

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCE, BLOEMFONTEIN

Case No.: 3200/2013

In the matter between:

PETER MBILINI

Applicant

and

THE MINISTER OF DEFENCE: S A NATIONAL
DEFENCE FORCE, FREE STATE
MICHAEL ALBERTUS VENTER N.O.

First Respondent
Second Respondent

CORAM:

JORDAAN, J *et* JAJI, AJ

JUDGMENT:

JAJI, AJ

HEARD ON:

2 JUNE 2014

DELIVERED ON:

12 JUNE 2014

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- [1] This is an application to review and set aside a decision by the second respondent, sitting as a senior judge of a Military Court, to dismiss the appellant, from service from the first respondent on 23 January 2009. The decision to dismiss the applicant was upheld on automatic review on 21 April 2009 by the court of military appeals.

- [2] The application is for an order in the following terms:

- “(i) Calling upon the respondents, responsible for the decision to dismiss applicant, to show cause why the decision to dismiss the applicant on 21 April 2009, should not be reviewed and corrected, or set aside;
- (ii) Ordering the respondents to reinstate the applicant, within 10 (ten) days from the date this application is finalised: alternatively
- (iii) Ordering the first respondent to remit the matter afresh for adjudication before a military judge other than the second respondent; within 30 (thirty) days from the date this application is finalised...”

- [3] The application has been delayed for an extended period of almost 2years and 9 months. The applicant alleged that the delay was occasioned due to factors beyond his control.
- [4] In the notice of motion, the applicant alleged that after his dismissal, he instructed a firm of attorneys, Vorster Botha Bredenkamp to pursue this matter. He claimed that he was advised that an employee of the firm who was responsible for the file did not do his work. He claimed that the file could not be located after the employee left the firm of attorneys.
- [5] Applicant claimed that an attorney had to reconstruct the file and approached the union for confirmation that it would pay the costs of bringing this application. To date the union has not confirmed that it would pay costs incurred as a result of this review. Consequently, he claimed that he did not unnecessarily delay this matter. He averred that it would be unfair to punish him for a mistake that occurred in the office of his attorney.

- [6] He further claimed that prospects of success were favouring him and that there was no prejudice to the respondent as the record of proceedings was still available. He alleged that upon factors considered in their totality, the court can condone an unreasonable delay where it is clear that the prospects of success were good.
- [7] He submitted that the constitutional court has held that the applicant must provide a comprehensive explanation for the whole period of delay.
- [8] The respondent opposed the application. It argued that the delay in launching the application was unreasonable. It claimed that the applicant was vague and devious. The union, under cover of the letter dated 25 April 2013, confirmed cover. This confirmation was three months before applicant deposed to his founding affidavit.
- [9] The respondent claimed that the applicant does not disclose:
- (i) When did he instruct the firm of attorneys?
 - (ii) What his instructions entailed?
 - (iii) Who the particular attorney was?
 - (iv) When the employee who was allegedly responsible for the file leave?
 - (v) When and how it was discovered that the employee did not do his work;
 - (vi) When and why it became necessary for the file to be reconstructed?

- (vii) Whether the firm of attorneys now representing him had anything to do with the firm Vorster Botha Bredenkamp?
- (viii) What role did the attorney who deposed to the confirmatory affidavit dated 21 October 2013 play in this matter?
- (ix) It was not explained why it was necessary to approach the union before launching this application and what steps (if any) were taken to monitor and follow up the matter.

[10] Respondents contended that all these questions have not been answered. It claimed that it could not even be said that the explanation was weak, there was no explanation at all,

[11] Upon request by the court to respond to these questions, to give a comprehensive explanation for the whole period, the applicant's legal representative conceded that applicant's allegations lacked particularity in the aforesaid respects.

CASE LAW

[12] The case of **Opposition to Urban Tolling Alliance & Others v SANRAL & Others** 2013 (4) All SA 639 (SCA), concerned an application for review under Rule 53 for the setting aside of the decision by SANRAL and the Minister which gave rise to the declarations of the roads as toll roads in 2008(28/03/08).

The application was brought on 23 March 2012 to review the decisions that gave rise to the declaration of the seven toll roads under section 27(1) of the SANRAL Act.

