IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO. 13/18

In the matter between:

MXOLISI SANDILE OLIVER NXASANA	Applicant
and	
CORRUPTION WATCH (RF) NPC	First Respondent
FREEDOM UNDER LAW (RF) NPC	Second Respondent
COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION	Third Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fifth Respondent
SHAUN ABRAHAMS	Sixth Respondent
DIRECTOR GENERAL: DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Seventh Respondent
CHIEF EXECUTIVE OFFICER OF THE NATIONAL PROSECUTING AUTHORITY	Eighth Respondent
NATIONAL PROSECUTING AUTHORITY	Ninth Respondent
DEPUTY PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Tenth Respondent

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APPLICANT'S WRITTEN SUBMISSIONS

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A INTRODUCTION

1. This is an application for leave to appeal against the High Court's refusal to condone the late filing of an affidavit filed by Mxolisi Nxasana, the former National Director of Public Prosecutions ("**NDPP**")("**Mr Nxasana**")("**the affidavit**") in the related applications brought by Corruption Watch and Freedom Under Law ("**CW/FUL**") and the Council for the Advancement of the South African Constitution ("**CASAC**") (collectively referred to as "**the applicants**").[1]

2. The affidavit explains --

   2.1. The efforts made by Mr Nxasana to restore stability and credibility to the National Prosecuting Authority ("**NPA**");

   2.2. The challenge to his leadership and the undermining of these efforts by senior management at the NPA;

   2.3. The failure by the former President of the Republic of South Africa, Jacob Zuma ("**the former President**" or "**President Zuma**"), to

[1] This application is opposed by the former President only in relation to the leave to appeal the condonation order and does not deal with the merits of the review judgment, see First Respondent's Answering Affidavit to Mr Nxasana's Application for Leave to Appeal in this Court ("Nxasana Application for Leave to Appeal"), Record Vol. 17, p. 1604 para. 2.

support Mr Nxasana's leadership of the NPA, seemingly due to his conflict of interest in avoiding his own pending criminal prosecution;

2.4. The unrelenting pressure applied to Mr Nxasana by President Zuma, culminating in a threatened suspension from office and the institution of a commission of inquiry seemingly aimed at ensuring his removal from office;

2.5. Mr Nxasana's resolute resistance to that pressure and ultimate resort to urgent litigation against President Zuma to preserve his position and prevent his removal from office;

2.6. The settlement of this litigation and the dispute with the former President in an agreement that is the subject of these proceedings ("**the settlement agreement**"); and

2.7. Mr Nxasana's reasons for entering into the settlement agreement.

3. By refusing condonation of the late filing of the affidavit, the High Court was deprived of its contents when it determined the applications before it and crafted the just and equitable relief that it granted to the applicants.

4. In its decision, the High Court refused to return the parties to the *status quo ante* resulting from the setting aside of the settlement agreement. This would have reinstated Mr Nxasana as the NDPP, as this is the lawful

and logical consequence of setting aside the settlement agreement.[2] Indeed, Mr Nxasana's reinstatement was the primary relief sought by the applicants from the High Court.

5. Instead, the High Court decided to exercise its discretion and craft an alternative remedy that deprived Mr Nxasana of his reinstatement, finding that it was just and equitable to do so. However, it can never be just and equitable to make serious adverse findings regarding a party to litigation without hearing their version of events.

6. The denial of condonation by the High Court, given the persuasive and reasonable explanation for the delay in its filing, amounts to a denial of access to justice for Mr Nxasana.

B STRUCTURE OF THESE SUBMISSIONS

7. These Heads of Argument address the following issues in turn below:

7.1. The relevant factual background;

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[2] See e.g. **Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others** 2009 (2) BCLR 111 (CC) at para 36, where this Court held –

> *"The ordinary meaning of the word "reinstate" is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract."*

7.2. The grounds on which condonation should be granted and the decision of the High Court reversed so as to permit this Court to consider the contents of the affidavit when determining these related appeals;

7.3. The grounds on which the adverse costs order against Mr Nxasana should be reversed;

7.4. The reasons why it is in the interests of justice for leave to appeal to be granted to this Court; and

7.5. The grounds for condonation in this Court of the late filing of the application for leave to appeal by Mr Nxasana's attorney of record.

C BRIEF FACTUAL BACKGROUND

8. The factual background to this matter is set out fully in the papers,[3] but the key issues of relevance are the following.

[3] Mr Nxasana's Explanatory Affidavit in the CW/FUL Application ("Nxasana Explanatory Affidavit CW/FUL"), Record Vol. 8, pp. 733-795; Mr Nxasana's Explanatory Affidavit in the CASAC Application ("Nxasana Explanatory Affidavit CASAC"), Record Vol. 14, pp. 1304-1326; Mr Nxasana's Condonation Application ("Nxasana Condonation Application"), Record Vol. 9, pp. 801-814; and Mr Nxasana's Application for Leave to Appeal, Record Vol. 17, pp. 1537-1543.

9. Mr Nxasana was appointed as the NDPP by President Zuma with effect from 1 October 2013. [4]

10. Mr Nxasana's tenure as NDPP was characterised by political interference and considerable undermining of his position.

10.1. The attempts to undermine and, ultimately, remove Mr Nxasana started during his first year in office when it became clear that his leadership was resisted by Deputy National Director of Public Prosecutions, Advocate Nomgcobo Jiba and the Special Director: Specialised Commercial Crime Unit, Advocate Lawrence Mrwebi.[5]

10.2. Mr Nxasana later established that Advocates Jiba and Mrwebi had run a campaign to discredit him as a person fit and proper to hold the Office of NDPP, and for President Zuma remove him.[6]

10.3. The campaign led by senior members of staff resulted in operational disruptions and instability at the NPA. Mr Nxasana took various steps to address these challenges, including:[7]

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4 Nxasana Explanatory Affidavit CW/FUL, Record Vol. 8, p. 776 para. 9.

