



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no. JA 111/2024

In the matter between:

NUMSA obo MEMBERS AS PER

ANNEXURE

Appellant

and

MACSTEEL SERVICE CENTRES

SOUTH AFRICA (PTY) LTD

Respondent

Heard: 28 August 2025

Delivered: 14 November 2025

Coram: Basson, Djaje et Tokota AJJA

This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Labour Appeal Court website, and released to SAFLII. The date and time for hand-down is deemed to be at 10h00 on 14 November 2025.

JUDGMENT

TOKOTA AJA

Introduction

[1] The devastating effects of load-shedding imposed by Eskom during 2022 brought about sufferings in many ways including, business financial losses due to electricity outage and loss of jobs by large numbers of people. Members of the appellant did not escape this calamity. More than 100 employees were dismissed by the respondent based on the alleged misconduct for participating in an illegal strike. The issue of unfair dismissal was referred to the Metal and Engineering Industries Bargaining Council (the Bargaining Council) for conciliation but it remained unresolved. The matter was referred to the court *a quo* but outside the statutory time limits within which it should have been referred for adjudication.¹ Condonation application in this regard was dismissed, thus closing the door for determination of the merits of the case. This appeal is against that judgment and order with leave of the court *a quo*.

Factual background

[2] In order to put a proper perspective of the matter it is necessary to set out broadly the chronological events leading to the application for condonation. The appellant's members (the employees), were employed by the respondent at its Harvey Roofing facility in Vulcania Industrial area. Harvey Roofing facility in the Vulcania Industrial area was at times hit by the then scourge of load-shedding. During the second half of 2022 it did not have a facility of a generator as an alternative means of supplying power.

¹ S.191(11)(a) of the Labour Relations Act 66 of 1995 provides: "(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."

- [3] As a result of the impact of the load-shedding, the respondent considered it wise to implement short time and consequent change to starting and stopping times at the plant. On 23 September 2022 the employees at Harvey Roofing facility were invited to a meeting scheduled to take place at the canteen. At that meeting a discussion ensued about resolving the financial problems brought about by the load-shedding. Proposal by the respondent for alternative working time was rejected by the employees.
- [4] After all the negotiations between the appellant and the respondent regarding respondent's proposal had failed, management called a meeting on 17 February 2023 followed by another one on 20 February 2023 where the appellant was informed that since no agreement could be reached, respondent had decided to determine the working hours and implement short time on a regular basis. For this decision, it alleged that it was relying on a clause in the Main Collective Agreement which it alleged authorised it to do so.
- [5] Subsequent to the decision which was taken by the management, 33 employees refused to work according to the revised working time schedule. The employees who refused to work according to the revised time frames were warned, both verbally and in writing, that they would face disciplinary charges of misconduct.
- [6] Subsequent to the threat of disciplinary process the employees embarked upon work stoppage. On 6 March 2023 the appellant, on behalf of the employees, referred a dispute relating to a unilateral change to terms and conditions of employment to the Bargaining Council for conciliation.
- [7] Prior to the commencement of the alleged unprotected strike which led to dismissal of the employees, there was a notice by the appellant of the impending strike, pursuant to the demands to revert back to working hours as before.
- [8] On 14 March 2023 the employees were issued with notices to attend a disciplinary inquiry scheduled for hearing on 16 March 2023. The first group consisting of 33 employees were charged with misconduct on two counts;

first, with participating in an illegal and unprotected work stoppage, having failed to resume their duties on 13 March 2023; and, second, with insubordination, having failed to carry out a reasonable and lawful instruction and leaving their work stations without permission. The second group of 72 employees were charged with participating in an illegal and unprotected work stoppage.

- [9] About 105 employees did not attend the disciplinary inquiry. There is a dispute between the parties as to the reason for non-attendance. The appellant alleges that its members were blocked and prevented by security from attending the hearings. The respondent alleges that the appellant's members refused to attend the hearings electing to gather in the street outside Harvey Roofing where they danced, sang and toy-toyed. The disciplinary process continued in their absence and were found guilty. On 17 March 2023 they were dismissed. NUMSA shop stewards were subsequently dismissed in their absence on 24 March 2023.
- [10] On 17 March 2023 appellant referred a dispute of unfair labour practice relating to unilateral change of conditions of employment. On the same day the commissioner issued a ruling that the parties were directed to meet on 22 March 2023 to finalise picketing rules failing which such rules would be imposed by the Bargaining Council.
- [11] Regarding the referral, the respondent took a point that the dispute was moot in that the 33 employees had been dismissed on 17 March 2023.
- [12] On 24 March 2023 appellant's attorneys, Cheadle Thompson Haysom Incorporated (CTH) addressed a letter to the respondent making certain proposals towards the resolution of the dismissal dispute. In summary, CTH set out in detail the events that led to the strike. They highlighted the areas of dispute including the question of whether the employer had violated the terms and conditions of employment and whether it had a right to unilaterally change same. They then proposed that the matter be referred to private arbitrator for mediation at the costs to be shared by the parties. They cautioned against

court litigation lamenting that such a move would take three to four years to resolve the issues.

