

SOUTH AFRICA / JUDGMENT

Molefe and Another v Unitrans Passenger (JS78/22) [2025] ZALCJHB 326 (12 June 2025) [2025] ZALCJHB 326

COURT

Labour Court Johannesburg

BEFORE

H Schensema

CASE / FILE NUMBER

JS78/22

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Source record**THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG****Not Reportable****Case****No: JS782/22****In**

the matter between:

REGINALD
MOLEFE
First Applicant
PETER
KWANGA
Second Applicant
and
UNITRANS PASSENGER
(Known
as BOJANALA BUS)
Respondent

Heard:

13 May 2025

Delivered:

12 June 2025

JUDGMENT

SCHENSEMA, AJ

Introduction

- [1] This is an opposed condonation application for the late filing of the applicants' statement of claim.

Background

- [2] For the purposes of this judgment, it is appropriate to commence with a concise overview of the relevant factual background.
- [3] The applicants were employed as inspectors. On 19 July 2022, the respondent's employees embarked on an unprotected strike. Following the return to work, the employees who had participated in the unprotected strike were issued with final written warnings.
- [4] The applicants, however, were charged with an additional charge of incitement and were subsequently dismissed in September 2022. What precisely transpired, resulting in the applicants' dismissal, is the subject of the dispute.
- [5] The applicants have submitted that they were scheduled for the afternoon shift commencing at 12h00 midday until 21h00. Upon their arrival at work, they were unable to gain access to the respondent's premises in light of the work stoppage. Upon gaining access to the respondent's premises, they were advised by the Chief Inspector Netshamolota to sign the daily register in order to prove that they were not participating in the strike.
- [6] After signing the register, the applicants waited outside. Whilst waiting, the respondent's management addressed the striking workers, instructing the employees to return to work, which instruction was ignored.
- [7] On 20 July 2022, the applicants were scheduled to work the morning shift, which commenced at 03h00 and ended at 12h00 pm. Upon their arrival, the strike was still ongoing. On 21 July 2022, the strike ended, and upon their arrival at work, the applicants were suspended for having initiated the strike. A joint disciplinary hearing was held for the employees who had engaged in the unprotected strike, which ultimately resulted in the employees receiving a final written warning.
- [8] The applicants however, were subjected to a separate disciplinary enquiry in which they faced an additional charge of incitement, resulting in their dismissal.
- [9] The respondent's version is that in addition to the applicants' involvement in the unprotected strike, the applicants were implicated in several other acts of unlawful conduct and misconduct in that the applicants had:

9.1 Acted as spokespersons for the striking employees;

9.2 Refused to allow members of management to give feedback on the issues raised by the striking employees; and

9.3 Stated to members of management that if the strikers' demands were not met, no one would return to work, even after the interdict had been granted by the Labour Court.

[10] Dissatisfied with their dismissal, the applicants referred an unfair dismissal dispute to the South African Road Passenger Bargaining Council. On 3 November 2022 a certificate of non-resolution was issued in which the applicants were required within 90 days to refer their unfair dismissal dispute to the Labour Court.

[11] The statement of claim ought to have been filed at the Labour Court on or before 1 February 2023, however was only served on the respondent on 31 May 2024 and filed at Court on 3 June 2024. The filing of the statement of claim is therefore 16 months late.

[12] Notwithstanding that the statement of claim was only filed at Court on 3 June 2024, the condonation application for the late filing of the statement of claim was filed 6 weeks later on 17 July 2024.

