

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

Case no: 2019/35600

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES:
YES/NO
(3) REVISED.

9 February 2022
.....

In the matter between:

JOYCE KETLELE N.O.

1st Applicant

(In her capacity as Executrix of the Estate Late

MALEFETSANE KETLELE, ID NO [...])

JOYCE KETLELE (Born RADEBE)

2nd Applicant

And

AMOS KETLELE

1st Respondent

THE DIRECTOR GENERAL OF THE DEPARTMENT

2nd Respondent

OF HOUSING, GAUTENG PROVINCE

REGISTRAR OF DEEDS, JOHANNESBURG

3rd Respondent

Delivered: This judgement was prepared and authored by the Judge whose name is reflected herein and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 9 February 2022.

JUDGMENT

BEZUIDENHOUT AJ:

- [1] The 1st and 2nd applicants lodged the current application wherein they seek to review a judgment issued by the housing appeal panel in 2003, in which the appeal panel confirmed the ruling made by the housing bureau to award no [...], Soweto, Gauteng (the immovable property) to the 1st respondent.
- [2] The applicants furthermore want the immovable property to be retransferred into the previous owner's name (The City Council) and seek costs against any respondent who opposes the relief sought.

[3] The review application was lodged late, and the applicants seek condonation for the late filing of the review application.

HISTORY

[4] Mr NS and Mrs EM Kettlele occupied the immovable property with their three children: Mankoe (born 1949), Malefetsane (born 1954) and Frans (born 1958). It is unknown when Mr and Mrs Kettlele took occupation of the immovable property. In 1967 Mankoe gave birth to the 1st respondent. In 1975, Mr Kettlele passed away and Mrs Kettlele obtained a residential permit which allowed her, her 3 children and grandchild (1st respondent) to remain in occupation of the immovable property. Mrs Kettlele passed away in 1976. Frans was born with disabilities which made him dependent on others for his daily care.

[5] In 1977 Mankoe applied for an was issued with a residential permit under sub section 4 of regulation 7, chapter 2, of the now repealed Regulations Governing the Control and Supervision of Urban Black Residential Area and Relevant Matters G.N. 1036 dated 14 June 1968 (the regulations). Mankoe was named as the holder of the residential permit and Malefetsane, Frans and Amos (the 1st respondent) were indicated to be Mankoe's dependants who were entitled to reside with her at the immovable property.

[6] In June 1979, Malefetsane and the 2nd applicant were married to each other in community of property. In May 1980, Malefetsane was issued with a lodger's permit under Regulation 20, chapter 2, of the regulations.

- [7] Mankoe co-habited with Mr Lumkwana at the immovable property and she passed away in February 2000.
- [8] After Mankoe passed away the 1st respondent approached the housing bureau with an application that the right to occupy the immovable property be awarded to him as Mankoe's only intestate heir. Case number 1690 was assigned to the application. Initially Mr Lumkwana opposed the 1st respondent's application however, they settled their dispute and Mr Lumkwana withdrew his opposition to the application in favour of the 1st respondent.
- [9] On 23 July 2001, the housing bureau found that the 1st respondent was entitled to inherit the right of occupancy of the immovable property by virtue of the laws of intestate succession and ruled that the immovable property be registered in the 1st respondent's name.
- [10] An appeal was lodged under case number 15962¹ against the ruling that the immovable property be registered into the 1st respondent's name². In March 2003, the appeal panel consisting of three adjudicators indicated that the appellant made the following submissions: that he was a lodger at the

¹ The 1st respondent claimed that he opened the case under case number 1690 and Malefestane opened a case at the housing tribunal under case number 15962, hence the two case numbers. The 2nd applicant did not deal specifically with the two case numbers and denied that Malefetsane filed the appeal.

² The 1st respondent alleged that Malefetsane lodged the appeal however the 2nd applicant disputed this.

immovable property, that he wants the immovable property to be a family home, that he was married to Joyce and that they resided at the house of Florence Mokoena.

