

SOUTH AFRICA / JUDGMENT

Jabari and Others v Telkom Limited and Others (81163/17) [2021] ZAGPPHC 52 (29 January 2021)

[2021] ZAGPPHC 52

COURT

North Gauteng High Court, Pretoria

BEFORE

Collis

CASE / FILE NUMBER

81163/17

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION PRETORIA)

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

29

January 2021

CASE NO: 81163/17

In

the matter between:

MPHO
JABARI
FIRST
APPLICANT
CYRIL
BALOYI
SECOND APPLICANT
FRANK
MOGALE
THIRD APPLICANT
REABETSWE
NTSIE
FOURTH APPLICANT
GARETH
RITTLES
FIFTH APPLICANT
PAUL
SCOTT
SIXTH APPLICANT
MARIA
MAGDALENA PRETORIUS
SEVENTH APPLICANT
and
TELKOM
LIMITED
FIRST RESPONDENT
WAYNE
LARRY VINCENT LOUIS
SECOND RESPONDENT
COMBINE
PRIVATE INVESTIGATORS
(PTY)
LTD
THIRD RESPONDENT
IMVULA
SECURITY SERVICES (PTY) LTD
FOURTH RESPONDENT
SMADA
SECURITY, A DIVISION OF THE
SMADA
GROUP (PTY) LTD
FIFTH
RESPONDENT
This

judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary.

The date
of this judgment is deemed to be 29 January 2021.

JUDGMENT

COLLIS J

INTRODUCTION

(1) This is an opposed review application, wherein the applicants as per the amended Notice of Motion, seek the following relief:[1]

1.1 Reviewing and setting aside the appointment made by the first respondent of the second respondent as Senior Manager, which appointment occurred during 2003;

1.2 Directing the first respondent to take appropriate disciplinary action against the second respondent;

1.3 Directing the second respondent to appoint the first applicant in the position of Senior Manager;

1.4 Setting aside the 'section 197 procedure' in terms of which the first respondent outsourced the work of its Network Protection Service Unit and Guest Relations Unit, to the third, fourth and fifth respondent;

1.5 Reviewing and setting aside the contracts entered into between the first respondent and the third, fourth and fifth respondents in terms of which the third, fourth and fifth respondents were to take over the work and employees of the fifth respondents Network Protection Services Unit;

1.6 That the first respondent be and hereby ordered to pay each applicant damages which is equal to the period of (60) sixty months' salary and reinstatement with no loss of benefit

1.7 For costs of suit as against any respondent(s) entering opposition to this application, jointly and severally, the one paying the other to be absolved;

1.8 Further and or alternative relief.

(2) Having regard to the relief sought as per the notice of motion, the case for the applicants can be formulated as follows:

2.1 Firstly, Mr Jabari is aggrieved at the appointment of Mr Louis, in 2003 into the position of Senior Manager: Security and Investigations on the basis that this appointment was fraudulent. As part of his relief, he seeks that this appointment of Mr Louis be set aside, that he be disciplined by Telkom and that he should be appointed into the said position on the basis that he was next in line.

2.2 Secondly, Mr. Jabari's case is that the section 197 transfers of former Telkom employees in terms of the provisions of the Labour Relations Act, Act 66 of 1995 to the third, fourth and fifth respondents as well as a tender that was awarded to them, should be set aside.

