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| Reportable: | YES / NO |
| Circulate to Judges: | YES / NO |
| Circulate to Magistrates: | YES / NO |
| Circulate to Regional Magistrates: | YES / NO |

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE HIGH COURT, KIMBERLEY**

Case No: 2597/2021
Heard on: 09/09/2022
Delivered on: 27/01/2023

In the matter between:

JOSEPH REED

APPLICANT

and

**MEC FINANCE, ECONOMIC AFFAIRS AND
TOURISM, NORTHERN CAPE**

1ST RESPONDENT

THE NORTHERN CAPE LIQUOR BOARD

2ND RESPONDENT

**THE CHAIRPERSON NORTHERN CAPE LIQUOR BOARD
CHIEF EXECUTIVE OFFICER, NORTHERN CAPE**

3RD RESPONDENT

LIQUOR BOARD

4TH RESPONDENT

JUDGMENT

MAMOSEBO J:

- [1] On 23 September 2016 this Court in Case Number 893/2016 denied the applicant condonation for his failure to serve the first respondent, the MEC for Economic Development and Environmental Affairs, Northern Cape, and the second respondent, Chief Executive Officer, Northern Cape Liquor Board, (the

respondents) with a Notice of intended legal proceedings as contemplated in s 3(1) and (2) of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002¹. The applicant was out of time by a period of twelve (12) years. His application, which emanated from a judgment by Tlaletsi AJ, then, under Case No 26/2003 granted on 30 May 2003, was dismissed with costs. He was unsuccessful in his application for leave to appeal the court's decision. He subsequently petitioned the Supreme Court of Appeal (the SCA) which was dismissed but he could not remember the dates and the details thereof are not in the court file. This Court in 2016 had found that the debt was extinguished by prescription. The applicant now in the case before me under Case Number 2597/2021 against the four cited respondents brings this application for condonation and rescission of the judgment of 23 September 2016 because, according to him, it was induced by fraud purportedly committed by the respondents by concocting a letter purportedly from the liquor board addressed to his legal representative, one Mr Theunissen.

Issues to be determined

[2] The issues that stand for determination are the following:

- 2.1 Whether the applicant has met the requirements for condonation; and
- 2.2 Whether the applicant has made out a case for the rescission of the judgment under Case No 893/2016 granted on 23 September 2016.

¹ Section 3(1) and (2) of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002 stipulates: Notice of intended legal proceedings to be given to organ of state

- (1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-
 - (a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or
 - (b) the organ of state in question has consented in writing to the institution of that legal proceedings-
 - (i) without such notice; or
 - (ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).
- (2) A notice must-
 - (a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4 (1); and
 - (b) briefly set out-
 - (i) the facts giving rise to the debt; and
 - (ii) such particulars of such debt as are within the knowledge of the creditor.

Condonation

- [3] Condonation is not to be had merely for the asking. In *Uitenhage Transitional Local Council v South African Revenue Service*² the Supreme Court of Appeal stated:

*“One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; **a full, detailed and accurate account of the causes of the delay and their effects must be furnished** so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, **if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.**”* (Emphasis added)

- [4] Mr Babuseng, counsel for the applicant, submitted that the application for condonation pivots on the report by the Premier’s office following a complaint by the applicant around 2021. No specific date is provided nor did the judgment by Snyders AJ form part of the papers. The respondents oppose the admission of the Premier’s report on the basis that, first, its author did not file a confirmatory affidavit, secondly, the report, said to be investigative in nature, falls short of the standard of what and how an investigative report ought to be; neither does it specify its terms of reference. At the very least, so the argument goes, it can be regarded as an internal memorandum not binding on the Liquor Board. It further lacks details on the evidence of witnesses consulted and their credibility. More importantly, the respondents deny that they committed any fraud.

- [5] These are the reasons for the delay relied on by the applicant deposed to in the founding affidavit. Without specifying the dates but using the term ‘*immediately*’ after judgment was handed down in Case No 893/2016, the applicant states that he sought leave to appeal the judgment but it was refused. He then petitioned the SCA but his petition was dismissed. The application for leave to appeal was heard on 07 November 2016 and judgment

² 2004 (1) SA 292 (SCA) para 6

was handed down on 11 November 2016. The date when the petition was dismissed is unspecified and there is no proof thereof on file. On 10 May 2017, without indicating the period that lapsed between the dismissed petition and this date, he addressed a letter to the Chief Executive Officer (CEO) of the Northern Cape Liquor Board (NCLB) asking, strangely, for the file of Mr Theunissen and the attendance register of the meetings held with Mr Theunissen. He claims that the respondents failed to favour him with the information as requested. He also launched separate applications under Case No's 1179/2018 and 731/2018 the details of which were unspecified and the papers thereof are not in the court file. On 16 October 2020 under Case No 1526/2020 he launched an application to compel the respondents to furnish him with a copy of the transcript of the hearing held in 2004, 16 years later, when he applied for a permanent liquor licence. The application to compel was dismissed on 29 October 2021 but the judgment does not form part of the papers. He then complained about the respondents' alleged refusal to avail the transcript to him to the office of the Premier which he maintains he made in 2019, two years before the judgment was delivered.

