



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

CASE NO.: 841/2018

Date Heard: 28 May 2020

Delivered on: 11 June 2020

In the matter between:

WORK FORCE SOLUTIONS

Applicant

and

SMALL CLAIMS COURT COMMISSIONER

First Respondent

YOLISA NONDLWANA

Second Respondent

SIZEKA JANGE

Third Respondent

NOLOYISO MSILARA

Fourth Respondent

BUKEKA MAJIBA

Fifth Respondent

ZOLELWA DLWENGU

Sixth Respondent

PHUMZA GOBA	Seventh Respondent
NOSIBUSISO MBASANE	Eight Respondent
THANDOKUHLE DANISTER	Ninth Respondent
NOSIPHIWO MANI	Tenth Respondent
ZUBENATHI MAGAYIYANA	Eleventh Respondent
NOSIPHO NGXANDSHE	Twelfth Respondent
LIZIWE NODOM	Thirteenth Respondent
NOLUSINDISO PHILLIP	Fourteenth Respondent
NOLITHA GCILISHE	Fifteenth Respondent
FUNEKA SAMBUMBU	Sixteenth Respondent
NONKUTALO SAMBUMBU	Seventeenth Respondent
KHOLIWE KWEKANI	Eighteenth Respondent
NOMFUNDISO MPANDENI	Nineteenth Respondent
AMANDA MAPAZI	Twentieth Respondent
AYANDISWA BOJI	Twenty-First Respondent

JUDGMENT

GQAMANA, J:

Introduction

[1] This application concerns twenty judgments that were handed down on 10 October 2017, by the First Respondent in her capacity as a Small Claims Court Commissioner¹, against the applicant² and in favour of the second to the twenty-first respondents³. The applicant seeks an Order that the aforesaid judgments be reviewed and set aside. The application is opposed by the respondents save for few⁴, who elected not to participate in these proceedings.

Factual matrix

[2] The applicant is a training academy and a placement agent with its main focus on training individuals for placement in health care institutions, the retail industry, the service station industry and business in general. The respondents were students under training by the applicant or had completed three months training courses offered by the applicant.

[3] The respondents⁵ issued individual summons on or about April 2017 against the applicant. The summons were served on the applicant on 3rd May 2017, save for the summons that were issued by the twelfth and twenty-first respondents⁶. The trial in respect of all their matters was set down on 27 June 2017, but was not finalised on

¹ Hereinafter referred to as the Commissioner.

² The defendant in the Small Claims Court.

³ Plaintiffs in the Small Claims Court.

⁴ The first, tenth, twelfth, thirteenth, sixteenth, seventeenth and twenty-first respondents.

⁵ Referring to the 2nd to twenty-first respondents collectively.

⁶ Case numbers 181/2017 and 180/2017 respectively.

the said date and was heard over a period of time until finalisation on 3 October 2017.

[4] The respondents' claims fell under three different groups. The first group were those respondents that had successfully completed their courses and received certificates⁷. The second group were those respondents that were allegedly removed by the applicant from the practical training courses based on allegations of misconduct⁸. The third group were those respondents who abandoned the training course during their practical training after they discovered that the certificates issued by the applicant were allegedly invalid because the latter was neither registered nor accredited by the relevant SETA.⁹

[5] As indicated in paragraph 3 above, the trial was heard over a period of time. A number of witnesses testified at the trial, some witnesses were subpoenaed by the Commissioner. Significantly, although the respondents had issued individual summons against the applicant, the Commissioner joined the respondents' actions in accordance with the provision of s 31 (1) of the Small Claim Court Act 61 of 1984 ("the Act"). Judgments were entered in favour of the respondents.

Issues for adjudication

[6] The application is brought in Rule 53 of the Uniform Rules of Court. The applicant formulated its case in terms of s 46 (b) and (c) of the Act. The respondents resisted the application, relying on undue delay by the applicant in bringing the application and also on the lack of merits of the actual review application.

Legal principles

⁷ Under that group, it is the second, third, fifth, seventh-eleventh respondents.

⁸ Under that group, it is the thirteenth to the twenty-first respondents.

⁹ For this group, it is the fourth and sixth respondents.

[7] In terms of s 46 (b) and (c) of the Act, a party aggrieved by a decision of a Commissioner may approach this Court for a review of such decision. The applicant contend that the Commissioner was biased and also committed a gross irregularity with regards to the proceedings.

[8] There is a presumption of impartiality of a judicial officer and the effect thereon is that a judicial officer will not lightly be presumed to be biased¹⁰. Therefore an applicant relying of an allegation of bias by a judicial officer would have to pass the double-requirement of reasonableness as was articulated by the Constitutional Court in *Bernert v ABSA Bank Ltd 2011 (3) SA 92 (CC)*¹¹. However, before I consider the grounds of review upon which this application hinges, I must first deal with the argument of undue delay raised by the respondents.

