

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, JOHANNESBURG)**

**CASE NO: 2017/0027774**

<b>(1) REPORTABLE: NO</b>	
<b>(2) OF INTEREST TO OTHER JUDGES: NO</b>	
.....04/02/2022.....	
<b>DATE</b>	<b>SIGNATURE</b>

In the matter between:

**KARIKI PIPELINE AND WATER PROJECT (PTY) LTD**

Applicant

and

**RAND WATER BOARD**

First Respondent

**CHIEF EXECUTIVE OFFICER: RAND WATER BOARD**

Second

Respondent

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**J U D G M E N T**

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**MOKUTU AJ:****Introduction**

1. This matter came before me on 8 March 2021 and at the conclusion of the argument, I gave judgment and ordered as follows:
  - 1.1. the application for the amendment of the notice of motion be dismissed with costs; and
  - 1.2. the costs of the previous postponement in the matter (prior 8 March 2021) be costs in the review application.
2. The said order was as a result of the oral judgment that I had granted, although the reasons were recorded on case line.
3. On 29 November 2021, I received a letter from the respondent's attorneys addressed to me, along these lines:

“ ...

*We refer to the above matter and the order handed down by the Honourable Acting Judge Makutu (sic) on 08 March 2021, which was uploaded on Vaselines (sic) on 01 July 2021.*

*Kindly note that this was an interlocutory application to amend our client's notice of motion, which was dismissed with costs.*

*Kindly note further that we then subsequently applied for the hearing of the main action before the Honourable Judge Mahalelo, who removed the matter from the roll for reasons which indicated that the Honourable Judge Makutu (sic) may have erred in dismissing our client's interlocutory application.*

*Our client has instructed us to request written reasons for that order.*

*To that end, we humbly request that you provide us with written reasons or an indication on when we can expect the written reasons. ...”*

4. Upon receipt thereof, on 3 December 2021, I sought clarity from the respondent's attorneys in that paragraph 3 of the said letter, insofar as it was recorded that honourable Judge Mahalelo had removed the matter from the roll on the basis that I had erred in dismissing the respondent's application for amendment.
5. On a reading of Judge Mahalelo's order of 15 November 2021, the contents thereof are at odds with paragraph 3 of the respondent's attorneys aforesaid letter dated 29 November 2021. For ease of reference Judge Mahalelo's order was to the effect that:

***“IT IS ORDERED: -***

1. *That the First and second Respondents are directed to comply with Rule 53(1)(b) and dispatch to the Registrar the full record of the tender proceedings for Tender No. RW 01177/17.*

2. *That the first and second respondents are directed to comply with prayer 1 above within 10 days of this order.*
3. *That the First and Second Respondents be ordered to pay the costs of this application jointly and severally, the one paying the other absolved. ...”*
6. Subsequently, on 6 December 2021, I received an email communication from the respondent’s attorneys which, *inter alia*, sought to clarify paragraph 3 of their aforesaid letter dated 29 November 2021 and it was recorded that the respondent’s merely sought reasons for the order that I had granted on 8 March 2021.
7. It is noteworthy that between 8 March 2021 and 6 December 2021, I was not made aware that the respondent would seek reasons flowing for my order of 8 March 2021. Same was only brought to my attention, as I have stated above, only on 6 December 2021.
8. On 6 December 2021, I requested the recording of the hearing on case line through the secretary/clerk, which recording was made available to me on 14 December 2021. However, the said recording expired within 7 days from the date of receipt and I had to seek another recording which was mailed to me on 17 January 2022.
9. It is in that context that my reasons for judgment and order which were recorded on case line (on 8 March 2021) are being furnished and or communicated to the parties as at present.