BACKGROUND

- (3) On 31 January 2003, Telkom advertised two positions for Senior Manager. Mr Mpho Jabari (first applicant) was among the persons shortlisted for the position. [2]
- (4) He was subsequently interviewed, was unsuccessful and Mr Wayne Louis (second respondent) ultimately appointed in the position of Senior Manager Security and Investigations. This appointment took effect on 1 April 2003.[3]
- (5) The applicant being aggrieved by having lost out on the position then proceeded to lodge grievance against the appointment of the second respondent on the grounds that he had falsified his qualifications.[4] A hearing was then conducted and he was offered a without prejudice settlement to part ways with the first respondent. This offer he ultimately refused. [5]
- (6) On the basis of him challenging the unlawfulness and fraudulent appointment of the second respondent he was then dismissed by Telkom on 31 August 2004 and subsequently reinstated by the Labour Court in 2006, this after him successfully challenged his dismissal.[6] Mr Jabari thereafter continue to work at the first respondent.
- (7) In September 2016, Telkom commenced a procurement process for its network and physical securing guarding contracts.[7]
- (8) After a market analysis was conducted by KPMG during October 2016, ten bidders were invited to participate in a closed tender process.[8]
- (9) On 18 October 2016, the tender was published.
- (10) After interviews were conducted with shortlisted service providers, Telkom, during April 2017 decided to enter into contracts with the third, fourth and fifth respondents. These contracts all commenced on 1 June 2017.[9]
- (11) During May 2017 applicants were informed that Telkom's Network Protection Services Division would as consequence of these contracts being concluded all be transferred in terms of section 197 of the Labour Relations Act to Imvula, SMADA and CPI on 1 June 2017. [10] The applicants were given less than a weeks' notice of the intended transfers.
- (12) In total the 'section 197 procedure' affected 29 Telkom employees, including the applicants. [11]
- (13) What followed thereafter was the conducting of information sharing sessions in respect of the outsourcing on the 17th and 30th March 2017 with organised labour. During this these sessions, Telkom informed labour of the impending tender for security and guest relations and during this session the option of the section 197 transfers to the successful bidders was first proposed.[12]

(14) Subsequent thereto engagement sessions were held with all effected parties during May 2017, and on 31 May 2017. Certain of the transferring

employees were introduced to their respective new employees and were issued with welcome/ induction letters. This had transpired after the tender process was concluded and after all engagements had taken place.[13]

LITIGATION HISTORY

(15) On 29 November 2017, the applicants proceeded to launch their review application.

(16) On 1 February 2018, Telkom filed its Answering Affidavit, which was deposed to by Praven Naidoo,[14] and was filed together with a supporting affidavit deposed to by Wayne Louis. [15] On 26 February 2018, the first applicant proceeded to file a replying affidavit.[16]

(17) Telkom proceeded to conduct further investigations into the circumstances leading to the award of the three contracts and following on from these findings, it no longer was able to rely on the allegations made by Mr Naidoo in his affidavit defending the awarding of the three contracts.[17] Its investigations further revealed that Mr. Louis and Mr Naidoo committed misconduct during the process of awarding the contracts.[18] This brought about the need to file a supplementary answering affidavit.

(18) Both Mr Naidoo and Mr Louis have since resigned from Telkom. This transpired on the 31 August 2018 and 8 September 2018 respectively

and it occurred at a time when disciplinary proceedings were pending against them.[19]

(19) Between February 2018, the date when the replying affidavit was filed and 15 January 2020 (the date when the applicant's filed their heads of argument and paginated their pleadings) nothing further was done by them to enrol their application.

(20) During February 2020, a case management meeting was then held with the Acting Deputy Judge President and all the parties concerned where after the first respondent was permitted to file a supplementary answering affidavit. This affidavit was eventually filed on 31 March 2020 and the matter was thereafter enrolled as a special motion for 29 and 30 July 2020.

GROUND IN OPPOSITION

(21) As mentioned, both the first respondent and fifth respondent opposes the granting of the relief as sought by the applicants. In respect of both of them they have mounted a challenge against the unreasonable delay by the applicants in having approached this court for a review and in addition by prosecuting the review application. As such this will be a convenient point of departure for

this court.

