



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable
Case No: D505/2021

In the matter between:

N. B. MTHEMBU

First Applicant

**SECOND AND FURTHER APPLICANTS
AS LISTED IN ANNEXURE "A"**

Second Applicant

and

SNACKWORKS

First

Respondent

NATIONAL BRANDS LIMITED (PTY) LTD

Second

Respondent

Heard: 15 July 2025

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email by the Registrar. The date and time for handing-down is deemed to be 14h00 on 29 July 2025

JUDGMENT

GOVIND BHIKHA, AJ

Introduction

[1] The applicants seek retrieval of a file that has been archived in terms of Clause 16 of the now repealed Practice Manual.

[2] The applicants referred a dispute to this Court by way of a statement of case under case number D505/2021. A period exceeding six months has elapsed since the date on which the last process in the referral was delivered.

[3] The application is opposed.

Background facts

[4] The applicants comprise Nkosinathi Bayanda Mthembu and nine others who were dismissed for reasons relating to operational requirements in July and August 2019.

[5] On 20 February 2020, the applicants referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The referral was delivered five months out of time.

[6] On 20 March 2020, a certificate of outcome was issued by the CCMA certifying that the dispute remains unresolved. Condonation for the late referral of the dispute was not granted.

[7] On 9 July 2020, the applicants referred their dispute to this Court by way of a statement of case under case number D304/20.

[8] The respondents defended the referral and raised a point *in limine* that condonation had not been granted by the CCMA, and that consequently, this Court lacks jurisdiction to deal with the dispute.

[9] The applicants then withdrew the referral under case number: D304/20.

[10] On 10 May 2021, the applicants referred a second or fresh unfair dismissal dispute, for the same dismissal, to the CCMA accompanied by a condonation application.

[11] The first referral to the CCMA was never withdrawn.

[12] On 28 June 2021, Commissioner Ngidi granted condonation for the second referral in the CCMA.

[13] On 16 August 2021, the applicants once more referred their dispute to this Court under the current case number by way of a statement of case.

[14] On 19 August 2021, the respondents delivered a notice of opposition to the statement of case.

[15] On 20 August 2021, the respondents launched an application in the CCMA to rescind Commissioner Ngidi's condonation ruling.

[16] The applicants opposed the rescission application.

[17] On 25 August 2021, the respondents delivered a statement of response under the current case number.

[18] On 26 March 2022, Commissioner Dubazane, made the following ruling in respect of the respondents' rescission application: '*The CCMA lacks the jurisdiction to entertain the dispute.*'

[19] In July 2022, the applicants wrote to the respondents' attorneys proposing a pre-trial conference. In response, the applicants were advised that their referral to this Court has been archived.

[20] The current application for retrieval was launched in October 2022.

Rules and Practice Manual

[21] At the times material to this application, referrals to this Court were dealt with in terms of the now repealed Rule 6 of the Rules for the conduct of proceedings in the Labour Court¹.

[22] The delivery of a statement of response, as the respondents did on 25 August 2021, triggers Rule 6(4)(a), which provides as follows:

'Pre-trial conference by parties

(4)(a) When a response is delivered, the parties to the proceedings must hold a pre-trial conference in terms of paragraph (b) within 10 days of the date of delivery of the response.'

[23] Clause 16 of the now repealed Practice Manual² provides the following in respect of archiving files:

'16. Archiving files

16.1. In spite of any other provision in this manual, the Registrar will archive a file in the following circumstances:

¹ Rules for the Conduct of Proceedings in the Labour Court, Published under GN 1665 on 14 October 1996.

² Practice Manual of the Labour Court of South Africa.

- in the case of an application in terms of Rule 7 or Rule 7A, when a period of six months has elapsed without any steps taken by the applicant from the date of filing the application, or the date of the last process filed;
- in the case of referrals in terms of Rule 6, when a period of six months has elapsed from the date of delivery of a statement of case without any steps taken by the referring party from the date on which the statement of claim was filed, or the date on which the last process was filed; and
- when a party fails to comply with a direction issued by a judge within the stipulated time limit.

16.2. A party to a dispute in which the file has been archived may submit an application, on affidavit, for the retrieval of the file, on notice to all other parties to the dispute. The provisions of Rule 7 will apply to an application brought in terms of this provision.

16.3. Where a file has been placed in archives, it shall have the same consequences as to further conduct by any respondent party as to the matter having been dismissed.'

[24] Thus, the delivery of the respondents' statement of response, on 25 August 2021, triggered the necessity for a pretrial conference within 10 days.

[25] It is common cause that a period exceeding six months elapsed from the delivery of the statement of response and that no further steps were taken by the applicants.

[26] The file is thus archived and retrieval is required before the applicants may proceed further with the referral.

Legal principles

[27] In *Samuels v Old Mutual Bank*³, the Labour Appeal Court stated as follows:

³ [2017] 7 BLLR 681 (LAC) at paragraph 17.

