



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

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No. 4629/2015

In the matter between:

HANS SEUNTJIE MATOTO

Applicant

and

FREE STATE GAMBLING AND LIQUOR AUTHORITY 1st Respondent

**THE CHAIRPERSON, FREE STATE GAMBLING
AND LIQUOR AUTHORITY**

2nd Respondent

THE CHIEF EXECUTIVE OFFICER,

FREE STATE GAMBLING AND LIQUOR AUTHORITY 3rd Respondent

THE MEMBER OF THE EXECUTIVE COUNCIL

ECONOMIC DEVELOPMENT, TOURISM

& ENVIRONMENT

4th Respondent

HEARD ON:

15 MAY 2017

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 8 JUNE 2017

- [1] The unsuccessful applicant in the review proceedings seeks leave to appeal. The review application was filed outside the period of 180 days envisaged by s 7(1) of the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”) and the applicant sought condonation for the late filing thereof. The condonation application was dismissed by Rampai J and Molitsoane AJ on 23 February 2007.
- [2] In the absence of Molitsoane AJ, who acted in this division during the fourth term of 2016 when the application was heard, the application for leave to appeal was allocated to me as his substitute.
- [3] On 15 May 2017 my brother, Rampai J and I heard the application for leave to appeal where after we reserved judgment.
- [4] The application for leave to appeal shall now be considered in accordance with the provisions of s 17 of the Superior Courts Act, 10 of 2013 and I quote from ss 17(1):
- “17. (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
- (a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) ...

(c) ..." (emphasis added)

[5] There can be no doubt that the bar for granting leave to appeal has been raised. Previously, the test was whether there was a reasonable prospect that another court might come to a different conclusion. Now, the use of the word "would" indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against. See *Acting National Director of Public Prosecutions and Others v Democratic Alliance* (19577/2009) [2016] ZAGPPHC 489 (24 June 2016). The use by the legislature of the word "only", emphasized *supra*, is a further indication of a more stringent test.

[6] In *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] 2 ALL SA 251 (SCA) the Supreme Court of Appeal held as follows at paras [11] & [12]:

"[11] Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice (per Holmes JA in *Federated Employers Fire & General Insurance Co Ltd & another v McKenzie* 1969 (3) SA 360 (A) at 362F-G).

[12] In *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) para 6 this court stated:

'One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'

[7] In *Commissioner for the South African Revenue Service v Candice-Jean Van der Merwe* [2015] ZASCA 86 at para [19] the Supreme Court of Appeal stated as follows:

"[19] In applications of this sort the prospects of success are in general an important, although not decisive, consideration. It has been pointed out (*Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* [1985] ZASCA 71; 1985 (4) SA 773 (A) at 789C) that the court is bound to make an assessment of an applicant's prospects of success as one of the factors relevant to the exercise of its discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. ... This court has often said that in cases of flagrant breaches of the rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal. This applies even where the blame lies solely with the attorney."

[8] Mr Pienaar on behalf of the applicant relied on *Camps Bay Ratepayers' and Residents' Association and Another v Harrison*

and Another 2011 (4) SA 42 CC at paras [53] – [57] and Mamobolo v Rustenburg Local Council 2011 (1) SA 135 (SCA) at para 10 for the submission that where a court wishes to raise a point of non-compliance mero motu, the least the court should do is to give the applicant an opportunity to supplement the affidavits in order to deal specifically with the apparent delay. In casu the respondent did not in its answering affidavit attack the applicant's reasons for the delay, but the applicant should have been forewarned insofar as the respondents' counsel specifically dealt with the matter in his heads of argument as well as during oral argument. It can therefore not be argued that this court raised the issue of delay mero motu without giving the applicant an opportunity to supplement his affidavits.

- [9] Undue delay should not be tolerated. See: *Aurecon v Cape Town City* 2016(2) SA 100 (SCA) at para [19]. As stated by Khampepe J in *Department of Transport v Tasima* 2017 (2) SA 622 (CC) at para [160]:

“Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action. A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review, reactive or otherwise.”

- [10] In *Tasima supra* condonation was granted notwithstanding a five year delay, but the facts in that case are so different from the facts *in casu* that a proper comparison cannot be made. I do not deem it necessary to refer to the distinctions. In *casu* the applicant filed his review application just outside the period of 180

days and it might be argued – as Mr Pienaar did - that the delay was properly explained, bearing in mind the few days with which the applicant missed the deadline and that another court would come to a different conclusion. The facts in this matter must be considered and I briefly need to emphasize the following:

1. The applicant received confirmation of his unsuccessful application on 18 March 2015.
2. In terms of s 7 of PAJA the 180 days as envisaged therein expired on 18 September 2015 whilst the review application was issued by this court on 29 September 2015.
3. Section 7 is clear: review proceedings 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. Therefore, a reasonable period could be less than 180 days. See *Optis Telecommunication (Pty) Ltd v Minister of Communications and Others* (A571/2006) [2007] ZAGPHC44 (30 May 2007). The applicant, through his attorneys abstained from taking action during the period of 180 days, although his attorneys entered into correspondence with the first respondent's officials.
4. As early as 13 May 2015 the applicant's attorneys were informed that the first respondent "will not litigate on correspondence". Clearly the applicant should have realised at that stage that it should stop wasting time writing letters and launch its contemplated review application without further delay.

5. Although further letters were written hereafter in anticipation that a settlement could be reached, the applicant could not seriously have harboured such a belief.

[11] As mentioned in *Commissioner for the South African Revenue Service supra*, prospects of success must be considered in the exercise of a court's discretion whether to grant condonation or not, unless the cumulative effect of the other relevant factors is such as to render the application for condonation unworthy of consideration. The respondents have an interest in the finality of the dispute and unnecessary delay in the administration of justice should be avoided. The applicant unnecessarily delayed the institution of the review proceedings in the face of respondents' unwavering stance communicated to him as early as May 2015. If the cumulative effect of all the factors referred to *supra* is considered, there is no room for a finding that another court would differ from the judgment of this court.

[11] Therefore the application for leave to appeal is dismissed with costs.

JP DAFFUE, J

I concur

MH RAMPAL, J

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