



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JS689/24

In the matter between:

SIPHIWE MIRRIAM CHONGO

Applicant

and

RSC CONSULTING SERVICES (PTY) LTD

Respondent

Heard on: 01 August 2025

Delivered on: 09 October 2025

JUDGMENT

SASS, AJ

Introduction

- [1] This is an application for condonation in respect of the late filing of the Applicant's Statement of Case. The Statement of Case was filed approximately 82 (eighty-two) days late.

- [2] The Respondent opposes the condonation application.

Relevant background facts

- [3] On or about 27 January 2024, the Applicant was dismissed by the Respondent for participating in an unprotected strike which took place on 26 January 2024. The strike by certain of the Respondent's employees was, *inter alia*, in retaliation to the adverse impact that the Respondent's biometric system caused on their respective disciplinary records.
- [4] The unprotected strike occurred on the Respondent's shop floor, also referred to as the grocery site. The Applicant ordinarily worked on the grocery site (where the unprotected strike was taking place). During the strike, the Respondent requested that non-striking employees move from the grocery site to the perishable site so that they could continue to render their services. The Applicant did not move to the perishable site but remained on the grocery site (in the vicinity of what she referred to as the podium) while the strike continued (for what appears to be the whole day on 26 January 2024). The Applicant's explanation for not moving to the perishable site was that she was not trained to work on the perishable site.
- [5] Subsequent to her dismissal, the Applicant referred an unfair dismissal dispute to the CCMA in terms of section 191(5)(b)(iii) of the Labour Relations Act No. 66 of 1995, as amended (the LRA).
- [6] On or about 21 June 2024, conciliation proceedings were held and a certificate of outcome of dispute was issued which indicated that the dispute concerned a dismissal related to participation in an unprotected strike, that the dispute remained unresolved, and that the next step was for the dispute to be referred to this Court.
- [7] During July 2024, the Applicant referred her unfair dismissal dispute to arbitration at the CCMA, apparently with the assistance of CCMA staff/officials although the certificate of outcome of dispute indicated that the next step to be taken was to refer the dispute to this Court.

- [8] On or about 31 July 2024, the Applicant went to the Wits Law Clinic to seek assistance with her unfair dismissal dispute. The Wits Law Clinic advised the Applicant that it would assist her with referring the unfair dismissal dispute to this Court. The Applicant was assisted by two student counsellors, under the supervision of Dieketseng Damane (an admitted attorney practicing as such at the Wits Law Clinic).
- [9] At some point between 31 July and 13 August 2024, the CCMA informed the Applicant that the arbitration proceedings in respect of her unfair dismissal dispute had been enrolled for hearing on 17 September 2024.
- [10] On or about 13 August 2024, the Applicant sent an email to the student counsellors assisting her informing them that the arbitration had been enrolled for arbitration at the CCMA on 17 September 2024. It appears therefore that the Wits Law Clinic only became aware that the dispute had been referred to arbitration about two weeks after the initial consultation with the Applicant.
- [11] The Applicant was legally represented at the arbitration proceedings on 17 September 2024 at the CCMA although her founding affidavit does not indicate if the Wits Law Clinic were her legal representatives at the arbitration.
- [12] The Respondent challenged the jurisdiction of the CCMA to arbitrate an unfair dismissal dispute relating to the Applicant's participation in an unprotected strike, as a point *in limine*. The Applicant's legal representative did not oppose the jurisdictional point and appears to have been in agreement that the dispute should have been referred to this Court.
- [13] The CCMA issued a jurisdictional ruling dated 17 September 2024 (by Commissioner R Byrne) indicating that it lacks the jurisdiction to arbitrate the unfair dismissal dispute as it relates to a dispute in terms of section 191(5)(b)(iii) of the LRA.
- [14] On or about 09 December 2024, the Wits Law Clinic delivered the Applicant's Statement of Case, referring her unfair dismissal dispute to this Court for adjudication.

The ninety-day time period in terms of section 191(11) of the LRA

[15] It is trite that the ninety-day time period referred to in section 191(11) of the LRA is calculated from the date on which the CCMA issues the certificate of outcome of dispute (21 June 2024 in *casu*). The Statement of Claim should have been delivered on or before approximately 09 September 2024.

