



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 166/2012

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

6.05.2019

DATE

SIGNATURE

In the matter between:

DELTATEX HOLDING LIMITED

AND

EXXARO COAL (PTY)LTD LIMITED

REGISTRAR OF THE HIGH COURT

APPLICANT

FIRST RESPONDENT

SECOND RESPONDENT

IN RE:

DELTATEX HOLDING LIMITED

PLAINTIFF

And

EXXARO COAL (PTY) LIMITED

DEFENDANT

JUDGMENT

STRIJDOM AJ

[1] The applicant in its amended Notice of Motion seeks orders, inter alia, in the following terms:

"1. Declaring that that part of the decision handed down by the second respondent in writing on 28 August 2012 and attached to the applicants' founding affidavit marked "DHL2" which reads "within fourteen days otherwise the plaintiff will be barred to proceed with the matter(the impugned decision) to be a nullity and of no force and effect,

Alternatively

2. ...

2.1 Reviewing and setting aside the impugned decision;

2.2 Condoning the applicants' failure to institute these proceedings for judicial review within '180 days after the date on which the applicant was informed of the administrative action referred to in paragraph 2.1 above;

Further alternatively

3. Directing the second respondent to uplift the bar imposed by it on 28th August 2012 preventing the applicant from proceeding with the action under the aforementioned case number until and such time as the applicant has furnished the requisite security for costs of the action.

Further alternatively.

4. Insofar as is necessary condoning the late filing of security for costs guarantee under the aforementioned case number.

5. *Directing the first respondent to file its plea or take such steps as it deems appropriate in terms of the Rules of this Honourable Court within 20 (twenty days from date of this order.”*

Counter Application.

[2] The first respondent has brought a counter-application in which it seeks an order setting aside the applicants' summons and particulars of claim and ancillary relief.¹

Background

[3] The applicant instituted action against the first respondent in January 2012.

[4] During February 2012 the first respondent called upon the applicant to furnish security for the first respondents' costs.² The applicant conceded liability to furnish security for costs.

[5] On 28 August 2012, the Registrar set the amount of security to be furnished in the amount of R275 000.00 and further ordered the security to be paid by way of bank guarantee to the first respondents' attorney within 14 days. The Registrar further determined that in the event of the applicants' failure to do so, it would be barred from proceeding with the action.³

[6] The applicant has failed to furnish the security to date hereof.

¹ Answering Affidavit ("AA"), Annexure "CA1" page 256..

² Annexure "AA1" page 205

³ Founding affidavit page 12, para 37, annexure "DHL2, page 25

[7] The applicant launched this application on 27 February 2017 as an interlocutory application in the action instituted by it under case number 166/2012.⁴

[8] The founding affidavit in support of the application was deposed to by Mr Goran Ohlsson. The first respondents' answering affidavit and counter claim was delivered on 29 March 2017.⁵

[9] The first respondent raised various points *in limine*, including the point that the applicant had failed to comply with the requirements of Rule 53 of the Uniform Rules of Court and had failed to bring a substantive application for review of the Registrars decision in terms of the Promotion of Administrative Justice Act, 2000 ("PAJA").

[10] The applicants' replying affidavit, deposed to by Mr Sibuyi, was delivered on 20 April 2017. At page 263, para 13.2, the applicant through Mr Sibuyi, dismissed the first respondents' second point *in limine* by saying that it had no basis in law.

[11] On 20 June 2017 the applicant gave notice of its intention to apply for the amendment of the applicants' notice of motion at the hearing of the matter by the insertion of a new prayer 1 for an order declaring that that part of the decision handed down by the Registrar in writing on 28 August 2012, which reads "*within 14 days otherwise the plaintiff will be barred to proceed with the matter*" to be a nullity and of no force and effect.⁶

⁴ Notice of Motion , Vol 1 page 1-4

⁵ Vol 2, page 154-204

⁶ See page 352

[12] In an affidavit delivered in support of the notice of amendment, Mr Sibuyi stated that the aforesaid part of the Registrar's decision constituted a nullity and that it was not necessary for the applicant to follow the procedure contemplated in PAJA and/or the provisions of Rule 53.⁷ The application was set down for hearing on 11 September 2017.

[13] On 21 August 2017, the applicant delivered a further notice of amendment providing for the review and setting aside of the aforesaid part of the Registrars' decision, and condonation of the applicants' failure to institute the proceedings within 180 days as required by "PAJA".⁸

[14] An amendment notice of motion was delivered on 7 September 2017 and contained a notice to the Registrar to dispatch the record of the proceedings and his reasons.

[15] On 9 October 2017, the applicant without the leave of the court delivered a supplementary founding affidavit. This supplementary founding affidavit was disallowed by Kollaphen J and eventually admitted by Fabricius J.

