



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

Case no: EL94/2023

In the matter between:

ALPHA OMEGA YOUTH OUTREACH

Applicant

and

NATIONAL LOTTERIES COMMISSION

1st Respondent

ARTS AND CULTURE DISTRIBUTION AGENCY

2nd Respondent

JUDGMENT

GQAMANA J

[1] In this application, the applicant, seeks the following order:

“1.

That the late filing of applicant’s application be condoned, and the period of 180 days be extended accordingly as provided for in section 9(1) of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”).

2. That the applicant be exempted from the obligation to exhaust internal remedy/remedies as provided for in section 7(2) (e) of PAJA.

3. That the respondents’ grant allocation to applicant in order project number 93382 dated 25 November 2019, be reviewed and set aside.

4. That first respondent be ordered to pay the sum of R1 571 540.10 to applicant as full and final grant allocation in respect of applicant’s 2015 grant application under project number 93382.

5. That the respondents be ordered to pay the costs of the application, jointly and severally, on the attorney and client scale.”

[2] As a short background, the applicant, Alpha Omega Youth Outreach is a non-profit organisation whose main purpose is to employ holistic approaches in steering the youth away from crime and drugs, using art, music and life skills.

[3] The first respondent is the National Lottery Commission which is established in terms of the Lotteries Act 57 of 1997 (“the Act”). The second respondent, is the Arts and Culture Distributing Agency. In terms of section 26B (1)(a) of the Act, second respondent is responsible for considering, evaluating, and adjudicating applications for grants or recommendations of funding of worthy good causes received from the first respondent. The grants are paid from the

National Lottery Distribution Trust Fund established in terms of section 21 of the Act. The administration of the fund is governed by section 22 of the Act. Further in terms of section 26 H(1) of the Act, a decision by the distributing agency concerning an application for a grant is subject to review by the board on application by an aggrieved applicant.

[4] It is common cause that on or about 20 October 2015, the applicant applied for a grant of R897 093.60 under project 93382. This was in response to an invitation which was issued by the first respondent on 14 September 2015, that was published in various newspapers inviting applications for funding from Non Profit Organisations (NPOs) for the 2016/2017 financial year. The application was under the category arts, culture and national heritage in terms of section 30 of the Act.

[5] On 28 March 2017, the applicant was advised that the aforementioned application was unsuccessful because the budget for 2016/2017 financial year had been depleted. The applicant, however, was advised that its application would be considered and adjudicated in the new financial year, i.e. 2017/2018 year.

[6] On 25 April 2017, the applicant was advised that its application in respect of 2017/2018 financial year was unsuccessful because the dates of the financial

year in the founding document were not aligned to the date in the annual financial statements. The applicant appealed such ruling. It was advised of the outcome of the appeal on 17 October 2017 that, it was unsuccessful. That resulted to the applicant launching an application for review in this Court, which led to the judgment by *Smith J* delivered on 12 November 2019 in favour of the applicant. The effect of the judgment was that, the decision of the respondents refusing the applicant's grant application was reviewed and set aside, and the matter was remitted to the respondents for reconsideration.

[7] Within few days after the judgment was delivered, the applicant's grant application was considered and a grant of R227 000.00 was allocated to the applicant. The applicant was advised of such decision on 25 November 2019. Further the applicant was informed that, it has to sign a grant agreement within 30 days in order for its grant to be processed further. The applicant was not satisfied with the aforesaid amount. It then engaged its attorney, but cutting straight to the point, such engagements yielded no positive results. I deal with the steps taken by the applicant until the present application was launched later in this judgment.

[8] On or about 23 January 2023, the applicant launched this review application seeking the relief mentioned in paragraph 1 above. This application is opposed

by the respondents. The issue of condonation is hotly contested.

[9] In light thereof, the first hurdle for the applicant to overcome is the delay in launching the review proceedings. In my view, the issue of condonation would be dispositive of this matter in the event the applicant is unable to persuade me in that regard.

[10] As a point of departure, section 7(1) of PAJA provides that:

“1. 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 come aware of the action and the reasons.”

[11] It is common cause that the respondents are organs of state and subject to the Constitution. The application is brought in terms of section 6 of PAJA.

[12] Further, the parties are in agreement that the present review application was not instituted within the 180-days from the date of the decision that is sought to be reviewed. However, they are at loggerheads on the date as to when the 180-days commenced. Be that as it may, a court may extend the 180-days

period, where interest of justice so require.¹ In consideration of same, the court must first determine whether there was an unreasonable delay and, if so, should the delay in all circumstances be condoned.² The enquiry depends on the facts of each case.

[13] For purposes of section 7(1) of PAJA, the delay must be considered from either the date that the applicant was informed or became aware or might reasonably be expected to have become aware of the administrative decision.