- [13] On 13 April 2023 appellant, on behalf of its members, referred the dispute of automatically unfair dismissal to the Bargaining Council for conciliation. On 28 April 2023 the dispute was conciliated, and it remained unresolved and a certificate to that effect was issued.
- [14] On 14 April 2023 appellant referred the unfair dismissal of the Shop stewards to the Bargaining Council. On 12 May 2023 a certificate of non-resolution was issued.
- [15] On 18 April 2023 the respondent, on an urgent basis, launched an application, in the Labour Court, for a declaratory order that the strike was illegal and unprotected and simultaneously seeking an order interdicting and restraining the employees from participating in the strike. On 28 April 2023 an interim interdict was granted by the Labour Court.
- [16] On 28 April 2023 after the dispute of unfair dismissal remained unresolved, the appellant referred the dispute to arbitration. The respondent took a point *in limine* that the Bargaining council had no jurisdiction. On 19 June 2023 the Commissioner ruled that the Bargaining Council did not have jurisdiction to adjudicate on the matter.
- [17] On 20 June 2023 the appellant received the arbitrator's ruling and immediately emailed the same to appellant's legal department for attention. The legal department instructed CTH to advise on what steps to be taken to challenge the ruling.
- [18] CTH was supposed to have filed a statement of claim in the Labour Court. Due to a dispute of fees between CTH and appellant the statement of claim was not filed on time. On 24 July 2023 as the appellant realised that the matter was being delayed, it instructed CN Phukubje attorneys to deal with the matter.

- [19] Phukubje attorneys set up a consultation for 27 July 2023. At the consultation Phukubje requested certain documents, in particular minutes of the meetings of 6,7 and 9 March 2023 and the appellant was not in possession thereof. Mr Nkabinde, an official of the appellant, sent an email on the same day to the respondent requesting the said documents. The respondent replied that such minutes did not exist, as none were recorded at the meetings. On 1 August 2023 Mr Mkoko of the appellant reconstructed the minutes and circulated them for verification.
- [20] On 16 August 2023 Phukubje attorneys were furnished with the final version of the minutes at a meeting with the General Secretary of the appellant. It was at that meeting that Phukubje advised appellant that their office did not have the capacity to handle the matter and that they were withdrawing as attorneys of the appellant. On the same day, Serfontein, Viljoen & Swart Attorneys were instructed to take over the matter.
- [21] The new attorneys arranged a consultation which was held on 28 August 2023. They also needed further documents. Ultimately the statement of claim was drafted on 4 September 2023 and finalised on 11 September 2023. It was filed on 13 September 2023. It is common cause between the parties that the due date for the filing thereof was 28 July 2023. However, none of the parties have referred to the dispute of the shop Stewards which only remained unresolved on 12 May 2023.
- [22] The appellant brought an application for condonation for the late filing of the statement of claim. The respondent opposed the application for condonation. The Labour Court dismissed the application but granted leave to appeal to this Court.

The Labour Court

- [23] When the Labour Court considered the condonation application it divided the delay periods into two segments. The first being the period within the 90-day period up to 24 July 2023, and the second being the period from 24 July to 13 September 2023. The Labour Court went ahead and considered the second period first and concluded that there was adequate explanation for this period

and for that reason the appellant could not be criticised. It held that the appellant dealt with such a complicated matter with some expedition and also ensured that the condonation application was delivered promptly. It then considered the first period prior to 24 July 2023 and came to the conclusion that there was no explanation for the delay during that period.

- [24] The Labour Court held that the delay in referring the matter to court for adjudication was caused solely by the appellant's shift in position that this was a case of a '*misconduct dismissal*.' It found that had this shift not occurred the matter would have been referred to court on time. It then held that appellant had a duty to proffer a full explanation for this period. It held that appellant provided '*no explanation at all*'. It then concluded that in the absence of such an explanation it was '*not obliged to consider prospects of success*'.
- [25] The Labour Court held that it appreciated "*that the prejudice to the individual applicants if condonation is not granted, is significant*", although, the lack of prospects of success ameliorates this somewhat. It held that the respondent had not alleged any specific prejudice other than that its right to expeditious resolution of this dispute has been compromised. It then dismissed the application for condonation with no order as to costs.

Parties' contentions.

- [26] Counsel for the appellant contended that the Labour Court failed to exercise its discretion judiciously. He contended that the Labour Court failed to determine whether or not it was in the interests of justice to grant condonation. The Labour Court erred, so the argument went, in limiting its assessment of the delay to the period prior to the period of the expiry of a 90-day period. He submitted that the Labour Court erred in finding that it was not obliged to consider the prospects of success regard being had to the fact that respondent presented no facts to dispute appellant's alternative claim. He contended that there are indeed prospects of success relating to substantive and procedural fairness of the dismissals. He submitted that the delay was adequately explained and it was not excessive.

[27] Counsel further submitted that the Labour Court erred and misdirected itself in dismissing the condonation application, especially after having found that there was adequate explanation for the period after the date on which the statement of claim was due, and, only based its finding on the inadequate explanation of the period when the statement of claim was not due. He submitted that in any event there was adequate explanation for the first period. He referred us to the case of *Ditsoane v ACWA Power Africa Holdings (Pty) Ltd*² where the Constitutional Court said:

‘The Labour Court’s misdirection on delay so tainted its assessment of the matter that we are entitled to consider the matter afresh. Given that the withdrawal of the case was unintended and unauthorised and that the applicant was not responsible for the ensuing delay, it would be most unjust to bar her from proceeding with her case. Insofar as prospects of success are concerned, on the applicant’s version there was virtually no consultation prior to her retrenchment. She also attacks the retrenchment decision on its merits. The respondent has not sought to persuade us that revival should be refused because of poor prospects. The respondent has also not sought to establish trial prejudice.’³

[28] Counsel for the respondent submitted that the Labour Court was correct in its judgment and had exercised its discretion judiciously. He contended that the original 90-day period was relevant in assessing the delay. He relied heavily on *Chasi v University of Johannesburg*⁴, *Matoto v Free State Gambling and Liquor Authority and Others*⁵ and some unreported Labour Court judgments.⁶ He therefore submitted that the Labour Court was entitled to have regard to the period prior to the due date of filing the statement of claim.

