

**GENERAL MEMORANDUM IN RESPECT OF APPLICATIONS FOR CONDONATION FOR THE LATE REFERRAL OF DISPUTES TO THE TRANSNET BARGAINING COUNCIL**

1. *The purpose of this general memorandum is to provide information and guidelines to assist parties where an application for condonation of the late referral of a dispute to Transnet Bargaining Council is sought.*
2. *Parties should be aware that Clause 2.3.1 of the Collective Agreement on the Rules Governing Conciliating and Arbitrating Disputes of the Transnet Bargaining Council reads as follows:-*

**“The dismissed employee may refer the dispute in writing to the Council within thirty (30) days of the date of dismissal or if it is a later date, within thirty (30) days of the employer making a final decision to dismiss the employee, to the Council for arbitration without the need for the Council to convene a conciliation.”**

3. *Parties should note the following aspects of this Clause of the Constitution:-*
  - 3.1 *The dispute must be referred within 30 Calendar days and not 30 working days from the date of the relevant dismissals.*
  - 3.2 *The notification of the dispute must be in writing.*
  - 3.3 *Where the referral of the dispute is after the 30 Calendar day period, the party referring the dispute is obliged to request condonation.*
  - 3.4 *Only once a request for condonation has been referred to the Secretary of the Transnet Bargaining Council is the Secretary of the Transnet Bargaining Council obliged to refer such application for condonation to a panel of arbitrators.*

4. *The Labour Court has confirmed that in considering the merits of a condonation application, the arbitrator has a judicial discretion and the test that the arbitrator is to apply is the test laid down in Melane v Santam Insurance Company Limited 1962(4) SA531(A) at 532 C-F where the following is stated:-*

**“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 therefore, Prospects of success, and the Importance of the Case. Ordinarily these facts inter-relate : 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 would be no point in granting condonation.”**

5. *Parties would be well advised in either seeking condonation or in opposing any application for condonation to set out in writing to the Bargaining Council for onward transmission to the arbitrator the parties’ submissions in regard to the following aspects:-*

- 5.1 ***The Degree of Lateness of the application for Condonation;***
- 5.2 ***Any Explanation for the late submission of the dispute;***
- 5.3 ***The Prospects of Success of the applicant for condonation in the principal case, that is, in an arbitration in respect of the alleged unfair dismissal;***
- 5.4 ***The Importance of the Case.***

6. *Parties are therefore encouraged and advised to make submissions on these various elements so that the arbitrator, in applying the test that he/she is obliged to apply, is aware of the submissions of both sides in regard to these aspects.*

7. *It should be stressed that the Appellate Division did not state that the above factors are the only factors to be considered but stated that the*



*above factors are “among the facts” that are usually relevant to the determination of an application for condonation. If there are other aspects which Parties believe should be taken into account then those factors should be raised in the written submissions.*

8. *Parties are advised that in terms of the legal principle of audi alteram partem, parties are to be afforded the opportunity to present their cases to the arbitrator in respect of the application for condonation. It has been the practice of the Transnet Bargaining Council to invite written submissions in regard to the application for condonation and the response thereto from the employer without a formal hearing before the arbitrator. The arbitrator is then, in the ordinary course, furnished with the written submissions of the parties. It is necessary for the Transnet Bargaining Council however to state that it is open to the parties to request that a formal hearing be convened before the arbitrator for the purpose of making oral submissions or leading evidence should the parties require to do so. There is obviously a cost element to this type of procedure but such a procedure is nevertheless available to the parties.*
9. *In order to assist the Transnet Bargaining Council in referring the application for condonation to an arbitrator, parties are required to indicate in their written submission whether or not they wish to attend at a formal hearing before the arbitrator who will consider the application or whether each party would be satisfied with the submission of written argument.*
10. *The Transnet Bargaining Council trusts that this memorandum will assist parties in formulating their written submission in respect of application for condonation of the late referral of disputes.*