Brief background facts

10. The applicant approached this Court by way of an interlocutory application. The applicant sought to amend its notice of motion as contemplated in Rule 28(1) of the Uniform Rules. In terms of Rule 28(1) of the Uniform Rules, any party desiring to amend any pleading or document other than a sworn statement filed in connection with any proceedings, shall notify all other parties of his/her intention to amend and shall furnish particulars of the amendment.
11. The dispute between the parties was in relation to how the initial notice of intention to amend the notice of motion was initiated, suffice to state that, in due course, the applicant filed its notice of intention to amend. On a closer examination of the notice of intention to amend, the applicant sought a prayer to the effect that the respondent had intentionally allowed the tender validity period of 180 days to lapse, which according to the applicant was unlawful.
12. The applicant further sought, in the alternative, a prayer that the applicant be paid damages in the amount of R53 million or so, to be incorporated in its notice of intention to amend its notice of motion.
13. The question before me, therefore, was whether, the Court had the authority to grant or refuse an amendment in circumstances where, on the applicant's own version, the applicant became aware of the decision affording it preferred

bidder status (administrative action), allegedly, on 2 September 2016 in circumstances where the review application was launched after expiry of 180 days calculated from 2 September 2016.

The delay rule

14. It is common cause fact that the 180 days period calculated from 2 September 2016, in terms of section 7<sup>1</sup> of Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) lapsed on or about 7 March 2017. At that time the applicant had not instituted review application proceedings either to compel the respondents or to pursue the matter.

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- <sup>1</sup> (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 become aware of the action and the reasons.
- (2) (a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted. (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act. (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.
- (3) The Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act 107 of 1985), must, before 28 February 2009, subject to the approval of the Minister, make rules of procedure for judicial review.
- (4) Until the rules of procedure referred to in subsection (3) come into operation, all proceedings for judicial review under this Act must be instituted in a High Court or another court having jurisdiction.
- (5) Any rule made under subsection (3) must, before publication in the *Gazette*, be approved by Parliament.

15. However, the applicant's case was that in July 2017, the applicant approached the respondent and sought information (around the tender validity period) in terms of the Promotion to Access Information Act 2 of 2000 ("PAIA") application, not necessarily the PAJA application. In my view, the question whether the Court can consider and/or grant or refuse an amendment, also has a bearing on the merits of the case.
  
16. Mr Tsatsawane, on behalf of the respondent, made three submissions on the nature of the proposed amendment. To summarise, he contended that the relief sought was bad in law in that the cancellation of a tender did not amount to an administrative action, in law. Even if I was inclined to grant the amendment, so went the argument, the issue at hand was, in the event the amendment sought was granted, there existed little prospects of success in the main review application.
  
17. As I have stated above, the thrust of Mr Tsatsawane's contention was that because the decision to cancel a tender did not amount to an administrative action.
  
18. I was in agreement with Mr Tsatsawane's submission in that regard. I should not, however, be construed as making a finding of fact on the merits of the pending review application (in the reviewing Court).

19. Furthermore, Mr Tsatsawane submitted that the relief sought in the amendment was sought outside the 180-day period, it being a stand-alone ground of review, that the respondent allowed the tender to lapse.
20. According to the applicant's counsel, Ms Ntingane, the circumstances that led to the lapse of tender validity period were unclear and/or the merits thereof were yet to be debated by the reviewing Court.
21. It was further submitted, on behalf of the respondent, in countering the applicant's argument that the condonation application had not been launched by the applicant (as it should have) and reliance was placed on the judgment of *Passenger Rail Agency of South Africa v Siyangena Technologies (Pty) Ltd.*<sup>2</sup>
22. It was also, in the main, further contended, on behalf of the respondent, that the damages claim of R53 million militated against the grant of the sought amendment purely because the applicant had invoked review application proceedings and sought damages and in law and in general, damages claims are non-suited in application proceedings.
23. In *MEC of Health, EC v Kirland Investments*,<sup>3</sup> the Constitutional Court held that:

*"[81] The Supreme Court state that the approval was, on Dr Diliza's own evidence, tendered by the department, 'invalid'. This was incautious. The*

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<sup>2</sup> 2020 JDR 2740 (GP).

<sup>3</sup> 2014 (3) SA 481 (CC) at para. 82.



approval was not before the court. But the court itself said so. It pointed out that the validity of the approval 'is not the subject of challenge in these proceedings. So it is wrong to take its statement as a definitive finding. The court was merely categorising Dr Diliza's conduct for the purpose of reaching the issue that was in fact before it, namely whether Mr Boya was entitled to revoke her approval. The court was saying that, even on the department's version, its legal; argument must fail.

