



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C393/2023

In the matter between:

BRADLEY MEARS

Applicant

and

**SOUTH AFRICAN NATIONAL COUNCIL ON
ALCOHOLISM AND DRUG DEPENDENCE**

Respondent

Heard: 30 July 2026

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 31 July 2026.

JUDGMENT

DE KOCK AJ

Introduction

- [1] Before this Court is an application by the respondent for condonation of its failure to deliver a statement of response to the applicant's statement of claim, for the upliftment of the bar said to have been constituted by a notice of bar served on 27 September 2023, and for leave to deliver its statement of response within five days of the order. The application is opposed by the

applicant. Although the applicant's application for default judgment is pending, only the condonation application was enrolled for hearing, and this judgment is concerned with that application alone.

- [2] The statement of claim was served on 27 July 2023. By the time the application was argued, on 30 July 2026, the statement of response had still not been delivered. That single fact frames everything that follows: the Court is asked to condone the late delivery of a pleading which, three years after it fell due, does not exist.
- [3] For the reasons set out below, the notice of bar was a procedural step unknown to the rules of this Court as they stood at the time, and it barred nothing; the respondent's default was, and remains, the failure to deliver its statement of response; no good cause has been shown for that failure; and the application falls to be dismissed, with costs. Directions are given for the determination of the applicant's application for default judgment in chambers.

Background

- [4] The respondent, the South African National Council on Alcoholism and Drug Dependence, Western Cape ('SANCA-WC'), is a non-profit organisation which renders substance-abuse services from offices in and around Cape Town and in the Northern Cape. The applicant was its director. He was dismissed on 3 April 2023, following a disciplinary enquiry chaired by the late Advocate Joyce Williams, who passed away in July 2023.
- [5] On 27 July 2023 the applicant referred a dispute to this Court by delivering a statement of claim, served by email. Proper service is admitted. The applicant's case is that his dismissal was automatically unfair as contemplated in the Labour Relations Act¹ ('the LRA'), in that he was dismissed for having made protected disclosures as contemplated in the Protected Disclosures Act.² In argument the claim was described as one for compensation of some R1.32 million, being 24 months' remuneration.

¹ Act 66 of 1995.

² Act 26 of 2000.

- [6] The referral was governed by the Rules for the Conduct of Proceedings in the Labour Court, 1996³ ('the 1996 Rules'), which applied until their repeal with effect from 17 July 2024. In terms of rule 6(3)(c) of the 1996 Rules, a response had to be delivered within 10 days of the date on which the statement of claim was delivered, that is, by 11 August 2023. No response was delivered. On 28 August 2023 the respondent delivered a notice of intention to oppose, signed by Ms Alayna Lewendal.
- [7] On 27 September 2023 the applicant's attorneys served, by email, a notice of bar calling for the statement of response. On 4 October 2023 the respondent sought an extension, and the period allowed in the notice was extended by agreement to 9 October 2023. The statement of response was not delivered by that date, or at all. From the bar it was stated that Ms Lewendal's contract with the respondent terminated on 31 December 2023, whereafter she continued to assist the respondent *pro bono*.
- [8] On 15 March 2024 the applicant served an application for default judgment. On 20 March 2024 the respondent delivered a notice of intention to oppose that application, again signed by Ms Lewendal, this time under the name of her firm. Nothing further was delivered by the respondent. When the default judgment application was enrolled for hearing on 3 September 2024, the respondent's erstwhile attorney arrived at court with the present application, which was handed up from the bar; the founding affidavit had been deposed to the previous day, 2 September 2024, and the notice of motion is undated. The matter did not proceed on that day.
- [9] The applicant delivered an answering affidavit opposing the application on 19 September 2024, stamped by the Registrar on 20 September 2024. No replying affidavit was ever delivered. Notices of set-down issued on 12 March 2026 and 2 April 2026 enrolled the application for hearing on 30 July 2026, when it was argued before this Court by videoconference. Mr T du Preez appeared for the

³ GN 1665, Government Gazette 17495, 14 October 1996, as amended; repealed with effect from 17 July 2024.

applicant, and Mrs A H MacKenzie, an office bearer of FEDHASA, appeared for the respondent.

