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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

CASE NO: 1602/2022

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

In the matter between:

LEFU JOSEPH MODUPE

Applicant

And

THE MASTER OF THE HIGH COURT, FREE STATE

1st Respondent

PROVINCE BLOEMFONTEIN

LESEDI LABOPHELO TRUST

2nd Respondent

MOSALA ALBERT SERUE TRUSTEE

3rd Respondent

LUCKYBOY SERUE

4th Respondent

HEARD ON: 17 July 2023

CORAM: MHLAMBI, J *et* DANISO, J

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: 21 SEPTEMBER 2023

[1] The applicant approached this court seeking the following relief on an unopposed basis:"

1. *Condoning, extending the 180 days' time period for the instruction (sic) of this application for the judicial review of the decision taken by the first respondent as per its letter dated 14th February 2019 as more referred to (sic) the First Respondent's letter marked annexure "A" in the founding affidavit informing the Applicant that he had been removed as one of the trustees of Lesedi Labophelo Trust, the second respondent;*
2. *Reviewing and setting aside alternatively declaring that the decision of the First Respondent in removing the Applicant as Trustee of the Second Respondent is unlawful.*
3. *Declaring that the Applicant is and hereby reinstated as a lawful trustee of Lesedi Labophelo Trust with immediate effect.*
4. *Directing the First Respondent to issue Letters of Authority appointing the Applicant as the Trustee of Lesedi Labophelo Trust under Trust Deed No. IT6[...].*
5. *Granting further and/or alternative relief, costs of suit in the event of those Respondents opposing this application."*

[2] Annexure "A" referred to in the notice of motion should read "B1", which is the first respondent's letter dated 11 February 2019 addressed to the applicant's attorneys informing the latter that the applicant was removed from office in terms of section 20(2)(e) of the Trust Property Control Act, as he failed to comply with the first respondent's lawful request to respond to allegations against him. This letter was in response to one dated 22 January 2019 from the applicant's attorneys who sought reasons from the first respondent for its decision of 13 March 2018 to remove the applicant as a trustee of the second respondent.

[3] In his explanation for the delay in filing the application within 180 days of the date of the first respondent's decision, the applicant stated that he learned for the very first time of his removal as trustee in February 2019 through his attorneys.¹ He never received the letter from the first respondent dated 16 November 2017, directing him to furnish reasons why he should not be removed from the trust. He had written to the Master in the years 2018, 2019 and 2021 requesting the reconsideration of the decision for his removal from office.² He struggled financially since his removal from office and could not obtain competent legal representation.³ Covid-19 had a role to play in his not bringing the application within the prescribed time, as he was unable to travel to his attorney's offices for proper consultation due to travel restrictions imposed at the time.⁴

[4] On 4 May 2018, he informed the first respondent that he did not receive the letter dated 16 November 2017. The first respondent, on receipt of such letter, should have considered his submission and reinstated him as a trustee.⁵ He was, in terms of section 6 of the Deeds Registry Act, the registered owner of the trust property with his successor in title. His removal from office deprived him of his legal right to enjoy the title to the said property.⁶ It was contended that his prospects of success were fairly good.

[5] The first respondent filed a notice to abide by the decision of the court and briefly stated that the applicant was removed from office for his failure to comply with a lawful request to respond to the allegations against him; and the matter could not be held in abeyance indefinitely. This was contained in the letter dated 13 March 2018 and, ever since, he has not received any formal complaint from the beneficiaries about the incompetency of the serving trustees.⁷

¹ Para 6.6 of the FA.

² Para 3.4 of the FA (condonation application on page 50).

³ Para 3.6 of the FA (condonation application).

⁴ Para 3.7 of the FA (condonation application).

⁵ Paragraphs 4.1 of the FA (condonation application).

⁶ Paragraphs 4.3 and 4.4 of the FA (condonation application).

⁷ Paragraphs 2.3 and 2.4 of the notice to abide on page 66 of the bundle.

[6] On 29 March 2021, the applicant's attorneys informed the first respondent that it was clear from its letter dated 14 February 2019, that the applicant's removal was based solely on the fact that he did not respond to the first respondent's letter of 16 November 2017; despite the applicant having furnished reasons as per his letter dated 4 May 2018. Furthermore, the applicant was the co-owner of the first respondent's trust property registered at the Deeds Office under the deed of transfer T11[...]. The first respondent's decision to remove the applicant as trustee, it was contended, infringed his constitutional right as a co-owner of the property assets of the Lesedi LabopheloTrust deed.⁸

[7] On 7 May 2018, the first respondent forwarded the applicant's letter of 4 May 2018 to the first respondent's other trustees for their comments⁹ which were furnished by the third respondent in his letter dated 15 June 2018.¹⁰ This letter is attached to the applicant's founding affidavit and marked annexures "H1" and "H2".¹¹ The third respondent's reply to the applicant's complaint was brought to the applicant's attention but, to date, the latter failed to respond to the damning allegations contained therein.

