IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION: MTHATHA)

CASE NO: 1693/2017

In the matter between:

BADANILE NTAMO APPELLANT

AND

AFRICAN NATIONAL CONGRESS, REGIONAL EXECUTIVE COMMITTEE, OR TAMBO REGION AND THREE OTHERS RESPONDENTS

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APPEAL JUDGMENT

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DAWOOD, J:

1. A brief background to this matter is as follows:
   a) The Appellant brought an application against the respondent wherein it *inter alia* sought the following relief:

      *"1. That the Regional Conference of O R Tambo of the African National Congress held on 16 to 18 October 2015 ("the conference") and the decisions taken in that conference are declared unlawful, illegal, unconstitutional and consequently null and void;*
      *2. Directing that the costs of this application be paid by those respondents who oppose this application; and*
      *3. As to such further and/or alternative relief as this Honourable Court seems meet."*

   b) One of the points raised by *inter alia* the 4th respondent *in limine* was that there was undue delay in launching the application in that the decision sought to be set aside was taken in October 2015 whereas the application was only launched in April 2017.

   c) The court *a quo* hearing the matter decided the point *in limine* in respect of undue delay in favour of the respondents and dismissed the application with costs.

   d) The court *a quo* found as follows:

      *"The conclusion that I reach is therefore that the applicants delayed inordinately and in the exercise of my discretion the explanation given does not meet the requisite standard. In the result, the applicants fall to be non-suited for having delayed before resorting to remedial action."*

e) The first applicant in the court *a quo*, the Appellant before us, brought an application and was granted leave to appeal the judgment of the court *a quo*.

f) The grounds of appeal *inter alia* were the following :

*"1. Regard being had to the fact that:*

*1.1 The African National Congress ("the ANC") has a tradition that internal remedies must be exhausted before recourse is made to the Courts;*

*1.2 The applicant had launched an appeal to the National Executive Committee ("the NEC") of the ANC for the nullification of the regional conference based on the irregularities that occurred in his branch, including participation of deceased persons in the selection of delegates to that conference;*

*1.3 The NEC, to which the applicant had appealed, is the highest organ of the ANC between the National Conferences and has the authority –*

*a) To lead the organisation, subject to provisions of the ANC Constitution;*

*b) To ensure that the Provincial, Regional and Branch structures of the ANC function democratically and effectively; and*

*c) To suspend or dissolve a Provincial Executive Committee ("PEC") where necessary and by extension the Regions of the ANC;*

*1.4 The letter of appeal was written by the applicant immediately or shortly after the regional conference, which is an act that evinces a determination to have the matter resolved and decided within the internal structures of the ANC;*

*1.5 On 22 October 2015, the applicant was caused to appear before the committee constituted by the NEC members, including Mr Derek Hanekom, appointed by the Secretary General ("Mr Gwede Mantahse") who heard the complaints by the applicants and undertook to revert to him within 3 days;*

*1.6 The applicant, having been promised by senior members of the ANC who were appointed by the highest structure of the ANC, was justified in believing and accepting that his complaints would be addressed by the NEC;*

*1.7 The applicant approached an attorney after giving up after months of waiting;*

*1.8 The letter written by the attorney to the ANC which attracted no response;*

*1.9 The explanation and the actions of the applicant since the date of the impugned conference up until the date when the attorneys gave notice of intention to institute legal proceedings, there was no trigger for the launch of the court proceedings until the expiry of the dates set out in the attorneys letter;*

*1.10 The applicant's complaints are of an ongoing nature as the elected leadership from the Regional Conference is still in office and will continue holding such office for another period of a year in accordance with the ANC constitution; and*

*1.11 There is no statutory provision governing the timeframes within which the applicant ought to launch an application for review,*

*the court erred, alternatively misdirected itself, in the exercise of its discretion in finding that the applicant had unreasonably delayed in bringing the application for review and there is a reasonable possibility that another court may find otherwise.*

2. *In the event that the Court did not misdirect itself in finding that the applicant had unreasonably delayed in instituting the review application, the Court erred, alternatively misdirected itself in:*

*2.1 Dismissing the application without further inquiring into whether it should nevertheless overlook the unreasonable delay; and*

*2.2 Not conducting an evaluation into:-*

*a) The potential prejudice to the affected parties and the fact that in terms of section 172 (1) (b) of the constitution of the Republic of South Africa the court has the power to ameliorate any prejudice suffered.*

*b) The nature of the decision(s) sought to be reviewed;*

*c) The merits of the applicant's cause of action and the fourth respondent's grounds of opposition;*

*d) The allegations of fraud made against the respondents;*

*e) The importance of the protection of rights enshrined in section 19 of the Constitution;*

*f) The fact that –*

*(i) The applicant made serious allegations of irregularity and impropriety against a political party (which allegations went to the core of the propriety of the elections in the OR Tambo*

*Region and by extension the Provincial elections in the Eastern Cape province); and*

*(ii) If it turns out that the applicant was right in his allegations, the political party in the whole of the province will be governed over the next four years by an irregularly appointed provincial leadership;*

