

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE HIGH COURT, MTHATHA)

Case No: 1698/10
Heard: 18/02/2011
Delivered: 09/05/2011

In the matter between:

MZIMKHULU JEREMIAH JIKIJELA **1st APPLICANT**

RUTH MANDISA GIYOSE **2nd APPLICANT**

VERSUS

MHLONTLO LOCAL MUNICIPALITY COUNCIL **1st RESPONDENT**

NOZIPHIWO SONGCA **2nd RESPONDENT**

MBULELO JARA **3rd RESPONDENT**

JUDGMENT

MJALI J:

1. The applicants seek an order couched in the following terms:

- 1.1 That the applicants failure to institute proceedings within 180 days be and 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.
- 1.2 The review and setting aside of 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.
- 1.3 Their reinstatement by the first respondent into their positions as members of its EXCO as well as payment of all attendant benefits and emoluments with retrospective effect from 20 February 2009 to the date of their reinstatement.
- 1.4 That the first respondent pays the costs of this application and that the second and third respondents be ordered to pay the costs of this application jointly and severally with the first respondent only in the event of them opposing the application.

2. The applicants were duly elected as Ward Councillors of the first respondent in March 2006 subsequent to the Local Government elections that had taken place during that year. They were also elected as members of the Executive Committee (EXCO) of the first respondent's Council. They continued serving as EXCO members until they were allegedly removed there from in a Special Council Meeting that was held on 20 February 2009. The aforesaid removal was consequent upon a decision taken on an alleged motion without a notice that was introduced by a certain Councillor Sabisa proposing the removal of the applicants from EXCO. Their removal as members of the first respondent's EXCO was unlawful in that the legislative prescripts, in particular, section 53 of the Municipal Structures Act No. 117 of 1998 were not complied with, so contend the applicants.

3. The second and third respondent having filed notices that they will abide by the decision of the court, the application is opposed only by the first respondent on the grounds that such removal took place on 23 March 2009 and not on 20 February 2009 and was preceded by the required notice. Thus was lawful. In limine the first respondent raised the point that the proceedings are in the nature of a review and should have been brought without undue delay, the applicants had taken inordinately and unreasonably long before instituting these review proceedings. It was submitted that the application ought to be dismissed on this ground alone. The first respondent submitted further that there is a serious dispute of fact pertaining to the issue of whether there was compliance with the legislative procedures or not prior to the removal of the applicants. Such dispute of fact cannot be resolved on paper, so contended the first respondent.
4. I deal first with the issue of undue delay. In terms of section 7(1)(b) of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA),

“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 on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or

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.”

5. In deciding whether the applicants had taken inordinately and unreasonably long before instituting these review proceedings I must take into account a number of considerations. Such considerations were eloquently stated by Brand JA in **Associated Institutions Pension Fund v Van Zyl** 2005 (2) SA 302 (SCA) at 321 as follows :

“[46] . . . It is a longstanding rule that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party had been guilty of unreasonable delay in initiating the proceedings. The effect is that, in a sense, delay would ‘validate’ the invalid administrative action (see eg Oudekraal Estates (Pty) Ltd v City of Cape Town and others 2004 (6) SA 222 (SCA) ([2004] 3 All SA 1 at para [27]). The raison d’être of the rule is said to be twofold. First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public

interest element in the finality of administrative decisions and the exercise of administrative functions (see eg *Wolgroeiërs Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41).

[47] The scope and content of the rule has been the subject of investigation in two decisions of this Court. They are the *Wolgroeiërs* case and *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander* 1986 (2) SA 57 (A). As appears from these two cases and the numerous decisions in which they have been followed, application of the rule requires consideration of two questions:

(a) Was there an unreasonable delay?

(b) If so, should the delay in all the circumstances be condoned?

(See *Wolgroeiërs* at 39C–D.)

[48] The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case (see eg *Setsokosane* at 86G). The investigation into the reasonableness of the delay has nothing to do with the Court's discretion. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of that case, the delay was reasonable. Though this question does imply a value judgment it is not to be equated with the judicial discretion involved in the next question, if it arises, namely, whether a delay which has been found to be unreasonable, should be condoned (see *Setsokosane* at 86E–F)."

