



THE LABOUR OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR351/2021

In the matter between:

PETRUS MZAEFANE NAGE

Applicant

and

DEPARTMENT OF CORRECTIONAL SERVICES

First Respondent

SS THOKA N.O.

Second Respondent

GENERAL PUBLIC SERVICE SECTOR

BARGAINING COUNCIL

Third Respondent

Heard: 24 October 2024

Delivered: 17 June 2025

JUDGMENT

VUKEYA, AJ

- [1] In this application, the applicant prays to this Court to review and set aside the condonation ruling rendered by the second respondent on 2 January 2021 under case number GPBC 1455/2020. It is also the applicant's prayer that the ruling of the second respondent be substituted with an order condoning the late referral of the dispute with an order remitting the matter back to the third respondent for arbitration of the main dispute.
- [2] The applicant avers that he was subjected to a disciplinary hearing during 2016 and as a result thereof, he was demoted from salary level 7 to level 6 implemented with effect from 1 January 2017. According to the applicant, he was demoted to the first leg of salary level 6. Which is the entry level while he had agreed to a demotion under the impression that it would be the last leg of salary level 6.
- [3] On realising this, his union wrote to the first respondent on 25 January 2017 challenging the decision and according to the applicant, the respondent on 2 February 2017 replied to the letter stating that they were looking into the matter. It is the version of the applicant that as at 27 February 2020, the dispute had not been resolved and he was informed at a meeting that the demotion would not be reversed.
- [4] The applicant referred several disputes to the third respondent and because these disputes were filed late, the second respondent dismissed the condonation application for the late referral of the dispute. It is alleged by the applicant that the second respondent, when deciding on the condonation application, committed misconduct and gross irregularities which caused the result to be grossly unreasonable. She, according to the applicant, failed to consider properly the interests of justice.
- [5] The applicant contends that the second respondent only focussed on the long delay and ignored other aspects that were properly ventilated in his founding affidavit. He relies on the following grounds to seek a review and setting aside of the order refusing condonation for the late lodgement of his dispute:

- 5.1. The second respondent failed to have proper regard of the fact that the application was unopposed and the second respondent ought to have considered all the facts before him properly;
 - 5.2. The second respondent failed to have proper regard of the submissions and arguments made that the disputes were ongoing with no period of dormancy.
 - 5.3. The second respondent determined the application on the papers and as a result had insufficient facts before him while the facts could have been properly ventilated had he called for the hearing of the application.
- [6] Although the first respondent opposes the application, it filed its answering affidavit late and then filed an application for condonation for the late filing of the answering affidavit. Before I deal with the applicant's main application, it is prudent that I deal with the first respondent's application for the late filing of its answering affidavit.

Condonation for the late filing of the first respondent's answering affidavit

- [7] Rule 6 (5) (d) provides that any person who opposes the grant of an order sought in a notice of motion must, within the time stated in the notice, give applicant notice in writing, stating that he or she intends to oppose the application. Within fifteen days of notifying the applicant of his or her intention to oppose the application, the respondent must deliver his or her answering affidavit, if any, together with any relevant documents opposing the application.
- [8] The first respondent delayed by nine months in filing its answering affidavit opposing the review application brought by the applicant. It now applies to the Court to grant condonation for the delayed answering affidavit. The applicant's review application was first filed on 23 February 2021. On 06 April 2021 the applicant further filed a Supplementary Affidavit, and at this point there was still no opposition from the first respondent to third respondents.

- [9] A Notice of Intention to Oppose was filed by the first respondent on 18 May 2021 and at that time, the time for the filing of this notice and the first respondent's Answering Affidavit had already lapsed. The first respondent's answering affidavit was eventually served on the applicant nine months later, on 14 January 2022 and filed on 20 January 2022.
- [10] The first respondent relies on the impact of the Covid-19 Lockdown restrictions and states in its application that this covers the entire period of delay. It states, that its employees were restricted from travelling and worked from home on a weekly rotational basis and it was difficult to access resources and to consult and file papers within the required time. Furthermore, the first respondent states that these Lockdown restrictions were compounded by the ransomware attack on the Information Technology system of the Department of Justice and Correctional Services during September 2021 resulting in further constraints to consult with legal representatives.
- [11] According to the first respondent, it is in the interests of justice that the late filing of the answering affidavit be condoned, as the applicant will not suffer any prejudice due to the non-compliance with the rules.
- [12] The application, citing the lengthy period of non-compliance and the inadequacy of the explanation, opposed the condonation application. It contends that the first respondent could have adopted alternative means to deal with the Covid-19 Lockdown situation. It highlights that the first respondent could have arranged consultations via virtual platforms like Zoom and MS Teams and documents could have been couriered for signing.
- [13] The applicant further submitted that the first respondent has failed to show good cause for the late delivery of the answering affidavit and that the application for condonation therefore falls to be dismissed.
- [14] Courts have a general discretion to condone the late filing of affidavits when it is in the interests of justice to do so.¹ Whether it is in the interests of justice to

