

IN THE HIGH COURT OF SOUTH AFRICA
[GAUTENG DIVISION, PRETORIA]

CASE NO: 16524/2004

In the matter between:-

17/4/2015

BARLOWORLD SOUTH AFRICA (PTY)

LTD t/a AVIS RENT A CAR

Applicant

and

DIRECTOR-GENERAL OF THE

DEPARTMENT OF LABOUR)

First Respondent

COMPENSATION COMMISSIONER

Second Respondent

JUDGMENT

DELETE WHICHEVER IS NOT APPLICABLE

1) REPORTABLE : YES/NO

2) OF INTEREST TO OTHER JUDGES : YES/NO

3) REVISED

DATE

SIGNATURE

SKOSANA AJ

[1] In this matter the applicant seeks a review and setting aside of the second respondent's decision to reclassify the business activities of Avis rent a car ("Avis") from a sub-class 1720 Industry to a sub-class 1710 Industry with retrospective effect from 01 October 2008 ("the first decision"). The applicant also seeks the review and setting aside of a decision taken by the second respondent on 09 November 2012 confirming the classification of Avis as a sub-class 1710 Industry ("the second decision").

[2] Furthermore, the applicant seeks the review of all the assessments issued by the second respondent in respect of the business activities of Avis which were based on the first and second decisions of the second respondent, namely the tariff of assessment applicable to sub-class 1710 Industry.

[3] The applicant also seeks an order that, upon the reissue of such assessment on the correct tariff of assessment with retrospective effect from 01 October 2008, the first and second respondents be ordered to refund to the applicant the overpayments made by the applicant from 01 October 2008. The applicant also seeks a costs-order against the first and second respondents.

[4] At the beginning of the hearing, counsel for the applicant, Adv van den Heever SC, indicated that he was to address me under 3 sub-topics, namely the

application for leave to submit the further affidavit in evidence; the application for condonation for the applicant's failure to bring the review application within a period of 180 days as envisaged in section 7(1)(b) of the Promotion of Administrative Justice Act no. 3 of 2000 ("PAJA"); and, on the merits of the application. Upon my enquiry from counsel for the respondent, Adv Matebese, he indicated that he opposes all 3 aspects of the case but, should I admit the further affidavit, the respondent will not require an opportunity to file a responding affidavit thereto as the facts contained in such further affidavit are the objective facts based on correspondence.

FURTHER AFFIDAVIT

[5] Adv van den Heever SC submitted that the affidavit was filed in amplification of the grounds for condonation. The application for condonation was brought in terms of prayer 1 of the notice of motion and supported in the founding affidavit. However, subsequently the applicant or its legal team realized that they had overlooked certain facts in relation to such condonation application as stated in paragraph 2.3 of such further affidavit.

[6] Adv van den Heever SC further submitted that the facts contained in such further affidavit do not bring about a new cause of action but are in support of the very condonation application that had already been instituted. He added that there is no prejudice to the respondent and this contention is fortified by the

respondent's counsel's concession that there is no need for the respondent to respond to such further affidavit as the facts contained therein are objective and supported by correspondence.

[7] Adv Matebese argued that this further affidavit should not be admitted as it does not explain why the evidence contained therein was not included in the applicant's founding affidavit but only introduced after the filing of the replying affidavit and simultaneously with the filing of the applicant's heads of argument.

[8] Adv Matebese emphasized that it is trite law that an applicant should make out its case in its founding papers. The applicant, so he continued, only filed the further affidavit when it felt that '*the shoe was beginning to pinch*' after the respondents had filed their opposing affidavit to such condonation application. He referred me to the case of **Hano Trading CC v JR 209 Investments (Pty) Ltd & Another 2013(1) SA 161 (SCA)** para [10]-[14] at 164-165.

[9] In that case, first, there was no application for leave to file further affidavit¹. Second, further affidavits that were sought to be filed were dealing with the merits of the case, being whether or not the agreement was valid and binding upon the parties².

¹ See para [7] of that case

² See para [8] of that case

[10] In the present case, there is an application for leave to submit this further affidavit in evidence. The further affidavit also deals, not with the merits of the case, but with the condonation application.

[11] Although the reason not to have included these facts in the founding papers of the applicant may not be satisfactory, the overriding consideration for me is that it contains objective facts which, as conceded on behalf of the respondents, could not be gainsaid. This would have been the case even if the facts were in the applicant's founding affidavit. The respondents would in any way have had difficulty convincing me that they are entitled to an opportunity to file an affidavit in opposition thereof since they had been invited by the applicant to respond thereto, if they so wished, already in October last year³.

[12] It must be kept in mind that in review proceedings an applicant has normally a second chance to amplify its paper after the record has been furnished. This further affidavit serves to amplify the applicant's case in respect of condonation, albeit out of sequence.

