



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case No: C27/2025

In the matter between:

NTOMBOZUKO MJELO AND OTHERS

Plaintiffs

and

HISENSE MANUFACTURING SA (PTY) LTD

Defendant

Heard: 13 August 2025

Delivered: 18 August 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 18 August 2025.

JUDGMENT

DE KOCK, AJIntroduction

[1] This matter came before the court as an application for the late filing of the statement of claim to be condoned. The application was opposed and set down as an interlocutory application separate from the trial proceedings. The court was advised that one of the plaintiffs, Ntombozuko Mjelo, has advised that she is no longer interested in pursuing the dispute. Mjelo will therefore no longer be regarded as one of the plaintiffs in this matter.

Degree of lateness

[2] The plaintiffs were dismissed on 30 September 2023. The dispute was referred to the CCMA within the prescribed 30-day period, and a certificate of non-resolution of the dispute was issued on 19 March 2024. The statement of claim was to be delivered within the prescribed 90-day period, i.e., on or before 17 June 2024. The statement of claim was only served on 12 February 2025, which makes the referral of the dispute to the Labour Court late by seven and a half months. It is not in dispute that the degree of lateness is substantial, especially viewed in the context that labour disputes must be resolved speedily.

Explanation for the delay

[3] The plaintiffs commence their explanation for the delay by stating that they were at all material times under the *bona fide* impression that their trade union, NUMSA, had referred their dispute to the Labour Court for adjudication within the statutory time periods. They were aware that the Labour Court referral was a long process and that they were patiently awaiting the outcome.

[4] On 21 January 2025, the plaintiffs were called to a meeting at NUMSA's Atlantis Local Branch offices and informed for the first time that their dispute was never referred to the Labour Court. Present at this meeting was a NUMSA official, Mr. Alfredo Smit, and an attorney representing NUMSA, Mr. Minnaar Niehaus, who informed them that the dispute was never referred to the Labour Court. According to the deponent, they attended the meeting under the impression that they were to receive an update as to when their matter was to be heard in court.

[5] It became clear during this meeting, duly amplified with more detailed information obtained after the meeting and further amplified with the inescapable inferences drawn from the information received, that they fell victim to internal factionalism and political battles within NUMSA. Intense internal battles occurred in the build up to NUMSA's National Congress in 2022 to gain control over the union. Reference was made to Labour Court and Labour Appeal Court judgments in support of the internal battles within NUMSA with the Labour Court referring to "*an atmosphere of untrammelled leadership issues*".

[6] The Western Cape Region, under leadership of the regional secretary (Luvuyo Lufele) and the regional committee, were most prominent in driving the dissent within NUMSA. Consequently, Lufele was suspended and subsequently dismissed with a pending dismissal dispute in the CCMA, and NUMSA's Western Cape Region was placed under administration in terms of NUMSA's constitution. Two administrators were appointed to co-administer the region in the interim, which was still the situation when the founding affidavit was deposed to. Internal disciplinary hearings of various NUMSA office bearers were also still being conducted when the founding affidavit was deposed to.

[7] The events surrounding the 2022 National Congress, referring to the dissent and struggles within NUMSA, continued, especially in the Western Cape Regional Executive Meeting scheduled for March 2023. At that point in time certain individuals within NUMSA actively embarked upon a campaign to undermine NUMSA's leadership by way

of *inter alia* orchestrating mass resignations from NUMSA. A WhatsApp group called “Send me Baba” was formed, which called for or attempted to mobilise NUMSA members to resign from NUMSA and to join a new rival union of which the NUMSA Atlantis Local Branch was apparently central to the campaign. More specifically, there was an active campaign within the respondent’s specific workplace to secure mass resignations from NUMSA. This was in fact quite effective in that various resignations occurred.

