



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE HIGH COURT LOCAL DIVISION: BHISHO**

CASE NO: 513/2015

Reportable	YES/NO
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In the matter between:

**THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF HEALTH,
EASTERN CAPE**

Applicant

and

LEONIE JANTJIES

Respondent

JUDGMENT

NTLAMA AJ

- 1 This matter concerns the application for condonation in respect of the late filing of a discovered document as envisaged in Rule 28 of the Uniform Rules of the Court. The applicant seeks to amend her heads and file a document entitled: Service Level Agreement (SLA: FA2) which was a contract between her and the second respondent in the main action: SAWAS Hospital. The latter was a private and state

aided hospital. The SLA contains an indemnity clause which absolves the Department of Health (DH): first respondent in the main action, from liability that might be incurred as a result of the injury suffered by the victim whilst in the care of the second respondent.

- 2 The applicant contended that after filing the heads of arguments which was solely based on the Transfer Agreement that came into effect on 1 April 2011, the existence of the SLA: FA2 came to her attention. She, therefore, had to try and get it in order to supplement her heads. The applicant pointed out that after extensive search for the document, she finally got her hands on it in the archives of the SAWAS Hospital. It was then not her intention to delay the proceedings but to lay a solid foundation in her argument. She also alluded to the fact that this was a reasonable and a satisfactory explanation for the late filing. She further demonstrated that she has a *bona fide* defence that forms the core content of the main cause of action. She will also be prejudiced should the condonation not be granted.
- 3 On the other hand, the respondent, who is the applicant in the main action, argued that the application should not be granted because the applicant:
 - (a) has failed to provide a satisfactory explanation on the delay to amend.
 - (b) has shown no genuineness in her application.
 - (c) showed disregard and recklessness in compliance with the rules of the court; and
 - (d) provided no supporting documents on intention to amend such as the contract between her and the service provider (SAWAS Hospital).
- 4 This application was preceded by another application for condonation of the non-compliance by the applicant (respondent in the main action) with the Case Management Order which was granted on 09 March 2018 by the Case Management Judge. After hearing the submissions from both Counsels, the Court granted the application.
- 5 This application is further grounded on the determination whether the condonation should be granted if it is established that:

- (a) there is existence of a reasonable explanation for the delay on the submission of the discovered document;
- (b) the application is not designed to frustrate the processes of the claim by the other party; and
- (c) there is no wilful flouting of the rules of the Court.¹

6 It is evident from the above factors, as correctly captured in *Minister of Safety and Security v Tembo Recovery*² that condonation will be granted after an extensive analysis to establish whether a good cause is shown for the delay in the submission of the document. The undertaking is designed to take into account the 'reasons for lateness, importance of the case, the prejudice to be suffered by the opposing party and whether there are any prospects of success'.³ At the risk of repeating what has already evolved relating to the application for condonations, it is my firm view, as endorsed by Madlanga J in *Turnbull-Jackson v Hibiscus Coast Municipality*,⁴ that the latter factors are a determinant of the quality of access to justice. The determination should involve an assessment of the reasonableness of the application within the broader framework of considering the:

- (a) length of the delay.
- (b) explanation for, or cause of, the delay.
- (c) prospects of success for the party seeking condonation.
- (d) importance of the issues that the matter raises.
- (e) prejudice to the other party or parties; and
- (f) the effect of the delay on the administration of justice.⁵

7 It is deduced from these factors, as similarly expressed in *Grobler v Msimanga*⁶, that the 'condonation for the non-observance of the rules is by no means a mere formality, there must be an acceptable explanation for the default'.⁷ The factors must be read cumulatively and not in isolation of each other. The interdependence of these factors brings insight the determination whether a good cause has been shown for the relief sought. The determination of the quality of evidence presented in support of the application for condonation lies at the 'door-step' of the discretion of

¹ See Brink J in *Smith v Brummer* 1954 (3) SA 352 358A.

² [2016] ZASCA 52.

³ *Tembo Recovery* para 7.

⁴ 2014 (11) BCLR 1310 (CC).

⁵ *Turnbull-Jackson* para 23.

⁶ CASE NUMBER: 05/29099 (WITWATERSRAND LOCAL DIVISION), para 30.

⁷ *Grobler* para 30.

the court, which has to be exercised judicially, having regard to all the circumstances of the case.⁸ In essence, the granting of condonation is grounded on the reasonableness of the proffered explanation which is directly linked to the establishment whether this entails a justified defence in the main action.

8 With the principles regulating the granting of applications for condonations, in this case, I must express the displeasure with the conduct of the applicant. The displeasure is related to what I may term, 'she is the author of her own misfortune'. I am appalled by the lack of the proper filing system in the archives of the DH, particularly of the documents that are the 'bread and butter' of the daily lives of ordinary South Africans. DH is constitutionally obliged to provide quality health care to all without distinction including the preservation of sensitive documents that are grounded in her functioning as the executive arm of the state. It is discomforting that the applicant today, applies to be condoned for the late filing of the document which could have been within her reach if there was a proper management of the filing system of her archives. The courts, including this one, functions within the domain of the clearly defined boundaries of the doctrine of separation of powers as envisaged in the 1996 Constitution.⁹ This conduct therefore, put these courts in an untenable situation of having to enter into the terrain of the executive function which in turn, subjects them to unnecessary criticisms.

9 I must further point out that the explanation in this present application, although the document is filed, is far from satisfactory. The discretion to be exercised by this court cannot be reduced to logistical difficulties in the obtaining of the SLA. The displeasure of this court over non-compliance with the time-frames as envisaged in the Rules, which were endorsed by this Court cannot be relegated to the applicant's own tardiness.

⁸ See *Darries v Sheriff, Magistrate's Court, Wynberg* 1998 (3) SA 34 (SCA) as the court summarised the legal principles relating to condonation as follows: 'Condonation of the non-observance of the Rules of this Court is not a mere formality. An [applicant] should whenever he realises that he has not complied with a Rule of Court apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. In applications of this sort the applicant's prospects of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. But appellant's prospect of success is but one of the factors relevant to the exercise of the Court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be', 40H-41E (footnotes omitted).

⁹ The Constitution of the Republic of South Africa 1996, hereinafter referred to as 'Constitution'.

- 10 Notwithstanding the unsatisfactory nature of the explanation presented by the applicant, the present case raises an important aspect of the point of law relating to the retrospective application of liability which the court has to determine in the main action. Simply put, the question is whether it is in the interest of justice to grant the condonation, considering the *lacuna* to be addressed in the main application?¹⁰ Further, despite dissatisfaction, whether the application is lodged in good faith without any intention to frustrate the claim by the respondent, as the applicant in the main action. These questions are also grounded on the establishment whether the respondent will suffer harm or prejudice by the granting of the condonation?
- 11 It is my view that the prejudice to be suffered by the respondent is insignificant. The granting of the application has the potential to bring certainty, in turn, advance the jurisprudence of the new constitutional dispensation in the determination of the liability of state organs. In essence, it is acknowledged that each case is determined according to its own merits, however, this application presents an opportunity whether a retrospective conduct may be brought within the imperatives of the new constitutional dispensation.
- 12 Given the concerns raised above on the quality of explanation provided by the applicant, balanced against the potential of the application in settling a point of law, I accordingly:

- (a) grant the application for the late filing of the discovered document (SLA: FA2).
- (b) No order is made as to costs.



N. NTLAMA

ACTING JUDGE OF THE HIGH COURT

¹⁰ *Unitas Hospital v Van Wyk* [2006] 4 All SA 231 (SCA) para 47.

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19 June 2018