² *Ditsoane v ACWA Power Africa Holdings (Pty) Ltd* (CCT107/23) 2024 (3) BCLR 307 (CC); (2024) 45 ILJ 467 (CC) (12 December 2023) at para 40.

³ See also: *Minister of Justice and Correctional Services and Another v Nene* (JA129/23) [2024] ZALAC 30; [2024] 9 BLLR 926 (LAC); (2024) 45 ILJ 2516 (LAC) (13 June 2024) at para 10.

⁴ (J 1747 / 2018) [2022] ZALCJHB 275 (3 October 2022) at para 66.

⁵ (4629/2015) [2017] ZAFSHC 80 (8 June 2017).

⁶ *Association of Mineworkers and Construction Union (AMCU) and Another v Black Rox Security Intelligence Services ta BOSASA Security (Pty) Ltd (in Liquidation) and Others* (D1780/17) [2024] ZALCD 50 (12 December 2024); *General Industries Workers Union of South Africa and Others v Mawer and Delpont (Pty) Ltd obo Golden Grove Body Corporate* (JS 667/21) [2022] ZALCJHB 139 (9 June 2022).

- [29] Counsel further submitted that notwithstanding the Labour Court's statement that it did not have to consider the merits, it indeed considered the merits and found that there are no prospects of success.
- [30] Counsel for the appellant submitted that the case of *Matoto* on which reliance was placed for consideration of the period prior to the expiry of the statutory limited period, dealt with a review in terms of the Promotion of Administrative Justice Act⁷ (PAJA). PAJA emphasises unreasonable delay on reviews which is not the case with section 191 of the Labour Relations Act⁸ (LRA). He persisted that the merits relating to the prospects of success were never considered by the Labour Court.

Analysis of the legal framework and facts

- [31] In terms section 191(11) (b) of the LRA the Labour Court may condone non-observance of the timeframes referred to in sub-section (a) on good cause shown. It is clear from the above that when dealing with an application for condonation the Labour Court exercises its discretion. An appeal Court will, depending on the nature of the discretion, act with restraint and will not lightly interfere with that discretion even if in its own view it would have exercised it otherwise.
- [32] There are two types of discretions, namely a discretion in the narrow sense and a true discretion or a discretion in a wider sense. In those cases, where the word "*discretion*" is used in a "*non-strict*" sense, the principle that an appellate Court does not interfere lightly with the exercise of a discretion by a lower Court does not apply. In such a case the Court of appeal is entitled to come to its own decision in accordance with its own view of the merits of the case.
- [33] In the case of a narrow discretion – that is a situation where the tribunal or Court has available to it a number of courses from which to choose – its decision can only be interfered with by a Court of appeal on very limited grounds such as where the tribunal or Court:

⁷ Act 3 of 2000.

⁸ Act 66 of 1995, as amended.

- 33.1 did not exercise a judicial discretion or;
- 33.2 exercised its discretion capriciously or;
- 33.3 exercised its discretion upon a wrong principle or;
- 33.4 has not brought its unbiased judgment to bear on the question or;
- 33.5 has not acted for substantial reasons;⁹
- 33.6 has misconducted itself on the facts¹⁰;
- 33.7 reached a decision in which the result could not reasonably have been made by a Court properly directing itself to all the relevant facts and principles.¹¹

[34] Although the principle is that the exercise of a true discretion by a Court of first instance or by a tribunal can only be interfered with by an Appeal Court on limited grounds, the list of those grounds on which interference is permissible is not so short any more as can be seen above. A true discretionary power was described as being characterised by the fact that a number of courses are available to the repository of the power.¹²

[35] In line with the authority of *Ditsoane*¹³ if the Labour Court's misdirection on delay has tainted its assessment of the matter, this Court is entitled to consider the matter afresh. I am of the view that the Labour Court misdirected itself in many respects as will be demonstrate below. This Court is therefore entitled to consider the matter afresh.

⁹ See: *Ex Parte Neethling and others* 1951 (4) SA 331 (A) at p 335.

¹⁰ See: *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others* 2000 (2) SA 1 (CC) para 11;

¹¹ See: *R v Zackey* 1945 AD 505 at 511-2; *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 398-9; and *Myburgh Transport v Botha t/a S A Truck Bodies* 1991 (3) SA 310 (NmSC) at 314 H- 315 A.

¹² *Kemp t/a Centralmed v Rawlins* (JA 11/06) [2009] ZALAC 8; [2009] 11 BLLR 1027 (LAC); (2009) 30 ILJ 2677 (LAC) at para 13.

¹³ *Id* fn 2.

[36] It is by now well established that condonation of the non-observance of the Rules of Court is not a mere formality.¹⁴ Although the condonation in this matter relates to statutory non-compliance the same principle should apply. In all cases some acceptable explanation for any delay in seeking condonation, must be given.

