IN THE LAND CLAIMS COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

Before: Ngcukaitobi AJ

CASENO.: **LCC54/2018(B)**

In the matter between:

MAITE NKOANA-MASHABANE	**Applicant**
and	
DISTRICT SIX WORKING COMMITTEE	**1st Respondent**
MYMOENA CLAASEN	**2nd Respondent**
ANNIE BAM	**3rd Respondent**
MARIAM SIMONS	**4th Respondent**
CEDRICK ADAMSON	**5th Respondent**
MARIAM MOSEVAL	**6th Respondent**
AMIENA KRIEL	**7th Respondent**
CYRIL SAMUEL WAGENER	**8th Respondent**

JUDGMENT: CONDONATION, JOINDER, RESCISSION

---

1. The applicant is Minister Maite Nkoana-Mashabane, who has approached this court to be joined as a party to the proceedings in her personal capacity. The applicant is aggrieved by two personal cost orders. The first order was made on 2 August 2019, where the applicant was held personally liable for the costs of the hearing of 17 April 2019. The second order was made on 23 March 2020. In terms of the latter order, the applicant was held personally liable for the costs of the application for leave to appeal, which was struck from the roll.

2. When the current proceedings were instituted, several orders were sought. First, the applicant asked for an order joining her in her personal capacity. Second, an order was sought declaring the two costs orders null and void. Third, rescission of the cost orders was sought. On the day of the hearing of the application on 1 October 2020, counsel for the applicant, Adv.[1] Kruger SC who appeared together with Adv. Slabbert, abandoned the rescission and the orders relating to the declaration as a nullity of the two cost orders. They persisted only with the application for joinder. Adv. Kruger submitted that the joinder was necessary to enable the applicant to pursue her intended application for leave to appeal. The application for leave to appeal, having been struck from the roll, would have to be reinstated, together with an explanation for condonation explaining the delay.

3. The present application is accompanied by an application for condonation. The application seeks to challenge an order granted more than a year ago, in August

[1] I use Adv. rather than the usual Mr or Ms because it is gender neutral.

2019, and another order granted some four months ago, in March 2020. The respondents abide on the question of joinder. But they oppose the condonation.

4. Condonation is an anterior question. If condonation is refused, the merits cannot be entertained. For this reason, I should consider whether enough grounds are set out for the condonation of the lateness of the application.

5. It is trite that where there is a delay in instituting proceedings, there must be an application for condonation. The request itself should be reasonable and acceptable when the totality of circumstances is taken into account. In addition, there should be prospects of success on the merits, and if prejudice is established, it must also be factored into the assessment whether condonation ought to be granted or not. A relatively short period of delay, which causes no prejudice and where there are strong prospects of success might result in the court allowing condonation despite a thin explanation. A lengthy delay, on the other hand calls for a convincing, acceptable explanation.

6. Delays by their nature are harmful to the proper administration of justice. Where the delay, as in this case, is at the instance of a member of the Cabinet, one ought to factor in the constitutional obligations imposed on state functionaries by section 7, and 237 of the Constitution. In terms of these provisions, the state, through its functionaries such as Ministers should give effect to the rights in the Bill of Rights and should in general do so expeditiously.

7. The explanation for the delay in this case is wholly inadequate. The period between August 2019 and March 2020, is explained on the basis that the applicant had brought the application for leave to appeal. But, as pointed out in the answering affidavit, the unsuccessful application for leave to appeal cannot be an explanation for the delay. That application was never premised on the contention – now being advanced – that the Minister was not personally before the Court. To the contrary, Minister Nkoana-Mashabane accepted the citation as correct and the personal costs order correctly sought. Minister Nkoana-Mashabane opposed that application for an award of costs in her personal capacity on the grounds that she had acted diligently as the Minister responsible. That explanation was rejected and she was held to have been reckless and grossly negligent in the discharge of her functions. Minister Nkoana-Mashabane had also brought an application for postponement late, and without adequate reasons causing prejudice to the parties and to the administration of justice.

8. As for the period since March 2020 to July 2020, the explanation similarly falls to be rejected. As I understand it from a consideration be the founding affidavit, the applicant blames the declaration of the National State of Disaster. The facts which are the substance of the application were always known to the applicant and her attorneys of record. The applicant does not explain what steps were taken after the judgment was delivered to consult with attorneys, why that consultation if any was arranged could not take place telephonically, why counsel could not be briefed telephonically or by email and why papers could not be drawn for a period

of four months. The date at which the application was brought also appears arbitrary and unrelated to any of the events during the State of Disaster. By 1 July 2020, the country was on Alert Level 3, until 17 August 2020. Nothing is stated in the application to indicate the change in the position of the applicant which is related to the State of Disaster, thus enabling her to institute the proceedings on 1 July 2020, rather than in March or April when the application should have been instituted.

9. It is not enough for an applicant for condonation simply to record that she has *"an explanation"*. What is required is that the explanation itself must be acceptable. To pass the acceptability test the explanation must be *reasonable* when objectively construed. The explanation given by the applicant is inadequate and unreasonable. It is grounds to dismiss the application on its own.

10. I am satisfied on the facts of this case that the application for condonation should be dismissed without more. But insofar as the question of prospects of success is relevant the enquiry is whether any prospects that are said to exist are sufficient to persuade me to overlook the lengthy delay which has not been properly explained.