[8] The deponent states that the plaintiffs were not involved in these internal struggles and factionalism and did not form part of those who resigned their membership from NUMSA. It is alleged that, with benefit of hindsight, the inescapable conclusion is that the plaintiffs were apparently seen as being part of one faction who supported NUMSA’s existing leadership. It also appears, after the fact, that Mr. Smit, who had represented the plaintiffs in the section 189 process, was likewise seen as being part of the faction supporting the existing NUMSA leadership. It also, in hindsight, became patently clear to the plaintiffs that, unbeknown to them, they were sacrificed in an endeavour to settle internal scores. Mr. Smit duly referred an unfair dismissal dispute on the plaintiff’s behalf to the bargaining council for conciliation.

[9] However, it does not fall within Mr. Smit’s ambit of responsibilities and powers to thereafter refer the matter to the Labour Court for adjudication. This is an issue which is dealt with by NUMSA’s Regional Legal Officer who worked under the direct supervision of Mr. Lufele, a prominent figure representing the dissenting group within NUMSA. Mr. Smit duly referred the plaintiff’s matter to the NUMSA Regional Legal Officer for same to be referred to the Labour Court for adjudication.

[10] However, unbeknown to the plaintiffs, the Regional Legal Officer refused to refer the matter to the Labour Court claiming that they had no claim in that Mr. Smit had allegedly compromised their claim given that he had allegedly not replied to the defendant’s last communication in the section-189 process. Consequently, the defendant closed the consultation process and implemented dismissals. The deponent

states that it now appears that there had been a stand-off between the NUMSA Regional Legal Officer and Mr. Smit relevant to the plaintiff's case in an apparent attempt to set Mr. Smit up for failure. The plaintiffs were advised that Lufele was later dismissed and that the Regional Legal Officer had very recently resigned.

[11] The deponent states that they were advised that Mr. Smit made various attempts to get an audience with the Regional Interim Administrators in an endeavour to get them to overrule the Regional Legal Officer. Meetings initially arranged were cancelled and when Mr. Smit eventually managed to bring the matter to the attention of the Interim Administrators, they remained indecisive in an apparent attempt to keep all factions within the Region satisfied. The plaintiffs were not aware of this at the time.

[12] Mr. Smit also advised the plaintiffs, after the fact that he was not making any progress with the Interim Administrators, that he brought the issue to the attention of NUMSA's General Secretary, Mr. Irvin Jim, when he had the opportunity to do so during a break in a meeting held in Cape Town in October 2024. Mr. Jim apparently instructed Mr. Smit to forward all relevant documentation to one of NUMSA's attorneys, Mr. Niehaus, who is based in Gqeberha.

[13] Mr. Smit duly complied, and he had some further interactions with Mr. Niehaus during the latter part of October 2024 and beginning of November 2024 at which time he was advised that the plaintiffs' matter indeed had strong prospects of success. It was, however, noted that the plaintiffs were confronted with a serious challenge in respect of condonation for the late referral of the matter. Mr. Niehaus advised that he would report to Mr. Jim and revert.

[14] Mr. Niehaus apparently then reverted to Mr. Smit later during November 2024 advising that he had received the go-ahead from Mr. Jim to proceed with a referral and a substantive application for condonation, but that it would be necessary for him to consult in Atlantis to obtain more detailed instructions. Such consultation was eventually only scheduled for 21 January 2025. The plaintiffs were advised that this was due to a

combination of work pressures towards the end of the year and a general problem with NUMSA relevant to the payment of service providers on its legal panel.