[14] Having said that, the first point of call is for me to locate such date. The evidence shows that the applicant was advised on 25 November 2019, that at a meeting of the second respondent its application for the grant was considered and that a decision was taken to allocate a total grant of R227 000.00 to it. It is not disputed that from the aforesaid date the applicant was aware of the impugned decision. From respondent's submission, the proverbial clock commenced on 25 November 2019.

[15] It is common cause that on 28 November 2019, Mr Bixa who is the Chief Executive Officer of the applicant and the deponent of the founding affidavit visited the first respondent's offices in East London and queried the grant

¹ Section 9 (1) and (2) of PAJA.

² *Wolgroeiërs Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 39C-D.

allocation and also stated that he would engage with the first respondent through its attorneys.

[16] Subsequently thereto, on an unspecified date the applicant briefed Sotenjwa Attorneys and the latter filed on 5 March 2020, a request for information in terms of the Promotion of Access to Information Act 2 of 2000 (PAJA). Amongst the information requested were the minutes of the meeting where the impugned decision was taken as well as the first respondent's financials.

[17] Nothing happened from then until 24 August 2020, when the first respondent refused to supply the information requested on the basis that PAJA is not applicable and that grant allocation process is dealt with in terms of the regulations to the Act. Furthermore, in the aforesaid reply, the applicant was advised to return the signed grant agreement by not later than 30 days from the date of receipt of such letter, failing which the grant would be withdrawn. The applicant contends that the proverbial clock only commenced on 25 October 2021.

[18] I am at pains to understand and comprehend such contention, because it is common cause that the applicant was informed of the impugned decision on

25 November 2019. In addition to that, the applicant's CEO attended to the first respondent's office on 28 November 2019 and queried the grant allocated to the applicant and stated that it will engage the first respondent through its attorney, Sotenjwa attorneys. Instead of engaging on the internal review mechanism processes sanctioned in terms of section 26H of the Act, which are the internal remedies as envisaged in section 7(1)(a) and (2) of PAJA, the applicant's attorney filed a request for information in terms of the PAIA.

[19] In my view the fact that there was a request for information in terms of PAIA does not change the factual reality, i.e. the applicant was aware of the decision on 25 November 2019. The 180-days period would have been delayed only if the applicant had engage the internal remedies envisaged in section 7 (1) of PAJA. In the circumstances, for purposes of condonation, 25 November 2019 is the date which the proverbial clock commenced. I now need consider whether there was an unreasonable delay in instituting the review and, if so, whether the delay should in all circumstances be condoned.

[20] As foreshadowed above, the applicant was aware of the impugned decision on 25 November 2019, therefore the 180-days expired in May 2020. The

evidence shows that from the time the applicant became aware of the impugned decision, and the date that the 180-days expired, the only action taken by it was to request information in terms of PAIA and nothing else. When no response was forthcoming from the respondents about the requested information, no action was taken by the applicant. However, it was argued by the applicant that the respondents “remarkably and obstructively” refused to supply the information sought and therefore the respondents are to be partly blamed for the delay. That submission makes no sense to me. The applicant was represented by an attorney (Sotenjwa attorneys), and the latter must have been aware of the internal remedies available to the applicant as envisaged in section 26H of the Act. Furthermore, when no response was forthcoming to its PAIA request, no application to court in terms of section 78 of the PAIA was instituted by the applicant. In fact, the applicant sat back and did nothing to pursue its request for information until its erstwhile attorneys (Sotenjwa attorneys) withdrew from the matter.

- [21] It is common cause that on 24 August 2020, the first respondent refused to supply the information. In the refusal notification, the applicant was advised that PAIA does not apply and that grant allocation process is dealt with in

terms of the regulations to the Act. Still the applicant did nothing either to pursue the internal processes or to issue the review application.

[22] After the withdrawal of Sotenjwa attorneys in August 2020, the applicant replaced them with Clark Laing Inc. in November 2020. I am completely oblivious why it took more than two months for the applicant to secure the services of another attorney. There is no allegation that the applicant lacked financial resources to procure services of another attorney. A party seeking condonation has to set out all the facts so as to enable the court to understand and assess the explanation for its non-compliance with the rules or the time frames.

[23] Even after Clark Laing Inc. was on board representing the applicant the latter still did nothing to issue the review application. Instead on 8 February 2021, Clark Laing Inc. requested copies of various records, including details of all grants allocated in the Arts, Culture and National Heritage sectors for the financial years 2017–2020, the minutes of the meetings of the second respondents in relation to application for funding made by the applicant, reports and documents that informed the impugned decision, budget and audited financial statements for the financial years 2017–2020, and approved financial policies applicable to the impugned decision.

