



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 2636/2021

In the matter between:

SAMWU obo TSHEPO MASHWENI

Applicant

and

**SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING
COUNCIL**

First Respondent

COMMISSIONER JOSEPH MPHAPHULI N.O.

Second Respondent

LEPELLE LOCAL MUNICIPALITY

Third Respondent

Heard: 5 February 2025

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on SAFLII and the Labour Court's website. The date and time for hand-down is deemed to be on 27 August 2025

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] There are two applications before the Court. In the first, the applicant seeks an order condoning the late filing of the review application. In the second application, and to the first application is successful, the applicant seeks an order reviewing and setting aside a ruling issued by the second respondent (Arbitrator). In the impugned ruling, the Arbitrator had dismissed the applicant's application for condonation for the late filing of his referral before the first respondent (SALGBC). The third respondent (Municipality) has opposed both applications.

Background:

[2] The applicant was employed by the Municipality in its fleet department. He was dismissed on 15 March 2021 on account of three allegations of misconduct. He had referred an alleged unfair dismissal dispute to the SALGBC. The referral was filed outside the statutory time period as contemplated in section 191(1)(b) of the Labour Relations Act¹ (LRA).

[3] In the referral before the SALGBC dated 7 June 2021, the applicant had stated that the dispute arose on 14 May 2021. That referral was not accompanied by an application for condonation and the matter was set down before the Arbitrator on 30 August 2021. At those proceedings, the Municipality disputed the jurisdiction of the SALGBC to determine the dispute in the absence of an application for condonation in the light of the late referral. The Arbitrator upheld the objection in a ruling issued on 06 September 2021.

[4] The applicant subsequently filed an application for condonation on 3 September 2021. This was prior to the Arbitrator having issued his ruling on jurisdiction. From the second ruling issued by the Arbitrator on 12 September 2021, it was recorded that the application for condonation was unopposed, and it was considered on the papers on 9 September 2021 and granted. The Municipality had

¹ Act 66 of 1995, as amended.

promptly sought a rescission of the Arbitrator's ruling. The Arbitrator had considered the matter and agreed that the Municipality's opposing papers had not come to his attention at the time that he granted condonation.

[5] The Arbitrator having rescinded his ruling on 20 September 2021 subsequently reconsidered the condonation application as now opposed and on the papers. He dismissed the application for condonation in a ruling issued on 20 September 2021.

The review application and condonation:

[6] The application to review and set aside the condonation ruling issued by the Arbitrator was delivered on 8 December 2021. The applicant also filed an application for condonation for the late filing of the review application on the same date.

The legal approach and evaluation:

[7] Under the provisions of section 145(1)(a) of the LRA, any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the CCMA or Bargaining Council may apply to the Labour Court for an order setting aside the arbitration award within six weeks of the date that the award was served on the applicant. Under section 145(1A) of the LRA, this Court may on *good cause* shown, condone the late filing of a review application.

[8] The onus of demonstrating *good cause* rests with the applicant. In deciding whether *good cause* has been shown for non-compliance with stipulated time frames, the court has to judicially exercise a discretion upon the consideration of all the relevant facts. These facts include the degree of lateness, the explanation therefor, prospects of success and the importance of the case, the importance of the issue(s) that the matter raises; the prejudice to the other party or parties; and the effect of the delay on the administration of justice².

²*Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A) at 532B – E; *Grootboom v National Prosecuting Authority and another* 2013 (5) ZACC 37; (2014) 35 ILJ 121 at para [50]

[9] The above factors are equally interrelated but not individually decisive and must be weighed against each other. Thus a minimal delay and a good explanation may compensate for weak prospects of success³. On the other hand, condonation may be refused where the explanation for the inordinate delay is neither reasonable nor acceptable, irrespective of good prospects of success⁴. Thus, that where the non-compliance was flagrant and cumulative, and where there was no acceptable explanation for the breaches, condonation may be refused whatever the merits were⁵. The weight to be attached to the other factors relevant for the determination of good cause count for little in circumstances where the degree of lateness is excessive and the explanation proffered amounts to no explanation at all⁶. Of crucial importance when considering the relevant factors, is whether in the end, the interests of justice dictates that condonation be granted or refused⁷.

