



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: J1205/19

In the matter between:

**THE ASSOCIATION OF MINEWORKERS
AND CONSTRUCTION UNION**

First Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

JOHNNY MATHEBULA N.O.

Second Respondent

**SIBANYE STILLWATER
Respondent**

Third

Heard: 18 June 2025

Delivered: 19 September 2025

JUDGMENT

LENNOX, AJ

Introduction

[1] This is an application in which AMCU seeks to review and set aside an arbitration award issued by the Second Respondent on behalf of three of its

members, who shall be collectively referred to herein as the three members. It faces a hurdle in that it also seeks condonation for the late filing of the review application.

[2] Both applications are opposed.

Condonation

[3] To say that the delay in bringing the review application is excessive is perhaps kind. The arbitration award was issued by the Second Respondent on 29 October 2021, and as such, the review application was to have been filed by 30 November 2021. It was only filed on 14 February 2023, which the Applicant accepts is 13 months and 21 days late.

[4] The explanation for the delay creates a further difficulty for the Applicant in that vast periods of time are not accounted for. Briefly, it appears that:

- 4.1 the arbitration award was handed down on 19 October 2021;
- 4.2 on 29 October 2021, the individual members of the Applicant were briefed on the outcome of the arbitration proceedings and that they asked that the matter be taken further;
- 4.3 on 11 November 2021, the regional official, Mr Hlatswayo, of the Applicant wrote to the Applicant's legal office asking for an opinion on the prospects of success;
- 4.4 the request for an opinion was forwarded to Mr Marais, the Applicant's Head of Legal, on 12 November 2021;
- 4.5 on 18 November 2021, Mr Marais referred the matter to the Applicant's General Secretary of the Applicant for instructions;
- 4.6 the six-week period for filing the review application would have expired on 30 November 2021;

- 4.7 on 6 December 2021, Mr Hlatswayo followed up with the legal office and the report was resent to the office of the General Secretary on 8 December 2021;
- 4.8 on 7 December 2021, 12 January 2022, 24 February 2022 and 23 March 2022, the individual applicants followed up on whether the matter would be taken on review;
- 4.9 on 11 April 2022, a Ms Khumalo, a paralegal employed by the Applicant, wrote to Mr Janse van Rensburg advising that no instruction had been received about referring the matter to the Applicant's attorneys;
- 4.10 on or about 11 April 2022, Mr Janse van Rensburg sent the bundles to the Applicant's attorneys seeking an opinion on the prospects of success of a review application;
- 4.11 on 26 September 2022, Ms Khumalo followed up with Mr Janse van Rensburg as to whether a legal opinion had been obtained;
- 4.12 on 27 September 2022, Mr Janse van Rensburg emailed the Applicant's attorneys asking after the status of the matter;
- 4.13 on 29 September 2022, the bundles were resent to the Applicant's attorneys;
- 4.14 in October and November 2022, opinions were provided to the Applicant by its attorneys and by counsel;
- 4.15 on 16 January 2023, the Applicant's national leadership authorised the launching of the review application;
- 4.16 on 20 January 2023, the review application was filed.

[5] The explanation put forward by AMCU is thus that it instituted a new case management system, which resulted in the matter falling through the cracks. Once this was discovered, it appears that two opinions were sought on the merits of the matter, both from Counsel and his instructing attorneys.

Notwithstanding this, a further delay took place as AMCU awaited a meeting of its national leadership on 16 January 2023 before authorising the filing of the review application.

[6] The periods involved are only dealt with in the broadest manner possible, with periods, notably the time period between the receipt of the legal opinions in October and November 2022 and the consideration of same by its national leadership on 16 January 2023 are unexplained.

[7] Other vast periods of time are not explained by the Applicant, notably 11 April 2022 to 26 September 2022, as well as November 2022 to 16 January 2023. The only explanation for the first period is as follows:

‘However, Mr Janse van Rensburg’s email was never received by Mr Dave (potentially due to the size of the attachments) and Mr Janse van Rensburg did not receive any failed delivery report. Mr Janse van Rensburg did not receive any failed delivery report. Mr Janse van Rensburg had therefore assumed that the email had been received by Mr Dave, that Mr Dave had attended to the matter and provided AMCU’s legal department with the requested opinions on its prospects of success, as is protocol.’