¹ *Baron and Others v Claytile (Pty) Ltd and Another* 2017 (5) SA 329 (CC) at para 26.

grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to, 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.²

- [15] As can be seen above, to explain the length of time that lapsed for the filing of the answering affidavit, the first respondent relies on the effects of Covid-19 Lockdown restrictions and the fact that the Department of Justice and Correctional Services' systems were down for some time. Although the applicant opposes the application stating that, the delays could have been curtailed by using the tools available to the first respondent then, the explanation is adequate for purposes of this application. The applicant had certain remedies available to utilize when the first respondent failed to file its answering affidavit on time. This is an indication of the fact that the applicant has not been prejudiced by the first respondent's failure to file its answering affidavit.
- [16] The importance of the issues raised in the review are also important considerations in the decision to grant or refuse an application of this nature. The applicant seeks a review and setting aside of the decision in which his condonation application was dismissed so that the dispute that exists between the applicant and the first respondent can be remitted back for arbitration. It is important that a decision to either grant or refuse the application be taken after careful consideration of all the relevant facts so that the main issues can be properly ventilated if need be. For this reason, and in the absence of any prejudice to the applicant, condonation for the late filing of the first respondent's answering affidavit is granted as it is in the interests of justice to do so.

The review application

² *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC) at para 3.

- [17] The genesis of the dispute between the parties is an allegation made by the first respondent against the applicant for the possession of 0.10 grams of dagga at his place of employment. This, according to the first respondent was in contravention of section 119 of the Correctional Services Act³. The applicant was subjected to a disciplinary hearing on 13 July 2016 where he pleaded guilty to the charge. He then agreed to and accepted a sanction of demotion as an alternative to a dismissal. This is common cause between the parties.
- [18] Subsequent to the disciplinary hearing where the applicant pleaded guilty and accepted a sanction of demotion, he referred a dispute to the General Public Service Sector Bargaining Council (the Third Respondent) alleging that the sanction implemented by the first respondent constituted unfair labour practice. This sanction was implemented on 01 January 2017 and the applicant referred a dispute to the third respondent on 28 January 2019, at least 16 months after he became aware of the alleged unfair labour practice, according to the first respondent.
- [19] Because the applicant's referral to the third respondent was out of time, the second respondent dismissed the applicant's condonation application on 2 January 2021. It is the dismissal of this condonation application which the applicant seeks to have reviewed and set aside.

The Arbitrator's Condonation Findings and Ruling

- [20] The second respondent determined the dispute to have arisen on 1 July 2017. He found that the Union or the applicant referred the dispute to the third respondent on 28 January 2019, instead of 29 September 2017, within 90 days of it arising. His view was that the period was inordinately excessive. He also determined the issue to be whether the applicant had furnished a reasonable and acceptable explanation for the delay and whether it would be in the interests of justice to grant condonation.

³ Act 111 of 1998.

- [21] According to the second respondent, the applicant gave no explanation why his Union did not refer the dispute to the third respondent during 2017 or at least during 2018. The applicant's explanation in support of his condonation application that he was not aware of the commissioner's ruling as neither the Commissioner nor the Council informed him about the ruling was found to be unacceptable by the second respondent. The second respondent had difficulty in accepting this explanation because the applicant elected to attribute the delay to his Union representative, the Commissioner and the first respondent.
- [22] Furthermore, the second respondent was of the view that it was the applicant's duty to enquire why the arbitration hearing did not proceed on 4 June 2019 and the applicant failed to explain what steps he took to seek intervention from the Union if he was unhappy with the Union representative, Mr Dire. The second respondent therefore dismissed the applicant's condonation because he was of the view that the applicant did not furnish an acceptable explanation for the lengthy delay. He was also of the view that it was not necessary to deal with prospects of success as the explanation for the delay was inadequate.

Grounds for review

- [23] The grounds relied upon for the granting of the review application can be summarized as follows:

23.1. The applicant contends that the second respondent:

23.1.1 Committed misconduct and gross irregularity resulting in his decision being grossly unreasonable.

23.1.2 Misapplied and misconstrued the condonation test, overly carries away and overemphasized the long delay in referring the dispute;

23.1.3 Overemphasized the prospects of success in the main arbitration;

23.1.4 Failed to properly consider the interests of justice;

23.1.5 Failed to consider that the application was unopposed and also failed to order that the condonation application be set down for hearing rather than determining it on the papers; and

23.1.6 Failed to have a proper regard of his submissions and arguments that the dispute was ongoing with no period of dormancy.