[37] More than five decades ago the case of *Melane v Santam Insurance Co Ltd*¹⁵ still makes good law where the Court said:

'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation thereof, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation.'

[38] Regarding the latter part of this quotation this is no longer the position. Cases which consider the delay in isolation and decide the case of the application for condonation without regard to the prospects of success¹⁶ must be regarded as having been overruled by the Constitutional Court.¹⁷

[39] In the context of a review, as regards unreasonable delay in *Gqwetha v Transkei Development Corporation Ltd*¹⁸, following the earlier decisions like *Wolgroeiërs Afslaeërs (Edms) Bpk v Munisipaliteit van Kaapstad*¹⁹, it was stated that a plea of undue delay in bringing a review application by an state organ is assessed by examining: (1) whether, on the facts, the delay is

¹⁴ See: *Meintjies v H D Combrinck (Edms) Bpk* 1961 (1) SA 262 (A) at 263H-264B; *Saloojee and another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 138E-F; *Turnbull-Jackson v Hibiscus Coast Municipality and others* 2014 (6) SA 592 (CC) at para 26.

¹⁵ 1962 (4) SA 531 (A) 532C-E.

¹⁶ *NUMSA and another v Hillside Aluminium* [2005] 6 BLLR 601 (LC).

¹⁷ See: *Department of Transport and Others v Tasima (Pty) Limited; Tasima (Pty) Limited and Others v Road Traffic Management Corporation and Others* 2018 (9) BCLR 1067 (CC); *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* 2019 (6) BCLR 661 (CC) at paras 39 and 40. (*Buffalo City*)

¹⁸ 2006 (2) SA 603 (SCA).

¹⁹ 1978 (1) SA 13 (A) at 41 E-F:

unreasonable or undue; and, if so (2) whether the court should exercise its discretion to overlook the delay and nevertheless entertain the application.²⁰

- [40] In *Department of Transport and Others v Tasima (Pty) Limited; Tasima (Pty) Limited and Others v Road Traffic Management Corporation and Others*²¹ the Constitutional Court expressed the view that the explanation that was proffered by the department for the delay of five years in bringing the counter-application of the review of its decision was not convincing. Khampepe J described it as follows²²:

‘The explanation provided by the Department was both *porous and lacked the markings of good constitutional citizenship*. But this is not the end of the inquiry. The delay cannot be “evaluated in a vacuum.” It must now be determined whether there are sound reasons for overlooking the delay.’
[Emphasis added]

- [41] In *Road Accident Fund and Another v Mdeyide*²³ it was said:

‘This court has repeatedly emphasised the vital role time limits play in bringing certainty and stability to social and legal affairs, and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time, bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events may have faded. The quality of adjudication is central to the rule of law. For the law to be respected, decisions of courts must be given as soon as possible after the events giving rise to disputes, and must follow from sound reasoning, based on the best available evidence.’²⁴

- [42] It is correct, as the Labour Court held, that when an application for condonation for the delay is considered, a full explanation that covers the

²⁰ *Khumalo v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); 2014 (5) SA 579 (CC) at para 49.

²¹ 2018 (9) BCLR 1067 (CC) at para 158.

²² *Ibid* at para 159.

²³ 2011 (2) SA 26 (CC) at para 8.

²⁴ See also: *Mohlomi v Minister of Defence* (CCT41/95) [1996] ZACC 20; 1996 (12) BCLR 1559; 1997 (1) SA 124 at para 11.

“entire period” must be provided.²⁵In *Khumalo and Another v MEC for Education, KwaZulu-Natal*²⁶, the Constitutional Court emphasised that an important consideration in assessing whether a delay should be overlooked is the nature of the decision. This was said to require, “*analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge*”.

- [43] The Labour Court first dealt with the second stage and it was at that stage that it found that Phukubje attorneys were to be criticised because they contributed to the delay by taking the matter knowing that they did not have the capacity to deal with it. It must be noted that Phukubje attorneys started to deal with the matter on 24 July which was during the first stage.
- [44] The Labour Court found that the delay was not trivial but it was not inordinate and described it as ‘significant’. It found that there was no explanation at all for the first period within the 90-day period. With respect, in my view the Labour Court erred in this regard and I deal with the matter on the assumption that the period within the 90-day period needed explanation for the delay. However, I express no view whether this is so.
- [45] Appellant explained that before the dismissals of the Shop stewards, CTH was instructed to advise on the matter hence they addressed a letter to the respondent on 24 March 2023 proposing resolution to the problem stating that an outcome of the Court may be ‘ruinous’.
- [46] It appears further that CHT were at all times acting for the appellant in the matter until after the ruling of 19th June 2023 when there was a fee dispute between them and appellant. This resulted in the statement not being filed on time.
- [47] On 20 June the ruling was received by the appellant and it was immediately forwarded to one Dakumbheka, an official of the appellant, for attention. On

²⁵See: *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at para 22; *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* 2012 (2) SA 637 (CC) at para 15; *SA Express Ltd v Bagport (Pty) Ltd* 2020 (5) SA 404 (SCA) at para 34.

