

REPUBLIC OF SOUTH AFRICA

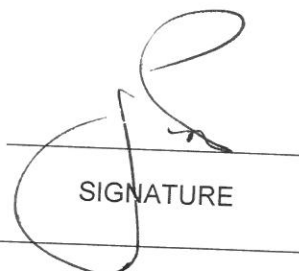


IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

02/7/2018  
DATE

  
SIGNATURE

Case Number: **40972/2016**

In the matter between:

**EPA DEVELOPMENT (PTY) LIMITED**

Applicant

and

**ATTORNEYS FIDELITY FUND BOARD OF CONTROL**

Respondent

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**JUDGMENT**

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**FISHER J,**

## INTRODUCTION

[1] The applicant, seeks the review of a decision of the Board of Control of the respondent (*“the Board”*) and asks that the decision be set aside. The applicant seeks also that the court condone the late filing of the application for review.

[2] The review arises out of a claim made to the fund under s 26 of the Attorneys Act 53 of 1979 (*“the Act”*). The applicant claimed that there had been theft of more than R 6 Million of its monies which were held in the trust account of a firm of attorneys, Turnbull & Associates.

[3] I deal with the application for condonation below. Because of the conclusion I have reached this aspect puts paid to this application.

[4] On 21 October 2013, the Applicant notified Respondent of its claim. The Respondent instituted an enquiry in terms of Regulation 8(bis) on 24 July 2014 during which enquiry oral evidence was given by the Managing Director of the applicant.

[5] The decision of the Board to the effect that it regarded the claim as time barred was provided in writing to the applicants attorneys Ramsay Webber on 04 September 2014.

[6] This application for review under s 6 of PAJA<sup>1</sup> was launched on 17 November 2016 i.e. approximately 28 months after the decision was handed down. This is significantly more than the 180 days outer limit prescribed by s 7(1) of PAJA.

[7] The condonation application comprises no more than sweeping statements as to the relative prejudice of the parties and the interests of justice. The significant delay is not explained, save to suggest vaguely that the fact that the matter was pursued in another forum should be taken into account. It is also implied that the idea for the application came late in the process and after consultation with senior counsel. No more than this is proffered. The

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<sup>1</sup> Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)

explanation for the delay is not satisfactory and I find that the delay in all the circumstances cannot but be found to be unreasonable.

[8] The enquiry does not, however, end there. In *Gqwetha v Transkei Development Corporation Ltd* [2005] ZASCA 51; 2006 (2) SA 603 (SCA), the majority of the Court held that, when considering a plea of undue delay, the Court should assess: (1) whether the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in the light of "all the relevant circumstances"); and if so (2) whether the court's discretion should be exercised to overlook the delay and nevertheless entertain the application.

[9] The SCA in *Aurecon South Africa (Pty) Ltd v City of Cape Town* 2016 (2) SA 199, relying on *Van Wyk v Unitas Hospital* [2007] ZACC 2008(2) SA 472 at para [20] and *eThekweni Municipality v Ingonyama* 2014 (3) SA 240 (CC) at para[ 28] set out the factors that need to be considered when granting condonation at para [17] as follows:

"Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success."

[10] The Constitutional Court, placing reliance on *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) at para[ 28] took a similar approach, in *Aurecon CC n City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5

Wherein it was held at para [49]:

"Nonetheless, due regard must also be given to the importance of the issue that is raised and the prospects of success. ... It should be borne in mind that, when carrying out a legal evaluation a court must, where appropriate, "take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision." (the quoted portion is from *Allpay supra* at para [40]).

[11] Whether the interests of justice require the granting of condonation entails the exercise by the court of a discretion and the factors to be considered in that enquiry will depend on the nature of each case. (see *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2010

(1) SA 333 (SCA) at para 82; *City of Cape Town v South African National Roads Agency Ltd and Others* (2165/2013) [2015] ZAWCHC 135 (30 September 2015) at paras [21] and [22]).

