

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION : MTHATHA

CASE NO. CA 47/12

In the matter between:

MHLONTLO LOCAL MUNICIPALITY

Appellant

and

MZIMKHULU JEREMIAH JIKIJELA

1st Respondent

RUTH MANDISA GIYOSE

2nd Respondent

FULL BENCH APPEAL JUDGMENT

GRIFFITHS, J.:

[1] Dissatisfied with a judgment granted against them by Mjali J, the appellants in this matter sought leave to appeal. They were granted leave by the court of first instance to appeal to this court on a limited basis.

[2] The respondents, then sitting members of the first appellant's council and members of its Executive Committee ("Exco"), launched an application in which they sought an order declaring their removal from Exco to be unlawful, an order of reinstatement and an order that they be paid all attendant benefits and emoluments with retrospective effect from 20 February, 2009 to date of reinstatement. They also sought an order condoning their failure to institute the proceedings within 180 days together with an order that they be exempted from exhausting any internal remedies that may be required in terms of section 7(1) and section 7(2)(c) of the Promotion of Administrative Justice Act¹ ("PAJA"). The application was opposed by the appellants being the municipality itself ("Mhlontlo"), and the two councilors who were elected to Exco in the respondents' stead. It is perhaps apposite at this stage to mention that the application for leave to appeal was brought by Mhlontlo, the second and third respondents having filed a notice to abide the decision of the court *a quo*. However, the order granting leave to appeal was headed "**MHLONTLO MUNICIPALITY COUNCIL & ORS APPELLANTS**" and the notice of appeal and subsequent documentation has referred to Mhlontlo "**And Others**" as the "**APPELLANTS**". It is however clear, and has been confirmed by counsel, that it is indeed only Mhlontlo that is before us on appeal.

[3] The respondents' cause of action was, in essence, that they were elected during March 2006 to their positions as councilors with Mhlontlo. Subsequent thereto they were elected as members of Exco. However, at a meeting of Exco held on Friday, 20 February 2009, they were removed by a

¹ No. 3 of 2000

majority vote from their positions on Exco. According to the respondents, this resolution taken by Exco was unlawful for various reasons, in particular because they were not given due notice thereof pursuant to the provisions of section 53 of the Municipal Structures Act². Accordingly, the resolution to remove the respondents from their positions on Exco was taken unlawfully and fell to be set aside.

[4] The appellant's response to this was that proper notice of the intention to move a motion for their removal was indeed given to the respondents and certain documentation, including minutes, was put up as proof thereof. The appellant denied that a case had been made out for condonation of the failure to comply with the 180 day period mentioned in section 7(1) of PAJA and, *in limine*, maintained that the application ought to be dismissed on this basis alone. In reply, the respondents dealt at length with the question of the appellant's failure to give them notice of the meeting and maintained that the reason as to why there had been a delay of almost one and a half years in instituting the application was because they had attempted to resolve the matter by appealing to political structures of the ANC and that Mhlontlo and its officials had been involved in such processes, but that their endeavors had come to naught.

[5] Mjali J, after hearing argument on the papers, found that a proper case had been made out for condonation of the respondents' failure to launch the application within a reasonable period. She also found that, despite the contention by the appellant that there was an extensive dispute of fact which could only be resolved by oral evidence, there was sufficient evidence

²No. 117 of 1998

before her on the papers to make a finding that the appellant's officials were not telling the truth in their affidavits before her to the effect that they had given due and proper notice to the respondents. She accordingly held that the respondents' evidence that they had indeed not received such notice was the truthful version. Based on these findings, she granted the respondents relief in the following terms by way of a judgment delivered on 9 May 2011:

- “23.1 The applicants' failure to institute proceedings within 180 days is hereby condoned and that in the interests of justice the applicants are exempted from exhausting any internal remedies that there may be as required in terms of section 7(1) and 7(2)(c) of the Promotion of Administrative Justice Act No. 3 of 2000
- 23.2 The first respondent's action of removing the applicants as members of the first respondent's Executive Committee (EXCO) without complying with the prescribed legal procedures, in particular section 53 of the Municipal Structures Act No. 117 of 1998 is set aside.
- 23.3 The first respondent is ordered to reinstate the applicants into their positions as members of its EXCO with immediate effect and to pay all attendant benefits and emoluments with retrospective effect from 20 February 2009 to the date of their reinstatement.
- 23.4 The first respondent is to pay the costs of this application on an attorney and client costs (sic).”

