IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, DURBAN

CASE NO: D3200/2020

In the matter between:

Consolidated Aone Trade and Invest 6 (Pty) Ltd (In Liquidation)	Intervening applicant
and	
Gearwise Properties CC	First respondent
The Master of the High Court, Durban	Second respondent
Imperial Crown 176 Trading (Pty) Ltd (In liquidation)	Third respondent
Fathima Cassim NO	Fourth respondent
Mandla Professor Madlala NO	Fifth respondent
Neil David Button NO	Sixth respondent

Judgment

Lopes J

[1] This is an application by Consolidated Aone Trade & Investment (Pty) Ltd (in liquidation) ('Aone') for leave to intervene in what I shall refer to as 'the main application'. The application is opposed by Gearwise Properties CC ('Gearwise'). This is the latest skirmish in the protracted litigation between the various parties.

[2] The history of the litigation may be summarised as follows:

(a) Aone was the registered owner of certain immovable property ('the property') at one Link Road, Ballito, KwaZulu-Natal.

(b) The property was sold by Aone to Imperial Crown Trading 176 (Pty) Ltd (in liquidation), the third respondent in the main application ('ICT').

(c) ICT employed Gearwise to construct the Ballito Bay Shopping Mall ('the Mall') on the property. Gearwise subcontracted TBP Buildings ('TBP') to carry out the construction.

(d) Gearwise and TBP parted ways, and Gearwise completed the construction of the Mall.

(e) ICT failed to pay Gearwise, and was liquidated on the 17th January 2014. The sale of the property by Aone to ICT collapsed, and Aone was liquidated on the 20th March 2014.

(f) At the first meeting of creditors in the liquidated estate of ICT on the 9th April 2014 (the meeting having been adjourned from the 2nd April 2014), seven creditors proved claims. Guardrisk Insurance ('Guardrisk') sought to prove a claim based upon a cession by Gearwise of its claims against ICT. The claim was accepted, but later expunged by the Master on the 29th October 2015 in terms of s 45(3) of the Insolvency Act, 1936 ('the Act'). Aone proved two claims, which were similarly expunged by the Master on the 12th May 2016.

(h) At the second meeting of creditors on the 14th June 2017, Gearwise applied in its name to prove the claim which had previously been submitted by Guardrisk. The claim was rejected.

(i) Gearwise then sought to review the decision to reject its claim. This court (per Kruger J) directed the Master to hold a further special meeting of creditors, solely to consider the claim of Gearwise. That meeting was held on the 17th October 2019, and ended in some confusion. Gearwise alleged that the Master (who presided at the special meeting) had accepted its claim, but Aone alleged that she had not done so. The point of issue was that it was alleged at the meeting that the liquidators had compromised the claim of Gearwise. The Master was clearly unhappy at making a decision when the liquidators had purported to have done so. However, one of the liquidators, Mr Button (the sixth respondent), protested at the meeting that the claim had not been compromised by them.

(j) On the 29th May 2020, Gearwise brought the main application to review the decision of the Master, and to vary her decision to read that she had accepted the claim of Gearwise in the sum of R213 120 795.10, and that she accepted that the claim had been compromised by the liquidators.

(k) Aone now seeks leave to intervene in the review application, on the basis that it is a creditor of ICT, and has a direct and substantial interest in the outcome of the main application.

[3] The problem which faced Mr *Lotz* SC, who appeared for Aone, was that both the claims of Aone, which had initially been accepted, had subsequently been expunged by the Master. Aone then brought an application on the 23rd November 2016 to review the Master's decision to expunge its claims. That review has not yet been heard.

[4] Mr *Manikum*, who appeared for Gearwise, submitted that;

(a) Because the claims of Aone were expunged, Aone was no longer a creditor of ICT, and accordingly, had no 'real and substantial' interest in the main application.

(b) The review application brought by Aone could not assist it because it was brought two days after the 180-day period referred to in s 7(1) of the Promotion of Administrative Justice Act, 2000 ('PAJA') had expired.

(c) Aone had not, as yet, brought an application to condone the late filing of its review application, and it was too late to do so now. In the event of the review failing, which is inevitable because it was out of time, Aone had no basis for seeking leave to intervene.

(d) Even if Aone was granted condonation, its claims would have expired by the effluxion of time. Prescription is not halted by the review application.

(e) Notwithstanding that the condonation may be granted, I must decide the application on the basis that, as Aone has not yet applied for condonation, it cannot succeed in the review.

[5] The procedure for judicial review is set out in s 7 of PAJA, and provides, inter alia:

> '(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –
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> (a) subject to subsection 2(*c*), on which any proceedings instituted in terms of internal remedies as contemplated in subsection 2(*a*) have been concluded; or
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> (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.'

[6] In Aone's founding affidavit in this application, the deponent states that Aone received notification of the expungement on the 25th May 2016. The notification (annexure 'EN1' to the affidavit) gives no reasons for the expungement, save to refer to s 45(3) of the Act and regulation 18 of the Companies Act, 1973. The deponent to the answering affidavit of Gearwise

alleges that the 180-day period expired on the 21st November 2016. That appeared to be common cause. The issue of Aone's review application was therefore two days' out of time. It was not suggested that any internal remedies were applicable to the review proceedings, and I shall assume that there were none.