[16] It was common cause that the Applicant had at least referred the unfair dismissal dispute to this Court within ninety days of the date of the jurisdictional ruling (i.e. on or about 9 December 2024), thus referring the dispute within the correct time period, just calculated from the wrong date.

Applicable legal principles

[17] The applicable legal principles are trite and the approach to be adopted by this Court in condonation applications is well settled. It is not necessary to burden this judgment with a repetition of all the applicable authorities, save to refer to a few.

[18] In *Steenkamp and Others v Edcon Limited*¹, the Constitutional Court re-affirmed the principle that granting condonation must be in the interests of justice and it referred with approval to its decision in *Grootboom v National Prosecuting Authority*²:

[36] Granting condonation must be in the interests of justice. This Court in *Grootboom* set out the factors that must be considered in determining whether or not it is in the interests of justice to grant condonation:

“[T]he standard for considering an application for condonation is the interests of justice. However, the concept ‘interests of justice’ is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and

¹ [2019] 11 BLLR 1189 (CC), specifically the Constitutional Court’s second judgment.

² 2014 (1) BCLR 65 (CC) at para 20.

cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors, but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.

The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice."³

[19] The Constitutional Court had also previously in *Brummer v Gorfil Brothers Investments (Pty) Ltd*⁴ pointed out that an application for condonation should be granted if it is in the interests of justice and refused if it is not.

³ Ibid at paras 22-3 and 51.

⁴ 2000 (2) SA 837 (CC).

- [20] The interests of justice must be determined by reference to all relevant factors outlined in *Melane v Santam Insurance Co Ltd*⁵, including the nature of the relief sought, the nature and cause of any other defect in respect of which condonation is sought, and the effect of the delay on the administration of justice⁶. The following portion of the Appellate Division's judgment in the *Melane* case outlined these relevant factors – “.... *Among the facts usually relevant are the degree of lateness, the explanation therefor, 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 is no prospects of success there would be no point in granting condonation..... What is needed is an objective conspectus of all the facts.*”
- [21] The above principles have long been qualified by the rule that where there is an inordinate delay that is not satisfactorily explained, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.⁷
- [22] This Court has a discretion when considering a condonation application which must be exercised judicially upon a consideration of the facts of each case. The granting of condonation is a matter of fairness to both sides.

The Applicant's submissions

- [23] Whilst no evidence was placed before this Court in relation to why an unfair dismissal dispute which arose on or about 27 January 2024 was only conciliated at the CCMA during June 2024, it does appear that the Applicant

⁵ 1962 (4) SA 531 (A)

⁶ Id fn 4 at para 3; See also *Ndlovu v S* 2017 (10) BCLR 1286 (CC) at paras 22 – 23; *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as amicus curiae)* 2008 (2) SA 472 (CC) at 477A-B; *SA Post Office Ltd v CCMA* [2012] 1 BLLR 30 (LAC) at para [23], where Waglay DJP (as he was then) stated that: ‘*In my view, each condonation application must be decided on its own facts bearing in mind the general criteria. While the rules are there to be applied, they are not inflexible but the flexibility is directly linked to and apportioned in accordance with the interests of justice; prejudice; prospects of success; and finally, degree of delay and the explanation thereof. The issue of delay must be viewed in relation to the expedition with which the law expects the principal matter to be resolved*’

⁷ *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC).

did at all material times intend to pursue her unfair dismissal dispute and act in good faith. The Applicant's own actions do not appear to be dilatory.