[6] The appellant applied for leave to appeal on three bases, namely the question of condonation of the 180 day period, the decision on the merits without a referral to oral evidence and costs. However, leave was granted by the court *a quo* on the following limited issues:

- "1. That leave to appeal granted (sic) on the issue of whether or not the late filing of the review proceedings is not inordinately long in the circumstances of the matter;
2. That the issue of cost (sic) should be reconsidered on appeal."

[7] Leave to appeal was accordingly refused on the remaining issue, that being the question as to whether the court *a quo* was correct in finding on the merits in favour of the respondents without hearing oral evidence.

[8] As an opening gambit both counsel, in their heads of argument, relied on section 21A of the Supreme Court Act³. This section reads as follows:

"When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone."

[9] Mr. Mpofu, for the appellant, argued that due to the fact that municipal elections were held shortly after the order in this matter was granted by the court *a quo* (a fact which was common cause between the

³ No. 59 of 1959

parties on appeal), the order granted by the court had no practical effect or result and thus the order should not have been granted. Mr. Zilwa, for the respondents, argued that any order which this court might make would, on the same reasoning, have no practical effect or result and thus the appeal should be dismissed on this basis alone. The net effect of these arguments is that, because a new council was to be voted in shortly after the orders were granted, the order granting reinstatement of the respondents to their former positions on Exco became redundant and thus of no practical effect.

[10] The appellant's argument is, in my view, misplaced in that section 21A clearly relates to a "judgment or order" which is sought on appeal, and not a judgment or order which has already been granted in the lower court. However, the reliance by both counsel on the question of redundancy only relates to one part of the orders granted by Mjali J. It does not take into account the fact that Mjali J, after ordering that the appellant was to reinstate the applicants as members of Exco, also ordered the appellant to "*pay all the attendant benefits and emoluments with retrospective effect from 20 February 2009 to the date of their reinstatement.*" As I have indicated, this order was granted on 9 May 2011 and thus, should this order stand, the appellant is obliged to pay such benefits and emoluments for the period 20 February 2009 to, I presume, the date of the municipal elections held shortly after 9 May 2011. Although we have not been apprised of the quantum of such benefits, they cannot be negligible and thus this part of the order cannot be regarded as having no practical effect. Additionally, Mjali J also granted leave to appeal as against the costs order which was granted on the attorney and client scale.

[11] In my view, therefore, the appeal cannot be dismissed on this ground.

[12] This then leaves the question as to whether or not the court *a quo* was correct in condoning the late institution of the application proceedings pursuant to the provisions of section 7(1) as read with section 9 of PAJA.

[13] Section 7 of PAJA insofar as it is relevant to this matter reads as follows:

"7 Procedure for judicial review

- (1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date-
 - (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or
 - (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.
- (2) (a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."

[14] Section 9 of that Act deals with the question of extensions of time as follows:

"9 Variation of time

(1) The period of-

(a) 90 days referred to in section 5 may be reduced; or

(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period,

by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require."

[15] It is common cause between the parties that the actions of the appellant in dismissing the respondents as members of Exco amounted to "administrative action" for the purposes of PAJA and thus that the provisions of sections 7 and 9 of the Act are applicable. Mjali J found (which finding is not on appeal before us), despite the contentions of the appellant to the contrary, that the respondents were in fact dismissed on 20 February 2009. The question which then arises is as to when the period of 180 days commenced?⁴ In terms of section 7(1) of the Act, this period would have commenced on the date upon which any internal remedies that may have been instituted had been concluded. Should no such internal remedies exist, the 180 day period would have commenced when the respondents became aware of the administrative action, namely on 20 February 2009.

