

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JS 777/19

In the matter between:

**GENERAL INDUSTRIES WORKERS UNION
OF SOUTH AFRICA (GIWUSA)**

First Applicant

DAVID MASILO & 79 OTHERS

Second Applicant

and

DEKRA AUTOMOTIVE (PTY) LTD

Respondent

Heard: 5 September 2025

Delivered: 18 November 2025

Summary: Interlocutory application of two points *in limine* of *lis pendens* and lack of jurisdiction.

JUDGMENT

MALULEKE AJ

Introduction

[1] This is an interlocutory application dealing with two preliminary points *in limine*. The respondent seeks the relief as set out below. This follows after the 79 applicants launched a claim for an alleged unlawful lock-out and the use of replacement labour. Therefore, this Court is called upon to adjudicate the following points:

1. *lis alibi pendens* (pending litigation) related to the previous urgent application that was struck under case numbers J3511/18.
2. that the Court has no jurisdiction due to lack of condonation.

- [2] The respondent sought relief for the granting of the two points *in limine* with costs. The applicants challenge these points with costs, further requesting that the main application be enrolled on an expedited date.
- [3] Prior to commencing with the hearing of parties' submissions, the respondent's representative submitted that there had been a change in the applicants' status. The applicants are no longer 79 in total because some employees have since returned to work. Therefore, this litigation only revolves around the remaining 11 applicants. The applicants' representative confirmed this status change.
- [4] What follows is a brief summary of the respondent and applicants' submissions made in their affidavits, annexures, oral argument and their heads or arguments.

Respondent's submissions and argument on the following two points:

lis alibi pendens.

- [5] On 9 October 2018, the parties had an internal dispute related to the lock-out. This led to the employees approaching the Labour Court on an urgent application under case number J3511/2018. On 9 October 2018, the urgent application was struck off the roll for lack of urgency; therefore such it is still pending.
- [6] Subsequent to an urgent application and a year later, in October 2019, the employees launched a new action dispute for an alleged unlawful lock-out and the unlawful use of replacement labour. The respondent challenged this action. The relief being sought from this current case number JS777/19 is the same relief that was sought in the urgent under case number J3511/18. Both cases involve the same parties with the same cause of action.
- [7] Further submission was that before the new case could have been issued, the employees should have either (i) withdrawn the struck urgent application or (ii) reinstated the struck urgent application on the normal roll. Alternatively (iii) to revive or reinstate the archived or deemed withdrawn urgent application, if it

was, but they failed to carry out any of these available steps. Therefore, the pending application constituted pending litigation.

lack of Jurisdiction (Condonation) point in limine.

[8] This Court lacks jurisdiction to adjudicate the main dispute related to section 76(1)(b) of the Labour Relations Act¹ (LRA) with respect to the lock-out and alleged use of labour replacement. The referral of this dispute found its way too late to this Court. The degree of lateness is more than a year with no explanation; therefore, condonation is required. Summary of timelines relied upon was outlined as follows:

1. That on 18 April 2018, a mutual interest of unlawful lock-out dispute was referred to the CCMA and dismissed on 29 May 2018.
2. That the employees had demands which were rejected on 15 June 2018.
3. The employees referred an unlawful lock-out dispute to the CCMA, which was dismissed on 27 July 2018.
4. On 14 September 2018, the employees wrote an acceptance letter to the demands counteroffer and requested to return to work. The employer responded on 21 September 2018 and proposed date for further discussions.
5. Urgent application was launched and dismissed on 9 October 2018.

[9] The employer's further submission was that six years had since elapsed when calculating from 2018 to date, without the employees referring this litigation or the filing of condonation. Besides that, the lock-out was uplifted, but no specific date. The dispute and the statement of claim were filed outside the expected reasonable period in October 2019, with no explanation of these delays.

Applicants' submissions and argument in response on the following two points:

¹ Act 66 of 1995, as amended.

lis alibi pendens

- [10] It is not in dispute that there was an urgent matter that was struck off. The relief sought was for the court's intervention on a perceived unfair lock-out and the use of replacement labour. The urgent application that was struck was no longer alive. Therefore, it cannot be referred to as a pending litigation between the parties and before this Court. Once the matter is struck off from the roll, it brings such matter into finality. Unless further step is taken of which is not the case in this matter.
- [11] The distinction between the two matters is also based on case numbers JS777/19 and JR 3511/2018. There is no rule, no directive or law from this court which directs that once the matter is struck from the roll for lack of urgency, it should be withdrawn prior to proceeding with any other similar or related dispute.
- [12] That, in the event the court found that such matter should have been withdrawn, the applicants' submission is that the urgent matter would have been deemed withdrawn or archived. Currently, there is no reinstatement application pending or issued by either of the parties to resuscitate the urgent matter. Therefore, the matter is not pending.

Lack of Jurisdiction (Condonation) point *in limine*.

