



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JS 575/24

In the matter between:

WILLIAM AMOS NOKANA & 5 OTHERS

Plaintiff

and

SOUTH AFRICAN BREWERIES (PTY) LTD

Defendant

Heard: 3 July 2025

Delivered: 22 August 2025

JUDGMENT

EDWARDS, AJ

Background

[1] The applicants were retrenched on 31 July 2022. They referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("CCMA"), which was conciliated on 19 August 2022 and arbitrated over numerous

days during the period between December 2022 and November 2023.

[2] The arbitrator issued a ruling on 22 November 2023 after hearing the evidence of both parties, finding that the CCMA did not have jurisdiction to entertain the dispute as the applicants had been dismissed for operational requirements and not for poor performance as they had alleged.

[3] In her ruling, the arbitrator advised the applicants that they could refer the dispute to this Court for adjudication.

[4] The applicants' statement of claim was filed almost a year later, on 7 November 2024, whereafter the respondent brought an exception alleging that, as the statement of claim had been delivered out of time with no condonation application having been brought, this Court did not have jurisdiction to entertain the dispute.

[5] The applicants' condonation application was delivered shortly before the exception was heard and upheld by this Court on 18 March 2024. The condonation application was then set down for hearing on the interlocutory roll.

[6] Where a dispute relating to the dismissal of an employee based on operational requirements is referred to this Court for adjudication, such referral must be made within 90 days after the CCMA has certified that the dispute remains unresolved.¹

[7] In this case, the certificate of outcome was issued on 19 August 2022. The statement of claim was therefore due before 18 November 2022. As the statement of claim was delivered on 7 November 2024, it was filed almost two full years out of time.

Condonation

¹ Section 191(11)(a) of the Labour Relations Act, 66 of 1995.

[8] The explanation given by the applicants for this lengthy delay covers two separate periods: the first being from the date of issue of the certificate of outcome to the issue of the arbitrator's ruling that the CCMA lack jurisdiction to entertain the dispute (a period of 460 days); and the second being from the date of issue of the ruling to the date the statement of claim was filed (a period of 351 days).

[9] With respect to the first period, the applicants' explanation is that the dispute was erroneously referred to arbitration rather than to adjudication by this Court after the certificate of outcome was issued, as the certificate of outcome had indicated that this was the appropriate next step. It was only once the ruling was issued by the arbitrator that it was confirmed that the dispute ought to have been referred to adjudication.

[10] The applicants submit that it is evident that the delay was caused by the matter having been ventilated in a forum with no jurisdiction and due to factors beyond their control.

[11] With regard to the second period of delay, the applicants' explanation is more complicated.

[12] They state that the issuing of the ruling by the arbitrator coincided with the festive season and that they needed to prioritise their familial and personal obligations at their respective homesteads.

[13] The matter was at that stage still in the hands of their union (FAWU) and, the applicants explain, the representative from the union dealing with the matter undertook several consultations with various attorneys to evaluate their prospects of success in this Court. This involved seeking a legal opinion assessing the merits of the dispute. This opinion, which was received on 21 December 2023, concluded that the applicants did not have reasonable prospects of success.

[14] After the union conveyed this opinion to them, the applicants state that they were disheartened and their motivation to pursue the matter further was significantly affected. A decision was therefore made to take no further steps in this matter.

[15] It is not clear from the founding affidavit when, however, it appears that at some point thereafter the applicants' attitude changed as they then made what they term a concerted effort to convene a meeting between January and mid-July 2024. The applicants submit that this was incredibly difficult to do given the dispersion of the group and the financial constraints of some of them, but that after months of effort, a meeting was eventually convened on 15 July 2024, and the applicants were able to formulate a strategic plan going forward.

[16] What this plan was is also not clear, but on 16 September 2024, a further meeting was convened at which the applicants resolved to organise a meeting independently of the union, which they then did. The applicants state that, at that meeting, the date of which is not recorded, a collective decision was made to sever their ties with their union and to seek independent legal advice.