5 Nxasana Explanatory Affidavit CW/FUL, Record Vol. 8, p. 776 para. 12.

6 Nxasana Explanatory Affidavit CW/FUL, Record Vol. 8, pp. 776-778 para. 12-16.

7 Nxasana Explanatory Affidavit CW/FUL, Record Vol. 8, p. 778 para. 17.1-17.6.

10.3.1. Securing a legal opinion from senior counsel following the unfavourable credibility findings against Advocates Jiba, Mrwebi and Sibongile Mzinyathi (the Director of Public Prosecutions for North Gauteng) made by the High Court and confirmed by the Supreme Court of Appeal ("**SCA**")[8] as to whether disciplinary steps ought to be taken against these individuals;[9]

10.3.2. The appointment of a Commission to inquire into the instability at the NPA, headed by retired Constitutional Court Justice Yacoob;

10.3.3. Preparation of the Memorandum, signed by senior NPA official, Mr Willie Hofmeyr, addressed to the Minister for onward transmission to President Zuma regarding the situation at the NPA;

10.3.4. Correspondence to the Bar Council regarding Advocates Jiba, Mrwebi and Mzinyathi;

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8 **Freedom under Law v National Director of Public Prosecutions and Others** 2014 (1) SA 254 (GNP) and **National Director of Public Prosecutions v Freedom under Law** 2014 (4) SA 298 (SCA).

9 CW/FUL Founding Affidavit, Record Vol. 1, p. 26 para. 47.3.

10.3.5. Informal attempts to improve his relationship with Advocates Jiba, Mrwebi and Mzinyathi; and

10.3.6. Repeated requests for a meeting with President Zuma to request his intervention in addressing the situation at the NPA and instituting disciplinary steps against Advocates Jiba, Mrwebi and Mzinyathi.

11. In July 2014, after less than a year in office, Mr Nxasana was informed by the President that a commission of inquiry would be instituted to determine whether Mr Nxasana was fit and proper to hold office, in terms of section 12(6)(a)(iv) of the National Prosecuting Authority Act 32 of 1998 ("**NPA Act**"). This was the former President's final attempt to procure Mr Nxasana's removal from office. [10]

12. At the end of that month, President Zuma also informed Mr Nxasana that he intended to suspend him with full pay pending the outcome of the inquiry and he gave him an opportunity to make submissions in that regard.[11]

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[10] Government Gazette Notice 102 of 2015, dated 5 February 2015, Record Vol. 3, pp. 255-262.

[11] Nxasana Explanatory Affidavit CW/FUL, Record Vol. 8, p. 779 para. 19.

13. On 15 August 2014, Mr Nxasana approached the High Court, Pretoria on an urgent basis to interdict his suspension and to obtain the relevant information needed to respond fully to the allegations that were to be made against him in any inquiry.[12]

14. On 5 February 2015, seven months after initial threats of suspension by President Zuma, he appointed the inquiry into Mr Nxasana's fitness to hold office.[13] The inquiry did not commence, and it was announced on 11 May 2015 that its mandate had been terminated.[14]

15. On 14 May 2015, the President, the Minister of Justice and Mr Nxasana concluded a settlement agreement. In terms of that settlement agreement Mr Nxasana relinquished the office of NDPP, on the basis that the parties to the settlement agreement confirmed that he was fit and proper to hold office.[15]

16. In 2015, CW/FUL and CASAC instituted review proceedings in the High Court, in which they sought to have the settlement agreement reviewed,

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12 Nxasana Explanatory Affidavit CW/FUL, Record Vol. 8, p. 779 para. 21.

13 Nxasana Explanatory Affidavit CW/FUL, Record Vol. 8, p. 780 para. 23; CW/FUL Founding Affidavit, Record Vol. 1, p. 20 para. 38.

14 CW/FUL Founding Affidavit, Record Vol. 1, p. 20 para. 41.

15 Nxasana Explanatory Affidavit CW/FUL, Record Vol. 8, p. 780 para. 24.

declared invalid and set aside; that Mr Nxasana be reinstated as NDPP; that the incumbent NDPP, Adv Abrahams, vacate office; and that sections 12(4) and 12(6) of the NPA Act be declared unconstitutional.

17. Once Mr Nxasana received the full set of papers in both applications and became aware of their status, on 6 April 2017, he filed an answering affidavit,[16] styled an "explanatory affidavit" in the CASAC and ~C applications.

17.1. The affidavit, sought to explain his tenure as NDPP and the facts and circumstances relevant to the conclusion of the settlement agreement that is the subject of the applications.

17.2. It also sought to explain the delay in its filing and provided further detail as to the circumstances of its preparation, which was elaborated on in the condonation application that is the subject of these proceedings.

[16] Nxasana Explanatory Affidavit CW/FUL, Record Vol. 8, pp. 773-795 and Nxasana Explanatory Affidavit CASAC, Record Vol. 14, pp. 1304-1326.

18. On 20 November 2017, at the main hearing, the Court dismissed his application for condonation, with costs, including the costs of two counsel where employed.[17]

19. As a private individual, acting in the public interest by ensuring that the Court had the full record of contemporaneous correspondence and documentation relating to his tenure as NDPP and his version of the events that resulted in the impugned settlement agreement, it is contended that not only was the High Court's order wrong as a matter of substance, but also he should not have been mulcted with costs too. There should have been no order as to costs in the condonation application, in compliance with the *Biowatch* principle.

20. On 8 December 2017, the Court delivered its judgment in which it declared the settlement agreement invalid and set it aside. However, the Court also concluded that it was not just and equitable to reinstate Mr Nxasana, instead setting aside Advocate Abrahams' appointment and directing that a new NDPP should be appointed by the Deputy President within 60 days.

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[17] An order to this effect was only communicated to the parties on 12 December 2017. Record Vol. 15, pp. 1395-1397.

21. We submit that the High Court could not, and should not, have reached this conclusion without considering Mr Nxasana's affidavit and the explanation set out in it as to why he entered into the settlement agreement.

22. By its refusal to condone the late filing of his explanatory affidavit, and thus to consider its contents, the High Court improperly, unfairly and unlawfully proceeded to make certain adverse findings against Mr Nxasana in order to craft the alternative remedy that it ordered. This was contrary to the principles of *audi alteram partem*, natural justice and procedural fairness, as explained below.

23. To be clear, Mr Nxasana abides the relief sought by the applicants and therefore makes no submissions regarding the merits of the applicants' case. But he does insist that a court cannot decide not to follow the regular legal route to the primary remedy sought by the applicants (setting aside the settlement agreement and consequentially reinstating him) and decide to, instead, craft an alternative, discretionary remedy based on an assessment of his conduct <u>when it refused to hear his explanation for that conduct.</u> It ought to have granted condonation and considered the affidavit before rejecting the primary relief sought.

