REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 17622/2015

24/11/17

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

24/11/2017
DATE

SIGNATURE

In the matter between:

NKENSANI ELLEN MATSUVUKI Applicant

and

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Respondent

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J U D G M E N T

TEFFO, J:

INTRODUCTION

[1] The applicant seeks to review and set aside the decision taken by the respondent ("the Minister") on 25 March 2011 to reconsider his earlier

decision to reinstate her to her position which she held with the Department of Justice and Constitutional Department (" the Department").

[2] She also seeks an order that she be reinstated to her position as at 7 December 2006 with no loss of benefits.

[3] The applicant has also filed an application for condonation for the late filing of her application.

[4] The application emanates from the termination of the applicant's employment in the Public Service on 16 July 2007 after she failed to report for duty for a period in excess of 30 days without authorisation. She unsuccessfully made representations to the Minister for her reinstatement. She alleges that she later learnt that the Minister had approved her application for reinstatement but reversed his decision. She challenges the decision taken by the Minister to reconsider his earlier decision that approved her application for reinstatement.

[5] The applications are opposed.

[6] The Minister also sought condonation for the late filing of his answering affidavit to the applicant's application for condonation. The application was not opposed and it was accordingly granted.

BACKGROUND

[7] The applicant was employed by the Department of Justice and Constitutional Development ("the Department") in August 1989 as a Senior Administration Clerk. She was stationed at Malamulele Magistrate's Court.

[8] During December 2006 she was absent from work for a period exceeding 30 days. Her employment was terminated on 16 July 2007 with immediate effect from 7 December 2006 in terms of Section 17(5) of the Public Service Act ("the PSA").

[9] She referred the matter to the General Public Service Sectoral Bargaining Council ("*the Bargaining Council*") in October 2008.

[10] On 10 November 2008 the Bargaining Council ruled that it did not have jurisdiction to hear the matter.

[11] On or about 23 March 2009 the applicant made representations to the respondent in terms of section 17(5)(b) of the PSA.

[12] On 25 March 2011 she was advised that her application for reinstatement in terms of section 17(5)(b) of the PSA was declined.

[13] She requested reasons for the decision not to reinstate her.

[14] She alleges that she received correspondence from the Regional Office of the Department on 6 April 2011 where she was advised that her

application for reinstatement was approved by the Minister on 5 July 2010. The correspondence further stated that the approval of her application to reinstate her to her position was made without certain documents which the Regional Office of the Department later sent to the Minister. It was explained to her that the Minister reversed his decision to reinstate her to her position after all the relevant documents were sent to her.

[15] Having been aggrieved by the Minister's decision not to reinstate her, the applicant referred the matter to the Bargaining Council again on 8 April 2011. She alleged that the dispute arose on 17 July 2007 and also applied for condonation for the late referral of the dispute. The Bargaining Council refused to grant condonation. It dismissed the matter on the basis that it did not have jurisdiction to hear it as it was previously arbitrated in October/November 2008.

[16] The applicant successfully reviewed the condonation ruling in the Labour Court. The Labour Court granted condonation and referred the matter back to the Bargaining Council for adjudication.

[17] The matter was heard in May 2012 and August 2012 by two different panellists for the reasons that will become clear in the judgment and it was dismissed.

[18] When the applicant launched the present application in March 2015, she did not bring an application for condonation. The issue of condonation

was raised in the Minister's answering affidavit but despite this, the applicant still filed the replying affidavit without an application for condonation. The application for condonation for the late filing of this application was only filed in January 2016.

[19] During 2013 the applicant referred the matter to the Labour Court. Shortly after the Minister had filed his statement of defence to the applicant's statement of claim in the Labour Court, she withdrew the proceedings.

[20] The proceedings were never pursued during 2014 and in March 2015 the present application was launched.

THE PARTIES' CONTENTIONS

THE APPLICANT

[21] The applicant alleges that in December 2006 she became sick. She could not execute her duties. She applied for temporary incapacity leave due to ill-health which was granted for a period of forty-one (41) working days pending the outcome of the SOMA initiative.

[22] The leave expired before the outcome of the SOMA initiative. She was ordered to report for duty on or about 5 July 2007. She alleges that she advised the respondent that she was still not fit to resume her duties. She made a request to utilize her vacation leave days pending the outcome of her

application to be discharged from her duties because of ill-health. She alleges that she addressed the correspondence to the Regional Office of the Department.

[23] She further alleges that her employment was terminated on 16 July 2007 with immediate effect from 7 December 2006. On or about 21 August 2007 her application for temporary incapacity leave was declined. She contends that her employer terminated her employment without even waiting for the outcome of the SOMA initiative relating to her application for temporary incapacity.