²⁶2014 (5) SA 579 (CC) at para 57. See also *Gqwetha v Transkei Development Corporation Ltd and others* 2006 (2) SA 603 (SCA) at para 33.

the same day, Dukumbheka forwarded the same to Mr Nkabinde requesting the leadership to authorise a challenge of the ruling in court. On the same day, Mr Nkabinde requested the national legal department to bring an urgent application in court challenging the ruling. On 24 July one Ms Prudence Gqoba forwarded the matter to Phukubje attorneys instructing them to deal with the matter.

- [48] From the above it is clear that, at all relevant times the appellant believed that this was a matter for arbitration after it remained unresolved. Therefore, as Counsel for the appellant pointed out, for the period between 28 April and 20 June, appellant was waiting for the outcome of the arbitration. I agree. Regard being had to the events of this matter, namely the charges of misconduct of insubordination against 33 employees, the referral of unfair dismissals of the shop stewards, this is not unreasonable. The referral of the Shop stewards' matter was on 13 April 2023 and the certificate of non-resolution was issued on 12 May 2023. There was also a referral of unfair labour practice relating to unilateral change of conditions of employment. These referrals could easily have caused confusion.
- [49] The only period which remained unexplained was a period between 20 June and 24 July when new attorneys were instructed to handle the matter after breaking up with CHT. The explanation for the period between 24 July and 27 July was accepted as satisfactory by the Labour Court though it criticised Phukubje attorneys for their conduct. Consequently, the unexplained period is less than a month and in my opinion cannot be described as excessive.
- [50] One must bear in mind that the delay in *Tasima*²⁷ was five years and there was no satisfactory explanation but the Constitutional Court considered it prudent to entertain the counter-application review on the basis of the interests of justice.
- [51] In considering the delay the Labour Court ought to have considered first, the nature of the impugned decision and then the conduct of the appellant.²⁸ The

²⁷ Id fn 22.

²⁸ *Buffalo City* (id fn 18) at para 82.

Labour Court made no reference to the nature of the impugned decision or the conduct of the appellant.

- [52] It has been held in *Tasima* that '[e]ven where the functionary has not acted as a model litigant or "constitutional citizen",²⁹ there may be a basis to overlook the delay if the functionary acted in good faith or with the intent to ensure clean governance. In *Tasima*, Khampepe J affirmed this principle and said:

'*Merafong* also holds that whether the failure to challenge the decision timeously was made in good faith may be a reason for overlooking delay'.³⁰

- [53] In my view the need for the explanation of the entire period cannot be interpreted as requiring explanation of each and every step taken on each and every day. One must bear in mind that there is a difference between dealing with a big organisation like NUMSA and an individual and furthermore there are week-ends and public holidays in almost every month. In this matter I am convinced that the appellant acted in good faith and the delay ought to have been condoned.

- [54] In the circumstances even if the Labour Court was correct in considering the period within the 90-day period as requiring an explanation for the delay, that period has been explained satisfactorily in my view.

- [55] In any event, I agree with Counsel for the appellant that the 90-day period within which the referral to Court must be made is distinguishable from the time limit set for the reviews by PAJA. In terms of the PAJA the institution of a review must be brought "without unreasonable delay" and in any event "*not later than 180 days*" after the date of becoming aware of the impugned decision.

- [56] The distinction between the statutory limit of 90-day period and a PAJA review is clear. In terms of section 7 of PAJA a review must be instituted without unreasonable delay. Therefore, reasonableness or otherwise of the delay commences once a party becomes aware of the impugned decision. The

²⁹ Id fn 22 at para 159.

³⁰ *Tasima* (Id fn 22) at para 168.

delay is not postponed until after the expiry of 180 days. Instead once 180 days have elapsed a party is barred from instituting the review proceedings unless condonation has been granted by the Court. This is not the case in terms of section 191 of the LRA.

- [57] Moreover, in the PAJA assessments the proverbial clock starts running from the date that the applicant becomes aware or reasonably ought to have become aware of the action taken.³¹ This is not the case in terms of section 191 of the LRA. Depending on the nature of the impugned decision, the assessment in PAJA is different because even 60 days can possibly be regarded as an unreasonable delay. Furthermore, the 180-day period may be extended by agreement between the parties failing which an application for extension must be made to Court. There is also no such provision in section 191 of the LRA.
- [58] Furthermore, the limitation of the 90-day period in terms section 191 of the LRA does not speak of an unreasonable delay. The section does not provide that the statement must be filed *without unreasonable delay* instead it provides that this must be done *within* 90 days. Furthermore, there is no provision for the parties to agree to extend the period of 90 days. Therefore, *Matoto's* decision is distinguishable from the present case.
- [59] Apart from the fact that the facts were wrongly analysed, the interests of justice were never considered by the Labour Court in the exercise of its discretion for the purposes of granting or refusing condonation. There were nine employees as mentioned in the statement of claim who were not involved in the strike by reason of the fact that six of them were at home with the permission of the respondent, and three of them were on study leave. This evidence was left unchallenged in the statement of defence. Where a deponent is under a duty to deny or admit a positive allegation, and elects not to respond thereto, he must be taken to have accepted the correctness thereof.³²

³¹ *City of Cape Town v Aurecon South Africa (Pty) Limited* 2017 (4) SA 223 (CC); 2017 (6) BCLR 730 (CC) (*Aurecon*) at para 41. *Buffalo City* (id fn 18) at para 49.s

³² *Makhuva and others v Lukoto Bus Service (Pty) Ltd and others* 1987 (3) SA 376 (V) at 386 D-F.

