

SOUTH AFRICA / JUDGMENT

Department of Higher Education and Training and Another v Dladla (JS240/2022) [2025] ZALCJHB 339 (8 August 2025)

[2025] ZALCJHB 339**COURT**

Labour Court Johannesburg

BEFORE

Riaz Itzkin

CASE / FILE NUMBER

JS240/2022

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Source record**THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG****Not Reportable
case****No: JS240/2022****In****the matter between:**

DEPARTMENT
OF HIGHER EDUCATION AND TRAINING First
Applicant
MPUMALANGA COMMUNITY
EDUCATION AND
TRAINING
COLLEGE
Second Applicant
and
PATRICK DLADLA & 9
OTHERS
Respondents

Heard:

28 July 2025

Delivered:08 August
2025

(This judgment was
handed down electronically by emailing a copy to the parties. The
08th of August 2025 is deemed to be the date of delivery
of this judgment).

JUDGMENT

ITZKIN, AJ

Introduction

- [1] The applicants in this condonation application are defendants in an alleged unfair discrimination claim in which the respondents (as plaintiffs) allege that they have been subject to a difference in terms and conditions of employment relative to other employees of the first applicant (the Department) performing the same or substantially the same work or work of equal value in terms of section 6(4) of the Employment Equity Act 55 of 1998 (EEA).
- [2] The condonation application was necessitated by the late delivery of the applicants' statement of response in the main proceedings. The condonation application is opposed.

Analysis

- [3] The delay in this matter has two components. The first is the delay in delivering the statement of response itself, which was a delay of three months and four days. The second is a far more substantial delay in delivering the condonation application itself, spanning two years and four months from the belated delivery of the statement of response. During the latter period, a pre-trial conference minute was concluded between the parties in which it was agreed that the condonation application would be delivered by 10 May 2024. The condonation application was ultimately filed on 15 November 2024.
- [4] In *Aspen Holdings Pty Ltd and Another v Phelane and Another*,^[1] the Labour Appeal Court (LAC) has recently made it clear that both periods (i.e. the delay in taking the necessary step for which

condonation is sought, and the delay in launching the condonation application), must be addressed:

'[23] The facts before the Labour Court show the employee needed to explain two delay periods. The first is the 41 days from issuing the certificate of non-resolution of the dispute to when the appellant raised the exception. The second period is from the date the employee became aware of the need to file the condonation application (being the date of the exception) to the date the condonation was filed – the 36-day delay'.

- [5] With reference to the delay in delivering the statement of response, the founding affidavit essentially advances the following

explanation:

5.1 A secretary at the Office of the State Attorney (who is alleged to have left the employ of the Office of the State Attorney) did not bring the instructions to oppose the matter to the attention of the relevant attorney, who later found the file when the secretary's former office.

5.2 For a period of three days, the State Attorney's office building was closed due to a fire risk, whereafter the attorney operated without a secretary and had a heavy case-load.

5.3 Part of the delay is also attributed to the process of appointing counsel, and it is alleged that counsel was briefed on 10 July 2022 (with the statement of response having been delivered on 30 July 2022). (Other than the reference to a consultation on 15 July 2022, and to the need to peruse documents and draft, it is not clear why there was a delay until 30 July 2022.)

[6] With reference to the delay in launching the condonation application, it is alleged that "the applicants omitted to bring a condonation application forthwith because they laboured under and innocent, though mistaken, belief that the matter will be settled out of court".

[7] The explanation for the delays in this matter (which are substantial), is imperfect. It includes periods that remain unaccounted for, and the explanation for those periods that are accounted for, is less than cogent. The explanation for the lengthy

delay in launching the condonation application is particularly concerning. It is not unusual for parties to attempt to settle matters, and optimism that this may be achieved is not a sufficient basis for a long delay.

[8] The question that arises is whether this should be the end of the inquiry, or whether there remains scope to grant condonation

(considering the applicants' prospects of successfully opposing the main claim, and the overarching standard of the interests of justice).

[9] There have been previous judgments that have held that condonation may be refused without a reasonable and acceptable explanation for the delay, irrespective of good prospects of success. However, this does not operate as a short-cut to avoid a judicious consideration of the matter.

[10] This issue has enjoyed the attention of the LAC in *Government Printing Works v Public Service Association and Another*,^[2] wherein it was held as follows:

'[25] Despite these sentiments, the failure to provide a proper explanation for a delay has not been an absolute bar to condonation. A measure of flexibility has been applied where required in the interests of justice. In *National Education Health and Allied Workers Union obo Mofokeng and Others v Charlotte Theron Children's Home*, for example, it was held that the interests of justice demanded that the case be heard given that the policy in question (namely, that only white housemothers could supervise white children) was seemingly 'saturated with a racist outlook' and was causing ongoing racism. The circumstances were described as exceptional, so as to justify less focus than normal on an unexplained delay. In *Toyota Marketing v Shmeizer*, a case involving alleged gender discrimination, the proper administration of justice compelled the

granting of condonation because the case had been pleaded in a fashion that made it difficult to formulate a fair and effective order. Barring that issue, the court was minded to refuse condonation purely based on the inadequacy of the explanation for delay...

