IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, BHISHO

Date heard: 7/6/18
Date delivered: 14/8/18
Not reportable/reportable

Case no. 459/16

In the matter between:

THEMBUKAZI NOLIHLE DLULANE	**Applicant**
and	
MAGISTRATE TWANI	**First Respondent**
CAPITEC BANK LTD	**Second Respondent**
CLERK OF THE CIVIL COURT, ZWELITSHA	**Third Respondent**
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**Fourth Respondent**

Case no. 460/16

and in the matter between:

THEMBUKAZI NOLIHLE DLULANE	**Applicant**

and

MAGISTRATE TWANI	**First Respondent**
CAPITEC BANK LTD	**Second Respondent**
CLERK OF THE CIVIL COURT, ZWELITSHA	**Third Respondent**
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**Fourth Respondent**

Case no.289/16

and in the matter between:

NDILEKA MPOZA	**Applicant**

and

MAGISTRATE TWANI	**First Respondent**
CAPITEC BANK LTD	**Second Respondent**
CLERK OF THE CIVIL COURT, ZWELITSHA	**Third Respondent**
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**Fourth Respondent**

JUDGMENT

Plasket J

[1] This judgment concerns three applications brought on strikingly similar facts against the same respondents for the review and setting aside of judgments to which the applicants had consented. It is because the issues that arise for determination are identical and the facts essentially similar that the three applications have been decided in one judgment.

[2] The applications are brought in terms of s 22 of the Superior Courts Act 10 of 2013. This section provides:

'(1) The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are-

(a) absence of jurisdiction on the part of the court;

(b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;

(c) gross irregularity in the proceedings; and

(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

(2) This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates' Courts.'

[3] The ground of review relied upon by the applicants is that set out in s 22(1)(*c*) – that in each case the proceedings are vitiated by a gross irregularity.

The facts

[4] Ms T N Dlulane is the applicant in two of the three applications. She is employed by the Department of Health in the Eastern Cape provincial government.

[5] In case number 495/16, it is not in dispute that Ms Dlulane, on 16 August 2010, borrowed R11 370 from the second respondent, Capitec Bank Ltd (Capitec), that she later defaulted on her repayment of the loan after paying only four instalments and that, on 24 September 2012, she signed a consent to judgment in the amount of R9 250.95 plus costs. A judgment was granted in terms of this consent on 19 October 2012 in the total amount of R10 657.25, the costs having been R1 406.25. The judgment ordered Ms Dlulane to pay R500 per month and an emoluments attachment order to this effect was also made. Ms Dlulane paid the amount of R500 per month from then on and, from what I can gather, is still doing so.

[6] In case number 460/16, it is also not in dispute that on 16 August 2010, Ms Dlulane also borrowed R13 981.39 from Capitec Bank. After paying three instalments, she reneged on her obligation to repay the loan. On 24 September 2012, she signed a consent to judgment in respect of this loan too, in the amount of R11 784.69 plus costs. A judgment was granted in terms of the consent on 19 October 2012 in the total amount of R13 190.99, the costs having been R1 406.30. The judgment ordered Ms Dlulane to pay R400 per month and an emoluments attachment order to this effect was also made. Ms Dlulane paid the amount of R400 per month from then on and, from what I can gather, is still doing so.

[7] Ms Ndileka Mpoza is the applicant in the third case, under case number 289/16. She is also employed by the Department of Health in the Eastern Cape provincial government.

[8] It is also not in dispute that on 8 February 2011, Ms Mpoza borrowed R58 872.49 from Capitec Bank. Shortly thereafter, she reneged on her obligation to repay the loan. On 10 May 2012, she signed a consent to judgment in respect of this loan, in the amount of R61 583.83 plus costs. A judgment was granted in terms of the consent on 25 June 2012 in the total amount of R63 476.06, the costs having been R1 892.23. The judgment ordered Ms Mpoza to pay R1 800 per month and an emoluments attachment order to this effect was also made. Ms Mpoza paid the amount of R1 800 per month from then on and, from what I can gather, is still doing so.

[9] Initially, Ms Dlulane's applications for the review and setting aside of the judgments were launched against only two respondents, Magistrate Twani and Capitec. The notices of motion in both were dated 10 August 2016. Later, the Clerk of the Court, Zwelitsha and the Minister of Justice and Constitutional Development were joined. Ms Mpoza's application had taken the same route. The notice of motion was dated 20 May 2016. Only Capitec opposes the relief sought in all three matters.

[10] In all three cases, a number of procedural irregularities are relied upon by the applicants. As they all admit their indebtedness, no defence is raised as to the merits.

