

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 3737/05

In the application between:-

ACTARIS SOUTH AFRICA (PTY)LTD

Applicant

and

CHAIRMAN OF THE TENDER COMMITTEE OF
THIRD RESPONDENT

1st Respondent

TATS ELECTRICAL SERVICES (PTY) LTD

2nd Respondent

MALUTI-A-PHOFUNG LOCAL MUNICIPALITY

Respondent

3rd

THE MUNICIPAL MANAGER OF THE
MALUTI-A-PHOFUNG LOCAL MUNICIPALITY

4th Respondent

CORAM:

RAMPAI, J *et* MILTON, AJ

JUDGMENT BY:

RAMPAI, J

HEARD ON:

14 MAY 2007

DELIVERED ON:

29 NOVEMBER 2007

[1] The matter came by way of motion proceedings for review in terms of section 53 of certain administrative decisions and

for certain declaratory orders. In addition the applicant sought an order of costs against the third respondent. The application is opposed by all the respondents.

The administrative decision which the applicant wanted reviewed, pertained to the award by the tender committee of the third respondent chaired by the first respondent. The tender was awarded to the second respondent. The tender was about the provision of certain electricity revenue management services. This was the primary purpose of the application.

- [2] The applicant is an electricity services provider. This company provides electricity revenue management services. The second respondent is also an electricity services provider. Like the applicant, the second respondent provides the same kind of services. Their identical core services entail the sale and distribution of electricity to consumers on behalf of a local authority.
- [3] The historical background appears to be necessary. The third respondent called for tenders in connection with the provision of services pertaining to electricity revenue management. During or about 15 April 2004 the third respondent issued a "Request for Proposal" through which it invited tenders.
- [4] The third respondent's local tender committee received

tender proposals from various interested parties. Among the tenderers were the applicant and the second respondent. On 10 November 2004 the local tender committee awarded the tender to the second respondent. A week later, on 17 November 2004, the local tender committee advised the applicant that the second respondent was the successful tender bidder. It followed, therefore, that the applicant was among the unsuccessful tenderers. Still in the year 2004 the tender contract was signed by the second respondent and the third respondent on 21 December 2004 to be precise.

[5] On 1 May 2005 the second respondent started delivering the services in terms of the written contract entered into by and between the second and the third respondent subsequent to the awarding of the electricity tender.

[6] Instead of initiating the necessary review proceedings while the sun still shined, the applicant saw fit to bring an urgent application. On 17 May 2005 the applicant launched an urgent application against the second respondent and the third respondent to interdict and to restrain them from implementing the terms of the said tender contract - *vide* case 2049/2005. This application was launched when the second respondent had already started rendering the services to the communities in the third respondent's jurisdiction.

[7] On 2 June 2005 the applicant delivered notice of a review application under case number 2385/2005. The purpose of that review application was to have the tender award made in favour of the second respondent nullified. At a later stage the applicant withdrew the application.

[8] On 7 July 2005 the applicant's urgent application referred to in par. [6] above was dismissed. The second respondent continued to render the services in terms of the tender contract.

[9] On 29 August 2005 the applicant delivered a new notice of a review application under case number 3734/2005. The purpose was still to have the tender award issued in favour of the second respondent reviewed and nullified. The latest review application concerns these current proceedings. This then completes the series of litigious attempts the applicant has made in an endeavour to upset the decision of the tender committee.

[10] The current review application is opposed *en bloc* by the respondents. The application is resisted not only on the merits but also on technical grounds. The applicant was obviously aggrieved by the decision of the local tender committee whereby it awarded a municipal tender to its rival competitor, the second respondent. It feels, and it appears to be a very strong feeling, that the local tender committee should have awarded the tender to it and to it alone.

[11] The applicant's case was well articulated by Mr. Wessels, counsel for the applicant, during argument before us. Counsel vigorously argued that measured by the requirements and standards which had been compiled and provided to the tender bidders by the local authority, in other words the third respondent, the applicant's compliant and competitive tender must have been accepted by the local tender committee, but was wrongly rejected in favour of the second respondent's less compliant and less competitive

tender because, as the applicant contended, the tender committee had lowered and relaxed requirements and standards which could and should not have been applied by the local tender committee and that, as a consequence of such double standards applied, the acceptance of the second respondent's undeserving tender bid and the conclusion of the consequent tender agreement between the second respondent and the third respondent for the provision of such electrical services fell to be reviewed and nullified.

