

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

Case No: 2024 - 023495

Reportable: No
Of interest to other Judges: No
Revised: No


SIGNATURE

Date: 15 April 2026

In the matter between:

BUSISIWE MKHWEBANE

Applicant

and

THE OFFICE OF THE PUBLIC PROTECTOR

1st Respondent

KHOLEKA GCALEKA

2nd Respondent

THE PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA

3rd Respondent

THE MINISTER OF FINANCE

4th Respondent

THE SPEAKER OF THE NATIONAL ASSEMBLY

5th Respondent

JUDGEMENT

MOOKI J

- 1 The applicant seeks condonation for the late prosecution of her application for leave to appeal. The Court rendered judgement on 9 October 2024. Any leave to appeal had to have been filed by 31 October 2024. The applicant filed her leave to appeal on 12 December 2025. The first and second respondents (Public Protector) oppose the granting of condonation.
- 2 I heard the application in the whole, meaning that the parties addressed the Court both on condonation and leave to appeal. I first address the condonation application.
- 3 The applicant says that she immediately instructed her then attorneys to prosecute an appeal to the Constitutional Court and a conditional appeal to this Court. The conditional appeal was an annexure to the application for direct access to the Constitutional Court. The conditional appeal is dated 29 October 2024.
- 4 The applicant says she gave clear instructions to Mr Shabangu of Shabangu Inc, her then attorneys, to file and serve the two applications timeously. The application to the Constitutional Court was filed on 30 October 2024. The Constitutional Court informed the applicant on 23 May 2025 that she had been refused direct access to that court.

- 5 The application for leave to appeal to this Court, as stated above, was filed on 12 December 2025. The applicant says that she was under the honest impression that both applications were filed simultaneously and that all appeal processes were properly under way. She says that “it now seems like my erstwhile attorney did not file the conditional application for leave to appeal” with this Court, contrary to her instructions, and that the attorney “without advising me of the consequences or the correct procedure ... elected only to file an application for direct access to the Constitutional Court only.”
- 6 It was only “very recently”, according to the applicant and following a diligent search and enquiries with the Registrar, that the applicant became aware that the application had not been filed. The applicant says the delay is approximately 6 months and that she truly believed that everything was in order during that period. She continued that it was her belief that her then attorneys were unfamiliar “with the very unusual procedure of filing simultaneous and/or conditional application for leave to appeal”. She further stated that it could be that her then attorneys did not realise the need to file the application separately in this Court. The applicant stated, in the alternative, that “something went wrong in the Registrar’s office or during the process of filing.”
- 7 The applicant says that the hearing of the application for leave to appeal will not come as a surprise to the respondents. That is because the respondents were always aware of her intention to prosecute the appeal, as shown by the conditional application annexed to proceedings in the

Constitutional Court. She further contends that she will be prejudiced should the application not be heard because “the matter concerns the illegal non-payment of my benefits following 7 years of service as the Public Protector of South Africa.” The applicant contends that the respondents “will not suffer any prejudice whatsoever if condonation is granted.”

- 8 The Public Protector contends that the applicant failed to provide the Court with a clear and honest explanation for the delay; that the office of the public protector will be prejudiced by having to record the matter as a contingent liability, and that the intended appeal has no prospects of success.
- 9 The Public Protector accepts that the applicant annexed a conditional application for leave to appeal in the application to the Constitutional Court. She disputed that the lodging of process in the Constitutional Court interrupted the requirements for the filing of an application for leave to appeal in the High Court. At best for the applicant, the Public Protector contended that the application was woefully out of time even if the period for the delay was calculated with reference to 23 May 2025, when the Constitutional Court dismissed the application for direct access. This application was brought more than six months after the Constitutional Court refused the application for direct access.
- 10 The applicant, according to the Public Protector, failed to provide a full and satisfactory explanation for her failure to comply with the time periods and sought to blame her previous attorney, whilst the applicant’s explanation for her own role in the delay was vague and superficial. The applicant

would, according to the Public Protector, and by virtue of the applicant being an experienced litigator both professionally and in person, have been aware of the need to follow-up with her attorneys and to instruct them to request a date for the hearing of the application.