[15] At the meeting of 21 January 2025, Mr. Niehaus advised the plaintiffs that the drafting of papers was in fact in an advanced stage, but whilst he required further detailed instructions from the plaintiffs, he is unfortunately confronted with serious difficulties. Mr. Niehaus advised that on further reflection he realized that he was confronted with a potential conflict of interest in that whilst he was acting for NUMSA he could not ignore the fact that the plaintiffs as members potentially had a claim against NUMSA for failing to refer the plaintiffs' matter timeously. Mr. Niehaus also advised that this was an issue he had to discuss with Mr. Jim which had also resulted in a delay in consulting with the plaintiffs in Atlantis. Mr. Niehaus also shared with the plaintiffs that, whilst attending to the initial drafting of papers, he was furthermore confronted with an ethical dilemma both towards the plaintiffs and the court in that it is required in a condonation application to take the court into full confidence. It was, however, apparent that given the internal issues and sensitivity within NUMSA, he will either not obtain full disclosure as to why the plaintiffs' matter was not referred, or to the extent that this is disclosed to him, he would not be at liberty to disclose all of this in the papers.

[16] As such, Mr. Niehaus advised that he could not in good conscience proceed with a condonation application where NUMSA remains a party in circumstances where he would be remiss in respect of his duties towards the court and ultimately this will only be to the detriment of the plaintiffs, seeking condonation.

[17] Mr. Niehaus apparently discussed these issues with Mr. Jim, and it was decided to advise the plaintiffs that NUMSA could no longer represent them and that they should secure their own legal representative and that NUMSA would assist in respect of the latter. As such Mr. Niehaus advised the plaintiffs that he made enquiries with colleagues in Cape Town and he could assist in respect of recommendations as to a new representative bearing in mind that the plaintiffs are in Atlantis and that they do not have readily access to lawyers. Mr. Niehaus also advised that he was authorised to provide

any new representative with the draft papers for same to be settled without major additional cost implications. The plaintiffs were accordingly referred to their present attorney of record.

[18] These further processes resulted in a further delay in finalising the plaintiff's papers since 21 January 2025 and, in addition, when the plaintiffs were advised that the defendant was in the process of filling permanent vacancies, the plaintiffs saw this as an opportunity for settlement. The plaintiffs' attorney of record was accordingly instructed to first engage with the defendant relevant to such potential settlement by way of formal correspondence. However, the defendant subsequently rejected the plaintiffs' proposal whereafter the plaintiffs were compelled to now proceed with this application.

[19] The deponent states that they are furthermore advised that suing NUMSA is most likely a futile exercise in that it is virtually impossible for a civil court to step into the position of the Labour Court and pronounce upon the merits of their unfair dismissal claim, in the absence of any opposing papers and evidence from the defendant, and to then conclude that had it not been for NUMSA's negligence the plaintiffs would have been reinstated or compensated. Accordingly, the plaintiffs' only viable remedy is to approach the Labour Court with an application for condonation.

Prospects of success

[20] The plaintiffs submit that their dismissals were both procedurally and substantively unfair. The fact that Mr. Smit was not aware of a communication and failed to respond accordingly was no justification for prematurely terminating the consultation process in circumstances where the parties had not yet fully ventilated and exhausted all issues which are required to be consulted on in law and/or fairness.

[21] It is alleged that the defendant was in any event subsequently advised that the non-reply was a *bona fide* miscommunication, yet the defendant refused to retract the dismissal letters and proceeded with consultations. The defendant's purported

economic rationale was emphatically exposed as a complete fabrication and far from a genuine desire to outsource, the defendant embarked upon a process to reduce its permanent workforce and to then rehire other (or in some cases the very same employees) in the very same positions through a labour broker at substantially reduced rates.

[22] The plaintiffs referred the court to the content of the statement of claim and were therefore advised, should they be able to prove the averments and contentions contained in the statement of claim during a trial, they would have established a substantively unfair dismissal (and procedurally unfair dismissal), and as a consequence that their prospects of success are exceptionally good.

Prejudice

[23] The plaintiffs state that should they be denied condonation, they will suffer immeasurable prejudice. The economy in Atlantis is depressed and most of the plaintiffs have been unable to find any gainful employment since their dismissals and there is very little prospect of this changing in future. Suing NUMSA does not appear to be a viable option. It is submitted that the defendant will suffer no prejudice should condonation be granted. In this regard, the deponent refers to an existing AMCU dispute that is currently before the Labour Court. Self-evidently, the defendant is still in possession of all evidence and witnesses for purposes of defending the AMCU case. It is also stated that should condonation be granted, it may well be feasible to bring an application for the joinder of their matter and as such the defendant will be confronted with a single trial dealing with all issues. The question of prejudice therefore overwhelmingly favours the plaintiffs being granted condonation.