[12] The contention of the applicant that it had complied with all the requirements of the third respondent's request for proposal and based on the subjective presumption that it was the lowest qualified tenderer, who should have therefore been named the preferred bidder and accordingly awarded the tender was vigorously challenged by Mr. Jordaan and Mr. Ploos van Amstel together with their juniors, Ms Eloff and Mr. Langenhoven, respectively. So much on the merits for now. I shall revert to the merits, if needs be, in due course.

[13] I now turn to the preliminary issues. The respondents have filed answering affidavits wherein, apart from the substantive merits, they have also raised, as a point *in limine*, a technical objection to the applicant's review application. The essence of the objection is that the review application was belatedly launched. The respondents contended that the review application was not launched within a reasonable period of

time after the tender was awarded to the second respondent. For that reason alone they urged us not to even consider the substantive merits of the matter, but rather to stop the train here and now and order the applicant to get off. We are thus called upon to determine whether or not Actaris, the applicant, has a valid ticket to remain on the train. If it has, it can remain on board the train until it reaches its chosen final destination, the merits. If it does not, then it cannot get there.

[14] We are now proceeding to examine the facts. I have already outlined the undisputed factual matrix of the matter. Before I embark upon the analysis of the facts, a cursory overview of the law is necessary.

[15] Section 7(1) of the Promotion of Administrative Justice Act, No. 3 of 2000, provides:

“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.

Therefore it is a specific statutory time-frame within which an

application for the review of an administrative act has to be brought.

- [16] The foregoing statutory enactment curtails the common law rule which requires that the review proceedings of an administrative act be instituted within a reasonable time. De Ville – **Judicial Review of Administrative Action in South Africa.**

Section 7(1) stipulates what a reasonable time is for the initiation of review proceedings.

The procedure pertaining to review proceedings in the High Court is governed by Rule 53 Uniform High Court Rules:

- [17] Section 9 of the Promotion of Administrative Justice Act provides that the restrictive time barrier of 180 days as set out in section 7(1) *supra* may be extended where the interest of justice so require.
- [18] Section 9 extenuates the hardship which is inherent in the strict enforcement of section 7(1). It injects a measure of flexibility to relax the rigidity of the primary limiting statutory enactment. It authorises the courts to condone the late review proceedings on good cause shown why such proceedings were not filed within 180 days in terms of section 7(1). The practical efficacy of section 9 is that in appropriate cases those who, for good reasons, fail to

comply with section 7(1) are not virtually remediless. The avenues of justice are not simply closed in their face on account of their mere lateness, however, marginal and reasonable the delay may be. However, an extension in terms of section 9 is not simply there for the taking. It is not given on mere demand. It must be earned on good grounds. A reasonable and adequate explanation must be given to ventilate the underlying cause of the delay the court is urged to condone.

- [19] In determining the reasonableness of the one party's delay in initiating and prosecuting review proceedings, which delay the court is asked to condone, prejudice to the other party is a vital component of the equation.

WOLGROEIER AFSLAERS (EDMS) BPK v
MUNICIPALITEIT VAN KAAPSTAD 1978 (1) SA 13 (AD);
LAERSKOOL MIDDELBURG EN 'N ANDER v
DEPARTEMENTSHOOF, MPUMALANGA DEPARTEMENT VAN
ONDERWYS, EN ANDERE 2003 (4) SA 160 (T) at 178 d – e.

- [20] In determining the reasonableness of the delay the extent of the delay is another crucial factor of the inquiry by the court. If the extent of the delay has been substantial, it is incumbent upon the applicant to lay before the court facts which will justify the court to find that, notwithstanding the delay, it would nonetheless be just and proper that the review proceedings be heard. See the decision of **ZWANE v**
MAGISTRATE, MAPHUMULO, AND ANOTHER 1980 (3)

SA 976 (N).

[21] Where review proceedings have been timeously initiated or where the review proceedings have belatedly been instituted, but not disturbingly late, the applicant still has to proceed seriously and prosecute his review case with reasonable swiftness within reasonable time. Unreasonable delay in prosecuting a review case, timeously instituted, is just as prejudicial to the respondent as in the case of review proceedings instituted unreasonably late. See **MKHWANAZI v MINISTER OF AGRICULTURE AND FORESTRY, KWAZULU** 1990 (4) SA 763 (D).