[16] It appears that the only internal remedy which was available to the respondents was that which is provided for in section 62 of the **Local Government: Municipal Systems Act**⁵ which, in effect, provides that the respondents could in the circumstances have appealed to the municipal council or, if the council is comprised of more than 14 councillors, a committee of councillors appointed by the council who were not involved in the decision to remove the respondents.

⁴ See: **Beweging vir Christelik-Volkseie Onderwys & Others v The Minister of Education & Others (308/2011) [2012] ZASCA 45 (29 March 2012)** at paragraph 46 where Plasket AJA said at paragraph 46: "In the application of both the delay rule and ss 7 and 9 of the PAJA, a two-stage approach is required. That is the way of the courts have always applied the delay rule and the structure of the PAJA requires two distinct inquiries. The first question that arises is whether the delay in launching an application was unreasonable, or whether it was launched more than 180 days after internal remedies had been exhausted or the applicant had been informed of, had knowledge of or ought to have had knowledge of the administrative action under challenge. The second question is whether, if the first question is answered in the affirmative, the delay ought to be condoned or whether it is in the interests of justice that the 180-day period be extended (or the failure to bring the application timeously should be condoned)."

⁵ No. 32 of 2000

[17] It is common cause that the respondents did not do this. Instead, they "appealed" to the political structures of their party, the ANC, to assist them. As alluded to earlier in this judgment, despite the fact that this took a period of almost one and a half years, they achieved no success by following this route. Mjali J, in her judgment in this regard dealt with this aspect thus:

"In so far as condonation for the late launch of these review proceedings is concerned, the applicants noted their appeal against their removal on the same day they were removed from EXCO. When the results were not forthcoming they moved up the structures of the ANC in an attempt to resolve the issues. Some meetings were called and some investigations into the issue of their removal were promised but all was in vain. These all in my view entailed giving the various structures some time to investigate and make a decision on the issue of their removal from EXCO. In terms of section 7(1)(a) of PAJA the proceedings launched in terms of the internal remedies must be concluded before any review proceedings are instituted. The applicants waited in anticipation of a resolution and when the wait proved too long the applicants launched the present review proceedings. Whilst it is true that the applicants delayed in launching the present review proceedings, **I do not deem such delay to be unreasonable in the light of the explanation given by them.**"

[18] In my view, Mjali j was incorrect in taking this approach as it seems clear that the purported remedies which the respondents followed, namely appeals to the various structures of their political party for assistance in resolving the issue, were not "internal remedies" as envisaged in section 7

of PAJA. Because of her view in this regard, Mjali J did not determine the point in time when the 180 day period commenced. It is thus incumbent upon this court to make that determination. As it is common cause that no such internal remedy as envisaged by the section was pursued by the respondents, and because Mjali J exempted the respondents from exhausting any internal remedies pursuant to the provisions of section 7(2)(c) (an aspect which is not before us on appeal), it follows that the 180 day period commenced running from 20 February, 2009. Accordingly, the 180 day period envisaged in section 7 of PAJA completed its course on 20 August, 2009. The respondents instituted the application on 26 July 2010, some 11 months thereafter.

[19] The next inquiry, one which involves the exercise of a discretion, is the question as to whether or not the delay in instituting the application should be condoned. Because of her approach to the matter as set out above, Mjali J did not pursue the twofold approach in this regard as set out in the **Beweging vir Christelik-Volkseie Onderwys** matter⁶. In this regard, Mr. Mpofu has argued that section 9(2) of PAJA requires an application to be made for an extension of the 180 day period and, because the respondents did not apply for such an extension but applied instead for condonation of their failure to institute the application within the 180 day period, they should have been non-suited on this basis alone. I do not agree. It is clear in my view that section 9(2) of PAJA envisages the granting of such condonation⁷.