[24] Subsequent to the termination of her employment, she referred the matter to the Bargaining Council for adjudication. She contended that her dismissal was unfair because she never absented herself from duty without permission. She contends that she submitted all her sick leave notes for all the days she was absent from work. The Bargaining Council dismissed the matter for lack of jurisdiction. She was advised to invoke the provisions of section 17(5)(b) of the Public Service Act 103 of 1998 ("*the PSA*").

[25] Section 17(5) has been substituted by section 17(3) in terms of section 25 of Act 30 of 2007. Section 17(5)(a) provided that an officer, other than a member of the services or an educator or the Agency or Service, who absents himself or herself from his or her official duties without the permission of his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been dismissed from the public

service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of duty.

[26] Section 17(5)(b) provides that if an officer who is deemed to have been so discharged, reports for duty at any time after the expiry of the period referred to in paragraph (a), the relevant executing authority may, on good cause shown and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that officer in the public service in his or her former or any other post or position, and in such a case the period of his or her absence from official duty shall be deemed to be absence on vacation leave without pay or leave on such other conditions as such authority may determine.

[27] On or about 23 March 2009 the applicant made representations in terms of section 17(5)(b) of the PSA to the Minister for her reinstatement to her position.

[28] On or about 25 March 2011 she was informed that her application for reinstatement in terms of section 17(5)(b) of the PSA was declined. She requested reasons for the decision not to reinstate her.

[29] The Regional Office of the Department advised her on or about 6 April 2011 through correspondence that the Minister had approved her application on 5 July 2010. She avers that the approval by the Minister was never sent to her. She refers in this regard to Annexures "M5" and "M5.1" attached to her

papers. "M5" is a letter from the Regional Office of the Department dated 5 April 2011 addressed to Mr Matsuvuke and it reads:

> *"Dear Mr Matsuvuke*
>
> *APPLICATION FOR REINSTATEMENT: MS N E MATSUVUKE*
>
> 1. *Your email messages dated 29 March 2011 and 4 April 2011 regarding the above has reference.*
>
> 2. *The memorandum signed by the Minister on 5 July 2010 did not include the report regarding the fact that Ms Matsuvuke was referred to Employee Assistance Programme and the complaint by the community which was broadcasted on SABC 2 Morning Live programme. It was the view of the Regional Office that all the information relating to Ms Matsuvuke's matter be referred to the Minister to assist him in taking an informed decision.*
>
> 3. *It was on the basis of all the facts contained in the Memorandum that the Minister did not approve Ms Matsuvuke's application for reinstatement in the public service."*

[30] "M5.1" is a memorandum from the Regional Office of the Department to the Minister wherein the Regional Office recorded their recommendations to the Minister.

[31] The applicant further alleges that the Regional Office of the Department advised her that when her application for reinstatement was approved by the Minister, certain documents did not serve before him. After receipt of the Minister's decision which approved her application for reinstatement, the Regional Office sent the outstanding documents to the Minister and requested him to review, alternatively reconsider his decision, which he did and as a result, he reversed his decision to reinstate her. The

applicant contends that Minister could not reconsider the decision made by him. That decision was according to her final and could not be reversed, so it was contended.

[32] Subsequent thereto she referred the matter to the Bargaining Council as an unfair dismissal dispute. She was advised to apply for condonation for the late referral of the dispute which she did and the application was refused. She successfully referred the condonation ruling to the Labour Court. The Labour Court granted condonation and referred the matter back to the Bargaining Council for adjudication by a different panelist. The Bargaining Council again dismissed the matter for lack of jurisdiction and advised her to approach the High Court or Labour Court.

[33] With the assistance of her previous attorneys of record, she referred the matter to the Labour Court. The Department opposed the matter and no further documents were filed. Her previous attorneys advised her to withdraw the matter in the Labour Court and the matter was subsequently withdrawn.

[34] She terminated the services of her previous attorneys of record and invoked the services of her new attorneys of record who advised her to bring this application.

[35] She contends that the decision taken by the Minister to reinstate or not reinstate her, constitutes an administrative action.

[36] She also contends that when the Minister exercised his discretion in terms of section 17(5)(b), by approving her application for reinstatement on 5 July 2010, he was *functus officio*. He could not as such change the decision without offending the *functus officio*, so it was accordingly argued.

THE MINISTER

Point *in limine*: Undue delay in instituting proceedings

[37] The Minister contended that the applicant's employment was terminated in 2007. It was contended that after the applicant had unsuccessfully referred her unfair dismissal dispute to the Bargaining Council and her application for reinstatement in terms of section 17(5), the last outcome having been received in August 2012, she referred the matter to the Labour Court in November 2012, after a period of a year and few months had lapsed. He opposed the matter in December 2012 and for the entire year in 2013 and 2014 the applicant failed to pursue the matter. She has now launched the present application in March 2015 without an application for condonation.