[8] It is common cause that both the applicant and the third respondent were the second respondent's trustees since the inception of the trust in 2002. Both are *ad idem* that their relationship was not good from the start. The essence of the third respondent's response to the applicant's complaint to the first respondent is not far different from the allegations contained in the third respondent's letter of 16 November 2017 to the latter.¹² The third respondent stated in his letter of 15 June 2018 that the applicant disappeared without a trace for a number of years and on his return he subdivided the farm without consultation. A number of things needed repairs on the side occupied by the applicant who failed to contribute financially or otherwise to the development of the trust. The applicant did not have the interests of the trust at heart and failed to attend its meetings for years.

⁸ Paragraph 8, 10, 12 and 13 of annexure "D2" and "D3" on page 30 and 31 of the index.

⁹ Paras 6.2/6 and 6.27 of the FA.

¹⁰ Annexures "H1" and "H2" to the applicants FA.

¹¹ Paras 6.28 and 6.29 of the FA.

¹² Pages 60-62 of the Record.

[9] The applicant stated in his letter to the first respondent that in 2013 he moved to the other side of the farm and it is evident from the contents of the said letter that, for a considerable period, he did not have much information about the activities taking place on the farm.¹³ He failed to refute the allegations against him contained in the third respondent's letter of 15 June 2018.

[10] In the applicant's heads of argument, it is stated that a trustee may at any time be removed from his office by the Master if he fails to perform satisfactorily any duty imposed upon him by the Act or comply with any lawful request of the Master.¹⁴ The applicant learnt of his removal as trustee by the first respondent on/or about October 2018.¹⁵ This application was lodged without unreasonable delay as the applicant had to exhaust the internal remedies.¹⁶ The decision sought to be reviewed is an administrative act under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").¹⁷

[11] The main thrust of the applicant's argument is that the first respondent's request to the applicant to comply with his request was not properly dispatched to the applicant.¹⁸ The first respondent did not afford the applicant an opportunity to be heard and took a decision unilaterally without considering the *audi alteram partem* rule.¹⁹ It was contended that the removal of the applicant was not in the interests of the trust or its beneficiaries.²⁰

[12] Under PAJA, proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned was informed of the administrative action.²¹ In *Opposition to Urban*

¹³ Annexure "F1" on pages 35 and 36 of the Index.

¹⁴ Para 2.3 of the heads of argument.

¹⁵ Para 3.1 of the heads of argument.

¹⁶ Para 3.4 of the heads of argument.

¹⁷ Para 3.5 of the heads of argument.

¹⁸ Para 3.7 of the heads of argument.

¹⁹ Para 3.8 of the heads of argument.

²⁰ Para 3.9 of the heads of argument.

²¹ RS 21, 2023, D1704A.

Tolling Alliance v The South African National Roads Agency Ltd,²² it was stated that: “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. Whether or not the decision was unlawful no longer matters. The decision has been ‘validated’ by the delay. That of course does not mean that, after the 180-day period, an enquiry into the reasonableness of the applicant’s conduct becomes entirely irrelevant. Whether or not the delay was unreasonable and, if so, the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not.”

[13] In considering a delay under the provisions of PAJA, the interests of justice are the decisive criterion. A two-stage approach should be followed. The first question to be answered is whether the application was launched more than 180 days after internal remedies were exhausted or the applicant had been informed of, had knowledge of or ought to have had knowledge of the administrative action under challenge. The second question, if the first is answered in the affirmative, is whether it is in the interests of justice to condone the delay.

[14] The question of whether the interests of justice require the grant of an extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other

²² [2013] 4 All SA 639 (SCA) (9 October 2013).

litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success. Although a consideration of the prospects of success of the application for review requires an examination of its merits, this does not encompass their determination.²³

[15] This application was launched on 7 April 2022. The applicant stated in his letter of 4 May 2018 to the first respondent that he knew on 2 May 2018 of his removal as trustee. Though the applicant is shifty about the date he had knowledge of the first respondent's decision, it is clear that a period of approximately four years elapsed since the impugned decision was taken and the applicant came to the knowledge thereof. He failed to give a full and reasonable explanation for the delay which covers the entire period. His explanation is scanty as to the work done by the first set of lawyers he employed after he allegedly learnt for the first time in October 2018 of the first respondent's decision.²⁴ This version contradicts his earlier versions that he had learnt of his removal through his current attorneys in February 2019 pursuant to a letter he had received in his post box from the first respondent in March 2018 informing him of his removal.

[16] The relief sought is his reinstatement as the trustee of the second respondent. Despite his awareness of the third respondent's comments to his complaint which were forwarded to the first respondent, he failed to respond thereto. The granting of the relief sought would have a negative effect on the administration of justice. In these circumstances, the application should fail.

[17] The following order is made:

Order:

The application is dismissed.

MHLAMBI, J

²³ Erasmus: RS 20, 2022, D1-706.

²⁴ Para6.13 of the FA.

I concur,

DANISO, J

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