

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 27754/ 2015

Delete whichever is not applicable

- (1) Reportable Yes / No
- (2) Of interest to other Judges Yes / No
- (3) Revised.

Date: 08th July 2016

In the matter between:-

MANAKA, MANCHA GABRIEL

First Applicant

CORNELIUS, JOHNATHAN MICHAEL

Second Applicant

And

OFFICE OF THE CHIEF JUSTICE

Respondent

J U D G M E N T

Ismail J:

[1] In this application the applicants seek an order in the following terms:

1. that the applicants be awarded R 2 124 888,00 ;
2. interest from the date of approval as per annexureMM3 or date of demand, as directed by the Honourable Court;
3. costs of the application, only if the application is opposed by the respondent(s);

Background to the dispute:

[2] The applicants were appointed as assessors in a criminal trial, in terms of the provisions of section 142 (2) the Criminal Procedure Act 51 of 1977 [CPA].The significance of the role of assessors in a criminal trial was dealt with by van der Westhuizen J in *S v Jaipal* 2005 (4) SA 581

(CC) at paras [36],[37] and [53] of the judgment.

[3] The applicants were paid the sum of a R1 000, 00 per day for each day that the trial lasted, during the initial period.

[4] The initial period is the period when the trial commenced on the 22 February 2010 until 24 April 2012

[5] The applicants made representation to the Judge President of the division, who recommended an increase in the daily fee. The Judge President forwarded his recommendation to the court manager.

[6] The court manager in turn forwarded the request to the regional head in terms of the chain of command, regarding the issue increasing the fee. To cut a long story short, the increment was approved on the 24 April 2012. The fee was thereafter increased from R1 000 per day to R3 494 per day as from the date of approval. This is evident from the internal memo dated 13 April 2012, which is contained at pages 124 to 126 of the paginated papers.

[7] In a further internal memorandum dated 13 April 2012 from M Janse van Rensburg, the Director Regional Court Services to Adv S Jiyane (pages 128-130 of bundle), Acting Chief Director: Court Performance, M

Ndlovane in manuscript commented as follows:

“ only support the increase from date of approval and does not support any past factor approval”

[8] The nucleus of the dispute between the applicants and the respondent evolves around the sphere, that the applicants aver that they were not awarded the increase retrospective from the inception of the trial. The applicants contend and seek an order compelling the respondent to comply with provisions of the Department of Justice Financial Instructions.(DFI)

[9] It was submitted that the tribunal erred in not approving the applicants fee from inception of the trial and had it properly construed its duty it would have found that there was merit in the applicants complaint to have their fee increased retrospectively, to 22 February 2010.

[10] In a further internal memorandum dated 5 October 2012, from the Director General, a response from the CFO, at page 134, the following appears:

“ In instances where the aforementioned process was not followed the granting of exemptions for example ex post facto approvals will reside with the Accounting Officer. Notwithstanding the aforementioned, in light of our existing financial constraints as well

as the precedence that will be set in this regard, it is recommended that *ex post facto* approval should not be granted.

The reason proffered for not granting such exemptions for increased fees, were twofold. Firstly, financial constraints and budgetary parameters and secondly the setting of a precedent for increased fees.

Financial constraints are by their very nature based on budgetary allocations to different departments from the treasury. Each department has to work within the parameters of the budget allocations made to it.

[11] The reasons for not granting the retrospective increase was that it would have equated to a 249% increase in the fee and it would have created pressure on the budgetary constraints.

[12] Court managers were in terms of a circular directed to keep assessors costs to a minimum, and increases were to be motivated, before they were considered. To this end the respondent submitted that it acted in terms of the prevailing legislation, namely in an endeavour to limiting costs and that the decision taken was a rational and reasonable one. The respondent could not accede to the request for the financial years 2010 and 2011. The viability of the request was considered for the year 2012 and it was accordingly approved.

[13] The respondent submitted that the request for an increase is discretionary and it does not give rise to a substantial right. The decision had to be taken in view of various factors, which had to be considered.

[14] This application is not an application seeking a review of the decision not to grant the increment with retrospective effect. It is an application seeking a declaratory order for payment 'the increased fee' for the initial period.

[15] On behalf of the respondent it was submitted and contended that affidavit, on which the applicants relied failed to disclose a cause of action for the relief they sought. It was contended that the relief which they seek in the notice of motion is an “**award in the amount of R2 124 888. 00 plus interest from date of approval**”

It was argued on behalf of the respondent that it is not clear whether the award sought

1. Is as a result of a contractual claim or a breach of thereof; and/or
2. is based on delict and the facts founded in a claim in delict.

In this regard the respondent relied upon the matter of *Democratic Alliance v Kouga Municipality and Others* [2014] 1 All SA 281 (SCA) where Ponnann

JA stated:

“ [18] it is disconcerting to say the least that the a simple throw- away line in paragraph 27 of the DA's founding affidavit could be relied upon as a foundation for the second leg of the argument advanced on appeal . for, as Mhlantha AJA remarked in *National Council of Societies for the Prevention of Cruelty to Animals v Oppenshaw* [2008] ZASCA 78, 2008 (5) SA 339 (SCA)

'[29] It is trite that the applicant in motion proceedings must make out a proper case in the founding papers. Miller J in *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger*, put the matter thus:

'In proceedings by way of motion the party seeking the relief ought in his founding affidavit to disclose such facts as would, if true, justify the relief sought and which would , at the same time, sufficiently inform the other party of the case he was required to meet. ' ”

[16] The applicants, in their heads of argument filed on their behalf, allege that they acted to their detriment owing to a serious material representation that was made to them by the court manager. The misleading information they relied upon was-

- (i) that the trial was scheduled to last 98 days when in fact the realistic estimation was not less than four years;
- (ii) the complexity of the issues to be determined , was undermined;
- (iii) relying on the misleading information they accepted to render service at a fee which was inappropriate. Thereafter they requested an appropriate fee or a variation of the rate by

increasing the fee to an appropriate amount.

