



IN THE HIGH COURT OF SOUTH AFRICA
(POLOKWANE CIRCUIT COURT OF THE NORTH GAUTENG HIGH COURT)

Case number: 34/2012

Date: 1 March 2013

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE	<u>YES/NO</u>
(2) OF INTEREST TO OTHERS JUDGES:	<u>YES/NO</u>
(3) REVISED	✓
<u>1/3/2013</u>	<u>[Signature]</u>
DATE	SIGNATURE

In the matter between:

MGOMBANE ROYAL COUNCIL

Applicant

And

LESIBA VAALTYN KEKANA

First Respondent

MOKOPANE TRADITIONAL AUTHORITY

Second Respondent

THE SENIOR MANAGER: DEPARTMENT OF

Third Respondent

CO-OPERATIVE GOVERNANCE, HUMAN

SETTLEMENT & TRADITIONAL AFFAIRS

LIMPOPO PROVINCIAL GOVERNMENT

PREMIER: LIMPOPO PROVINCIAL GOVERNMENT

Fourth Respondent

JUDGMENT

PRETORIUS J.

- [1] This is an application for a review in terms of rule 53, requesting the Court to rescind and set aside:

"The decision of the Fourth Respondent to recognize the First Respondent as a Senior Traditional leader or Kgoši of the VAALTYN KEKANA TRADITIONAL COMMUNITY, which was approved or issued in terms of the Certificate of Recognition to him, with effect from 16 April 2003,"

and

"The question of the recognition or identification of the Senior Traditional Leader of Kgoši or Regent for Vaaltyn Kekana Traditional Community be referred back for re-consideration by the Third and Fourth Respondents, respectively in the District of the Second Respondent, alternatively that it be referred back to the Fourth Respondent for a proper decision,"

and

"That, condonation for the late filing of this application be granted."

- [2] This application is opposed by the first and second respondents, whilst the third and fourth respondents will abide with the court's decision. Initially the third and fourth respondents opposed the application, but withdrew their opposition.

[3] The decision the court is requested to rescind and set aside, is a decision of the Executive Council of the Limpopo Provincial Government appointing Lesiba Vaaltyn Kekana as Kgoši of Mokopane Traditional Authority: Waterberg District on 16 March 2003.

[4] Decision No 40/2003 reads as follows:

"That Kekana Lesiba Vaaltyn born from Naume who was the Candle Wife be appointed Kgoši of Mokopane Traditional Authority: Waterberg District, in terms of the Black Administration Act, Act 38 of 1927 and that he be remunerated."

[5] An application for condonation was launched almost 10 years after the decision had been taken. This application for condonation is vehemently opposed by the first and second respondents. The parties are *ad idem* that the whole matter should be argued as the condonation application forms part of the main application. The application was served on the first and second respondents on 24 January 2012 – almost 9 years after the decision had been taken.

[6] There was a previous review application in 2004 to the High Court wherein the same relief was requested as in the present application. Ms Emily Kekana and Constance Kekana were amongst the applicants in the 2004 application. They are two of the members who are part of the present application. The 2004 application was abandoned. No reason for these actions are set out by the applicant. On 21 November

2005 Lesiba Bernard Kekana deposed to an opposing affidavit, after the first respondent had apparently instituted an application to have his appointment as Kgoši confirmed by the court. This application went no further and no details were given to the court.

[7] Apparently certain steps were taken during August 2006 to refer the so-called dispute to the Commission on Traditional Leadership Dispute and Claims. No further steps were taken by the applicant to ascertain what had happened to the referral.

[8] Only on 13 May 2011 did the applicant enquire from the Commission on Traditional Leadership as to what the position was – 4 years and 9 months after referring the matter. There is no explanation whatsoever of what had transpired in the time period 2007, 2008, 2009, 2010 and the first part of 2011.

[9] There is only one letter from the office of the fourth respondent acknowledging receipt of a letter from the Secretary, Mgobane Local Authority Moshade. The letter to which is referred to is not attached and the court does not know what the contents of this letter had been.