6. It is thus crucial to have regard to the facts of this matter in order to determine whether there has been unreasonable delay by the applicants in the launching of the present review proceedings. In their founding and replying affidavits the applicants stated that on the same day of their removal from the first respondent's EXCO they appealed to the OR Tambo Region of the ANC through Mr. Siyakholwa Mlamli the Regional Secretary of the ANC. A meeting chaired by the chief whip of the ANC who happened to be Mr Sabisa, the very same person who moved a motion for their removal from EXCO could not resolve the issue. They then made representations to the Regional Working Committee of the ANC which promised to consider the matter and inform them of the outcome. When such outcome was not forthcoming the applicants approached the Provincial Executive Committee (PEC) of the ANC in October 2009. A certain Mr Xolile Nqatha was tasked to investigate the matter and report back to the PEC. When no results were forthcoming from the PEC the applicants launched the present review proceedings on 26 July 2010. According to the applicants all attempts which they had thought would resolve the issue without having to institute court proceedings had failed when they launched the present review proceedings.

7. Section 62 of the Local Government: Municipal Systems Act, No. 32 of 2003 provides for an internal resolution mechanism and states as follows:

“Section 62.—(1) A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.

(2) The municipal manager must promptly submit the appeal to the appropriate appeal authority mentioned in subsection (4).

(3) The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

(4) When the appeal is against a decision taken by—

(a) a staff member other than the municipal manager, the municipal manager is the appeal authority;

(b) the municipal manager, the executive committee or executive mayor is the appeal authority, or, if the municipality does not have an executive committee or executive mayor, the council of the municipality is the appeal authority; or

(c) a political structure or political office bearer, or a councillor—

(i) the municipal council is the appeal authority where the council comprises less than 15 councillors; or

(ii) a committee of councillors who were not involved in the decision and appointed by the municipal council for this purpose is the appeal authority where the council comprises more than 14 councillors.

(5) An appeal authority must commence with an appeal within six weeks and decide the appeal within a reasonable period.

(6) The provisions of this section do not detract from any appropriate appeal procedure provided for in any other applicable law.

8. It is important to note that, in terms of the provision in section 7(2) (a) of PAJA, no court may review an administrative action in terms of that Act unless any internal remedy provided for in any other law has first been exhausted. In this matter the decision to remove the applicants as members of the EXCO was taken at a Municipal Council meeting. In terms of section 62(4) the appeal authority would either be the municipal council or a committee of councillors who were not involved in the decision and appointed by the municipal council for the appeal. Clearly the applicants did not follow that route but appealed to the political structures of the

ANC that deployed them. They have applied that they be 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. In the papers and in argument I did not get the impression that this application was opposed. Instead the first respondent in its answering affidavit sought to refute that the applicants ever appealed to any of the ANC structures mentioned in their founding affidavit. In support of its denial the first respondent stated that the decision to have the applicants removed from EXCO was taken by the regional structures of the ANC due to their lack of performance and the fact that they brought the ANC and the Municipality into disrepute. According to the first respondent the applicants' removal from EXCO had the support of the provincial structures of the ANC. In an elaborate replying affidavit the applicants gave details of their appeal process as well as those of the persons that were involved in the appeals. They (the applicants) further denied that any of the structures of the ANC were involved in the decision to have them removed from EXCO as such structure expressed shock at their removal. The denial by the first respondent that the applicants ever appealed to the ANC structures was not pursued in argument.

9. Bearing in mind what was stated in **Walele v City of Cape Town & Others** 2008(6) SA 129 (CC) para 142 that

"[o]ur system of administrative justice seeks to encourage internal remedies to resolve disputes that arise out of administrative action. That is the very purpose of section 7(2) of PAJA. In my view, section 62 should be read in the light of this commitment, as it establishes an internal remedy." I am of the view that by approaching the various structures of the ANC the applicants sought to resolve a dispute that arose from a decision that was allegedly taken by such structures in conjunction with the Municipal Council or implemented by the Municipal Council. For the aforesaid reasons and also the fact that the application for exemption from exhausting any internal remedies is not opposed **I deem it in the interest of justice that the exemption sought by the applicants be granted.**

10. 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.**

11. Even if I am wrong in holding that the delay was not unreasonable, I am of the view that it must be overlooked as the lapse of time in itself is not necessarily decisive having considered all the relevant factors in this matter. In **Oudekraal Estates (Pty) Ltd v City of Cape Town**: [2004] 3 All SA 1 (SCA) para 46, the SCA, dealing with the necessity for a review to be properly brought by a party seeking to set aside an alleged invalid administrative act, referred to the Wolgroeiers (supra) and remarked as follows:

“No doubt a court that might be called upon to exercise its discretion will take account of the long period that has elapsed since the approval was granted, but the lapse of time in itself will not necessarily be decisive: Much will depend upon a balancing of all the relevant circumstances, including the need for finality, but also the consequences for the public at large and indeed for future generations, of allowing the invalid decision to stand. 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.”

