

SOUTH AFRICA / JUDGMENT

# Masha v Zizwe Opencast Mining (Pty) Ltd (JS188/23) [2025] ZALCJHB 337 (6 August 2025) [2025] ZALCJHB 337

COURT

Labour Court Johannesburg

BEFORE

H Schensema

CASE / FILE NUMBER

JS188/23

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THE LABOUR COURT OF  
SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

No: JS188/23

In

the matter between: MALETSOKO PAULOS  
MASHA  
Applicant  
and  
ZIZWE  
OPENCAST MINING (PTY) LTD  
Respondent

Heard: 15 May 2025

Delivered: 06 August 2025

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**JUDGMENT**

SCHENSEMA, AJ

**Introduction**

- [1] This is an opposed condonation application brought by the applicant for the late filing of the statement of case.

The application to condone the late filing of the review application

Degree of lateness

- [2] The applicant referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) on the basis of an unfair retrenchment on 8 March 2023. The matter was conciliated on 30 March 2023 and a certificate of non-resolution was issued by the Commissioner in which the applicant was directed to refer the dispute to the Labour Court.
- [3] In terms of section 191(11)(a) of the Labour Relations Act[1] (LRA) the applicant was required to have referred the matter to the Labour Court within 90 days of the certification by the CCMA that the dispute remains unresolved. The period for filing the statement of case expired on 28 June 2023, the statement of case was only filed on 24 January 2024 and is accordingly 209 days late.
- [4] In respect of the condonation application, the applicant only served his application on 31 May 2024, 120 days after the statement of case had been filed.

The explanation for the delay

- [5] The applicant submits that he consulted with his attorneys of record on 17 April 2023, following which the statement of case was prepared. On 9 May 2023, the applicant was requested by his attorneys to provide the contact details of the respondent.
- [6] As the applicant was unable to provide the respondent's contact details, it was subsequently decided to instruct the sheriff to serve the statement of case. On 11 May 2023, the sheriff of Middelburg was instructed to effect service of the statement of case.
- [7] A further delay was caused as a result of the applicant's attorneys of record utilising the South African Post Office to post the statement of case to the sheriff. As a result, the statement of case was only received by the sheriff on 31 August 2023.
- [8] On 23 August 2023, the sheriff advised the applicant's attorneys of record that it did not have jurisdiction to serve the documents, despite prior confirmation from the attorneys, before dispatching the statement of case, that the sheriff did, in fact, have jurisdiction. In response, the attorneys requested that the sheriff return the statement of case by post. To date, the statement of case has not been received from the sheriff.

- [9] The applicant ultimately submits that as a result of the collapse of the South African Post Office that this resulted in the delay in filing the statement of case, coupled with the fact that the applicant was not in possession of the respondent's email address.

#### Condonation Application

- [10] The delay in filing the condonation application was as result of the applicant's attorney of record's non availability due to a heavy workload and court schedule.
- [11] The applicant has further submitted that only once he had received the statement of response did it become clear that a condonation application was required and he is of the view that in light of the fact that the statement of response was filed in March 2024, that the condonation application is therefore only two months late.
- [12] In respect of the prospects of success, the applicant in summary is of the view that the respondent had failed to adhere to the legislative prescripts prescribed by section 189 of the LRA, which resulted in the applicant simply being dismissed without the respondent complying with its obligations as set out in section 189 of the LRA. The prior mass retrenchment did not apply to the

applicant as he was permanently employed by the respondent and in light hereof his dismissal is substantively and procedurally unfair.

- [13] In opposition to the applicant's condonation, the respondent has provided extensive background facts to explain how the dispute came about. In summary, the respondent was contracted as an opencast mining contractor at the Lwala Mine and the applicant was employed on 25 October 2017 in the position of Excavator Ripper Operator. In terms of the contract between the respondent and Lwala Mine, the service agreement would come to end upon the closure of the mine in August 2022.
- [14] On 30 March 2022, the respondent issued the section 189(3) notice in terms of the LRA in respect of which 204 employees were affected as a result of the closure of the mine. The employees together with the applicant were consulted with and on 31 March 2022, the respondent requested facilitation at the CCMA. Numerous facilitated consultations were held, and it was agreed that the retrenchments would be implemented in a phased approach.
- [15] On 28 June 2022 the life of the mine was extended which resulted in a number of employees contracts being extended. As a result of the mine closure, the services of the Excavator Ripper Operators were among those who were released early and the only services that were required were that of the Excavator Bucket Operators. However, the salary of this position was lower than that of an Excavator Ripper Operator.