[38] It was contended that the applicant unreasonably delayed in launching this application to his prejudice. He has already appointed another employee in the position of the applicant in view of the passage of time. The applicant has applied for her pension benefits and they were paid to her.

[39] The applicant launched this application after the expiry of a considerable period without a condonation application.

[40] The condonation application was brought in January 2016 eight months after the replying affidavit was filed despite the fact that she was advised in the answering affidavit that she should have brought an application for condonation.

[41] She seeks to challenge a decision that was taken in 2011. She always knew the facts upon which she now seeks a declaratory order.

[42] It was contended that the applicant failed to pursue the matter in 2013 and 2014 after she withdrew it in the Labour Court. The Department assumed that the issues between it and the applicant had been laid to rest, so it was further contended. The applicant failed to give an explanation as to why she did not pursue the matter during 2013 and 2014, so, it was accordingly submitted.

[43] It was contended that the applicant also failed to explain what happened during the period of about eight to ten months after the undue delay was brought to her attention by the Minister in his answering affidavit.

[44] The Minister contends that in her condonation application, the applicant has failed to address the prospects of success in the application she is pursuing. It was contended that the alleged memorandum which purportedly

reinstated the applicant to her position was written by the officials of the Minister at the Regional Office of the Department. It was not addressed to the applicant and neither did it create any contractual relationship between her and the Department.

[45] The Department is unreasonably prejudiced by the applicant's failure to prosecute her claim once and for all. She has referred her matter to different forums and this has huge financial implications to it as it has to seek legal advice every time the applicant initiates an application against the Minister arising from the same facts, so it was argued.

[46] It was contended that the applicant was paid all her pension monies in 2015 and the Department considered the matter to have been finalised. The position previously held by the applicant has been filled.

[47] It was argued that the respondent has failed to explain why she elected to pursue an unfair dismissal dispute instead of reinstatement, which she has always known since 2011.

[48] The applicant alleges that the reason for bringing the application late was because of the legal advice she received from the time her employment was terminated.

[49] She blames her previous attorneys for giving her wrong advice and contends that she should not be punished for the wrong advice she has been getting since the inception of the matter.

[50] She gave the history of the matter as she did in the founding affidavit and contended that the chronology of the events as highlighted, proffers a *bona fide* and indisputable explanation for any undue delay in bringing the application.

[51] She alleges that she is not aware of any prejudice which might be suffered by the Department as a result of her alleged undue delay in bringing the application. She contends that on the contrary, she will be severely prejudiced if her application is not heard. She has been suffering since the termination of her employment with the Department in 2007 to date and submitted that she has good prospects of success for the reasons set out in the main application.

THE ISSUES

[52] Whether the applicant is entitled to condonation.

[53] Whether the decision made by the Minister in terms of section 17(5)(b) of the PSA constitutes an administrative act.

[54] Whether at the time the Minister reviewed, alternatively reconsidered his earlier decision, he was *functus officio* or whether he had lawful authority to do so.

THE LAW

[55] Section 7(1) of the Promotion of Access to Justices Act 3 of 2000 (PAJA) provides:

> "*(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.*"

[56] In *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited* [2013] 4 All SA 639 (SCA) at para [26] the court referred to the two-stage enquiry at common law and proceeded to explain:

> "*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."

[57] There is a longstanding rule of our common law that proceedings for judicial review of the decisions of public bodies must be instituted without undue delay. If there has been an unreasonable delay, a court may in the exercise of its inherent power to regulate its own proceedings, refuse to determine the matter. In this manner an invalid decision may, in a sense, be validated. The reasons for the rule are said to be twofold. First, it is desirable and important that finality should be reached within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administrative justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long time has elapsed. The second reason is the inherent potential prejudice involved in failure to bring a review within a reasonable time, not only to a party affected by the decision but also to the effective functioning of the public body in question and to third parties who may have arranged their affairs in accordance with the decision. For this reason proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay. The extent of the prejudice is, however, a relevant consideration and may be decisive when the delay has been relatively slight. The application of the rule requires answering the two questions, namely:

(a) Was there an unreasonable delay?

(b) If so, should the unreasonable delay be condoned?

Although the first question implies a value judgment, it entails a factual enquiry. The second question involves the exercise of a judicial discretion. Both questions must of course be answered in the light of the facts and circumstances of the particular case (see *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 38H-42D; *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoer Kommissie en 'n Ander* 1986 (2) SA 57 (A) at 86A-G; *Gqwetha v Transkei Development Corporation Limited* [2006] 3 All SA 245 paras [22] to [24]; *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) paras [46] to [48]).