12. Except for replacing the applicants with the second and third respondents and that they have been overseeing various projects ever since they took over from the applicants it is by no means clear in this matter how and to what extent finality will be disrupted. There is also no evidence as to what extent third parties have acted on the decision to oust the applicants as members of EXCO of the first respondent. There is also no evidence that in the event of a finding in favour of the applicants, they cannot take over where the second and third respondents left. What is clear is that the respondents were made aware (through the various meetings) immediately after the challenged decision was taken that an appeal was launched. Opposing the application for condonation for the late launch of these review proceedings Mr

Noxaka who appeared for the respondents argued that the municipality would be prejudiced in that there is a need for finality in the decisions taken by the council. Mr Zilwa counsel for the applicants argued that there will be no prejudice on the part of the municipality instead the only prejudice will be to allow an invalid decision to stand. As pointed out by the SCA in *Oudekraal* (supra) para 36

“[A] court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy. It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide.”

13. Bearing in mind that the internal remedies resorted to by the applicants failed to yield any results and that they were not concluded by the time these review proceedings were instituted, the computation of the 180 day period envisaged in section 7 (1)(a) of PAJA presents some difficulty. In **Wolgroeiërs Afslaers v Munisipaliteit van Kaapstad** the SCA set out the parameters of a court's discretion in relation to delay:

“What has indeed been prescribed by our Courts is that proceedings should be instituted within a reasonable time and, as I have already mentioned, the Court is at liberty, depending on the circumstances and in the exercise of its discretion, to condone unreasonable delay in appropriate cases. I cannot possibly accept that in the formulation of the requirement that proceedings should be instituted within a reasonable time, it was intended to fetter the Court's discretion to such an extent that even where a litigant disregards the Court's directive by unnecessary and excessive delay in bringing proceedings, the Court does not have the right to refuse the application merely because it is not proved or cannot be proved that the respondent was not materially prejudiced, even though there were, on a review of all the circumstances, other well- founded reasons for the exercise of its discretion against the applicant. I accept that prejudice to the respondent and the degree thereof are relevant factors in the consideration of whether unreasonable delay ought to be overlooked, and that they can sometimes be the decisive factor, especially in cases of comparatively trivial delays . . . Whilst, as I have already indicated, the question whether there was an unreasonable delay requires a factual finding, the answer to the question whether an unreasonable delay ought to be overlooked rests in the discretion of the Court, exercised by taking into consideration all the relevant circumstances and factors.”

14. In the present case, the time lapse before the appellants acted was sufficiently

explained. For all the aforesaid reasons, **I conclude that the delay in launching the present review proceedings should be condoned.**

15. I turn now to the issue of the alleged dispute of facts on papers. It has been argued on behalf of the first respondent that there is a serious dispute of fact pertaining to the issue of whether there was compliance with the legislative procedures or not prior to the removal of the applicants and that such dispute of fact cannot be resolved on paper. Mr Zilwa for the applicants argued that the disputes raised are spurious, dishonest and can be resolved on paper. It is instructive at this stage to have regard to the dictum of Heher JA in **Wightman t/a JW Construction v Headfour (Pty) Ltd and another** [2008] 2 All SA 512 (SCA) at par 12 where he stated:

“Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter’s allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E–635C [also reported at [1984] 2 All SA 366 (A) – Ed]. See also the analysis by Davis J in Ripoll-Dausa v Middleton NO 2005 (3) SA 141 (C) at 151A–153C with which I respectfully agree. (I do not overlook that a reference to evidence in circumstances discussed in the authorities may be appropriate.)”

16. It is common cause that the applicants were removed as members of the first respondent’s EXCO and that in terms of section 53 of the Municipal Structures Act they must be given notice prior to such removal. Whilst it is true that there is a dispute pertaining to the date on which the applicants were ousted from the EXCO of the first respondent and whether proper procedures were adhered to prior to their removal, I am inclined to agree with Mr Zilwa that such disputes can be resolved without the necessity to refer them to oral evidence. In doing so I will be guided by the dictum in **Wightman t/a JW Construction v Headfour (Pty) Ltd and another** (supra) and the authorities cited therein.