- [16] The respondent offered the 4 Excavator Ripper Operators the short-term positions of Excavator Bucket Operators at a reduced rate for purposes of finishing off the duties at the mine. The offer was rejected by the applicant. As a result, the applicant was issued with his retrenchment letter and was further informed that he would be paid in lieu of his notice period for October 2022.
- [17] Upon receipt of the retrenchment letter, the applicant attempted to render services as an Excavator Bucket Operator, however due to him having previously rejected this position and further refusing to sign the change of status, the respondent submits that the applicant had not commenced with the short-term position of Excavator Bucket Operator.
- [18] The applicant subsequently referred an unfair dismissal dispute to the Bargaining Council for the Civil Engineering Industry. On 26 October 2022, the dispute was settled, and the applicant agreed to accept a new position at a reduced rate and, in doing so, withdrew his referral.
- [19] Throughout this time, the applicant was well aware that the life of the mine was coming to an end and on 23 January 2023, the respondent issued the applicant with a retrenchment letter in which the applicant was inter alia advised that his last month would be February 2023. The mine closed on 28 February 2023, thereafter which the applicant referred a dispute to the CCMA claiming an unfair retrenchment.
- [20] The respondent further inter alia submits that the Labour Court lacks jurisdiction to determine the alleged procedural unfairness of the retrenchment on the basis of section 189A(13) of the LRA.

## Analysis

of the condonation application for the late filing of the statement of case

- [21] 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 regard to all these factors.
- [22] In *A Hardrodt (SA) (Pty) Ltd v Behardien and others*[2] (Hardrodt) the Labour Appeal Court (LAC) restated the guidelines laid down in *Queenstown Fuel Distributors CC v Labuschagne NO and others*[3] and held inter alia that there must be good cause shown 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 time periods must be compelling. The onus is on the applicant to satisfy the Court that condonation should be granted.

[23] The general principles applicable to deciding applications for condonation apply even more stringently when 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*[4] (Thilivali), the Court said:

‘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.’

[24] The courts have held and emphasised that an applicant must necessarily act with the degree of diligence required, thus giving effect to the statutory imperative of expeditious dispute resolution. The fundamental requirement for expedition cannot be ignored.

[25] The onus is on the applicant seeking condonation to satisfy the Court that condonation should be granted. In employment disputes, there is an additional consideration which applies in determining whether the onus has been discharged, as was held in *Thilivali*: [5]

‘There is, however, an additional consideration which applies in employment disputes in determining whether an applicant for condonation has discharged this onus. This is the fundamental requirement of expedition. The Constitutional Court has, as a matter of fundamental

principle, confirmed that all employment law disputes must be expeditiously dealt with and any determination of the issue of good

cause must always be conducted against the back drop of this fundamental principle in employment law.’

[26] In summary: the Courts have endorsed the principle that where there is a delay with no reasonable, satisfactory and acceptable

explanation for the delay, condonation may be refused without considering prospects of success, and to grant condonation where the delay is not explained may not serve the interests of justice. The expeditious resolution of labour disputes is a fundamental consideration.

[27] Notwithstanding the aforementioned principle, a measure of flexibility has been applied where required in the interests of justice. In *National Education Health and Allied Workers Union obo Mofokeng and Others v Charlotte Theron Children's Home*[6] it was determined that, in the interest of justice, the case should proceed, as the policy in question appeared to be deeply influenced

by a racist perspective and was perpetuating ongoing racial discrimination. In this case the circumstances were described as "exceptional" thereby justifying less focus on the unexplained periods of delay.

[28] In the matter of *Government Printing Works v Public Service Association and another*[7] the LAC held that:

[26] Judicial discretion involves a value judgment based on the facts of the case. The Labour Court must be fair to both sides. It must also consider the broader objects of the LRA, including the importance of expeditious resolution of employment disputes. The facts that must be considered in determining whether or not it is in the interests of justice to grant condonation, and the appropriate approach, have now been resolved as follows:

*"[22] ... [T]he concept "interests of justice"... 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..." and the prospects of success. It is crucial to reiterate 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. (own emphasis)*

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

[51] 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."

[27] This description evokes a balancing approach, characterised by proportionality and flexibility. The general principle remains that the various factors are to be considered collectively, and not mechanically, in determining the interests of justice.’

[29] It is in this context that the application for condonation stands to be determined.

#### Explanation for the delay

[30] It is trite that a failure to comply with the timeframes must be explained and the reasonableness of the delay should be considered by having regard to the explanation for the delay.

[31] The explanation for the delay has to be compelling, convincing and comprehensive and should cover every period of the delay.[8] Furthermore that the explanation provided is reasonable and acceptable. In this regard an applicant in a condonation application

is required to provide an explanation for the entire period of the delay and the aspects related thereto.

[32] The facts before this Court required the applicant to provide an explanation for the entire period of the delay, i.e. from 28 June 2023 to 31 May 2024.