[10] On 9 September 2011 the applicant's attorney enquired from the fourth respondent as to the reasons for the decision to appoint Lesiba Vaaltyn

Kekana as Kgoši. No reply was received and no further enquiries were made by the applicant's attorney.

[11] Thereafter the present application was served on the first and second respondents on 24 January 2012. It is clear that the applicant had legal advice from the onset as a review application was launched in 2004 – there is no explanation as to why it was abandoned. There is no explanation as to the inordinate delay from 2006 until the beginning of 2012 to launch the present review application.

[12] In **Bertie van Zyl v Minister of Safety and Security 2010 (2) SA 181 CC** at 190 D Mokgoro J found:

*“[14] However, in determining whether condonation may be granted, lateness is not the only consideration. **The test for condonation is whether it is in the interests of justice to grant condonation.**”* (Court's emphasis)

[13] In **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 SCA** at 249 H – I the court found:

“In weighing the question whether the lapse of time should preclude a court from setting aside the invalid administrative act in question an important - perhaps even decisive - consideration is the extent to which the appellant or third parties might have acted in reliance upon it.”

[14] and in **Oudekraal Estates (Pty) Ltd v City of Cape Town 2010 (1) SA 333** in paragraph 33 Navsa JA found:

“In reviewing and considering whether to set aside an administrative decision, courts are imbued with a discretion, in the exercise of which relief may be withheld on the basis of an undue and unreasonable delay causing prejudice to other parties, notwithstanding substantive grounds being present for the setting aside of the decision. The application of the delay rule would in a sense ‘validate’ a nullity. This rule evolved because, prior to the Promotion of Administrative Justice Act 3 of 2000 (PAJA), no statutorily prescribed time limits existed within which review proceedings had to be brought. The rationale was an acknowledgment of prejudice to interested parties that might flow from an unreasonable delay as well as the public interest in the finality of administrative decisions and acts.” (hof se klem)

[15] In **Gqwetha v Transkei Development Corporation Ltd and Others 2006 (2) SA 603 SCA** Nugent AR found in paragraph 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 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.** (Court's emphasis)

[16] In **Setsokosane Busdiens v Nasionale Vervoerkommissie** 1986 (2)

57 AD Hefer JA found at p 86:

"In Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad op 39 het MILLER AR dit soos volg beskryf:

"Word beweer dat die aansoekdoener nie binne redelike tyd die saak by die Hof aanhangig gemaak het nie moet die Hof beslis (a) **of die verrigtinge wel na verloop van 'n redelike tydperk eers ingestel is** en (b) , indien wel, **of die onredelike vertraging oor die hoof gesien behoort te word.** Weer eens, soos dit my voorkom, met betrekking tot (b) , oefen die Hof 'n regterlike diskresie uit, met inagneming van al die relevante omstandighede."

[17] The applicant cannot rely on blaming the previous attorneys for the delay of several years, as Mr Pathudi, for the applicant, tried to do during argument.

[18] In **Saloojee and Another v Minister of Community Development 1965 (2) AD 135** on p 141 C-D Steyn HR found:

*"I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. **There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations ad misericordiam should not be allowed to become an invitation to laxity.**" (Hof se klem)*

[19] The applicant contends that Promotion of Administrative Justice Act 3 Of 2000 ("PAJA") is not applicable in this instance and the court should adjudicate the application in terms of the common law. I cannot agree as the decision take by the Executive Council was an administrative act in terms of section 1 of PAJA. Section 1 provides inter alia:

"administrative action" means any decision taken, or any failure to take a decision, by –

- (i) an organ of state, when –
exercising a power in terms of the Constitution or a provincial constitution; or*
- (ii) exercising a public power or performing a public function in terms of any legislation."*

[20] Section 7 of PAJA provides that any proceedings for judicial review in terms of section 6 (1) must be instituted without reasonable delay and not later than 180 days after the applicant had become aware of the decision.