- [24] As for the referral of the dispute to arbitration at the CCMA instead of to this Court as indicated in the certificate of outcome of dispute, the Applicant contends that as a layperson she followed the advice of CCMA officials in this regard.
- [25] The Applicant contends that if her legal representatives had issued her Statement of Case referring her unfair dismissal dispute to this Court after the dispute had been referred to the CCMA for arbitration but before the dispute was adjudicated or finalized at the CCMA (so at some point between 13 August and 17 September 2024), a special plea of *lis pendens* would have been raised by the Respondent in this Court in response to the Statement of Case.
- [26] The explanation which has been provided for the delay and the various periods of the delay is not overly detailed. In essence, the explanation for the delay relates to the incorrect advice and assistance received from CCMA staff/officials in respect of whether, after the certificate of outcome of dispute was issued, the unfair dismissal dispute should have been referred to the CCMA for arbitration or this Court for adjudication and the incorrect advice and assistance received from the Wits Law Clinic through an admitted attorney, Dieketseng Damane, and the two student counsellors in respect of: (i) whether the principle of *lis pendens* was applicable and precluded the Applicant from withdrawing her dispute at the CCMA prior to the arbitration on 17 September 2024 and the jurisdictional ruling being obtained [the Wits Law Clinic being of the view that *lis pendens* was applicable and precluded the withdrawal of the dispute at the CCMA before the arbitration set down date]; and (ii) whether the ninety day time period for the referral of the unfair dismissal dispute to this Court in terms of section 191(5)(b)(iii) commenced on the date on which the certificate of dispute was issued or on the date of the jurisdictional ruling [the Wits Law Clinic being of the view that it was the latter]. The views of the Wits Law Clinic were regrettably erroneous on both of these

aspects (as was the advice and assistance received from the CCMA staff/officials).

- [27] Accordingly, whether or not a reasonable and acceptable explanation has been provided for the delay turns primarily on the conduct of the Applicant's legal representatives. It was for this reason that I requested the parties to provide me with written submissions in relation to the case of *Saloojee and Another NNO v Minister of Community Development*,⁸ and the limits to which an applicant may rely on the negligence of her legal representatives (through the provision of incorrect legal advice) and whether reliance on such incorrect advice may excuse an applicant's non-compliance with the relevant time periods.
- [28] Quite astonishingly, the Applicant's written submissions prepared subsequent to the date of hearing (the Applicant's post-hearing written submissions), made no mention of the *Saloojee* case and the principles relating to the limits of a legal representative's negligence and the consequences of such negligence being imputed to the Applicant. This was another telling example of the negligence of the Applicant's legal representatives (besides that which led to the need for a condonation application).
- [29] The Wits Law Clinic also persisted with its erroneous contentions in relation to *lis pendens* and the date from which the ninety-day period should be calculated. It did so notwithstanding the misgivings which I expressed to the Applicant's counsel during argument in this regard.
- [30] The erroneous advice received from CCMA staff/officials was only, however, partly to blame and the need for a condonation application could have been avoided notwithstanding such erroneous advice and assistance, if the Wits Law Clinic had, between 13 August (the date on which the Applicant provided it with the Notice of Set Down for the arbitration on 17 September 2024) and 9 September 2024 (being the day on which the ninety-day referral period calculated from the date on which the certificate of outcome of dispute was issued, lapsed), withdrawn the request for arbitration by the CCMA and

⁸ 1965 (2) SA 135 (A) at 141C - E.

referred the unfair dismissal dispute to this Court for adjudication in accordance with the certificate of outcome of dispute which had already been issued by 31 July 2024 when the Applicant first consulted with the Wits Law Clinic. The Wits Law Clinic had a period of almost three weeks within which to do the above, in which event the Applicant would not have required condonation.

- [31] The Applicant contends in respect of the prospects of success, that she did not participate in an unprotected strike (thus disputing the substantive fairness of her dismissal) and that she was not given a hearing prior to her dismissal (i.e., an opportunity to say why she should not be dismissed). She also denied receiving any ultimatums (although she does deal with the contents of the various ultimatums of the Respondent in some detail in her founding affidavit).
- [32] In closing, the Applicant submitted that she had provided a reasonable and acceptable explanation for the delay, that she had good prospects of success, that there would not be undue prejudice to the Respondent if condonation was granted and that the granting of condonation was in the interests of justice.