[13] In considering the factors which I must take into account in exercising my discretion as set out in the Superior Court Practice: Erasmus, Juta vol. 1 at B1-48 to 49, I accept that all these factors, except for one or two⁴, have been satisfied.

³ See para 2 of the notice of intention to apply for leave to submit this evidence in supplementary affidavit

⁴ Probably, the reason why the evidence was not produced timeously and the possibility that it may have been shaped to 'relive the pinch of the shoe'

In addition, this affidavit only relates to condonation which is a procedural matter and which could have been raised by the court *mero motu*⁵.

[14] In the circumstances, the further affidavit is admitted and will be taken into account in considering whether or not to grant condonation.

CONDONATION

[15] There is now a plethora of cases dealing with the defence of unreasonable delay. It has been found that, when the defence of unreasonable delay is raised in review proceedings, the court must embark on a twofold enquiry. The first one is whether a reasonable time has elapsed from the time the decision was taken to the time when the review proceedings were instituted. In this regard the court does not have a discretion as this is a purely factual enquiry. If the court finds that the delay was reasonable, the enquiry ends there and need not be taken any further. If it is found that the delay was unreasonable, the court has to embark on the second enquiry namely, whether the unreasonable delay should be condoned. During this second enquiry the court exercises a discretion⁶.

[16] It is also well established that an applicant who fails to bring a review application within a reasonable time may forfeit his right to have the

⁵ See *Mkhwanazi v Minister of Agriculture & Forestry, Kwa-Zulu Natal* 1990 (4) SA 763(D) at 767 E-F

⁶ *Harvey v Umhlathuze Municipality & Others* 2011 (1) SA 601 (KZP) at 627 para [70]; *Associated Institutions Pension Fund & Others v Van Zyl & Others* 2005 (2) SA 302 (SCA) at 321 para [46]-[48]

administrative action complained of, reviewed and set aside, unless the delay is satisfactorily explained⁷.

[17] In this matter the first decision was taken in March 2009 but the applicant became aware thereof in February 2010. Both counsel agreed in this regard. The review application was instituted in February 2014, i.e. 4 years after the first decision had been taken. The delay is unreasonably long by any measure. The period also falls outside the 180 days as required by the PAJA.

[18] Prayers 2 to 5 of the notice of motion are structured in such a way as to reflect the applicant's contention that a series of decisions were taken by the second respondent, the first being the reclassification in March 2009, the second being the assessments which were made from 01 October 2008 to 09 November 2012 based on the first decision, the third being the confirmation of the sub-class 1710 Industry classification on 09 November 2012 and the fourth being the assessments made by virtue of the decision of 09 November 2012 to date.

[19] This contention is contradictory to and flies in the face of the applicant's claim that it ought to have been assessed on the basis of sub-class 1720 Industry from 01 October 2008 when it applied for registration. Clearly the second respondent took only one decision and, as will appear more fully hereunder, it could only have taken one decision in connection with the classification of the business of the applicant. Such a decision was taken in

⁷ *Lion Match Co. Ltd v Paper Printingwood & Allied Workers Union & Others* 2001 (4) SA 169 (SCA) at 156-157E

March 2009 and reaffirmed by the second respondent in June 2011 and on other occasions.

[20] It is my finding therefore that the clock started to tick from February 2010 with regard to the timeous institution of the review proceedings.

[21] Both counsel agreed that the empowering legislation, being the Compensation for Occupational Injuries and Diseases Act no. 130 of 1993 ("COIDA") does not make provision for the second respondent to classify or reclassify business activities of the applicant other than at the time of its application for registration in terms of section 80 of the COIDA. The assessments were also not made in accordance with a varied tariff of assessment as contemplated in section 85 of the COIDA.

[22] This state of affairs presents another problem relating to the principle of *functus officio*, which prevents a functionary from revisiting its own decision. When this issue was raised with Mr Van den Heever SC, he submitted that the *functus officio* principle only applies to final decisions and not decisions which are erroneous or obviously mistaken. He relied on the work of C Hoexter, Administrative Law in South Africa, 2nd edition pp. 278 to 280.

[23] On page 280, Hoexter makes the following statement:

"Where mistaken decisions are concerned, the general position would seem to be that the administrator will be functus officio irrespective of whether the mistake was one of fact or law, and whether it was within or beyond the administrator's jurisdiction. An exception may exist where an error comes to the administrator's attention as soon as the decision has been announced". **[Footnotes excluded]**

[24] In my view, the quotation above does not support the submission made by Adv van den Heever SC. In this case, there being no statutory provision for the respondents to revisit their decision of classification, the *functus officio* rule applies to their decision even if such decision was made in error. The last sentence of the quotation above refers to the error coming to the attention of the administrator concerned and not to the attention of the affected parties. In his submission, Adv Van den Heever SC seems to suggest that the alleged error in the decision of the respondents was obvious and came to the applicant's attention immediately it had occurred. This is not in line with the common cause facts. On the contrary, the second respondent adamantly maintained its stance that the original classification of the applicant in March 2009 was correct. This approach therefore does not assist the applicant.