(i) *The delay and its extent:*

[10] The founding affidavit in support of condonation was deposed to by Mr Mabitsela, the Provincial Organiser of SAMWU on behalf of the applicant. Notwithstanding certain averments made in reference to other individuals, no confirmatory affidavit were filed, let alone by the applicant. Mabitsela averred that the delay in filing the review application was 22 days which was not significant. The Municipality on the other hand through the answering affidavit deposed to by its Chief Financial Officer, Ms Mankga, had contended that the delay was 34 days, which was inordinate.

³ *United Plant Hire (Pty) Ltd v Hills* 1976(1) SA 717 (A) at 720 E – G.

⁴ *Collet v Commission for Conciliation, Mediation and Arbitration and others* [2014] ZALAC 1; (2014) 35 ILJ 1948 (LAC) (*Collet*) at para 38

⁵ *Blumenthal and Another v Thomson NO and Another* (462/1992) [1993] ZASCA 190 (30 November 1993); 1994 (2) SA 118 (A) at 121I – 122B

⁶ *Moila v Shai N.O and Others* (2007) 28 ILJ 1028 (LAC) at para 34.

⁷ See *Grootboom v National Prosecuting Authority (Grootboom)* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) at paras 22-3 and 51

[11] The applicant was served with the ruling on 23 September 2021 and the *dies* for the filing of the review application as he had correctly identified it was on or about 4 November 2021. The delay is effectively four weeks. The Court agrees that the delay is excessive, *albeit* not in the extreme.

The explanation for the delay:

[12] Mabitsela averred that the ruling was served on a Mr Maribe who had represented the applicant at the proceedings at the SALGBC. Upon its receipt, Maribe had then had drafted a memorandum and presented it together with the ruling to Mr Aphane at SAMWU's office on 28 September 2021. This was approved on 01 October 2021 and after the file was sent to the union's labour section for assessment on the prospects of the merits of the matter. Thereafter it was for the union's Registry's section and a briefing panel to consider various quotations from practitioners prior to an appointment being approved.

[13] Mabitsela averred that it was only on 14 October 2021 that instructions were issued to counsel to launch the review application. The appointed counsel however failed to carry out his mandate and was '*debriefed*'. Ultimately the matter was handed over to the applicant's current attorneys of record on 22 November 2021. The applicant was contacted and consultations were held with counsel on 29 November 2021, leading to the filing of the review application on 8 December 2021.

[14] The opposing averments made by Mankga on behalf of the Municipality were that the applicant had not proffered any explanation for the delay, and that if there was any, material facts pertaining to the identity of the counsel allegedly briefed and the union's own internal processes were not disclosed. In addition, it was averred that neither the said counsel nor the applicant's attorneys involved in the matter prior to its delivery, had attached supporting or confirmatory affidavits pertaining to their involvement in the matter.

[15] It was only in the replying affidavit that Mabitsela had sought to expand on the explanation for the delay and by filing supporting affidavits of Mr. Setlatjile, an attorney with the applicant's attorneys of record, and that of Adv. Mothupi.

[16] It is trite that an explanation for non-compliance when seeking indulgence from the Court must cover all the aspects related to the delay, including the period of any delay after becoming aware of the need to apply for condonation, and that the explanation given must be reasonable⁸. In this case, the Court will accept that the application for condonation was delivered simultaneously with the main review. It was however correctly pointed out on behalf of the Municipality that the explanation fell short of being reasonable or satisfactory.

[17] In the first place it is trite that a party stands and falls by its founding affidavit, and that a case cannot be made out in the replying affidavit⁹. The Court in *Shephard v Tuckers Land and Development Corporation (Pty) Ltd*¹⁰ held that ordinarily, such an affidavit raising a new matter ought to be struck out. The Court nonetheless reaffirmed that the rule was not absolute, and that it was within its discretion to permit such new matters to remain in the replying affidavit, provided the respondent is afforded an opportunity to deal with those matter in a second set of answering affidavit. That indulgence was however to be allowed in special or exceptional circumstances.

[18] In this case, the confirmatory affidavits and other new averments were merely explained by Mabitsela as an oversight when the founding affidavit was settled. This explanation makes it even worse for the applicant and the drafters of the founding affidavit. A defence or claim of an oversight in drafting court papers hardly qualifies as an exceptional or special circumstance for the purposes of indulging the new material in the replying affidavit.

