

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: GRAHAMSTOWN]**

CASE NO. 2202/2019

In the matter between:

ALGOA BUS COMPANY (PTY) LIMITED **Applicant**

and

NELSON MANDELA BAY METROPOLITAN MUNICIPALITY **1st Respondent**

SPECTRUM ALERT ITS (PTY) LIMITED **2nd Respondent**

ALGOA TAXI ASSOCIATION **3rd Respondent**

NORTHERN AREAS TAXI ASSOCIATION **4th Respondent**

**MEMBER OF THE EXECUTIVE COUNCIL FOR TRANSPORT
AND PUBLIC WORKS EASTERN CAPE** **5th Respondent**

MINISTER OF TRANSPORT **6th Respondent**

JUDGMENT

JOLWANA J:

[1] On 15 February 2022 I delivered a judgment (the judgment) in which I dismissed the plaintiff's action as a consequence of my dismissal of the plaintiff's condonation application for its non-compliance with section 7(1) of PAJA. In its notice of application for leave to appeal the plaintiff lists no less than 37 grounds for seeking leave to appeal on the basis of which it is contended that the appeal would have a reasonable prospect of success and that there are compelling reasons on the basis

of which the appeal should be heard regard being had to what the plaintiff calls a public interest factor in the action.

[2] I do not intend to deal with each ground of appeal line by line as doing so would lead to the inevitable regurgitation of my reasons in arriving at the conclusion that I did which are contained in my judgment. I will, however, deal with some of the grounds of appeal essentially to deal with what I consider to be the main grounds of appeal. I must hasten to indicate that I have considered all of the grounds of appeal.

[3] The agreement, the Vehicle Operating Agreement (annexure "POC3") and the failure of the first defendant to furnish a copy of such agreement to the plaintiff despite numerous requests made by the plaintiff to the first defendant to furnish it with a copy thereof has been adequately dealt with in the judgment. The plaintiff has not dealt with its failure to invoke the remedies that were readily available. Its failure to invoke any of the available remedies should not excuse it from having to comply with PAJA and institute legal action within a reasonable time and not later than 180 days. The plaintiff could neither explain nor come with a single cogent reason why it did not do so. That on its own was an implicit acknowledgment that such remedies were in fact available. The fact that instead of invoking any of those remedies for example, interdicting the buses from operating pending an urgent review application and/or seeking an urgent court order to be furnished with an agreement on the basis of which the buses were operating for example but persisted in sending invoices to the first defendant says a lot. In electing to send invoices it sought to be paid compensation while allowing the amount claimed to accumulate over time in circumstances where the payment would be in lieu of the plaintiff not raising the issue of the illegality of the contract or non-compliance with section 41 of the Act is indeed troubling to say the least. When the action was instituted the amount of compensation claimed had accumulated to more than twenty six million rand. This is more so that the plaintiff came before court citing breach of legality as the basis for its entitlement to compensation.

[4] The plaintiff is in the situation in which it is of having failed to comply with section 7 (1) of PAJA because it opted not to seek remedies and apply to court timeously to have the contract set aside. Instead it continued to send invoices and in that process

ignored the provisions of PAJA to the extent that it was required to institute review proceedings within 180 days. I simply do not think that the interests of justice required that the plaintiff be granted condonation nor is there a public interest in it being granted condonation. I also see no public interest in the determination of the alleged failure of the first defendant to comply with section 41 of the Act in circumstances where the plaintiff choose the option of sending invoices instead of instituting review proceedings within the period prescribed in PAJA. This, in my view, is especially so in circumstances in which the plaintiff was always of the view that first defendant contravened the provisions of section 41 in introducing the buses or allowing the second defendant to operate them on its routes. The contract now sought to be reviewed and set aside has run its course.

[5] The plaintiff relies on its contention that its delay should have been overlooked on the basis that section 172 of the Constitution enjoins a court to declare invalid without hesitation any law or conduct that is inconsistent with the Constitution. The submission seems to be that it matters not what the delay is and the reasons therefor, as long as there is a suggestion or evidence that there was non-compliance with a legislative provision, a court must overlook the delay. There a number of problems with this approach. The first one is that the reasons for the delay play a very crucial role in the discretion that the court must exercise in deciding whether or not to condone. It clearly cannot be that the reason for the delay becomes irrelevant once the basis for the review is an alleged non-compliance with a statutory provision. I certainly do not understand that to be our jurisprudence on condonation applications in general.

[6] In *Notyawa v Makana Municipality and Others* 2020 (2) BCLR 136 (CC) paragraph 48-49 the Constitutional Court said:

“While not taking issue with the approach followed by the High Court, relying on *Gijima* Mr Notyawa contended that despite the unreasonable delay, the High Court should have entertained the review application. It is apparent from the judgment in *Gijima* that a court has discretion to overlook a delay. And that the discretion must be exercised with reference to facts of a particular case which warrant the overlook.

The nature and extent of the illegality raised in respect of the impugned decision constitutes a weighty factor in favour of overlooking a delay. Where, as in *Gijima* and *Tasima1*, the illegality stems from a serious breach of the Constitution, a court may decide to overlook the delay in order to uphold the Constitution, provided the breach is clearly established on the facts before it. This flows from the obligation imposed by section 172 (1) (a) of the Constitution which requires every competent court to declare invalid law or conduct that is inconsistent with the Constitution.”