D THE HIGH COURT ERRED IN REFUSING CONDONATION

24. This Court has previously held that our courts reserve the power to condone non-compliance with the Rules where the interests of justice require them to do so.[18] Rigidity has no place in the operation of court procedures and so rules of procedure must be applied flexibly where necessary.[19]

25. The courts' power to grant condonation ensures access to justice. Without such a power, non-compliance with the filing deadlines contained in the High Court Rules,[20] despite a reasonable and persuasive explanation for the filing delay, would amount to an absolute bar to participate in legal proceedings.

26. The Supreme Court of Appeal has held that such an outcome -

> "*would constitute a real impediment to the claimant's access to court. Indeed, a blanket bar to the amelioration by a court of the*

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18 **Mukaddam v Pioneer Foods (Pty) Ltd & Others** 2013 (5) SA 89 (CC) at para 39.

19 **Mukaddam** at para 39.

20 Rule 6 of the **Rules Regulating The Conduct Of The Proceedings Of The Several Provincial And Local Divisions Of The High Court Of South Africa** in terms of the Supreme Court Act 59 of 1959.

hardship worked . . . could hardly survive constitutional scrutiny."[21]

27. The purpose of the condonation power is to ameliorate "the potentially fatal limitation on the right to access to courts", guaranteed by section 34 of the Constitution,[22] that would result from the inflexible treatment of non-compliance with the filing deadlines.[23]

28. It is for this reason that the overarching focus of the test for condonation is on the interests of justice. A court has a discretion whether or not to grant condonation,[24] but it is settled that the test for condonation centres around whether it is in the interests of justice to do so.[25] The concept "the interests of justice" is not capable of precise definition, but has been held to include factors such as:[26]

28.1. The nature of the relief sought;

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21 **Minister of Safety and Security v De Witt** (588/2007) [2008] ZASCA 103; 2009 (1) SA 457 (SCA) (19 September 2008) at para 2 and 12.

22 **Constitution of the Republic of South Africa**, 1996

23 **Vlok v Sun International** [2017] JOL 37229 (GJ) at para [60]

24 **Grootboom v National Prosecuting Authority & Another** 2014 (2) SA 68 (CC) at para 20.

25 **Van Wyk v Unitas Hospital & Another (Open Democratic Advice Centre as amicus curiae)** 2008 (2) SA 472 (CC) and **Brummer v Gorfil Brothers Investments (Pty) Ltd & Others** 2000 (2) SA 837 (CC).

26 **Grootboom**, at para 22.

28.2. The extent and cause of the delay;

28.3. The effect of the delay on the administration of justice and other litigants;

28.4. The reasonableness of the explanation for the delay;

28.5. The importance of the issue to be raised in the intended appeal; and

28.6. The prospects of success.

29. This list is not exhaustive and the various factors themselves are not individually decisive. Ultimately, condonation is a value judgement based on the facts of a particular case.[27]

30. The High Court rejected the affidavit for two reasons. At paragraph [8] of its judgment, it stated that:

> "*There were primarily two reasons for our ruling [dismissing Mr Nxasana's condonation application, with the costs of two counsel]. One was that the explanation for the delay in filing the affidavit was not persuasive, and the other was that it is generally accepted that when evidence is presented so late in proceedings, there is the danger of it having been tailored to fit a particular position*."

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[27] **Grootboom,** at para 35.

30.1. First and foremost, we submit that the High Court erred since Mr Nxasana provided a full, persuasive and reasonable explanation for his non-compliance with the filing deadline.

30.2. Second, the High Court did not properly consider all of the factors that are relevant to a consideration of the interests of justice in this case, inappropriately according weight to only one factor.

30.3. Finally, the specific second reason given by the High Court for rejecting the affidavit, that there is "the danger of it having been tailored to fit a particular position" — despite merely detailing and amplifying the events referenced in the contemporaneous correspondence in the record — was not properly canvassed with Mr Nxasana's legal team.

31. We respectfully submit that, once the explanation and all of the relevant factors are properly considered, the interests of justice plainly favour the granting of condonation.

Extent and cause of delay sufficiently explained

32. An application for condonation must provide a full explanation for the delay, which explanation must cover the entire period of the delay.[28] All that is required is for Mr Nxasana to set out an explanation that is reasonable enough to excuse his default.[29] It is respectfully submitted that the explanation provided is reasonable and satisfactorily explains the delay in the filing of Mr Nxasana's affidavit. Attached as **Appendix A** is a chronology detailing the relevant dates for this application and appeal.

33. Mr Nxasana's affidavit in the High Court was filed almost one year after the other respondents' answering affidavits were filed.[30] While it is acknowledged that this is considerably out of time, the reasons for the delay justify its extent.

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28 **Van Wyk,** at para 22.

29 **Grootboom,** at para 23 and **Von Abo v President of the Republic of South Africa** 2009 (5) SA 345 (CC), at para 20.

30 The respondents filed their answering affidavits in April and May 2016 and Mr Nxasana filed his explanatory affidavit in April 2017.

34. First, Mr Nxasana was never served with any papers in the application brought by CASAC and only obtained these papers on 6 April 2017, one week before he filed his affidavit in response.[31]

35. Second, with respect to the CW/FUL application —

35.1. Mr Nxasana was served with the founding papers only. [32]

35.2. Mr Nxasana never intended opposing the relief sought in that application, rendering the filing of an answering affidavit strictly unnecessary.[33] Mr Nxasana was of the view that no answering affidavit would be required from him unless President Zuma's version materially conflicted with his recollection of what actually happened. This approach to the CW/FUL application was communicated by Mr Nxasana to the former President's legal representative, Mr Hulley.[34]

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31 Nxasana Condonation Application, Record Vol. 9, p. 808 para. 6.