[22] In two recent decisions, it was authoritatively held that the provisions of the Promotion of Administrative Justice Act were unassailable and that parties could not choose whether the principles embodied in that statute were to be applied or not.

TRANSNET LTD AND OTHERS v CHIRWA 2007 (2) SA 198 (SCA) on 207;
MINISTER OF HEALTH AND ANOTHER NO v NEW CLICKS SOUTH AFRICA (PTY) LTD AND OTHERS (TREATMENT ACTION CAMPAIGN AND ANOTHER AS AMICI CURIAE) 2006 (2) SA 311 (CC).

The decision is also reported in 2006 (1) BCLR 1 (CC).

[23] In determining whether to condone the delay to have an

administrative action reviewed, the court will consider the efficacy of the court order it is urged to give. Where a review application is brought at a time when the court order will have little or virtually no practical, meaningful and effective impact, the court will be inclined to refuse a remedy.

MAMABOLO v RUSTENBURG REGIONAL LOCAL COUNCIL 2001 (1) SA 135 (SCA);
LEBOWA MINERAL TRUST v LEBOWA GRANITE (PTY) LTD 2002 (3) SA 30 (T).

[24] The decision in the case of **SETSOKOSANE BUSDIENS (EDMS) BPK v VOORSITTER, NASIONALE VERVOER-KOMMISSIE, EN 'N ANDER** 1986 (2) SA 57 (AD) is probably the *locus classicus* as regards the approach which a court has to adopt in the process of determining whether a delay in bringing a review application, is fatal or not. The factors which should be taken into account in considering whether to condone or not to condone an inordinate delay were set out and examined. However, it must be readily appreciated that the decision concerned a common law review application where no statutory limit was applicable. In **TRANSNET LTD AND OTHERS v CHIRWA** *supra* at par. 11 Mthiyane JA said the following about the *fons et origo* of the law of judicial review:

“[11] Even though all administrative actions are subject to review under PAJA (subject to the exclusions in PAJA itself), Brassey AJ did not submit the decision to dismiss to scrutiny under PAJA. He determined that it was sufficient to

apply the common law as laid down in *Zenzile* as already indicated above. In my view, he erred. The 'cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past' (*Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 11). In *New Clicks* Chaskalson CJ said:

'[95] PAJA is the national legislation that was passed to give effect to the rights contained in s 33. It was clearly intended to be, and in substance is, a codification of these rights. It was required to cover the field and purports to do so.

[96] A litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on s 33(1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights contained in s 33 to be given effect to by means of national legislation.'

(See also *Zondi v MEC for Traditional and Local Government Affairs and Others*. 12)"

[25] I now proceed to examine the facts in the instant case. The tender was awarded to the second respondent on 10 November 2004. It is this administrative action taken by the first respondent and his tender committee which precipitated the current review application. The applicant filed its review application on 29 August 2005. In terms of section 7(1) Act No. 3 of 2000, the applicant was entitled to bring its application for the review of the tender award within 180 days. The first respondent advised the applicant about the

decision of his tender committee on 17 November 2004 that is to say within one week or seven days, if you will. The letter annexed and marked fa24 has no address. It was possibly either delivered *per traditio manu* or *per traditio fax* to the applicant. Whatever the delivery method, the applicant received the letter of 17 November 2004 – *vide par. 59* founding affidavit. I shall generously assume that the applicant received it seven days later on 24 November 2004. On that day the applicant's cause of action arose. The applicant's statutory unfettered right to bring the review application against the respondents, was extinguished by the effluxion of time on 25 May 2005. At the latest the review application was supposed to have been filed on that date. It was never done. Section 7(1) is binding and litigants ignore it at their own peril - **TRANSNET LTD AND OTHERS v CHIRWA**, *supra*. The parties have no choice but have to adhere to this statutory provision - **MINISTER OF HEALTH AND ANOTHER NO v NEW CLICKS SOUTH AFRICA (PTY) LTD AND OTHERS**, *supra*.