Analysis

- 11 I accept that the applicant would not have been able to prosecute her application pending the outcome of proceedings before the Constitutional Court. The delay in filing her application for leave to appeal must then be reckoned from 23 May 2025, when the Constitutional Court dismissed her application for direct access to that court.
- 12 The applicant says that her conduct was always that of a person who wished to pursue the matter. She admits having always been aware of the applicable timelines specified in the Rules. She says in the founding affidavit that the Constitutional Court dismissed her application for direct access on 23 May 2025. Her very next averment is that it was “[o]nly very recently and after a diligent search and enquiries with the Registrar” that she discovered that the application had not been filed in Court. She deposed to the affidavit in support of the condonation application on 11 December 2025, with the application itself being filed the next day. The applicant is practically silent on what happened between 23 May 2025 and the filing of her application. She does not say when “very recently” she established that the application had not been filed. She does not say whether she enquired from her former attorneys about the status of the application.

- 13 The applicant admits being familiar with the timelines specified in the Rules. She knew on 23 May 2025 that her application to the Constitutional Court had been dismissed. She did not make contact her former attorneys about the next steps now that the Constitutional Court had dismissed her application. I do not accept that the applicant found out “very recently” that the application had not been filed in Court.
- 14 The applicant would have briefed her new attorneys, informing them that the Constitutional Court dismissed her application on 23 May 2025. The applicant would also have informed her new attorneys about her intended conditional application to this Court. The applicant is silent about her instruction to the new attorneys regarding her intended conditional application. This is more so considering that the new attorneys came on record on 28 October 2025. There is no explanation why the applicant’s new attorneys did nothing to prosecute the application if those attorneys were briefed to prosecute the intended application for leave to appeal. There was more than a month between 28 October 2025 and the filing of the application for leave to appeal on 12 December 2025, after the new attorneys came on record.
- 15 Mr Mpofu SC, counsel for the applicant, submitted, when the Court pointed out that the applicant was silent regarding steps taken during the period 28 October 2025 to 12 December 2025 given that she had new attorneys, that “things don’t work smoothly in real life.” This cannot be an exoneration. The applicant’s newly appointed attorneys would be expected to bring themselves up to date, including by perusing the conditional application.

They would have known that the application had not been filed in Court. The applicant therefore knew, or should have known, long before 11 December 2025 that the application had not been filed in Court. She did nothing to rectify the situation.

16 The applicant did not address the criticism by the Public Protector that the applicant did not substantiate her averments. The Public Protector also pointed out that the applicant does not say that her previous attorneys informed her that the application was not filed. The criticism has merit. The applicant does not say when she commenced with “proper enquiries” and a “diligent search”. She also did not say when, in fact, she became aware that the application had not been filed.

17 An applicant for condonation must be frank with the court. The applicant is required to be frank with the Court by giving particulars in her founding affidavit. The applicant’s bland assertion that her explanation was sufficient demonstrates that she does not have an answer to the criticism raised by the Public Protector.

18 The applicant’s explanation for the delay is wholly inadequate. I do not accept that she made enquiries that she contends for. She does not give details of the enquiries that she made with the Registrar. More importantly, she does not say what was the outcome of the enquiries that she made with the Registrar. The Registrar would have informed her of the status of the application if the applicant had, in fact, made such enquiries. I am fortified in my view that the applicant did not make enquiries with the Registrar for the following further reason. The applicant says elsewhere in her founding

affidavit, in seeking to explain the delay, that something could have gone wrong at the office of the Registrar, resulting in the delay. The applicant cannot resort to such speculation if, in fact, she made enquiries with the Registrar. The applicant's mentioning of the Registrar is a deflection of her own remissness. It is also misleading. The fact that the applicant does not say what was the outcome of her enquiries with the office of the Registrar substantiates my view that the applicant did not make the enquiries.

- 19 The applicant sought to blame her then attorneys for the failure to file the application on time. She mentioned in her application to the Constitutional Court that the conditional application had been filed in this Court. She later, in this application, speculated that her then attorneys did not file the application because those attorneys were perhaps unfamiliar with the procedure to be followed pertaining to the filing of conditional applications.
- 20 There is no confirmatory affidavit by the applicant's then attorneys. This is not explained. Mr Mpofu invited the Court to "read between the lines" when the Court raised the absence of a confirmatory affidavit by the applicant's then attorneys of record.
- 21 Courts do not determine matters by "reading between the lines." The authorities are, in any event, clear that there is a limit to indulging a litigant where a legal practitioner does not perform his office properly.¹ The applicant has not, in any event, shown that her then attorneys of record were at fault. This is more so because the applicant is familiar with Rules

¹ Saloojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A), at 141

governing process in the courts. She therefore knew that she had to prosecute her application before this Court once the Constitutional Court dismissed her application for direct access.