[58] In *Van Wyk v Unitas Hospital* [2007] ZACC 24; 2008 (2) SA 472 (CC) para [20], the court held that an essential requirement for condonation for the unreasonable delay is an explanation that is full which covers the entire period of the delay (see also *Camps Bay Rate Payers' and Residents Association v Harrison* [2010] ZASCA 3).

ANALYSIS

WAS THERE AN UNREASONABLE DELAY?

[59] Section 9(1) of PAJA provides that the period of 180 days referred to in section 7 may be extended for a fixed period by agreement between the parties or by a court on application by the person concerned. The court may

grant an application in terms of section 9(1) where the interests of justice so require.

[60] While the applicant has filed an application for condonation, her counsel argued that because she relies on the principle of legality in her application, there was no need for her to apply for condonation. I do not agree. Counsel for the respondent correctly argued that the applicant realises she is out of time in bringing the review application under PAJA, she now relies on common law. In this case the Minister's decision falls within the definition of "*administration action*". In my view it makes no difference whether the question of unreasonable delay is decided in terms of common law or PAJA.

[61] The applicant seeks to review a decision that was taken in March 2011. The application was launched in March 2015, four years after the decision she seeks to review was taken. A delay of approximately 3 years was found to be clearly inordinate in *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA (CC) at para [54]. Although each case must be decided on its own facts, a delay of four years, is far longer than the period of 180 days.

[62] The applicant gave a history of the matter which I referred to under background which is common cause between the parties. From her explanation she referred the dispute to the bargaining in 2008. The last time the dispute was heard at the Bargaining Council was in August 2012. There is

an issue of a referral of the dispute as an unfair dismissal and later as an application for reinstatement in terms of section 17(5)(b) of the PSA. There was also a referral of the matter to the Labour Court which granted condonation and referred the matter back to the Bargaining Council. After the dismissal of the matter by the Bargaining Council, the applicant eventually referred the matter to the Labour Court in November 2012. Nothing happened in 2013 and 2014 long after the Department opposed the matter. The applicant has not explained the reason why she did not pursue the matter in 2013 and 2014. All what she states is that she obtained wrong advice from her previous attorneys of record from the time she was advised of her termination of employment. She also does not explain what happened from the time she received the respondent's answering affidavit raising the issue of condonation up to the time she filed the application.

[63] The applicant alleges that she knew of the events that led to the decision taken by the respondent in April 2011. In my view there is no acceptable explanation for the delay for the reasons advanced above. A delay of four years in bringing the application is, in my view, unreasonably long.

SHOULD THE DELAY BE CONDONED?

[64] The applicant has taken her pension benefits in 2015. I agree that this was a sign that she had considered the dispute between her and the Department to have been resolved. She had moved on and it was reasonable

for the Department to also move on. The contention by the applicant that the respondent was always aware that she was still prosecuting the dispute and should have waited before filling her post, has no merit because she had withdrawn her pension benefits. She could not pursue her dispute after withdrawing her pension benefits. The relief sought is unreasonable and grossly prejudicial to the Department. If the applicant wants to return to the Department as an employee, she has to apply for employment. The Department has moved on. Another person has been appointed in the position which the applicant previously occupied.

[65] The fact that the applicant does not bring the matter to finality also prejudices the respondent. The proceedings started in 2008 at the Bargaining Council. Causes of action of the applicant keeps on changing from forum to forum depending on the outcome of the matters taken there. The applicant cannot litigate indefinitely. It is in the interest of justice to bring the matter to finality once and for all within a reasonable time. Unreasonable delay in bringing the matter to finality affects the effective functioning of the Department and service delivery. In my view the prospects of success, the nature of the application, and the merits thereof do not favour the applicant. The period of delay was unreasonably long and the explanation thereof was not satisfactory. In the exercise of my discretion I conclude that the delay should not be condoned.

[66] It will therefore not be necessary to deal with the other issues raised.

[67] The respondent raised the issue of jurisdiction for the first time in his heads of argument. It was contended that the applicant started her matter in the labour tribunals and also referred it to the Labour Court. She should have completed the proceedings in the Labour Court and not come to the High Court. I did not find it necessary to deal with the issue. A party's case is made in the pleadings. The issue has not been raised in the pleadings.

[68] Consequently I grant the following order:

68.1 The application is dismissed with costs.

M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

On behalf of the applicant	J C Prinsloo
Instructed by	Thandi du Plessis Attorneys
On behalf of the respondent	K Magano
Instructed by	The State Attorney
Date of hearing	20 April 2017
Date of judgment	24 November 2017