



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case No: C549/2023

In the matter between:

THE SOUTH AFRICAN POLICE SERVICE

Applicant

and

**THE SAFETY AND SECURITY SECTORAL
BARGAINING COUNCIL**

First Respondent

CLARENCE RANDALL N. O.

Second Respondent

SOLIDARITY obo SONJA ESTERHUIZEN

Third Respondent

Heard: 14 August 2025

Delivered: 25 August 2025

JUDGMENT

NIEUWOUDT, AJ

Introduction

- [1] This is an application to review and set aside the arbitration award under case number PSSS 397-21/22 issued by the second respondent (Commissioner) on 7 February 2023 in terms of which he ordered that the applicant should pay the amount of R370 890 to Ms Esterhuizen (employee).

- [2] The application was launched significantly out of time and was accompanied by an application for condonation, which is the only aspect that the court dealt with on 14 August 2025.

The test for condonation

- [3] The test to be applied when considering such an application is trite.¹ On appeal in *Grootboom*², the Constitutional Court, in a majority decision, held that:

'... the 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* emphasize 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.'

- [4] In *Melane supra* the Court stated that the factors were interrelated and not individually decisive. What was needed was an objective conspectus of all the facts; therefore, slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success could also compensate for a long delay.

- [5] A further principle is important. In *Colett v Commission for Conciliation, Mediation and Arbitration and others*³ the Labour Appeal Court (LAC) stated as follows:

'[38] There are overwhelming precedents in this Court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where

¹ See: *Melane v Santam Insurance Co Ltd (Melane)* 1962 (4) SA 531 (A); *Foster v Stewart Scott Inc.* (1997) 18 ILJ 367 (LAC) and *Grootboom v National Prosecuting Authority & another* (2013) 34 ILJ 282 (LAC).

² *Grootboom v National Prosecuting Authority & another* (2014) 35 ILJ 121 (CC) at para 22.

³ [2014] 6 BLLR 523 (LAC).

there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success. In *NUM v Council for Mineral Technology*, it was pointed out that in considering whether good cause has been shown the well-known approach adopted in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532 C-D... should be followed but:

“There is a further principle which is applied and that is without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.”

[39] The submission that the court *a quo* had to consider the prospects of success irrespective of the unsatisfactory and unacceptable explanation for the gross and flagrant disregard of the rules is without merit.’ (Own emphasis)

[6] In *Nair v Telkom SOC Ltd and Others*⁴ the Labour Court emphasised that every period of the delay should be explained:

‘In order to exercise its discretion whether or not to grant condonation, this court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. See *NUMSA and another v Hillside Aluminium*, where Murphy AJ held that an unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success.’

[7] Although a strict application of the test discussed above could entail not having regard to the prospects of success at all, the Court will nevertheless have regard to them.

Application of the test

Period of the delay

⁴ (JR59/2020) [2021] ZALCJHB 449 (7 December 2021) at para 15.

- [8] The arbitration award was served on the applicant on 7 February 2023. Therefore, the application ought to have been launched by 22 March 2023 (21 March being a public holiday). It was launched at the beginning of November 2023 and was more than 7 months out of time. In the context of the requirement that labour disputes have to be finalised speedily, the delay is very long.

The explanation for the delay

- [9] The applicant does explain certain periods of the delay.
- [10] However, there is no explanation for the delay between 22 March 2023 and 31 May 2023 (when the applicant instructed its attorneys in the matter).
- [11] The explanation for the further delay is that the state attorney had certain administrative requirements that it had to meet in order to brief counsel, the inadequate response that it had received to its requests for quotations from counsel, and, to put it mildly, a failure to accord the matter the necessary degree of urgency.
- [12] The extent to which the adjudication process in this court should be delayed by the administrative processes of the state attorney, would have required greater scrutiny if there was any explanation at all for the initial delay of more than 2 months before the applicant instructed the state attorney.
- [13] The absence of an explanation for that period has the consequence that the application for condonation should be refused.

Prospects of success

- [14] Despite the authority that it is not necessary to deal with the prospects of success in the absence of a properly explained delay, the court chooses to briefly deal with the facts of the matter.
- [15] The employee applied for promotion to the post of Provisioning Administration Officer Senior at Nyanga. Mr Bota also applied for the position. One of the requirements for the position was a valid driver's license. Mr Bota did not complete the relevant question on his application form, and his SAP96 record

did not indicate that he had such a licence. The applicant does not consider applications that are incomplete.

- [16] Colonel Gwanya, who was the applicant's only witness at the arbitration proceedings agreed that Mr Bota ought not to have been considered for promotion.
- [17] Mr Bota was successful in the application and was promoted.
- [18] The employee was subsequently promoted to on 1 November 2022, which meant that she forfeited the benefits of the promotion for a period of 3 years.
- [19] The Commissioner awarded compensation, equal to the 12 months' remuneration, to the employee.
- [20] On the face of it, the Commissioner was correct in finding that the applicant had committed an unfair labour practice relating to promotion. His finding in this regard certainly does not give rise to any prospects of successfully contending that it was a finding that a reasonable decision maker could not reach.
- [21] The fact that the Commissioner awarded the maximum amount of compensation left a feeling of unease, but is not obviously wrong. The court has not concluded that the award is one that no reasonable Commissioner could have made because the court simply has not analysed the situation in sufficient detail to get to that point.
- [22] Any prospects of success that the applicant may have are not so compelling that it would outweigh the long delay and absence of a proper explanation.

Other criteria

- [23] The issues of prejudice and the importance of the matter are not such that they would disturb a decision on condonation.

Conclusion

- [24] The period of the delay is significant, and the explanation for some parts of the period is absent. To the extent that the applicant's prospects of success are relevant, they are not such that they outweigh these aspects.
- [25] In the light of the foregoing, the application for condonation must fail and, so too, the review application.
- [26] Ms Ras did not press for costs.
- [27] In the premises, the court makes the following order:

Order

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



H. Nieuwoudt
Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant : Mr. Mawethu Dyalivane

Instructed by : State Attorney, Cape Town

For the respondent : N Ras

Instructed by : Solidarity

LABOUR COURT