32 Nxasana Condonation Application, Record Vol. 9, p. 808 para. 5.

33 Nxasana Application for Leave to Appeal, Record Vol. 17, p. 1541 para. 29.2-29.3, 29.7.

34 At a meeting between Mr Nxasana and Mr Hulley concerning the CW/FUL application. At the meeting, Mr Hulley undertook to provide Mr Nxasana with a draft of the former President's answering affidavit, which he never did. Mr Hulley was advised by Mr Nxasana that, should the former President's version not be factually correct, he would then provide a response containing his version. Mr Hulley, in his confirmatory affidavit to the former President's response, confirms

35.3. During 2016, Mr Nxasana assisted CW/FUL in their Rule 30/30A application to ensure that the High Court had the full record of relevant and material documentation before it, which record the former President had failed to provide, contrary to Rule 53.[35]

35.4. Throughout 2016, Mr Nxasana understood the Rule 30/30A proceedings to be ongoing and was unaware that the matter had progressed to finality in the meantime.[36]

35.5. As would be expected following the assembly of the complete record at the completion of the Rule 30/30A proceedings, and as in fact happened,[37] Mr Nxasana awaited supplementary founding papers by the applicants.[38]

35.6. Although Mr Nxasana had sight of the former President's answering affidavit in March 2016 when he was alerted to it by a

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the meeting with Mr Nxasana and, crucially, does not deny Mr Nxasana's version of what occurred at that meeting. Nxasana Explanatory Affidavits, Record Vol. 8, pp. 789-791 para. 48 and Vol. 14, pp. 1320-1322 para 48.

35 CW/FUL Further Supplementary Affidavit, Record Vol. 7, p. 632 para. 24.

36 Nxasana Condonation Application, Record Vol. 9, p. 810 para. 14-15.

37 First Respondent's Answering Affidavit to Nxasana Condonation, Record Vol. 9, p.857 para. 7.12.

38 Nxasana Condonation Application, Record Vol. 9, p. 809 para. 13-14.

journalist, he had expected to have an opportunity to file his affidavit once the interlocutory proceedings had been completed and the supplementation of the applicants' founding papers was completed.[39]

35.7. This approach, although not in strict compliance with the Rules, was a pragmatic one given the delay occasioned by the former President's failure to comply with Rule 53 and Mr Nxasana's desire only to provide a single affidavit to the Court.[40]

35.8. For this reason, he decided not to provide a confirmatory affidavit to CW/FUL, but, rather, to await the completion of the Rule 30/30A process and then file his own attested version.[41]

36. Third, Mr Nxasana only became aware of the full papers in both applications when he was provided a copy by his attorneys on 6 April 2017.[42]

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39 Nxasana Condonation Application, Record Vol. 9, pp. 809-810 para. 10-14.

40 Nxasana Application for Leave to Appeal, Record Vol. 17, p. 1542 para. 29.8.

41 Nxasana Application for Leave to Appeal, Record Vol. 17, p. 1542 para. 29.3.

42 Nxasana Explanatory Affidavit CASAC, Record Vol. 14, p. 1324 para 58; Nxasana Condonation Application, Record Vol. 9, p. 808 para 5.

36.1. It was only after considering both sets of papers in full that Mr Nxasana saw the extent of the factual dispute between the version set up by the former President and the Minister in their answering affidavits, and Mr Nxasana's recollection of the events leading up to his removal from the Office of the NDPP. His recollection is confirmed by the contemporaneous correspondence which was predominantly obtained with Mr Nxasana's assistance in the Rule 30/30A proceedings. [43]

36.2. Mr Nxasana also felt it was then necessary to provide his version on oath as the applicants had only been able to rely inferentially on the contemporaneous correspondence obtained through the Rule 30/30A application.[44]

36.3. Mr Nxasana acted expeditiously to ensure that his affidavit was provided to the High Court, filing a notice of intention to abide the relief sought by the applicants, accompanied by his affidavit within a week of that date.[45]

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43 Nxasana Condonation Application, Record Vol. 9, p. 810 para. 16.

44 Nxasana Condonation Application, Record Vol. 9, p. 810 para. 17.

45 Record, Vol. 8, pp. 769-772.

36.4. Given that the explanatory affidavit was filed on 12 April 2017, it is evident that there was no unreasonable delay between the point when Mr Nxasana became fully aware of the dispute he had with the former President and the Minister's versions and the filing of his explanatory affidavit, a fact which the High Court failed to take into account.

37. In light of the above, we submit that the Court was incorrect in dismissing the application for condonation for the late filing of Mr Nxasana's affidavit on the basis that the explanation for the delay was "not persuasive".[46] It is respectfully submitted that the Court did not give adequate consideration to the explanation provided for the delay.

The Court did not properly consider all other relevant factors

38. In exercising its discretion and dismissing the application for condonation for the late filing of Mr Nxasana's affidavit, we submit that the Court afforded undue weight to the length of the delay, without properly considering all of the other factors relevant to the determination of a condonation application.

39. In particular, the High Court failed to consider --

[46] High Court Judgment, Record Vol. 15, p. 1356 para 8.

39.1. The prejudice that would be caused to Mr Nxasana if condonation were denied;

39.2. The lack of prejudice to the other parties to the litigation who had ample opportunity to consider and respond to his explanatory affidavit and took that opportunity;[47] and

39.3. In particular, the materiality, relevance and importance of Mr Nxasana's affidavit[48] to the issues which the High Court was called upon to determine in the case.

40. It is settled that in determining whether condonation may be granted, lateness is not the only consideration.[49]

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47 All of the parties were given an adequate opportunity to respond to Mr Nxasana's affidavit and did so. The former President and the Minister filed a comprehensive affidavit in response to the explanatory affidavit (Record, Vol. 9, pp. 815-844 and Vol. 14, pp. 1327-1352) and the applicants were given an opportunity to file supplementary heads of argument, which they did.

48 This is borne out by the fact that all of the applicants made direct reference to the explanatory affidavit in their supplementary heads of argument. The crucial issue which the Court was called upon to determine was whether or not Mr Nxasana requested to vacate his office, the answer to which formed the linchpin to the relief ultimately granted. The High Court's answer was precisely the answer Mr Nxasana gave: he did not request to vacate office, contrary to all of the former President's assertions (on oath) to the contrary.

49 **Bertie Van Zyl (Pty) Ltd & Another v Minister for Safety and Security & Others** 2010 (2) SA 181 (CC).

41. It is respectfully submitted that the Court, in exercising its discretion, did not properly consider the prejudice to Mr Nxasana by refusing to condone the late filing of his affidavit and depriving him of his right to be heard, and to make submissions. This is particularly so in this context where the High Court made adverse findings against him and decided not to grant the primary relief sought by the applicants without first having given him the opportunity to be heard, contrary to the principles of *audi alteram partem,* natural justice and procedural fairness.

42. Moreover, the High Court afforded weeks for the former President to consider the affidavit and prepare a fulsome response to it, of which opportunity the former President took full advantage.[50]

43. Further, the issues raised in these applications are significant and are of national importance for the constitutionally-enshrined requirement of the independence of the NDPP.