[17] In essence, an application for the retrieval of a file from the archives is a form of an application for condonation for failure to comply with the Court Rules, timeframes and directives. Showing good cause demands that the application be *bona fide*; that the applicant provide a reasonable explanation which covers the entire period of the default; and show that he/she has reasonable prospects of success in the main application, and lastly, that it is in the interest of justice to grant the order. It has to be noted that it is not a requirement that the applicant must deal fully with the merits of the dispute to establish reasonable prospects of success. It is sufficient to set out facts which, if established would result in his/her success. In the end, the decision to grant or refuse condonation is a discretion to be exercised by the court hearing the application which must be judiciously exercised.'

[28] Thus, an application for retrieval is akin to an application for condonation for failure to comply with the Court Rules.

[29] The principles regarding condonation are now well established.

[30] In *Melane v Santam Insurance Co Ltd*⁴, the Court held as follows:

'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 therefore, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to

⁴ 1962 (4) SA 531 (A) at 532 C-F.

compensate prospects which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interests in finality must not be overlooked.'

[31] 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.⁵

[32] In addition to the aforementioned factors, there is an additional consideration of the interests of justice.

[33] In *South African Post Office Ltd v Commission for Conciliation Mediation and Arbitration and Others*⁶, the court said:

'In exercising that discretion the court must consider a number of factors namely: the degree of delay and the reasons or explanation for the delay; the prospects of the party seeking the indulgence succeeding in its claim or defence; the prejudice that the parties will suffer if condonation is granted or refused; and finally, whether it is in the interest of justice to grant the condonation sought.'

[34] The interests of justice require that where there is some exceptional nature on the facts, less weight may be given to the other determinable factors in granting condonation.⁷

Analysis

[35] The last step taken in terms of the referral, was the delivery of the statement of response, on 25 August 2021.

⁵ *National Union of Mineworkers v Council for Mineral Technology* [1998] ZALAC 22 at paragraph 10.

⁶ [2012] 1 BLLR 30 (LAC) at paragraph 17.

⁷ *National Education Health and Allied Workers Union on behalf of Mofokeng and Others v Charlotte Theron Children's Home* [2004] 10 BLLR 979 (LAC) at paragraph 24 to 27.

[36] The applicants were required to hold a pre-trial conference within 10 days of 25 August 2021.

[37] No further steps were taken and the file was archived on 25 February 2022.

[38] In July 2022, the applicants wrote to the respondents proposing dates for a pre-trial conference. The request was met with a response that the file had been archived and this led to the launch of the current application, in October 2022.

[39] Mr Nonyongo, who appeared for the applicants, argues that the referral could not proceed until the application to rescind Commissioner Ngidi's ruling in the CCMA was finalised.

[40] Upon receipt of Commissioner Dubazane's ruling in respect of the rescission application, the parties were not *ad idem* as to the interpretation of the ruling.

[41] This court has considered Commissioner Dubazane's ruling. The ruling itself does not rescind Commissioner Ngidi's ruling. In these circumstances and especially in light of the parties conflicting interpretations of the ruling, the parties ought to have approached the CCMA once more for a variation of the ruling. This process was never undertaken.

[42] In any event, the launch of the rescission application in the CCMA does not suspend the time frames in respect of the referral to this Court.

[43] Even if this Court is to make such finding, the applicants have the further task of explaining a lengthy delay of approximately 7 months after receipt of the rescission ruling dated 26 March 2022 to the launch of the current application. The applicants attempt to do this at paragraph 5 of their founding affidavit as follows:

‘5.5. Even after the ruling has been issued their legal practitioners were claiming that it is on each side, that is, applicants were claiming that it is on their side;favour and also the respondents were claiming that it is on their side/favour.

5.6. As the applicants are residing on different areas and others at rural areas it was extremely difficult to convene and instruct out attorney properly and fully.

5.7. As I was mandated to depose to the affidavit I was not contactable due to network failure from middle March 2022 until end September 2022 although our attorney has been phoning.

5.8 On or about the 05th October 2022 I happened to come at EThekwini and decided to go to our attorney’s office to check for any development. I made an appointment for the 07th October 2022 at 14h00 to prepare affidavits but I was told that there will be a load shedding and we agreed to meet on the 10th October 2022.’

(sic)

[44] Mr Nonyongo submitted that since the applicants’ explanation for the delay has been placed in dispute by the respondents, the applicants ought to be afforded an opportunity to tender oral evidence on the delay at trial.

[45] It is trite that the applicants must stand or fall by the averments made in their founding papers. In motion proceedings, the applicant is required to disclose such facts that would, if true, justify the relief sought and would sufficiently inform the other party of the case they are required to meet.⁸

[46] Further, the applicants could have sought to supplement their papers upon receipt of the respondents’ answering affidavit, which they failed to do.

⁸ *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at paragraph 29, referring to *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976 (2) SA 70 (D) at 704G.