The condonation application

- [10] The notice of motion seeks four substantive orders: condonation for the respondent's non-compliance with the rules of court 'relating to service and process'; the upliftment of the bar constituted by the notice of bar dated 27 September 2023; leave to file the respondent's plea within five days of the date of the order; and costs in the cause. No draft statement of response accompanies the application.
- [11] The founding affidavit is deposed to by Professor Nadine Harker, a member and former chairperson of the respondent's board, supported by a confirmatory affidavit of Ms Lewendal in her capacity as a board member for 2022 and 2023. The explanation offered for the default, in summary, is this: Advocate Williams, who had been briefed in the matter, passed away in July 2023, and alternative counsel had to be briefed; after the applicant's dismissal the director's position was not filled, and the organisation was managed by the board and a part-time interim director in circumstances of significant financial strain; correspondence addressed to a former board member and to Advocate Williams did not come to the respondent's attention; the respondent had no funds for legal costs and is assisted *pro bono*; and the respondent believed that the applicant, not having been heard from, might have abandoned his claim, until the default judgment application was served. The deponent also attacks the statement of claim itself, contending that it lacks averments establishing a cause of action and attaches no supporting documents.
- [12] On the merits, the founding affidavit avers that the respondent has a *bona fide* defence: the applicant, it is said, was fairly dismissed for misconduct, and the matters he relies upon as protected disclosures were known to the respondent and attended by due internal process. The deponent avers that the respondent will be severely prejudiced if not permitted to present its case, and that the applicant has suffered no prejudice beyond the inconvenience of delay.

The answering affidavit

- [13] The applicant's answering affidavit joins issue on virtually every material averment, and makes a series of pointed allegations. It underlines that, as at its date, the respondent had still not filed its statement of response. It records that at the hearing on 3 September 2024 the respondent's attorney informed the presiding judge that she had signed the notice of intention to oppose in August 2023 as 'a friend of the respondent' and that she was not an employee of the respondent; and it annexes a Performance Monitoring Report of the Western Cape Government, recording a site visit conducted from 3 to 7 July 2023, which lists Ms Lewendal as the respondent's director. The applicant states that she was paid a salary of R40 000 per month. On that footing he submits that both the attorney and the deponent to the founding affidavit misled the court.
- [14] The answering affidavit makes the further points that no attempt to brief alternative counsel is described; that Advocate Williams chaired the disciplinary enquiry and could hardly have been briefed in the referral, which was served in the very month of her death; that the respondent's attorney had known of the matter from the outset, having signed the notice of intention to oppose in August 2023 and the notice of intention to oppose the default judgment application in March 2024; that no explanation whatsoever is given for the period after the default judgment application was served on 15 March 2024 until the condonation application was handed up on 3 September 2024; and that a litigant who requires condonation must apply immediately upon realising that it is required. The suggestion that the applicant might have abandoned his claim is dismissed as baseless. The applicant asks that the application be dismissed with costs.
- [15] Despite these allegations, which go both to the explanation for the delay and to the candour of the respondent's deponents, the respondent elected not to deliver a replying affidavit. The allegations accordingly stand uncontradicted on the papers.