The Respondent's submissions

- [33] The Respondent contends in relation to the explanation for the delay that: (i) eighty-two days is unreasonably long [although it did concede during argument that such a delay was not excessive]; and (ii) no explanation is provided for the period from 17 September (when the jurisdictional ruling was issued) and 09 December 2024 (when the referral was made to this court). It does, however, appear that this second period of the delay is covered by the Applicant's explanation that the Wits Law Clinic did not launch the review application before 09 December 2024 as it understood that it had ninety days from 17 September 2024 to do so.
- [34] The Respondent contends in relation to prospects of success that: (i) the Applicant refused to go and work in the perishable site after receiving the ultimatums, unlike many other employees who did and who were not dismissed; (ii) the Applicant was provided with various ultimatums by it and

given a chance to make representations in respect of why she should not be dismissed (in the final ultimatum).

- [35] In relation to prejudice, the Respondent relied on 'trial prejudice' – it indicated that it would need to bring witnesses to the trial proceedings and would lose operational time due to that, as well as having to wait about 3 (three) years before the unfair dismissal dispute was heard by this Court at trial. This, however, appears to be a form of prejudice that the Respondent would suffer regardless of whether a condonation application was required or not.
- [36] The Respondent's opposition to the condonation application does of course also contribute to the delay in finalizing the matter. Whilst the Respondent is well within its rights to oppose any condonation application, its own conduct in opposing the condonation application does contribute to the prejudice which it complains of.
- [37] As requested by this Court, the Respondent also prepared written submissions subsequent to the date of hearing (the Respondent's post-hearing written submissions). In those written submissions, the Respondent contends that there are clear limits on the extent to which the negligence of an applicant's legal representatives can be excused and that has been exceeded in this matter due to the policy considerations underlying these limits – preventing laxity in practice, reducing the burden on courts, and maintaining the principles that clients must bear responsibility for their chosen representatives. The Respondent did not, however, provide a cogent explanation why in the circumstances of this particular case, and a delay of eight-two days, that these clear limits have been exceeded – the explanation relies on generic submissions drawn from policy considerations.
- [38] It is apparent from the relevant authorities that in certain circumstances an applicant must bear responsibility for the actions of its chosen legal representatives but that there are also circumstances in which an applicant does not have to bear that responsibility.
- [39] As for the argument put forward in relation to student counsellors giving the advice and there not being any affidavit from these unnamed student

counsellors, I am of the view that nothing turns on this. A confirmatory affidavit was provided by the admitted attorney responsible for this matter at the Wits Law Clinic, and responsible for supervising the student counsellors (Dieketseng Damane).

Analysis

- [40] Notwithstanding the Wits Law Clinic receiving a copy of the CCMA's Notice of Set Down for the arbitration of the unfair dismissal dispute on or about 13 August 2024, which confirmed that the arbitration was enrolled for hearing on 17 September 2025, it decided that the proceedings before the CCMA should be concluded first before the dispute was referred to this Court for adjudication, apparently in alignment with the doctrine of *lis pendens*.
- [41] The relevant ninety day-time period for the referral of an unfair dismissal dispute relating to participating in an unprotected strike was calculated by the Wits Law Clinic from the date of the CCMA's jurisdictional ruling (being 17 September 2024) instead of from the date on which the certificate of outcome of dispute was issued (being 21 June 2024). The Applicant's Statement of Case would have been due for delivery on or about 9 September 2024 if the ninety day-time period had been calculated from 21 June 2024.
- [42] The Applicant's explanation for the delay in referring the unfair dismissal dispute to this Court for adjudication has two legs: firstly, the erroneous advice received from CCMA staff/officials during July 2024 that the unfair dismissal dispute should be referred to arbitration at the CCMA (instead of to this Court for adjudication; and secondly, the erroneous advice received from the Wits Law Clinic in relation to – (i) it deciding that the proceedings before the CCMA should be concluded first before the dispute was referred to this Court for adjudication, apparently in alignment with the doctrine of *lis pendens*; and (ii) the relevant ninety day-time period for the referral of the dispute being calculated from the date of the CCMA's jurisdictional ruling (17 September 2024) instead of from the date on which the certificate of outcome of dispute was issued (21 June 2024).

[43] If the ninety day-time period had been calculated from 21 June 2024, the Applicant's Statement of Case would have been due for delivery on or about 9 September 2024 – the Wits Law Clinic had at least between approximately 13 August and 9 September 2024 (a period of roughly three weeks) to refer the dispute to this Court without requiring condonation (after becoming aware of the enrolment of the arbitration proceedings at the CCMA). The Applicant appears to be blameless in this regard. It is her legal representatives (the Wits Law Clinic) who acted negligently and without the necessary care, rigour or conscientiousness.