[17] Due to financial constraints and a lack of leadership, decisiveness and direction within the disjointed group of applicants, one of the applicants, William Nokana, took the lead and conducted research and spent considerable time and effort drafting their statement of claim. The result was that the statement of claim was eventually served on the respondent on 21 October 2024 and then filed on 7 November 2024.

[18] On 7 November 2024, the applicants received the respondent's exception raising this Court's lack of jurisdiction to entertain the dispute due to their failure to apply for the condonation of the late filing of the statement of claim. The applicants then met on 28 November 2024, but were not able to understand what it meant.

[19] On 27 February 2025, the applicants received the notice of set down for the hearing of the exception, and after a group discussion, they resolved that it was necessary to appoint attorneys to assist them.

[20] It appears that the applicants approached their current legal representatives the following day, and they state that, after consultation, they understood the necessity of delivering a condonation application for the late filing of the statement of

claim and that they instructed their representatives to do so on their behalf. This condonation application was filed on 11 March 2025, a week before the exception was heard.

[21] Although the applicants admit in their papers that the delay is extensive (771 days by their calculation), they contend that the explanation they have furnished is reasonable, or at least adequate, and *bona fide* and that their prospects of success are very good. They also assert that there would be minimal prejudice to the respondent should condonation be granted. For this reason, they argue that it would be in the interests of justice for the late filing of their statement of claim to be condoned.

[22] In opposing the condonation application, the respondent submits that condonation ought to be refused as the applicants have not shown good cause and that their application is *mala fides*. It contends that the applicants have provided an unsatisfactory explanation for the excessive delay, that the explanation does not cover the entire period of the delay as there are periods which have not been explained, and that they have not provided an explanation for their failure to apply for condonation even after it was brought to their attention that it was necessary.

[23] The respondent also submits that the applicants have never acted with the required speed in prosecuting their claim and that they have throughout sought to frustrate the relevant statutory processes. The respondent contends that it has been made to incur unnecessary costs due to the applicants following incorrect procedures, together with their unreasonable insistence that they were dismissed for poor performance rather than operational requirements. The respondent further submits that it has been prejudiced by the fact that the matter has still not been finalised due to their lack of diligence in prosecuting their claim. It contends that the delay was caused mainly by factors within the applicants' control.

Evaluation

[24] In *NUM v Council for Mineral Technology*,² the Labour Appeal Court (“LAC”) confirmed that the approach set in *Melane v Santam Insurance Co Ltd*³ should be adopted in considering condonation applications. That is, that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and that, in essence, it is a matter of fairness to both sides. The factors to be considered are the degree of lateness, the explanation for the delay, the prospects of success and the prejudice to both parties.

[25] The LAC added a further principle to be applied, that is, that 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.

[26] In *NUMSA & another v Hillside Aluminium*,⁴ with reference to the LAC’s decision in *NUM v Council for Mineral Technology*, this Court held that there should be an acceptable explanation tendered in respect of each period of delay. Parties seeking condonation for non-compliance are obliged to set out full explanations for each and every delay throughout the process. An unsatisfactory and unacceptable explanation for any of the periods of delay will normally exclude the grant of condonation, no matter what the prospects of success on the merits.⁵

[27] The Constitutional Court in *Grootboom v National Prosecuting Authority and another*⁶ (“*Grootboom*”) held that it is trite that condonation cannot be had for the mere asking and that a party seeking condonation must make out a case entitling it to the court’s indulgence. It must show sufficient cause, which requires giving a full explanation for the non-compliance with the rules or court’s directions, and the explanation must be reasonable enough to excuse the default.⁷

[28] The Constitutional Court held that:

‘... the standard for considering an application for condonation is the interests

² [1999] 3 BLLR 209 (LAC) at para 10.

³ 1962 (4) SA 531 (A) at 532 C - F

⁴ [2005] 6 BLLR 601 (LC).

⁵ Ibid at para 12.

⁶ [2014] 1 BLLR 1 (CC).

⁷ Ibid at para 23.

of justice... the 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.'⁸

[29] This was echoed in the minority judgment, in which it was remarked that: '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.'⁹

[30] Recently, in the matter of *Government Printing Works v Public Service Association and another*,¹⁰ the LAC, per Govindjee AJA, referred to the principles set out in *Grootboom* and found the following:

'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. While no single factor is ever likely to be decisive, the

⁸ Ibid at para 22.