The hearing

[16] Mrs MacKenzie, who came into the matter at a late stage, argued the respondent's case with commendable candour. She accepted that the delay is substantial and serious, and made no attempt to minimise it; she accepted that there is a gap in the explanation from the delivery of the answering affidavit on 19 September 2024 until the set-down in March 2026; and she accepted that it would have been far better had the statement of response accompanied the condonation application. She submitted, however, that the delay was not wilful and that the proceedings were never abandoned: a notice of intention to oppose was delivered in August 2023, an extension was sought when the notice of bar was received, the default judgment application was opposed, and the condonation application, whatever its imperfections, evidenced a consistent intention to defend. Identifying the presently relevant period as that from 20 March 2024 to 2 September 2024, some five and a quarter months, she submitted that the matter should be viewed holistically: the respondent has a *bona fide* defence with good prospects, the applicant having been found guilty on 11 of 12 charges of serious misconduct after a disciplinary enquiry conducted over five days before an independent chairperson; the prejudice to the applicant is one of delay only, while refusal of condonation may spell the closure of a non-profit organisation employing 18 people and serving a vulnerable community; and the dispute ought to be ventilated on its merits. She relied on *Melane v Santam Insurance Co Ltd*⁴ (*Melane*), on *National Union of Mineworkers v Council for Mineral Technology*⁵ (*NUM*) for the proposition that all the factors must be weighed holistically, and on a further decision cited as *Allround Tooling v NUMSA*⁶ ('Allround Tooling'), cited by her as a matter in which a delay of about a month had been condoned for compelling reasons. She also advanced submissions on the merits of the main claim, contending among other things that the dispute was one of misconduct which ought to have been arbitrated, and that the compensation claimed exceeds the statutory cap for such a dispute; those contentions do not appear from the papers, and it is neither necessary nor appropriate to decide them in this application.

⁴ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C to 532D.

⁵ *National Union of Mineworkers v Council for Mineral Technology* [1998] ZALAC 22; [1999] 3 BLLR 209 (LAC) at para 10.

⁶ *Allround Tooling (Pty) Ltd v NUMSA* [1998] ZALAC 8; [1998] 8 BLLR 847 (LAC).

- [17] Mr du Preez submitted that, whether the application is styled one for the upliftment of the bar or one for condonation, the test is the same, and it founders on the explanation: on the respondent's own showing there is none for the period from 20 March 2024, when its attorney opposed the default judgment application with full knowledge of the position, to 2 September 2024, when the founding affidavit was deposed to; and the respondent, invited by the answering affidavit to explain itself in reply, filed nothing. Relying on *Aspen Holdings (Pty) Ltd and Another v Phelane and Another*⁷ (*Aspen*), he submitted that an unexplained period of delay of this order is fatal without more, the Labour Appeal Court having set aside a grant of condonation where a far shorter delay had been poorly explained. On the default judgment itself he relied on *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd*⁸ (*Lodhi 2*) for the proposition that a plaintiff who has complied with the rules is procedurally entitled to default judgment, the existence or non-existence of a defence on the merits being an irrelevant consideration. He sought the costs of the condonation application, on instructions, by reason of the complete absence of an explanation and the respondent's failure to assist the court by way of a replying affidavit.

The notice of bar and the applicable rules

- [18] The first issue is the status of the notice of bar, because the relief is framed around it: the respondent asks that 'the bar' be uplifted. A notice of bar is a creature of the Uniform Rules of the High Court. The 1996 Rules, which governed this referral at the time, made no provision for it. The word 'bar' does not appear in them, nor in the Practice Manual of this Court.⁹
- [19] The 1996 Rules were not silent on the consequence of a failure to deliver a response; they simply attached a different consequence to it. Rule 6(1)(a)(iv) required every statement of claim to carry:

⁷ *Aspen Holdings (Pty) Ltd and Another v Phelane and Another* [2025] ZALAC 4; [2025] 4 BLLR 409 (LAC) at paras 21 to 24.

⁸ *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* [2007] ZASCA 85; 2007 (6) SA 87 (SCA) at para 27.

⁹ Practice Manual of the Labour Court of South Africa, in effect from 1 April 2013; see clauses 10.1.1 and 10.1.2.

‘a notice advising the other party that if that party intends opposing the matter, a response must be delivered in terms of subrule (3) within 10 days of service of the statement of claim, failing which the matter may be set down for default judgment and an order for costs may be granted against that party’.

[20] Rule 16(1) then provided:

‘If no response has been delivered within the prescribed time period or any extended period granted by the court within which to deliver a response, the registrar must, on notice to the applicant(s), enrol a matter for judgment by default.’

