

SOUTH AFRICA / JUDGMENT

Mkhombo and Others v Minister of Defence (31242/18) [2021] ZAGPPHC 741 (2 November 2021) [2021] ZAGPPHC 741

COURT

North Gauteng High Court, Pretoria

BEFORE

E van der Schyff

CASE / FILE NUMBER

31242/18

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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: NO

Date: 2 November 2021 E van der Schyff

CASE NO: 31242/18

In the matter between:

FREDERICK NKUKUKEKO MKHOMBO

AND 23 OTHERS

APPLICANT

and

MINISTER OF DEFENCE

RESPONDENT

JUDGMENT - CONDONATION

Van der Schyff J

Introduction

- [1] The applicant instituted a review application under the above case number on 4 May 2018. The condonation application with which this court is seized, was issued on 6 March 2020.
- [2] The applicant seeks condonation for the failure to institute the judicial review application 'within 180 days as prescribed by Section 7 (1) (b) of the Promotion of Administrative Justice Act 3 of 2000 alternatively within a reasonable time in terms of the common law'. Before I continue to deal with the merits and the applicable legal principles, it is necessary at this stage to indicate that the applicant errs in stating that the Promotion of Administration of Justice Act 3 of 2000 (PAJA) prescribes that judicial review applications are to be brought within 180 days. 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-

- (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.' (My emphasis).
- [3] Section 9 of PAJA provides that a court may extend the 180 days where the interests of justice requires so.

The

facts

- (i) The applicant's case
- [4] The applicant, Mr. Mkhombo, is the deponent to the founding affidavit filed in the condonation application. Although he is cited as applicant with '23 others', no confirmatory affidavits were filed. Since he relays his reasons for seeking condonation in the condonation application, and states that '[t]he purpose of this application is to request the Honourable court to grant me condonation for the late filing of my application for judicial review',[1] this application cannot be regarded as an all-encompassing condonation application for the '23 others' whoever they

may be.

- [5] In the main application the applicant states that the application is premised upon (i) a legitimate expectation that was created by the respondents; (ii) the principle of legality; and (iii) unlawful dismissal. The applicant and 23 others, whose confirmatory affidavits in the main application are only attached to the replying affidavit, seek (i) to be reinstated as Petty Officers, (ii) that the respondents be ordered to pay their tuition fees and to make a back

payment of salaries they would have been paid upon the completion of their studies, and (iii) that the decision of the respondents not to grant them five year CSS contracts be reviewed and set aside. The applicants rely on ss 3 and 6 of PAJA.

- [6] The applicant avers that he and others were studying technical subjects at various universities during 2012. They were recruited by the respondents to become members of the SA Navy and became part of the intake group for April 2013. The applicant, and others who had not yet completed 'S4' at the commencement of their basic military training never signed any contract and worked about three months without being paid salaries. He avers that they were advised to be placed as reserve force members prior to completing their basic military training in order to expedite the payment of their salaries. During the training course, and during November 2013, they were informed that they had to complete their outstanding modules and that the respondents would pay their school fees and re-instate them with CSS contracts upon completion of their respective qualifications. They were given a period of 6 months to complete their outstanding modules. This 6 months' period commenced in January 2014.
- [7] After completing their qualifications, some members were given CSS contracts. The applicant was not included in the group of people who were given CSS contracts. He states that he and the 23 others 'have a claim of legitimate expectation and also of unfair administrative decision'.
- [8] The applicant claims that the review application was instituted late because the SA Navy has a chain of command that had to be followed. He wrote several letters to the respondents in an attempt to follow procedure and exhaust internal remedies. From the emails attached to the founding affidavit it is evident that:
- i. An email was sent by the applicant to a Mr. T Flack on 2 July 2014. The email was sent to a Gmail address and is titled 'Breach of Contract'. The content of the email generally corresponds with the facts set out above with the exception that mention is made they were advised by Commander Fourie to return to their institutes and to complete their diplomas. Commander Fourie allegedly guaranteed that upon completion of their studies they would be 'readmitted back into the navy.' He relates that they went back to their institutions 'trusting that the Navy would rehire' them upon completion of their diplomas.
 - ii. On 20 July 2014 a similar email was sent to the Chief Defence Reserve, to which email a response was received on 21 July 2014. The applicant was informed that the matter being addressed falls in the mandate of the Chief of the SA Navy and he was advised to forward his enquiry to either the Director Navy Reserves or the Chief of the Navy.
 - iii. On 21 July 2014 an email was sent by the applicant to the Chief of the Navy to the email address provided.