The issues

[11] Two issues arise in all three of the applications. The first is whether the applicants delayed unreasonably in bringing their applications and, if so, whether they have made out cases for the condonation of those unreasonable delays. The second issue, which has a bearing on condonation, is whether the applicants have established gross irregularities in the proceedings in which the judgments against them were granted.

Unreasonable delay

[12] From the facts that I have set out above, it is clear that Ms Dlulane launched her applications approximately three years and ten months after the judgments had been granted. Ms Mpoza launched her application approximately three years and 11 months after the judgment against her had been granted. They appear to have paid their admitted debts without demur for that period.

[13] The Superior Courts Act does not stipulate a period of time within which decisions of magistrate's courts are to be taken on review. That being so, in terms of the common law, review proceedings must be brought within a reasonable time.[1] In

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[1] *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) at 380B-F; Cilliers, Loots and Nel *Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa* (5 ed) (Vol 2) at 1295; Van Loggerenburg *Erasmus: Superior Court Practice* (2 ed)(Vol 2) at D1-701.

the event of an applicant delaying unreasonably in bringing his or her review application, a court may withhold a remedy.[2] In *Lion Match Co Ltd v Paper, Printing, Wood and Allied Workers Union & others*[3] Farlam JA said that when an applicant for review delays unreasonably and the delay is not condoned, that person loses 'the right to complain of the irregularity in regard to which the review is brought'.

[14] The rationale for the delay rule was set out in *Gqwetha v Transkei Development Corporation Ltd & others*,[4] in which Nugent JA said the following:

'[22] It is important for the efficient functioning of public bodies (I include the first respondent) that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule - reiterated most recently by Brand JA in *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) at 321 - is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Miller JA in *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41E - F (my translation):

"It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed - *interest reipublicae ut sit finis litium*. . . . Considerations of this kind undoubtedly constitute part of the underlying reasons for the existence of this rule."

[23] Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight (*Wolgroeiers Afslaers*, above, at 42C).'

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[2] Baxter *Administrative Law* at 712-713 and 715.

[3] *Lion Match Co Ltd v Paper, Printing, Wood and Allied Workers Union & others* 2001 (4) SA 149 (SCA) para 25.

[4] *Gqwetha v Transkei Development Corporation Ltd & others* 2006 (2) SA 603 (SCA) para 22.

[15] The enquiry into the issue of unreasonable delay is a two-stage process. In the first place, a court must enquire into and decide whether a delay was unreasonable. This is a factual enquiry coupled with a value judgment. Once it has been determined that a delay was indeed unreasonable, a court must decide whether that delay should be condoned. This involves the exercise of a discretion.[5] An applicant seeking condonation for an unreasonable delay is required to furnish a full explanation covering the entire period of the delay.[6] The duration of the delay must be considered from when the applicant became aware of the decision under challenge, or ought reasonably to have become aware of it, until the launching of review proceedings.[7] Generally speaking, because the time within which an application is brought does not form part of an applicant's cause of action, he or she does not have to explain any delay in the founding affidavit. Where, however, the delay is 'manifestly inordinate' an applicant is required to deal with it in his or her founding affidavit.[8]

[16] The explanations for the delays given by Ms Dlulane and Ms Mpoza are identical. They are that they never received notice that a judgment had been taken against them and that it was only in 'the recent months leading to this application' that abuses in the emoluments attachment order system were discussed in social media and by members of the public 'who had been assisted by my attorneys to investigate unlawful Emoluments Attachment Orders'. This led them to consult with their attorneys who investigated the matters, who found a number of procedural defects, whereupon the review applications were launched.

[17] Capitec claimed in its answering affidavit to have been prejudiced by the delay. Once again, its contentions in all three cases are identical. In the first place it disputed that Ms Dlulane and Ms Mpoza had no knowledge of the judgment. It said that the consents to judgment stated in terms that Capitec could apply for judgments at any time and without notice. Secondly, Capitec made the point that Ms Dlulane and Ms Mpoza would have been aware of the deductions from their accounts every

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[5] *Beweging vir Christelik-Volkseie Onderwys & others v Minister of Education & others* [2012] 2 All SA 462 (SCA) para 46; *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 39C-D.
[6] *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA) para 54.
[7] *Aurecon South Africa (Pty) Ltd v Cape Town City* 2016 (2) SA 199 (SCA) para 16.
[8] *Scott & others v Hanekom & others* 1980 (3) SA 1192 (C) at 1193E.

month. That would have alerted them to the judgment to which they consented having been taken.