- [13] It is not required or necessary for the applicants to file an application for condonation on the following basis:
1. Though it is conceded that there was a dispute of mutual interest that arose on 01 April 2018, but denied that the application is late based on the following grounds:
 - On 18 April 2018, the employees referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), which remained unresolved on 29 May 2018. This dispute was for an unfair labour practice (ULP), not the unlawful lock-out or the replacement labour dispute.

- That subsequent to the dismissed urgent of 9 October 2018, the parties continued with engagement.
- On 14 April 2019, the employees filed a referral to the CCMA.
- That the afore-mentioned referral was not dealt with at the CCMA, hence the letter was addressed to the CCMA to this effect and as per annexure "M2".
- The applicants are calculating the referral from the period of July 2019, when the letter was addressed to the CCMA. Therefore, there is no duty that calls for a condonation application.

Issues to be determined

[14] The essential task is to determine two issues. First, whether or not the urgent application that was struck from the roll constitutes a *lis alibi pendens* litigation, and if so, to determine on its status.

[15] Secondly, whether or not condonation is required for the statement of claim filed in October 2019, and if so, to decide on the jurisdiction of the court.

Evaluation of submission and analysis.

Lis pendens: the Urgent Application

[16] It is a common cause that on 9 October 2018, the urgent application was struck off the roll. The respondent's submission is that the struck matter was still alive to be re-enrolled on a normal roll. In the alternative, the applicants should have withdrawn the matter, especially if they intended to bring the new claim on the same issues related to the lock-out. The respondent's submission is persuasive and correct.

[17] The uncontested issue is that this matter surrounds the same parties and the same cause of action of unlawful lock-out and the labour replacement dispute. The only dispute raised by the applicants was that the case numbers of these cases are different. That there is no rule which provides for the procedure that, after an urgent matter is struck, it must be withdrawn or re-enrolled, the

court finds the applicants' submission and approach fatal in law and not acceptable.

[18] This argument cannot be correct and proper with respect to the legal principles and procedures of the courts. The applicants had an opportunity to re-enrol the matter. If the matter is deemed withdrawn, such would have been reinstatement by filing an affidavit and explaining the reason why the matter is to be re-enrolled. If a supplementary was required, then the applicants should have applied to be granted leave to supplement, and same matter would have proceeded.

[19] The respondent substantiated its argument based on *Shongwe and Others v City of Johannesburg Metropolitan Municipality*², wherein the court referred to the case of *Dumisani and Another v Mintroad Saw Mills (Pty) Ltd*.³ The Labour Appeal Court held that it was against public policy that litigants should be able to consistently demand the same relief and on the same grounds from the same adversary.'

'In the light of the above, it is therefore untenable for the applicants to approach this Court with essentially the same claim under a different guise and effectively seek the same relief that was determined by the CCMA.'

[20] It is trite that a matter that is struck from the roll does not automatically disappear, but remains very much alive. It takes an interested party, in this instance the applicants, to elect whether it intends to proceed with the urgent application. It is also common cause that when a matter is struck from the roll, it can only be re-enrolled by filing an affidavit addressing the reasons for which it was struck and why it should be reconsidered for enrolment. However, the applicants elected not to do so. For the applicants to issue a new action on the same facts, and despite the different case numbers, is nothing but *lis pendens*.

² (JR483/14) [2016] ZALCJHB 67 (25 February 2016) at para 27.

³ [2000] 2 BLLR 134 (LAC) at para 9.

[21] In *VKN Enterprises v Peter Martin Lekalakala and three Others*⁴, the court stated that ‘*thus, if an action is already pending between parties and the applicant lodges another action against the same respondent on the same cause of action and in respect of the same subject-matter, whether in the same or in a different Court, it is open to the respondent to take the objection of lis pendens, because another and same action has already been instituted*’. In such instances, the Court may, in its discretion, stay one action pending the decision of the other or dismiss the action.⁵

[22] There is a negative impact on applicants’ failure to act on the pending litigation. Because such an application will be forever in stay on idling mode. This will always leave the respondent to wonder what is next with such an application. This Court is much alive to the fact that the urgent matter that was struck constitutes a pending litigation.

[23] The Court accepts that a successful plea of *lis pendens* is not an absolute bar to proceedings commencing. It is a matter within the discretion of the Court to decide whether an action brought before it should be stayed pending the decision of the first action, or whether it is more just and equitable that it should be allowed to proceed. Thus, the Court enjoys a discretion to be exercised in a proper case and determine whether the interests of justice dictate that the second action should be allowed to proceed.⁶ Therefore, and in the interests of justice and in carrying out the purpose and objects of the LRA on speedy resolution of disputes, this Court affords the applicants’ current case number JS777/19 to proceed. More so after consideration of the following factors:

1. The struck urgent case number JR 3511/2018 is to be deemed withdrawn;
2. There is no reinstatement application pending against the urgent that was struck or archived;

⁴ (J363/2024) [2024] ZALCJHB 212 (12 May 2024) at para 9.