Reasons

for the delay

[13] The applicants have submitted the following reasons for the delay in filing the statement of claim:

13.1 At the conciliation, the applicants were represented by Mr Letlape of NUMSA;

13.2 The applicants believed that at the conclusion of the proceedings on 3 November 2022 that NUMSA would continue to represent the applicants at the Labour Court;

13.3 Mr Letlape subsequently advised the applicants that NUMSA was "not taking their matter seriously" and proposed to the applicants that they lodge their case with the Labour Court themselves, and further informed the applicants of the need to ensure compliance with the timeframe;

13.4 On 9 November 2022 the applicants received their case number, thereafter which they consulted with an Advocate Moloto and instructed him to proceed to draft the statement of claim;

13.5 The applicants at this stage believed that their matter was being dealt with by Advocate Moloto and that the statement of claim would be timeously filed in accordance with the Rules of this Court;

13.6 The applicants subsequently consulted with Advocate Moloto at least 3 times a month from November 2022 to July

2023. The reason for these consultations has not been disclosed by the applicants. The applicants, however, continued to believe throughout these numerous consultations that the statement of claim had been served and filed;

13.7 The applicants subsequently contacted the respondent's chief inspector to enquire whether the respondent had received the statement of claim. In response to this, Chief Inspector Netshamolota informed the applicants that the respondent had not received the statement of claim. By this stage, the statement of claim was already 5 months late;

13.8 After having been informed by Chief Inspector Netshamolota that the statement of claim had not been served on the respondent, the applicants contacted Advocate Moloto;

13.9 On 17 August 2023, the applicants demanded proof from Advocate Moloto that the statement of claim had been served on the respondent. In response to this demand, Advocate Moloto informed the applicants that the statement of claim had not been served and filed, resulting in the applicants terminating his mandate and lodging a complaint with the Legal Practice Council on 22 August 2023;

13.10 The first applicant subsequently contacted his brother-in-law, who advised the first applicant to seek the assistance of T Mapanza attorneys. At this stage, the statement of claim was 6 months overdue;

13.11 On 28 September 2023, the applicants duly signed a mandate with Mrs Thandeka Mpanza of T Mapanza Attorneys and subsequently instructed

her to proceed with the filing of the statement of claim;

13.12 Notwithstanding the signing of the mandate in September 2023, on 27 November 2023, Mrs Mapanza advised of a conflict of interest and that she could no longer continue with the instruction. A period of almost 2 months had passed since the signing of the mandate. No explanation for this period has been provided;

13.13 The applicants were subsequently advised by Mrs Mapanza to approach Mrs Mpho Mogodi, who assisted on a pro bono basis;

13.14 Despite the referral, Mrs Mogodi showed no interest in assisting the applicants;

13.15 The applicants subsequently met with Mr Letlape of NUMSA, who referred the applicants to Mrs Portia, at this stage, the statement of claim was already 12 months late;

13.16 On 25 February 2024, Mrs Portia referred the applicants to Mqina attorneys. The applicants consulted with Mr Mqina on 26 February 2024, and Mr Mqina advised the applicants that he would require R2500.00 for him to travel to Johannesburg for purposes of perusing the court file to determine what progress had been made. Given the applicants' financial constraints, they were not able to immediately make the payment to Mqina attorneys;

13.17 On 12 March 2024, it was confirmed that nothing other than a case number had been obtained in respect of this matter. No explanation has been provided as to why it was necessary for an inspection of the Court file to be made, given that the applicants at this stage were fully aware that the statement of claim had not been filed;

13.18 Notwithstanding the applicants being advised of their limited prospects of success, the applicants were able to convince Mqina attorneys on a pro bono basis to assist them; and

13.19 The statement of claim was subsequently served and filed on 31 May 2024 and 3 June 2024, respectively.

Prospects of Success

- [14] In respect of the prospects of success, the applicants refer this Court to their statement of claim in which they have set out the various factors in support of their claim that they have good prospects of success.
- [15] In summary, the applicants maintain that they did not participate in the unprotected strike and further deny having incited the strike action. The applicants have further submitted that the respondent's sanction was inconsistent in that other employees who had participated in the unprotected strike had only received a final written warning.
- [16] Furthermore in light of the fact that the charges emanated from the same set of facts, the decision to dismiss was unfair. In conclusion, the applicants are of the view that the respondent has adduced no evidence to support the charges against the applicants and, in this regard, rely on the fact that they had been paid during the unprotected strike action.