Undue delay

[9] This application is brought in terms of Rule 53 of the Uniform Rules of Court. Rule 53 does not stipulate a period within which the review proceedings must be lodged. However, it is well established that such an application must be brought within a reasonable time¹².

[10] What is reasonable depends on the circumstances of each case. The enquiry is twofold; namely, (a) whether the delay is unreasonable and, (b) whether it should be condoned. The first enquiry is factual and the second one entails an exercise of a discretion based on the adequacy of the explanation for the delay, prejudice to the parties and prospects of success. These factors must not be considered in isolation, but must be weighed up cumulatively.

¹⁰ *President of RSA v SAFRU 1999 (2) SA 14 (CC)*.

¹¹ Para [35].

¹² *Wolgroeiens Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A)* at 41E-F and also *Gqwetha v Transkei Development Corporation Ltd 2006 (2) SA 603 (SCA)* para 22.

[11] On the facts herein, it is common cause that the impugned judgments were handed down 10 October 2017. The present review application was only issued on or about 20 March 2018, a period in excess of five months from the date of the judgments. Although there is no time period to institute the review proceedings in terms of Rule 53, however the delay of more than five months is unreasonable. The issues in this application are not complex and the papers are not voluminous.

[12] Insofar as to whether such delay must be condoned, I need to exercise my discretion, and in doing so, I must consider the explanation given for the delay, prejudice to both parties and prospects of success.

[13] The explanation proffered by the applicant is that, shortly on receipt of the judgments, on 13 October 2017, legal advice was sought from its attorneys of record. Based on such advice, further documentation were required by its attorneys and such information was provided on 23 October 2017. Soon thereafter, a working draft founding affidavit was provided to it on 1 November 2017. An advice was given to it that counsel should be briefed to settle the affidavit. There is no explanation for the period of 1 to 13 November 2017, when counsel was eventually briefed to settle the papers. The brief was not actioned by counsel and it was then terminated on 22 January 2018. An allegation was made that during this period various correspondence was forwarded to counsel, reminding the latter to execute the brief. Such correspondence was not attached to the founding affidavit. On 25 January 2018, the current counsel was briefed and thereafter further information was sought and the affidavit was settled on 9 March 2018.

[14] Mr Olivier, on behalf of the respondents, argued that the applicant had to provide a full and satisfactory explanation for the entire period of delay and the explanation given by it, is so pathetically unsatisfactory. I agree. The applicant's explanation does not cover the entire period of the delay and is not satisfactory. Lacking as it is, but I am able to understand how the delay came about.

[15] It is evident that, the applicant took reasonable steps to investigate the reviewability of the Commissioner's decision as soon it became aware of it¹³.

[16] The evidence points that the delay was mostly caused by the applicant's erstwhile counsel, but the applicant should not easily escape its erstwhile counsel's tardiness. In *Saloojee v Minister of Community Development*¹⁴, it was said that:

'There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are. (Cf. *Hepworths Ltd v Thornloe and Clarkson Ltd.*, 1922 T.P.D. 336; *Kingsborough Town Council v Thirlwell and Another*, 1957 (4) SA 533 (N)). A litigant, moreover, who knows, as the applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney (cf. *Regal v African Superslate (Pty.) Ltd.*, *supra* at p. 23 *i.f.*) and expect to be exonerated of all blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to

¹³ Associated Institutions Pension Fund v Van Zyl 2005 (2) SA 302 (SCA) paras 50-51.

¹⁴ 1965 (2) SA 135 (A) at 140H-141C-H.

be imputed to himself. That has not been done in this case. In these circumstances I would find it difficult to justify condonation unless there are strong prospects of success (*Melane v Santam Insurance Co. Ltd.*, 1962 (4) SA 531 (AD) at p. 532).’

[17] The above principle applied in *Buthlezi and Other v Eclipse Foundries Ltd*¹⁵. However on the facts of this case, the applicant should not be punished for the tardiness of its erstwhile counsel. The explanation given despite lacking in details has enlightened me to understand the seed germination of the delay, so as to be able to exercise my discretion.

[18] Another equally important factor to be considered is the prospects of success. Prospects of success may perhaps compensate for an explanation which is otherwise lacking. The applicant in its founding affidavit advanced serious allegations of bias against the Commissioner and those allegations remained uncontested by the Commissioner. As an officer of this court, one would have expected the Commissioner to provide her side of the story and refute them if they were inaccurate. In the absence of the Commissioner’s affidavit refuting such allegations, I am inclined to accept the correctness of the applicant’s allegations. However, I intend to dispose of this application on a narrow but acute point sufficient to asphyxiate and cause demise to the respondents’ opposition on the merits.