[19] Notwithstanding the above, the issue remains whether a satisfactory and explanation was proffered. That question in my view ought to be answered in the

⁸ *Van Wyk v Unitas Hospital and Another* (CCT 12/07) [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 22

⁹ *Mostert and Others v FirstRand Bank t/a RMB Private Bank and Another* 2018 (4) SA 443 (SCA) para 13; *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) at para [177]

¹⁰ (1) 1978 (1) SA 173 (W) at 177G – 178A

negative. At the core of the explanation is that the delay is attributable to the internal processes of SAMWU. It was submitted that these processes were out of the applicant's control and could not be circumvented.

[20] The importance of adherence to statutory time frames clearly trumps over everything else, inclusive of an organisation's internal processes. SAMWU, being familiar with Court processes and statutory requirements, must have been aware of the need to act with the necessary haste when seeking a review. The rules of Court and statutory provisions are meant for the convenience of the Court, and not to accommodate an organisation's internal cumbersome processes prior to instituting or defending matters. In this case, nothing was said in the founding affidavit to demonstrate whether any alacrity was exercised when there was an intention to file this application upon receipt of the ruling, with clear knowledge of the time frames.

[21] Equally not helpful is an explanation that an appointed counsel failed to timeously attend to the matter resulting in the applicant's current attorneys of record being appointed. Nothing is said about what caused the previous counsel to delay the matter and what steps were taken against that counsel, other than that he was at some time '*debriefed*' and the matter handed over to the current attorneys of record. It does not further assist the applicant's case for a mere contention to be made on behalf of the applicant that '*in reality these things do occur.*' The applicant and SAMWU as *dominus litis*, are obliged to show some seriousness in timeously prosecuting their matter and ensuring that '*these things*' do not occur when counsel is instructed.

[22] Conspicuous with his silence is the applicant, who it appears in the absence of his confirmatory affidavit, was only contacted around 22 November 2021 to attend consultations on 29 November 2021. There is however no confirmation from him. In *Saloojee and another v Minister of Community Development*¹¹, it was held that "*there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered.* Effectively, an applicant cannot simply hand over his/her matter to representative, including his union, and

¹¹ 1965 (2) SA 135 (A) at paragraph 141C-E,

not bother to enquire about its progress as an interested party¹². In this case, at the time that the applicant was contacted, the six-weeks period had long passed. It is unknown as to whether at any time between the issuing of the ruling and 22 November 2021 when he was allegedly contacted for consultations he had done anything to enquire about progress in his matter.

[23] Against the above observations and conclusions, clearly the explanation proffered for the delay hardly qualifies as acceptable or satisfactory.

Prospects of success

[24] Even though it has been concluded in this judgment that the explanation for the delay was not satisfactory or acceptable, it has equally been concluded that the delay was excessive *albeit* not in the extreme. In *Steenkamp and Others v Edcon Limited*¹³, the Constitutional Court reiterated the approach in *Grootboom*¹⁴ that in the overall consideration of what is in the interests of justice, the court may grant condonation where the period of the delay is short and the explanation unsatisfactory. But that approach in this case must be assessed against the question whether the applicant's prospects of success in the review application can be said to compensate for the lack of a satisfactory explanation.

¹² See *Huysamen and Another v Absa Bank Limited and Others (Huysamen)* (660/2019) [2020] ZASCA 127 (12 October 2020 at para 14 where it was held;

"The question is whether the applicants' condonation application should be granted despite their attorney having been remiss in fulfilling his duty to them. Courts, in general, are ordinarily loath to penalise a litigant on account of his attorneys' negligence. But in *Reinecke*, this Court warned litigants that the time had come that it should be no excuse. Attorneys are members of the Court. The Court expects them to know and uphold the Rules of the court in which they practise. A litigant can derive no benefit from the ineptitude of his attorney. After all the attorney is the litigant's chosen legal representative. If one's legal representative has poorly executed the mandate, one must suffer the consequences. In any event, the applicants themselves are not without blame. It would be unreasonable to accept that once a client has given instruction to an attorney, he or she can sit back and do nothing. The applicants herein, it would seem, hardly enquired from their attorney as to the progress with the appeal..."