[33] The applicant inter alia relies on the delay by the South African Post Office for the late filing of the statement of case in that he was unable to obtain the respondent’s email addresses for service, this notwithstanding the fact that the respondent’s email address is recorded in annexures “N1” to “N4”. These annexures relate to the withdrawal by the applicant in respect

of his first referral and clearly reflects the respondent’s email address.

[34] It is therefore implausible that the applicant was not in possession of the respondent’s email address.

[35] No explanation has been provided for the period between May 2023 and August 2023. Furthermore, the applicant has failed to explain why it was necessary for the sheriff to return the statement of case by post to the applicant’s attorneys of record in order to effect service on the respondent, and why a new statement of case was not simply issued and served on the respondent via email.

[36] No explanation is provided for the period from September 2023 to January 2024.

[37] The delay is further compounded by the fact that the applicant only filed his condonation application in May 2024. It is trite that an application for condonation must be brought as soon as it was discovered that it would be necessary to bring such an application, and this fact should have been clear to the applicant by 31 August 2023 when the sheriff of Middleburg confirmed that they had received the statement of case and that it did not have jurisdiction to serve the statement of case. The condonation application was however only filed on 31 May 2024.

- [38] No explanation has been provided by the applicant for this excessive delay, other than to state that the applicant only became aware that a condonation application was required upon receipt of the respondent's statement of response.
- [39] The applicant has failed to discharge the onus to show good cause why the indulgence sought should be granted. The delay is excessive and required an extensive explanation, which the applicant has failed to provide.

#### Prospects of Success

- [40] In light of the excessive delay and the explanation provided not being compelling or even adequate, it leaves the issue of prospect of success.
- [41] With reference to the aforementioned authorities, the Courts have affirmed that where there is a failure to provide a comprehensive, compelling, or convincing explanation for a material period of the delay, the prospects of success become irrelevant and need not be considered.
- [42] The excessive delay required the applicant to provide a detailed and acceptable explanation, which the applicant failed to give. The reasons provided by the applicant, cannot be considered reasonable or even acceptable under the circumstances.

#### Prejudice

- [43] The applicant submits that the respondent would not be prejudiced were the late filing of the statement of case to be condoned on the basis that the pleadings have already been finalised and the only outstanding issue that remains is the convening of the pre-trial conference and the filing of the pre-trial conference minute.
- [44] On the other hand the respondent submits that it would be severely prejudiced were condonation to be granted as it would be financially prejudiced in that it would be required to engage the services of legal practitioners to deal with the matter.
- [45] The Constitutional Court in the opening paragraph of *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[9] held that:

'Time periods in the context of labour disputes are generally essential to bring about timely resolution of the disputes. The dispute-resolution

dispensation of the old Labour Relations Act was uncertain, costly, inefficient and ineffective. The new Labour Relations Act (LRA)

introduced a new approach to the adjudication of labour disputes. This alternative process was intended to bring about the expeditious

resolution of labour disputes, which by their nature, require speedy resolution. Any delay in the resolution of labour disputes undermines the primary object of the LRA. It is detrimental not only to the workers who may be without a source of income pending the resolution of the dispute but, ultimately, also to an employer who may have to reinstate workers after many years.'

[46] This Court exercises a discretion that must be applied judicially, based on the specific facts of each case, and ultimately guided by considerations of fairness to both parties. While refusing to condone the late filing of the statement of case will prevent the applicant from pursuing the matter before this Court, the prejudice to the respondent outweighs the prejudice suffered by the applicant.

[47] For the afore stated reasons, I am of the view that no basis has been established by the applicant to justify its shortcomings in the condonation application to be overlooked in the interests of justice.

#### Costs

[48] This Court has a wide discretion insofar as the awarding of costs is concerned, and the principle that costs ought to follow the result does not, as a rule or general principle, apply in the Labour Court.

[49] I am of the view that this is a matter in which no costs ought to be awarded.

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

#### Order

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

H. Schensema

Acting Judge of the Labour Court of South Africa

#### Appearances:

For the Applicant: Mr MC Mathabathe

For the Respondent: Advocate M Lukhele (Trust Account Advocate)

[1] Act 66 of 1995, as amended.

[2]

(2002) 23 ILJ 1229 (LAC).

[3]

(2000) 21 ILJ 166 (LAC).

[4]

(2015) 36 ILJ 232 (LC) at para 22.

[5] Thilivali at para 25.

[6]

[2004] 10 BLLR 979 (LAC).

[7]

[2025] 2 BLLR 112 (LAC) at para 26.

[8] Van Wyk v Unitas Hospital and Another 2008

(4) BCLR 442 (CC).

[9] (2016) 37 ILJ 313 (CC) at para 1.

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