The respondent relied on what has become known as the delay rule i.e. proceedings for judicial review must be instituted without unreasonable delay. The court referred for Nugent JA in:

Gqwetha v Transkei Development Corporation Ltd and Others 2006 (2) SA 603 (SCA) paras [22] – [23]:

“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.”

[13] See also **Wolgroeiërs Afslaeërs (Edms) Bpk v Munisipaliteit van Kaapstad** 1978 (1) SA 13 (A) at 41E – F:

“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.”

[14] 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.

[15] In **Camps Bay Ratepayers' and Residents' Association v Harrison and Another** [2010] 2 ALL SA 519 (SCA) para [54]:

“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.”

[16] In the case of **SANRAL** (*supra*), five years had lapsed since the impugned decisions were taken. Things have happened in those five years that cannot be undone. The delay rule gives expression to the fact that there are circumstances in which it is contrary to the public interest to attempt to undo history. The application for review could not succeed in those circumstances.

[17] See further **Ethekwini Municipality v Ingonyama Trust** 2014 (3) SA 240 (CC). The SCA having decided in favour of the respondent. In an application to the Constitutional Court for leave to appeal against the decision which was filed more than two months after the deadline for doing so. The applicant (municipality) asked the Constitutional Court for condonation for its late lodging thereof. The court restated the requirements for granting condonation and identified the cause and extent of the delay, as well as the prospects of

success, as the prominent factors in determining whether condonation should be granted in that case.

It held that the application for condonation had to fail for the following reasons:

- (i) Where the delay was not short, the explanation given must not only be satisfactory, but must also cover the entire period of delay. Apart from being unsatisfactory, the explanation furnished did not cover the entire period. Consequently, the applicant had failed to establish that the non-compliance was pardonable.

The court noted that the conduct of litigants in failing to observe rules of the court, is unfortunate and should be brought to a halt. The court cannot continue issuing warnings that are disregarded by litigants. It must find a way of bringing this unacceptable behaviour to a stop. One way that readily presents itself is of the court to require compliance with the rules and refuse condonation where these requirements are not met. Compliance must be demanded, even in relation to rules regulating applications for condonation.

The application for condonation and leave to appeal were dismissed with costs.

- [18] In the case of **Gqwetha**, *supra*, the court in a majority judgment held:

“In bearing in mind the nature of the decision (dismissal) of the applicant, the lapse of fourteen months, for which there is no adequate explanation, was unreasonable and the appeal had to fail. The court held that the reliance upon absence of the transcript as a reason to explain the delay was spurious. The transcript of the disciplinary had no bearing. Her reason for review was that the disciplinary hearing was irregular because she asked for but not granted postponement.”

- [19] In the matter **Beweging vir Christelik-Volkseie Onderwys v Minister of Education** [2012] 2 ALL SA 462 (SCA) the court noted the explanation for the delay as unacceptable. In some instances, no explanation at all is tendered, while in others it is so threadbare as to amount to no explanation. Throughout there is a dearth of detail and where explanations were offered, they tend to indicate that the appellants dragged their heels throughout and did not take steps to safeguard their interests with reasonable expedition. The delay was lengthy and its cause was the laxity and indifference of the appellants. In summary, no full and reasonable explanation has been given for the entire period of delay. The application was dismissed without the merits even being considered.
- [20] The trend seems to be the same internationally. In the High Court of Namibia in the case of **Ogbokor v Immigration Selection Board and Minister of Home Affairs and Immigration(A223/11)2012NAHCMD 33(17/10/12)** A delay of eight months in bringing a review application regarding refusal of a permit was held to constitute an unreasonable delay. The court was not satisfied that there was evidential

basis laid for the delay. The applicant was aware of the decision to refuse the permit on 4 January 2011. It however only launched the review application on 2 September 2011. The court held that the delay was unreasonable and refused the application.

[21] In the case at hand, the applicant only brought the review application two years and nine months later. There is no explanation at all for the whole period of delay. In any event, the explanation as terse as it is, is not satisfactory. Consequently, the application has to fail because of want of compliance with the rules. Applicant failed to establish that non-compliance was excusable.

[22] The application is dismissed with costs.

N. P. JAJI, AJ

I concur.

A. F. JORDAAN, J

On behalf of applicant: Adv. A.P. Berry
Instructed by:
Bredenkamp Attorneys
Bloemfontein

On behalf of respondents: Adv. M.C. Louw
Instructed by:
State Attorney
Bloemfontein

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