[60] The Constitutional Court had this to say about consideration of merits in *Buffalo City*³³ when Theron J said:

‘There is a further basis for interfering with the Supreme Court of Appeal judgment, one that would ordinarily be sufficient to demonstrate that it is *in the interests of justice* for this Court to entertain the appeal. The Supreme Court of Appeal interfered with the High Court’s finding, among others, on the ground that it was improper for the High Court to have had regard to the merits before determining whether the delay ought to be condoned.’

It said: ‘The judgment of the Supreme Court of Appeal predated, by a matter of some months, the judgment of this Court in *Gijima*. However, it was made clear in *Tasima I* (a PAJA review where this Court found that the explanation for the delay was not satisfactory) that regard must *still be had to the merits* in deciding whether the delay should be condoned.³⁴ The Supreme Court of Appeal’s decision in this matter does not align with the jurisprudence of this Court on this aspect and warrants interference. [Emphasis added]

Prospects of success

[61] The Labour Court held that it was not obliged to consider prospects of success regard being had to the fact that no explanation for the delay was forthcoming. In this regard the Labour Court adopted the approach of the Supreme Court of Appeal (SCA) in *Matoto*³⁵ where Ponnan JA said that where there is no satisfactory explanation condonation may be refused irrespective of whatever the prospects of success are. This is not in line with judicial precedence of the Constitutional Court.

[62] In addition, if regard is had to the employees who were absent during the strike but were dismissed nonetheless, their case appears to be unassailable. It must be remembered that, as pointed out above, on 6 March 2023, and, prior to the commencement of the alleged unprotected strike which led to dismissal of the employees, there was a notice by the appellant of the

³³ Id fn 18 at paras 39 and 40.

³⁴ *Tasima I* n 13 at paras 163-4.

³⁵ Id fn 5 at para 15.

impending strike, pursuant to the demands to revert back to working hours as before. Whether anything turns on this or not to me it really does not make any difference.

- [63] Furthermore, the issue of whether there was a unilateral change of the terms and conditions of employment and, whether at the disciplinary enquiry the employees were blocked by the security to enter and participate in the hearings is still to be determined by the trial Court after the evaluation of evidence. If it is ultimately found that the version of the appellant is credible then the employees shall have been denied their rights to a fair labour practice in terms of section 23 of the Constitution of the Republic of South Africa, 1996.

Prejudice

- [64] Although the Labour Court mentioned that the appellant would suffer prejudice if condonation was not granted, it did not pertinently deal with this factor. The prejudice which would be suffered by appellant's members weighs heavily against the prejudice to be suffered by the respondent. The appellant's members have been deprived of their Constitutional right to fair labour practice in terms of section 23 of the Constitution, and a right to have their disputes resolved by an independent and impartial tribunal in terms of section 34 of the Constitution. No reference is made also to the employees who were either absent at home or on study leave. Those employees, it would seem to me, have good prospects of success especially with the onus being on the respondent to justify their dismissals. This is consonant with the dicta in *Khumalo* that, '*consequences and potential prejudice . . . ought not in general, favour the Court non-suiting an applicant in the face of the delay*'.³⁶

- [65] On the right of access to court, the Constitutional Court has said in *Chief Lesapo v North West Agricultural Bank and Another*.³⁷

"The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised

³⁶ *Tasima* (Id fn 22) at para 170.

³⁷ 2000 (1) SA 409 (CC) at p 418 F – G.

mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance’.

[66] This Court in *City of Johannesburg Metropolitan Municipality and Others v Independent Municipal and Allied Trade Union and Others*³⁸ per Cripps JA held:

‘The court *a quo* erred in dismissing the application because of the delay, without considering whether, in light of factors such as the right of the parties in terms of s 34 the Constitution, the importance of the matter, the prospects of success of the application, the potential prejudice to the parties, including the consequences of not granting or of granting the relief sought and of not finalising the application on its merits, it should, nevertheless, entertain the application, despite the delay, and concluding accordingly.’

This statement is apposite in this matter.

[67] I am of the view that the Labour Court failed to consider relevant factors in order to exercise its discretion. It did not consider the nature of the impugned decision. It was not enough simply to say the employees would be prejudiced if the condonation is not granted but still go ahead and refuse it. It did not consider the interests of justice at all.³⁹ On its own version it did not consider the prospects of success. I cannot agree with Counsel for the respondent that an interpretation of its judgment demonstrates that it considered the merits. Nowhere does the Labour Court discuss the merits of the case. In my view there is merit in the appeal and it must succeed.

Costs

[68] What remains is a question of costs. In labour matters it is a well-established principle that costs do not necessarily follow the result. In considering the

³⁸ (2017) 38 ILJ 2695 (LAC) at para 76.

³⁹ See: *Tasima* (Id fn 22).

award of costs the court must have regard to law and fairness. It is not in the interests of justice to make an award of costs.

[69] In the result the following order will issue

Order:

1. The appeal is upheld with no order as to costs.
2. The order of the court *a quo* is set aside and substituted with the following order;
 - “1. *The application for condonation for the late filing of the statement of claim by the applicant is granted.*
 2. *There is no order as to costs*”
3. The matter is referred back to the Labour Court for trial on the merits to continue.