- [26] The applicant's review application is clearly late. It was filed approximately ten months after the cause of action had arisen. Therefore it was three months one week and four days out of the statutory time. The applicant's reasons for the delay have to be scrutinised to determine whether such delay may be condoned on common law grounds. I hasten

to say that the applicant cannot invoke the rescue provisions of section 9 Act No. 3 of 2000. The wording of the section suggest that the 180 day period as contemplated in section 7(1) may be extended provided a court is approached before the expiry of such period for the required extension. It seems the court cannot *ex post facto* be approached to grant an extension when nothing exists to extend. It seems logical to me. It fortifies the contention of the respondents that section 7(1) must be strictly adhered to and only relaxed in the most deserving of cases. Is this current application before us one of those rare but appropriate cases?

- [27] The applicant's deponent, Mr. Adams, avers in the first place that the launch of the applicant's review application was retarded by the obstacles the applicant encountered in its endeavours to obtain certain documentation from the third respondent. The vagueness of the averment concerning this reason for the delay is perturbing. For instance, not a single date is specifically mentioned as to precisely when the applicant requested the third respondent to provide the documents it so desperately required. Similarly no date is specified as to on which date such documents were actually received by the applicant from the third respondent. No diligent efforts are spelt out of what the applicant practically did between its initial request for documents and its eventual receipt of the documents. If such efforts were expressly set out and sufficiently motivated they would have gone a long

way towards facilitating an objective assessment and appreciation of the applicant's very first and presumably the most important reason for the delay. There is therefore a huge vacuum in the first reason for the delay. I find the first reason unacceptable.

[28] It has to be mentioned that as far back as 2 June 2005 when the applicant initiated similar but abortive review application under case number 2385/2005 the applicant was already aware of the problem pertaining to the documents. Its deponent states that at the time the third respondent made available a large volume of documentation consisting of two full boxes:

“I did not have full and sufficient knowledge of the relevant documentation but already had grounds for forming a strong suspicion that something was wrong.”

[29] The difficulty I have is this: If the applicant had no knowledge of precisely what specific documents it required and what the relevance of such unknown documents would be, how could it be argued that such unknown documents of uncertain relevance had slowed down the process of instituting the review application on time? I fail to understand, because it appears that when the applicant's deponent perused the voluminous documentation, seemingly nothing significantly new came to light – the documents merely confirmed the strong suspicion the applicant had all along. The point is, on the applicant's own version, the review application could

have been initiated in good time with or without the alleged documents. I am still in the dark as to which specific documents in the two full boxes of documents materially energised the applicant to bring this review application on 29 August 2005 and not much earlier in accordance with section 7(1).

[30] The applicant's claim that the belated documents enabled it to correctly identify the parties to sue is incredibly amazing. I cannot believe that the applicant's who, it must be borne in mind, was still rendering the same electrical services to the same municipality and was familiar with the intricacies of the tender process and the then members of the tender committee was having business negotiations with the second respondent immediately before the deadline for the submission of tenders in order to form a joint venture and who certainly must have known the municipal manager very well had to wait for almost ten long months for the documents in order to identify who had to be sued as the respondents. This excuse holds no water.

[31] The applicant's second reason for the delay was that it was under the reasonable impression that no valid tender contract had been concluded between the second respondent and the third respondent pursuant to the award of the tender to the second respondent. If there was such a tentative sort of a contract as might have been entered into,

it was in the process of being cancelled as a result of the second respondent's failure to perform. The only ground on which the applicant's impression was based was the fact that the third respondent had extended the previous tender contract it had with the applicant. I can see nothing reasonable about the alleged reasonable impression. The applicant's rival competitor had won the new tender award, the applicant had been notified accordingly and the applicant's tender contract had already expired.

[32] There is nothing in the applicant's averment to suggest that its contract was extended until May 2005 because the third respondent was contemplating to revoke the tender award granted to the second respondent. It seems to me that the applicant read too much into the extension which was granted to it. The applicant was naturally disappointed to lose the contract but took no immediate practical steps to seek the review of the decision of the tender committee. The applicant held back for more than 180 days in the hope that the second respondent would fail to render the services and that it might be asked to come to the third respondent's rescue if such failure eventualised. It never did. In these circumstances there is hardly a mere suggestion of any legitimate expectation created by anyone. Such an unreasonable impression can never serve as a justifiable reason for the delay. The applicant was the sole architect of its own unrealistic hope. The second reason fails to impress.

