



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR1305/22

In the matter between:

SPECIAL INVESTIGATING UNIT

Applicant

and

SOLIDARITY obo R WALSER

First Respondent

SEELA MOKWENA N.O.

Second Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Third Respondent

Heard: 24 April 2025

Delivered: 13 June 2025

JUDGMENT

SCHENSEMA, AJ

Introduction

[1] This is an opposed application brought by the applicant to review and set aside the arbitration award of the second respondent in terms of which it was found that the applicant had committed an unfair labour practice and ordered the applicant to pay the first respondent an amount of R30 648.41, being the shortfall of a performance bonus.

[2] The applicant further seeks condonation for the late filing of its review application, which application is opposed by the first respondent.

The application to condone the late filing of the review application

Degree of lateness

[3] The arbitration award was received by the applicant on 13 April 2022, in response to which it launched its review application on 15 June 2022. The review application is 14 Court days late. Whilst the delay is not excessive, it is not insignificant.

The explanation for the delay

[4] The applicant has submitted that due to a miscommunication between its managers that were tasked with instructing counsel and its senior management, no final instruction had been received from senior management to draft the review papers for purposes of setting aside the arbitration award. Furthermore, the instruction to senior counsel was sent via electronic mail, which email was inadvertently not received by counsel as it was delivered into the junk mailbox.

[5] On 6 June 2022, a warrant of execution was received by the applicant in response to which a meeting was arranged with senior counsel for purposes of considering the prospects of success and the way forward. Counsel was subsequently briefed to proceed to draft the review application, which instruction was given on 13 June 2022.

[6] In opposition to the applicant's condonation, the first respondent has *inter alia* submitted that the applicant's delay in filing the review application has not been sufficiently explained, despite the deponent to the founding affidavit in the review application being involved in both matters, i.e. the arbitration and the review application.

[7] The applicant has further failed to provide information or evidence upon which this Court could be persuaded that condonation should be granted based on the purported prospects of success. The first respondent holds the view that the applicant has no prospects of success in that the applicant has failed:

7.1 by not complying with the requirements of *audi alteram partem* by failing to consult with the applicant's employees to provide the financial reasons as to why the applicant deemed it appropriate to interfere with the prescribed increase percentage set out in Table 1 to the applicant's Performance Appraisal Policy (the Policy);

7.2 when the Head of the Unit of the applicant unilaterally determined that the percentage increase would change, despite the National Moderating Committee having approved the outcome of the performance appraisal process;

7.3 to provide any lawful reason not to comply with the prescripts of the Policy; and

7.4 by providing false, misleading and/or completely irrelevant reasons to the applicant's employees when it explained its reasoning not to pay in accordance with the Policy. In short, this reason related to the financial problems of the applicant.

[8] The first respondent further takes issue with the applicant's failure to attach any supporting documentation in support of its reasoning for the late filing of the review application, in the form of confirmatory affidavits or emails to senior counsel.

[9] The first respondent further criticises the reasoning for the delay on the basis that the dispute was being dealt with at the highest level within the applicant's organisation from the commencement of the dispute and it was therefore improbable that a delay to secure instructions to brief senior counsel could have occurred.

[10] Furthermore, the applicant has failed to file the arbitration documents and has merely elected to file the transcript of the proceedings.

Analysis of the condonation application for the late filing of the review application

[11] The relevant legal principles to be applied in an application for condonation are well established. This Court is required to exercise a discretion, having regard to the extent of the delay, the explanation for that delay, the prospects of success and the relative prejudice to the parties that would be occasioned by the application being granted or refused. The interest of justice will ordinarily reflect regard to all these factors.

[12] In *A Hardrodt (SA) (Pty) Ltd v Behardien and others*¹ (*Hardrodt*) the Labour Appeal Court (LAC) restated the guidelines laid down in *Queenstown Fuel Distributors CC v Labuschagne NO and others*² and held *inter alia* that there must be good cause shown for condonation in the sense that the reasons tendered for the delay have to be convincing. In other words, the excuse for non-compliance with the time periods must be compelling. The onus is on the applicant to satisfy the Court that condonation should be granted.