[27] This description evokes a balancing approach, characterised by proportionality and flexibility. The general principle remains that the various factors are to be considered collectively, and not mechanically, in determining the interests of justice. While no single factor is ever likely to be decisive, the prospects of success in favour of the party seeking condonation is usually an important factor to be considered. Only in exceptional circumstances would a party's disregard for delay and delay in pursuing a matter justify completely overlooking the merits of the case. The Western Holdings principle is, in a sense, less exacting and now appears to have been overtaken by the approach of the Constitutional

Court. In the words of Zondo J, 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' (own emphasis). The prospects remain relevant, it seems, even 'where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party'...

[29] The effect is that an approach which completely ignores the prospects of success on the merits whenever there is an unsatisfactory, unreasonable or unacceptable explanation for a delay, requires explication. There does come a time in any case where a party's disregard for procedure and delay in pursuing a matter is so extensive that they will be penalised irrespective of the merits of the case. The SCA has confirmed that an assessment of prospects of success is a relevant factor in the exercise of a discretion regarding condonation, 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'. It is in cases of 'flagrant', 'gross' breaches of the rules, especially in the absence of an acceptable explanation, that condonation may be refused regardless of the merits of the appeal, even where the blame lies solely with the legal representative. In this court, it has been acknowledged that excellent prospects of success lead to the granting of condonation even when the delay is substantial and the explanation inadequate.

[30] Assuming that there remains some scope to ignore the prospects of success completely, doing so requires careful and deliberate analysis. Borrowing from the language supported in Steenkamp, it is first necessary to conclude, with due deliberation, that the delay is 'unacceptably excessive'. Secondly, and accepting that the reference to 'no explanation for the delay' is not to be construed literally, consideration must still be given to whether the explanation offered is tantamount to an absence of a full and reasonable (acceptable, sufficiently cogent) explanation for the delay. It should be clear, when considering the explanation offered, that the non-observance of the rule is 'flagrant and gross' before the inquiry into the prospects of success may be jettisoned. Thirdly, and noting the usual reluctance to do so, the court must exercise a discretion to refuse condonation without any consideration of the prospects of success.

- [31] Considering these dimensions, it is evident that a court may only rarely avoid any assessment of the prospects of success based on the extent of delay and quality of the explanation. This accords with the broad approach to delay and condonation that has emerged in our jurisprudence, also in respect of legality and administrative reviews. It is so that one of the primary objects of the LRA is to promote the effective resolution of labour disputes, so that procedural expeditiousness is desirable. The overall approach must nonetheless accord with the interests of justice, including fairness to both parties, in the context of an enquiry that naturally lends itself to a holistic consideration of interrelated factors to enable an objective value judgment.’ (References omitted; emphasis added.)
- [11] Applied to this case, despite the deficiencies in the explanation for the lengthy delay, in my assessment, this is not a matter wherein it is so flagrant and gross that it warrants the wholesale jettisoning of an assessment of prospects of success.
- [12] With reference to prospects of success, the applicants (as defendants in the main case) appear to have sufficient prospects of successfully opposing the main case, to warrant their opposition being taken into account in its determination. They do not dispute that the respondents (as plaintiffs in the main case) experienced salary disparities, but they allege that these were not caused by them, and they contend that these were a legacy of their historical employment as ABET teachers, and that they came about as a result of their transfer from the provincial basic education departments to the Department on their existing conditions of employment. It appears that they therefore dispute that the disparities are based on grounds of discrimination in section 6(1) of the Employment Equity Act 55 of 1998, as envisaged in section 6(4) thereof. They also allege that there has been a ‘standardization’ process, pursuant to which back-pay for a portion of the period to which the claim pertains, has been made.
- [13] On an overall basis, the interests of justice warrant the granting of condonation in order to allow for the main case to be properly ventilated, taking into account both parties’ respective cases.
- [14] With reference to the issue of costs, in accordance with the requirements of the law and fairness, it would not be appropriate to saddle either party with a costs order.

Order

1. Condonation is granted for the late delivery of the defendants’ statement of response.
2. There is no order as to costs

Riaz Itzkin

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: K Letsholo

Of:

Letsholo Manasoe Inc

For the Respondent: OG Legae

instructed by: The State Attorney

[1]

[2025] 4 BLLR 409 (LAC).

[2]

[2025] 2 BLLR 112 (LAC); (2025) 46 ILJ 915 (LAC).

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