[7] Our jurisprudence on the question of whether or not a delay could be overlooked is that the discretion of the court to overlook or not to overlook a delay in an appropriate case is still applicable even where the review relates to non-compliance with a legislative prescript. That the discretion must be exercised with reference to the facts of a particular case. An assessment must be made on whether or not on the facts of a particular case it is in the interests of justice to overlook a delay. The question of the seriousness of the alleged breach of the Constitution is also part of the overall considerations and a very weighty factor in the court’s exercise of its discretion.

[8] It is troubling that the plaintiff was prepared to allow what it calls a serious breach of the Constitution to continue if it was compensated. Even when it was not being compensated and its invoices were in fact being ignored it still took no action within the timelines provided for in PAJA. Its reluctance and ultimate failure to institute the review proceedings timeously was largely influenced by its willingness to accept compensation that would flow from the first defendant’s alleged contravention of section 41 of the Act. This is an attitude of a party that is not certain of its legal entitlement to compensation and whose commitment to the rule of law is wavering at best. The contention that it was lulled into a false sense of security is difficult to understand. How could there have been any sense of security based on non-compliance with the law? The entitlement of the plaintiff to rely on the so called undertaking to pay compensation has no firm legal basis as there was no contractual agreement stipulating the terms on which the first defendant would be liable to pay compensation and how it would be calculated and for which routes. As a country we

can ill afford to blow hot and cold or vacillate between the north and the south poles on the fundamental constitutional principle of the rule of law.

[9] The impugned contract has since expired by effluxion of time having run its course. Even if the non-compliance was clearly established it remains relevant in my view that it would have been committed in the spirit of trying to put the small role players like the taxi industry and possibly other small bus operators in a position where they would be prepared for the planned integrated public transport network. This was the evidence of the plaintiff's own witness. In this regard the bona fides of the first defendant even on the plaintiff's own evidence are not in doubt and in fact are admitted. This aspect of the first defendant's case makes this case distinguishable from any of the cases referred to by the plaintiff. This is more so if regard is had to the very provisions of section 41 which enjoin contracting authorities to have regard to the promotion of the economic empowerment of small business or persons previously disadvantaged by unfair discrimination.

[10] Whether or not it would have been correct for the first defendant to assist the small role players in the transport sector in that manner is a different matter. Even if it were to be established that there was a contravention of section 41 its bona fides in the alleged contravention would minimise the seriousness of the alleged constitutional violation in my view. That must be considered together with the reasons for the delay on the part of the plaintiff and the fact that the delay led to the contract that is sought to be declared invalid expiring after having been implemented in full. All of these considerations are part of the factual matrix that inform as they must, the discretion of the court on whether or not the delay should be overlooked. They do not lose relevance merely because a statutory provision may have been contravened.

[11] The contention that it was not up to this Court to also consider the prospects of success of the plaintiff in its claim for damages cannot be correct in my view. In deciding whether or not a delay should be overlooked the prospects of success for the plaintiff in claiming damages is a very relevant consideration. It would make no sense for the court to overlook the delay and allow the plaintiff to go ahead with its case in circumstances where its prospects of success may be in serious doubt. The

prospects of success are, as they must be, a weighty consideration as well. This is more so where the consideration involves not just a factual enquiry in proving damages but an assessment of whether or not as a matter of law the plaintiff may or may not be entitled to claim damages. If the plaintiff might be entitled to claim damages its prospects of success are severely limited if they exist at all on the facts of this case. The plaintiff has not pleaded a firm legal basis for claiming compensation beyond alleging losses that it says are as a result of the contravention of section 41.

[12] For these reasons the plaintiff's prospects success on appeal are at best arguable and there are no compelling reasons why the appeal should be heard. I do not see any public interest in a claim for damages which is what ultimately the plaintiff's case is all about. Its argument for constitutional probity is undermined quite severely by its own preparedness to accept compensation in exchange for turning a blind eye to what it contends, was statutory contravention. That approach would shake the fundamental underpinnings of the constitutional principle of the rule of law if its violation were to be countenanced in exchange for compensation.

[13] In *MEC for Health, Eastern Cape v Mkhitha and Another* (1221/2015) [2016] ZASCA 176 (25 November 2016) Sclippers AJA stated the test as follows:

“[16] Once again it is necessary to say that leave to appeal, especially to this court's must not be granted unless there truly is a reasonable prospect of success. Section 17 (1) (a) of the Superior Courts Act 109 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success, or there is some other compelling reason why it should be heard.

[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless is not enough. There must be a sound rational basis to conclude that there is a reasonable prospect of success on appeal.”

[14] On the facts of this case I am not convinced that the plaintiff enjoys reasonable prospects of success on appeal. I cannot find any compelling reason why the appeal should be heard.

[15] In the result the following order will issue:

1. The application for leave to appeal is dismissed with costs including costs occasioned by the employment of two counsel.

M.S. JOLWANA
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the plaintiff: A. BEYLEVELD SC

Instructed by: WHEELDON RUSHMERE & COLE INC.

GRAHAMSTOWN

Counsel for the defendant: O.H. RONAASEN SC with L.N. NTSEPE

Instructed by: MACI INCORPORATED c/o MQEKE ATTORNEYS

GRAHAMSTOWN

Date heard : 30 March 2022

Delivered on : 26 April 2022