- (22) As a starting point a court called upon to adjudicate a review application can either be approached in terms of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA) or at common law in accordance with the provisions of rule 53 of the Uniform Rules of court. The present review is brought in terms of PAJA.
- (23) Where a review application is launched in terms of PAJA, such application in terms of section 7 of the enabling legislation, should be filed within 180 days, failing which there must be an application for condonation.
- (24) In this application as mentioned, the issue of a delay in launching a review application is pre-eminently a point raised by the respondents, not only in their respective affidavits but also in their heads of arguments.
- (25) Section 7(1) provides that 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 the person concerned was informed about 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.[20]
- (26) In terms of section 9 of PAJA the period of 180 days may be extended for a fixed period by agreement between the parties or, failing such agreement, by a court on application by a person or administrator concerned. Such an application may be granted where the interest of justice so requires.
- (27) At the outset it is worth mentioning that the present application is not accompanied by a substantive application for condonation, nor is such a prayer requested as part of the relief in the notice of motion.

ARGUMENTS ON CONDONATION ADVANCED BY THE FIRST RESPONDENT

- (28) On behalf of the first respondent it was contended that the applicants are precluded from bringing this review application due to their unreasonable delay both in instituting their application and in prosecuting it.
- (29) As far as the relief which the applicants seek to set aside the appointment of Mr Louis, this decision was taken as mentioned during 2003, some 17 years ago.
- (30) The second prayer seeks to direct Telkom to take appropriate disciplinary action against Mr Louis, who as previously mentioned left the employ of Telkom on 8 September 2018.
- (31) The third prayer seeks to direct Telkom to appoint Mr Jabari to the position of Senior Manager: Security & Investigations previously occupied by Mr Louis. This position no longer exists within Telkom as the organizational structure and service delivery model of the company has since evolved.

- (32) In relation to the fourth payer (to set aside the section 197 procedure) and fifth prayer (to review and set aside the contracts entered into between the first respondent and the third, fourth and fifth respondents), both prayers have become moot as the said contracts will have terminated to the effluxion of time, by the time that the application is enrolled for hearing.
- (33) As per the answering affidavit deposed to by Mr Naidoo, the decision to award the contracts to SMADA, CPI and Invula was taken on 3 April 2017.[21] A decision to challenge same placing reliance on section 7 of PAJA, should thus have been launched within 180 days i.e. by 30 September 2017, and where it was not, condonation should have been sought from the court. It is common cause that the applicant's application was launched on 28 November 2017.
- (34) In the absence of an extension in terms of section 9 of PAJA, counsel had argued the applicants are barred from pursuing a review because of its unreasonable delay.

ARGUMENTS ADVANCED ON CONDONATION BY THE FIFTH RESPONDENT

- (35) On behalf of the fifth respondent, a similar argument is advanced, i.e. that the applicants have approached this court outside of the 180-day time prescript as set out in section 7(1) of PAJA, and in circumstances such as the present, they should have requested an extension in terms of section 9.
- (36) Their failure to have asked this court for condonation has the effect of their application being procedurally flawed which this court simply cannot overlook.
- (37) In addition to the above, it was further submitted, that the applicants failed to make any allegation in their affidavits that they have exhausted all internal remedies available to them, or that they ought to be exempted from exhausting such internal remedies. In as far as the 'section 197-procedure' is concerned, in circumstances where the applicants had issues with the transfer itself, or if they contended that they were prejudiced thereby, they ought to have followed the remedies, provided for in the Labour Relations Act.
- (38) Similarly, where the applicants felt aggrieved by the tender process and the subsequent awarding of the contracts between the first, third, fourth and fifth respondents, then the applicants ought to have taken steps in terms of the remedies set out in various legislation such as the Criminal Procedure Act, Prevention and Combating of Corrupt Activities Act and the Public Finance Management Act, and it is for this reason that the fifth respondent had argued, that failure to seek condonation should result in the application to be dismissed with costs.

ARGUMENTS ADVANCED ON CONDONATION BY THE APPLICANTS

- (39) On behalf of the applicants it was conceded that this review is sought in terms of the Promotion of the Administrative Justice Act.

(40) As per the founding affidavit, more specifically paragraphs 29 and 58, this much was conceded. The paragraphs are quoted hereunder for ease of reference:

Paragraph 29 “For reasons as set out above, I submit that the appointment of the Second Respondent as a Senior Manager by the first respondent was unlawful, irregular and falls to be set aside by the above Honourable Court and that I should have been appointed in his stead.”