[8] The Court could simply dismiss the condonation on this ground alone without reference to the prospects of success left unexplained. It is not for AMCU and its leadership to sit on their laurels and ignore the fact that a further delay in the institution of the review application was a direct result of its failure to consider the opinions immediately upon their being provided. The Court cannot understand such conduct; it demonstrates a disregard for the Rules of this Court, which is brazen and reckless.

[9] It is established law that an applicant must fully explain the reason for the delay in order for a court to be able to assess whether the explanation tendered is a good one.¹

[10] No explanation is provided as to what was done by the legal office to follow up with the Applicant’s attorneys or Mr Janse van Rensburg in the interceding

¹ *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council* (2010) 31 ILJ 1413 (LC) at para 13.

five months. The explanation that AMCU had instituted new protocols deals only with the situation from November 2021 to April 2022.

[11] The explanation is wholly lacking for these periods, and given the fact that the review application was already out of the time period for launching same, AMCU and its officials ought to have paid more attention to the matter.

[12] In *Chetty v Baker McKenzie*², the following was held:

[9] The position as stated by this court in *NUM v Council for Mineral Technology* still pertains, namely, that in considering whether good cause has been shown in an application for condonation, the approach in *Melane v Santam Insurance Co Ltd* should largely be adopted (i.e subject to an important qualification which is dealt with i). In terms of that approach, the court has a discretion that has to be exercised judicially upon a consideration of all the facts and that, basically, it is a matter of fairness to both sides. Amongst the relevant factors to be considered are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. In terms of this approach, a slight delay and a good explanation might compensate for weak prospects of success and the importance of the case and strong prospects may compensate for a long delay.

[10] However, the further principle applicable in conjunction with the broad approach of *Melane* is that in the absence of a full and reasonable (acceptable) explanation for the delay, the prospects of success are immaterial, and that if there are no prospects of success an application for condonation should be refused even if there is a good explanation for the delay. It is important that the explanation for the delay, considered objectively, must be “sufficiently cogent to warrant a consideration of the prospects of success.” There are those explanations that do not meet the objective standard. In such cases the court would be justified in not considering the prospects of success, because they are immaterial, unless issues are raised that would justify the Court’s interference. The explanation for the delay

² (2022) 43 ILJ 1599 (LAC) at para 9.

must thus be full and reasonably clear, logical and convincing to excuse the default.' (Footnotes omitted)

- [13] It is the view of the Court that it need not engage with the prospects of success insofar as prospects of success are concerned, as the delay has not been properly explained.
- [14] The Court would have dismissed the condonation application on this ground alone, but was encouraged by both parties to examine the prospects of success of the review application.
- [15] It must be observed that, given the lack of an explanation for the delay, the Applicant would need to show exceptional prospects of success to be granted condonation. In argument before the Court, Mr Cook, who appeared for the Applicant, implored the Court to deal with the merits of the review application and not simply dismiss the application and in doing so make a determination based on the merits of that application. The consequence would be that in all cases where litigants or their representatives (be it a trade union, employer's organisation or legal practitioner) simply decline to act with the necessary care, this must be overlooked in the interests of allowing a ventilation of the facts.
- [16] With respect to the submission, condonation is not there for the taking, and for it to be granted, there must be excellent prospects of success.
- [17] Mr Fourie SC referred the Court in his heads to *Gaoshubelwe and Others v Piemans Pantry (Pty) Ltd*³ as authority for the proposition that a consideration of the prospects of success merely implies a determination of the likelihood or chance of success when the main case is heard and that for the Court to be able to make such an assessment that it is necessary to set out briefly and succinctly such essential information that would allow the Court to make such an assessment. It follows that these submissions must be set out in the founding affidavit to the condonation application. This is acknowledged in the founding affidavit deposed to by Mr Marais, who deposed thereto on behalf of AMCU.

³ (2009) 30 ILJ 347 (LC) at para 27.

[18] Mr Marais set out the grounds for review in detail in the founding affidavit and, in doing so, has rescued AMCU from the real possibility of having the condonation application dismissed outright.

[19] It seems from what Mr Marais has stated that the application is not without merit, and therefore, as seriously as the Court views the conduct of AMCU in these proceedings, it shall accept the invitation by both parties to consider the merits of the review application.