B R Tokota

Djaje AJA concurs

Basson, AJA, dissenting

[70] The issue in this appeal is whether the court *a quo* exercised its discretion judicially in refusing condonation for the late filing of the appellants' statement of claim. In brief, the court *a quo* held that there is “virtually” nothing in the condonation application that explains the delay up to July 2024 when the 90-day period provided for in section 191(11)(a) of the LRA for the filing of the statement of claim had expired.

[71] It is accepted that the appellants had to fully explain the entire delay in filing the statement of claim, which was eventually submitted only on 13 September 2024. For convenience, the Labour Court divided the period of delay into two stages, each of which required a full, detailed and satisfactory explanation.

The first stage covered the 90-day period specified in section 191(11) (a), ending on 24 July 2023. The second stage extended from 24 July 2023 (in other words, *after* the 90-day period expired) to 13 September 2024, when the statement of claim was finally filed. The Labour Court was satisfied with the explanation for the delay during the second stage. As a result, this Court does not need to consider the second stage of the delay.

- [72] In my view, the court *a quo* correctly held that the principal reason for the failure to refer the strike dismissal dispute within the prescribed period was NUMSA's inexplicable change in stance — from its initial and consistent position that the dismissal was for participation in a strike - to the later contention that it was for misconduct. This shift in position is not explained, leading the court *a quo* to conclude that “[i]t seems incontrovertible that had this shift in position not occurred, the dispute would have been referred to Court on time”.
- [73] The issue in this appeal is whether the appellants adequately explained the delay during the first stage.
- [74] The majority decision held that there was an adequate explanation for the first delay and that the court *a quo* failed to consider all relevant factors and, accordingly, ought to have granted condonation. It is on this point that I part ways with the majority's reasoning. Although I agree with the broad exposition of the facts, I take a different view on whether the refusal of condonation was exercised judicially, and more particularly, on the finding that the Labour Court failed to consider relevant factors. In my view, if there is no explanation for the delay, a court is not required to consider any other factors, such as the prospects of success.
- [75] It is not necessary to give a detailed exposition of the law regarding condonation, nor of the role of a court on appeal when considering whether a discretion was exercised judicially. The principles are well established and have been affirmed in numerous decisions of this Court and the SCA. A court considering condonation exercises a true discretion. An appellate court will not interfere with such a decision merely because it would have reached a

different conclusion. Interference is warranted only where it is shown that the court *a quo* failed to exercise its discretion judicially, meaning that the court *a quo* acted capriciously, applied wrong principles, relied on insubstantial reasons, committed a misdirection or irregularity, or otherwise exercised its discretion improperly or unfairly.⁴⁰ In short, a court on appeal will only interfere where wrong facts or principles informed the decision, or where the decision reached is one which "*could not reasonably have been made by a court properly directing itself to all the relevant facts and principles*".⁴¹

- [76] Granting condonation must be in the interests of justice. The Constitutional Court in *Steenkamp and others v Edcon Ltd*,⁴² with approval of the decision in *Grootboom v National Prosecuting Authority and another*,⁴³ set out the factors that must be considered in determining whether it is in the interests of justice to grant condonation and said the following⁴⁴:

"[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 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

⁴⁰ *Aspen Holdings (Pty) Ltd and Another v Phelane and Another* [2025] 4 BLLR 409 (LAC) at para 17.

⁴¹ *AFMS Group (Pty) Ltd and Another v Vuyisela Mzukwa and Others*. Unreported judgment. Case no. CA03/2024. Delivered: 26 March 2025 at para 24.

⁴² (2019) 40 ILJ 1731 (CC).

⁴³ [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) at para 22.

⁴⁴ *Ibid* at paras 22, 23 and 51.

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."

- [77] What is in the interests of justice is not, however, a standalone consideration. All factors must therefore be considered when assessing whether it is in the interests of justice to grant or refuse condonation. And, as stated in *Grootboom*,⁴⁵ where the delay is unacceptably excessive and there is no explanation for it, there may be no need to consider the prospects of success. If the period of delay is short and the explanation is unsatisfactory, but there are reasonable prospects of success, condonation should be granted. This was also confirmed in *Colett v Commission for Conciliation, Mediation and Arbitration and others*⁴⁶ where this Court held 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. As a general proposition therefore, the various factors are not individually decisive, but should all be taken into account to conclude as to what is in the interests of justice:

⁴⁵ Id fn 46.

⁴⁶ (2014) 35 ILJ 1948 (LAC) at paras 38 and 39.

“[38] There are overwhelming precedents in this court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success. In *NUM v Council for Mineral Technology* it was pointed out that in considering whether good cause has been shown the well-known approach adopted in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-D should be followed, but —

'[t]here is a further principle which is applied and that is 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'.

[39] The submission that the court a quo had to consider the prospects of success irrespective of the unsatisfactory and unacceptable explanation for the gross and flagrant disregard of the rules is without merit.”

[78] Despite criticism expressed in the majority judgment regarding decision in *Matoto*,⁴⁷ on the basis that it was decided in the context of PAJA, I am nonetheless of the view that the SCA’s view is sound in holding that a court need not consider the prospects of success where there is no explanation for the delay, and that it is in line with constitutional jurisprudence.