Analysis

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

- [17] 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 for all these factors.
- [18] In *A Hardrodt (SA) (Pty) Ltd v Behardien & others*[1] (Hardrodt) the Labour Appeal Court (LAC) restated the guidelines laid down in *Queenstown Fuel Distributors CC v Labuschagne NO and others*[2] 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.

[19] 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.

[20] 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 *National Union of Metalworkers of SA on behalf of Thilivhali v Fry's Metals (A Division of Zimco Group) & others (Thilivali)*: [3]

‘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.’

[21] 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.

[22] Notwithstanding the aforementioned principle, a measure of flexibility has been applied where required in the interests of justice. In *NEHAWU obo Mofokeng & others v Charlotte Theron Children's Home* [4] 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.

[23] In the matter of *Government Printing Works v Public Service Association and another* [5] the LAC held at paragraph 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 factors 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.

- [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.’ (own emphasis)
- [24] It is in this context that the application for condonation stands to be determined.

Explanation for the delay

- [25] It is trite that a failure to comply with the timeframes must be fully explained and the reasonableness of the delay should be considered by having regard to the explanation for the delay.
- [26] The explanation for the delay has to be compelling, convincing and comprehensive and should cover every period of the delay.[6] 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.
- [27] The facts before this Court required the applicants to provide an explanation for the entire period of the delay, i.e. from 1 February 2023 to 3 June 2024.

[28] With reference to the explanation for the delay, the applicants have attempted to provide an explanation by setting out the following time periods:

28.1 9 November 2022, the applicants applied for a case number;

28.2 During November 2022, a consultation was held with Advocate Moloto and the applicants were subsequently under the mistaken belief that their statement of claim had been served and filed by Advocate Moloto;

28.3 From November 2022 to July 2023, the applicants consulted with Advocate Moloto three times a month. The reason for these consultations is not disclosed;

28.4 Sometime in July/August 2023, the applicants contacted Chief Inspector Netshamolota who informed them that the respondent had not received the statement of claim. The reason for this contact is not explained;

28.5 On 17 August 2023, Advocate Moloto admitted to not having served and filed the statement of claim;

28.6 On 28 September 2023, a new mandate was signed with T Mapanza Attorneys;

28.7 27 November 2023, T Mapanza Attorneys withdraw on the basis of a conflict of interest;

28.8 Contact is made with Mrs Mpho Mogodi (date unknown);

28.9 No progress is made by Mrs Mogodi and the applicants approach Mr Letlape of NUMSA (date unknown), who advises the applicants to contact Mrs Portia;

28.10 Mrs Portia makes contact with Mqina Attorneys on 25 February 2024;

28.11 Consultation with Mqina Attorneys is held on 26 February 2024;

28.12 12 March 2024, the court file is inspected by Mqina Attorneys; and

28.13 On 31 May 2024, the statement of claim is served on the respondent and filed at court on 3 June 2024.

[29] It is clear from the aforementioned timeline that the applicants have failed to provide an explanation for the entire period of the 16 month delay. The case law in this regard is clear.

[30] In *Sibanyoni v Trans-Africa Projects (Pty) Ltd*[7], the Labour Court held that an explanation for the delay in referral to the Labour Court has to be compelling, convincing and comprehensive and should cover every period of the delay.

[31] Whilst I am sympathetic to the applicants' challenges, it is clear from the time line provided that the applicants for long periods of time did nothing under circumstances where they were well aware that there was a specific time period in which the statement of claim needed to be filed.

[32] Whilst much of the blame can be attributed to the various legal representatives (prior to Mqina Attorneys' appointment), whose representation can only be described as deplorable, there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence of the insufficiency of the explanation tendered.

[33] In *SA Post Office Ltd v Commission for Conciliation, Mediation & Arbitration & others*[8] the learned judge confirmed that in an application for condonation, a party cannot use the negligence of its legal representative as a reason for failing to adhere to the statutory time period. Thus, the applicants cannot even rely on the negligence and/or incompetence of their representatives to justify the delay.