- [9] The applicant avers that he established a line of communication with the respondents after he obtained his S4 in 2014. Each time he received a 'call up' he enquired as to when he would receive a CSS contract as promised, and he would try to escalate his grievance. He never received any answers but was sent from pillar to post. During 2015, 5 other members of their group received CSS contracts. The applicant and other members were also instructed to apply for CSS contracts in 2015 and despite them undergoing a Continuous Health Assessment, they received no feedback following their applications.
- [10] The applicant claims that he only became aware of the fact that the respondents did not intend to respond to his grievance in April
2018. It must be noted already at this juncture, that the applicant does not explain what happened during April 2018 that caused him reaching this conclusion. He emphasises that as a lay person, he never knew that he might be entitled to claim re-instatement and back payment of salaries. Without providing any detail, he states that he 'then' approached his attorneys of record who advised him during March 2018 to claim and issued a notice in terms of Act 40 of 2002. The applicant notes that it is difficult to establish from which date the 180 days' period should be calculated as he (they) never received any formal response of a decision or any form of signal regarding the issue of re-instatement and or translation into CSS. He claims that the respondents have not been prejudiced by the late filing of 'this' application, but that he will suffer extreme prejudice if he is not granted condonation.
- (ii) The respondent's case
- [11] The respondents oppose the condonation application. They claim that the applicant's explanation does not cover the entire period of the delay and submit that the explanation provided is 'grossly unacceptable' considering that it took the applicant four years to launch the application. While the applicant initially claims that he has been pursuing internal processes in order to resolve the matter, without indicating which processes could have taken four years, he later claims that he only became aware that he had recourse against the respondents during April 2018 when he consulted with his attorney. However, he does not relay what prompted him to consult with an attorney and why he did not do so earlier.
- [12] The respondents allude thereto that after the email correspondence of 21 July 2014, the applicant was invited for a call-up commencing on 7 November – 5 December 2014, which call-up he ignored. He reported for the next call-up which started on 2 February 2015 and ended on 31 July 2015, and during this call-up made enquiries with Commander Fourie regarding the issues he raised in the emails. Commander Fourie explained the procedure to apply for a CSS contract and advised the applicant that the allegations he made in the emails were wrong. He was advised to follow the prescribed process if he wished to be considered for a CSS contract. The applicant subsequently handed in his application together with his qualifications. No impression was given that the applicant would receive preferential treatment. Commander Fourie filed a confirmatory affidavit.

[13] Regarding the merits, the respondents deny that the applicant was appointed into the reserve force for the purpose of facilitating payment of his salary. The appointment into the reserve force was an opportunity that opened up after the applicant, and others, failed to qualify for appointment into the regular force. The applicant completed enrolment forms in which he categorically stated

that the nature of the appointments was explained and is understood.

[14] No replying affidavit was filed by the applicant in the condonation application.

Submissions

[15] The matter was enrolled for argument on 26 October 2021. Both counsel indicated that the application should be considered on paper and that they stand by their written heads of argument. The only aspect that came up that was not addressed in the heads of argument, is the issue of the liability for costs occasioned by the previous postponement when the learned Mokose J removed the matter from the roll because she was not timeously provided with access to the Caseline file.

[16] The applicant's counsel revisited the facts of the matter in the heads of argument. While seeking condonation, the applicant simultaneously avers that the 180 day period they the applicant submits the application had to be instituted, commenced in April 2018 and hence no condonation is required.

[17] Counsel for the respondents referred to applicable caselaw and submitted that the applicant failed to furnish a full and reasonable explanation for the delay which covers the entire duration thereof. Counsel emphasised that the applicant was aware as at 20 July 2014 that the respondents refused to grant him a CSS contract or to appoint him into the regular force of the South African Navy. The review application was only instituted 3 years and 22 months later. The enquiry made in the emails of 20 and 21 July 2014 is not a reasonable account of any formal steps taken in an attempt to 'follow the chain of command within the SANDF' before filing a civil claim.

[18] Addressing the submission that the applicant is a layperson who was not aware that he could take the respondents on review, counsel for the respondents referred to *Associated Institutions Pension Fund and other v Van Zyl and others*[2] where the court held:

'[51] In my view there is indeed a duty on applicants not to take an indifferent attitude but rather to take all reasonable steps available to them to investigate the reviewability of administrative decisions adversely affecting them as soon as they are aware of the decision. These considerations are, in my view, also reflected in both section 7(1) of PAJA and in the provisions of section 12(3) of the Prescription Act 68 of 1969. Whether the applicants in a particular case have taken all reasonable steps available to them in compliance with this duty, will depend on the facts and circumstances of each case.'