[24] The first respondent replied to such request on 24 May 2021, and provided the applicant with the information relating to the reports and documents that informed the impugned decision, its budget and audited financial statements for the relevant periods and its approved financial policies. However, it refused to supply the applicant with the details of all grant applications in the relevant sector received during the financial years mentioned above and to the minutes of all meetings of the second respondent relevant to the application for the grant application made by the applicant. Still, the applicant did nothing to issue the review application.

[25] On an unspecified date Clark Laing Inc. withdrew as the attorneys of the applicant because of lack of financial instructions. However, on 6 July 2021, the applicant approached its present attorney of record. Even when the present attorneys came on board, no review application was issued. The applicant must have been advised by its attorneys of the time frame set out in section 7(1) of PAJA. Instead of bringing the review application, its present attorneys of record apparently investigated the affairs of the respondents. It is averred by the applicant that through such investigation it unearthed information about “*systematic corruption and collusion*” by the respondents. The alleged corruption is that the respondents, (a) turned a blind eye to NPOs with no mandatory documents such as financial records,

(b) they did not follow the peremptory jurisdictional restrictions in that NPOs and NGOs from Gauteng would apply and receive grants from other provinces, (c) the so called capped principle was ignored and (d) the new kids on the block with no proven track records and financial records or annual returns were granted exorbitant funding. To bolster the corruption allegations, the applicant also placed reliance on the proclamation which was issued by the President on 6 November 2020 requesting the Special Investigating Unit (SIU) to investigate maladministration in the affairs of first respondent in relation to the allocation of funds in terms of the Act to beneficiaries, the status report by the SIU to such investigation and a newspaper article by Daily Maverick dated 3 March 2022.

[26] In terms of the aforementioned proclamation, the maladministration which the SIU had to investigate is in relation to: (a) the investment of funds in the National Lottery Distribution Trust fund contrary to the provision of the Act, (b) allocation of money in the fund to beneficiaries who were not entitled thereto and (c) any improper or unlawful conduct by the officials or employees of the National Lotteries Commission (NLC). I will revert to these reports and allegations of corruption and collusion latter.

[27] On 6 September 2021 the applicant's present attorneys served '*a letter of demand*' to the first respondent. Within 10 days thereafter, on 16 September

2021, the first respondent responded in detail to the aforementioned letter of demand.

- [28] The first respondent in its response advised the applicant's attorneys that it had a limited budget when the application for grant was made and that, in each financial year there are new budgetary allocations and there is no guarantee that the amount which was offered to the applicant was still available. It was further pointed out to the applicant that, its expectation of more than the allocated amount (R227 000.00) was irrational, because its application for grant was adjudicated in 2019 under the 2019/2020 financial year budget. Further it was pointed out to the applicant that the first respondent budget allocation had significant decrease from 2015 and as such the amount which was allocated to the applicant was reasonable having regard to the number of applications received under the charity sector. Most importantly, it was pointed out to the applicant that, an applicant for grant allocation is not entitled as of right to the amount it has applied for, because in terms of the regulation 9 of the 2015 Regulations to the Act, the distributing agency has a discretion to determine the amount to be made to each approved applicant based on its budgeting constraints and the number of applications received.

[29] Even then the applicant still did not issue the review application until 23 January 2023. It is contended by the applicant that its investigation into the affairs of the first respondent was ongoing up to 8 November 2022. The applicant in its founding affidavit has stated that the process of drafting the review application started after 25 November 2021.³ Counsel services were procured on 12 January 2022 and due to ill health his brief was terminated on 23 March 2022. Thereafter, on the same date, Senior Counsel was briefed and his first available date for consultation was on 12 May 2022. Despite the clear provision of section 7(1) of PAJA, it is averred by the applicant that the Senior Counsel had a busy program and only managed to work on the brief from 11 July 2022 and managed to settle the papers on 29 December 2022.⁴

[30] What is glaring from the applicant's founding affidavit is that, it took 14 months to draft and settle the review papers. The founding affidavit is merely 26 pages long with 45 annexures attached to it. On any body's standard, there was an unreasonable delay in instituting the present review application, which eventually was launched on 23 January 2023.

³ Index p 30 para 111.

⁴ Index p 30 – 31 paras 112 to 119.

[31] Having found that the delay was unreasonable, the next question is whether, in the interests of justice the delay should be condoned or the 180-days should be extended in terms of section 9(2) of PAJA.

[32] In *Gqwetha v Transkei Development Corporation Ltd and Others*,⁵ Nugent JA explained the purpose and function of the delay rule under section 7(1) of PAJA and said:

“[22] It is important for the efficient functioning of the public bodies ... that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that long standing rule is two-fold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Miller JA in *Wolgroeiens Afslaers (Edms) Bpk v Municipaliteit van Kaapstad* 1978 (1) at 41E-F (my translation).