[82] **All this indicates that this court should not decide the validity of the approval. This would be in accordance with the principle of legality and also, if applicable, the provisions of PAJA. PAJA requires that the government respondents should have applied to set aside the approval, by way of formal counter-application. They must do the same even if PAJA does not apply. To demand this of government is not to stymie it by forcing upon it a senseless formality. It is to insist on due process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.**

24. Preller, J,<sup>4</sup> specifically held that:

**“[16] ... Returning to the question whether the plaintiff has employed the incorrect procedure it is indubitably correct that an undiluted constitutional issue should be raised by way of motion**

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<sup>4</sup> In *The South African National Roads Agency SOC Ltd v Face First Media (Pty) Ltd and Others* [Unreported] Case No. 69993/2014 GNP at para 16.

***proceedings... The plaintiff could not be heard to argue to the contrary.”***

25. The importance of condonation application was recently restated in the ***Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited***.<sup>5</sup> Importantly at paragraph 47, the Court held that:

*“[47] However, this time period is not absolute. Section 9 of PAJA provides a mechanism for extensions:*

*(1) The period of—*

*(a) 90 days referred to in section 5 may be reduced; or*

*(b) 90 days or 180 days referred to in sections 5 and 7 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....*

*When the delay is longer than 180 days, a court is required to consider whether it is in the interests of justice for the time period to be extended.”*

26. As far as the application before me was concerned, the founding affidavit in support of the amendment application made mention of the late filing of the replying affidavit, however, the applicant sought to deal with the extension in terms of section 7 read with section 9 of PAJA. The difficulty that I had was that the said affidavit did not explain what had transpired between 2 September 2016 and March 2017.

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<sup>5</sup> 2019(4) SA 331 (CC) between paras. 46 – 50.

27. In any event, the same affidavit recorded the fact that the applicant contended that the review application was launched within the required 180-day period as contemplated in PAJA. If that was the case, it begged a question why the condonation application was filed, if the applicant was of the view that the review application was launched within the 180-day period as contemplated in section 7(1) of PAJA.

Conclusion

28. In the result, I was not convinced that the applicant had made out a case for the grant of the relief sought in the notice of motion based on what I have already stated on record.
29. If the Court were inclined to grant the amendment sought by the applicant it was, in my view, undesirable to do so because the amendment sought, if granted, would not have result in any meaningful debate between the parties on account of the dates that had *ex facie* been pleaded before me which related to 2 September 2016 and March 2017.
30. In my view, the applicant ought to have applied for an extension of the period in terms of section 9 of PAJA and in any event, it would have been incompetent of me to grant an amendment which would be faced with an exception to the effect that damages claim, as I have stated, are non-suited for application proceedings.

31. In the result I granted the following order.

**ORDER**

31.1. the application for amendment of the notice of motion is dismissed with costs;

31.2. the costs of the previous postponement in the matter, prior to 8 March 2021, would be costs in the review application.

32. I was not prepared to entertain the costs occasioned by the postponement of the previous matter on the previous occasion, simply because those facts are/were not placed before me, however, it is for the reviewing Court when it deals with the merits of the review application, in its totality, that all costs incurred by the parties in as far as the merits of the application are concerned would be dealt with.

**MOKUTU AJ**

**ACTING JUDGE OF THE HIGH COURT**

Date of hearing: 8 March 2021

Judgment and order communicated: 8 March 2021

Written reasons for judgment sought: 6 December 2021

Date of communicating written reasons: 4 February 2022

Attorneys for Applicant: Rambevha Morobane Attorneys

Counsel for the Applicant: Adv Siphoh Mahlangu (did not appear)

Adv Neo Ntingane (argued the matter)

Attorneys for Respondent: Raborifi Attorneys Incorporated

Counsel for the Respondent: Adv Kennedy Tsatsawane SC

Adv. Tumelo Loabile-Rantao