Discussion

- [19] As alluded to earlier, s 7 of PAJA prescribes that proceedings for judicial review should be instituted without unreasonable delay. The section does not provide for judicial review applications to be brought within 180 days. Circumstances might arise where an application brought within 180 days may be held not to have been brought without reasonable delay. Having said that, the legislature provided that the time period of 180 days may be extended when the interests of justice so required.
- [20] The Constitutional Court in *City of Cape Town v Aurecon SA (Pty) Ltd*,^[3] and the Supreme Court of Appeal in *Asia Construction (Pty) Ltd v Buffalo City Metropolitan Municipality*,^[4] rejected the proposition that the date of first knowledge of the irregularities triggers the computation period. Section 7(1) refers to the date on which the reasons for administrative action became known or ought reasonably to have become known to the party seeking its judicial review.
- [21] In the present case, there is no indication that the applicant requested reasons for the alleged impugned decisions that it seeks to have reviewed. Section 5 of PAJA provides that any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.
- [22] On the applicant's own version, he became aware of the fact that he would not be afforded the opportunity to sign a five year fixed CSS contract with the SA Navy in June 2014. The two emails attached indicate that he raised a grievance regarding not being reinstated, but he did not request reasons for the decision. If it is considered that reasons must be requested within 90 days of becoming aware of the decision, and that the administrator then must provide reasons within 90 days after receiving the request,

it can be accepted that the applicant ought to have become aware of the reasons for the impugned administrative action 180 days after becoming aware of the fact that he was not being reinstated. Unfortunately, that date is not known. On the facts provided in the founding affidavits to both the main and condonation applications it is only stated that the applicant completed his studies in June 2014 and when he contacted the SA Navy for briefing no positive feedback was received. His founding affidavit reflects that the first email was sent to a Mr. Flack on 2 July 2014. In favour of the applicant it will be accepted that this is the date on which the applicant became aware of the fact that he would not be reinstated in the SA Navy. It can thus safely be assumed that by the end of January 2015 the applicant ought to have been aware of the reasons for the decision.

- [23] The applicant fails, however, to give any reason for the delay in instituting the review proceedings, except for stating that he is a layman and had been pursuing internal remedies. The caselaw is very clear –

‘An applicant for a condonation application must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay.’[5]

[24] The applicant fails to explain what internal remedies he was pursuing, except for referring to the two emails he sent in July 2014. He failed to take any steps pursuant to sending those emails, or why he never requested reasons for the impugned decision. He also failed to explain how it came about that he decided to obtain legal advice in 2018. The undue delay is not explained at all, and this in itself is sufficient reason to dismiss the condonation application.

[25] The interests of justice requires finality of administrative decisions.[6] In considering the applicants prospects of success, the papers reveal the existence of substantial factual disputes. The respondents attached documentation to their answering affidavit that reflects that the applicant was fully aware of the nature and consequences of an appointment to the reserve force. After weighing up the nature of the relief sought, the extent of the delay, the lack of a comprehensive explanation that covers the whole period of the delay, the importance attached to the finality of administrative decisions, and the nature and extent of the factual disputes which will require the application of the Plascon Evans principle in the adjudication of the review application,[7] I am of the view that it is not in the interests of justice to grant condonation.

[26] The remaining issue relates to the reserved costs. Neither party filed any explanatory affidavit regarding the costs incurred on the said date when Mokose J removed the matter from the roll. It was argued from the bar by the applicant’s legal representative that the registrar failed to invite the judge’s registrar timeously to the Caseline file. Since there are no affidavits before me dealing with this issue, I am of the view that it is fair and just that the costs occasioned by the removal be costs in the cause. In light of the outcome of the condonation application it will form part of the costs to be carried by the applicant.

ORDER

In the result, the following order is made:

1. The condonation application is dismissed with costs.

E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date for hand-down is deemed to be 2 November 2021.

Counsel for the applicant:

Ms. R Chokoe

Instructed by:

Chokoe Attorneys

Counsel for the respondents:

Adv. M. Raphahlelo

Instructed by:

State Attorney

Date of the hearing:

26 October 2021

Date of judgment:

2 November 2021

[1] My emphasis.

[2] [2004] 4 All SA 133 (SCA) at para [51].

[3] [2017] ZACC 5 (28/02/2017) at para [41].

[4] [2017] ZASCA 23 (24/03/2017) at para [7].

[5] Van Wyk v Unitas Hospital and Others 2008

[4] BCLR 442 (CC) at para [22].

[6] Gqwetha v Transkei Development Corporation Ltd and others 2006

(2) SA 603 (SCA).

[7] As explained in National Director of Public Prosecution v Zuma (2009) ZASCA 1 at para [26] - 'It is well established under the Plascon-Evans rule 7 that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order.'

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