[44] In the *Saloojee* case, Steyn CJ stated the following in relation to a lack of diligence on the part of an attorney and how a litigant that chose that attorney as its representative should not be absolved from the normal consequences of such a relationship, no matter what the consequences of the failure by the attorney are:

"I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with his attorney. 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. To hold otherwise might have a disastrous effect on the observance of the Rules of this Court. Considerations ad misericordiam should not be allowed to become an invitation to laxity. In fact, this Court has lately been burdened with an undue increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. 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 consequences of the failure are."

- [45] The Honourable Justice Nicholson AJA stated the following in the *Superb Meat Supplies CC v Maritz*:⁹

“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 of 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 and encourage laxity on the part of practitioners.”

- [46] In *UTI South Africa v Pilusa and Others*¹⁰ the applicant, through its former attorneys of record, failed to lodge the Review Application timeously and later sought condonation for the delay. The applicant blamed the negligence of its previous attorneys for the delay. However, this Court, relying on the *Saloojee* case stated that an applicant cannot solely rely on the tardiness or negligence of its legal representative in a condonation application to justify the delay, and condonation was refused on the basis that good cause was not shown to justify the granting of condonation. The applicant was held accountable for the lack of diligence on the part of its former attorneys of record.

- [47] The most often quoted portion of the judgment of the Appellate Division in the *Saloojee* case is set out above. Prior to those remarks, the Appellate Division does, however, state that it has on a number of occasions demonstrated its reluctance to penalise a litigant on account of the conduct of his attorney. It then makes references to its judgment in *R v Chetty* 1943 AD 321, a case in which the delay was even longer than in the *Saloojee* case and the excuses offered by the attorney concerned was clearly unsatisfactory, but where it nevertheless granted condonation. In the *Chetty* case, the Court remarked that the applicant himself was not responsible for the delays which occurred save insofar as it the applicant continued to allow his case to remain in the hands of an attorney who had shown himself unworthy of such confidence.

⁹ (2004) 25 ILJ 96 (LAC) at 100H.

¹⁰ (JR1732/12) [2016] ZALCJHB 270 (21 July 2016) at paras 11 - 15 and 22 - 24.

- [48] The Appellate Division then goes on to mention its judgment in *Regal v Superslate (Pty) Ltd* 1962 (3) SA 18 AD at p23, where the Court came to the conclusion that the delay was entirely due to the neglect of the applicant's attorney, and held that the attorney's neglect should not, in the circumstances of the case, debar the applicant, who was himself in no way to blame, from relief.
- [49] It is after dealing with the *Chetty* case and the *Regal Superslate* case that the Appellate Division stated the oft-quoted portion of its judgment in the *Saloojee* case. That portion of the judgment should not be considered in isolation for that reason, but within the context of the references made to the judgments in the *Chetty* case and *Regal Superslate* case.
- [50] The Court in the *Saloojee* case then went on to state the following after its reference to the two above-mentioned cases – “A litigant, moreover, who knows, as the applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. 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 (cf. *Regal v African Superslate (Pty.) Ltd.*, supra at p. 23 i.f.) and expect to be exonerated of all blame;”.¹¹
- [51] Consequently, it appears to me, that when deciding whether the limit has been exceeded beyond which the Applicant cannot escape the results of the lack of diligence, ineptitude or remissness of her legal representatives, that limit is reached if the Applicant knew or ought reasonably to have known that the ninety day time period: (i) was to be calculated from 21 June and not 17 September 2024; (ii) had elapsed by 9 September 2024 already; and (iii) that a condonation application was necessary. In such circumstances, the Applicant would not be entitled to hand over the matter to her legal representatives and then ‘wash her hands of the matter’.
- [52] It cannot be said that there is any evidence before this Court in relation to the Applicant knowing, or ought reasonably to have known, that the ninety day time period: (i) was to be calculated from 21 June and not 17 September 2024; (ii)

¹¹ *Saloojee* supra at p141

had elapsed by 9 September 2024 already; and (iii) that a condonation application was necessary.