¹³(CCT29/18) [2019] ZACC 17; 2019 (7) BCLR 826 (CC); (2019) 40 ILJ 1731 (CC); [2019] 11 BLLR 1189 (CC) at para [36]

¹⁴ At paras 22-3 and 51

[25] In determining prospects of success, and to do justice to this aspect of the enquiry, I deem it expedient to do so within the context of the merits of the review application. This is so in that the submissions in regard to the prospects of success are essentially the same as those pleaded as grounds of review in the main application. Against this approach, whether the applicant has prospects of success in the main review application has to be assessed in regards to the material that was before the Arbitrator when condonation was considered.

[26] To recap, after the applicant was dismissed on 15 March 2021, he had referred a dispute to the SALGBC on 7 June 2021. It is apparent that the applicant was out of time. It is further common cause that the provisions of section 191(1)(ii) of the LRA related to '*upholding of the dismissal*' could not have applied in this case since no appeal or further hearings were held after the initial dismissal.

[27] It was submitted before the Arbitrator that the delay was about fifty one days late. It is common cause that the late referral was not accompanied by an application for condonation. When the matter came before the Arbitrator, he had confirmed that he lacked jurisdiction. The applicant then filed an application for condonation. That application¹⁵ was deposed to by Aphane, the SAMWU's Provincial Secretary and previously a shop steward. Although it is not clear as to when the affidavit was filed, the Court will accept from Mankga's answering affidavit that it was filed on 3 September 2021, some six months since the time periods of the referral had lapsed.

[28] In opposition to the application before the Arbitrator, Mankga, who was the then Acting Municipal Manager, had similarly deposed to the answering affidavit and disputed that the application was only 51 days. She averred that the delay between the date of the dismissal and the initial referral without condonation was 54 days. However, when it was taken into account that that the application for condonation was only delivered on 3 September 2021, the degree of lateness was 142 days, which was excessive and weighed against condonation being granted.

¹⁵ Page 5 – 8 of the Record

[29] In explaining the delay before the Arbitrator, Aphane contended that the applicant had after his dismissal, exercised his right of appeal internally on 23 March 2021 within seven days in accordance with the SALGBC Disciplinary Code Collective Agreement. It is contended that receipt of his appeal was acknowledged by the Municipality on the same date and the latter had appointed an appeals panel on 28 April 2021 and scheduled a hearing for 30 April to 3 May 2021. It was submitted that the applicant had also received his salary for April 2021. He had however waited for a month without the appeal hearing being convened until he decided to refer the dispute to the SALGBC.

[30] Mankga disputed that the applicant had lodged an appeal with the Municipal Manager, and that despite his arrangements with the Labour Relations Officer, his appeal never reached the office of the Municipal Manager, hence the appeal hearing was never convened. Mankga further averred that even if the applicant had lodged an appeal on 23 March 2021, under clause 17.4 of the SALGBC Disciplinary Procedure Code, the appeal ought to have taken place within 10 days of its lodging. The 10 days therefore expired on 7 April 2021, and it could not be contended that the applicant was still waiting for an appeal thereafter as the time period had lapsed.

[31] Mankga averred that the applicant failed to explain each period of the delay between 16 April and 7 June 2021, had in addition, failed to furnish an explanation for the delay between 16 April 2021 and 3 September 2021 when he filed his application for condonation.

[32] In regards to the applicant's prospects of success, it was simply contended that he *'enjoys excellent prospects of success and that his dismissal will hopefully be declared unfair'*.

[33] Mankga averred that the applicant had not set out any facts which demonstrated that he had reasonable prospects of success. She pointed out that the applicant had not set out the reasons and charges of misconduct against him that led to his dismissal. Mankga averred that the applicant was charged with several acts of gross misconduct related to dishonesty for *inter alia*, failure to declare business interests in the financial disclosure form, and contravention of the Municipality's

Code of Conduct for staff. In this regard, it was alleged that the applicant as an employee in the Municipality's fleet department had purchased a vehicle which belonged to the Municipality which was written off after an accident. The value of the vehicle, which was just three months old with a milage of less than 200km when it was involved in an accident, had been assessed at over R400 000.00 by the insurers. The applicant had however purchased it for R75.000.00.