[11] The appeal panel further recorded that the (1st) respondent stated that: the house cannot be a family house as the appellant fought with his mother before he left the immovable property and the only reason the appellant wanted to move back onto the immovable property was because his mother passed away.

[12] Under the heading facts proved, the tribunal found that a permit was issued on 19 April 1977 in Mankoe's name, and a certificate of tenancy was issued on 1 May 1977 again in Mankoe's name. Mankoe passed away on 21 February 2000.

[13] Under the heading Legal Position and Equity the panel recorded that they explained to the appellant what his rights were under the Conversion Act and that he could apply for an RDP house. The panel was unanimous in their view that the adjudicator a quo's ruling was sound in law and equity, they found that the (1st) respondent continuously resided at the immovable property and continued to reside at the immovable property after Mankoe's death and that the (1st) respondent cared for Frans and that Frans resided at the immovable property with the (1st) respondent. The appeal panel upheld the original

decision of the housing bureau to award the immovable property to the (1st) respondent and dismissed the appeal.

[14] In 2009, the 1st Respondent brought an application in the Magistrates Court seeking to evict Malefetsane and all occupying the property through or under him. Malefetsane defended this application and brought a separate application in this Court wherein he sought to review and set aside the appeal panel's judgment. The application being lodged late included an application for condonation. Both Malefetsane and the 1st respondent withdrew their applications as they settled the dispute between them³.

[15] In 2014 / 2015 Malefetsane and his children build a second house on the immovable property and carried the costs thereof⁴.

[16] In 2015 / 2016, the 1st respondent brought another application for the eviction of Malefetsane and all persons occupying by or through him, which application the 1st respondent withdrew.

[17] Malefetsane passed away on 22 March 2017.

³ The terms on which the parties settled the dispute are in dispute.

⁴ The 1st respondent claimed that he did not give his approval for this house to be build.

[18] On 11 May 2017, the 2nd applicant was appointed as executrix to Malefetsane's estate.

[19] In March 2018, the 1st respondent issued another eviction application out of the Magistrates Court for the district of Soweto, seeking to evict the 2nd applicant and all persons claiming occupation through or under her. The 2nd applicant defended the application, and the application was still pending when this application was argued.

[20] In October 2019, the applicants issued the current application. I have been informed from the bar that Frans had passed away and he left no offspring.

GROUNDINGS FOR REVIEW

[21] The applicants claimed that the housing bureau did not properly investigate the claim filed by the 1st respondent and had they done so they would have noted that the immovable property was a family home. This omission negatively affected Frans and Malefetsane as the immovable property was awarded to the 1st respondent based solely on his version and Frans and Malefetsane never had an opportunity to place their versions before the housing bureau and appeal panel for consideration.

[22] According to the applicants the immovable property should not have been awarded to one family member only as it was inherited by all three children from their parents.

ISSUES FOR DETERMINATION

[23] Whether the applicants' failure to lodge the review application timeously should be condoned.

[24] Whether Malefetsane and Frans were denied the right to participate in the proceedings and place their versions before the housing tribunal and the appeal panel for consideration.

THE LAW

[25] The applicants legal representative referred me to the well-known case of *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) and the factors which a Court would take into consideration in exercising its discretion whether to grant condonation to a litigant.

[26] In its heads of argument the applicants' legal representative also referred me to the matter of the *Academic and Professional Staff Association v Pretorius NO and Others* (2008) 29 ILJ 318 (LC), where the Labour Court at paragraphs 17–18 indicated that: 'The factors which the court takes into consideration in

assessing whether or not to grant condonation are: (a) the degree of lateness or non – compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply with time frame; (c) prospects of success or bona fide defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice.

[27] Further to the above, the applicant's legal representative also referred me to *Foster v Stewart Scott Inc.* (1997) 18 ILJ 367 (LAC) where it was held that: 'It is trite law that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay.'

[28] The 1st respondents legal representative referred me to section 7 of the Promotion of Administrative Justice Act 3 of 2000 where it is stipulated that any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 of the person becoming aware that the proceedings instituted were concluded, or when that person had been informed of the administrative action or became aware of the administrative action and the reasons therefore and so forth.

