

SOUTH AFRICA / JUDGMENT

Linoe v Industroclean (Pty) Ltd (JS353/21) [2021] ZALCJHB 404 (25 October 2021)

[2021] ZALCJHB 404**COURT**

Labour Court Johannesburg

BEFORE

F. Coetzee

CASE / FILE NUMBER

JS353/21

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Source record**IN****THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG****Not****Reportable****Not****of interest to other judges****Case****no: JS353-21****In****the matter between:**

LEFATOLA

LINEO Applicant

and

INDUSTROCLEAN (PTY)

LTD Respondent

Heard: 22

October 2021

Delivered: This

judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII.

The

date and time for hand-down is deemed to be 10h00 on 25 October 2021.

Summary:

Condonation

JUDGMENT

COETZEE AJ

- [1] The parties agreed that the matter be determined on paper.
- [2] The applicant approaches this Court for condonation for the late filing of her statement of claim.
- [3] The relevant legal principles to be applied in an application for condonation are well established. This Court is required to exercise a discretion, having regard to the extent of the delay, the explanation for that delay, the prospects of success and the relative prejudice to the parties that would be occasioned by the application being granted or refused. The interest of justice will ordinarily reflect all these factors.
- [4] The principle in *NUM v Council for Mineral Technology*[1] applies where the LAC said the following:

"The approach 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 therefore, the prospects of success and the importance of the case. These facts are interrelated: they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There 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 prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused." (own emphasis)

- [5] In *Melane v Sanlam Insurance Co Ltd*[2] it was held that:

"... Among the facts usually relevant, are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, for that would be a piecemeal approach

incompatible with a true discretion, save of course that if there are no prospects of success there will be no point in granting

condonation. What is needed is an objective conspectus of all the facts."

- [6] In *A Hardrodt (SA) (Pty) Ltd v Behardien and others*[3] (Behardien) the Labour Appeal Court (LAC) restated the guidelines laid down in *Queenstown Fuel Distributors CC v Labuschagne NO and others*[4] inter alia that there must be good cause for condonation in the sense that the reasons tendered for the delay have to be convincing. In other words, the excuse for non-compliance with the six-week time period must be compelling. The onus is on the applicant for condonation to satisfy the Court that condonation should be granted.

[7] In this Court the principles have long been qualified by the rule that where there is an inordinate delay that is not satisfactorily explained, the applicant's prospects of success are immaterial.

[8] The general principles applicable to deciding applications for condonation apply even more stringently where it comes to review

applications. In *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) and others*[5] the Court held that:

'What is clear from the judgment in *Hardrodt* is that general principles applicable to condonation applications are even more stringently applied where it comes to a condonation application for the late filing of a review application. In review condonation applications, the explanation that needs to be submitted must be compelling and the prospects of success need to be strong. Where it comes to the issue of prejudice, the applicant in fact has to show that a miscarriage of justice will occur if the applicant's case is not heard. The reason for these more stringent requirements is that review applications occur after the parties have already been heard, presented their respective cases and a finding has been made. Under such circumstances, considerations of justice, fairness and expedition require that challenges of such findings must not be delayed and must be completed as soon as possible.'

[9] In *Toyota SA Motors (Pty) Ltd v CCMA and others*[6] the Constitutional Court emphasised that one of the fundamental purposes of the Labour Relations Act[7] (LRA) was to establish a system for the simple, quick, cheap, and informal adjudication of labour disputes. When it assesses the

reasonableness of a delay, the Court must not lose sight of this purpose.

[10] Condonation for delays in all labour law litigation is not simply there for the taking. The starting point is that an applicant in an application such as the present, seeks an indulgence and bears the onus to show good cause and a proper case should be made out before the indulgence could be granted.

[11] In *Du Plessis v Wits Health Consortium (Pty) Ltd*[8] the Court held as follows:

"It is clear from the above and other judgments that a claim of lack of funds on its own cannot constitute reasonable explanation for the delay. In other words, when pleading lack of funds as the cause of the delay, the applicant needs to provide more than a mere claim that the reason for the delay is lack of funds. In this respect, the applicant has to take the court into his or her confidence in seeking its indulgence by explaining when, not only that he or she finally raised funds to conduct the case, but also how and when did he or she raise those funds. The 'when' aspects of the explanation are important, as it provided the courts with information as to whether there was any further delay after raising the funds and whether an explanation has been provided for such a delay."

[12] The application is opposed.