[34] The applicant in his replying affidavit before the Arbitrator had as he had done in the condonation for the late filing of the review application, sought to expand on the prospects of success and other factors scantily dealt with in the founding affidavit. I will revert to these averments in the course of this judgment.

[35] The Arbitrator against the above submissions had concluded that a delay of 51 days, even on the applicant's own calculations was inordinate. He concluded that the reasons proffered by the applicant for the delay were not at all convincing and there was no justification for it. In this regard, he concluded that even if the applicant had lodged an appeal, he took no steps during the 51 days to enquire why it was not convened on time, and he demonstrated no eagerness in remedying any infringement of his rights or the unfair dismissal.

[36] The Arbitrator in considering the prospects of success concluded that the applicant failed to address this pivotal question in his affidavit, and that a mere contention that one had prospects of success without laying a basis for that contention was insufficient. The Arbitrator found that the applicant failed to address how his dismissal was unfair and did not dispute the serious charges of misconduct involving dishonesty preferred against him. Those charges according to the Arbitrator, pertained to dishonesty and were ordinarily regarded as fair grounds for a dismissal. It was held that in the absence of a satisfactory explanation for the delay and the failure to substantiate on prospects of success, the applicant had not shown *good cause*.

[37] In seeking a review of the Arbitrator's ruling, various grounds were raised on behalf of the applicant. These included *inter alia* that the Arbitrator committed gross misconduct and gross irregularities and arrived at an unreasonable conclusion. It

was further contended that the Arbitrator adopted an approach unjustified on the facts and inconsistent with his statutory duties; did not exercise powers conferred on him by the LRA; wrongly and unjustifiably made certain factual findings and/or assumptions against the applicant and displayed a one-sided analysis of the evidence and argument. In the main, it was submitted that the applicant's prospects of success and other factors were sufficiently addressed in his replying affidavit, which the Arbitrator ignored and thus made the ruling unreasonable.

[38] It is trite that at the core of any application for condonation is whether *good cause* was shown. Of equal importance is that granting or refusing condonation involves an exercise of a discretion whether by the Court or arbitrators. In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*¹⁶ it was held that a court is not entitled to interfere with the decision of a lower tribunal in the exercise of its discretion, merely on the basis that it would have arrived at a different conclusion on the facts that served before the tribunal. The court is only entitled to interfere in circumstances where the tribunal did not exercise its discretion judicially, or where it was influenced by the wrong principles, or had committed a misdirection on the facts, or arrived at a decision which could not have been reasonably arrived at by a tribunal properly directing itself to all the relevant facts and principles¹⁷.

¹⁶ (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 at para 11.

¹⁷ See also *Bosch v Seynhaeve NO* (159/2023) [2024] ZALCCT 25 (27 June 2024) where it was held; "[19] In an appeal against a condonation ruling by the Labour Court, the Labour Appeal Court in *Colett v Commission for Conciliation, Mediation & Arbitration & others* reaffirmed the test adopted by the Constitutional Court in *Mabaso v Law Society, Northern Provinces & another* to decide such an appeal:

"[29] A court of appeal will not lightly interfere with the exercise of a judicial discretion by a lower court. An appellant who challenges the exercise of a judicial discretion will have to show that such discretion was not exercised judicially. More specifically the appellant will have to show that the court a quo either-

- 29.1. failed to bring an unbiased judgment to bear on the matter;
- 29.2. did not act for substantial reasons;
- 29.3. exercised its discretion capriciously or arbitrarily;
- 29.4. exercised its discretion upon wrong principle;

[39] In the light of the above principles, and to the extent that the Arbitrator had accepted that the delay was at least 51 days and thus inordinate, there is no basis for any interference with that observation and conclusion. Worst still however was that at the time that the referral was lodged, the applicant or SAMWU must have been aware that the time periods had lapsed, and yet no condonation was sought. Condonation was only sought after the matter initially came before the Arbitrator, and in September 2021, some almost six months after the time periods had lapsed. Clearly the delay was inordinate as properly found by the Arbitrator. This meant that for the application to succeed, the applicant had to demonstrate that notwithstanding the inordinate delay, he had a reasonable and acceptable explanation for the delay

[40] It is apparent from a long line of authorities that where an employee invokes internal appeal procedures in challenging a dismissal, the date of the appeal outcome, and not the date of the dismissal, shall be determinative in calculating the timeframes contemplated in section 191(1)(b)(i) of the LRA.¹⁸ It was held in *Gous*¹⁹ that the fact that an employee had waited for the outcome of the internal appeal before referring a dispute to the CCMA was far from an irrelevant consideration.