43.1. Mr Nxasana's affidavit deals with the very core of the dispute between the parties – whether he requested to vacate his office as NDPP.

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[50] First Respondent's Answering Affidavit to Nxasana Explanatory CW/FUL, Record Vol. 9, pp. 850-869.

43.2. His affidavit is an important piece of evidence, which confirms the contemporaneous correspondence and related documents used by the Court to determine the applications.

44. Had these other factors, which should be considered when determining whether to grant condonation been properly assessed, it is submitted that the High Court would have reached a different conclusion and would have granted condonation, with no order as to costs.

No danger of evidence being tailored

45. The High Court further dismissed Mr Nxasana's application for condonation on the basis that "when evidence is presented late in proceedings there is a danger of it having been tailored to fit a particular position."[51]

46. This finding is problematic for at least two reasons.

46.1. First, it was not canvassed by any of the parties who opposed condonation, nor was it adequately canvassed with Mr Nxasana's counsel during the brief oral argument prior to the commencement of argument in the applicants' cases.

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[51] High Court Judgment, Record Vol. 15, p. 1356 para 8.

46.2. Second, Mr Nxasana's evidence was not capable of being tailored to fit a particular position. It only confirms the contemporaneous documentary evidence (which was provided to the applicants by Mr Nxasana) that was accepted and relied upon by the Court to conclude that Mr Nxasana did not request to vacate his office. Mr Nxasana's version supplements this evidence with his factual account of personal encounters he had with the cited respondents and other relevant persons, and directly calls into question the former President's version which he has given on oath.

47. It is unfortunate that this "danger" was never put to Mr Nxasana for response by the Court. Nor was any factual basis provided by the Court for finding that a danger existed that evidence may be tailored to fit a particular position in its judgment.

48. It is respectfully submitted that mere speculation or conjecture by the Court (particularly where the Court drew adverse inferences against Mr Nxasana and exercised its discretion to depart from the ordinary relief) is unjustified.

49. In these circumstances, the Court should have found that there was little, if any, danger of Mr Nxasana's evidence being tailored to fit a particular position and should have granted condonation.

Conclusion

50. In determining an application for condonation, a court exercises a discretion in the loose sense, meaning a court "is entitled to have regard to a number of disparate and incommensurable features in coming to a decision."[52]

51. As such, an appellate court is as capable of determining the matter as the court of first instance. In fact, the appellate court can substitute its own exercise of the discretion without first having to find that the court of first instance did not act judicially.[53]

52. Whilst this Court must be guarded in doing so,[54] we submit that this is precisely the case where this Court should substitute its own exercise of discretion to grant condonation.

53. We submit that it is in the interests of justice for this Court to exercise its discretion and to condone the late filing of Mr Nxasana's affidavit. Once it has done so, the question of the appropriate remedy in this

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52 **Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa and Another** 2015 (5) SA 245 (CC) at para 86 and **Knox D'Arcy Ltd & Others v Jamieson and Others** 1996 (4) SA 348 (SCA).

53 **Trencon Construction***,* at para 87.

54 **Trencon Construction***,* at para 87.

matter may be considered by the Court in light of all of the available, relevant, material and pertinent evidence.

54. It is to this linkage between condonation and remedy in this case that we now turn.

E CONDONATION IS VITAL TO ENSURE THAT A JUST AND EQUITABLE REMEDY IS GRANTED UNDER SECTION 172(1)(B) OF THE CONSTITUTION

55. The courts have broad powers when determining what constitutes an appropriate remedy. The following was stated in this regard in *Electoral Commission v Mhlope and Others*:

> "*Section 172(1)(b) clothes our courts with remedial powers so extensive that they ought to be able to craft an appropriate or just remedy, even for exceptional, complex or apparently irresoluble situations. And the operative words in this section are "an order that is just and equitable". This means that whatever considerations of justice and equity point to as the appropriate solution to a particular problem, it may justifiably be used to remedy that problem. If justice and equity would best be served or advanced by that remedy, then it ought to prevail as a constitutionally sanctioned order contemplated in section 172(1)(b)."*[55]

[Emphasis added]

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[55] **Electoral Commission v Mhlope and Others** 2016 (5) SA 1 (CC) at para 12.

56. This Court has developed certain principles which serve as a guide in determining what constitutes just and equitable relief, including the following:

56.1. What is just and equitable must be evaluated not only from the perspective of the parties involved. Rather, the broader interests of society as well as all those who might be affected by the order made should be considered;[56]

56.2. What is just and equitable will ordinarily be in the interests of justice;

56.3. What is just and equitable depends on the facts of each case;[57] and

56.4. Just and equitable relief is also effective relief.[58]

57. We respectfully submit that the alternative relief crafted by the High Court when it decided not to reinstate Mr Nxasana as NDPP, in circumstances in which that was the logical and necessary

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56 **Florence v Government of the Republic of South Africa** 2014 (6) SA 456 (CC).

57 **Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others** 2006 (3) SA 1 (CC).

58 **Hassam v Jacobs NO and Others** 2009 (5) SA 572 (CC) at para 44.

consequence of the orders it made as to the unlawfulness of the settlement agreement, was not just and equitable as required by section 172(1) of the Constitution.[59]

58. We submit that this is so for several reasons:

58.1. First, the High Court erred in finding that it was not just and equitable to reinstate Mr Nxasana to the office of NDPP on the basis that "his unlawful conduct will have been rewarded by achieving for him what he wanted all along: back in the saddle, with no unjustified threat from the [former] President".[60]

58.2. Had the High Court condoned and then considered Mr Nxasana's explanatory affidavit, it would have had a full

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[59] Section 172 provides:

"(1) When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[60] High Court Judgment, Record Vol. 15, p. 1379 para 85.

explanation of why Mr Nxasana entered into the settlement agreement. It would have considered the exposition of his resistance of the threats from the former President aimed at his efforts to perform his prosecutorial functions and may have concluded that it was desirable to have such a man "back in the saddle."

58.3. Had the High Court done so, we submit that it may not have found that Mr Nxasana "held out" for a "price" in order to secure his removal from the office of NDPP,[61] but that he settled his disputes with the former President with reference to the remaining term of his contract as NDPP.