The applicant's submissions

- [24] The applicant submitted that the second respondent should have ordered that the condonation application, which was unopposed by the first respondent be set down for hearing instead of determining it on the papers. He referred the court to the case of *Zimela Thelma Mpyapeli v Department of Education*⁴ in which the court stated that, when deciding whether a hearing should be called, the critical consideration always has to be, whether the failure to convene an actual condonation hearing, would deprive the applicant for condonation of a fair opportunity to make out a proper case for condonation.
- [25] He further argued that the second respondent's failure to set the matter down for hearing deprived him of an opportunity to properly ventilate his application, as the second respondent would have been in a much better position to make a fair determination of the crucial aspects of his application, had he done so. This, according to the applicant amounts to an irregularity, which renders the second respondent's ruling susceptible to review as the decision arrived at, was unreasonable.
- [26] Furthermore, the applicant submits that the second respondent should not only have considered whether or not good cause was shown, the degree of lateness, the explanation for the delay and the prospects of success, he should have also applied the reasonableness test and made a determination

⁴ Unreported decision. Case no. C531/16. Delivered: 7 September 2018.

thereto. He relied on the case of *POPCRU obo Malekane v SSSBC*⁵ to make this submission.

Respondent's submissions

[27] The first respondent submitted that the second respondent did not misconstrue or misapply the condonation test. It submits further that a reasonable commissioner in the place of the second respondent and based on the material before him would have arrived at the same conclusion. According to the first respondent, the second respondent considered the condonation application in accordance with Rule 9 of the third respondent's rules when determining whether good cause has been shown and considered the interests of justice.

[28] The first respondent goes further to submit that, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive. It argues that the applicant failed to furnish an explanation for the delay and that this is prejudicial to the respondents.

Issues for determination

[29] The issues for determination in this application is whether the second respondent applied his discretion properly when he dismissed the applicant's condonation application; whether he committed a misdirection or irregularity; whether he misconstrued the principle which resulted in him arriving at a decision that a reasonable decision maker could not reach.

Applicable Legal Principles

[30] The Constitutional Court in *Grootboom v National Prosecuting Authority*⁶ stated as follows:

"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

⁵ (JR 2725/16) [2017] ZALCJHB 221 (19 May 2017).

⁶ 2014 (2) SA 68 (CC) at para 23.

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. "

- [31] Factors to be considered in respect of an application for condonation were clearly stated in *Melane v Santam Insurance Co. Ltd*⁷ as follows:

"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 therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: 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. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits."

- [32] In an application for condonation, the court also has to consider the interests of justice. The factors that are relevant in the interest of justice enquiry include; the existence of reasonable prospects of success, the importance of the issue raised by the matter, prejudice and the reasonableness of the applicant's explanation for the delay, the extent and cause period of delay, the effect of the delay on the administration of justice and other litigants. Sometimes, even if the explanation for the delay is not sufficiently explained, the court may grant condonation on the basis that the other party is not opposing it, or an applicant did not show any disinterest in their matter.⁸

⁷ 1962 (4) SA 531 (A) at 532 B-E.

⁸ See: *City Power (Pty) Ltd v Grinpal Energy Services (Pty) Ltd and others* (2015) 36 ILJ 1423 (CC) at para 15.

- [33] Regarding the Commissioner's discretion in dealing with arbitration matters, the court in *Cowley v Anglo Platinum and others*⁹, held that:

“when the Commissioner is endowed with a discretion this court will be very slow to interfere with the exercise of that discretion. The Commissioner's exercise of discretion would be upset on the review if the applicant shows, inter alia, that the Commissioner committed a misdirection or irregularity, or that he or she acted capriciously, or on the wrong principle or in bad faith or unfairly or that the exercise seeing the discretion the Commissioner reached a decision that a reasonable decision-maker could not reach.”

Analysis

- [34] The applicant concedes that there was a delay in referring the dispute to the third respondent. The main reason advanced by the applicant for the delay before the first respondent was that he relied on the Union to advance his case. When the matter was set down for arbitration and a ruling issued, he was never made aware of this until he approached his erstwhile Attorneys. He further stated when the matter was referred to the Council for Conciliation and Arbitration on 4 March 2020, despite the fact that he was present, he did not hear the decision of the Commissioner. He further explained that even the Union member did not explain to him what was decided. He contended that the Union failed to pursue the matter diligently.
- [35] What is clearly visible from the second respondent's analysis of the facts presented before him by the applicant in the condonation application is that he focussed mostly on the excessive delay and the reasons furnished for the delay. He was in displeasure of the explanation given for the delay because the applicant attributed the delay to his Union representative and not himself. Furthermore, the second respondent dismissed the application because the applicant did not explain what steps he took to find information from the council regarding his case on 4 June 2019 or to seek intervention from the Union if he was unhappy about Mr Dire.