- [53] In my assessment and having regard to the above, I find that the limit has not been exceeded beyond which the Applicant cannot escape the results of the lack of diligence, ineptitude or remissness of her legal representatives. The Applicant also did not appear to have much choice when it came to choosing her legal representatives, with there being very few options available to parties that cannot afford to pay for legal representation.
- [54] The limits beyond which the Applicant cannot rely on its legal representatives' lack of diligence or negligence when they are themselves innocent insofar as an explanation is provided for any delay or non-compliance with time periods, has not been exceeded *in casu*. The conduct of the Applicant and her legal representatives indicate that she intended at all material times to pursue the unfair dismissal dispute, whether in the CCMA or this Court.
- [55] In the *Saloojee* case, Steyn CJ made it clear that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is no such blanket rule. The degree of negligence by the Applicant's legal representatives is not extreme unlike the degree of negligence by the attorneys in *Saloojee* case.
- [56] The delay of eighty-two days it is less than the statutory time period of ninety days within which a dispute of this nature is to be referred to this Court for adjudication after a certificate of outcome of dispute has been issued. The explanation provided by the Applicant for the delay is not unreasonable and unacceptable although it is lacking in some detail in certain areas.
- [57] As the limits to which the Applicant may rely on the negligence of her legal representatives have not been exceeded in the circumstances having regard to the relevant authorities, and as the Applicant has therefore provided an explanation that meets the minimum threshold of a reasonable and acceptable explanation for the delay, the prospects of success must be considered along with the other relevant factors.

- [58] Both this Court and the Labour Appeal Court have previously recognized that in certain circumstances, a *bona fide* explanation for a delay based upon an erroneous referral to the CCMA may constitute a satisfactory explanation for the delay in a subsequent referral to this Court.¹² In this regard, the Labour Appeal Court in *SATAWU obo Members v South African Airways (Pty) Ltd and Others*¹³ stated the following: “*The uncontested explanation for the delay is that most of the period of the delay was taken up by the referral to arbitration. The remainder of the period was caused by internal processes within the appellant in taking a decision to proceed with the claim and instructing attorneys accordingly. Although the period is lengthy, it has been, in my view, adequately explained and it would be unfair to punish the individual employees for a process they did not have direct control over.*”
- [59] It is common cause that the Statement of Case was delivered eight-two days late. This delay, whilst not insignificant, is not excessive though, particularly in the context of action proceedings instead of motion proceedings.
- [60] The unfair dismissal dispute has been referred by the Applicant to this Court within what she understood, based on erroneous advice received from the Wits Law Clinic, to be the ninety-day time period (ninety days calculated from 17 September 2024). The ninety-day time period should of course have been calculated from the date on which the certificate of outcome was issued (from 21 June). There is, however, no reason for me to conclude that through any act/s or omission/s on the part of the Applicant, that she indicated any intention on her part to abandon the unfair dismissal dispute or waive any of her rights.
- [61] The Applicant was regrettably hindered from referring the unfair dismissal dispute timeously to this Court for adjudication by three interventions or omissions beyond her control. Firstly, someone at the CCMA informed the Applicant that, notwithstanding the contents of the certificate of outcome of dispute, she should refer her unfair dismissal dispute to arbitration at the CCMA. Secondly, the Wits Law Clinic, after being informed on or about 13 August 2024 that the Applicant’s unfair dismissal dispute had been referred to

¹² *Motloi v SA Local Government Association* (2006) 27 ILJ 982 (LAC); *National Union of Metalworkers of SA and Others v Crisburd (Pty) Ltd* (2008) 29 ILJ 694 (LC); *National Union of Metalworkers of SA and Others v SA Truck Bodies (Pty) Ltd* (2007) 28 ILJ 1603 (LC).

¹³ [2015] 2 BLLR 137 (LAC) at 16.

the CCMA for arbitration and that the arbitration had been enrolled for hearing on 17 September 2024, failed to withdraw the request for arbitration before 09 or 17 September 2024 and refer the dispute to this Court for adjudication. Thirdly, after the jurisdictional ruling was issued, the Wits Law Clinic delayed the referral of the unfair dismissal dispute to this Court for adjudication until 09 December 2024.