58.4. There is no evidence supporting the contentions by CASAC that Mr Nxasana "is a man that has a price" and that "the institution [of the NPA] is best served if he is not reinstated".[62] These can be dismissed if Mr Nxasana's affidavit is actually considered by this Court.

58.5. The rule of law is ensured by restoring the leadership of the NPA under Mr Nxasana now. His reinstatement would allow him to

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61 High Court Judgment, Record Vol. 15, p. 1377 para. 79 and p. 1378 para. 84.

62 CASAC Heads of Argument, p. 42 para. 77-78

continue the prosecutorial work he was prevented from doing by its highest profile target, as explained in his affidavit. The integrity of the office of the NDPP would be strengthened by the return to public service of a man who withstood an assault on his position for nearly two years for simply trying to do his job.

58.6. As detailed in his affidavit, the former President sought to bring considerable pressure to bear on Mr Nxasana throughout his tenure as NDPP, including by failing to act when requested against senior officials at the NPA determined to undermine his leadership, and ultimately establishing a commission of inquiry into whether he was fit and proper to maintain his position as NDPP.

58.7. At no stage did Mr Nxasana vacate office nor did he request to vacate office. In fact, as confirmed by the contemporaneous correspondence, Mr Nxasana advised the former President to proceed with the inquiry.[63] This demonstrates that Mr Nxasana was willing to remain in office despite the former President's threats of removal.

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63 Annexure "MN2" to Nxasana Explanatory Affidavit CW/FUL, Record Vol. 9, pp. 799-800.

58.8. It is therefore factually incorrect to find that he was “holding out” for a “price” and is therefore unsuited for reinstatement.

58.9. This is especially so where his reinstatement is the logical and lawful consequence of setting aside the settlement agreement.

58.10. Second, had the High Court admitted the affidavit of Mr Nxasana it would have been aware that, at the time of the conclusion of the settlement agreement, Mr Nxasana did not consider section 12 of the NPA Act to be applicable to the settlement of his litigation dispute with the former President,[64] since he had not requested to leave office and had engaged in litigation with the former President which required resolution through the settlement agreement.

58.11. As explained in his affidavit and as reflected in the settlement agreement itself,[65] Mr Nxasana concluded the settlement agreement to settle the acrimonious litigation and relationship between himself and President Zuma arising from his diligence

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64 Nxasana Explanatory Affidavit CW/FUL, Record Vol. 8, p.781 para. 26.5.

65 Record Vol. 1, pp. 168-171.

and independence. He also entered into it to restore public confidence in the office of the NDPP.[66]

58.12. A public servant who withstood the ordeal detailed in Mr Nxasana's affidavit is precisely the man who should be returned as NDPP to complete his work by this Court.

58.13. Finally, the Court's conclusion that it was not just and equitable to reinstate Mr Nxasana[67] on the basis that he "must have known that the bargain he was driving was unlawful"[68] and that he was "reckless as to whether his demand was lawful"[69] is disturbing in circumstances in which the Court refused to admit and consider his affidavit. Had it done so, it would have had the benefit of his explanation that he did not consider the settlement unlawful, and that it was a considered decision taken to protect the stability of the NPA. As a result, the Court had nothing before it on which to make such a finding, and Mr Nxasana was deprived of any right to make submissions on such a far-reaching and adverse

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66 Nxasana Explanatory Affidavit CW/FUL, Record Vol. 8, p. 782 para 27.

67 High Court Judgment, Record Vol. 15, p. 1380 para 94.

68 High Court Judgment, Record Vol. 15, p. 1380 para 92.

69 High Court Judgment, Record Vol. 15, p. 1380 para 93.

conclusion and had decided not to consider evidence of precisely the opposite, contrary to the principles of *audi alteram partem*, natural justice and procedural fairness.

59. In **De Beer NO**, Yacoob J described the right to a fair hearing in these words:

> *"This section 34 fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution, courts must interpret legislation and rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case."*[70]

[Emphasis added]

60. The High Court refused to condone the late filing of Mr Nxasana's affidavit. Its findings are far-reaching, made directly against Mr Nxasana and are plainly adverse to him. It made those findings without affording him any opportunity to state his case, a right which this Court has stated

[70] **De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)** 2002 (1) SA 429 (CC) at para 11; cited with approval in **Member of the Executive Council for Health, Gauteng v Lushaba** (2017 (1) SA 106 (CC) at para 20.

lies at the heart of the rule of law. An order granted in these circumstances cannot be considered to be just and equitable.

F COSTS

61. In dismissing Mr Nxasana's application for condonation, the High Court awarded costs against him, being the costs of two counsel, where employed.

62. We submit that the costs order was inappropriately made, in violation of the *Biowatch* principle. The Constitutional Court stated in **Biowatch**:

> *"… the general rule for an award of costs in constitutional litigation between a private party and the state is that if the private party is successful, it should have its costs paid by the state, and if unsuccessful, each party should pay its own costs."*[71]

63. The rationale of the *Biowatch* principle is a cautionary note as to the "unduly inhibiting or chilling effect on other litigants" that adverse cost orders may have in constitutional litigation.[72] This Court has confirmed in a number of cases that the *Biowatch* principle is a vital tool in

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71 **Biowatch Trust v Registrar, Genetic Resources, and Others** 2009 (6) SA 232 (CC) at para 43.

72 **Motsepe v Commissioner for Inland Affairs** 1997 (2) SA 898 (CC) at para 30.

facilitating constitutional litigation and that it protects litigants who seek to enforce their rights, irrespective of the eventual outcome.[73]

64. We submit that this was precisely the kind of case in which the High Court should not have made an adverse costs order against Mr Nxasana.

65. First, the applications brought by CW/FUL and CASAC evidently fall within the realm of the *Biowatch* principle. They are of extraordinary public interest and importance. These were also applications that implicated the Constitution, the NPA Act and scrutinised the lawfulness and impropriety of the conduct of the former President.

66. Second, Mr Nxasana sought to participate in the matter in order to assist the Court by providing his version on oath, and supports the contemporaneous documentation that he assisted the applicants to obtain through the Rule 30/30A proceedings. It bears emphasis that of the three parties to the settlement agreement (the former President, the Minister of Justice and Mr Nxasana), only Mr Nxasana fully disclosed

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[73] See e.g. **SACCAWU v Irvin & Johnson (Seafoods Division Fish Processing)** 2000 (3) SA 705 (CC). See also **Giddey v JC Barnard** 2007 (5) SA 525 (CC) at para 35; **Gory v Kolver NO and Others (Starke and Others Intervening)** 2007 (4) SA 97 (CC) at para 65; see also **Union of Refugee Women v Director: Private Security Industry Regulatory Authority** 2007 (4) SA 395 (CC).

the relevant events leading up to the conclusion of the settlement agreement, and his version was ultimately consistent with the findings of the High Court.