⁹ [2016] JOL 35884 (LC) at para 21.

[36] The second respondent made no attempt to deal with the prospects of success and was of the view that no acceptable explanation had been provided for the delay and therefore it would not be necessary to consider the prospects of success. The court in *Melane* (supra) advised that the discretion to be exercised by the decision-maker should be flexible and proper consideration of the conspectus of all the facts is necessary. This means that a slight delay and a good explanation may help to compensate for prospects of success which are not strong. On the other hand, the importance of the issue and strong prospects of success may tend to compensate for a long delay.

[37] The second respondent did not have to stop as soon as he formed the view that the explanation provided was inadequate for the excessive delay. My view is that he should have proceeded to inquire into the prospects of success to determine if they compensated for the excessive delay. According to the evidence presented by the applicant, the first respondent wrongly implemented the adjustment to his salary and in an email dated 9 January 2020, conceded to the wrong implementation of the adjustment.

[38] The quoted emails the applicant relies on to show that he has good prospects of success in the arbitration, first one penned by Mathabatha Calvin on 9 January 2020, read thus:

“Good Day. Attached kindly please find the implementation of Mr Nage’s demotion. I am of the opinion that it was wrongly implemented however I am subject to be rectified. Let us join hands together in this matter and advise where possible...”

[39] On 23 January 2020, Ms Busi Ndlovu responded to the email and stated that:

“Since the implementation of the OSD for Correctional Officials in 2009/07/01, the Department of Correctional Services has dealt away with the salary levels in terms of the notches (no longer level 5,6 and 7) but introduced CB1-1, CB102 and CB 1-3. It needs to be mentioned that when we are talking about demotion we refer to the lowering in rank not in notch, unless otherwise if it was indicated that its notch reduction. The issue of Mr Nage was dealt according to the OSD levels for Correctional Officials.

I have attached the cost of living adjustment table which serves as a guideline in terms of the implementation process. Your attention is also drawn to the fact that on Persal System the code “notch reduction” was utilised simply because there was no event code for demotion.”

- [40] Without even trying to analyse the above communication among the Officials, I can safely say that the above illustrates the possibility of the applicant’s version being true and therefore justifying the granting of the application in the interest of justice. It must be borne in mind also that, the respondent did not oppose the condonation application and that it was decided on the papers without a formal hearing. The fact that it was an unopposed application with good prospects of success should ought to have been considered in the applicant’s favour.
- [41] In *City Power v Grinpal Energy Services*, (supra) the Constitutional Court also had in mind that in some instances the applicant will not have a good explanation, but will have good prospects of success while his application is unopposed. In such circumstances, it suggests that the court may grant the condonation application. My view is that this will also be a consideration of the interests of justice.
- [42] It is indeed so that the court should be very slow to interfere with the exercise of the Commissioner’s discretion. However, interference is justified on review if the applicant has managed to show that the Commissioner committed a misdirection or irregularity, or that he or she acted capriciously, or on the wrong principle or in bad faith or unfairly or that the exercise using their discretion was that the Commissioner reached a decision that a reasonable decision-maker could not reach.

Finding

- [43] By failing to enquire on the prospects of success and by concluding that it was not necessary to do so because the explanation of the excessive delay was insufficient, the second respondent applied a wrong principle and committed a misdirection. Failing to grant condonation while the first respondent did not oppose the application in circumstances where the applicant had good

prospects of success was a misdirection on the part of the second respondent which justifies that his ruling be reviewed and set aside. My considered view is therefore that the application stands to succeed.

[44] In the circumstances, the following order is made:

Order

1. The condonation ruling rendered by Panellist SS Thoka, on the 2 January 2021 under case number GPBC 1455/2020 is reviewed and set aside. Thus, replaced with the order that:
2. The applicant's condonation application for the late referral of the unfair labour practice dispute against the first respondent is hereby granted."
3. The matter is remitted to the third respondent for arbitration of the main dispute.
4. There is no order as to costs.

L. Vukeya

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant :Adv Dube

Instructed by :Isaac Teke Mothibe Attorneys

For the respondent :

Instructed by :State Attorney (Mahikeng)