



**THE LABOUR COURT OF SOUTH AFRICA, DURBAN**

Not Reportable  
Case No: D22/2019

In the matter between:

**D JOGIAH**

**Applicant**

and

**KWAZULU NATAL DEPARTMENT OF HEALTH AND OTHERS    Respondents**

**Heard:        15 July 2024**

**Delivered:   19 September 2024**

---

**JUDGMENT**

---

**SHAPIRO, AJ**

Introduction

[1] The applicant seeks condonation for the late delivery of his referral in terms of section 6 of the Employment Equity Act<sup>1</sup> (EEA), which referral was 1003 days out of time.

[2] The facts are set out in the application papers and the heads of argument delivered on behalf of the parties and I will not canvass them at length in this judgement.

### Background

[3] Essentially, the applicant is employed by the first respondent as a finance manager and has been since October 2012. He is remunerated on salary level 11, which is the same salary level at which he was initially employed. He complains that he has been treated unfairly and contrary to the provisions of the EEA because a Human Resource Manager employed by the first respondent after January 2013 was upgraded to salary level 12 but the applicant has not been placed on salary level 12.

[4] The applicant argues that he should have been placed on salary level 12 if, for no other reason, because of the provisions of clause 3.6.3.2 of Resolution 3 of 2009 of the Public Service Co-ordinating Bargaining Council (Resolution 3).

[5] The argument with respect to Resolution 3 can be disposed of quickly. Clause 3.6.3.2 of Resolution 3 applies to an employee on *inter alia* salary level 11 with 15 years of complete service on the salary level and who has obtained at least a satisfactory rating in his performance assessment.

[6] The applicant has not completed 15 years of service and therefore, Resolution 3 does not apply.

[7] It is therefore necessary to consider whether condonation should be granted in circumstances where he blames the ineptitude of his union, the PSA, who did not timelessly refer his complaint to this Court.

---

<sup>1</sup> Act 55 of 1998.

### Applicable legal principles

[8] As regards the legal principles that apply to condonation applications, I can do no better than to quote the relevant paragraphs of this Court's judgment (per Sass AJ) in *Solidarity obo various Members v Agricultural Research Council*<sup>2</sup>:

'[11] The applicable legal principles are trite and the approach to be adopted by this Court is well settled. It is not necessary to burden this judgment with a repetition of the applicable law and authorities save to refer to the Constitutional Court decision in *Steenkamp and Others v Edcon Limited*<sup>3</sup> in which the Constitutional Court re-affirmed that granting condonation must be in the interests of justice and in which it referred with approval to its decision in *Grootboom v National Prosecuting Authority and Another*<sup>4</sup>:

"[36] Granting condonation must be in the interests of justice. This Court in *Grootboom* set out the factors that must be considered in determining whether or not it is in the interests of justice to grant condonation:

"[T]he standard for considering an application for condonation is the interests of justice. However, the concept 'interests of justice' is so elastic that it is not capable of precise definition. As the two cases demonstrate, it 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 to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasise 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.

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

<sup>2</sup> (JS712/21) [2022] ZALCJHB 270 (8 September 2022).

<sup>3</sup> [2019] ZACC 17; [2019] 11 BLLR 1189 (CC), specifically the Constitutional Court's second judgment.

<sup>4</sup> [2013] ZACC 37; 2014 (1) BCLR 65 (CC) at para 20.

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.

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.”<sup>5</sup>

[37] All factors should therefore be taken into account when assessing whether it is in the interests of justice to grant or refuse condonation.”

[12] The Constitutional Court had also already in *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*<sup>6</sup> pointed out that an application for condonation should be granted if it is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors outlined in *Melane v Santam Insurance Co Ltd*<sup>7</sup>, including the nature of the relief sought, the nature and cause of any other defect in respect of which condonation is sought, and the effect of the delay on the administration of justice<sup>8</sup>.

---

<sup>5</sup> Ibid at paras 22-3 and 51.

<sup>6</sup> [2000] ZACC 3; 2000 (2) SA 837 (CC).

<sup>7</sup> 1962 (4) SA 531 (A).

<sup>8</sup> Id fn 7 at para 3; See also *Ndlovu v S* [2017] ZACC 19 (CC); 2017 (10) BCLR 1286 (CC) (*Ndlovu*) at paras 22 – 23; *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as amicus curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC) at 477A-B; *South African Post Office Ltd v Commission for Conciliation, Mediation and Arbitration and others* [2012] 1 BLLR 30 (LAC) at para [23], where Waglay DJP (as he was then) stated that: ‘In my view, each condonation application must be decided on its own facts bearing in mind the general criteria. While the rules are there to be applied, they are not inflexible but the flexibility is directly linked to and apportioned in accordance with the interest of justice; prejudice; prospects of success; and finally degree of delay and the explanation therefor. The issue of delay must be viewed in relation to the expedition with which the law expects the principal matter to be resolved’.

[13] Significant with a determination of such applications is that condonation cannot be had for the mere asking, and that a party is required to make out a case entitling it to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay<sup>9</sup>. In the end, the explanation must be reasonable enough to excuse the default<sup>10</sup>.

[9] In respect of the applicant's explanation for his delay, the first respondent correctly points out a number of inconsistencies in his version. The applicant alleges that he consulted with his current attorneys in 2017 who informed him of the timeframes applicable to the referral of his complaint to this Court. The applicant states that he "constantly" sought a response from his union during 2018 and 2019 and that his current attorneys were advised during April 2019 that the PSA was not pursuing the matter in this Court.

[10] This application was launched on 15 November 2019, approximately seven months after the applicant's attorneys received the above-mentioned advice from the PSA. By then, of course, the referral was massively out of time already.

[11] I can accept that the PSA did not act responsibly or with expedition. However, the applicant was aware from 2017 that "the clock was ticking". Despite taking legal advice (demonstrating his legitimate concern), the applicant took no active steps to prosecute the referral. The ineptitude of the PSA only goes so far and does not explain the delay until November 2019.

[12] I therefore conclude that the applicant has not provided an acceptable explanation for his lengthy delay.

[13] Even if I am wrong about this, the application for condonation would still fail given the total absence of any prospects of success in the main application.

---

<sup>9</sup> *Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd and Others* [2017] ZASCA 88; 2017 (6) SA 90 (SCA) at para 6.

<sup>10</sup> See: *Ndlovu supra* at para 31.

[14] In addition to the lack of merit in the Resolution 3 argument, the applicant's sole cause of complaint is that a Human Resources Manager employed after him was upgraded to salary level 12. The applicant is not a Human Resources Manager but a Finance Manager.

[15] I have not been given any information about the relative qualifications of the applicant versus this person, nor have I been provided with the job gradings or job specifications of either role.

[16] No evidence has been led about the general practices of the first respondent in this regard and I am left with a bland allegation that one other employee within the first respondent, doing a different job to the applicant, was appointed at a higher salary level. This does not begin to satisfy the requirements of unfair discrimination as contemplated in the EEA.

[17] In my view, and applying the authorities set out above, the applicant did not make out a case for condonation and there are no grounds on which this Court can or should grant condonation.

[18] This is not a matter that justifies the imposition of a costs order.

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

Order

1. The application for condonation is dismissed with no order as to costs.

W.N. Shapiro

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Ms Chewparsad

For the First Respondent:

Mr Goldstone