IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no: **16706/2022P**

In the matter between:

ISIMANGALISO WETLAND PARK AUTHORITY **APPLICANT**

and

SIZO SIBIYA **FIRST RESPONDENT**

JABULANI PHUMASILWE NGUBANE **SECOND RESPONDENT**

CAIPHUS ERNEST KHUMALO **THIRD RESPONDENT**

SIMANGALISO QHAMUKILE MNTAMBO **FOURTH RESPONDENT**

Coram: Mossop J
Heard: 16 April 2024
Delivered: 16 April 2024

ORDER

The following order is granted:
The application for leave to appeal is dismissed with costs.

JUDGMENT

MOSSOP J:

[1] This is an ex tempore judgment.

[2] The applicant seeks leave to appeal against a judgment that I delivered on 30 January 2024. The application for leave to appeal is opposed by the first respondent, who is the only respondent who opposed the application when it was initially argued on 22 January 2024.

[3] In its notice of motion, the applicant sought an order declaring invalid a decision taken by its Board of Directors (the Board) to convert the fixed term contracts of employment of the four respondents to contracts of permanent employment. After hearing argument and reserving judgment, I dismissed the application with costs.

[4] The facts of the matter must be briefly considered. The applicant employed the four respondents on fixed term contracts. Having done so, the Board resolved on an undisclosed date in 2018 to convert those contracts of employment to full time employment. The date upon which this decision was taken is not known with any precision because the minutes that relate to the meeting at which the Board took the decision have been lost. The first of the respondents to have his contract of employment converted was the first respondent and this occurred on 20 March 2018. The contracts of the other three respondents were converted on 1 August 2019, 1 July 2019 and 15 February 2021 respectively.

[5] The Board, either in 2020 or in 2021, then came to the view that it was not entitled to effect such a conversion and resolved to bring a legality review to set aside the conversion of the first respondent's contract of employment and those of the other respondents. The legality review was ultimately launched on 30 November 2022. It is that application that I dismissed.

[6] In resisting the relief claimed by the applicant, the first respondent, inter alia, took the point that there was an undue delay in bringing the application. The applicant provided an extremely brief and unsatisfactory explanation for that delay in its founding affidavit. The explanation was so brief that it was capable of being quoted in full in the judgment that I delivered without rendering the judgment prolix. In reply, further particularity was provided by the applicant. It is trite, however, that an applicant must make its case in its founding affidavit, but this was not done in this instance.

[7] The further particularity that was provided in the replying affidavit merely sprinkled new facts into the period already dealt with by the deponent to the founding affidavit, Mr Sibusiso Bukhosini (Mr Bukhosini). No new information was forthcoming regarding the period of three years from the date of the decision taken by the applicant's Board to the date of the decision to bring the legality review. The applicant states that Mr Bukhosini was not employed over that period and thus could not realistically be expected to explain the applicant's indolence over that period.

[8] It appears to me that this is a confused way of approaching the issue for it seems to present Mr Bukhosini as the applicant in the matter. He is not. He is a witness with limited knowledge of what went before him. This is not his application. It is the application of the applicant. The applicant is required to provide a full explanation for the period of the delay. There is no obligation on Mr Bukhosini to do that. If the person chosen to depose to the founding affidavit cannot give this evidence, then another person must be found who can. I am fortified in this view by the decision in *City of Cape Town v Aurecon South Africa (Pty) Ltd*,[1] where the Constitutional Court stated that:

'The distinction that the City attempts to draw between what is within its own knowledge and what is within the knowledge of its committees is superficial. It is common cause that the BEC and the BAC are committees mandated by the City for purposes of the tender procurement process. These committees form part of an

[1] *Cape Town City v Aurecon SA (Pty) Ltd* [2017] ZACC 5; 2017 (4) SA 223 (CC) para 36.

internal arrangement by the City. Accordingly, it may reasonably be expected that all information regarding the tender process which is within the knowledge of the BAC or BEC, may be deemed to be within the City's knowledge. In my view, that is a weak attempt by the City to deny knowledge of what it ought reasonably to have known.'

[9] For there can be no doubt that a full explanation must be given. In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited*, [2] the Constitutional Court held that:

'If there is an explanation for the delay, the explanation must cover the entirety of the delay.'

It is not open for a deponent to merely explain a portion of the delay because that it is all that he has personal knowledge of and then argue that the whole period of the delay should be considered as having been satisfactorily established. Significantly, the Constitutional Court went on to state in *Asla*, after the extract referred to above, that:

'But, as was held in *Gijima*, where there is no explanation for the delay, the delay will necessarily be unreasonable.'[3]

That is the position in this matter. No explanation has been provided for a delay of several years. The delay is therefore unreasonable.

[10] The heads of argument prepared by Mr Naidoo SC's junior, Mr Cele, prior to Mr Naidoo's involvement in the matter, and which heads of argument were relied upon by Mr Naidoo, referred to the matter of *Swifambo Rail Leasing (Pty) Ltd v Passenger Rail Agency of South Africa*.[4] The facts of that matter were that malfeasance and the concealment of that malfeasance were purposefully concealed

[2] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* [2019] ZACC 15; 2019 (4) SA 331 (CC) para 52.
[3] Infra, para 52
[4] *Swifambo Rail Leasing (Pty) Ltd v Passenger Rail Agency of South Africa* [2018] ZASCA 167; 2020 (1) SA 76 (SCA).

from its board of directors. This led to a delay of three years in the instituting of the review, which delay was condoned. I assume that the reference to this matter was to establish that a period of three years may not in itself constitute an excessive delay because in *Swifambo* the delay was overlooked. But there are facts that distinguish that matter from this matter. Firstly, the delay in this matter is much longer. Secondly, an explanation was provided in *Swifambo* that established both that malfeasance and concealment had occurred. In this matter, there is nothing similar because there is simply no explanation offered at all and there is certainly no suggestion of malfeasance. And thirdly, condonation for the late delivery of the review was sought in *Swifambo*. That is not the case in this matter where, as mentioned in my judgment, it appears that the applicant seemingly did not appreciate that the reasons for the delay needed to be comprehensively addressed in the founding affidavit. No thought was given to the fact that the review may be out of time.

