that 2 May 2022 was a public holiday and that the Statement of Case could only be filed on the next business day, 3 May 2022. However, the Court stamp on the statement of case reflects 13 May 2022 as the filing date. There is some explanation that there were challenges filing the pleading in the Cape Town Labour Court because the matter had a Johannesburg Labour Court case number. How it was missed that the document needed to be filed in the Johannesburg Labour Court, which issued the case number, is not explained.

[29] Be that as it may, I have considered that the delays from May 2021, when the 30 days expired since the referral until the attorneys were instructed to refer the matter to this Court, cannot be laid at the door of the attorneys, but that they are to blame for some of the delays for the subsequent period as set out above. Those being the facts, it would be prejudicial to the applicants to refuse them condonation

in circumstances where they have diligently pursued the matter since April 2021. In *Saloojee and Another NNO v Minister of Community Development*¹⁰, the Court stated that on several occasions, the Court had demonstrated its reluctance to penalise a litigant on account of his attorney's conduct, however, there was a limit beyond which a litigant cannot escape the results of their attorney's lack of diligence in prosecuting his dispute.¹¹ In *casu*, this is not one of those cases where it can be said that a litigant should not escape the results of attorneys' negligence or insufficiency of the explanation provided by the attorneys.

[30] There is an explanation for the delay, but it could have been better.

Prospects of success

[31] Mika Industries was voluntarily liquidated on 18 March 2021, and the applicants were informed. The applicants contend that their dismissals are automatically unfair because of or for reasons related to a transfer of a business as contemplated in section 197 of the LRA and that Mika Industries and Precision Cutting sought to evade the consequences of section 197 of the LRA. They also allege that Mika Industries contemplated the section 197 transfer before the dismissals took effect and were not provided with advance notice that Mika Industries would be voluntarily wound up. In the alternative, the applicants contend that the dismissals were effected because of Mika Industries' operational requirements and that section 189(3) of the LRA setting out the procedure to be followed in such matters was not complied with.

[32] Precision Cutting contends that Mika Industries dismissed the applicants before the issue of the voluntary liquidation order and that Mika Industries is the only party that ought to have been cited as sections 197 and 197A of the LRA do not apply.

¹⁰ 1965 (2) SA 135 (AD).

¹¹ Ibid at 140H-141C.

[33] The trial court can properly determine the factual and legal disputes between the parties. Based on the pleadings, *prima facie*, the applicants' case is not hopeless, and they may succeed at the trial stage if they prove the facts they allege.

Prejudice and the importance of the case

[34] The applicants submit that they will be prejudiced if condonation is refused, as that will be the end of the matter. This is correct, as that finding will be subject only to the right to appeal.

[35] Precision Cutting, surprisingly, also contends that it will be prejudiced should condonation be refused because it “*will be deprived of an opportunity to have its case considered*”, but at the same time, it complains about the applicants' delay of almost a year in referring the matter to this Court. The two contentions are mutually exclusive.

[36] Labour disputes should be resolved expeditiously, and this dispute has been ongoing since 2021. An explanation for the delay has been provided but is lacking in some respects. However, what is not in contention is that Precision Cutting was informed of the applicants' intention to join it to the proceedings a day after the referral for conciliation was made. Since that date, it has been aware of the applicants' intent to pursue the dispute against it. The delays that followed, which are prejudicial to all the parties, were not all of the applicants' making. At no point was an impression given to any of the respondents that the applicants had abandoned the dispute.

[37] A further consideration is that this is not a dismissal dispute involving an individual where the applicable principle is that condonation will not be lightly granted.¹² Twenty-two employees are affected. It is in the interests of all parties that the matter proceeds to trial, where all issues will be ventilated. Should the matter

¹² See: *Queenstown Fuel Distributors CC v Labuschagne NO and Others* [1999] ZALAC 24; [2000] 1 BLLR 45 (LAC) at para 24.

continue, there is no identifiable prejudice to the respondents, and they can all present their cases to the trial Court as necessary.

Costs

[38] Though the applicants have been successful, they sought an indulgence from the Court for referring the matter to this Court late and cannot be granted costs. Additionally, Precision Cutting, the only respondent who opposed the application, was assisted by an employer organisation in drafting the opposing affidavit, and therefore, the question of legal costs does not arise, and any disbursements incurred would be minimal. In accordance with section 162 of the LRA, the requirements of law and fairness require that each party pay its costs.

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

Order

1. Condonation for the late filing of the statement of case is granted.
2. There is no order as to costs.

T Gandidze
Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr Imraan Haffegée

Instructed by: Haffegée Roskam Savage Attorneys

For the Third Respondent: No appearance, but Mr MJ van Dyk, an Official from the Association for Retailers, Manufacturers and Service Providers (ARMS), drafted the pleadings.