[25] In **MEC for Health, EC v Kirland Investments 2003 (3) SA 481 (CC)** at paras [87]-[90], it was held that the *functus officio* principle applies to erroneous or even grossly erroneous decisions as it avoids self-help by administrators. This

should bring the argument about the applicability of the *functus officio* rule to rest in so far as the first decision of the second respondent is concerned.

[26] Adv Matebese correctly submitted that, if the *functus officio* rule applies, then the applicant was knocking at the wrong door when it was writing letters to the second respondent with a view to persuade him to change the classification made in March 2009. The applicant was simply flogging a dead horse. This must be seen against the background that the applicant is not without financial means. It then stands to reason why it only decided to instruct attorneys to bring a review application in 2013 (the aborted one). The applicant could have sought advice as soon as it became aware of the decision to reclassify it as sub-class 1710 in February 2010.

[27] In **Associated Institutions Pension Fund & Others v Van Zyl & Others 2005(2) SA 302 (SCA)** para [46], the Supreme Court of Appeal held that there is a duty on an applicant not to take an indifferent attitude but rather to take all reasonable steps available to him to investigate the reviewability of administrative decision as soon as he becomes aware thereof. The steps taken by the applicant to negotiate with the second respondent were, in the first place, unreasonable as they could not have borne any fruits in view of the *functus officio* principle. In the second place, it was not reasonable for the applicant to have continued to negotiate with the second respondent for such a long time especially after it had been unequivocally informed in June 2011 by the second respondent that he

maintains his stance with regard to the original classification of the applicant. The applicant's failure to seek legal advice on the reviewability of the decision demonstrates its indifference on the matter and the steps it took fall short of the test laid down in **Associated Institutions Pension Fund** case (supra).

[28] My finding is, with regard to the first stage of the two stage enquiry referred to earlier, that the delay of 4 years in bringing the review application is not only unreasonable but also falls outside the period of 180 days prescribed in section 7(1) of the PAJA.

[29] With regard to the second leg of the enquiry, I am not satisfied by the explanation given by the applicant. If an applicant brings a review application outside 180 days, he is in fact barred from bringing such proceedings and the court may only entertain such application if it is satisfied that the interest of justice so require in terms of section 9 of the PAJA.

[30] In this case, the explanation given by the applicant for the delay is not satisfactory, first in view of the *functus officio* principle being applicable to the decision of the respondents and second, even if I am wrong on the applicability of the *functus officio* rule, on the basis that the applicant did not take reasonable steps to ascertain the reviewability of the decision as stated in the **Associated Institutions Pension Fund** case (supra).

[31] As regards prejudice, Adv van den Heever SC emphasized that the respondents have not established prejudice and that the applicant stands to suffer severe prejudice. Adv Matebese countered that there is prejudice to the respondents and beyond, i.e. the public on the basis of the public interest element in the finality of administrative decisions.

[32] I agree with Adv Matebese that, underlying the aspect of finality, is the inherent potential for prejudice both to the efficient functioning of the public body and those who rely upon its decisions, if the validity of its decisions remains uncertain. Consequently, proof of actual prejudice to the respondents is not a precondition for refusing to entertain review proceeding by reason of undue delay⁸.

[33] In view of the length of delay and the potential prejudice to the respondents and public they serve, even if it is not directly proved, as well as unsatisfactory explanation proffered by the applicant, I am disinclined to grant the condonation application on this basis.

[34] In the circumstances, I am of the view that the application for condonation ought to be dismissed. Since unreasonable delay constitutes a complete defence⁹, it follows that the application for review falls to be dismissed as well. It

⁸ See *Wolgroiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41 E-F; *Gqwetha v Transkei Development Corporation Ltd & Others* 2006 (2) SA 603 (SCA) at 612H-613B

⁹ See *Kirland* case (*supra*) para [97]

is therefore not necessary for me to deal with the third aspect, namely the merits of the review application.

[35] In the result, I make the following order:

[35.1] The application for leave to file the further affidavit in evidence is granted.

[35.2] The application for condonation for the late bringing of the review application is dismissed.

[35.3] The review application is dismissed.

[35.4] The applicant is ordered to pay the costs of this application.



DT SKOSANA AJ

Acting Judge of the High Court

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