Paragraph 58 “For the reasons set out above. I submit that the section 197 of the Labour Relations Act, transfers were unlawful, irrational and irregular and fall to be set aside by this Honourable Court.”

(41) The attack by the respondents on the unreasonable delay by the applicants in approaching this court and their failure to seek condonation from this court, was not only raised in heads of arguments prepared by counsel for the respondents but this attack was first raised in the respective answering affidavits. [22]

(42) Mr Jabari in his replying affidavit admitted that the application is brought out of time and sets out the reason for this was on the advice, pressure and threats which he received from a Telkom official specifically, Mr Thami Msubo, the then Chief of Human

Resources who advised him not to proceed to challenge the appointment of Mr Louis.

(43) Furthermore, that the delay was not intentional on his part, and that the interest of justice requires that this matter be finalised and ventilated in court.[23]

(44) The reasons as to why Mr Jabari acted on this advice so received and as to why he deemed it unnecessary to seek legal advice earlier on, his affidavit is evidently silent on. His affidavit is also silent as to exactly when he had received this advice from Mr Msubo not to pursue legal action in relation to the appointment of Mr Louis.

(45) It is also to be noted, that his replying affidavit is further not accompanied by a confirmatory affidavit by Mr Msubo, confirming that he advised Mr Jabari accordingly and the extent of his advice.

(46) Even, if this court was to accept that he indeed had received this advice from Mr Msobu, it still does not explain why his review application is not supported by an application seeking condonation or at the very least containing a prayer for condonation.

(47) The SCA in the decision in *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others*

[2013] 4 All SA 639 (SCA) at para [26] summarised the principles that apply to unreasonable delay under PAJA as follows:

‘At common law application of the undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and second, if so, whether the delay should in all circumstances be condoned. Up to a point, I think, section 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature’s determination of a delay exceeding 180 days as

per se unreasonable. Before, the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. BUT after the 180 day, period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable per se. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been 'validated' by the delay. That of course does not mean that, after the 180 day, period an enquiry into the reasonableness of the applicant's conduct becomes entirely irrelevant. Whether or not the delay was unreasonable and if so the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not.'

(48) In the present application not only did the respondents raise the point of the delay in launching this review application on affidavits, but counsel for the respondents had also raised the points in arguments.

(49) It is significant, that on behalf of counsel for the applicant, it was contended that no need existed for condonation in terms of section 9 of PAJA, as this was a material misdirection on the part of the respondents. In this regard, counsel had argued, that

as the appointment of Mr Louis was fraudulently made and fraud is a criminal offence which prescribes after considerable many years,

there existed no need to have complied with the provisions of section 7(1) and s 9 of PAJA.

(50) This argument with respect is not only flawed but it is also misplaced. It is flawed, not only because, Mr Jabari himself conceded that this review is brought in terms of the provisions of PAJA, but more so that this court is approached on review proceedings, which is civil proceedings in nature and not criminal proceedings.

(51) In casu, further, the appointment of Mr Louis occurred in 2003 (some 17 years ago) and the awarding of contracts and 'section 197 procedures' all occurred as from 1 June 2017. The present application for review was only launched as mentioned, on 28 November 2017.

(52) Furthermore, and in the present instance, the applicants have also delayed in prosecuting this review.

(53) In its Supplementary Answering Affidavit [24] deposed to by one Sifiso Mazibuko on behalf of Telkom, the deponent also sets out, that the applicants had unreasonably delayed the prosecuting of this review. Specifically, it is sets out that when the matter became ripe for hearing in March 2018, it took the applicants two years before they applied for a date from the Registrar.