[29] The 1st respondents legal representative furthermore referred me to the matter of *Brummer v Gorfil Brothers Investments (Pty) Ltd and others* 2000 (2) SA 837 (CC) where the Court in the context of condonation held the following: “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.”

[30] The 1st respondent’s legal representative referred me to the matter of: *Opposition to Urban Tolling Alliance v The South African National Roads Agency Limited* (90/2013) [2013] ZASCA 148 (9 October 2013). I quote the relevant portion of the judgment here below:

“[22] Apart from contesting the appellants’ challenge to the impugned decisions on its merits, the respondents relied on what has become known as the delay rule. Despite the appellants’ contentions to the contrary and for reasons that will become apparent soon, I believe we are compelled to follow the example set by this court in *Beweging vir Christelik Volkseie Onderwys and others v Minister of Education and others* [2012] 2 All SA 462 (SCA) para 44, by dealing with the delay rule first.

[23] Although the delay rule has its origin in common law, it now finds its basis in s 7(1) of PAJA which provides in relevant part: ‘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) . . . (b) . . . 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.'

[24] Section 9(1) provides, however, that the 180-day period 'may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal, on application by the person or administrator concerned'. Section 9(2) provides that such an application may be granted 'where the interests of justice so require'.

[25] As to the purpose and function of the delay rule under s 7(1) of PAJA and its common law predecessor, Nugent JA explained in *Gqwetha v Transkei Development Corporation Ltd and others* 2006 (2) SA 603 (SCA) paras 22-23: 14 '[22] It is important for the efficient functioning of 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 longstanding rule . . . is twofold: 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 a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Miller JA in *Wolgroeiërs Afslaeërs (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41E-F (my translation): "It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an 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.” [23] Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight (*Wolgroeiers Afslalers*, above, at 42C).’

[26] 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 the circumstances be condoned (see e.g. *Associated Institutions Pension Fund and others v Van Zyl and others* 2005 (2) SA 302 (SCA) para 47). Up to a point, I think, s 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 (see eg *Associated Institutions Pension Fund* para 46). 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 (see eg *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA) para 54).

[27] In its terms s 7(1) envisages asking when 'the person concerned' was informed, or became aware, or might reasonably be expected to have become aware, of the administrative action."

[31] On the review side of the application, the applicants referred me to the matter of *Nzimande v Nzimande & Another* 2005 (1) SA 83 (W), and specifically the portion where it was held that: 'it was not intended to automatically convert rights held under the R1036 regulations to more effective common law rights of leasehold or ownership without considering the availability, or lack thereof of new houses in the area, the need for family members' occupation rights to be recognized and protected and the need not to increase homelessness but to decrease it in the defined area.'

CONDONATION

[32] When regard is had to the portion of the founding affidavit which deals with condonation the 2nd applicant indicated that she has been advised that the review application: "could have been filed late as her husband passed away in 2017".

[33] From the founding affidavit it appears that the 2nd applicant only in July 2019 decided to launch the current review application and that she then contacted attorney Selamolela whom informed her that she could no longer assist her⁵. She then briefed attorney Hadebe to launch the current review application in July 2019.

[34] In the matter of Van Wyk⁶ the Constitutional Court expressed the following: An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable.

[35] The period the 2nd applicant was required to provide an explanation for, started from the date she and Malefetsane became aware of the appeal tribunal's decision, and it must cover the entire period until she lodged the current review application. Malefetsane and the 2nd applicant was married in community of property and thus the interest in the immovable property fell into the joint estate. Malefetsane has been aware of the appeal tribunal's decision as from 2003 / 2005 as on his version⁷, he tried to resolve the issue surrounding the immovable property being awarded to the 1st respondent, with

⁵ See paragraph 98

⁶ Van Wyk v Unitas Hospital and Another (CCT 12/07) [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC)

⁷ which can be found as annexure F to the founding affidavit

the 1st respondent through various informal structures like the street committees, the ANC, the Local Municipality and family meetings. The 2nd applicant in her answering affidavit then confirmed that Malefetsane involved the street committee and so forth and from her response it is evident that she knew Malefetsane engaged the street committees, ANC and so forth as he was trying to get the 1st respondent to relinquish his title to the immovable property. The 2nd application is thus required to provide an explain for the delay in instituting the review application as from 2003 / 2005 to October 2019.