[19] The other factor to be considered is the prejudice to the parties. Actual prejudice to the respondents is not a pre-condition for refusing to entertain the review proceedings by reason of undue delay. The argument advanced for the respondents on this point is their entitlement to finality of the matter. Mr Olivier, passionately argued that the respondents on receipt of the judgments obtained writs of execution and were expecting payment of their monies. The extension of the argument was that the respondents are men of straw, but this latter point quickly crumbled as soon

¹⁵ [1997] 18 ILJ 633 (A) at 638I-639A.

as it became clear to counsel that it was not the case pleaded. I accept that the respondents are entitled to finality of the matter and that they are prejudiced by the delay in the finalisation of their case. However, such prejudice would be well compensated by way of interest in the event of success in their actions. But, if I decline to condone the delay, the applicant who in my view, has demonstrated gross irregularity in the conduct of the proceedings would suffer more prejudice compared to the respondents.

[20] In the results, I am satisfied that although the delay is unreasonable, however such delay should be condoned.

Grounds of review

[21] The applicant's case for review hinges on s 46 (b) and (c) of the Act. Mr Williams, on behalf of the applicant argued that the Commissioner was bias and secondly there was gross irregularity with regard to the proceedings. However as hinted above, this application is capable of being disposed on a narrow point, namely, the contention that there was gross irregularity with regard to the proceedings as envisaged in s 46 (c) of the Act.

[22] As indicated above, the respondents issued separate summons against the applicant. The twelfth and twenty-first respondents' summons were never even served on the applicant. Despite such obvious shortfall and non-compliance with s 29 (2) of the Act, the Commissioner entertained their actions and gave judgments in favour of these respondents. This is a gross irregularity on its own.

[23] Furthermore and on the evidence from the papers before me, the Commissioner conducted a joint hearing of all the respondents' claims and there was no formal joinder of the respondents. Section 31 (1) of the Act, reads as follows:

'(1) Any number of persons each of whom has a separate claim against the same defendant; may join as plaintiffs in one action if the right of each to relief depends upon the determination of some question of law or fact which; if

separate actions were instituted, would arise in each action: Provided that if such a joint action is instituted the defendant may apply to the court that separate trials be held; and the court may in its discretion make such order as it may deem just and expedient.'

[24] The Commissioner did not bring to the attention of the applicant as a layman that, it is entitled to hold separate trials and there was a duty on her to do so¹⁶. This as well is a gross irregularity sufficient to vitiate the entire proceedings.

[25] Parties have agreed that, in the event I find that the judgments had to be reviewed and set aside, I should not entertain the actual merits of the claims instituted by the respondents because I am not fully equipped with the evidence to adjudicate same. It is trite that the Small Claims Court is not a court of record and as such there was no transcript filed by the parties that could have assisted me to adjudicate on the merits of the respondents' claim.

[26] In the circumstances, a remittal of the matter to the Small Claims Court, Port Elizabeth to be heard *de novo* by another Commissioner other than the first respondent is justified.

Costs

[27] Insofar as the issue of costs are concerned the applicant sought an order that the costs should follow the results and that the respondents jointly and severally should pay the costs of the application.

[28] Mr Olivier, argued that there are exceptional circumstances in this case which justify a deviation from the general rule, that the costs should follow the results. It was argued that the respondent should not be saddled with a costs order because

¹⁶ Smith v Seleka and Andere 1989 (4) SA 157 (O).

the reasons advanced for the review application were as a result of the gross irregularity caused by the Commissioner and not the respondents.

[29] Without a shadow of doubt, the respondents were oblivious that, in terms of s 31 (1) of the Act, the Commissioner had a duty to advise the applicant that it was entitled to hold separate trials. As such the respondents opposed this application unaware of such duty on the Commissioner and it will not just and fair to saddle them with a costs order.

[30] Furthermore, Commissioners at the Small Claims Court are legal practitioners in private practise who volunteer their services *pro bono*, and it would equally not be just and fair to award costs orders against them.

Order

[31] In the circumstances, I make the following order:

1. The Commissioner's judgments handed down on 10 October 2017 in favour of the respondents and against the applicant are reviewed and set aside.
2. The actions instituted by the respondents against the applicant are remitted to the Small Claims Court, Port Elizabeth to be heard *de novo* by another Commissioner.
3. Each party to pay their own costs.

N. GQAMANA
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant : ADV K WILLIAMS

Instructed by : KAPLAN BLUMBERG ATTORNEYS
PORT ELIZABETH

For the Respondents : ADV OLIVIER

Instructed by : BLANCHE ATTORNEYS
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