[33] The third and final reason for the applicant's delay was that the third respondent had passed a resolution to have the awarding of the tender to the second respondent set aside. The resolution, so avers the applicant, created another impression which negated the necessity of the applicant initiating review proceedings at all. Once again the

allegation is not beefed up by any critical averments. No meaningful particulars of the alleged resolution are set out and no copy is annexed. Even if such resolution was indeed taken, one thing about it appears reasonably certain - it was probably not taken before 31 May 2005. The critical cut of deadline of 180 days was 24 May 2005. It seems to me therefore that the municipal resolution so heavily relied upon, could not honestly have been a genuine reason for the applicant's neglect to bring the review application timeously. The third reason is also unsatisfactory and therefore unacceptable to me.

[34] In the light of the foregoing the applicant has dismally failed to give any reasonable and adequate explanation for its delay which any objective assessor of the facts may find satisfactory.

[35] The next factor which I have to take into account is the degree of the delay. In determining the degree of the lateness one is tempted to focus on the period after the statutory deadline of 180 days which lapsed on 25 May 2005 and to ignore the period prior to such deadline. This is wrong. One must not distort the true picture. Since 25 May 2005 until 29 August 2005 the delay was 95 days. To get a true picture of the extent of the delay the proper approach demands that the entire period must be investigated. The period on both sides of the statutory deadline has to be

brought into reckoning. When that is done in the instant case the total delay is 275 days. This, in my view, is disturbingly excessive because no valid reasons whatsoever were advanced as to how the initial 180 days were utilised to prevent the extinctive erosion of time. In law, as in the business world and indeed as in many other spheres of our daily lives *tempus fugit*. Where the delay is substantial, as in the instant case, all courts are inclined to refuse to grant a remedy. *In casu* the delay has been so perturbingly substantial that I would not condone it unless there are other compelling factors to compensate for it.

- [36] In determining whether to rescue an applicant whose review application was brought outside the prescribed time-frame, the court must also take into account the applicant's prospects of success on the merits if the late institution of the review application is condoned. It was contended on behalf of the respondents by Mr. Jordaan that some of the essential requirements which informed the awarding of the tender to the second respondent by the first respondent and the tender committee, were the transformative considerations of black economic empowerment and the third respondent's policies of preferring and promoting its local business enterprises. According to the fourth respondent the applicant did not meet the requirements of the third respondent. I may also add that those whom public service contracts are awarded by way of public tendering system, should not seek to monopolise the

system by their ever increasing demands that they be perpetually retained as the sole providers of public services.

[37] In the final analyses the fact that the applicant's tender proposal was the lowest, was not the only decisive factor. There were other equal important considerations. I have already mentioned some of them. As I see it, it cannot be said that on the merits the applicant has strong prospect of success. This whole outcry about the requirements and standards which the first respondent's tender committee is accused of having lowered with intent to subvert the applicant is, in my view, a storm in a tea-cup. In the light of this it seems to me that on the merits the applicant prospects of success are no good.

[38] I turn now to another factor we have to take into account in determining whether we should exercise our judicial discretion in favour of the applicant notwithstanding the fact that its case is riddled with numerous unsatisfactory features. The factor I am here referring to concerns the efficacy of the court order which the applicant prays we grant. Now even if the applicant had made out a convincing case which justified condoning its failure to comply with section 7(1) I would still not see my way through to nullify the award of the tender to the second respondent. This is so because nullifying it would be a fruitless exercise with no real practical effects. The second respondent signed a three year tender contract

with the third respondent on 21 December 2004 subsequent to the awarding of the tender. The contract period is almost over.

- [39] *In casu* we cannot ignore the fact that the second respondent has already provided the electrical services for longer than 24 months of the total 36 months contract period which commenced on 21 December 2004 to the apparent satisfaction of the third respondent. The second respondent has incurred enormous expenses to install, to implement and to keep the system operational. The likelihood of disruption not only to the respondents but also to the communities which the second respondent is currently servicing on behalf of the third respondent looms large on the horizon should we set the administrative action complained of aside.

WOLGROEIERE AFSLAERS (EDMS) BPK v
MUNISIPALITEIT VAN KAAPSTAD, *supra* and more recently **LAERSKOOL MIDDELBURG EN 'N ANDER v**
DEPARTEMENTSHOOF, MPUMALANGA DEPARTEMENT
VAN ONDERWYS, EN ANDERE, *supra*.