[36] The 2nd applicant however pleaded that she only became aware of the 1st respondents title to the immovable property in 2009 when he launched the eviction application. As I have already indicated this statement is open to serious doubt but giving the 2nd applicant the benefit of the doubt, she thus had to explain the delay in launching the review application for the period 2009 to 2019.

[37] In her founding affidavit, the 2nd applicant has not dealt chronologically with the dates and times she interacted with attorney Hadebe or Selamolela over the period 2009 to 2019. The 2nd applicant averred that Malefetsane gave instructions to attorney Selamolela to launch a 2nd review application however the 2nd applicant did not plead the dates on which she or Malefetsane would have given attorney Selamolela instructions to launch the 2nd review application nor mentioned the dates on which they followed up with attorney

Selamolela on the execution of their instructions to her. There is also no confirmatory affidavit from attorney Selamolela attached to the founding or replying affidavits confirming the instructions.

[38] The period between the 2nd applicant's appointment as executrix in May 2017 to July 2019 is similarly vague and again there is no chronological pleading of dates and times where the 2nd applicant would have given instructions and followed up on the execution of her instructions, if any.

[39] The 2nd applicant acknowledged that she was served with the third eviction application in 2018 and stated that she briefed attorney Hadebe to represent her in that matter however, no explanation was tendered as to why the 2nd applicant did not brief attorney Hadebe to launch a review application at that stage or any sooner. In her replying affidavit the 2nd applicant claimed that she did not have funds to brief attorney Hadebe earlier. Save for this bald allegation the 2nd applicant had not explained why she had funds to brief attorney Hadebe in the eviction application but not to issue a review application, where she got funds from to eventually launch the review application and had not attached any proof that would support her lack of funds plea. The 2nd applicant should also have dealt with these facts in her founding affidavit and not raise it in reply for the first time.

[40] The 2nd applicant attested to the founding affidavit on 19 October 2019, it took the applicants from July 2019 to October 2019, a further three months to

lodge the current review application. What steps were taken over this period to expedite the filing of the review application was not included in the founding affidavit nor addressed in reply.

[41] The 2nd applicant seems to suggest that the settlement agreement reached between the 1st respondent and Malefetsane and the litigation that ensued over the years must also serve as mitigation for them not actively pursuing a review application. However, if regard is had to the litigation history, it appears that the 2nd applicant and Malefetsane only reacted to the eviction applications launched by the 1st respondent and on their own, evidenced no independent desire to approach the Courts with a review application or to enforce the disputed settlement agreement. On the 2nd applicant's version Malefetsane gave instructions for a 2nd review application to be filed yet no action was taken in that regard until July 2019, when the 2nd applicant issued instructions to attorney Hadebe to launch the current review application after attorney Selamolela informed the 2nd applicant that she could no longer assist her.

[42] The 2nd applicant alleged that it was in the interest of justice to allow the review as Malefetsane was never given the opportunity to state his case before the appeal tribunal and thus an injustice had occurred. Whether Malefetsane was afforded an opportunity to place his version or case before the appeal tribunal and had them consider it, also forms the basis for the review application.

[43] In this regard, the 1st respondent's version is that he filed his claim against Mr Lumkwana under case number 1690 however he and Mr Lumkwana settled their dispute. The 1st respondent attached as annexure AK 1, a judgment by consent to his answering affidavit. This judgment accords with the 1st respondent's version as it indicated that the 1st respondent and Mr Lumkwana settled their dispute in that Mr Lumkwana withdrew his dispute in favour of the 1st respondent and the 1st respondent is entitled to inherit the immovable property by virtue of interstate succession. The 2nd applicant does not dispute this portion of the 1st respondent's version.