Public Interest

[24] The plaintiffs submit that the defendant is operating its business in the Atlantis Special Economic Zone with the concomitant governmental incentives attached thereto.

As such, being a beneficiary of governmental incentives to *inter alia* create job opportunities, it is unconscionable that the defendant had resorted to the plaintiffs' retrenchments in a patently dishonest manner as to secure cheap labour by means of an abuse of a temporary employment service. This goes beyond the parties and is of interest to the public at large.

Legal requirements in relation to condonation

[25] It is necessary for this court to refer to relevant case law regarding applications for condonation, especially given the degree of lateness in this matter. This case law will then be considered, and applied, to the plaintiffs' application for condonation and the defendant's opposition thereto.

[26] The relevant legal principles to be applied in an application for condonation are well established. The court or relevant tribunal has a discretion, which must be exercised judicially on a consideration of the facts of each case and in essence, it is a matter of fairness to both sides.¹ In *Melane v Santam Insurance Co Ltd*² (Melane), it was held that:

'.... Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation... What is needed is an objective conspectus of all the facts.'

[27] The approach that, in the absence of a satisfactory explanation for a delay, the applicant's prospects of success are ordinarily irrelevant, has been conventionally applied³ and was confirmed in *National Education Health and Allied Workers Union on*

¹ D Harms, 'Civil Procedure in the Superior Court', LexisNexis South Africa at B27.6

² 1962 (4) SA 531 (A) at 532C-F

³ See: *NUM v Council for Mineral Technology* [1998] ZALAC 22; [1999] 3 BLLR 209 (LAC)

*behalf of Mofokeng and others v Charlotte Theron Children's Home*⁴ where the LAC held that without a reasonable and acceptable explanation for a delay the prospects of success are immaterial. In *Colett v Commission for Conciliation, Mediation and Arbitration and others*⁵, the LAC confirmed that 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.

[28] The onus is on the applicant seeking condonation to satisfy the court or tribunal 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 *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) and others*⁶:

'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 backdrop of this fundamental principle in employment law.'

[29] The fundamental requirement of expedition is not to be ignored. In *Toyota SA Motors (Pty) Ltd v CCMA and others*⁷, the Constitutional Court emphasised that one of the fundamental purposes of the LRA was to establish a system for the quick adjudication of labour disputes. When it assesses the reasonableness of a delay, the court must not lose sight of this purpose.

⁴ [2004] ZALAC 9; (2004) 25 ILJ 2195 (LAC) at para 23.

⁵ [2014] ZALAC 1; [2014] 6 BLLR 523 (LAC)

⁶ [2014] ZALCJHB 115; (2015) 36 ILJ 232 (LC) at para 25.

⁷ [2015] ZACC 40; (2016) 37 ILJ 313 (CC).

[30] In *Grootboom v National Prosecuting Authority and another*⁸ the Constitutional Court held 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.'

Evaluation of evidence and submissions

[31] This court must emphasise from the onset in evaluating the merits of the application for condonation, and the opposition thereto, that the speedy resolution of labour disputes is a key objective of our labour legislation. The court notes that speedy dispute resolution of labour disputes is frustrated by huge backlogs in the Labour Court. The delays caused by a backlog of cases are unfortunate. However, the backlog of cases is no excuse for parties who fail to comply with statutory time frames in which to refer disputes. There are no doubts that non-compliance with the prescribed time frames by parties adds to the backlog of cases before the Labour Court and to further delays due to applications for condonations having to be set down and determined separate to the main disputes.