*g) The importance of the requirement that members of political parties should not be governed by an irregularly elected leadership; and*

*h) The fact that the respondents did not allege facts to support any allegations of prejudice.*

*3. In the event that the Court did not misdirect itself in finding that the applicant had unreasonably delayed in instituting the review application, the Court ought to have nevertheless overlooked the unreasonable delay in the circumstances and it erred, alternatively misdirected itself, in not so doing and there is a reasonable possibility that another court may find otherwise. There is a reasonable possibility that another court may find that had the Court overlooked the unreasonable delay and conducted the evaluation referred to in paragraph 2.2 above, it would have exercised its discretion in favour of the applicant."*

g) It is evident from the foregoing grounds that it was the decision of the court *a quo* on the point *in limine* raised with regard to the undue delay that was intended to be the subject matter of the appeal. The merits of the matter were not a subject matter of the notice of appeal, save in the context of determining the issue of condonation, and accordingly adjudication of the merits cannot be considered by the appeal court.

h) Mr Mtshabe (who appeared together with Mr Bodlani for the respondents) accordingly correctly argued that the merits were not the subject matter of the appeal and his election not to argue the merits in the circumstances was well founded.

i) Despite the Constitutional Court allowing such an approach after proper notification to the parties, there is ample authority for the proposition that a party is bound by the grounds of appeal unless amended. It would result in giving one party an unfair advantage were the other party to suddenly have the right to argue points or issues that were not properly raised even if addressed in heads of argument.[1] And, in any event, no such notice to argue the merits was issued in this matter.

j) It would accordingly not be in the interest of justice or in accordance with proper procedure to adjudicate upon the merits of this matter in this case.

2. The issues for determination by this Court accordingly are:

   (i) Whether the court *a quo* correctly found that there was an unreasonable delay;

   (ii) If it is found that there was an unreasonable delay:

      (a) Did the court *a quo* consider the next leg of the inquiry, that is, whether or not the delay ought to have been condoned;

      (b) In making that inquiry did the court consider *inter alia* the following:

         (1) The importance of the protection of constitutional rights being advanced;

         (2) The nature of the decision sought to be reviewed;

         (3) Prospects of success;

         (4) The issue of prejudice; and

         (5) The allegations of fraud, irregularity and impropriety made against the respondents.

[1] The South African Police Service Medical Scheme ('Polmed') v Lamond (542/10) [2011] ZASCA 91 (30 May 2011) at para 13.
See also KwaZulu-Natal Law Society and Another v Sharma and Another (3489/2017) [2017] ZAKZPHC 15; [2017] 3 All SA 264 (KZP) (28 April 2017) at para 17.

3. Undue delay

i) It is trite that there are no set time limits at common law for the launching of review applications and of necessity the facts of each case would need to be considered to determine whether or not there was an unreasonable delay[2].

ii) It is however evident that reviews ought to be brought as soon as reasonably possible[3].

iii) The court *a quo* has correctly dealt with the issue of undue delay and was alive to the applicable test of unreasonable delay at common law.

iv) The learned Judge extensively dealt with the facts, with the time periods, the sequence of events and the explanations furnished by the Appellant, and these will accordingly not be repeated.

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[2] *Opposition to Urban Tolling Alliance v The South African National Roads Agency Limited* (90/2013) [2013] ZASCA 148 [2013] 4 All SA 639 (SCA) at paragraph 26

"At common law application of the undue delay rule required a two stage enquiry, first, whether there was an unreasonable delay and second, if so, whether the delay should be condoned."

[3] Khampepe J stated as follows in *Department of Transport v Tasima (Pty)* 2017 (2) SA 622 (CC) at paragraph 160:

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

In *Business Unity South Africa v Minister of Higher Education and Training and Others (*JR 1110/13 [2015] ZALCJH B285 (7 AUGUST 2015) at paragraph 56 the court set out the general rule as follows:

'This the submission goes was stressed in *Gqwetha v Transkei Development Corporation Limited and Others* in these terms:

> '[22] it is important for the efficient functioning of public bodies…. that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule… is twofold. First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions.

v) At the outset it must be stated that it is commendable that the parties attempted to resolve the dispute internally on an amicable basis.

vi) However, in this case it became evident that such attempts were futile having regard to the fact that the Appellant on his version had no feedback from October 2015 to date of launching the application.

vii) On the Appellants' version even the letter written by his attorney in October 2016, one year later, yielded no response or resolution.

viii) As noble as the Appellant's intentions were, he ought to have realised at least at that stage that the matter would not be resolved internally, although in my view that realisation ought to have dawned on him sooner than a year after the meeting. The Appellant at the latest ought to have launched his application by October 2016 and not waited a further 6 months before launching the application.

ix) There is very limited information to assist the court in finding that the delay of a period of about 18 months was in fact reasonable in the circumstances of this case, with large periods of this time being unexplained.

x) Clearly insufficient facts were placed before the court *a quo* by the Appellant in order for it to make a finding that the delay was in fact reasonable despite the lapse of a period of 18 months.

xi) The court *a quo* accordingly correctly found that this delay was unreasonable and not adequately explained.

xii) It is accordingly found that there was an unreasonable delay and that this leg of the inquiry was correctly decided by the court *a quo*.