- [6] The Court gave its judgment on the matter on 26 September 2016. The rescission application was evidently triggered by the report from the office of the Premier which was signed in July 2020 and addressed to Mr A Vosloo, MEC for Economic Development and Tourism, under a covering letter dated 11 August 2020. It is unclear from the papers why the applicant only approached the Court with his rescission application in December 2021 (five years after the judgment was handed down). There is a further unexplained lapse of about 16 months from after he had obtained the Premier's report to launching the application.
- [7] The deponent to the answering affidavit, Ms Thandiwe Modibela, CEO of the NCLB countered the applicant's submissions by furnishing this explanation. There was a meeting held between the members of the respondents and the applicant on 22 December 2017 where he was informed that the NCLB records are only archived for five years and since he was requesting records of events that occurred in 2004 from the NCLB the records no longer exist.

The attendance register and the minutes of the meeting were attached to the papers to confirm that the meeting took place and was attended by Mr Reed, the applicant.

[8] It is the respondents' case that they have suffered prejudice caused by the piecemeal litigation that the applicant has pursued as already explained. As at 2019 the financial prejudice stood at R747,726.09 (Seven Hundred and Forty-Seven Thousand Seven Hundred and Twenty-Six Rand and Nine Cents) resulting from multiple litigation with the applicant. They contend that applicant has not shown any prospects of success except to lay emphasis on the report of the Premier. They reiterate that the Court should not attach any evidentiary weight to that report.

[9] The applicant is no stranger to the admonition as regards what an applicant, who seeks the indulgence of condonation, must set out to be granted such relief. This was dealt with comprehensively in the 2016 Judgment. Having dispassionately considered the submissions from the parties pertaining to condonation, I am unpersuaded that the applicant has explained the delay in full. I have also considered the Premier's report that the applicant is relying on to substantiate his prospects of success. The author of the report did not file a confirmatory affidavit, moreover the rules of evidence have been ignored. The report's contents do not really speak to the 2016 judgment and the basis why it should be rescinded. Nowhere in the report does it say that Adv T I Rakgoale, then Chairperson of the Liquor Board, who communicated with Mr Theunissen, was not authorised to do so in his capacity as the Chairperson. The report is silent regarding the Board Members and witnesses who would have substantiated the application that served before the Board prior to the decision being taken. There is no sound basis to justify the granting of condonation or to even consider rescission of the judgment based on a flawed report as that will be tantamount to breathing life into an already dead horse. **It therefore follows that the applicant has failed to state the grounds why the 2016 judgment must be rescinded. As a result the application stands to fail.**

[10] On the question of costs. Mr Babuseng urged this Court to apply the Biowatch principle should the case not be in his client's favour as the applicant is trying to vindicate his constitutional rights by approaching the Court. However, should his client succeed, the respondents should be ordered to pay punitive costs solely because the 2016 judgment was induced by fraud. I have not been able to fathom any fraud in the papers before me.

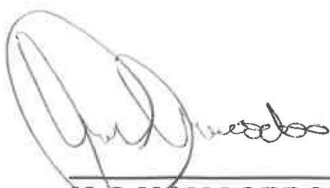
[11] The Constitutional Court in *Biowatch Trust v Registrar, Genetic Resources, and Others*³ said:

"[7] This judgment does not deal with costs orders in general, but only with the proper approach to costs awards in constitutional litigation. The cases cited at the hearing showed that although when dealing with costs this court has frequently referred to the need to take account of the constitutional dimension of a case, it has tended to do so on a rather ad hoc, case-by-case manner. The need for flexibility and a careful case-by-case approach was in fact emphasised in one of the first cases heard by this court, Ferreira v Levin. In a judgment on costs given separately from the judgment on the merits, Ackermann J pointed out that the courts have over the years developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general principle, have his or her costs."

[12] This case does not implicate a constitutional right. At least not in the true sense. Mr Ramabulana urged that the application be dismissed with costs. I agree.

[13] There is no reason why costs should not follow the result. In the result, the following order is made:

The application is dismissed with costs.



M.C. MAMOSEBO
JUDGE: NORTHERN CAPE HIGH COURT

³ 2009 (6) SA 232 (CC) at para 7

On behalf of the Applicant:
Instructed by:

Adv B Babuseng
Justin Pillay & Associates

On behalf of the Respondents:
Instructed by:

Mr M Ramabulana
The Office of the State Attorney
Kimberley