[32] In this matter before the court, the plaintiffs delivered their statement of claim more than seven and a half months after expiry of the prescribed 90-day period. The 90-day period is legislated for a reason, which is to ensure the speedy and effective resolution of labour disputes. In this context, the plaintiffs, although seven and a half months late after the expiry of the 90-day period, took more than ten and a half months

⁸ [2013] ZACC 37; (2014) 35 ILJ 121 (CC) at para 51.

to refer their dispute to the Labour Court. Such a delay must surely be frowned upon by this court, as it defeats the purpose and objective of speedy and effective dispute resolutions. As a direct result of this delay, this court is now required to first determine the application for condonation, which will add an even further delay should condonation be granted, before the matter is set down for trial.

[33] The plaintiffs are required to show good cause for the late referral. One of the factors to be considered, which is the degree of lateness, is not favourable to the plaintiffs in attempting to show good cause, and in showing that it is in the interest of justice that condonation be granted.

[34] Applying the case law in relation to condonation, the plaintiffs who are seeking the indulgence of this court for the late referral to be condoned, given the substantial degree of lateness, must satisfy this court that there is a good explanation for such a lengthy delay. The court has considered the reasons for the delay advanced on behalf of the plaintiffs and finds that the founding affidavit contains unsubstantiated allegations and/or inferences on crucial facts without establishing the facts relied on. Specific details are required and where necessary, confirmatory affidavits must be obtained from people relied upon to explain the delay. In this regard, no confirmatory affidavits have been obtained from Mr. Niehaus, Mr. Jim, and the Interim Administrators.

[35] The court notes that the explanation for the delay is blamed on the political infighting that took place within NUMSA since 2022, and which was still ongoing into early 2025. That this may be the case cannot seriously be disputed. However, there is a major problem for the plaintiffs in this regard, and this is the well-established principle of there being a limit beyond which parties cannot rely on the tardiness or failures of their chosen representatives, whether it being an attorney or a trade union in the context of employment law.

[36] The onus to show good cause in the context of a condonation application rests with the plaintiffs. Condonation is not there for the taking, and when a dispute is referred

late by some seven and a half months, a proper and full explanation is required for such a lengthy delay. The plaintiffs were required to set out in detail the reasons for the lateness, and place sufficient evidence before this court to convince this court that they have done everything in their power and/or ability to follow up on the progress of their dispute.

[37] The plaintiffs failed, in the founding affidavit, to set out what steps they took to follow up on their dispute. They only referred to attempts made, without giving specific details thereto, in the replying affidavit. The plaintiffs cannot make out a case for condonation in the replying affidavit. They were required to do so in the founding affidavit. There is nothing in the founding affidavit which points to the plaintiffs following up and ensuring that their dispute was referred to the Labour Court. It is not sufficient for the plaintiffs to state that they at all material times laboured under the incorrect but *bona fide* belief that their matter was in fact referred to the court for adjudication and that they were awaiting a trial date. There is no concrete evidence that they followed up with NUMSA before January 2025 to confirm that their matter was indeed referred to the Labour Court. The plaintiffs simply assumed that the matter was referred without seeking confirmation thereof.

[38] In the replying affidavit, the deponent states, for the first time, that she personally followed up with Mr. Smit on three occasions. No details are given as to the first two times when she followed up on the matter. The third occasion relates to the meeting called of 21 January 2025. As stated already, the plaintiffs cannot make out their case in the replying affidavit and, in any event, the allegations of a follow up lacks specific details as to the dates when there was a follow up. It is also important to note that Mr. Smit, in his confirmatory affidavit to the founding affidavit, makes no mention of the plaintiffs or the deponent following up on the matter. Neither does Mr. Smit explain why he failed to bring to the plaintiff's attention that there was infighting within NUMSA, which had an impact on the referral of their dispute to the Labour Court.