[7] Mr *Lotz* submitted that Aone could apply for condonation of the two-day late filing of the review at any time before the hearing of the review. In the alternative, he submitted that notwithstanding the expungement of Aone's claim, it still retained the right to prove its claims by way of action, should the review fail because of a failure to comply with the 180-day time limit.

[8] The first issue to be decided then, is whether Aone is able to apply for condonation of its late filing of its review application. Mr *Manikum* submits that the cases, properly read, imply that the application for condonation must accompany the review application, or at least, be brought as soon as an applicant becomes aware that it will be required.

[9] The starting point in determining the first issue is PAJA itself. Section 9 provides:

> 'Variation of time. – (1) The period of –
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> (a) 90 days referred to in section 5 may be reduced; or
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> (b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period,
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> by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.
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> (2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.'

[10] Mr *Manikum* relied upon the statement by Ploos van Amstel AJA in *Mostert NO v Registrar of Pension Funds and Others* 2018 (2) SA 53 (SCA) paras 34 -36:

'[34] The approach under PAJA to a delay is not the same as under the common law. Under the common law a court may refuse to hear a review if there has been an unreasonable delay in instituting the proceedings. What would constitute an unreasonable delay would depend on the circumstances. See in this regard *South African National Roads Agency Ltd v Cape Town City* 2017 (1) SA 468 (SCA) para 79. Section 7(1) of PAJA provides that proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the dates specified in subsections (a) and (b). In *Opposition to Urban Tolling Alliance* Brand JA said (para 26):

"At common law application of the undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned… Up to a point, I think, s 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding 180 days as *per se* unreasonable. Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable *per se*. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all."

[35] It follows in my view that where it appears to the court on the papers that there has been a manifest delay and that the proceedings may not have been instituted within the period of 180 days, it will be entitled to raise the point itself as such a delay will be unreasonable per se and the court will not have the power to entertain the review. As was said in *Camps Bay Ratepayers and Residents' Association,* the applicant should then be given an opportunity to deliver a further affidavit to explain the apparent delay, or apply for an extension in terms of s 9. It will, of course, be entitled not to do so and to argue the matter on the papers as they stand.

[36] This brings me to the question whether the court a quo erred in allowing the Minister to raise the point when he had not done so in his papers. Where it appears from the applicant's papers that there had been a delay of more than 180 days, and there is no application for an extension of the period, a respondent is in my view entitled to raise the point in argument that the court has no power to hear the review. This is not raising a defence – it is a submission that, on the applicant's own papers, the court has no power to entertain the review. If the court is entitled to raise the point *mero motu* then there can be no reason why the respondent should not be allowed to raise it. It was in any event dealt with by both parties in their heads of argument, and the appellant elected not to seek leave to file a further affidavit.

[37] I do not agree with the submission that the time bar in s 7(1) is the same as a special defence of prescription. Section 17(1) of the Prescription Act 68 of 1969 provides that a court shall not of its own motion take notice of prescription. Subsection (2) provides that a party to litigation who invokes prescription shall do so in the relevant document filed of record. There is no similar provision in PAJA. Where the proceedings were not instituted within the periods specified in s 7(1) a court has no power to hear the review.'

[11] For the sake of completeness, I have set out paragraph 37 in addition to the paragraphs referred to. I do not understand the court to be saying that it is peremptory that;

(a) the application for condonation must be launched at the time that the review papers are issued; nor that

(b) the condonation must be launched as soon as the applicant for review becomes aware that condonation will be required;

and that a failure to do so would be fatal to the application.

The court stated that the lack of jurisdiction could be raised in argument. It is the election of the applicant whether or not to apply for condonation, and, in general, a party should be given an opportunity to do so.

[12] The parties agree that the decision of the Master expunging the claims of Aone or Gearwise are subject to PAJA. Mr *Lotz* submits that Aone is entitled to bring an application for condonation to demonstrate that the *per se* determination that the delay is unreasonable, should not be applied. Although Aone has not, as yet, brought a substantive application for condonation, on the authorities it should be allowed to deliver an affidavit dealing with this aspect in the review. (See: *Mamabolo v Rustenburg Regional Local Council* 2001 (1) SA 135 (SCA)). I do not believe that I am able, in this application, to decide whether such an application would be successful or not. That is up to Aone and the court hearing the review.

[13] Mr *Manikum* relied on the authority of Asla Construction (Pty) L*td* v Buffalo City Metropolitan Municipality 2017 (6) SA 360 (SCA) para 8, which states:

'[8] The respondent therefore required an extension of the period fixed by PAJA within which to bring the application for review. Section 9 contemplates a substantive application to the relevant court or tribunal, by the person or administrator concerned. That application ought to have been made by the respondent when it first approached the court for relief. It did not do so. Once the appellant had raised the issue of compliance with PAJA, the respondent was obliged to launch an application in terms of this section for an extension of the fixed period. This application could thereafter have been consolidated with the review application. The correct procedure would have ensured that the relevant facts were placed before the court a quo, to enable it to exercise its discretion properly.'