[47] This Court is therefore confined to the explanation set out in the papers, which is wholly insufficient. There was much that could have been said to explain the delay. This Court is left to believe that the applicants simply sat back and did nothing for months until 5 October 2022, whilst their attorneys made more effort than they did in at least attempting to contact them.

[48] In the circumstances, the delay is lengthy and the reasons tendered are unsatisfactory.

[49] Although the authorities suggest that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, for the sake of completeness, the applicants' prospects are considered below.

[50] The applicants were dismissed for reasons relating to operational requirements in terms of a large-scale retrenchment referred to in Section 189A of the Labour Relations Act⁹ (LRA).

[51] The applicants dispute the procedural and substantive fairness of their dismissal.

[52] The applicants are however precluded from disputing the procedural fairness of their dismissal in terms of Section 189A(18) of the LRA.

[53] That leaves the issue of substantive fairness.

[54] At this stage, the applicants are only required to allege those facts, which if established would result in success.¹⁰ Of course, a statement of response has been delivered and it would be remiss not to consider the allegations therein.

⁹ Act 66 of 1995, as amended.

¹⁰ *Samuels v Old Mutual Bank* [2017] 7 BLLR 681 (LAC) at paragraph 17.

[55] The applicants premise their claim upon an internal memorandum disseminated by the respondents as well as an award issued by Commissioner Williams-de Beer under case number: KNDB16915-17.

[56] The memorandum alleges that the employees affected by the retrenchment process include only those '*Adcorp Blu temporary employees*' and not permanent employees. The applicants further allege, with reference to Commissioner Williams-de Beer's award, that the second respondent was deemed to be their employer in terms of Section 198A(3)(b)(i) of the LRA and that they were not candidates for retrenchment.

[57] The award of Commissioner Williams-de Beer, concerned a dispute referred by AMITU on behalf of 202 of its members in terms of Section 198A(3)(b) of the LRA.

[58] Although the applicants were not part of the aforementioned 202 employees, they too were employed by the second respondent in terms of a temporary employment service.

[59] Gleaned from the award of Commissioner Williams-de Beer, the second respondent did not dispute that it was the deemed employer of the referring employees. The point of departure was the interpretation of the deeming provision found in Section 198A(3)(b)(i). The second respondent argued that the deeming provision operated only for the purposes of the LRA and that it was still permitted to utilise the services of the temporary employment service provider in relation to the applicants. AMITU contended that the effect of the deeming provision was to exclude the temporary service employer in totality.

[60] The award of Commissioner Williams-de Beer does no more than declare the second respondent to be the sole and only employer of the referring applicants in terms of the deeming provisions of Section 198A(3)(b)(i) and further declared that the second respondent is not prohibited from continuing its commercial arrangement with the

temporary employment service provider in relation to remuneration and other human resource and administrative functions.

[61] The award does not have the effect of converting the applicants' temporary employment status to permanent.

[62] For all intents and purposes, the applicants remained temporary employees forming part of the pool of '*Adcorp Blu temporary employees*' affected by the retrenchment process.

[63] In the circumstances, the applicants do not enjoy prospects of success in the referral.

[64] On the issue of prejudice, it was alleged in the founding papers that there is another case on similar facts that is pending before this Court under case number: D60/2020 and which may be joined with the referral under the current case number for trial. However, the matter under case number: D60/2020 has already been determined at trial and is subject to an appeal.

[65] This Court is mindful that issues relating to employment concerns one's livelihood and are of significant importance. Whilst the applicants will be prejudiced by not being afforded an opportunity to ventilate their matter, it would not serve any purpose to allow the applicants to proceed further where their prospects of success appear to be dismal.

[66] The respondents further indicate that the dismissals took place in 2019 and that they were suffer prejudice if this application is granted as witnesses are no longer available given the lengthy period of time that has elapsed.

[67] Further, there is nothing exceptional on the facts to justify the grant of condonation in the interests of justice.

Costs

[68] The rule of practice that costs follow the result does not apply in this Court.¹¹

[69] Rather, when considering an award of costs, this court must consider what fairness demands and err on the side of not discouraging parties from approaching the Courts for the peaceful resolution of labour disputes. Further, if costs are to be awarded, there must be reasons that justify the departure from the position that a losing party should not be mulcted in costs in labour disputes.¹²

[70] There are no reasons to justify the departure from the prevailing position in relation to costs in this Court.

[71] In the result, the following order is made:

Order

1. The application for retrieval is dismissed.
2. There shall be no order as to costs.

Jaishica Govind Bhikha
Acting Judge of the Labour Court

Appearances

For the applicants: Mr M. P. Nonyongo of M P Nonyongo Attorneys

For the respondents: Mr M. Alexander of Norton Rose Fullbright SA Inc.

¹¹ *Zungu v Premier of the Province of KwaZulu-Natal and Others* 2018 (6) BCLR 686 (CC) at paragraph 24.

¹² *Booi v Amathole District Municipality and others* 2022 (3) BCLR 265 (CC) at paragraph 60.