- 22 I conclude that the applicant has not, in substance, explained the delay. I do not accept her unsubstantiated averments that she made enquiries. Her averments are misleading, as shown by the internal contradiction in her founding affidavit and her failure to address the specific points raised by the Public Protector.
- 23 I raised with Mr Mpofu that the condonation application did not address the prospects of success. Mr Mpofu referred me to a section of the founding affidavit under the heading “Prospects of success” as setting out the applicant’s contentions on this aspect. The applicant averred that “...these prospects are dealt with fully in the application(s) for leave to appeal and there is no need to repeat them.” The applicant would thus incorporate her affidavit in proceedings before the Constitutional Court regarding the prospects of success for purposes of the condonation application.
- 24 The applicant does not mention “prospects of success” in her application to the Constitutional Court. The application for leave to appeal before this court also does not address the prospects. It bears pointing out that an application for leave to appeal is made on notice, not on notice of motion. A litigant in such application sets out grounds which a litigant contends merit granting leave to appeal. These grounds do not constitute what is required to be set out, as regards “prospects of success”, in a condonation application. The requirement in a condonation application is that a litigant

must set forth, briefly and succinctly, such essential information as may enable the court to assess such a litigant's prospects of success.² The applicant did not do this.

- 25 The applicant contends that the respondents are not prejudiced by the delay in filing her application. This is denied by the Public Protector. The absence of prejudice to a respondent is not determinative as to the grant or otherwise of condonation. A court may refuse condonation even where another party is not prejudiced.³
- 26 It was submitted on behalf of the applicant that condonation be granted, notwithstanding shortcomings in explaining the delay in filing the application. That is because a court, ultimately, decides a condonation application with reference to whether it is in the interests of justice to grant condonation. The applicant submitted that her application merits the granting condonation.
- 27 The applicant referenced the following as showing that it is in the interests of justice for the Court to grant condonation: the delay was not deliberate; her attorney caused the delay; she acted promptly once she became aware of the omission, and because it would otherwise be manifestly unjust for an important and unprecedented constitutional issue to remain unresolved by a competent court.

² Rennie v Kamby Farms (Pty) Ltd 1989(2) SA 124 (A), at 131E

³ Ferris and Another v Firststrand Bank Limited and Another 2014 (3) SA 39 (CC), para 11

- 28 An applicant's prospects of success and the importance of the issue to be determined are relevant factors in considering whether it is in the interests of justice for a court to grant condonation.⁴ The applicant did not address the prospects of success in her application.
- 29 The applicant agrees that the primary dispute in the main proceedings entails the interpretation of her contract. Specifically, the interpretation of the conditions of service regarding payment of a gratuity. The Court addressed this dispute in the main judgement. The court also dealt with the applicant's contention that her main application raised constitutional issues.
- 30 I am not persuaded that it is in the interests of justice to grant condonation. The applicant does not deal with the prospects of success. She blames her then attorneys for the delay. She failed to put up her exchanges, if any, with her then attorneys to allow the court to test her claim. She has, in any event, a remedy against her then attorneys if those attorneys were remiss in carrying out their office.⁵
- 31 It does not serve the interests of justice for a litigant who seeks the indulgence of a court to do so by putting out a case that is premised on a falsehood. The applicant claims to have made enquiries with the Registrar. I have detailed why that is not true.
- 32 It is unnecessary to address the application for leave to appeal, given my refusal to grant condonation. It is sufficient to say that I would have

⁴ Ferris, para 10

⁵ Ferris, para 25, 31

dismissed the application. I would also have refused leave to appeal. The dispute in the main proceedings is fundamentally about the interpretation of the conditions of service. There are no constitutional issues that arise, as detailed in the main judgement.

33 The first and second respondents are the only respondents who opposed the condonation application.

34 I make the following order:

(1) The application for condonation is dismissed.

(2) The applicant is ordered to pay the costs of the first and second respondents in the condonation application, including the costs of two counsel. The costs of counsel are on Scale B.



O MOOKI

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Heard on: 8 April 2026

Decided on: 15 April 2026

Counsel for the applicant: DC Mpofu SC (together with L Moela)

Instructed by: MT Makhubela Inc.

Counsel for the first
and second respondents: F Hobden (together with N Qwabe)

Instructed by: Werksmans Attorneys