[13] The general principles applicable to deciding applications for condonation apply even more stringently when it comes to review applications. In *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) and others*³ (*Thilivali*), the Court said:

'What is clear from the judgment in *Hardrodt* is that general principles applicable to condonation applications are even more stringently applied where it comes to a condonation application for the late filing of a review application. In review condonation applications, the explanation that needs to be submitted must be compelling and the prospects of success need to be strong. Where it comes to the issue of prejudice, the applicant in fact has to

¹ (2002) 23 ILJ 1229 (LAC).

² (2000) 21 ILJ 166 (LAC).

³ (2015) 36 ILJ 232 (LC) at para 22.

show that a miscarriage of justice will occur if the applicant's case is not heard. The reason for these more stringent requirements is that review applications occur after the parties have already been heard, presented their respective cases and a finding has been made. Under such circumstances, considerations of justice, fairness and expedition require that challenges of such findings must not be delayed and must be completed as soon as possible.'

[14] The courts have held and emphasised that an applicant must necessarily act with the degree of diligence required, thus giving effect to the statutory imperative of expeditious dispute resolution.

[15] The onus is on the applicant seeking condonation to satisfy the Court that condonation should be granted. In employment disputes, there is an additional consideration which applies in determining whether the onus has been discharged, as was held in *Thilivali*: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.'

[16] In summary: the Courts have endorsed the principle that where there is a delay with no reasonable, satisfactory and acceptable explanation for the delay, condonation may be refused without considering prospects of success, and to grant condonation where the delay is not explained may not serve the interests of justice. The expeditious resolution of labour disputes is a fundamental consideration.

[17] Notwithstanding the aforementioned principle, a measure of flexibility has been applied where required in the interests of justice. In *National Education Health*

⁴ *Thilivali* at para 25.

*and Allied Workers Union obo Mofokeng and Others v Charlotte Theron Children's Home*⁵ it was determined that, in the interest of justice, the case should proceed, as the policy in question appeared to be deeply influenced by a racist perspective and was perpetuating ongoing racial discrimination. In this case the circumstances were described as “exceptional” thereby justifying less focus on the unexplained periods of delay.

[18] In the matter of *Government Printing Works v Public Service Association and another*⁶ the LAC held that:

‘[26] Judicial discretion involves a value judgment based on the facts of the case. The Labour Court must be fair to both sides. It must also consider the broader objects of the LRA, including the importance of expeditious resolution of employment disputes. The facts that must be considered in determining whether or not it is in the interests of justice to grant condonation, and the appropriate approach, have now been resolved as follows:

“[22] ... [T]he concept “interests of justice”... 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...’ and the prospects of success. It is crucial to reiterate 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. (own emphasis)

[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...

⁵ [2004] 10 BLLR 979 (LAC).

⁶ [2025] 2 BLLR 112 (LAC) at para 26.

[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 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.”

[27] This description evokes a balancing approach, characterised by proportionality and flexibility. The general principle remains that the various factors are to be considered collectively, and not mechanically, in determining the interests of justice.’

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

Explanation for the delay

[20] It is trite that a failure to comply with the timeframes must be explained and the reasonableness of the delay should be considered by having regard to the explanation for the delay.

[21] The explanation for the delay has to be compelling, convincing and comprehensive and should cover every period of the delay.⁷ Furthermore that the explanation provided is reasonable and acceptable. In this regard an applicant in a condonation application is required to provide an explanation for the entire period of the delay and the aspects related thereto.

⁷ *Van Wyk v Unitas Hospital and Another* 2008 (4) BCLR 442 (CC).

[22] The facts before this Court required the applicant to provide an explanation for the entire period of the delay, i.e. from 25 May 2022 to 14 June 2022.

[23] No explanation has been provided for the period of delay between 25 May 2022 until 6 June 2022 when the applicant received the warrant of execution. This notwithstanding the submission that the applicant was of the view that the failure to grant the postponement rendered the arbitration proceedings defective.