[18] Capitec made two further points relating to prejudice. The first was that as Ms Dlulane and Ms Mpoza had acquiesced in the judgments for so long, 'the agent who served the section 129 notice and in whose presence the Applicant signed the consent to judgment cannot be traced and, even if he could be traced, will, in all likelihood, not be in a position to remember the particulars of his encounter with Applicant'. Capitec's second point encompasses both prejudice and the importance of finality. It stated:

'Second Respondent is also prejudiced by the revisiting of a debt incurred many years ago and which is being repaid. Second Respondent provides credit to several million such debtors and it establishes its solvency and the fulfilment of the requirements of the Banking Act and the Ministry of Finance by taking into account the ambit of debts which have been repaid or not. When a debt has been subject to a repayment scheme it is treated as income by the Second Respondent. This is also the case when the debt has been repaid. The present application is but one of many hundreds which are being brought and when the total amounts are added up, and should the reviews be successful, they would impact negatively on the position of Second Respondent. Further it will open the floodgates for debtors to bring applications such as the present one many years after judgment. Revisiting of judgments in general after such a long period would have a wide impact upon the entire credit industry. It will further not promote a culture of responsible behaviour amongst credit consumers, which could negatively impact the cost of credit.'

[19] The delay from October 2012 to August 2016, in the applications of Ms Dlulane, and from June 2012 to May 2016, in the application of Ms Mpoza, are inordinate delays. Of that, there can be no doubt. While I take note that both say that they only approached attorneys after being exposed to discussions concerning abuses in the system of emolument attachment orders on social media and in other fora, their evidence is vague and scant on detail to say the least. I would, in the first place, have expected the affidavits to set out when they heard these allegations, what those allegations were and why it had a bearing on them, as they had consented to judgments. The applicants must have been aware all along of the judgments having been taken because they consented to them and never queried or objected to the deductions, in the amounts agreed to, from their salaries. There is no

explanation for this conduct. This state of affairs, which endured for nearly four years in each case, would have lured Capitec into a reasonable belief that that the applicants had acquiesced in the judgments against them, as their consent had manifested in the first place.[9]

[20] I turn now to the applicants' prospects of success in their applications. This is a factor that must be considered in the exercise of a discretion as to whether the unreasonable delays ought to be condoned.[10]

[21] It is a general requirement that a party seeking the review of a decision must establish prejudice. In *Jockey Club of South Africa & others v Feldman*[11] Tindall JA formulated the general rule applicable to the review of judicial proceedings, administrative proceedings and the proceedings of voluntary associations as being that while an irregularity in the proceedings of one of these bodies gives an applicant a right, prima facie, to have the resultant decision set aside, if the 'irregularity caused such party no prejudice . . . he is not so entitled'. The point was made forcefully by Holmes JA in *Rajah & Rajah (Pty) Ltd v Ventersdorp Municipality & others*:[12]

'Now I think it is clear that the Court will not interfere on review with the decision of a quasi-judicial tribunal where there has been an irregularity, if satisfied that the complaining party has suffered no prejudice. *Jockey Club of South Africa and Others v Feldman*, 1942 AD 340 at p. 359; *Larson and Others v Northern Zululand Rural Licensing Board*, 1943 NPD 40. In principle it seems to me that the Court should likewise not interfere in the present case at the instance of the Council, whatever the precise nature of the present proceedings, since it is clear that there has been no prejudice to the public interest which the Council represents. The underlying principle is that the Court is disinterested in academic situations.'

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[9] See too *Khiba v Magistrate Nel, King William's Town & another; Tyabazayo v Magistrate Nel, King William's Town & another; Tyabazayo v Magistrate Nel, King William's Town & another* ECG 11 April 2017 (case nos. 2765/16; 2497/16; 3312/16) unreported para 49 (hereafter *Khiba (1)*); *Khiba v Magistrate Nel, King William's Town & another* ECG 10 April 2018 (case no.4204/16) unreported para 33 (hereafter *Khiba (2)*), cases in which the facts were strikingly similar to the facts in these cases and the same template appears to have been used as the founding and replying papers are in essentially similar terms to the papers in these cases. In the two *Khiba* cases, the applications were dismissed on account of the applicants' unreasonable delay in instituting the proceedings.

[10] *Khiba v Magistrate Nel & another* ECG 10 April 2018 (case no. 4204/2016) unreported, para 15.

[11] *Jockey Club of South Africa & others v Feldman* 1942 AD 340 at 359.

[12] *Rajah & Rajah (Pty) Ltd v Ventersdorp Municipality & others* 1961 (4) SA 402 (A) at 407H-408A.

