IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)

CASE NO: 1693/17

In the matter between:

BADANILE NTAMO **Applicant**

and

AFRICAN NATIONAL CONGRESS-REGIONAL EXECUTIVE COMMITTEE, OR TAMBO REGION **1st Respondent**

AFRICAN NATIONAL CONGRESS-PROVINCIAL EXECUTIVE COMMITTEE, EASTERN CAPE PROVINCE **2nd Respondent**

AFRICAN NATIONAL CONGRESS-NATIONAL EXECUTIVE COMMITTEE **3rd Respondent**

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

MBENENGE ADJP:

[1] This is an application for leave to appeal against the judgment of this court non-suiting the applicant and Mr Mlandeli Ndabetha (the second applicant in the proceedings from which this application arises, who is otherwise not featuring in the instant application) on the ground that they had inordinately delayed before launching their application challenging the conference of the O R Tambo of the African National

Congress held on 16 to 18 September 2015 and the decisions taken thereat, delivered on 26 September 2017 (the main application).

[2] Apart from the preliminary issue that was raised by the respondents that the applicants lacked the requisite *locus standi* to launch the main application, which did not prevail, the parties had, somewhat tentatively, been of the view that, on the merits, the main application was beset by a dispute of fact hard to resolve on the papers. The merits of the main application were, however, not gone into, the court having been of the view that the applicants had not explained the delay and in the exercise of its discretion not seen its way clear in overlooking the delay.

[3] The leave to appeal application is predicated on the ground that there is a reasonable prospect of another court finding that the applicant had not unreasonably delayed alternatively, conducting a broader enquiry that takes into account the constitutional considerations such as, *inter alia,* the importance of the protection of the rights enshrined in section 19 of the Constitution of the Republic of South Africa 108 of 1996 than just merely whether the delay had been explained.

[4] The parties did not lock horns in relation to the test formulated in section 17 of the Superior Courts Act 10 of 2013; the test has now become more onenous as leave may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard.[1] Use of "*only*" in the section is a further indication of a more stringent test.

[5] In *Mkhitha*[2] the SCA formulated the test as follows:

> "[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be sound, rational basis to conclude that there is a reasonable prospect of success on appeal."

[1] Section 17 (1)(a); See *Valley of the Kings Thaba Motswere (Pty) Ltd & Ano v AL Mayya International* (unreported judgment of the Eastern Cape Division by Smith J delivered under Case No. EL 926/2016 – GHT 2226/2016 delivered on 10 November 2016; also see *MEC for Health, Eastern Cape v Mkhitha (*1221/15) [2016) ZASCA 176 (25 November 2016)

[2] *Supra*

[6] Whilst on the subject of the test applicable to a leave to appeal application, I am reminded of *Brian Manor Body Corporate v Sithole, Thabisile Renneth and Another* wherein it was held:[3]

> "[5] It was also well to reflect briefly on what the Supreme Court of Appeal said in *Pretoria Portland Cement Company Ltd and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA) at para [38] about the temptation of a judge to defend his or her own judgment when challenged:
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> > 'Judges know perfectly well that their decisions may be upset by higher court appeal, or even by another single judge in the case of an *ex parte* order. If one's order is set aside one's vanity maybe pricked but one's function is finished. Perhaps the judge will be consoled by the reflection of Ulpian contained in *Dig* 49.11, that an appeal sometimes alters a well-delivered judgment for the worse, as it is not necessarily the case that the last person to pronounce judgment judges better.'"

[7] In the applicant's heads of argument a contention which was also advanced during oral argument was that the court merely pronounced on the inadequacy of the explanation for the delay without proceeding to the second stage of the enquiry, i.e. considering whether the delay should be condoned. This submission losses sight of the applicable test as enunciated in *Beweging vir Christelik Voksie Onderwys v Minister of Education*[4] relied on by the respondents, formulated as follows:

> "[46] The first question that arises is whether the delay in launching an application was unreasonable … The second question is whether, if the first question is answered in the affirmative, the delay ought to be condoned …(or the failure to bring the application timeously should be condoned).
>
> [47] In both instances, once the first stage has been determined against an applicant, the delay will only be condoned if the explanation for it is acceptable. That, by its nature, involves the exercise of a discretion."

[8] That is precisely the approach that was adopted in the judgment that is now the subject of this application, the relevant portion of which reads:

> "… in the exercise of my discretion I find that the explanation, if it is anything to go by, does not pass muster. The conclusion that I reach is therefore that the applicants delayed inordinately and in the exercise of my discretion the explanation given does not pass muster."[5]

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[3] Unreported judgment of the Gauteng Local Division, Johannesburg by Ngalwana AJ delivered under Case No 15430/2014 on 15 September 2015 and the authorities cited therein

[4] (308/2011 [2012] ZASCA 45 (29 March 2012)

[5] *Ntamo & Ano v ANC & Others*, p12

[9] The finding made by the court that the delay was unacceptable and that the delay was not condonable involved the exercise of a discretion. The contention that the court did not proceed to the next stage of the enquiry is thus devoid of merit. The matter of whether the discretion was properly exercised or not is a separate matter altogether.

[10] I accordingly do not see another court arriving at a conclusion than that there was an unexplained, reprehensible delay. That, however, is not, for present purposes, the end of the matter.

[11] On the authority of *Khumalo v MEC for Education,*[6] because of the constitutional rights involved in this matter, there is a reasonable possibility of another court being loath to allow a procedural obstacle to prevent it from enquiring into the merits of the case, involving as it does constitutional issues, even if that enquiry would result in it being found that there is an irresoluble dispute of fact on the papers necessitating the referral of the matter to oral evidence. In the case of a private (as against a public) litigant, said Skweyiya J in *Kumalo,*[7]the failure to explain a delay weighs less heavily and the unreasonableness of the unexplained delay is less serious.

[12] The applicant has presented factual and legal submissions constraining me to be of the opinion (not a definite conclusion) that the appeal would have a reasonable (not definite) prospect of success within the meaning and contemplation of section 17 1)(a)(i) of the Superior Courts Act. I am, in any event, of the view that there are compelling reasons for the appeal to be heard.[8]

[13] In arriving at this conclusion I am also not unmindful of the pronouncement in *Aurecon v Cape Town City*[9]and the following *dictum* by Khampepe J in *Department of Transport v Tasima*:[10]

> "Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty

[6] 2014 (5) SA 579 (CC)
[7] Para [51], p595
[8] Section 17 (1)(a)(ii)
[9] 2016 (2) SA 100 (SCA para [19], where it was held that undue delay should not be tolerated
[10] 2017 (2) SA 622 (CC) para [160]

> and finality… A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review, reactive or otherwise."

[14] In the result, I make the following order:

1. *The applicant is granted leave to appeal to the full court of this division against the whole of the judgment of this court delivered on 26 September 2017.*

2. *The Registrar of this Court is directed to enrol the matter for hearing on an expedited basis.*

3. *Costs of the application for leave to appeal shall be costs in the appeal.*

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S M MBENENGE
ACTING DEPUTY PRESIDENT JUDGE
OF THE HGH COURT, MTHATHA

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Heard on:	17 October 2017
Delivered on:	19 October 2017