[44] On the 1st respondent's version Malefetsane filed an application under case number 19562 which was dismissed, Malefetsane then appealed that decision which appeal was unsuccessful. The 1st respondent pleaded that it is only the citation of the applicant and respondent on the 1st page of the judgment which is incorrect. The file cover and the rest of the judgment is unaffected. The 2nd applicant deny that Malefetsane filed an application with the tribunal, that Malefetsane filed an appeal application or partook in any proceedings before the housing bureau or appeal panel.

[45] Having regard to the body of the judgment under case number 19562, it supports the 1st respondent's version rather than the 2nd applicant's version as it refers to the appellant as being the lodger (Malefetsane held a lodger's permit) who was married to Joyce (the 2nd applicant) and who wanted the immovable property to be a family home (Malefetsane wanted the immovable

property to be a family home). On the file cover Malefetsane is also indicated as a claimant. The 2nd applicant, in reply did not explain why Malefetsane's details would appear as a claimant if he was not part of the process and why all the details included in the body of the judgements accords with what is known about him and his position. In annexure F, attached to the founding affidavit, Malefetsane also indicated that he filed his own application with the housing tribunal although no case number was pleaded.

[46] The 1st respondent pleaded that regard must be had to his prejudice when condonation is considered. According to the 1st respondent the 2nd applicant attended all the hearings before the housing bureau and appeal tribunal and knew as from 2003 that the immovable property has been awarded to him. He has a right to finality and his rights must also be considered and respected. He and Frans had to vacate the immovable property due to the acrimony between the 2nd applicant's family and him, and the two of them had to rent other suitable accommodation. The 1st respondent wanted to sell the immovable property, yet the 2nd applicant and her family's continued occupation of the immovable property made it impossible for him to do so. The 2nd applicant and her family build another house on the immovable property without the 1st respondent's consent. The 1st respondent incurred the costs of 3 eviction applications seeking to enforce his right to the immovable property that has been awarded to him after he lodged his claim to the immovable property. The 1st respondent indicated that the 2nd applicant and her family had had ample time and opportunity to challenge the appeal panels judgment, yet they had failed to do so.

[47] The option to take the decision of the appeal panel on review was there for the 2nd applicant and her family to exercise if they felt aggrieved by the appeal panel's decision however this option must be exercised within a reasonable time. The 2nd applicant was aware of the time limits imposed on review applications as she and Malefetsane had to address the aspect of condonation in the 1st review application brought in 2009. The 2nd applicant has failed to adequately explain why, when it became evident that the 1st respondent was not going to abide by the terms of the disputed settlement agreement, did they not see to it that their instructions to proceed with the 2nd review application was properly executed or an order to enforce the disputed settlement agreement was obtained.

[48] As was alluded to by Nugent JA in the Gqwetha matter, the decision to take public bodies decisions on review must be done without undue delay as it has the potential to cause prejudice.

[49] As was pointed out by the applicant's legal representative in the Foster v Stewart matter. The factors a court needs to weigh are not individually decisive but are interrelated and must be weighed against each other and in weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay.

[50] The appeal in this matter has been finalised in 2003. At the very least the 2nd applicant had been aware of the 1st respondents title to the immovable property since 2009 when the 1st respondent launched the first eviction application. In 2017 Malefetsane passed away and the 2nd applicant was appointed as executrix in May 2017. The 2nd applicant signed her affidavit in October 2019.

[51] The delay in lodging the review application is excessive and the reasons advanced in explaining the delay are poor to say the very least. The applicants' prospects of success with the review are slight as prima facie it would appear that Malefetsane did have an opportunity to present his case to the appeal tribunal and same was considered.

[52] Weighing all the factors, the applicants have failed to make out a proper case for condonation and condonation is therefore refused.

WHEREFORE THE COURT ORDERS THAT:

1. The application is dismissed, with costs.

J M BEZUIDENHOUT AJ
Acting Judge of the High Court

DATE OF HEARING: 19 October 2021

DATE OF JUDGMENT: 9 February 2022

For the Applicant: T Radebe

For the Respondent: WB Ndlovu