[21] Clause 10.1.2 of the Practice Manual is to the same effect: an application for default judgment is made after the expiry of the *dies* for the filing of a statement of response in terms of rule 6(3)(c). There was, accordingly, no lacuna in the 1996 Rules for a notice of bar to fill. Rule 11(3), which provided that ‘[i]f a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems appropriate in the circumstances’, does not assist the applicant’s erstwhile procedure either: it empowers the court, not a litigant, to adopt a procedure, and only where the rules do not provide for the situation, which they did. It may be noted that the current Rules of this Court,¹⁰ in force from 17 July 2024, do now make provision for a notice to a party in default of a pleading, upon the expiry of which the defaulting party ‘shall be in default of filing the pleading and *ipso facto* barred’; but those Rules post-date the events of 2023 and operate prospectively.

[22] It follows that the notice of bar served on 27 September 2023 had no foundation in the rules then in force and barred nothing. The respondent was never under any bar; it was simply in default of delivering its statement of response, a default which exposed it to the very consequence the statement of claim had warned of, namely default judgment. Strictly, then, there is no bar to uplift, and the second prayer in the notice of motion is misconceived. But nothing turns on the label, and Mr du Preez, correctly and fairly, did not suggest otherwise: on any

¹⁰ Rules for the Conduct of Proceedings in the Labour Court, GN 4775, Government Gazette 50608, 3 May 2024, with effect from 17 July 2024; see rule 16(1).

approach the respondent required, and requires, the condonation of this Court before its response could be received. If the respondent regarded itself as barred, it was required to apply promptly for the upliftment of the bar, tendering its statement of response with the application, as practice in the High Court would in any event require; if it was not barred, it was required to deliver its response together with an application for condonation of its lateness. It did neither. It delivered nothing for a year, and then applied, without a tendered pleading, for condonation of a step it had still not taken. Whichever way the matter is approached, the enquiry is the same: has good cause been shown for the failure, over the whole of the relevant period, to deliver the statement of response?

The legal principles

[23] Rule 12(3) of the 1996 Rules empowered this Court, on good cause shown, to condone non-compliance with any period prescribed by the rules; rule 42(3) of the current Rules is in identical terms. The principles are settled. In *Grootboom v National Prosecuting Authority and Another*¹¹ (*Grootboom*) the Constitutional Court held that '[i]t is now trite that condonation cannot be had for the mere asking'; the party seeking it must furnish a full explanation for the non-compliance, and 'the explanation must be reasonable enough to excuse the default'. The factors identified in *Melane*; the degree of lateness, the explanation for it, the prospects of success and the importance of the case, are weighed together, none being individually decisive; but they are interrelated, and the Labour Appeal Court has recently reaffirmed, in a matter itself concerning the late delivery of a statement of response, that the enquiry is a proportional and holistic one conducted in the interests of justice, having regard to the broader objects of the LRA, including the expeditious resolution of employment disputes.¹²

¹¹ *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC) at paras 23 and 51.

¹² *Government Printing Works v Public Service Association and Another* [2024] ZALAC 63; (2025) 46 ILJ 915 (LAC) at paras 26 to 27.

[24] Two further principles bear directly on this application. The first is that stated in *NUM*:

‘[W]ithout a reasonable and acceptable explanation for the delay, 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.’

[25] In the same vein, in *Grootboom* it was held that ‘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’; and in *Colett v Commission for Conciliation, Mediation and Arbitration and Others*¹³ that where there is a flagrant or gross failure to comply with the rules, condonation may be refused without considering the prospects of success. The second principle, applied by the Labour Appeal Court in *Aspen*, is that every discrete period of the delay must be explained, including the period after the party became aware that condonation was required. In *Aspen* the Labour Court had condoned a 41-day delay in the delivery of a statement of case on a poor explanation, in reliance on prospects of success; a further period of 36 days, after the need for condonation had become apparent, was unexplained. The Labour Appeal Court set the order aside, holding that ‘the failure to explain the further delay after the applicant became aware of the need to apply for condonation is fatal’.