[16] On 28 September 2017, the applicant delivered another supplementary affidavit without the leave of the court. Application was made at the hearing of the application for this supplementary affidavit to be struck out and the affidavit was disallowed by Kollaphen J.

⁷ Vol 4, 357, para 10

⁸ See Notice of amendment, page 370-373

[17] On 22 November 2017, the first respondent delivered a provisional answering affidavit to the applicants' supplementary founding affidavit, pointing out that the applicants' supplementary founding affidavit had been delivered without the requisite leave from the court having been obtained and objecting to the delivery of the affidavit and the procedure adopted by the applicant.⁹

Security for Costs

[18] Rule 47 provides the mechanism for the provision of security for costs whereas is contemplated in Rule 47 (2). *"The amount of security only is contested the Registrar shall determine the amount to be given and his decision shall be final."* In the instant matter it was only the amount of security to be given which was contested.

[19] Rule 47(3) provides as follows:

"If the party from whom security is demanded contests his liability to give security or if he fails or refuses to furnish security in the amount demanded or the amount fixed by the Registrar within 10 days of the demand or the Registrars' decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with."

[20] In terms of Rule 47(4) the court may, if security be not given within a reasonable time dismiss the proceedings instituted or strike out any pleadings filed by the party in default or make such other as it may seem fit.

⁹ Vol 5, page 425, para 5

[21] It was submitted by counsel for the applicant that it was incumbent on the first respondent in the event of it seeking to bring the matter to an end to have made an application pursuant to the provisions of Rule 47(4) for an order dismissing the proceedings.

The Delay in furnishing the Guarantee

[22] In paragraph 4 of the notice of motion, as amended, the applicant seeks, in alternative, an order condoning the late filing of the security for costs guarantee.

[23] The counsel for the applicant submitted that Mr Ohlsson, the sole director of the applicant became seriously ill during September 2012 and as a result of his failing health was unable to communicate or give instructions to the applicant's attorneys in relation to the furnishing of security until his recovery during November 2016.

[24] The applicant, did not comply with the Registrars' directive from 28 August 2012 until November 2016.

[25] There is no proper explanation for the delay during the period 7 September 2012 to 19 November 2016. There is no explanation why the security could not have been furnished at an earlier stage and why it could not be furnished within the 14 days stipulated by the Registrar.

[26] The applicant in its replying affidavit did not attempt to deal with the allegations contained in paragraph 32 of the answering affidavits.¹⁰

¹⁰ Page 268, para 25

[27] The second respondents' decision was made on 28 August 2012, the applicant furnished its guarantee on 21 December 2016 which was replaced by a second guarantee on 2 February 2017.

[28] The applicants' delay in furnishing security has brought about an unordinated delay. It is an overarching requirement of public policy that the principle of finality in litigation should generally be preserved rather than be eroded.¹¹

[29] In my view the applicant has not shown good cause for the indulgence sought by it.

The Decision of the Registrar

[30] The applicant in prayer 1 of its amended notice, seeks an order declaring part of the decision handed down by the Registrar of the High Court, Pretoria on 28 August 2012, which reads: "*within 14 days otherwise the plaintiff will be barred to proceed with the matter*" to be a nullity and of no force and effect.

[31] The Registrar's decision constitutes "Administrative Action" within the meaning of PAJA.¹²

[32] In the case of invalid administrative action, the law remains that the Administrative act remains legally effective until set aside by a competent Court. The principle was endorsed and applied by the Constitutional Court.¹³

¹¹ Firestone South Africa (Pty)Ltd v Genticuro Ag 1977(4)SA 298 (A) at 309 A

¹² Trakman NO v Livshitz 1995(1) SA 282(A)

The Review Application

[33] In prayer 2 of the amended notice of motion, the applicant seeks the review and setting aside of the Registrars' decision, as well as condonation for its delay.

[34] It was conceded by counsel for the applicants' that the impugned decision of the Registrar is reviewable in terms of section 6(2)(a)(i) of PAJA. However the application to review the impugned decision was not brought within the period of 180 days after the date the applicant became aware of the impugned decision.¹⁴

[35] In terms of section 9(2) of the PAJA a Court may grant an application extending the period "*where the interest of justice so require.*"

[36] In my view the application for the setting aside of the Registrars decision, should have been made, from the start, in terms of PAJA.

Delay under PAJA.

[37] It is trite that a party seeking an extension of timeframes (in terms of Section 9(2) of PAJA) must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and factors relevant thereto, the nature of the relief sought, the extent and cause of the delay, the effect on administrative justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospect of success.¹⁵

¹³ MEC for Health, Eastern Cape vs Kirland Investments 2014(3) SA 481(CC) and Oudekraal Estates v City of Cape Town 2004(6) SA 222 (SCA).