[24] Given the seriousness of the defect (as alleged) and the so called impact this decision could have on the applicant, coupled with the seniority of the people involved in the arbitration, it is reasonable to assume that the applicant would have taken all necessary steps to immediately, upon receipt of the arbitration award, launch the review application within the stipulated time frame of six weeks.

[25] The delay was further compounded by the miscommunication in the applicant's office with reference to the briefing of senior counsel to attend to the drafting of the review application. Furthermore that the instruction to senior counsel via email was received by senior counsel in the junk mail box and therefore did not come to the attention of senior counsel. No documents in support of this version have been attached to the applicant's founding affidavit.

Prospects of Success

[26] For purposes of properly determining the condonation application and for the afore stated reasons I have not limited my assessment of the review application on the basis of the reasons for the delay only.

[27] In order to ensure that this process is complete, I have further considered the prospects of success in order to determine whether there are compelling reasons for this Court to grant condonation.

[28] For purposes of assessing the prospects of success, I have considered the arbitration award, the transcript and the two review grounds as set out in the applicant's founding affidavit. The first being the applicant's witnesses being

excluded from the proceedings and the second relating to the Commissioner's refusal to grant the postponement.

[29] It is common cause that at the commencement of the arbitration on 2 February 2022, the Commissioner did not allow the applicant's witnesses to remain on the virtual platform during the evidence of the first respondent. As a result of the Commissioner's refusal, the applicant was not in a position to immediately proceed with the cross examination of the first respondent at the conclusion of his evidence in chief.

[30] It was therefore agreed between the parties, that the matter would be postponed to 23 and 25 March 2022. During 2 February 2022 and 23 March 2022, the applicant was required to secure a copy of the recordings of the proceedings for purposes of preparing the applicant's witnesses and to further provide its legal representative with its instructions for purposes of cross examining the first respondent.

[31] The applicant's founding affidavit at paragraph 16 confirms that upon conclusion of the proceedings on 2 February 2022, the applicant requested that the Commission for Conciliation, Mediation and Arbitration provide a copy of the recording. A follow up was made by the applicant on 8 March 2022, no explanation however has been provided as to what steps the applicant took between 2 February 2022 and 8 March 2022 to secure a copy of the recording. The recording was finally received on 10 March 2022.

[32] The applicant has further submitted that a period of 12 days to consult with the applicant's witnesses and to prepare for the cross examination of the first respondent was insufficient for the following reasons:

32.1 Mr Gernandt is a key senior managerial official;

32.2 For two weeks from 15 February 2022, Mr Gernandt was not available due to compassionate leave; and

32.3 Mr Gernandt returned to work on 28 February 2022 and was subsequently engaged in financial year end preparations and was therefore

not available to listen to the recordings and to provide the applicant's legal representative with instructions.

[33] On 17 March 2022, the applicant sought a postponement from the first respondent, which request was declined, which resulted in the applicant launching a formal postponement application. At the conclusion of the application on 23 March 2022, the Commissioner advised the parties that he would provide his ruling on 25 March 2022 and further warned the parties to be prepared to proceed with the arbitration, in the event that he did not grant the postponement.

[34] On 25 March 2022, the Commissioner refused the postponement, in response to which the applicant's legal representative informed the Commissioner that the applicant was not in a position to cross examine the first respondent. The effect of the refusal to grant the postponement according to the applicant, prevented the applicant from presenting its opposition to the first respondent's case. The arbitration proceedings were subsequently concluded on the basis that the applicant did not cross examine the first respondent or lead any evidence in support of its opposition to the first respondent's claim of an unfair labour practice.

[35] At the conclusion of the arbitration, both parties submitted closing submissions, in respect of which the applicant simply relied on its submissions that it had made in support of its application for postponement.

[36] Whilst I may not agree with the Commissioner's ruling that the witnesses were not permitted to remain on the virtual platform during the first respondent's evidence in chief, resulting in the postponement of the matter to 23 and 25 March 2025, of significance however is that the dates were mutually agreed upon by the parties. Accordingly there was no valid reason as to why the applicant could not have been prepared to proceed with the cross examination of the first respondent, given its agreement to the scheduled dates.