(54) In answer the applicants explain that the delay was occasioned by them appointing a new attorney of record during July 2019 and an interlocutory joinder application which had to be enrolled. It is further explained that an investigation report was obtained by Telkom, which revealed that Mr Louis and Mr Naidoo had committed fraud.[25]

- (55) This explanation as tendered by the applicants do not explain the reason as to why it took so long for them to apply for a date from the Registrar to enrol the application for adjudication. As such I cannot but conclude that no adequate explanation is given for this inordinate delay.
- (56) Therefore, having regard to the authoritative decision of *Opposition to Urban Tolling Alliance and Others v South African National Roads Agency Ltd and Others* quoted above, and in the absence of condonation being sought, I can only but conclude that the applicants are precluded from bringing their review due to their unreasonable delay in not only instituting their review application, but also in prosecuting their review application.
- (57) This conclusion so reached by this court to my mind is dispositive of the entire application.

COSTS

- (58) As to the appropriate costs order to be awarded, the first applicant contended that in the event of him being unsuccessful, that this court should not order costs against him as he is an individual who took on the first respondent, which he alleges is a state owned entity.
- (59) On behalf of the first respondent it was submitted, that Telkom is listed on the Johannesburg Stock Exchange, is a major public entity and it is not an organ of state.
- (60) In addition to the above, the review application has not only been launched against the first respondent only but also against other respondents, some of whom are private owned companies.
- (61) The first applicant, in the present instance, is the only applicant who have deposed to affidavits throughout and him being the unsuccessful party, I could find no basis to deprive the respondents of their costs.
- (62) I do not however believe costs on the attorney and client scale would be warranted under the circumstances.

ORDER

- (63) In the premises the following order is made:

63.1 The application is dismissed with costs on the basis of an unreasonable delay both in instituting and prosecuting the application.

63.2 The respondents are awarded costs on a party and party scale, including the costs of two counsel, where so employed.

C.J. COLLIS

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant : Adv. D.Z. KELA

Attorney for the Applicant : Blessed Mongwe Attorneys

Counsel for the First Respondent : Adv. N. H. MAENTJE SC &

Adv. N. FERREIRA

Attorney for the First Respondent : Adams & Adams

Counsel for the Fifth Respondent : Adv L. Keijser

Attorney for the Fifth Respondent : Waldick Jansen Van Rensburg Inc.

Date of Hearing :

29 & 30 July 2020

Date of Judgment

: 29 January 2021

Judgment

transmitted electronically.

- [1] Index 004-7
- [2] Founding Affidavit para 12 Index 004-23
- [3] Founding Affidavit para 22 Index 004-24
- [4] Founding Affidavit para 22 Index 004-25
- [5] Founding Affidavit para 23 Index 004-25
- [6] Founding Affidavit para 24 Index 004-26
- [7] Answering Affidavit- Telkom para 27 Index 005-20
- [8] Answering Affidavit-Telkom para 27-33 Index 005-20 to 005-22
- [9] Answering Affidavit-Telkom para 41 Index 005-25
- [10] Founding Affidavit para 34 Index 004-29
- [11] Answering Affidavit para 46 Index 005-26
- [12] Answering Affidavit para 48 Index 005-27
- [13] Answering Affidavit para 54 Index 005-29
- [14] Answering Affidavit Index 005-104
- [15] Answering Affidavit-Louis Index 006-141

- [16] Applicant's Replying Affidavit Index 007-6
 - [17] Applicant's Supplementary Answering Affidavit para 12 Index 011-10
 - [18] Applicant's Supplementary Answering Affidavit para 13 Index 011-11
 - [19] Applicant's Supplementary Answering Affidavit para 14 Index 011-11
 - [21] Answering Affidavit para 41 Index 005-25
 - [22] Answering Affidavit para 6.1 & 6.4 Index 005-10 to Index 005-11, Fifth Respondent's Answering Affidavit para 7.1 to 7.4 Index 009-39
 - [22] Answering Affidavit para 6.1 & 6.4 Index 005-10 to Index 005-11, Fifth Respondent's Answering Affidavit
para 7.1 to 7.4 Index 009-39
 - [23] Replying Affidavit para 6.1 Index 007-11
 - [24] Supplementary Answering Affidavit para 4 Index 011-5
 - [25] Applicant's Replying Affidavit para 16 Index 011-102
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