- [62] There is no basis for me to reject the Applicant's version in relation to what she was told by someone at the CCMA, having regard to the evidence properly before me as contained in the parties' respective affidavits, notwithstanding the Applicant not providing the name of the person/s at the CCMA who told her this or providing an affidavit from that person to confirm her version. The Applicant's version of course does not amount to hearsay evidence. There is also no basis for me to reject the Applicant's version in relation to the advice which she received from the Wits Law Clinic.
- [63] Whilst the explanation provided could have been more detailed, a sufficiently satisfactory and *bona fide* explanation has been provided by the Applicant. The Applicant acted at all times in accordance with her understanding of what she was told by the CCMA and the Wits Law Clinic, albeit erroneous in both instances.
- [64] The Applicant's legal representatives did at least appear to act relatively expeditiously in applying for condonation once they became aware of the need to do so.
- [65] In my assessment and having regard to the legal principles set out above and the evidence, properly construed, that served before me, the explanation tendered by the Applicant is reasonable and acceptable for present purposes.
- [66] It is accepted that where the delay is: (i) excessive; and (ii) the explanation is unreasonable and unacceptable, the Court may refuse condonation without considering the prospects of success⁹. I am in agreement with the Respondent's concession that the delay is not excessive (although it is not trivial either), and as the explanation provided is reasonable and acceptable, it is therefore necessary for it to consider prospects of success. It is only where the delay is extremely or unacceptably excessive and there is no reasonable

and acceptable explanation for the delay that there may be no need to consider the prospects of success.

[67] As such, the prospects of success must be considered along with the other relevant factors.

Prospects of Success

[68] In *Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd*¹⁴ it was held 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.

[69] A similar approach was followed in *Seatlholo and others v Entertainment Logistics Service (A division of Gallo Africa Ltd)*¹⁵, where it was held that the test is whether the applicants would succeed in the main action if the facts pleaded by them in their condonation application were established at trial.

[70] For the purposes of a condonation application, the consideration of the prospects of success does not entail an applicant having to prove on a balance of probabilities that she would succeed when the merits of the case are heard¹⁶.

[71] It cannot be reasonably disputed that if the facts pleaded by the Applicant in her Statement of Case are established at trial, for example, that she did not participate in the unprotected strike and that she was not given a hearing prior to being dismissed, that the Applicant would not succeed with her unfair dismissal dispute – that her dismissal was substantively and/or procedurally unfair. It is not necessary for the Applicant to prove that she will succeed when the merits of the matter are considered.

Prejudice and other factors

¹⁴ 2009 30 ILJ 347 (LC) at para 27.

¹⁵ (2011) 32 ILJ 2206 (LC) para 24.

¹⁶ See: *Production Institute of South Africa (Pty) Ltd v CCMA and others* (2011) 32 ILJ 1712 (LC) at para 12; See also: *SA Democratic Teachers Union v Commission for Conciliation, Mediation and Arbitration and others* (2007) 28 ILJ 1124 (LC) at para 38, where it was held that: 'A commissioner in considering prospects of success does not have to pronounce on the merits of the case. All that the commissioner needs to do is to investigate whether on the averments made by the applicant there is a *prima facie* case, that there is a chance of succeeding when the main case is heard. In other words, to establish whether there is a reasonable prospect of success on the merits, it suffices if an applicant can show a *prima facie* case through setting out averments which, if established at the proceedings of the main case, would entitle the applicant to some relief. The applicant need not deal fully with the merits of the case'.