Evaluation

[26] The extent of the delay comes first. The statement of response fell due on 11 August 2023. Even on the respondent’s own approach, which treats the extended notice of bar as fixing the operative date, it fell due by 9 October 2023. The condonation application was deposited on 2 September 2024 and handed up on 3 September 2024, some 11 months later. And the delay did not end there: as at the hearing, on 30 July 2026, the response had still not been delivered, three years after the statement of claim was served. In a statutory dispute-resolution scheme whose very object is expedition, a delay of this order

¹³ *Colett v Commission for Conciliation, Mediation and Arbitration and Others* [2014] ZALAC 1; (2014) 35 ILJ 1948 (LAC) at para 38.

is, on any reckoning, extreme. This is among the worst instances of dilatory litigation this Court has encountered.

- [27] The application is, moreover, afflicted by a defect more fundamental than lateness: it seeks condonation *in vacuo*. The respondent asks the Court to condone the late filing of a pleading which has not been filed, and asks for leave to deliver it at some point after the order. No draft statement of response is annexed from which the Court could satisfy itself of the seriousness of the respondent's intent or the substance of its defence. A party that seeks an indulgence of this magnitude is expected to come to court with the outstanding pleading in hand, demonstrating that, if the indulgence is granted, the matter will proceed without further delay. The absence of the pleading, two years after the application was launched, speaks louder than the averments of intent within it.
- [28] Against those principles the explanation, such as it is, may be assessed by period. For the first period, from August 2023 to March 2024, the founding affidavit offers the death of Advocate Williams, the disarray and financial strain within the organisation, and the belief that the claim might have been abandoned. The death of Advocate Williams, however sad, explains little: the statement of claim was served in the very month of her passing, and she had chaired the disciplinary enquiry, which makes it improbable that she was, or properly could have been, briefed in the referral; no attempt to brief alternative counsel is described. The organisational difficulties provide context, not excuse: on the respondent's own papers Ms Lewendal, an admitted attorney, was engaged with the matter from the outset, signing the notice of intention to oppose on 28 August 2023 and seeking the extension of the notice of bar in October 2023, and the uncontradicted evidence in the answering affidavit is that the respondent's own governmental monitoring report listed her as its director at a salary of R40 000 per month. The belief in abandonment was never a reasonable one for a litigant under a known obligation to plead, and it was in any event destroyed on 15 March 2024, when the default judgment application was served.

- [29] It is the second period that is decisive. On 20 March 2024 the respondent, through its attorney, delivered a notice of intention to oppose the default judgment application. From that date, at the very latest, the respondent knew that its default was being pressed to judgment and that condonation was indispensable. Yet it delivered nothing for five and a quarter months, until the founding affidavit was deposed to on 2 September 2024, the day before the hearing. For that period the founding affidavit offers no explanation whatsoever; Mrs MacKenzie, with proper candour, accepted as much. On the authority of *Aspen*, where far shorter unexplained periods were held fatal to condonation already granted, that concession is the end of the application. The respondent's position is in fact worse than that of the employee in *Aspen*: there the delay in issue was one of weeks and a pleading had at least been filed; here the unexplained period is more than five months, within an overall default measured in years, in respect of a pleading not filed at all.
- [30] The period after the application was launched compounds the position. The answering affidavit of 19 September 2024 squarely accused the respondent's attorney and deponent of having misled the court about the attorney's relationship with the respondent, and squarely recorded that no explanation had been given for the March to September 2024 period. A replying affidavit was the obvious, and invited, vehicle to answer those charges and to fill the gap. None was filed, in the 22 months between the answering affidavit and the hearing; nor was the outstanding statement of response delivered in that time; nor was any supplementary explanation tendered for what is now a further two years of inactivity. The application before the Court speaks only to the period up to September 2024, and the Court decides it on that footing; but the respondent's conduct since then confirms the pattern the earlier periods disclose, and weighs against it in the assessment of where the interests of justice lie.
- [31] In these circumstances the prospects of success need not be reached: on *NUM*, *Grootboom* and *Aspen*, an unexplained delay of this order is fatal irrespective of the merits. It may be said, in fairness to the respondent, that its outline of a defence; a dismissal for misconduct upon the findings of an