[39] The explanation for the delay in referring the matter to the Labour Court from 17 June 2024 to October 2024 is therefore unacceptable and unreasonable and most certainly not sufficient to explain a lengthy delay of some four months. All that was required was for the plaintiffs to follow up with Mr. Smit and for Mr. Smit to advise the plaintiffs that their matter is being prejudiced due to the NUMSA infighting. This was not done. There is further no proof that the matter was referred to the Regional Legal Officer other than the say-so of Mr. Smit. Neither is there any supporting evidence obtained from the Regional Interim Administrators as to the role they allegedly played in not ensuring the referral of the plaintiffs' matter to the Labour Court.

[40] There is further no reasonable and acceptable explanation for the delay from October 2024, when Mr. Smit allegedly spoke to Mr. Jim, until February 2025 when the matter was eventually referred. At the time that Mr. Smit spoke to Mr. Jim, the General Secretary, the referral was already four months late. Mr. Smit was then told to forward all relevant documents to Mr. Niehaus, which he did during the latter part of October 2024 and beginning of November 2024. No reasonable explanation is provided why the matter was not addressed urgently, and why documentation was sent to Mr. Niehaus from the latter part of October 2024 and beginning of November 2024.

[41] Mr. Smit was then allegedly advised that the plaintiffs had strong prospects of success, but that there was a serious challenge in respect of condonation for the late referral. Neither Mr. Smit nor Mr. Niehaus showed any urgency to ensure that the referral is done without any further delay given that the referral was now already late by nearly five months. Another delay of two and a half months occurred despite Mr. Smit, Mr. Niehaus and presumably Mr. Jim being aware that there was a serious challenge in respect of condonation for the late referral. This is simply unacceptable. Although it may be so that the plaintiffs cannot directly held responsible for this delay, except for their failure to follow up on their matter and seeking confirmation that their matter was referred, the plaintiffs were represented by their chosen trade union.

[42] In fact, Mr. Niehaus advised Mr. Smit later during November 2024 that he had received the go-ahead from Mr. Jim to proceed with a referral and a substantive application for condonation, but that it would be necessary for him to consult in Atlantis to obtain more detailed instructions. Despite this, there is no acceptable explanation why Mr. Niehaus, having received the go-ahead, failed to arrange for an urgent consultation in November or December 2024. It is simply unacceptable to blame this delay on a combination of work pressures towards the end of the year and a general problem within NUMSA relevant to the payment of service providers. Nothing was therefore done from the latter part of November 2024 until 21 January 2025 when the meeting with the plaintiffs took place.

[43] Mr. Niehaus' explanation to the plaintiffs that, although the drafting of papers was in fact at an advanced stage but that he is unfortunately confronted with serious difficulties, is unacceptable. Mr. Niehaus received the go-ahead from NUMSA in November 2024 to pursue the matter and for him, at this late stage, to raise the difficulties regarding NUMSA potentially being sued by the plaintiffs is extremely unacceptable. NUMSA and Mr. Niehaus, and in fact Mr. Smit must accept full responsibility for their failures in this regard. It is completely unacceptable that a further delay was now occasioned in the referral of the matter to the Labour Court because Mr. Niehaus could not assist the plaintiffs any further.

[44] Mr. Niehaus, instead of accepting responsibility for NUMSA's failure to timeously refer the matter to the Labour Court, raised the so-called ethical dilemma to the plaintiffs and the court for not being able to take the court into full confidence in fear of exposing NUMSA to civil litigation. In this regard, NUMSA was responsible for the delay and NUMSA was obligated to refer the matter and to explain to this court NUMSA's failure. By simply walking away from this obligation, NUMSA neglected their responsibility towards the plaintiffs and increased the likelihood of being sued for their failures. In fact, NUMSA as the representative trade union, was grossly negligent in ensuring that their members' rights to pursue their alleged unfair dismissals are exercised.

[45] And then, yet again from 21 January 2025, it took the plaintiffs' new attorneys another three weeks to deliver a statement of claim. No proof is provided of the plaintiffs' attempts to seek reinstatement to explain the further 3-week delay.