¹⁴ Section 7 (1) of PAJA

¹⁵ *Beweging vir Christelike –Volkseie Onderwys v Minister of Education* (308/2011) [2012] ZASC 45

[38] The question of delay must be dealt with before the merits of the review can be entertained. Unless an extension is granted, a court is precluded from embarking upon the merits of a review application.

[39] In Cape Town City v Sanral¹⁶ a Full Court set out the criteria which empowers a Court to extend the time period in which an application to review a decision under PAJA may be brought outside the 180 day period as follows:

“[15] The effect of Section 7 (1) read with section 9 of PAJA is thus largely to restate and codify the common law delay rule. Because PAJA is the legislation contemplated in terms of Section 33(3) of the Constitution the provisions of Section 7(1) read with as a legal principle pertaining to the exercise and enforcement of the fundamental right that everyone has to administrative action that is lawful, reasonable and procedural fair. The ambit of the right of access to court in terms of Section 34 of the Constitution thus falls to be defined consistently with the limiting and controlling effect of Section (7)(1) and 9 of PAJA.

[16] In Opposition to Urban Tolling Alliance v The South African National Roads Agency Ltd supra in [13] (hereafter cited as OUTA (SCA), it was held that if an application for review under PAJA were brought outside the 180 day period stipulated in Section 7(1) a court is only empowered to entertain it if the interest of justice dictates an extension in terms of Section 9. This highlights the legal character of the effect of Section 7(1) read with Section 9, as distinct from the judicial policy nature of the delay rule under the common law. The common law delay rule continues to apply in the traditional way, as

¹⁶ Cape Town City v South African National Roads Agency Ltd and Others 2015(6) SA 535 (WCC).

a matter of judicial policy, in respect of review challenges to the exercise of public power that do not fall within the purview of PAJA.”

[40] Later at paragraph [21] the court said the following:

“[21] The outcome of an application for condonation in terms of Section 9 of PAJA falls, according to the tenor of the provisions, to be determined in the courts assessment of whether, notwithstanding an unreasonable delay by the applicant in commencing proceedings the interest of justice nevertheless require it to entertain the review.”

[41] It was submitted by counsel for the applicant that it would be in the interest of justice to condone the applicants’ unreasonable delay in instituting the review proceedings for the following reasons:

“41.1 The impugned decision constitutes nothing more than an impediment in the litigation between the applicant and the first respondent;

41.2 The first respondent was content to remain supine when the applicant failed to put up security notwithstanding the first respondents remedies in terms of Rule 47.

41.3 The review application is unanswerable inasmuch as, the second respondents’ impugned decision relates to a matter which he was not authorised to do so.

41.4 If the relief sought is granted and the matter goes to trial the first respondent will not be prejudiced.

41.5 The delay in launching the review proceedings was brought about almost entirely as a result of a failure to appreciate that the relief the applicant

seeks should have been by way of review proceedings and not on the basis upon originally when stems from a failure to appreciate that the impugned decision constitutes administrative action contemplated in PAJA.

[42] It was further submitted that the abovementioned misunderstanding coupled with the delay brought about in furnishing security constitutes a proper reason for the delay.

[43] In the applicants founding affidavit it is clear that the applicant was aware of the decision as far back as September 2012. The applicant blames the inordinate delay on the poor health of its director and the applicants' attorneys' ignorance of the law.

[44] The first respondent in its answering affidavit raised a point *in limine* that the applicant had failed to comply with the requirements of Rule 53 of the Uniform Rules of Court and had failed to bring a substantive application for review in terms of the Promotion of Administrative Justice Act, 2000 ("PAJA").

[45] The applicants' replying affidavit deposed to by Mr Sibuyi, was delivered on 20 April 2017. At page 263, paragraph 13.2, the applicant through Mr Sibuyi, dismissed the first respondents' point *in limine* by saying that it had no basis in law. The applicant thus elected to continue on the course adopted by it.

[46] The applicant, in its heads of argument at para130, admits to an unreasonable delay in instituting the review proceedings.

[47] The grounds on which the first respondent relies as basis why the review should not be granted to the applicant can be summarised as follows:

“47.1 The first respondent will suffer prejudice if the matter is allowed to continue, inasmuch as a lot of documentation has been lost,

47.2 After the execution of the Anton Pillar order, it is alleged that certain documentation which had been removed, was not returned,

47.3 Exxaro International Trading BV has since been deregistered and that certain documents that were in its possession and are crucial for the first respondents defence cannot be located,

47.4 Two individuals, one Myburgh and one Shaw, who are described as crucial witnesses have left the employ of the first respondent or the group of companies, are not freely available to the first respondent and there is no assurance of their co-operation,

47.5 In answering the question whether the lapse of time should preclude a Court from setting aside an invalid administrative act (it being disputed by the first respondent that any of the registrar's administrative actions relevant herein were invalid) it has been held that an important consideration will be...” the extent to which the Appellant or third parties might have acted in reliance upon it.”¹⁷

47.6 The applicant failed in its duty to take all reasonable steps available to it to investigate the reviewability of administrative decision alleged to have adversely affected it as soon as it was aware of such decision. Thus the applicant failed to do not only in respect of the review application, but also in respect of prosecuting the review application.