⁹ Ibid at para 51.

¹⁰ [2025] 2 BLLR 112 (LAC).

prospects of success in favour of the party seeking condonation is usually an important factor to be considered. Only in exceptional circumstances would a party's disregard for delay and delay in pursuing a matter justify completely overlooking the merits of the case... The prospects remain relevant, it seems, even "where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party".¹¹

[31] The LAC went on to conclude that:

'...it is evident that a court may only rarely avoid any assessment of the prospects of success based on the extent of delay and quality of the explanation. This accords with the broad approach to delay and condonation that has emerged in our jurisprudence... It is so that one of the primary objects of the LRA is to promote the effective resolution of labour disputes, so that procedural expeditiousness is desirable. The overall approach must nonetheless accord with the interests of justice, including fairness to both parties, in the context of an enquiry that naturally lends itself to a holistic consideration of interrelated factors to enable an objective value judgment.'¹²

[32] In this context, although the delay in this matter is without question inordinate, I must consider the reasons for the delay as well as the prospects of success. While the explanation proffered by the applicants may be unreasonable in the view of the respondent, it is not a case where the delay is excessive and there is no explanation for such delay.

[33] The explanation furnished by the applicants for the first period of delay, although frustrating to the respondent, is, in my view, sufficient. It was not unreasonable of the applicants to refer the dispute to the CCMA for arbitration after the certificate of outcome was issued in light of the fact that, firstly, it was recorded on the certificate that if the dispute remained unresolved, a referral to arbitration was the next applicable step to be taken, and secondly, the applicants (albeit incorrectly) believed that the reason for their dismissal had in reality been due to their poor performance rather than their ostensible retrenchment.

¹¹ Ibid at para 27.

¹² Ibid at para 31.

[34] It was the commissioner who was appointed to deal with the dispute who made the decision in November 2022 that the matter should proceed to arbitration in order for her to make a determination as to the real reason for their dismissal because of the dispute between the parties on this issue. Unfortunately, it appears that those proceedings took an enormously lengthy period of time to reach a conclusion, with there being seven sittings before the arbitrator issued her ruling that the applicants had been dismissed for operational requirements and that therefore the CCMA did not have jurisdiction to entertain the dispute.

[35] Although the arbitrator came to a different conclusion from that of the applicants, in my view, the applicants' belief may have been misguided, but it was not completely unreasonable, and there is also nothing to suggest that they deliberately sought to mislead the arbitrator to avoid having to approach this Court or for some other ulterior motive.

[36] In the premises, I am satisfied that the applicants have furnished a reasonable explanation for the first period of delay.

[37] Insofar as the second period of delay is concerned, I am in agreement with the respondent that the explanation proffered by the applicants is significantly less reasonable. This is so as there are long periods of time for which no explanation has been furnished. Furthermore, where explanations are given, many of them are vague or unsubstantiated.

[38] In addition, the applicants have not taken this Court in their confidence regarding where they were all located during this second period of delay or when or why they decided to pursue the matter after, on their own version, they had taken a decision not to take any further steps to pursue it. There is also no explanation as to why it took so long for them to part ways with their union after it appears that they had completely opposing views on the prospects of success in the matter and no explanation as to why they did not seek *pro bono* assistance from a law clinic, a justice centre or SASLAW once they did so.

[39] The applicants do not explain the delay of 17 days between the statement of claim being served on the respondent and it being filed with this Court, and the explanation for their failure to do anything about the exception for a period of almost four months before they received the notice of set down and approached their current legal representatives is also unsatisfactory.

[40] In argument, Mr Serogole made much of the fact that the applicants are vulnerable people who had no legal assistance and no means to pursue their matter despite their unwavering intention to do so. However, this picture painted by Mr Serogole is not entirely accurate, as it was only at some point after 16 September 2024 that the applicants resolved to pursue the matter without the assistance of their union (10 months after the ruling was issued by the arbitrator) and within less than two months thereafter, they delivered their statement of claim. Three months after that, they secured the assistance of their current legal representatives.