⁵ Ibid.

⁶ *Eksteen v Road Accident Fund* [2021] 3 All SA 46 (SCA) at paras 52 – 53.

3. The parties in the current matter have already engaged and held the pre-trial proceedings;
4. The applicants' status changed from a total number of 79 applicants to 11. Though this status changed after the current action was lodged with all 79 employees. The remaining applicants are to be afforded an opportunity to litigate their dispute to finality.

Lack of Jurisdiction (Condonation)

- [24] The respondent raised the issue of a lack of jurisdiction, which was based on an unreasonable delay of almost a year. This calculation is made from the date of the urgent application that was struck on 9 October 2018. The Court accepts that this period is exorbitant and deserves explanation prior to dealing with the statement of claim in October 2019.
- [25] The employees contended that the action which led to the launching of the current statement of claim of October 2019 action was not triggered by the unresolved CCMA dispute of 29 May 2018. The current statement of claim arose from the CCMA dispute referred to in April 2019. Therefore, there is no need for the applicants to file a condonation application.
- [26] That subsequent 7.11 referral that was filled, the CCMA refused to hear the matter and stated that it did not have jurisdiction. This allegation was substantiated by a follow-up copy of the letter served to the CCMA in July 2019. Except for this submission, there is no ruling from the CCMA nor the certificate of outcome in terms of section 191 of the LRA attached to this application. This Court finds it difficult to assume jurisdiction in the absence of reliance on the relevant provisions of the LRA.
- [27] The LRA provision requires that the CCMA or the Council must attempt to resolve '*Disputes about unfair dismissals and unfair labour practices.*' Whilst section 191 (4) – (11) of the LRA provides that 'the council of the Commission must attempt to resolve the dispute through conciliation:

...

- (5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved.

...

- (10) No person may apply to any court of law to review the director's decision until the dispute has been arbitrated or adjudicated, as the case may be.
- (11) (a) The referral, in terms of subsection (5)(b), of a dispute to the Labour Court for adjudication, must be made within 90 days after the council or (as the case may be) the commissioner has certified that the dispute remains unresolved.
- (b) However, the Labour Court may condone non-observance of that timeframe on good cause shown.'

[28] The current application is in dispute as to whether it complies with the required provisions stipulated above. The employees failed to comply with the submission of the evidence that this matter was resolved and finalised at the CCMA, prior to being issued or heard at the Labour Court. Even in the event that this Court may accept the applicants' explanation that the CCMA ignored or refused to deal with their claim, the CCMA convenor or director should have been approached. Alternatively, lodged an application to compel the CCMA, which was not so done.

[29] There is no further evidence demonstrated before this Court that the CCMA refused to attend to the applicants' dispute. Save for the applicant's letter, which was not responded to. The Court finds that there is a duty upon the applicants to explain the period lapsed between:

- (i) The urgent matter that was struck on 9 October 2018 and the period of filing the statement of claim in October 2019.

- (ii) The period between the alleged April 2019 CCMA dispute and to date of the statement of claim. More so because there is no certificate or ruling order.

Therefore, the court finds that the condonation application is required in this matter.

[30] The court is of the view that the applicants were attempting to avoid this explanation of the missing puzzle of the periods stated above by hiding behind the newly instituted action. It follows that in the absence of an application for condonation, this Court has no jurisdiction and cannot come to the Applicant's assistance. Therefore, the court finds that the respondent's *point in limine* of lack of jurisdiction stands. In the absence of an application for condonation adducing evidence as to why this Court should hear the action, this Court lacks jurisdiction to entertain the main action claim.

[31] Having addressed the relevant provisions and issues. The last issue to be decided is on the costs. This is a case where the Court has to strike a balance, considering the requirements of law and fairness and the number of affected employees.

[32] Insofar as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness. In my view, the interest of justice will be best served by reserving costs to be determined at the hearing of the main application.

[33] In the premises, I make the following order:

Order

1. The respondent's first point in limine of *lis pendens* succeeds. The case number J3511/18 was still a pending litigation in this court at the time of launching case number J777/19.
2. The case number J3511/18 is deemed to be withdrawn in terms of Paragraph 11.2.3 of the Practice Manual of this court.

3. The second *point in limine* of lack of jurisdiction is upheld on two grounds:
 - 3.1. No compliance with the provisions of section 191 (4) and (5) of the Act (LRA).
 - 3.2. Absence of condonation application.
4. Costs are reserved to be determined in the main action.

ZD Maluleke
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Amause Mohlala.

Instructed by: Bayi Attorneys

For the Respondent: Advocate Lenette Pillay

Instructed by: Yusuf Nagdee Attorneys

LABOUR COURT