- [72] If condonation is granted, then the matter must proceed to trial. The Applicant clearly intended to proceed with the unfair dismissal dispute at all material times.
- [73] Whilst the delay of eighty-two days in relation to the referral of the dispute to this Court for adjudication has regrettably delayed the finalization of this matter, so has the decision of the Respondent to oppose the condonation application to some extent as well. The matter has been delayed by the condonation application to some extent, but even if condonation was not required, a set-down date for the trial of the matter, even if the dispute had been referred to this Court by 09 September 2024, any set-down date for trial might only have been forthcoming in 2026. An expeditious trial in an opposed action was always unlikely, even if condonation was not required.
- [74] There cannot conceivably be any material prejudice to the Respondent if condonation is granted. The presentation of the Respondent's case also does not appear to be prejudiced in any way by the delay of eight-two days, which should be seen in light of the months that parties would have to wait for a trial date in any event once pleadings had closed.
- [75] The Respondent did not allege that the memories of witnesses or that witnesses will become unavailable because of the delay. The prejudice relied on by the Respondent is prejudice to its operations caused by witnesses having to be absent from work when giving evidence, a type of prejudice that the Respondent would encounter in the circumstances regardless of whether a condonation application was required or not.
- [76] The Applicant's prejudice if condonation is not granted, namely that the merits of her unfair dismissal dispute would not be ventilated before this Court, outweighs any possible prejudice that the Respondent may suffer if condonation is granted (such as any prejudice to its operations, or legal costs occasioned by it opposing the unfair dismissal dispute which according to it is without any prospects).
- [77] If one has regard to the nature of the relief sought and has regard to the effect of the delay on the administration of justice, which is minimal in the context of awaiting a trial date once pleadings have closed, I am of the view that the

granting of condonation would be in the interests of justice in order to permit a proper ventilation of the merits of the Applicant's unfair dismissal dispute.

Conclusion

- [78] The length of the delay, whilst not trivial, is not excessive. An explanation has been provided for the delay, which is reasonable, acceptable and *bona fide*. The conduct of the Applicant and her legal representatives indicate that the Applicant intended at all material times to pursue the unfair dismissal dispute, whether in the CCMA or this Court.
- [79] The limits beyond which the Applicant party cannot rely on her legal representative's lack of diligence and care, or negligence, when she is herself not blameworthy insofar as an explanation is provided for any delay or non-compliance with time periods, has not been exceeded in the circumstances as there is no reason for me to conclude that the Applicant herself was aware of the need to file her Statement of Case on or before 9 September 2024.
- [80] To the extent that the explanation provided may be lacking in some respects, a lack of an adequate explanation can be compensated for by other considerations - it being trite that the factors to be considered are indeed interrelated and further the regard that must be had for the interests of justice.
- [81] It is quite unfortunate that the Applicant is unable to afford any other legal representatives. She does deserve much better than the advice and assistance that she has received from the Wits Law Clinic to date.
- [82] I am also satisfied that the Applicant has as a bare minimum shown that she has some prospects of success and that she would succeed with the unfair dismissal dispute if the facts which she pleaded were accepted at trial, and that the granting of condonation would not materially prejudice the Respondent or prejudice the Respondent more than the Applicant would be prejudiced if condonation was not granted (i.e., the balance of convenience favours the Applicant).
- [83] In all the circumstances, I am satisfied that the Applicant has established that it is in the interests of justice that condonation be granted, that there is good

cause for the granting of condonation, and that a proper case has been made out for condonation.

Costs

- [84] In terms of the provisions of section 162(1) of the LRA, which regulates orders for costs in this Court, I have a wide discretion when it comes to the issue of costs, having regard to the requirements of the law and fairness after taking into account all of the relevant facts and circumstances.
- [85] In exercising this judicial discretion, the Constitutional Court in *Long v South African Breweries (Pty) Ltd and Others*¹⁷ reaffirmed the principle set in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*¹⁸ with regard to costs in employment disputes and stated that '*when making an adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties.*'
- [86] Taking account of all the relevant facts and circumstances and having regard for the requirements of the law and fairness, I do not consider it appropriate to make a cost order, and I exercise my discretion as to costs accordingly.

Order

1. The application for condonation is granted.
2. There is no order as to costs.

Mendel Sass

Acting Judge of the Labour Court of South Africa

¹⁷ (2019) 40 ILJ 965 (CC) at para 30.

¹⁸ (2018) 39 ILJ 523 (CC) at para 25.

Appearances:

For the Applicant: Advocate P Sinthmule (instructed by the Wits Law Clinic)

For the Respondent: Attorney A Dippenaar (Kirchmanns Inc.)

LABOUR COURT