¹⁷ Oudekraal Estates(Pty) Ltd supra and Walgroeiers Afslaaers (Edms) BPK v Minisipaliteit van Kaapstad 1978(1)(AD) at 40 E-G and 42 C-D.

47.7 *There was, in the founding affidavit, no application for condonation or extension of time in respect of the review application.*

[48] The following was said in *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited*.¹⁸

“[41] After all is said and done, the stark reality remains that because of the delay in bringing the review application, five years had elapsed since the impugned decisions were taken, and that during those five years, things have happened that cannot be undone. The delay rule gives expressions to the fact that there are circumstances in which it is contrary to the public interest to attempt to undo history. The clock cannot be turned back to when the toll roads were declared and I think it would be contrary to the interest of justice to attempt to do so.”

[49] In *Mkhwanazi v Minister of Agriculture and Forestry, Kwa Zulu*,¹⁹ it was held that the reasoning underlining the principle that delays may be fatal to an application, must equally also apply pertaining to the prosecuting of such application. This being so, not only resulting from a High Courts inherent power derived from common law, but also from its power derived from Section 173 of the Constitution, to regulate its own process.

[50] Having considered the submissions made by counsel for the parties and having considered the affidavits filed, I am of the view that:

50.1 There has been an inordinate delay on the part of the applicant;

¹⁸ [2013] 4 All SA 639 (SCA).

¹⁹ 1990(4)SA 763 (D) at 766 G-H

50.2 The applicants' failure to furnish security timeously has not been explained;

50.3 The first respondent will be prejudiced if the relief sought is granted,

50.4 It will not be in the interest of justice to condone the delay in respect of the review application and also in respect of prosecuting the review application. By now almost 7 years have passed.

50.5 The delay is such as to constitute an abuse of the Courts process.²⁰

Peremption

[51] If the applicants' application for condonation or an extension can be entertained the applicants' problem is compounded by the fact that it accepted the second respondents' order, if not granted by agreement, firstly by not protesting and secondly by actively requesting an extension from the second respondent.

[52] It was held in Liberty Life Association of Africa v Kackelhaffer NO that;²¹

"The right of an unsuccessful litigant to appeal against an adverse judgment or order is perempted if such a litigant by unequivocal conduct, inconsistent with an intention to appeal, acquiesces therein."

[53] The onus of proving that a right of appeal or review has been peremted rest on the party alleging it.

[54] In my view the applicants' right of review has become peremted as the applicant by not protesting, acquiescing and actively requesting an extension from

²⁰ Cassimjee v Minster of Finance, 2014(3) SA 198 (SCA).

²¹ 2001(3) SA 1094 (C).

the second respondent, abandoned or waived its right to bring the ruling of 28 August 2012 of the second respondent on review.

The Counter application

[55] The first respondent in its counter application seeks the dismissal of the applicants' claim in terms of Rule 47(4) on the basis that the applicant has failed to furnish security within the time stipulated by the Registrar or within a reasonable time.

[56] It was submitted by counsel for the applicant that, the respondents' counter-application is premature. It was further submitted that it is clear from Sub-Rule 47 that prior to applying for the dismissal of a claim for the want of furnishing security within a reasonable time must be preceded by an application "*to Court on notice for an order that such security be given, and that the proceedings be stayed until such order is complied with*" must have been granted.

[57] Counsel for the applicant argued that the second counter-application is devoid of merit, inasmuch as, the action has been prosecuted and the delay is excusable and there is no serious prejudice to the respondent.

[58] I have dealt with the applicant's failure to provide security within a reasonable time, as well as applicants delay in prosecution, *supra*.

[59] Having dealt with the requirements for showing that an action be dismissed for want of prosecution and having exercised my discretion, I am of the view that the applicants claim be dismissed.

[60] In the result the following order is made:

- 60.1 The applicants' application is dismissed;
- 60.2 The first respondents' counter application is granted;
- 60.3 The applicant is ordered to pay the costs of the application and the counter-application, such costs to include the costs of two counsels.



JJ STRIJDOM

ACTING JUDGE OF THE HIGH COURT

Matter heard:	3 May 2019
Judgment delivered:	6 June 2019
Counsel for Applicants':	SL Joseph SC and HL Fischer
Instructed by:	DMS Attorneys
Counsel for Defendant:	F Terblanche SC and C Bothma
Instructed by:	Webber Wentzel Attorneys