17. The respondent’s case that the removal of the applicants from the EXCO was preceded by the required notice is not borne out by the papers instead it reflects a clumsy and desperate attempt to mislead this court. In its answering affidavit the respondent avers that a meeting was convened for 23 March 2009. The notice of

such meeting together with the agenda including motions to be moved was served to the applicants by the Municipal manager, Monde Sondaba. In support of this averment the respondent attached a copy of such notice (as annexure ZM1) which was said to have been served to the applicants on 4 March 2009. On closer scrutiny the said annexure is dated 23 March 2009 which is much later than the day of the alleged service on the applicants. What is even more glaring is that a different person signed on behalf of Monde Sondaba who was said to have effected service of the notice to the applicants. A copy of a notice of a meeting of 23 March 2009 filed by the applicants as MJ4 negates any suggestion that the applicants were served with a notice of that meeting on 4 March 2009 as the date appearing thereon is 16 March 2009.

18. Further, annexure ZM1 is in direct conflict with the minutes of the Council meeting of 23 March 2009 which were filed of record by the respondent on 15 September 2010. Those minutes were signed by both the speaker and the municipal manager on 9 April 2009. In those minutes the reshuffling of the EXCO is listed under item 4 as a motion without a notice. Which motion was eventually discussed under item 7 and a resolution taken. In an attempt to explain this glaring discrepancy the respondent stated that those minutes were erroneously signed by both officials without being proof read and were not confirmed by the Council. This explanation does not hold water. It is difficult to imagine that two officials who both hold responsible positions can sign a document containing important resolutions of the Council without satisfying themselves as to the veracity of the contents thereof. Of note is that such document was filed in support of their case on 15 September 2010 and is dated 09 April 2009. It is inconceivable that a wrong document would be kept for that long without noticing an "obvious error".
19. The respondent's version that the applicants removal from EXCO took place on 23 March 2009 and was lawful falls flat in the light of the following. An extract of the minutes of the meeting of 20 February 2009 filed by the applicants (MJ 5) reflects under Resolution No. 04-20/02/2009 that the applicants were removed from the EXCO on 20 February 2009 with immediate effect. Further the first applicant's salary slips filed as MJ 6 & 7 show a negative change in the salary of the first applicant for the month of March 2009. The respondent could not deny the fact that EXCO members earn more than the ordinary members of the council. On papers and in argument the applicants submitted that if they were only removed from the EXCO

on 23 March 2009 the negative change in their salary could not have been effected on 25 March 2009 which is two days thereafter as more than two days are required to process salaries in the municipal system. The argument went further to say that even if the salary section of the municipality could miraculously process salaries within two days, the negative change in their salaries should have been marginal as they would have been removed from the EXCO two days before month end. No convincing counter argument could be advanced on behalf of the respondents in this regard. I am inclined to agree with counsel for the applicants that documents submitted by the applicants show beyond pale that they were removed from the EXCO on 20 February 2009 on a motion without a notice and not on 23 March 2009 as contended by the first respondent. **I accordingly find that the applicants' removal from the EXCO was done without complying with the legislative prescripts.**

20. I turn now to the issue of costs. It is trite that the award of costs is in the discretion of the court which must be exercised judicially with due regard to all relevant considerations. These would include the nature of the litigation being conducted before it and the conduct of the parties (or their representatives). **Intercontinental Exports (Pty) Ltd v Fowles** 1999 2 SA 1045 (SCA) 1055F-G. Mala fides, unreasonableness and frivolousness have been found to be factors justifying the imposition of an adverse costs order. **Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union** 1994 (2) SA 204 (A) at 221A-C.

21. The general rule is that costs follow the event, in other words the successful party should be awarded costs. This rule should be departed from only where good grounds for doing so exist. In this matter the first respondent persisted with its ill conceived defence when it should have avoided litigation altogether. After so many attempts by the applicants to resolve the issue of their removal without resorting to court had failed, it became clear to them that litigation was the only way that would resolve the matter. In **Skotnes v SA Library** 1997 2 All SA 379 (SCA) at p386 VIVIER JA stated,

a *"Unsuccessful litigants cannot escape liability for costs..... when it is clear that resort to litigation was the only way in which the successful party could obtain delivery of that which the unsuccessful party unlawfully refused to deliver."*

22. The first respondent's conduct was most unreasonable and unfair and as such mala fide justifying an order on an attorney and client scale against the respondent.

23. In the result the following order is made:

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.

GNZ MJALI

JUDGE OF THE HIGH COURT.

On behalf of the Applicants	Adv. P.H.S, Zilwa
Instructed by	X.M. Petse Incorporated
On behalf of the Respondents	Mr. Notyesi
Instructed by	Messrs Mvuzo Notyesi Incorporated