[46] The degree of lateness is severe, and the explanation for the delay is unacceptable. It was already stated above that there is a limit beyond which a party can no longer rely on the tardiness of their chosen representative. This principle is trite, as will be demonstrated by referring to some case law in this regard.

[47] The following *dictum* in *Saloojee and another, NNO v Minister of Community Development*⁹ is particular apt of this kind of conduct by NUMSA where it was held as follows:

"If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney and expect to be exonerated of all blame; and if, as here, the explanation offered to this court is patently insufficient, he cannot be heard to claim that insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he realises upon the aptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case."

[48] The court in *Superb Meat Supplies CC v Maritz*¹⁰ held as follows:

"The case of appellant is firmly grounded in the delinquency of Majola and that is manifest and self-evident... I also am of the judgement that the appellant through the agency of its member Schreiber was negligent in not monitoring progress of its case from the time of the service of the claim in August 1999 to the set down for the trial on 12 March 2011, a period of nearly 18 months. The appellant appointed new attorneys, and the file was available to them and would have

⁹ 1965 (2) SA 135 (A)

¹⁰ (2004) 25 ILJ 96 (LAC)

indicated what contact took place between Majola and Schreiber during that period. The court has not been informed of any communication, and it can be inferred that the appellant took no active interest in its own litigation, a further reason to conclude that it was negligent.

As I have indicated Trengrove AJA held in the De Wet case that disinterest and failure to keep in touch with an attorney barred relief. Attorneys cannot be blamed and the appellants – as in this matter – were the authors of their own problems...”

[49] The court concluded:

“In this court and the Supreme Court of Appeal there have been frequently repeated judicial warnings 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. It has never been the law that invariably a litigant will be excused if the blame lies with the attorney. To hold otherwise might have a disastrous effect upon the observance of the rules of this court and set a dangerous precedent. It would invite or encourage laxity on the part of practitioners. The courts have emphasised that the attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.”

[50] The above *dictum* is of direct application in the matter before this court and the plaintiffs must stand or fall by the grossly negligent manner in NUMSA, their chosen representative, handled their matter. The political infighting in NUMSA is no excuse for non-compliance with prescribed time periods. The failure by Mr. Smit to advise the plaintiffs of the infighting and to take appropriate and speedy steps to ensure the referral of the dispute constitutes gross negligence. The failure by Mr. Niehaus, who received the go-ahead from NUMSA to pursue the matter, amounts to a serious neglect of the responsibility and obligations of NUMSA towards their members. The refusal by

Niehaus to take the court into his confidence rather than trying to protect NUMSA from civil litigation is deplorable to say the least. The plaintiffs cannot, however, escape the result of NUMSA's gross negligence and the insufficiency of the explanation tendered.

[51] The court in *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others*¹¹ held as follows:

“Trade unions exist for the very reason of looking after the interests of their members. When employees join a trade union they entrust responsibility for issues relating to their employment and the termination thereof to the trade union. In the circumstances of this relationship I believe that there is an even greater limit on the extent to which trade union members can escape the results of their trade union’s lack of diligence. Trade unions have a vested interest in the processing and outcome of disputes referred on behalf of their members. Their very existence is about acting in the interests of their members. Members for their part are happy to entrust their labour relations affairs to their union. This case is a good example of where the trade union has been involved with the dispute from the inception. It represented Mr. Zungu at the arbitration and as the applicant in this matter has deposed to the affidavits in support thereof... In these circumstances a member such as Mr. Zungu would have to put up good reasons as to why he should be allowed to escape the consequences of the union’s lack of diligence in launching the review application timeously. In this case there is no explanation at all before this court from Mr. Zungu that would enable it to come to his assistance. The condonation application must accordingly fail.”