Background to the dismissals

[20] A strike was underway, led by AMCU. The evidence suggests that it was not peaceful. The strike, as all too frequently happens, resulted in violence. The Third Respondent obtained a court interdict prohibiting acts of violence. The events of the strike are merely the tapestry upon which the facts of this matter were woven.

[21] The violence surrounding the strike continued and *inter alia* resulted in the houses of two non-striking employees of the Third Respondent being burnt on 15 December 2018. Such conduct is reprehensible. The question before the Second Respondent is essence was whether the three members were in any way involved in this act of wanton criminality?

[22] The three members were charged as follows:

‘Conduct in contravention of a court order and/or off-duty misconduct in that you engaged in and/or formed part of a group that acted with common purpose to intimidate and use violence and two respective properties of fellow non-striking employees were burnt on 15th December 2018 at Blybank.’

[23] The defences raised are briefly that the three were not in town and were unable to have committed such acts.

[24] At the disciplinary hearing, as well as by the Second Respondent in the subsequent arbitration proceedings, the defences were rejected.

- [25] At the heart of this application is the question as to whether the Second Respondent came to a decision which, even if wrong, was still one that a reasonable decision maker could have arrived at.

The eyewitness

- [26] The Third Respondent relied on the evidence of Mr Phasika Nsele, who was in effect the landlord to the three. This ended when he was accused of being a 'snitch' and he and his family were threatened by the three, who also threatened to burn his RDP house.
- [27] He also stated that 'Luzuko' was not in Parys on 15 December 2018, as he had overheard him state at a braai at his property what he had done the previous evening.
- [28] He further stated that 'Luzuko' was carrying a dark container on that evening as the three walked towards the house, which they burnt.
- [29] He also stated that he had seen Mr Ndhlala on 16 December 2018 when he came from the fields and that Mr Likhuleni was also present at the braai held on 16 December 2018.
- [30] His evidence therefore suggests that all three were together at his house on 16 December 2018 and that he had seen two of them the previous evening.
- [31] In cross-examination, he stated that he had seen Mr Ndhlala and Mr Likhuleni burn houses in Blybank on 15 December 2018. He also disputed that Mr Manhcephu was in Parys as he could hide behind a streetlight.

The defences

- [32] Mr Ndhlala stated that he was travelling to Mpumalanga on 15 December 2018 and that he returned on 6 January 2019.
- [33] Mr Mangciphu stated that he left Blybank on 14 December 2018 for Parys, where he would play in a soccer tournament, returning on 16 December 2018. He claimed to have slept in the taxi. Mr Thobile Ngquphaza stated that he was

at the soccer tournament with Mr Mangciphu, who slept in a separate car from his.

- [34] Mr Likhuleni stated that he was in Bushbuckridge on 15 December 2018 and that he returned on 6 January 2019. Mr Douglas Maphosa testified that he travelled with Mr Likhuleni to Bushbuckridge. It was put to Mr Maphosa that the Third Respondent only closed on 21 or 22 December 2018.

The findings

- [35] The Second Respondent correctly identified that he was required to weigh the evidence of the eyewitness and that of the three members, and that he would have to rely on credibility assessments and the inherent probabilities attendant thereto.
- [36] The Second Respondent assessed whether there was a motive for the three members to commit arson and whether Mr Nsele had a reason to fabricate evidence in order to incriminate them.
- [37] The Second Respondent held that it would not be unreasonable to infer that the three members had committed arson as a form of reprisal for Mr Nsele snitching.
- [38] The Second Respondent also recorded that the arbitration award was not made in 'snippets' but as a result of a holistic approach in evaluating the evidence.
- [39] To this point, the arbitration award is soundly reasoned in line with what one would expect from an arbitrator. The following statement made by the Second Respondent is troubling:

'A lot of activities allegedly committed by AMCU were not opposed. To that extent I attached more weight on them and concluded that the applicants' (sic) conduct, as members of AMCU were more probable.'⁴

⁴ Paragraph 86 of the arbitration award

[40] The Second Respondent accepted the version of Mr Nsele that he saw the three members '*literally torching the house*' and later discussing it over a braai on 16 December 2018. He proceeded to find as follows:

'All other AMCU members testified on the applicants' behalf. I do not see an AMCU member not testifying favourably for a fellow member as requested, lest he be called a rat.'⁵

The grounds of review

[41] The grounds raised in the founding affidavit for condonation are that the Second Respondent:

- 41.1 accepted the uncorroborated evidence of a single witness whose credibility was challenged and who came to a reasonable conclusion;
- 41.2 failed to attach any weight to the fact that the versions of the individual applicants and their witnesses corroborated each other;
- 41.3 failed to conduct a proper appraisal of key aspects of the evidence by failing to consider or ignoring relevant material facts and evidence, and making findings on the probabilities that were not supported by an overall conspectus of the evidence;
- 41.4 failed to draw the most natural and plausible inference flowing from a proper evaluation of all the evidence and made findings on the probabilities that were not supported by an overall conspectus of the evidence; and
- 41.5 misinterpreted and misapplied the law in respect of the reliance of *Emfuleni Local Municipality v SALGBC and Others*⁶.

[42] The supplementary affidavit continues to raise further grounds of review, all of which seem to suggest that the Second Respondent did not apply his mind to the evidence and arrived at unreasonable findings.

⁵ Paragraph 89 of the arbitration award

⁶ (JR2525/11) [2015] ZALCJHB 356 (14 October 2015)

- [43] The difficulty faced by AMCU is that a review is not determined on whether a commissioner was correct in the findings. It sets a far higher test. The commissioner must have come to a conclusion that no other commissioner could have arrived at.
- [44] Thus, could the Second Respondent have reached the conclusion that he arrived at based on the evidence? It is the view of the Court that the Second Respondent indeed considered the evidence and reached a conclusion which is reasonable, even if not correct. As was stated in *Mooki v CCMA and Others*⁷, a commissioner is allowed to be wrong provided that the result is not unreasonable.
- [45] Insofar as the evidence of Mr Nsele is concerned, the Second Respondent accepted his version over that of the three members of AMCU and two additional witnesses. The Second Respondent considered the evidence. He proceeded to weigh up the probabilities and, in the end, took the view that the corroborating witnesses had reason to lie. This is a decision he could arrive at. He preferred one version over another. The Second Respondent weighed up the evidence of Mr Nsele and preferred that version. He carried out the duties imposed on him.⁸
- [46] Again, it must be emphasised that in doing so, the Second Respondent may come to a wrong conclusion which would still be unassailable for as long as it is a conclusion which could be reached based on the evidence before him.
- [47] The Second Respondent's remarks in the award, which we most stringently criticised by Mr Cook in argument, were as follows:

'All other AMCU members testified on the applicants' behalf. I do not see an AMCU member not testifying for a fellow member as requested, lest he be called a rat. Mangciphu, who appeared to be at the forefront, was apparently in Parys. Thobile could not commit himself about the time of the course of action. Even if he did, by virtue of him being an AMCU member who was on

⁷ (JR772/15) [2017] ZALCJHB 173 (3 February 2017) at para 9.

⁸ See: *Northam Platinum Mines v Shai N.O. and Others* (2012) 33 ILJ 942 (LC) and *S v Carolus* 2008 (2) SACR 207 (SCA).

strike, his evidence would have been looked at with circumspect since he was appears (sic) to be assisting his colleagues.'

[48] Mr Cook pressed the argument that the Second Respondent had concluded that he took the view that if you are a member of a trade union, you would lie to protect a member. The view of the Second Respondent must be seen in the light of his evaluation of the evidence and the credibility of the witnesses.

[49] The Second Respondent was faced with the direct evidence of Mr Nsele and alibi witnesses who conveniently or fortuitously provided evidence that exonerated at least two of the three AMCU members by placing them out of town.

[50] In contrast, the Second Respondent had evidence suggesting that Mr Nsele had reason to give false evidence.

[51] The Court is of the view that the decision arrived at was one which could have been arrived at, based on the evidence, whether one agrees with it or not.

Conclusion

[52] As the condonation application must now fail for a lack of prospects of success, the Court is of the view that whilst an order of costs may be warranted as a clear sign of the Court's displeasure at the manner in which AMCU dealt with the review application, given the ongoing relationship between the parties, same would not be in the interests of the parties going forward.

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

Order

1. The application for condonation for the late filing of the review application is dismissed.
2. There is no order as to costs.

M.A. Lennox

Acting Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicant: Mr A Cook

Instructed by: LDA Inc

For the Third Respondent: Mr G Fourie SC

Instructed by: Solomon Holmes Attorneys

LABOUR COURT