Mr *Manikum* drew attention to the fact that Aone had been informed of its need to seek condonation in the Gearwise review application, as early as 2017. He emphasised that the review application had been issued some four years' ago, and had not been prosecuted by Aone.

[14] I do not understand the Supreme Court of Appeal to state in *Asla* that a failure to apply for condonation at the time of issuing a review application would

be fatal to the application. Clearly it would be prudent and sensible to do so at that time. The fact that Gearwise drew Aone's attention to the need for condonation is not alleged to have been done in the application itself, but in the application brought by Gearwise to compel the Master to consider its own claim. I drew to the attention of the parties that I had endeavoured to draw Aone's review application from the Registrar's office, but the staff could not locate the file. Possibly, that was because it is in off-site storage.

[15] I was also informed by Mr *Manikum* that Gearwise had sought to obtain leave to intervene in the Aone review application, but that had initially been opposed by Aone. At some stage, Aone withdrew its opposition to the application of Gearwise for leave to intervene. However, the parties could not agree on the matter of costs, and, as I understand the position, the joinder application has not been finalised. There is no explanation from Gearwise as to why it has not sought to finalise its application for leave to intervene. Either party was in a position to have caused the application to be finalised. Whatever their reasons are, it is not for me to speculate.

[16] As to the point raised that Aone's claims against ICT will have prescribed by the time the review application is heard, and accordingly that its application to intervene has no merit, I refer to s 13(1)*(g)*, and s 15 of the Prescription Act, 1969. Section 15 provides:

'**15. Judicial interruption of prescription.** – (1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.

(2) Unless the debtor acknowledges liability, the interruption of prescription under subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.

. . .

(4) If the running of prescription is interrupted as contemplated in subsection (1) and the creditor successfully prosecutes his claim under the process in question to final judgment and the interruption does not lapse in terms of subsection (2), prescription shall commence to run afresh from the day on which the judgment of the court becomes executable.

. . .

(6) For the purposes of this section, "process" includes a petition, a notice of motion, a rule *nisi,* a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced.'

[17] The point raised accordingly has no merit. The claim accepted by the Master against the insolvent estate of ICT, the subsequent expungement by the Master and Aone's as yet unheard review application of the Master's decision must be viewed together in this regard. The review application brought by Aone, alone demonstrates that it does not accept that it has no claim against ICT. The fact that there is presently no bar to it amending its review application demonstrates, *prima facie*, at least, that it has a real and substantial interest in the main application.

[18] In *Snyders and others v De Jager* (joinder) 2017 (5) BCLR 604 (CC); [2016] ZACC 54, 'a direct and substantial interest' was explained as follows:

'[9] A person has a direct and substantial interest in an order that is sought in proceedings if the order would directly affect such a person's rights or interest. In that case the person should be joined in the proceedings. If the person is not joined in circumstances in which his or her rights or interests will be prejudicially affected by the ultimate judgment that may result from the proceedings, then that will mean that a judgment affecting that person's rights or interests has been given without affording that person an opportunity to be heard. That goes against one of the most fundamental principles of our legal system. That is that, as a general rule, no court may make an order against anyone without giving that person the opportunity to be heard.'

[19] It is accordingly unnecessary for me to decide whether, on the basis that the review application must be decided against Aone now, Aone is a creditor (albeit an unproven one) of ICT. The failure of Aone to apply for condonation is not, in my view, a reason to dismiss its application for leave to intervene. It has satisfied the test for intervention.

[20] With regard to the question of costs in this application, Mr *Manikum* submitted that they should be reserved for the decision of the court hearing the main application. As that court should not be burdened with dealing with the merits of this application which deals only with leave to intervene, the successful party should be entitled to its costs. It was appropriate, in my view, for senior counsel to be engaged by Aone.

[21] A final matter with which I need to deal is an application contained in the replying papers by Gearwise, seeking an order to strike out a number of paragraphs in the answering affidavit of Aone. The application was not raised by either counsel in argument, and I accordingly assume that Gearwise did not intend me to deal with it. My *prima facie* view is that the application to strike out had no merit. I shall therefore make no order in relation to it, and it is not to form any part of the costs order I make.

[22] I accordingly grant the following order:

(a) The intervening applicant, Consolidated Aone Trade and Invest 6 (Pty) Ltd (in liquidation), is granted leave to intervene in the application issued by Gearwise Properties CC under Case No: D3200/2020 on the 29th May 2020 ('the main application').

(b) The intervening applicant's affidavit deposed to on the 17th July 2020 is to serve as its founding affidavit in the application for leave to intervene and as its answering affidavit in the main application, and the headings of all future documents delivered in the main application shall refer to the intervening applicant as such.

(c) Gearwise is directed to pay the costs of Aone's application for leave to intervene, such costs to include those costs consequent upon the employment of senior counsel.

Graham Lopes.

Lopes J

Date of hearing:	23rd July 2021.
Date of judgment:	30th July 2021.
For the applicant:	GME Lotz SC (instructed by Edward Nathan Sonnenbergs Inc).
For the respondent:	M Manikum (instructed by Nirvan Kawulesar & Company).