[52] The following dictum in *National Education Health and Allied Workers Union and Others v Vanderbijlpark Society for the Aged*¹² is directly relevant to this matter insofar as NUMSA being a long standing and experienced union:

“The LRA has been in existence for more than 15 years, and the time-limits governing referrals have not changed in that time. It is reasonable to expect that

¹¹ (2010) 31 ILJ 1413 (LC) at para 25

¹² (2011) 32 ILJ 1959 (LC) at para 9

trade unions ought to be well aware of the need to act timeously in the interests of their members and to adapt their internal procedures to accommodate those time-limits, not vice versa. The scale of an organisation cannot serve as a justification for delays. On the contrary, it is reasonable to expect that larger organisations, be they trade unions or businesses, ought to be able to see to it that they are organised to deal with disputes of this nature in a systematic manner to ensure that they do not fall foul of the time-limits in the LRA. Where handling such disputes is a core function of the organization, this should go without saying.”

[53] In this case the plaintiffs, being members of NUMSA, are even more bound to the conduct of NUMSA as their chosen union. In *Seatlolo and Others v Entertainment Logistics Service (A Division of Gallo Africa Ltd)*¹³ the court said:

“Indeed a trade union is not an independent legal representative acting as an agent to the detriment of a client. It is a collective embodiment of its members and is akin to a curator ad litem in civil proceedings – in other words, it is ‘the institutional embodiment of the several members involved in the dispute’... The trade union is its members and this the applicants cannot escape the consequences of their decision to be members of SACCWU...”

[54] Given the aforesaid, this court is of the view that the plaintiffs’ prospects of success are not a decisive consideration in this matter. Even if this court accepts that the plaintiffs have established a *prima facie* case in respect of prospects of success, the degree of lateness and the poor explanation for the delay outweighs such prospects of success. It is unfortunate that the plaintiffs to some extent became victims of NUMSA’s infighting. However, their right to seek recourse does not lie with this court and against the defendant. There is no reason why the defendant’s right to speedy and effective resolution of disputes must be infringed by NUMSA’s infighting. The defendant surely must have concluded, given the failure by the plaintiffs to refer their dispute within the

¹³ (2011) 32 ILJ 2206 (LC) at para 27

prescribed 90 days, that the plaintiffs and NUMSA no longer intended to pursue their dispute.

[55] Insofar as the plaintiffs relied on the public interest, there is no merit in their submission that this matter attracts public interest. The defendant does not receive any grants from the government, nor any concessions for operating in Atlantis. This therefore leaves the issue of prejudice. The court notes that the plaintiffs will be prejudiced should condonation be refused. However, such prejudice is due to their own failure to ensure that their matter has been referred, and due to NUMSA's gross negligence in protecting their interests. As stated already, the plaintiffs have the right to pursue a claim for such negligence against NUMSA. The submission that pursuing such a claim may be difficult to prove is not sufficient grounds for granting condonation. Should condonation be granted, there may well be another delay of a year or longer before the matter may be heard. It is not in the interest of justice to grant condonation for the excessive delay in referring the matter to the Labour Court. It is also not in line with the objective of speedy and effective resolution of labour disputes.

[56] Insofar as reference is made to the AMCU matter and to a joinder, the court notes that the AMCU matter has now been concluded in this court. The reference to the AMCU matter, therefore, does not assist the plaintiffs in respect of prejudice.

Costs

[57] In terms of the provisions of section 162(1) of the LRA, this court has wide discretion when it comes to the issue of costs. The court is mindful of the *dictum* of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*¹⁴ when it comes to the issue of costs in employment disputes. This court does not deem it proper both in law and fairness to saddle the plaintiffs with an order as to costs.

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

¹⁴ (2018) 39 ILJ 523 (CC).

Order

1. The application for condonation for the late filing of the statement of claim is refused.
2. No order is made as to costs.

C. de Kock
Acting Judge of the Labour Court of South Africa

Appearances:

For the Plaintiffs: A Heunis

Instructed by: JP Joubert Attorneys

For the Defendant: T Moyo from Snyman Attorneys