[34] In *Superb Meat Supplies CC v Maritz*[9] the court held that there have been frequently repeated judicial warnings that there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence of the insufficiency of the explanation tendered. It has never been the law

that invariably a litigant will be excused if the blame lies with the attorney, to hold otherwise might have a disastrous effect upon the observance of the rules of this court and set a dangerous precedent. It would invite and encourage laxity on the part of practitioners. This principle was enunciated in the *PPWAWU & others v AF Dreyer & Co (Pty) Ltd*[10] where the court held that "employees are not entitled to rely on the tardiness of their representative. Although the delay was caused by the negligence of the representative, there are limits to which applicants can rely on such negligence even when they are personally innocent of any tardiness." [11]

[35] For purposes of properly determining the condonation application and with reference to recent case law in particular the matter of *Government Printing Works v Public Service Association and Another*[12] (Government Printing) I have not limited my assessment of the condonation application on the basis of the reasons for the delay only.

[36] It is for this reason that I have further considered whether compelling reasons have been established by the applicants to justify its shortcomings in their condonation application to be overlooked in the interests of justice.

[37] There can be no dispute that the delay in this matter is excessive, thereby necessitating the applicants to provide a full explanation for the delay.

[38] By their own admission, the applicants were aware of the applicable timeframes. Nevertheless, they failed to pursue their dispute expeditiously. The reasoning for the numerous monthly consultations with Advocate Moloto, for example, are not fully explained. In this regard, I can only agree with the respondent that were the applicants of the belief that their statement of claim had been filed, there would have been no reason to consult with Advocate Moloto in the absence of the respondent's response to the statement of claim.

- [39] Furthermore, no reasons have been provided (despite the applicants' belief that the statement of claim had been served on the respondent) as to why they made contact with the respondent's chief inspector to establish whether the statement of claim had been served on the respondent.
- [40] The applicants' prospects of success in my view are not sufficient to excuse their failure to provide a full account for the delay. The lengthy and unexplained periods of inaction, despite their awareness of the deadlines, therefore, cannot be overlooked. In short, there is nothing special about the applicants' case that would make a compelling case for the shortcomings in the condonation application to be overlooked in the interest of justice.
- [41] The onus falls on the applicants to convince this Court that a case for condonation has been made out. For the reasons set out above, I am not satisfied that the applicants have shown good cause for condonation to be granted, and it would not be in the interests of justice to do so.

Costs

- [42] This Court has a wide discretion in awarding costs, I am of the view that this is a matter where the interests of justice will be best served by making no order as to costs.

- [43] In the premises, I make the following order:

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 Applicants: Mr Mqina of Mqina Attorneys

For the Respondent: Advocate C Orr SC

Instructed by:

Bowman Gilfillan Attorneys

[1]

(2002) 23 ILJ 1229 (LAC).

[2]

[1999] ZALAC 24; (2000) 21 ILJ 166 (LAC).

[3] Thilivali (2015) 36 ILJ 232 (CC); [2014] ZALCJHB 115 at para 25.

[4]

[2004] 10 BLLR 979 (LAC); (2004) 25 ILJ 2195 (LAC).

[5]

[2025] 2 BLLR 112 (LAC).

[6] Van Wyk v Unitas Hospital and Others 2008

(4) BCLR (CC); [2007] ZACC 24.

[7] (J385/16) [2018] ZALCJHB 130 (13 March 2018).

[8]

(2011) 32 ILJ 2442 (LAC); [2012] 1 BLLR 30 (LAC).

[9]

(2004) 25 ILJ 96 (LAC).

[10]

[1997] 9 BLLR 1141 (LAC).

[11] Ibid at para 14.

[12] [2024] ZALAC 63; [2025] 2 BLLR 112 (LAC).

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Prepared on 9 October 2026 · Esheria