[37] Whilst I am mindful that Mr Gernandt suffered a personal tragedy, he did return to work on 28 February 2022 and therefore had ample opportunity to listen to the recordings and to consult with the applicant's legal representative. The reasons

provided for the applicant's inability to be prepared, suggest that the applicant intended to determine how the matter would progress and that all concerned would be subject to the availability of the applicant and its witnesses.

[38] With reference to the witnesses and despite advising at the commencement of the proceedings on 2 February 2022, that the applicant intended to call two witnesses, the applicant simply relied on the non-availability of Mr Gernandt.

[39] The applicant further simply relies on its inability to have consulted with senior counsel due to Mr Gernandt's non-availability, however provides no further explanation as to why its second witness could not have provided the instructions to senior counsel, which were required for purposes of preparing for the cross examination of the first respondent.

[40] The prejudice suffered by the applicant was clearly self-created in that the applicant failed to utilise the period from 28 February 2022 to 23 March 2022, to provide its legal representative with instructions needed to cross examine the first respondent and to prepare its own defence.

[41] In my view, the reasons relating to financial year-end preparations do not support the applicant's claims regarding the alleged seriousness of the dispute. These reasons fail to establish that the matter is of vital importance to the applicant or that upholding the arbitration award would have far-reaching consequences. Any prejudice suffered by the applicant was therefore self-created and the prejudice suffered by the first respondent far outweighs that of the applicant.

[42] In light of the fact that the evidence as summarised by the Commissioner in the arbitration award, has not been placed before this Court by the applicant, there is no basis on which this Court can assess whether the Commissioner applied his mind to the relevant considerations and took into account all of the material factors. The review application is therefore limited to the Commissioner's postponement ruling and his refusal to allow the applicant's witnesses to remain on the virtual platform during the first respondent's evidence in chief.

[43] In relation to the Commissioner's refusal to allow the applicant's witnesses to remain during the evidence in chief of the first respondent, in my view does not constitute a reviewable irregularity in that any prejudice suffered by the applicant, was cured by the postponement from 2 February 2022 to 23 March 2022.

[44] The basis of the Commissioner's refusal to allow a further postponement, is set out in the transcript at pages 135 to 139. The Commissioner's ruling clearly demonstrates that the Commissioner considered the applicant's postponement application and in this regard was guided by the well-known principles for a postponement, which are in summary:

- 44.1 a postponement is not merely there for the taking;
- 44.2 the application must be properly motivated and substantiated; and
- 44.3 the Commissioner exercised his discretion. In so doing the Commissioner considered the explanation for the postponement coupled with the extensive time provided to the applicant, determined that it would not be in the interest of justice to grant a further postponement.

[45] The Commissioner's ruling is not one in which the submission made by the applicant that the Commissioner failed to grant a reasonable request for a postponement and in so doing failed to exercise his discretion in accordance with the legal principles, is supported.

[46] The applicant was afforded ample opportunity to prepare for the proceedings, yet chose at the eleventh hour (on 18 March 2022) to request a postponement on the grounds that its key witness, Mr Gernandt, was unavailable for the reasons stated. This notwithstanding the fact that the proceedings had already been postponed on 2 February 2022, to afford the applicant an opportunity to prepare its cross examination and witnesses to the agreed scheduled dates of 23 and 25 March 2022.

[47] The reasons advanced for the postponement, which essentially pertain to Mr Gernandt's unavailability were rejected by the Commissioner on the basis that they do not constitute a valid justification for the applicant's failure to ensure its

preparedness to proceed with the arbitration, particularly in circumstances where sufficient time had been provided for such preparation, cannot be faulted.

[48] For the afore stated reasons, I am of the view that no basis has been established by the applicant to justify its shortcomings in the condonation application to be overlooked in the interests of justice.

Costs

[49] This Court has a wide discretion in awarding costs, and notwithstanding the submissions made by the first respondent for the awarding of costs, I am of the view that this is a matter where the interests of justice will be best served by making no order as to costs.

[50] In the premises, the following order is made:

Order

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

H Schensema

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate N Ali

Instructed by: State Attorney

For the First Respondent: Mrs Karolien van Wyk of Solidarity