[41] In this case, it is common cause there was never an appeal hearing. There is a dispute as to whether the applicant had lodged an appeal or not. Aligned to that is the contention on behalf of the applicant that such an appeal was arranged but not convened.

29.5. committed a misdirection of such a serious nature and degree as to justify a conclusion that it acted improperly or unreasonably..."

[20] It follows that a review of an arbitrator's condonation ruling must not be assessed on a less stringent standard. In reviewing the ruling of an arbitrator exercising a flexible discretion in the application of the multi-factor test applicable to condonation rulings, a court needs to be mindful that the review is confined to the ambit of the abovementioned grounds for interfering with the exercise of a wide discretion."

¹⁸ See *Fidelity Guards Holdings (Pty) Ltd v Epstein & others* (2000) 21 ILJ 2009 (LC) at para 18; see also *Information Trust Corporation v Gous & others (Gous)* (JA49/2002) [2003] ZALAC 25; (2005) 26 ILJ 2351 (LAC); [2005] JOL 16037 (LAC) at para 8.

¹⁹ At para 10

[42] In this case, the applicant having been dismissed on 15 March 2021, he alleged that an appeal was lodged timeously on 23 March 2021, and that despite it being arranged for 30 April 2021, such an appeal was never convened. Any appeal under Clause 17.4 ought to have been convened within 10 days of it being lodged. It was averred that the applicant had waited for a month after the appeal was not convened, until he referred the dispute to the SALGBC. It was further contended that he had trusted that the appeal would be convened, more specifically since he was paid his April monthly salary despite his dismissal on 15 March 2021.

[43] Even if the Court were to accept that indeed an appeal was lodged, a difficulty faced by the applicant is that nothing is said about what he had done at least between 30 April 2021 when the appeal did not convene as allegedly arranged, and 7 June 2021 when the matter was referred to the SALGBC. Effectively, a period of over thirty days of inactivity is unexplained. Without even being bogged down by whether an appeal was lodged or not, in the absence of that specific period being unexplained, the Arbitrator's conclusions that the applicant failed to engage the Municipality to establish the reasons why an appeal was not held and had simply folded his arms, cannot in my view be faulted. Clearly the explanation did not cover the entire period of the delay, an omission which is fatal.

[44] To the extent that the inordinate delay was not explained or at most, any explanation in that regard was unconvincing and unacceptable, the Arbitrator in line with *Grootboom* and *Steenkamp*, had regard to the applicant's prospects of success despite the contrary submissions made on behalf of the applicant.

[45] In *Thompson v National Health Laboratory Services*²⁰, it was reiterated that the requirement in demonstrating prospects of success is that an applicant must set forth briefly and succinctly, such essential details which shall enable the court to properly assess those prospects. This means that the prospects of success need not be discussed in great detail as this is a task reserved for evidence during the

²⁰ [2009] JOL 24319 (LAC) at para 22; See also *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131D – E.

arbitration proceedings.²¹ In assessing the prospects of success, the onus is on the applicant to set out reasonable prospects of success.

[46] In the founding affidavit before the Arbitrator, it was simply averred that he enjoyed excellent prospects of success. Mankga on behalf of the Municipality and the Arbitrator, had correctly pointed out that the contention about prospects of success on the merits was scant and without any attempt at substantiation.

[47] From the founding affidavit, it is difficult to appreciate how it could have been expected of the Arbitrator to conclude that substantial averments were made regarding prospects of success. It was submitted that the applicant had evinced good prospects of success in that he had denied the charges and pleaded not guilty, and that the Arbitrator nonetheless failed or refused to take note of those averments as set out in his replying affidavit in the application for condonation.

[48] It is disingenuous for any contention to be made that there was anything in the founding affidavit related to the applicant having denied the charges or having pleaded not guilty to those charges. It was only after the scant nature of the averments was pointed out in the answering affidavit that an attempt was made to expand on the prospects of success. It was submitted on behalf of the applicant in reference to *Bosch v Seynhaeve NO*²² that a failure by the Arbitrator to consider the averments in the replying affidavit made his ruling unreasonable.