⁶ footnote 4 above

⁷ In the **Beweging vir Christelik-Volkseie Onderwys** matter (footnote 4 above) Plasket AJA specifically alluded to this when he stated "... or whether it is in the interests of justice that the 180-day period be extended (or the failure to bring the application timeously should be condoned)." This view is also in line

[20] The approach to the question of condoning a delay in terms of PAJA was dealt with by the SCA in the matter of **Camps Bay Ratepayers' and Residents' Association v Harrison**⁸. It said in the following:

"Section 9(2) however allows the extension of these time frames where "the interests of justice so require". And the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success."

[21] Holmes JA explained the judicial discretion vested in a court in granting condonation in the following manner:

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for

with the generally accepted view of the courts when condoning a failure to comply with a time period imposed in terms of the rules of court pursuant to the provisions of rule 27(1) which provides that a court may "make an order extending... any time prescribed by these rules or by an order of court..."

⁸ [2010] 2 All SA 519 (SCA) para 54 (confirmed on appeal in **Camps Bay Ratepayers' and Residents' Association & another v Harrison & another** 2011 (4) SA 42 (CC)).

that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits. I think that all the foregoing clearly emerge from decisions of this Court, and therefore I need not add to the evergrowing burden of annotations by citing the cases."⁹

[22] It seems to me therefore that in dealing with condonation pursuant to the provisions of section 9(1)(b) of the Act, a court should not mechanically tick off the various factors involved but should accord due weight to each factor in accordance with the circumstances of the matter. Thus, as expressed by Holmes JA in the above-mentioned passage, "*...the importance of the issue and strong prospects of success may tend to compensate for a long delay*". Clearly, in such circumstances, more weight is accorded to the facts that the issue is an important one and that there are strong prospects of success than is accorded to the question of a long delay and, I might add, a weak explanation therefor¹⁰.

⁹ **Melane v Santam Insurance Co Ltd 1962 (4) SA 532 (A)**

¹⁰ See also: *Carolus v Saambou Bank*; *Smith v Saambou Bank* 2002 (6) SA 346 (SE) at 349 B -E where Jones J said the following: " Both applications are out of time and the applicants seek condonation. The explanation for the delay in each case is weak. So also the explanation of each applicant for allowing

[23] In the present matter the respondents delayed institution of the application proceedings for a period of a year and five months after they became aware of the administrative action, and for a period of 11 months after the period provided for in PAJA for the institution of such proceedings had expired. In my view, this is a long delay which has not been fully explained by the respondents. Apart from mentioning, in general terms, that they made application to the local and provincial structures of the ANC for assistance and that such assistance was not ultimately forthcoming, very little detail in this regard has been provided. It seems to me that, in this regard, the respondents failed to provide a "full and reasonable explanation for the delay which covers the entire duration" thereof. Of particular importance in this regard is the fact that the respondents maintained that they reported the matter to the Provincial Executive Committee of the ANC in October 2009. The replying affidavit in this regard proceeds to state:

"The current member of the PEC, Xolile Nqatha, was tasked to investigate the matter and report back to the PEC. We waited in vain for word from the PEC until we decided to approach this Honorable Court when no such word was forthcoming."

judgment to be taken against him in the first place, which affects the bona fides of the applications for rescission (*Grant v Plumbers C (Pty) Ltd* 1949 (2) SA 470 (O); *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E) at 300F - 301C; *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E)). In these circumstances the strength of the applicants' defence on the merits of the case becomes crucial. Condonation will be granted and rescission will be ordered only if the applicants can satisfy me that the defence they wish to raise on the merits if the matter goes to trial has reasonable prospects of success. If it is a weak defence the applications have little chance of succeeding. See, for example, *Zealand v Milborough* 1991 (4) SA 836 (SE) at 838D - E where the following guideline appears:

'... (A) measure of flexibility is required in the exercise of the Court's discretion [to grant rescission]. An apparently good defence may compensate for a poor explanation (*Harms Civil Procedure in the Supreme Court* 313 (K6)), and vice versa.'