[11] Once Mr Bhukosini offered facts in respect of which he had personal knowledge, it was again apparent that there was no great haste on the part of the applicant to bring the review before the courts. On his own version, Mr Bhukosini suggested to the Board that the decision to convert the employment contracts:

'may not be enforceable due to failure to comply with the WHCA and the Regulations …'

When this was suggested is, again, not precisely revealed, but that statement just quoted appears in the context of a sentence that makes reference to the term of the Board commencing in March 2020. The review application was issued on 30 November 2022, two years and eight months later.

[12] Section 17(1) of the Superior Courts Act, 10 of 2013 (the Act) regulates applications for leave to appeal from a decision of a High Court. It provides as follows:

'Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(*a*)(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

[13] Prior to the enactment of the Act, the applicable test in an application for leave to appeal was whether there were reasonable prospects that an appeal court may come to a different conclusion than that arrived at by the lower court. The enactment of the Act has changed that test and has significantly raised the threshold for the granting of leave to appeal.[5] The use of the word 'would' in the Act indicates that there must be a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.

[14] Leave to appeal should therefore only be granted where a court is of the opinion that an appeal would have a reasonable prospect of success, and which prospects are not too remote.[6] As was stated by Schippers JA in *MEC for Health, Eastern Cape v Mkhitha and Another*[7]:

'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.'

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[5] *Public Protector of South Africa v Speaker of the National Assembly and Others* [2022] ZAWCHC 222 para 14.

[6] *Ramakatsa and Others v African National Congress and Another* [2021] JOL 49993 (SCA) para [10]

[7] *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 para 17.

[15] I have read the notice of application for leave to appeal and the applicant's extensive heads of argument and I have listened carefully to both counsel this morning. I remain of the view that the delay in bringing this application was unreasonable and the prospect of another court finding this not to be the case on the known facts of this matter is remote. In coming to this view, I take cognisance of the following observation by the Constitutional Court in *Cape Town City v Aurecon SA (Pty) Ltd*,[8] where it stated that if the irregularities discovered had:

'…unearthed manifestations of corruption, collusion or fraud in the tender process, this court might look less askance in condoning the delay. The interests of clean governance would require judicial intervention.'[9]

[16] I acknowledge that this is not a matter involving a tender. There is, however, no suggestion of there not being clean governance in this matter. While the court has a discretion to refuse a review because of an unacceptable delay, if the decision about which complaint is made is patently unlawful, this may in turn dictate that the delay be overlooked and that the review be granted. I do not lose sight of this. What the Board decided to do in this matter was not infected with dishonesty and it therefore cannot be regarded as patently unlawful conduct, as set out in my judgment. The requirement to bring review proceedings without undue delay is to ensure that there is finality in those proceedings. The Constitutional Court has held that there is a strong public interest in both certainty and finality.[10]

[17] In *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal*,[11] Skweyiya J, whilst acknowledging the indisputable existence of the delay rule, stated that courts nevertheless have a discretion to overlook a delay where appropriate and that:

'[A] court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power. But that does not mean

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[8] *Cape Town City v Aurecon SA (Pty) Ltd* [2017] ZACC 5; 2017 (4) SA 223 (CC).
[9] Ibid para 50.
[10] *Khumalo and another v MEC for Education, KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC) para 47.
[11] *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC).

that the Constitution has dispensed with the basic procedural requirement that review proceedings are to be brought without undue delay or with a court's discretion to overlook a delay.'[12]

[18] As to whether an unreasonable delay should be condoned, the Constitutional Court has also observed that:

'… it is equally a feature of the rule of law that undue delay should not be tolerated. Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action. A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review ... .'[13] (Footnotes omitted.)

[19] In *Merafong City Local Municipality v AngloGold Ashanti Limited*,[14] the Constitutional Court reiterated that:

'... The rule against delay in instituting review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself.'[15]

[20] Mr Saks, who appears for the first respondent, drew my attention to the following extract from the matter of *Transnet SOC Ltd v Tipp-Con (Pty) Ltd and Others*,[16] where the court stated that:

'This is a cynical self-review. The purpose of an organ of state's self-review should be to promote open, responsive, and accountable governance. Transnet is required to promote these goals through its actions. Given the prejudice suffered by Tipp-

[12] Ibid para 45.
[13] *Department of Transport and Others v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) para 160.
[14] *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC).
[15] Ibid para 73.
[16] *Transnet SOC Ltd v Tipp-Con (Pty) Ltd and Others* [2024] ZASCA 12 para 57.

Con, the nature of Transnet's complaints, the fact that the irregularities were not egregious, and the unconscionable conduct of Transnet, the unreasonable delay cannot be overlooked.'

[21] Those factors are to be found in this matter. I remain unpersuaded that another court would come to a different conclusion on whether the delay was unreasonable and whether it should, in the circumstances, be condoned. The prejudice to the respondents is manifest and substantial.

[22] In the circumstances, I grant the following order:

1. The application for leave to appeal is dismissed with costs.

MOSSOP J

APPEARANCES

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