[49] The facts in *Bosch* are clearly distinguishable from those in *casu*. The issue in *Bosch* concerned the unwillingness of the Arbitrator to consider the prospects of success expanded in the applicant's extensive closing arguments. Those closing arguments were submitted to the chairperson of the disciplinary enquiry concerning the merits and sanction, and the applicant in that matter had attached those written arguments to his application for condonation. Clearly the Arbitrator's unwillingness to consider the closing heads of argument which formed part of the record before him in that case was unreasonable.

²¹ See *PPWAWU & others v AF Dreyer & Co (Pty) Ltd* [1997] 9 BLLR 1141 (LAC) at 1144J.

²²(159/2023) [2024] ZALCCT 25 (27 June 2024)

[50] In this case however, any expansion on the prospects of success was attempted in the replying affidavit without adding anything of value. Other than the principles and conclusions set out elsewhere in this judgment in regards to the futility of making out a case in the replying affidavit, the applicant had not attached anything from the internal disciplinary hearing to back up his claims in the replying affidavit in regards to prospects of success. It follows that the Arbitrator could only make an assessment of the prospects of success and exercise his discretion in relation to what was before him, and not based on mere unsubstantiated assertions and conclusions without any basis being laid in that regard. All that the applicant did in the replying affidavit was to confirm that he was found guilty on three allegations of misconduct. All he could muster even in the face of allegations made in the answering affidavit, was to aver that all the '*charges lacks substantive merit and will necessarily not see the light of day in Arbitration...*'. Again, nothing can be read into those submissions from the replying affidavit.

[51] In the end, it is apparent that contrary to what was stated in *Thompson v National Health Laboratory Services*²³, the applicant failed to set forth briefly and succinctly, such essential details which would have enable the Arbitrator to properly assess what his prospects of success were. He thus failed to discharge the onus placed on him to set out what his reasonable prospects of success were, even when regard is had to the replying affidavit. Against these conclusions, I fail to appreciate how the Arbitrator would have been expected to exercise his discretion in favour of granting condonation.

[52] It was submitted on behalf of the applicant that he would suffer prejudice in that he would be unable to place his version before the, and further that the prejudice he would suffer far outweighs that to be suffered by Municipality. It is trite that an exercise of a discretion by this Court equally involves an assessment of the parties' rights and what is fair to both.

²³ *supra*

[53] Both applications before the Court demonstrates a complete failure by the applicant and his Union in adhering to statutory time frames when referring disputes to either the Bargaining Council or this Court. Clearly the Municipality will be prejudiced in circumstances where other than the cumulative failures to adhere to time frames, it would then be compelled to have to defend a matter where its prospects of success are non-existent.

Summary:

[54] The applicant failed to provide a satisfactory explanation for a not insignificant delay in lodging his review application. Any explanation for the delay has been found to be unsatisfactory and unreasonable and the applicant prospects of success in the review are poor. He has not disclosed grounds justifying this Court's interference with the Arbitrator's condonation ruling. That ruling shows that in the light of the material before him, the Arbitrator applied the applicable principles in a reasonable, correct, and sound manner, and in the end exercised his discretion judicially in dismissing the Applicant's condonation application. This Court would be hard-pressed to find a basis for any interference with the ruling as the decision reached by the Arbitrator is one which could reasonably have been reached by another Arbitrator properly exercising her/his discretion on the same facts. Considering the relevant factors in their totality, and the conclusions reached in respect of both applications, the interests of justice and fairness are best served by refusing the granting of condonation in the review application.

[55] I have further had regard to whether any costs order should be made as sought by the Municipality. Against the requirements of law and fairness as contemplated in section 162 of the LRA, I am of the view that any such costs order is not warranted and each party must be burdened with its own costs

[56] Accordingly, the following order is made:

Order:

1. The applicant's application for condonation for the late filing of the review application is dismissed

2. Each party is to pay its own costs.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Adv. N Gaffor, instructed by AM Carrim Attorneys INC.

For the Third Respondent: Adv. E Nwedo, instructed by Lebea Attorneys.

LABOUR COURT