[21] Miller JA held in **Wolgroeiërs Afslaers v Munisipaliteit van Kaapstad 1978 (1) 13** on p 41 D – F:

Dit kan teen die regspleging en die openbare belang strek om toe te laat dat sodanige beslissings of handellinge na tydsverloop van onredelike lang duur tersyde gestel word - interest reipublicae ut sit finis litium. Oorwegings van hierdie aard vorm ongetwyfeld 'n deel van die onderliggende redes vir die bestaan van die reël." (Court's emphasis)

[22] There is no cogent explanation by the applicant for the time period that had lapsed between 2006 and 2011, a period of five years, before this application was launched and the court cannot accept the argument that the court should condone the applicant's actions in letting 5 years lapse before instituting the review application. The court finds that the application was launched after an unreasonable time and that the court should not condone the unexplained length of time it took the applicant to launch the present review application.

[23] I have considered all the facts and circumstances and listened to the arguments by legal counsel. I have considered the authorities and am of the opinion that the applicant cannot succeed in the application for condonation. The court finds that the application was launched after an unreasonable time and that the court should not condone the unexplained length of time it took the applicant to launch the present review application.

[24] The background giving rise to the application for review is that Kgoši MA Kekana died in April 2002. Two groups of the Kekana Tribe supported different candidates. The first group supported Anna's son. Anna was an ordinary wife of Kgoši, but Naume, whose son was supported by another group, was a candle wife.

[25] Mr Phatudi, for the applicant, argued that there were no consultations with the two opposing groups before a decision was taken to recognize Naume's son as the Kgoši. This cannot be true as it is set out in the memorandum in which Naume's son is indicated as the preferred candidate that:

"In order to bridge the gap between the two parties, several meetings were held with them by Government officials but there was no agreement reached. "

[26] It is clear from the memorandum that the cluster went to great trouble to ascertain which were the true facts. They consulted widely to find out what the Ndebele Culture was in regards to finding an heir to the throne. They realized that the matter may end up in court and noted it in the memorandum. The decision was taken not to appoint Anna's son as Kgoši as Anna's mother was not a candle wife or masechaba. It was recommended that the first respondent be appointed as a Kgoši as he was born from a candle wife or masechaba.

[27] Mr Nameng, for the respondents, argued that the applicant contradicts itself as set out in the founding affidavit that on 6 February 1963 a decision was taken to marry a Langa. Then later on in the same affidavit it is set out by the deponent that a candle wife will not be chosen from the Royal House of Langa of Mapela. This is the position, according to Mr Phatudi in spite of the decision of 6 February 1963.

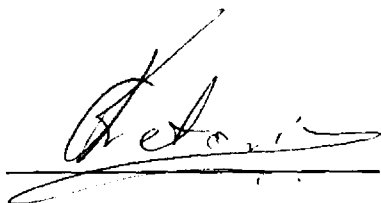
[28] The court does not have to decide the merits of the matter, should the court find that condonation for the late application should not be granted. In any event it is clear that the decision of the Executive Council of 16 March 2003 cannot be faulted, as extensive consultations took place with the two groups as well the Bakenberg Traditional Authority, the Mapela Traditional Authority, the Lekalakala Traditional Authority and the Zebediela Traditional Authority.

[29] Although Mr Phatudi requested the court to take into consideration that it was lay people who are involved, the court cannot give credence thereto, as they already instituted a review application in 2004. According to the deponent of the founding affidavit this 2004 application was abandoned, without any reason for waiting nine years before instituting a further review application.

[30] In the circumstances the merits of the application is not such that it can persuade the court to grant condonation for the launch of the review application 9 years after the decision has been taken. In line with the **Oudekraal** decision (*supra*) it is clear that since 2003 the applicant has been the Kgoši. The unreasonable delay will prejudice the respondent should the court now entertain the review application. The unreasonable delay by the applicant to institute this application is not in the public interest in the finality of the decision taken in 2003.

[31] The following is made an order of court:

1. The application is dismissed with costs;
2. In as far as it is necessary the application for condonation is dismissed with costs.

A handwritten signature in black ink, appearing to read 'Pretorius', is written over a horizontal line.

Judge Pretorius

Case number : 34/2012
Heard on : 26 February 2013
For the Applicant / Plaintiff : Mr Phatudi
Instructed by : M.G. Phatudi Inc
For the Respondent : Adv Nameng
Instructed by : Makhafola Verster Inc
Date of Judgment : 1 March 2013