[24] No explanation whatsoever was given by the respondents in this regard as to what was done, if anything, during the period between October 2009 and 26 July 2010 when the application was launched. This, on its own, is an inordinately long delay and one would have expected some explanation for this delay other than their having "waited in vain" for word from a political body which was not even the body tasked with an internal appeal against the decision under challenge. As pointed out by Mr. Zilwa in this regard, however, it should be remembered that the respondents were, during this period, waiting for word from a person whom they must have regarded as being a reasonably important official.

[25] Mr. Mpofu has argued in this regard that as there is a dispute of fact as to whether or not the respondents did indeed approach the structures of the ANC for relief as alleged, this question ought to have been resolved in favour of the appellant and the court *a quo* ought thus to have found that no such approach was made. I do not agree with this submission for two reasons. Firstly, it is most probable that the respondents, having been summarily dismissed as members of Exco, would have done something about their dilemma. It is most improbable that they would have remained supine for such a long period. Secondly, unless palpably improbable or false, the court will generally accept an explanation given in an application for condonation and will not enter into a *voir dire* in this regard.

[26] He has also argued that the explanation was only dealt with in reply, after the question of delay had been pertinently raised in the appellant's answering affidavit. In my view this question was properly raised by the respondents in their founding affidavit. In their founding affidavit an

explanation was given for the delay, albeit not detailed. In answer to the challenge raised in this regard by the appellant, the respondents merely sought to elaborate in reply.

[27] As against this, it must be borne in mind that there can be little if any prejudice to the appellant by the granting of such condonation. As indicated by the appellant, the reinstatement itself as granted by Mjali J has little or no effect at this stage. No indication has been forthcoming from the appellant to the effect that the delay resulted in their being prejudiced in the presentation of their defence to the action. On the contrary, the appellant put up extensive evidence to establish its case, both documentary and by affidavit.

[28] There is, however, a further important factor to be considered. Whether or not the court of first instance was correct in its finding that the appellant forged documentation and that its officials were untruthful in their affidavits is of no consequence in this appeal as it is not an aspect which is before us. Accordingly we are obliged to accept for the purposes of this appeal that, indeed, the appellant, through its officials, acted in this manner. This being so, one cannot escape the conclusion that the respondents had very strong prospects of success on the merits and this is an aspect which must weigh heavily in considering whether or not the lengthy delay in instituting the application ought to be condoned.

[29] In my judgment this is a case where the facts that the respondents have a strong case on the merits and where there is little, if any, prejudice to the appellant, must outweigh any deficiencies in their explanation for the

lengthy delay. In this regard it must also be borne in mind that, although her approach may not have been absolutely correct as dealt with earlier, Mjali J was nonetheless vested with a discretion in this regard which she exercised judicially. It is trite that a court on appeal will be slow to interfere with the exercise of such a discretion.

[30] As regards the question of costs, the court *a quo* once again exercised a discretion. In my view this court cannot interfere therewith in particular because of the fact that it was necessary to show disapproval of the appellant's conduct.

[31] In the circumstances, I would propose that:

The appeal be dismissed with costs, such costs to include the costs of two counsel.

JUDGE OF THE HIGH COURT

HARTLE, J. : I agree

JUDGE OF THE HIGH COURT

MAKAULA, J. : I agree and it is so ordered

JUDGE OF THE HIGH COURT

HEARD ON : 16 NOVEMBER 2012

DELIVERED ON : 29 NOVEMBER 2012

COUNSEL FOR APPELLANT : Mr Mpofu

INSTRUCTED BY : Mvuzo Notyesi Inc.

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: Mr Bodlani

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