Analysis

- [13] The applicant filed her statement of claim on 16 April 2021 instead of 25 January 2021. The delay is almost three months. This is an inordinate delay.
- [14] The applicant is assisted by an attorney appointed by Legal Wise. The attorney on 27 October 2020 requested Legal Wise for an appointment and cover and followed it up on various dates until the approval was given on 20 January 2021 and the first consultation was only possible on 5 February 2021. It is not explained why it was possible only to consult on 5 February
2021. This was already after the expiry of the 90-day period.
- [15] Counsel requested a particular document that she attempted to obtain from her colleagues still at work. She informed her attorney only on 26 March 2021 that she had tried but in vain. Counsel then was instructed to draft the statement of claim without the documents she was looking for. She did not disclose who she approached and when she did it.
- [16] According to her, the festive season from December 2020 to January 2021 also delayed the process and so did the Easter weekend in the beginning of April 2021.
- [17] The explanation is very weak.
- [18] The applicant waited for the appointment of her attorney by Legal Wise. He was appointed on 20 January 2021. From what transpired between the attorney and the insurer shows that the attorney understood the urgency of the matter.
- [19] By 20 January 2020 the attorney knew that time was running out. One can only assume that he advised the applicant that the statement of claim had to be served by 25 January 2021.
- [20] Her explanation in failing to obtain relevant documents lacks detail. In fact, there is no detail whatsoever. When she states that she was unaware of any urgency in obtaining the documents, it rings hollow as she was represented by an attorney and had already consulted an advocate. Her attorney had already expressed the urgency of the matter in his exchanges with the insurer. And eventually it was possible to file the statement of claim without the documents she was looking for. It cannot, however, be said that there is no explanation. The explanation is not reasonable and acceptable.
- [21] The prospects of success are determined as in *Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd* [9] where it was held that a consideration of prospects of success merely implies a determination of the likelihood or chance of success when the main case is heard. A similar approach was followed in *Seatlholo & others v Entertainment Logistics Service (A division of Gallo Africa Ltd)*[10], where it was held that the test is whether the applicants would succeed in the main action if the facts pleaded by them in their condonation application were established at trial. Equally so, the prospects of success do not entail an applicant having to prove on a balance of probabilities that he or she would succeed when the merits of the case are heard[11]

[22] The applicant submits that she was retrenched while others had a shorter service period than she. If she can prove this, then she has prospects. The respondent merely denied her version but does not address it in any detail. The prospects are not so overriding as to cure the leisurely pace at which the matter was pursued.

[23] Prejudice does not determine this application.

[24] It is in the interest of justice that the dispute be ended. Having regard to the long delay and the absence of a reasonable and detailed explanation, the application stands to be dismissed.

Costs

[25] This is not a matter where a cost order is justified.

Order

[26] I make the following order:

1. The application for condonation for the late delivery of the statement of case is dismissed with no order as to cost.

F. Coetzee

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: On Paper

Instructed by:

For the Respondent: On Paper

[1]

[1999] 3 BLLR 209 (LAC) at para 10

[2] 1962 (4) SA 531 (A) at 532 C - F.

[3]

(2002) 23 ILJ 1229 (LAC).

[4] (2000) 21 ILJ 166 (LAC).

[5] (2015) 36 ILJ 232 (LC).

[6]

(2016) 37 ILJ 313 (CC).

[7] Act 66 of 1995 as amended.

[8] [2013] JOL 30060 (LC) at para 16.

[9] 2009 30 ILJ 347 (LC) at para 27.

[10]

(2011) 32 ILJ 2206 (LC) para 24.

[11] Production Institute of South Africa (PTY) Ltd v CCMA and others (Case No: JR1974/2009) at para 12; See also SA Democratic Teachers Union v Commission for Conciliation, Mediation and Arbitration and others

(2007) 28 ILJ 1124 (LC) at para 38, where it was held that; ‘A commissioner in considering prospects of success does not have to pronounce on the merits of the case. All that the commissioner needs to do is to investigate whether on the averments made by the applicant there is a prima facie case, that there is a chance of succeeding when the main case is heard. In other words to establish whether there is a reasonable prospect of success on the merits, it suffices if an applicant can show a prima facie case through setting out averments which, if established at the proceedings of the main case, would entitle the applicant to some relief. The applicant need not deal fully with the merits of the case’.

[11] Production Institute of South Africa (PTY) Ltd v CCMA and others (Case No: JR1974/2009) at para 12; See also SA Democratic Teachers Union v Commission for Conciliation, Mediation and Arbitration and others

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Prepared on 10 October 2026 · Esheria