67. Third, Mr Nxasana's intervention was also in the public interest. Members of the public have an interest in the proper administration of the NPA and the appointment and removal of the NDPP. Mr Nxasana's intervention was intended to assist the applicants in ensuring that section 179 of the Constitution relating to the independence of the NPA is given effect to fully and effectively. The former President stated on oath that Mr Nxasana requested to leave his position and his departure was thus in compliance with the NPA Act. Mr Nxasana stated that he did not make such a request – which is fully borne out by the contemporaneous correspondence. Mr Nxasana's submissions thus contributed to the resolution of a fundamental issue – the former President's unlawful removal of Mr Nxasana from office – and were essential to the relief sought by the applicants and ultimately granted by the High Court (reviewing and setting aside Mr Nxasana's removal from office).

68. Finally, it bears emphasis that the principle in *Biowatch* has a limit and that not all instances of constitutional litigation are exempt from costs orders. In **Lawyers for Human Rights v Minister in the Presidency**

and Others[74] this Court explained that a Court, in its discretion, might order costs, if the constitutional grounds of attack are frivolous or vexatious – or if the litigant has acted from improper motives or there are other circumstances that make it in the interests of justice to order costs.[75]

68.1. Vexatious litigation is described as being "frivolous, improper, and instituted without sufficient ground, to serve solely as an annoyance to the defendant".[76] And a frivolous complaint was cast as one with no serious purpose or value.[77]

68.2. These exceptions to the *Biowatch* principle were developed in order for the Court to protect itself from an abuse of process.[78] They serve to disincentivize weak or poorly considered litigation.

68.3. But neither of these concerns were applicable in this case.

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74 [2016] ZACC 45.

75 **Lawyers for Human Rights v Minister in the Presidency and Others** [2016] ZACC 45 at para 18.

76 **Bisset v Boland Bank Ltd** 1991 (4) SA 603 (D) at 608D-F.

77 **Lawyers for Human Rights,** at para 19.

78 **Lawyers for Human Rights,** at para 20.

68.4. Mr Nxasana's submissions were relevant and material to the matter. They served a serious purpose and held value. In addition, Mr Nxasana acted in good faith in an effort to assist the High Court in determining the crucial legal question, namely, whether his removal from office by the former President was lawful, hinged on whether Mr Nxasana had requested to vacate his office in terms of section 12(8) of the NPA Act.

69. In light of the above, Mr Nxasana's participation cannot be characterized as being vexatious or frivolous.

70. Accordingly, the *Biowatch* principle applies and the High Court erred in mulcting Mr Nxasana with the costs of his unsuccessful condonation application.

G LEAVE TO APPEAL TO THIS COURT

71. Mr Nxasana seeks leave to appeal against the order of the High Court dated 12 December 2017 dismissing his application for condonation, and those parts of the judgment of 8 December 2017 which drew adverse inferences against him, in the absence of considering his

version, and which ultimately resulted in the High Court concluding that it was not just and equitable to reinstate him to the office of NDPP.[79]

72. It is trite that leave to appeal should be granted when a constitutional matter or an issue connected with a decision on a constitutional matter is raised, and when it is in the interests of justice to do so.[80] It is submitted that this test is satisfied and that leave to appeal should be granted in this matter.[81]

This appeal raises constitutional issues

73. We submit that this appeal raises constitutional issues in the following respects.

73.1. It implicates *inter alia* Mr Nxasana's fundamental rights to procedural fairness and to be heard, which are essential components of the rule of law enshrined in section 1(c) of the Constitution and, relatedly, which form a fundamental part of Mr

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79 Nxasana Application for Leave to Appeal, Record Vol. 17, pp. 1534-1535 para 4.

80 **Nabolisa v S** (CCT 105/12) [2013] ZACC 17 at para 19.

81 Section 167(3)(b)(i) of the Constitution.

Nxasana's constitutional right to a fair hearing in terms of section 34.[82]

73.2. The High Court elected not to re-instate Mr Nxasana to his position as NDPP on the basis of adverse findings that it drew against him, in the absence of hearing his version.[83] The High Court violated the most basic principles of *audi alterem partem*, natural justice and procedural fairness, and, in so doing, also violated Mr Nxasana's constitutional right to access the court and to a fair hearing.

73.3. The High Court declared certain conduct of the former President unconstitutional and crafted certain relief in that regard. That relief concerns the NPA and the appointment of the NDPP, both of which are regulated by section 179 of the Constitution and the NPA Act, which gives effect to section 179.

74. In the event, an appeal implicating the office of the NDPP, particularly the occupation and vacation of that office, raises constitutional

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[82] Section 34 of the Constitution provides: *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum."*

[83] High Court Judgment, Record Vol. 15, p. 1380 para. 92- 94.

matters.[84] This is even more so since the High Court has declared unconstitutional the former President's conduct in removing Mr Nxasana from office.

It is in the interests of justice for leave to be granted

75. It is, however, settled in our law, that leave to appeal to this Court will only be granted where it is in the interests of justice to do so. We submit that it is in this case.

76. Prospects of success are an important component of the interests-of-justice analysis.[85] We submit that there are reasonable prospects that this Court will set aside the decision of the High Court to dismiss Mr Nxasana's condonation application.

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[84] Section 179 of the Constitution provides:

"(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament and consisting of —

(a) A National Director of Public Prosecutions, who is the head of the prosecuting authority and is appointed by the President as head of the national executive.

…

(4) National legislation must ensures that the prosecuting authority exercises its functions without fear, favour or prejudice."

[85] **Brummer,** at para 3.

77. The High Court made a number of adverse findings against Mr Nxasana, which formed the basis for the alternative relief it crafted. But it did so without hearing Mr Nxasana or considering his version of events, despite the fact that he had endeavoured to place his affidavit before the Court and had not prejudiced any parties in the matter.