[22] In relation to s 22(1)(*c*) of the Superior Courts Act, in particular, the element of prejudice is what makes an irregularity a gross irregularity. In *ABSA Bank Limited v De Villiers & another*[13] Navsa JA held that a 'gross irregularity in civil proceedings in an inferior court means an irregular act or omission by the presiding judicial officer in respect of the proceedings of so gross a nature that it was calculated to prejudice the aggrieved litigant'. And in *Building Improvements Finance Co (Pty) Ltd v Additional Magistrate, Johannesburg & another*[14] Margo J held, to much the same effect, that it was 'an established principle that the Court will not set aside proceedings on review if it is satisfied that no substantial prejudice was done to the applicant i.e. that the irregularity was not likely to prejudice the applicant'.

[23] The applicants admit their indebtedness. They borrowed the money involved from Capitec, reneged on repaying their loans, and then consented to judgments. If the applications succeeded and the judgments were set aside on the basis of some or all of the procedural irregularities that have been alleged, the applicants would still owe the money and judgments would again be taken against them, presumably in smaller amounts, given their regular payments since the judgments by consent. All that would then have happened is that Capitec would have been put to the inconvenience of starting the process afresh, in the knowledge that the same result would accrue.[15] Ms Dlulane and Ms Mpoza have, accordingly, suffered no prejudice as a result of the irregularities that they rely upon. As a result, they have no prospects of success in the event of condonation for the unreasonable delays being granted.[16]

[24] Given the vagueness of the explanation, the fact that the explanation failed to explain the entire period of delay, the prejudice suffered by Capitec and the lack of any prospect of success as a result of an absence of prejudice on the part of the

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[13] *ABSA Bank Limited v De Villiers & another* 2009 ZASCA 140 para 26. See too *Magistrate Pangarker v Botha & another* 2015 (1) SA 503 (SCA) para 21.
[14] *Building Improvements Finance Co (Pty) Ltd v Additional Magistrate, Johannesburg & another* 1978 (4) SA 790 (T) at 793A-B. See too *Hip Hop Clothing Manufacturing CC v Wagener & another* 1996 (4) SA 222 (C) at 230A-C.
[15] See for an analogous set of circumstances, *Larson & others v Northern Zululand Rural Licensing Board* 1940 NPD 40 at 44.
[16] See *Khiba (1)* (note 9) paras 49 and 52-53; *Khiba (2)* (note 9) para 31.

applicants, I am of the view that the explanation for the unreasonable delays in each case ought not to be condoned.

Absence of prejudice

[25] Even if I am incorrect on the question of delay, I am of the view that the applications must be dismissed because the applicants, due to the absence of prejudice, have failed to establish the ground of review that they rely on, namely gross irregularities in the proceedings.

Costs

[26] It was argued by Mr Paterson who, together with Ms Beard, appeared for Capitec, that we ought to issue a rule nisi calling upon the applicants' attorneys to show cause why they should not be ordered to pay the costs of the applications *de bonis propriis*. The basis for this was an order to this effect made by Lowe J in *Khiba (1)* on the basis that the bringing of applications on technical grounds where the debts had been acknowledged and where no prejudice could be established may have amounted to an abuse of process.

[27] If *Khiba (1)* and *Khiba (2)* had been the only cases dealing with these issues, we may have accepted Mr Paterson's invitation. We were, however, referred to two judgments that set aside decisions of magistrate's on the technical grounds raised in these matters in the apparent absence of prejudice to the applicants being established.[17] I have qualified my statement as to the prejudice requirement because both cases were unopposed and without having seen the papers it is not possible to say whether the prejudice requirement was dealt with in the founding affidavit. No mention of prejudice is made in the judgments, and the applicants relied on these cases in support of their argument that the decisions in issue ought to be set aside.

[17] See *Dyantyi-Tali v Magistrate Nel, King William's Town & another* ECG undated judgment (case no. 1922/16) unreported; *Mjongile v Magistrate Twani, Zwelitsha & another* ECB 23 February 2017 (case no. EL406/16) unreported.

[28] To the extent that these cases set aside the impugned decisions in the absence of prejudice to the applicants, they would be in conflict with well-established authority, but the point remains that they were apparent authority for the applicants' argument that the decisions could be set aside on the basis of the technical defects alone. In these circumstances, we are unable to conclude that there is sufficient indication that the applicants' attorneys may have abused the process. In the result, the usual costs order will be made.

The order

[29] The application in each matter is dismissed with costs, including the costs of two counsel.

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C Plasket
Judge of the High Court

I agree.

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NP Ntlama
Acting Judge of the High Court

APPEARANCES

For the applicants:	P Zilwa SC and A De Silva Instructed by N J Du Plessis & Associates Inc, East London

For the second respondent:	T Paterson SC and M Beard Instructed by Moors and Dlamini, Port Shepstone, Hutton and Cook, King William's Town