



THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable
Case No: P 35/23

In the matter between:

MNYAMEZELI NXELANE AND 70 OTHERS

Applicants

and

CHEP SOUTH AFRICA (PTY) LTD

First Respondent

**CONTRACTA-FORCE CORPORATE
SOLUTIONS (PTY) LTD**

Second Respondent

Heard: 23 July 2025

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date for hand-down is deemed to be on 23 July 2025

Summary: application for postponement to supplement pleadings in application for condonation – application brought on the day matter was to be heard – application granted in the interests of justice – party-and-party costs tendered – costs awarded on attorney-and-client scale due to applicants' failure to timeously apply for a postponement.

JUDGMENT

DE KOCK, AJIntroduction

- [1] This matter came before the court as an application for condonation. The application was set down on the opposed motion roll for 23 July 2025. On 22 July 2025, the applicant sent an email to the respondents and to the court, advising that the applicants had not yet filed heads of argument and that the applicants would seek a postponement on 23 July 2025.
- [2] The applicants, on the morning of 23 July 2025, handed to the court a notice in which a postponement was sought, accompanied by an affidavit. The respondents were not afforded an opportunity to deliver any answering affidavits, and the parties were afforded an opportunity to make submissions in court regarding the application for postponement.
- [3] The respondents, unsurprisingly, objected to the application for postponement at such a late stage and requested an order that the application for postponement of the condonation application be denied, and for the application for condonation to be heard.
- [4] The court, after hearing arguments, adjourned the application for consideration of the parties' respective submissions. Upon reconvening the matter, the court advised the parties that the application for postponement is granted, and that reasons will be provided in due course. The parties were also advised that the applicants' tendered costs and the respondents' request that such costs be on an attorney-and-client scale, including the costs of counsel, will be addressed in the judgment.
- [5] The parties were also requested to agree to a date on which the application for condonation can be argued, as well as to agree on a timeline in which the parties' respective further pleadings were to be delivered. The parties have agreed to a date and the timeline for delivery of further pleadings, which are contained in the order this court makes hereunder.

Reasons for the postponement

- [6] The court must firstly state that the way the applicants have been represented by at least two previous attorney firms insofar as filing an application for condonation for the late filing of their statement of claim is highly unsatisfactory. This includes the referral of the dispute to the CCMA for arbitration, despite the reasons for dismissal being that of the applicants' participation in an unprotected strike, the late filing of the statement of case, and the late filing of an application for condonation. It also includes a very poor attempt to properly address the factors required in an application for condonation.
- [7] The relevance of the poor attempt made to seek condonation is that Mr Dyke, in seeking a postponement, conceded that the application for condonation was poorly drafted. The essence of the application for a postponement was to allow the applicants an opportunity to file a further, supplementary affidavit in respect of the application for condonation. Mr Dyke was briefed at a very late stage, and based on his advice, it became apparent that vital information had not been included in the initial application for condonation.
- [8] The current firm of attorneys, who appears to have inherited the matter in April 2024, similarly did not give the matter the attention it deserved. One would have expected that, upon inheriting a matter, the pleadings already filed would be perused and a decision be made whether the pleadings are in order, and the matter is ripe for a set down. This applies particularly to the application for condonation. However, this was not done. According to the affidavit handed up in court, the matter was allocated to a professional assistant at the time, who took the necessary steps to set the matter down for hearing on or about 15 April 2024. No view appears to have been taken at that time that the application for condonation was lacking any detail, or that it was necessary to file a further affidavit in support of the application for condonation. The matter was left pending enrolment.
- [9] It is stated that the professional assistant to whom the file was allocated around April 2024 left the employment of the attorney firm towards the end of 2024.

Thereafter, the matter was overseen by a temporary candidate attorney who, shortly thereafter, left at the end of 2024. The matter was then inherited by yet another candidate attorney working for the current attorney on record.

- [10] At that stage, the professional assistant and the two candidate attorneys failed to give much attention to the matter, probably because the matter was pending enrolment. The set down for the opposed application for condonation was sent to the parties on 23 June 2025, setting the matter down for 23 July 2025. According to the attorney, his secretary redirected the set down to his candidate attorney as she did not recognise it as one of the matters in which he was engaged. This led to the attorney not initially being aware of the enrolment of the matter.
- [11] On 4 July 2025, the court called for heads of argument, and shortly thereafter, the candidate attorney brought the matter to the attorney's attention. The candidate attorney was requested to seek out counsel to assist in the matter. The attorney then explains that he was snowed under with various arbitrations, trials in the magistrate court and an in-house company disciplinary enquiry, as well as a school disciplinary enquiry. The candidate attorney was unable to secure counsel with a view to drafting papers and generally advising on the way forward relative to the argument scheduled for 23 July 2025. The attorney, during the week prior to 23 July 2025, took ill. He, however, managed to contact senior counsel to assist in the matter, and a copy of the court file was presented to senior counsel to secure input from the applicants' union relative to the papers.
- [12] Senior counsel then took the view that the application for condonation required further supplementary papers. Further information was collated from the union, and it emerged that certain facts regarding the application were hidden from the applicants and the union and that certain documentation had not been included in the papers. It is not clear from the affidavit what those documents are or what the information is that was allegedly hidden. It is, however, alleged that such documentation, which was not in the court file nor the attorney's file, was obtained

from the union and must be considered in determining whether or not it is in the interest of justice to grant condonation in the matter.