independent chairperson is not fanciful on its face; but it rests on bald averment, unaccompanied by the pleading in which it would have to be made good, and bald averments of a defence cannot compensate for the total absence of an explanation. The authority relied upon by Mrs MacKenzie, cited as *Allround Tooling*, does not, on examination, assist the respondent; it is authority the other way. The Labour Appeal Court there refused condonation for heads of argument delivered some three weeks late, holding the explanation tendered to be neither reasonable nor acceptable. If a three-week delay upon an unacceptable explanation could not be condoned, an unexplained default measured first in months and now in years cannot be. *Melane's* holistic weighing does not rescue the application either, for the factors are interrelated: where the delay is extreme and the explanation absent, there is nothing on that side of the scale to weigh.

[32] Nor does prejudice avail the respondent. The prejudice to the applicant is real and continuing: an individual litigant has been kept from the adjudication of his claim for three years by the inactivity of his former employer, in a forum designed for expedition. The prejudice the respondent invokes; the possible closure of a non-profit organisation, the jobs of its employees and the interests of the community it serves is not to be minimised, but it is prejudice of the respondent's own making, and it flows not from any order of this Court but from the respondent's persistent failure, over years and under legal guidance, to take the elementary step of pleading to the claim. An organisation's non-profit character does not exempt its board from the ordinary diligence required of litigants.

[33] Good cause has accordingly not been shown. Condonation is refused, and with it the prayers for the upliftment of the bar, insofar as there is anything to uplift, and for leave to deliver the statement of response.

The default judgment application

[34] That leaves the applicant's application for default judgment, served on 15 March 2024 and twice enrolled. It was not on the roll before this Court, and Mr du Preez properly accepted that it would need to be dealt with in the ordinary

course. Rule 21 of the current Rules provides that default judgments will ordinarily be dealt with by a judge in chambers, upon an affidavit confirming the correctness of the facts averred in the statement of claim, proof of service, and the particulars of remuneration where compensation is claimed; and that if the judge is not satisfied that the requirements are met, or considers it inappropriate to grant default judgment in chambers, the judge may issue directives, including that the plaintiff appear in court to lead evidence. As the Supreme Court of Appeal explained in *Lodhi 2*:

'A court which grants a judgment by default ... does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous one.'

- [35] There is no reason why that application, which has already waited more than two years, should wait further for a hearing in open court if it can properly be determined in chambers. The Registrar will accordingly be directed to place it before this Court in chambers, without prejudice to the Court's powers under rule 21(4) to require more if the papers do not satisfy it.

Costs

- [36] In terms of section 162 of the LRA, costs are awarded according to the requirements of the law and fairness, and do not follow the result as a matter of course. This, however, is not an ordinary case. The respondent sought an extraordinary indulgence and put up, for the decisive period, no explanation at all; it levelled its application at an individual former employee who has been obliged, over two years, to oppose it, to answer it on affidavit, and to appear, twice, to resist it; and, when its own candour was pertinently impugned in the answering affidavit, it elected silence. The employment relationship between the parties has long since ended, so no ongoing relationship counsels restraint. Fairness, in these circumstances, requires that the applicant should not be out

of pocket for successfully resisting an indulgence so poorly explained. The respondent will pay the costs of the condonation application.

Order

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

1. The respondent's application for condonation, for the upliftment of the bar and for leave to deliver its statement of response is dismissed.
2. The respondent is to pay the costs of the application, including the costs of counsel, on scale C.
3. The Registrar is directed to place the applicant's application for default judgment before this Court for determination in chambers in terms of rule 21(3) of the Rules of this Court.



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

Appearances:

For the applicant: Adv T du Preez, instructed by Malcolm Lyons & Brivik Inc

For the respondent: Mrs A H MacKenzie, office bearer of FEDHASA