[12] The interests of justice test thus requires due consideration of all relevant factors. Condonation may be granted where the sufficiency of the reasons for the late filing may, when viewed in isolation, not be deemed to be particularly strong if the merits of the application have strong prospects of success and if the application determines a question of fundamental importance. A prime example of this reasoning is the case of *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC). While the Court differed on the merits, it was unanimous in relation to the granting of condonation. It held as follows at para [49]:

*"The explanation furnished for the delay is utterly unsatisfactory. Ordinarily, this should lead to the refusal of the application for condonation. However, what weighs heavily in favor of granting condonation is the nature of the constitutional issues sought to be argued in the intended appeal, as well as the prospects of success"*

[13] In this matter there is no merit in the application and it appears to have been brought as something of an afterthought.

[14] S 26 provides that for payment to persons who may suffer pecuniary loss as a result of inter alia theft of monies held in trust by a practising practitioner, his candidate attorney, or his employee<sup>2</sup>. The claim is that a certain Mr Pavoncelli, who was employed by the firm was responsible for the misappropriation of the monies. There is some debate about whether these monies were stolen or provided for in s 26 or whether they were the subject matter of an investment – but this is not directly relevant to the matter at hand, as there was no consideration of the merits by the Fund. Instead, the matter was held to be time barred in accordance with s 48 of the Act which prescribes the following procedure for claims under

*"48. (1) No person shall have a claim against the fund in respect of any theft contemplated in section 26 unless-*

*(a) written notice of such claim is given to the council of the society concerned and to the board of control within 3 months after the claimant became aware of the theft or by the exercise of reasonable care should have become aware of the theft; and*

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<sup>2</sup> S 26 (1)(a)

- (b) *within 6 months after a written demand has been sent to him by the board of control, the claimant furnishes the board with such proof as the board may reasonably 50 require.*
- (2) *If the board of control is satisfied that, having regard to all the circumstances a claim or the proof required by the board has been lodged or furnished as soon as practicable, it may in its discretion extend any of the periods referred to in subsection"*

[15] There can be no doubt that, on all the facts, the claim was time barred under s 48. The applicant makes no serious attempt to dispute this in the application and the argument was conducted on this basis.

[16] The applicant contends however that the Board should have exercised its discretion to condone the late filing of claim in terms of s 48(2) of the Act. When it was argued for the respondent that no application was brought for condonation in terms of this section and thus no decision made in this regard, there was an attempt by the applicant to rely on a letter written on 31 July 2014 by the applicant's attorneys in which the terms of s 48(2) where the following was stated:

*"The Board of Control will recall that the claimant's representative Mr Bonile Jack-Pama, gave extensive evidence regarding his claim and the circumstances pertaining to how and when it was that the claim was lodged. This evidence was uncontroverted and, the axiomatic result, is that the Board of Control ought to accept his explanation, unless it can reject the evidence on account of the testimony being palpably as untrue."*

[17] The applicant argues that this overture should have been construed as an application for condonation by the Board and that the Board should have considered it as such. I do not accept that the Board could have been expected, with this, to fashion from a the evidence led, a motivation for the exercise of the discretion under s 48(2). To the extent that a decision was sought under this section this should have expressly and pertinently been raised with reference to the factors relied on by the applicant.

[18] It was raised further that even if there was no application the court should have exercised its discretion under s 48(2) *mero motu*. The Board has the discretion to condone the late claim in cases where it may see fit to do so of its own accord<sup>3</sup>. This has not been

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<sup>3</sup> See Northern Province Development Corporation v Attorneys Fidelity Fund Board of Control 2003(2) SA 284 (T) at [40].

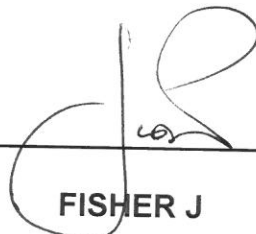
done in this case and there is furthermore no indication as to why this should have been done.

[19] Given that there is no decision required in relation to the time bar provision and it is merely a question of fact whether the claim is barred or not, there is no decision and thus there is nothing to review.

## ORDER

[20] I thus make the following order:

1. The application for condonation<sup>15</sup> refused.
2. The applicant is to pay the costs.



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FISHER J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG LOCAL DIVISION, JOHANNESBURG

Heard on: 6 June 2018.

Delivered on: 2 July 2018.

### Appearances

<b>Counsel for Appellant:</b>	Adv K Loulianou.
<b>Instructed by:</b>	Ramsay Webber.
<b>Counsel for the Respondent:</b>	Adv G Oliver.
<b>Instructed by:</b>	Brendan Muller Incorporated.