[41] Furthermore, on the applicants' version, it does not appear that they have always had the intention to pursue their claim, as they expressly state in their condonation application that, after they were informed of the legal opinion by their union on 21 December 2023, they made the decision not to take any further steps in the matter. They make the sweeping statement that thereafter they made a concerted effort to meet as a group between January and mid-July 2024, before they did finally meet on 15 July 2024, but it is difficult to discern when that decision not to proceed was reversed.

[42] As the applicants have not taken this Court into their confidence about their individual financial situations, it is not possible to assess that aspect of Mr Serogole's argument.

[43] It is unfortunately all too common that employees who have been dismissed find themselves in the situation where they have no means to pursue their claims due to the fact that they are unemployed and still have numerous financial obligations to meet, and they are not educated or aware of their rights or the legal processes for pursuing their claims. When such employees act in groups, they can often be dispersed across large geographical areas as they may have left the area in

which they were employed and returned to their homes, making it difficult for them to communicate between themselves or to meet or to collectively formulate their claim. Their lack of financial means due to their unemployment also often results in them being unable to afford data to communicate, and they often have no access to the internet or email.

[44] This can make it extremely difficult for such people to pursue their claims with the level of speed parties with significantly more resources expect and demand.

[45] This Court must be fair to both parties to a dispute and, in my view, it is not always in the interests of justice strictly to hold a party which falls into the category I have described above to the prescribed timeframes when such a party faces such enormous obstacles. To close the door on these employees because of factors outside of their control would be profoundly unfair.

[46] This Court must therefore consider what is a reasonable explanation for an excessive delay in the context within which each litigant finds itself.

[47] In this matter, the applicants were represented by their current legal representatives at the time when the condonation application was drafted. They, as legal practitioners, would have been well aware of the requirements for condonation to be granted and the necessity for a full and detailed explanation to be furnished to this Court, particularly given the extensive period of delay in this matter.

[48] On the applicants' behalf, Mr Serogole argued that it was not possible to provide a detailed explanation for each period of the delay as records were not kept when discussions between the applicants took place or when discussions were held with their union before they parted ways. He suggested that this is so because the applicants did not know that this information would be required for a condonation application.

[49] If I accept that this is so, I am still left with the lack of detail in the explanation that has been provided. The founding affidavit is full of broad statements about the applicants' familial and person obligations, consultations by the union with several

attorneys, months of diligent efforts by the applicants to pursue their claim, the financial constraints of some of the applicants, the disjointed nature of the group and so on, but the details of who and when and what have not been provided. There is also the issue of the periods of time for which no explanation has been given.

[50] All of these add up to an explanation for the second period of delay that is unsatisfactory and incomplete. It is, however, not a non-existent explanation.

[51] In the circumstances, even though the delay is excessive, I have found that the explanation for the first period of delay, which is the longer period, is reasonable in the particular context of this matter, and that there is an explanation for the second, shorter period of delay, whatever its deficiencies.

[52] While there may be some prejudice to the respondent should condonation be granted due to the lengthy period of time that has passed since the respondent embarked on the retrenchment process and the applicants were dismissed, in my view, this is not a matter in which there is no need to consider the prospects of success. Based on the jurisprudence of our courts, which I have referred to above, the interests of justice must be determined in this matter with reference to the applicants' prospects of success and not simply to the explanation for the delay.

[53] The applicants submit that their prospects of success are excellent, as their retrenchment was not in terms of section 189 of the Labour Relations Act¹³, ("LRA") because the defendant failed to follow proper procedures in terms of the LRA in that it did not provide alternatives to retrenchment to them. They also allege that the meetings held with them could not be regarded as consensus-seeking and were inadequate, unreasonable and held in bad faith.

[54] They go on to submit that their retrenchment was pre-determined and that the defendant's restructuring was done without a valid reason or a proper basis, with the need for the restructuring not satisfactorily explained to them. They allege that fair selection criteria were not used, the respondent did not consider transfer,

¹³ Act 66 of 1995, as amended.

redeployment, bumping or skills retention as alternatives and that the respondent did not do all that was possible to avoid their retrenchment.