The applicants aver that the court manager acted negligently in that they were given incorrect and/or misleading information regarding the duration of the trial. The court manager also kept the Department of Justice Financial Instructions(DFI) as a confidential document whereas it ought to have been made available to them.

These arguments are contested by the respondent in that it was contended that the court manager had no control or say regarding the duration and/or complexity of the trial.

[17] The applicants allege that their request for an increase took two two years before the court manager, ultimately acceded to their request. This was only done as a consequence of the intervention of the Judge President who recommended an increase of the fee. Only on the 23 April 2012 did the court manager find that there was substance to their request. It was submitted that the administrator did not take the decision within a reasonable time, and *a fortiori* there was a substantial delay on the part of the administration, which prejudiced them financially.

[18] The applicants are dissatisfied with the decision taken by the tribunal referred to in para [7], *supra*. They aver that the tribunal did not act independently and objectively in that it failed to consider that the court

manager delayed in determining their request. Furthermore no good or sound reason was proffered regarding the approval of the increase only from 23 April 2102 as opposed to February 2010. They are accordingly of the view that there is no substance for not awarding the increase from inception of the trial.

[19] The applicants contend that they were seeking a review with the tribunal to have the terms of their contract reviewed by the Accounting Officer.

[20] The applicants referred to a letter from Mrs C Kok read with the comments of Ms T N Sindane, the Director General, of the 18 September 2012 which indicated that the accounting officer was not opposed in principle to paying the appropriate rate retrospectively. The only reservation being the availability of funds.

[21] On behalf of the respondent, Adv Platt SC, submitted that the letter from the Judge President only came to the attention of the correct officer during April 2012. In this regard she referred to the para 4.11 of the first respondent's answering affidavit, at paginated page 89 where the following is stated:

“ The letter from the Judge President wherein his 'support' of the application was made on 12

March 2012 which was received by the national office on 13 April 2012, as annexure MM12 to the founding affidavit.

The approval for the increment was approved on the 24 April 2012, within 11 days of receipt of the request. It was argued that there was no delay on the part of the administration and they acted promptly and the allegation made by the applicants therefore has no merit.

[22] Mr Magano, acting for the applicants, submitted that this matter was *sui generis* and that in terms of section 172 (1) of the Constitution a court has a discretion to make a declaratory order. The issue which this court is confronted with, is whether the decision to grant the applicants an increase was an administrative decision. If so, it was always subject to the process of review in terms of the Promotion of Administrative Justice Act 3 of 2000 [PAJA]. The applicants who were aggrieved by the decision not to grant the fee with retrospective effect should have taken the panel's decision on review in terms of section 6 of PAJA. This was not done. In *Bengwenyama Minerals v Genorah Resources* 2011 (4) SA 113 at 138A para [61] Froneman J referred to *Zondi v MEC for Traditional Local Government Affairs and Other* 2005 (3) SA 589 (CC) where Ngcobo J stated:

“ PAJA was enacted pursuant to the provisions of s33 of, which requires the enactment of national legislation to give effect to the right of administrative action. PAJA therefore governs the exercise of administrative action in general. All decision-makers who are entrusted with authority to make administrative decisions by any statute are therefore required to do so in a

manner that is consistent with PAJA. ...”

[23] Even if the 180 days period had elapsed since the decision was taken, they, the applicants, could have brought an application for condonation. This was not done. As far as this court is concerned the decision of the panel stands, irrespective of it being correct or not. In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] 3 All SA 1 (SCA) at para [31] the court stated:

“ Thus the proper enquiry in each case – at least at first- is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent acts will have legal effect for so long as the initial act is not set aside by a competent court.”

[24] This court is requested to make an order that the increased payments should be applied retrospectively, however the order which was made still stands, and has not been set aside by a competent court. To compound the issue, the applicants simply seek the court to make an order for the payments, without challenging the decision not to allow the increments with retrospective effect. In essence this court is called upon to make a decision that the fees should have been paid with retrospective effect. This should have been done by reviewing the decision taken not to increase the fees from the outset. This has not been prayed for in the notice of motion.

[25] I am therefore of the view that the applicants claim to be compensated for the initial period at the rate of R3 499,00 per day stands to be dismissed.

[26] I have thought long and hard why the issue of costs should not follow the result. The applicants already feel 'done in'. If I were to order costs against them they would suffer even further financial hardship apart from those alluded to by their counsel during the arguments presented.

[27] Their counsel submitted that they sacrificed their time and spent a considerably time away from, their practices and both of them had to make enormous adjustments to the careers. That the first applicant was even sued whilst the trial was pending.

[28] This is in my view is a unique case and for that reason I have decided to exercise my discretion in not making a cost order in the normal course, namely that the costs should follow the result.

[29] Accordingly I make the following order:

The applicants claim is dismissed. Each party is to pay its own costs.

Ismail J

8 / vii /2016

APPEARANCES:

For the Applicants : Adv T J Magano.

For the Respondent : Adv A L Platt SC instructed by State attorney,
Johannesburg

Date of hearing : 15 June 2016

Date of Judgment : 08 July 2016.