78. In addition, the paucity of reasons given by the High Court for its dismissal of Mr Nxasana's condonation application will not pass constitutional muster given that condonation facilitates access to justice and to courts, as addressed above. Therefore, we submit that there are prospects of success and that it is in the interests of justice that leave to appeal should be granted.[86]

79. Finally, given the importance of the office of the NDPP, as the subject of these proceedings, it is in the public interest that these matters be dealt with expeditiously, comprehensively and finally by this apex Court.

80. It is therefore in the interests of justice that this matter is heard and finalised swiftly in order to ensure the proper administration and functioning of the office of the NDPP.

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[86] As stated in **Nabolisa** at para 56:

"*This means that once it is established that there are prospects of success, it must be accepted that the interests of justice warrant the granting of leave*."

H CONDONATION BEFORE THIS COURT

81. The Constitutional Court will grant applications for condonation for special leave to appeal if it is in the interests of justice to do so.[87] The interests of justice are determined with regard to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and reasonableness of the explanation for the delay or defect.[88]

82. Mr Nxasana's application for leave to appeal and answering affidavit were filed one day out of time, on 22 January 2018. The delay arose from various administrative challenges experienced in the office of Mr Nxasana's attorney of record.[89]

83. We submit that it is in the interests of justice to condone the late filing of the application for leave to appeal and answering affidavit, for the following reasons:

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87 **Brummer,** at para 3.

88 **Brummer,** at para 3.

89 Nxasana Condonation Application in CC, Record Vol. 17 pp. 1623-1633.

83.1. The delay was minimal, and the explanation provided for the delay is reasonable;

83.2. No prejudice is caused to any of the parties since they all received copies of the papers in advance, save for one of them;[90]

83.3. Conversely the prejudice to Mr Nxasana would be severe if he were not granted leave as he would again be denied an opportunity to be heard on issues that are of fundamental importance and to which he can speak directly;

83.4. No party has indicated an intention to oppose Mr Nxasana's application for condonation for the late filing of his application for leave to appeal;

83.5. Having Mr Nxasana's version before this Court will assist the Court and the administration of justice since his evidence is vital to the determination of the confirmation proceedings, and particularly what constitutes a just and equitable remedy in the circumstances;

83.6. The confirmation proceedings raise issues of critical national importance; and

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[90] Nxasana Condonation Application in CC, Record Vol. 17 pp. 1623-1633.

83.7. It is respectfully submitted that Mr Nxasana has reasonable prospects of success in the intended appeal.

84. Accordingly, we submit that a proper case has been made out and that it is in the interests of justice for this Court to condone the late filing of Mr Nxasana's application for leave to appeal and answering affidavit.

CONCLUSION

85. We thus respectfully submit that a proper case has been made out for leave to appeal to be granted to Mr Nxasana to appeal to this Court against the order dismissing, with costs of two counsel, his application for condonation for the late filing of his explanatory affidavit before the High Court.

86. We submit that this Court should grant condonation for his explanatory affidavit, so that it may assist this Court in crafting a just and equitable remedy.

MM LE ROUX
JL GRIFFITHS
O MOTLHASEDI

Chambers, Sandton
23 February 2018

APPENDIX "A" - CHRONOLOGY IN CONDONATION APPLICATION

DATE	EVENT	RECORD REFERENCE
5 August 2015	CW/FUL institutes proceedings	Vol. 1, pp. 1-43
14 Sep 2015	Record furnished in terms of Rule 53(1)(b)	Vol. 5, p. 465, para. 3
30 Sep 2015	CW/FUL applicants serve a Rule 30A notice on all respondents	Vol. 7, pp. 663-664
22 Oct 2015	Mr Nxasana meets with Minister Mahlobo	Vol. 8, p. 789, para. 48.1
23 Oct 2015	Mr Nxasana meets with Mr Hulley	Vol. 8, p. 789, para. 48.3
23 Oct 2015	Applicants sign an application to compel delivery of record	Vol. 7, p. 630, para. 15
28 Oct 2015	First to Eighth Respondents file further record and reasons	Vol. 5 pp. 456-461
18 Nov 2015	CASAC institutes proceedings	Vol. 10, pp. 886-941
24 Nov 2015	First Applicant's Supplementary Founding Affidavit	Vol. 5, pp. 462-470
January (– March) 2016	Mr Nxasana consulted with CW/FUL in the preparation of their application in terms of new Rule 30A	Vol. 7, p. 632, para. 24
29 Jan 2016	Fourth and Seventh Respondent's Answering Affidavit	Vol. 5, pp. 482-511
1 March 2016	First Respondent's Answering Affidavit	Vol. 6, pp. 523-565
3 March 2016	Second Respondent's Answering Affidavit	Vol. 6, pp. 566-615
23 March 2016	Rule 30 Application launched	Vol. 9, p. 857, para. 7.11

March 2016	Mr Nxasana consulted again with CW/FUL in the preparation of their application in terms of new Rule 30A	Vol. 7, p. 632, para. 24
28 April 2016	First Respondent's Supplementary Answering Affidavit	Vol. 7, pp. 620-624
26 May 2016	Supplementary affidavits in Rule 30 filed by applicants	Vol. 9, p. 857, para. 7.12
23 Aug 2016	First Respondent files affidavits in Rule 30 application	Vol. 9, p. 857, para. 7.13
12 Oct 2016	First Applicant's Further Supplementary Affidavit	Vol. 7, pp. 625-642
14 Nov 2016	First Respondent's Answering Affidavit to the First Applicant's Further Supplementary Affidavit	Vol. 8, pp. 723-733
15 Dec 2016	Applicants' Replying Affidavit	Vol. 8, pp. 737-750
10 March 2017	Applicant's Heads of Argument filed	
6 April 2017	Mr Nxasana receives a full set of papers for the first time	Vol. 9, p. 808, para. 6
12 April 2017	Notice to Abide and Explanatory Affidavit	Vol. 8, pp. 769-795
31 May 2017	Case management meeting with Deputy Judge President	
26 June 2017	First Respondent's Answering Affidavit to Explanatory Affidavit	Vol. 9, pp. 815-844
28 June 2017	Application for Condonation	Vol. 9, pp. 801-814
3 July 2017	Confirmatory Affidavit of M Hulley	Vol. 9, pp. 845-846
18 August 2017	First Respondent's Answering Affidavit in Condonation Application	Vol. 9, pp. 850-869
17 October 2017	Replying Affidavit in Condonation Application	Vol. 9, pp. 872-885