11. The applicant says that she should have been joined in her personal capacity before the order of August 29 that she must be personally liable for costs could be lawfully made. She makes the same claim in relation to the March 2020 order. There is no merit to these claims. Adv. Budlender SC, who appeared with Adv. Nacerodien and Adv. Blomkamp, for the respondents usefully drew my attention to the relevant authorities on the subject. The leading authority is *Black Sash*

Trust v Minister of Social Development & Others 2017 (9) BCLR 1089 (CC). The principle is stated thus *"if the possibility of a personal costs order against a state official exists, it stands to good reason that she must be made aware of the risk and should be given an opportunity to advance reasons why the order should not be granted."*. [2] Joinder is preferred as one of the ways of achieving that purpose and *"the safest"*. But there is no authority that the absence of joinder precludes a court from granting a personal costs order against an official. Indeed, in the case of *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) the Constitutional Court found no fault in the High Court's judgment which had imposed a personal costs order against the Public Protector, flowing from her dishonest and grossly negligent conduct, despite not being personally joined. Similarly, the Full Court of the Gauteng Division mulcted former President Jacob Zuma with a personal costs order in a case that he had instituted in his official capacity, in *President of the Republic of South Africa v Office of the Public Protector & Others* 2018 (2) SA 100 (GP). In that case, no joinder or any objection of the sort was considered an obstacle to the granting of that costs order.

12. The principle emanating from the case law is that fair and adequate notice is mandatory before a personal costs order can be imposed on an official who sues in a representative capacity. Personal joinder is a safe method to achieve the purpose. But that joinder is a safe method should not elevate into legal principle on its own.

---

[2] At para 4.

13. It was also stated that the applicant was treated differently by this Court to Minister Thoko Didiza the current Minister of Agriculture, Land Reform and Rural Development. There can be no fair comparison between the two. Minister Didiza has filed full and comprehensive reports about the steps that she is personally taking to ensure the resolution of the Land Claim of the District Six Community. She has explained the difficulties that she is experiencing, and set out the steps that she is taking to overcome these. She has not sought meritless applications for postponements. She has not sought to shift responsibility from herself to junior officials. The complaint about unequal treatment is thus unfounded.

14. Another argument was that there was an inconsistency between the order of 17 April 2019 and the order of 2 August 2019. The nature of the inconsistency is that on 17 April 2019, so the applicant claims, this Court already determined that the cost shall be borne by the Minister in her official capacity. But there is no basis for this at all. Had there been such confusion, no doubt senior counsel who acted for the applicant in the proceedings leading to the personal costs order of August 2019 would have raised that objection. This is also not borne out by the costs order itself. What is clear is that on 17 April 2019 this Court granted an order of costs against the Minister. But it left open the question whether such costs shall be borne personally by the Minister or in her official capacity. This was the entire reason there was a full trial in the matter resulting in the judgment of 2 August 2019.

15. As such, any prospects that may exist are simply not strong enough to warrant this court to overlook the lengthy and unexplained delay.

16. I should consider prejudice. I was informed by Adv. Budlender that progress is being made in relation to the resolution of the main issue before this Court, namely the resolution of the land claim. But it is not fair that the District Six Community is being brought to court repeatedly over this issue. This appears to be an abuse of this court's processes. The Minister's claim that she has right of access to court are true. But the right of access to court does not mean that when one is out of time, they do not have to give an explanation. Nor does it mean that one can bring a case to court that is singularly lacking in merit. So, although the respondents concede the joinder, it is this Court's responsibility to protect the proper use of its resources and to consider whether or not a proper case for condonation has been made. I have come to the conclusion that the application ought to be dismissed for lack of reasonable explanation.

17. It has also been argued that the applicant is unable to pursue the leave to appeal without being joined as a party. It is so that to pursue the appeal, the applicant needs to be joined in her personal capacity. This is not to be confused with joinder for the purposes of imposing a personal costs order.

18. Here, however, I am concerned with whether to grant or refuse condonation. When the application for leave to appeal was first brought, I specifically invited the applicant to join the application in her personal capacity to pursue the leave to appeal. She refused. The refusal has legal consequences, as it was an unequivocal

statement of abandonment of the right to join the legal proceedings in the appeal. If she is to be allowed at this stage to "change her mind" she must proffer a full explanation, which she has failed to do. It is also notable that at that stage, the applicant knew that Minister Didiza was not pursuing the appeal. It is an abuse of this Court's processes, having refused an invitation from the court to join, for the applicant to now insist that she wishes to do so, without any proper explanation as to why she rejected the invitation by this court.

19. Finally, I should consider costs. Adv. Budlender argued for a punitive scale on an attorney and own client basis. I would have been inclined to grant this, but Adv. Kruger made fair concessions about aspects of the case that he could not advance and thus substantially curtailed the scope of work of this Court. Although I have dismissed the application on condonation, some consideration should be given to the fact that senior counsel, who now acts for the applicant conducted the argument fairly and responsibly. It is only on that account that I am prepared to grant costs on a party and party scale.

20. I have also given consideration to whether or not to issue an order as requested on behalf of the respondents to require Minister Nkoana-Mashabane to pay the costs before she can institute any further proceedings before this court. While her conduct in this case – bringing a hopeless rescission application and then abandoning it on the day of the argument, and asking for a joinder which she has previously spurned – verges on vexatiousness, I do not think the stage has arrived now to issue an order barring the applicant from further approaches to this Court.

21. In the circumstances the application for condonation is dismissed with costs, such costs to include the costs of two counsel, to be paid by Minister Maite Nkoana-Mashabane in her personal capacity.

T Ngcukaitobi

Acting Judge: Land Claims Court

5 October 2020

Appearances

For Applicants: Adv. T P Kruger SC, Adv. J P Slabbert – *Instructed by Mafona Ramothwala Inc.*

For Applicants: Adv. G. Budlender SC, Adv. A. Nacerodien & Adv. J Blomkamp – *Instructed by Norton Rose Fulbright*