“It is desirable and important that finally should be arrived at within a reasonable time in relation to judicial and administrative decisions or merits. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after and unreasonably long period of time has elapsed-*interest reipublicae ut sit finis litium* ... Considerations of this kind undoubtedly constitute part of the underlying reasons for the existence of this rule.”

[33] Mr Pienaar SC, counsel for the applicant argued with reference to *SANRAL v Cape Town City*⁶ that, the merits of the case are a critical factor when a court considers the delay for purposes of determining whether it will be in the interests of justice that such delay be condoned.

⁵ 2006 (2) SA 603 (SCA) para 22.

⁶ 2017 (1) SA 468 (SCA) at para 81.

- [34] I was also referred to the decision of the Constitutional Court, in *Notyawa v Makana Municipality*,⁷ where the court expressed the view that, the nature of the illegality raised in respect of the impugned decision constitutes a weighty factor in favour of overlooking a delay.
- [35] Further in *Minister of Safety and Security v Jongwa*,⁸ the delay in bringing the review application, although it was not within the context of PAJA, but the court was persuaded that given the nature of the issues at stake it would be preferable to deal with the application on its merits and not to dispose it on the delay.
- [36] I must state that the explanation proffered by the applicant for the delay is profoundly lacking. It appears to me that there was a lackadaisical approach in the manner in which the applicant dealt with the matter. As indicated above, it took the applicant more than three years to institute the review application. There are no complex issues involved in this matter. Further, even after the applicant's attorneys started preparing on the review papers on 25 November 2021, it took the applicant a period of almost 14 months to settle and finalise them.
- [37] The applicant submitted that because of the alleged corruption, the matter requires the attention of the court and that on the merits it has strong

⁷ [2020] 41 ILJ 169 (CC) at para 49.

⁸ 2013 (3) SA 455 (ECG).

prospects of success. Firstly, the alleged corrupt activities are irrelevant to the issues at hand. Further it would be absolutely wrong for me to accept the investigation report of the SIU without evidence that the findings therein were indeed correct. The allocation of grant to deserving beneficiaries is a discretionary matter and is informed by the available budget and the number of applications received on each particular financial year.

[38] The applicant was advised that the amount which was allocated to it was based on the available budget and the applications received for that sector. The applicant was informed that the first respondent may in terms of regulations 5 of the Act, set a cap on the amount an organization may apply for, irrespective of the number of projects that may be specified in such an application. Therefore, the grant which was allocated to it was in line with the capping principle.

[39] In *Opposition to Urban Tolling and Alliance and Others v South African National Road Agency Ltd and Others*,⁹ Brandt JA emphasised that, underlying the delay rule is the rationale that there is inherent potential for prejudice, both to the efficient functioning of the public body and those who rely upon its decision, if the validity of its decisions remain uncertain.

[40] It is more than 3 years since the impugned decision was taken by the first respondent. The payment of such funds are based on the available financial

⁹ 2013 All SA 639 (SCA) para [23].

budget for each year and also based on the number of applications received. Having considered all the facts and evidence herein, I am not persuaded that it will be in the interests of justice to extend the 180-days' time period.

[41] With regard to costs, Mr *Pienaar* argued with reliance to *Biowatch Trust v Registrar Genetic Resources and Others*¹⁰ that, the applicant should not be ordered to pay costs even if it is unsuccessful. The general approach of not awarding costs against an unsuccessful litigant in genuine constitutional proceedings against organ of state should not easily be forsaken. To fit the bill, the issues must be genuine constitutional matters litigated in an acceptable fashion.¹¹ In *Lawyers for Human Rights v Minister in the Presidency*,¹² the Constitutional Court made it clear that *Biowatch* does not imply 'risk free constitutional litigation' and that costs may well be awarded where, for instance, the grounds of attack are frivolous vexatious, or a litigant has acted from improper motives. The issues raised in this application are not genuine and substantive constitutional issues. The purpose of the application was to assert the applicant's purported entitlement to the grant allocation in terms of the Act. I have indicated above the applicant was allocated an amount of R227 000.00 because of budget

¹⁰ 2009 (6) SA 232 (CC).

¹¹ Cora Hoexter: Administrative Law in South Africa, 3rd edition.

¹² 2017 (1) SA 645 (CC) para 30.

constraints and the number of applications received for that sector in that particular financial year. Therefore, there is no reason why the general rule that, the costs follow the results should not apply.

[42] In the circumstances the order issued is the following:

1. The application is dismissed with costs.

N GQAMANA
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicants	:	<i>Adv Pienaar SC</i>
Instructed by	:	Singh and Associates Attorneys East London
Counsel for the 1 st and 2 nd Respondents	:	<i>Adv F J Nalane SC</i>
Instructed by	:	Diale Attorneys C/o Mbabane & Maswazi Attorneys East London
Heard on	:	9 November 2023
Judgment Delivered on	:	9 January 2024