[79] In considering an application for condonation, sight should also not be lost of one of the fundamental purposes of the LRA, which is the expeditious

⁴⁷ The Court held: “[14] Whilst the prospects of success may, in general, be an important consideration - they are by no means decisive. I have not dealt with the appellant’s prospects of success because, in my view, the circumstances of the present case are such that the high court was entitled to refuse the application for an extension irrespective of the appellant’s prospects of success. When considering whether to condone a litigant’s failure to comply with the rules, this court has said, that: (i) in cases of flagrant breaches of the rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal; (ii) the court is bound to make an assessment of an applicant’s prospects of success as one of the factors relevant to the exercise of its discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration and (iii) this applies even where the blame lies solely with the attorney.”

resolution of labour disputes.⁴⁸ It is thus important that the entire delay must be fully explained with sufficient detail to allow a court to exercise its discretion judicially. It is also settled law that applications for condonation will be subject to “*strict scrutiny*” as pointed out by the Constitutional Court in *Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd*⁴⁹.

“[188] The Labour Court in *Makuse* adopted the position that—

“condonation for delays in all labour law litigation is not simply there for the taking. . . the courts have made it clear that applications for condonation will be subject to ‘strict scrutiny’, and that the principles of condonation should be applied on a ‘much stricter’ basis.”

[80] Because the 90-day period provided for in the LRA for the filing of a statement of claim is generous, there is, in my view, all the more reason that any failure to comply with that period must be adequately explained.

[81] It is not clear from the papers why NUMSA later changed its position and characterised the dismissal as one for “misconduct,” rather than as a dismissal for participation in a strike, considering the overwhelming evidence that NUMSA had held the view that the individual appellants were dismissed for participating in a strike. Some of the facts that point to this conclusion are the following:

81.1 On 7 March 2023, the respondent specifically informed NUMSA that it regarded the conduct of the employees as constituting an illegal strike and participation in an unprotected work stoppage. On that date, Macsteel issued final written warnings to all employees engaged in unprotected strike action.

81.2 On 10 March 2023, the General Secretary of NUMSA addressed a letter to the respondent requesting, *inter alia*, to be provided with “*the employment contracts of those participating in the strike, including the*

⁴⁸ *Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd* (2018) 39 ILJ 1213 (CC) at para 187. *Toyota SA Motors (Pty) Ltd v CCMA and others* (2016) 37 ILJ 313 (CC); *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 at para 62.

⁴⁹ (2018) 39 ILJ 1213 (CC) at para 188.

33 workers whom you intend to issue with notices to attend disciplinary hearings.” NUMSA thus clearly accepted at that time that the employees were participating in strike action.

81.3 On 14 March 2023, NUMSA served a strike notice on Macsteel. It is specifically stated in this notice that “[t]he demand in this strike is that Macsteel must revert to the working hours, shift, and remuneration patterns, in place before the changes unilaterally introduced during August or September last year.” This strike demand is almost identical to the one that led to the unprotected strike and which commenced on 6 March 2023.

81.4 The unprotected strike continued despite a series of ultimatums. On 14 March 2023, the striking employees were issued with notices to attend disciplinary inquiries scheduled for 16 March 2023. Although additional charges were brought against 33 employees, all were charged with participating in an unprotected strike. When none of the employees attended the disciplinary hearings, they were dismissed on 24 March 2023.

81.5 On 22 March 2023, NUMSA provided Macsteel with proposed picketing rules — yet another clear indication that NUMSA was fully aware of the fact that the individual employees were engaged in strike action (leaving aside for the moment whether that strike was protected or not). Simply put, picketing rules arise only in the context of strike-related activity and serve to ensure the orderly conduct of employees at or near workplaces during protected industrial action.⁵⁰

81.6 On 13 April 2023, Mr Mkoko of NUMSA referred an alleged automatically unfair dismissal dispute to the MEIBC, describing the facts giving rise to the dismissal as “*Dismissal for participation in an alleged unprotected strike*”.

⁵⁰ Picketing rules are regulated by section 69 of the LRA and provides that picketing may be conducted only in support of a protected strike or in opposition to a lockout.

81.7 On 28 April 2023, the Labour Court granted a strike interdict against NUMSA and its members. Conspicuously absent from the statement of claim is any reference to the strike interdict. What the existence of the strike interdict does, however, indicate is that as of 28 April 2023, NUMSA was aware that the Labour Court had taken the view that the employees' conduct constituted an unprotected strike

81.8 On 18 June 2023, the Bargaining Council upheld the jurisdictional point raised by the respondent that the Bargaining Council lacked jurisdiction to arbitrate because the reason for the dismissal is participation in unprotected strike action. By that time the Labour Court had long since interdicted the unprotected strike.

81.9 Only on 12 September 2023, the statement of claim was served, now claiming that the appellants were dismissed for strike action.

[82] As previously noted, nowhere in the application for condonation does NUMSA provide any explanation for its shift from maintaining that the dismissal was for participation in a strike, to asserting that it was for misconduct (despite the strike interdict), and then reverting to the original position that the dismissal was for participation in a strike. This material change in stance calls for a cogent and satisfactory explanation, yet none was forthcoming.

Conclusion

[83] Given the complete absence of an explanation — let alone an acceptable one — the court *a quo* was, in my view, correct in concluding that it was not obliged to consider the appellants' prospects of success.

[84] I can therefore find no reason to interfere with the discretion of the court *a quo* in refusing condonation. For these reasons, I would have dismissed the appeal with no order as to costs.

APPEARANCES:

For the appellant : Adv. Bester SC

Instructed by Serfontein, Viljoen & Swart

For the Respondent : Adv. P Moll

Instructed by Webber Wentzel