[55] Conversely, the respondent submits that the applicants have no prospects of success in their claim as they have simply alleged in vague terms that the defendant did not follow the prescribed procedures set out in section 189 and that the procedures it did follow were not transparent and fair. It argues that the applicants' denial that the defendant meaningfully consulted with them is unsubstantiated, even on their own version, as despite the fact that the applicants allege in their replying affidavit many of them were not afforded interviews or proper assessments to determine their suitability for alternative roles, Mr Nokana testified during the arbitration proceedings that five of the applicants were unsuccessful during the interviews for the new T1 Execution Analyst role and, in his founding affidavit, he pleaded that all of the applicants had applied for the newly created position, the recruitment process for which included an interview, and that all of the applicants were asked the same interview questions and participated in the same testing exercise.

[56] While it is not necessary for an applicant for condonation to prove that they will succeed when the merits of the matter are considered, but only to provide a basis to establish that they have a good chance of succeeding when the matter is heard, this still requires an elucidation of the prospects of success beyond a broad and sweeping statement to the effect that the applicant has good prospects. The averment must be substantiated, and the applicant must set out sufficient facts to sustain such a finding.¹⁴

[57] In my view, the applicants have not substantiated the statements they make with regard to their prospects of success. Instead, they simply make broad statements which are conclusions rather than setting out the facts which, if proven at trial, would result in them succeeding in their claim. In addition to this, the defendant has set out sufficient facts which tend to show otherwise.

¹⁴ See: *Mould v Roopa NO and others* [2003] 1 BLLR 38 (LC) at para 34, *Samuels v Old Mutual Bank* [2017] 7 BLLR 681 (LAC) at paras 17 and 22 and *Public Servants Association obo Manamela v General Public Services Sectoral Bargaining Council and Others* (JR 1354/2018) [2020] ZALCJHB 155 (25 August 2020) at para 5.

[58] In the circumstances, their prospects of success in their claim are not enough to overcome the poor explanation for the second period of delay, which is excessive at 351 days. Were their prospects of success very good, this might have assisted them in overcoming their poor explanation for the excessive period of delay, but this is not the case.

[59] I am enjoined to consider fairness to both parties in considering this application for condonation. In my view, it would be unfair to the respondent to condone the late filing of the statement of claim in circumstances where there is such a lengthy delay, with an unsatisfactory explanation therefor and prospects of success which are not sufficient to overcome these factors. The prejudice to the respondent should condonation be granted is self-evident.

[60] In my view, it would not be in the interests of justice to grant condonation. The applicants have not shown good cause for the granting of the indulgence which they seek, and their application must, in those circumstances, fail.

[61] With regard to the question of costs, it was argued on behalf of the respondent that a costs order should be made against the applicants as it had had to raise an exception because of their conduct, they have not been diligent litigants, and they are simply taking a chance at the expense of the respondent. The representative for the respondent went so far as to say that the applicants have been grossly negligent and that their application is frivolous. On the other hand, it was argued on behalf of the applicants that costs should not be awarded against them if they do not succeed in their application for condonation as this Court is a court of equity and fairness, the applicants are vulnerable, unemployed and unable to pay costs, and parties ought not to be discouraged from approaching this Court because of the risk of an adverse costs order. It was also submitted that a costs order would be inappropriate as the applicants' case was not frivolous, vexatious or hopeless.

[62] In my view, while I have refused condonation, I see no reason to deviate from the principles set out by the Constitutional Court in *Zungu v Premier of the Province*

*of KwaZulu-Natal and others*¹⁵ and *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and others*¹⁶ that costs do not follow the result in this Court.

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

Order

1. The applicants' application for the condonation of the late filing of their statement of claim is dismissed.
2. There is no order as to costs.

M. Edwards
Acting Judge of the Labour Court of South Africa

Appearances:

For the applicants: PF Serogole

Instructed by: Mashifane Moswane Attorneys Inc

For the respondent: B Mtotoba of Bowman Gilfillan Inc

¹⁵ [2018] 4 BLLR 323 (CC) at para 24.

¹⁶ [2021] 12 BLLR 1173 (CC) at paras 33 and 35.