The potential prejudice to the respondents and the community at large weighs heavily against the nullification of the awarding of the tender sought by the applicant. Not only will the third respondent suffer vast damages but the communities would be seriously prejudiced by the sudden

disruption of essential services such as the provision of electricity. The relatively short unexpired period of the tender contract favours the running and not the nullifying of the contract.

[40] Yet another important factor to consider in determining whether to condone or not to condone the delay is the importance of the case. The case entails the provision of electricity. The rendering of such essential services to the communities is a function of vital importance to the third respondent and to the fourth respondent – *vide* **MELANE v SANTAM INSURANCE CO LTD** 1962 (4) SA 531 (AD) at 532 C – D.

[41] The applicant initiated these review proceedings late. But that was not all. Since 29 August 2005 the applicant took its own time yet again. It hopelessly failed to proceed with swiftness and vigour to prosecute the matter to its logical conclusion. The review application was enrolled over nine months later. It was argued before us on 14 May 2007 a mere seven months before the contract comes to its end in accordance with the mutual agreement between the second respondent and the third respondent.

[42] Where an applicant in review proceedings has failed to demonstrate his seriousness about the remedy he seeks by acting swiftly and decisively to attain the desired relief the

court will not come to his rescue even in the case where, unlike here, the review application was initiated in good time in terms of section 7(1) - **MKHWANAZI v MINISTER OF AGRICULTURE AND FORESTRY, KWAZULU**, *supra*.

[43] In determining whether or not to condone an applicant's delayed case our courts closely scrutinise such applicant's conduct. The primary source of the whole thing is a substantive formal condonation application supported by a proper sworn statement. Needless to say there was no such condonation application in the instant case for us to consider. The respondents, and we as judges, had to search in the founding affidavit of the applicant made in support of the main review application and not condonation application for some possible reasons which brought about the applicant's inordinate delay. We could find none even there in an unfamiliar territory where we all trespassed for the sake of the applicant. Of all the defective features of the current review proceedings, this was the most fatal, in my view.

[44] When all is said and done what emerges is this – the delay has been so substantial and the explanation thereof so exceedingly inadequate that there are virtually no compelling facts which can justify the court coming to the conclusion that, notwithstanding such excessive delay, it would nonetheless still be just and proper to let the review proceedings be heard - **ZWANE v MAGISTRATE,**

MAPHUMULO, AND ANOTHER, *supra*.

Having considered all the relevant factors governing the review application, I could find nothing to compensate anything.

[45] In deciding whether the interests of justice require the considerable delay to be condoned it is apposite to remind ourselves of what Holmes JA once said:

“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 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.”

Vide **MELANE v SANTAM INSURANCE CO LTD** 1962 (4) SA 531 (AD) at 532 B – E.

In casu to condone the applicant's delay would be incompatible with the exercise of a true judicial discretion – something the law forbids.

[46] In the circumstances I am persuaded by the collective argument of the respondents. There are merits in the preliminary objection raised on behalf of the respondents and articulated by Mr. Jordaan and Mr. Ploos van Amstel. In the circumstances I have come to the conclusion that the point *in limine* was well taken. The objection is one which on review I am inclined to uphold. The train stops right here and now. It cannot proceed any further.

[47] In the result the following order:

47.1 The point *in limine* is upheld.

47.2 The costs incurred by all the respondents which costs were occasioned by the successful opposition to the review application shall be borne and paid by the applicant.

47.3 The payment of such costs by the applicant includes the costs occasioned by the employment of two counsels who appeared on behalf of the first, third and fourth respondents.

47.4 The payment of such costs by the applicant further includes the costs occasioned by the employment of two counsels who appeared on behalf of the second respondent.

I concur.

D. MILTON, AJ

On behalf of the applicant:

Adv. M.W. Wessels SC
Instructed by:
Rosendorff Reitz Barry
BLOEMFONTEIN

On behalf of the first, third, fourth
respondents:

Adv. A.F. Jordaan SC
with him:
Adv. Z. Eloff
Instructed by:
Symington & De Kok
BLOEMFONTEIN

On behalf of the second
respondent:

Adv. C. Ploos van Amstel SC
with him:
Adv. G.T. Langenhoven
Instructed by:
Lovius Block Attorneys
BLOEMFONTEIN

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