[13] The attorney states further that counsel was instructed to prepare the supplementary papers, which has been done, save for further input from the applicants and their union regarding the explanation and prospects of success. To finalise the supplementary papers, a further consultation is required with the applicants and the union in order to take on board the full extent of the information that was not at the attorney's disposal previously and to point out what was hidden from the applicants and their union by their former attorney and what has not been placed before court regarding prospects of success. The attorney states that the applicants enjoy a constitutional right of access to court and to be shut out from court, without being given the opportunity to supplement the explanation, and their prospects of success would not be in the interests of justice.

[14] This then led to the application for a postponement being made in court, coupled with a tender for costs.

Reasons for granting postponement

[15] The current application for condonation before this court fails to address the applicants' prospects of success insofar as their dismissals for participation in an unprotected strike are concerned. The stated prospects of success are limited to the issue regarding who the real employer of the applicants is.

[16] It appears that there has been much confusion regarding the dispute as to who the real employer is, versus the dismissal of the applicants due to their participation in an unprotected strike. Mr Dyke submitted that it is necessary to first know who the employer is before one gets to the dismissal dispute.

[17] The difficulty with this submission is that the Labour Court does not have jurisdiction, certainly as a primary dispute, to determine who the real employer is. This is a determination that falls within the exclusive jurisdiction of the CCMA and is not a dispute that should have been referred to the Labour Court. Neither is it an

issue that can assist the applicants in explaining their prospects of success in an application for condonation for the late filing of their statement of claim.

[18] In this regard, section 198D(1) of the Labour Relations Act¹ states:

‘Any dispute arising from the interpretation or application of sections 198A, 198B and 198C may be referred to the Commission or a bargaining council with jurisdiction for conciliation and, if not resolved, to arbitration.’

[19] The applicants did in fact refer such a dispute to the CCMA simultaneously with the dismissal dispute. The CCMA, however, declined to determine the issue as to who the real employer is and found that, due to the dismissals being related to the applicants having participated in an unprotected strike, the matter must be referred to the Labour Court. The CCMA ruling was never challenged by the applicants. Instead, the applicants ended up referring both disputes to the Labour Court.

[20] As already stated, relying only on the prospects of success related to an issue which this court does not have jurisdiction over would be fatal to an application for condonation. The degree of lateness, the explanation for the delay and prejudice to the parties, which are some factors that must be considered in an application for condonation, might all prove to be insufficient in the absence of the applicants having addressed their prospects of success in relation to their dismissals.

[21] It is the view of this court that, despite the unacceptable manner in which the application for condonation was dealt with, as well as the unacceptable failure by the current firm of attorneys to deal with the matter when the matter was inherited and to wait until the last moment to obtain advice from senior counsel, that it will not be in the interest of justice to refuse the application for postponement. Should this opportunity not be granted to the applicants, the applicants will be severely prejudiced by having to argue the application for condonation on the current pleadings, which fail to address the prospects of success of the real dispute before the Labour Court.

¹ Act 66 of 1995, as amended.

- [22] It is most unfortunate that the respondents in this matter are now faced, at this late stage, with a postponement and potentially further supplementary pleadings in support of the application for condonation. This will require the respondents to file further answering affidavits and to once again submit further heads of argument. This is over and above the expenses and costs incurred by the respondents to appear before the court on 23 July 2025.
- [23] The court, however, took into consideration that the applicants tendered to pay the respondents' costs. This is a crucial consideration in determining whether to grant a postponement. The respondents' representatives, however, indicated that, should this court be inclined to grant a postponement, the costs tendered should not be costs on a party-and-party scale, but on an attorney-and-client scale.
- [24] The court agrees with the respondents' submissions that the tendered costs must be on an attorney-and-client scale. The respondents were put through unnecessary expense to appear in court by no reason of their own, but due to the failure by the applicants' current attorney to peruse and take a view on the matter as soon as the matter was inherited by the firm in April 2024. In fact, awarding costs *de bonis propriis* on a punitive scale was a real consideration in this matter. The court will, however, refrain from making such an order given the decision that the tendered costs must be on an attorney-and-client scale, including the costs of counsel. Attorneys must, however, guard against adopting an approach to matters as was done in this matter, as this could lead to this court ordering costs *de bonis propriis*.
- [25] In the premises, the following order is made:

Order

1. The application for postponement is granted.
2. The applicants' union, which this court was advised is the client in this application, is ordered to pay the respondents' costs in respect of the postponement of the matter on 23 July 2025, on an attorney-and-client scale, including the costs of counsel.
3. By agreement between the parties, the applicants are directed to file their supplementary papers on or before 8 August 2025. The respondents are directed to file their further answering papers on or before 19 August 2025. The applicants are directed to file their replying papers, as well as their heads of argument, on or before 25 August 2025. The respondents are directed to file their further heads of argument, if any, on or before 5 September 2025. The applicants are directed to ensure that the court file is properly indexed and paginated.
4. By agreement between the parties, the application for condonation will be heard, via a virtual platform, on 16 September 2025 at 15h00. The registrar is directed to provide a link for the virtual hearing on the morning of 16 September 2025.



C de Kock

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

B Dyke SC

Instructed by:

Brown Braude and Vlok Inc.

For the First Respondent:

I Lambrechts

Instructed by:

Cox Yeats Attorneys

For the Second Respondent:

W Jacobs of the Willem Jacobs and Associates