4. Condonation

a) The next inquiry is whether or not the court ought to have nonetheless condoned the undue delay.

(i) "The "delay rule" in relation to administrative review has been described by Navsa JA in the following terms:

> *"In reviewing and considering whether to set aside an administrative decision, courts are imbued with a discretion, in the exercise of which relief may be withheld on the basis of an undue and unreasonable delay causing prejudice to other parties, notwithstanding substantive grounds being present for the setting aside of the decision. The application of the delay rule would in a sense 'validate' a nullity. This rule evolved because, prior to the Promotion of Administrative Justice Act 3 of 2000 (PAJA), no statutorily prescribed time limits existed within which review proceedings had to be brought. The rationale was an acknowledgment of prejudice to interested parties that might flow from an unreasonable delay as well as the public interest in the finality of administrative decisions and acts."*[4]

(ii) In *United Plant Hire (Pty) Ltd vs Hills and Others*[5], Holmes JA described the manner in which a court should exercise its judicial discretion when considering condonation in the following terms:

[4] *Oudekraal Estates (Pty) Ltd v City of Cape Town 2010 (1)* SA 333 (SCA) at para 33.
[5] 1976 (1) SA 717 (A)

*"It is well settled that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.*

*These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong."*[6]

(iii) The court *a quo* in this regard found at page 12 paragraph 6 of the judgment:

*"In the exercise of my discretion I find that the explanation proffered, if it is anything to go by, does not pass muster."*

[6] Ibid page 720F-G.
See *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa* limited and Another (2015) ZACC22
See also General Council of the Bar of South Africa v Geach and Others 2013 (2) SA SCA at paragraph 57 "where a discretion is conferred it implies that the matter for decision has no single answer and calls for judgment, upon which reasonable people may disagree. That being so the court of appeal is restricted to determine whether the decision – maker has correctly gone about the enquiry. If he or she has correctly gone about the enquiry then a court on appeal may not interfere with the decision, albeit that it considers the decision to be wrong.

*The conclusion that I reach is therefore that the Applicants delayed inordinately and in the exercise of my discretion the explanation given does not meet the requisite standard."*

(iv) The learned judge in the court *a quo* was alive to the fact that he had a discretion and found that the applicants' explanation did not meet the requisite standard for him to exercise his discretion in their favour.

(v) The issue of interference by an appellate Court with the exercise of judicial discretion has been extensively dealt with in a long list of case.

(vi) In this case the learned judge did not state what criteria he explicitly adopted in exercising his discretion not to condone the delay.

(vii) Whilst the court *a quo* appeared to be alive to the fact that it was vested with a discretion in this regard. It failed with respect to deal properly or at all with important elements of that discretion, such as the constitutional points raised, the allegations of irregularity and fraud, the question of prospects of success and the question of prejudice. As consideration of these aspects comprises an important part of the exercise of such a discretion, especially in this particular case, I am of the view that such discretion was not exercised properly. This, then, leaves this Court at large to consider such discretion afresh.

(viii) There is accordingly a basis upon which this Court can consider afresh the issue of whether or not

condonation ought to have been granted, having regard to the absence of the actual reasons for the exercise of the discretion being given, and to consider the grounds raised by the Appellant.

(ix) The factors that this Court needs to consider in determining whether or not to condone the undue delay are inter alia the following:

[A] Constitutional rights

(i) The Appellant has alleged a violation of his rights both in terms of the Constitution of the Republic of South Africa and in terms of the Constitution of the ANC.

(ii) The case of *Ramakatsa*[7] comprehensively deals with these rights.

(iii) The alleged infringements of constitutionally entrenched rights clearly are important issues that warrant ventilation.

(iv) The alleged infringement of constitutional rights is one which ought to have been a particularly weighty consideration that warranted a ventilation of the merits of the matter despite the delay in launching the application.

(v) This factor alone in my view is sufficient to warrant the granting of condonation of the unreasonable delay and an adjudication of the merits of the matter.

[B] Prejudice

(i) The onus rests upon the Appellant to establish that the Respondent was not prejudiced by the undue delay[8].

[7] *Ramakatsa and Others v Magashule and Others* 2013 (2) BCLR 202 (CC) (at paras 63 - 9)

(ii) However, the court can consider that no facts or circumstances were presented to warrant a finding that there was indeed prejudice to the Respondents.

(iii) The Appellants' cause of action did not suddenly spring up, 18 months later but was raised from the outset shortly after the branch executive council meeting in April 2015.

(iv) It is however evident in this case that the Respondent was indeed aware of the Appellant's complaints throughout, that it was in possession of the requisite documentation and had the requisite persons available to depose to affidavits.

(v) The Respondent was alive to the dispute throughout.

(vi) Although the Appellant was obliged to state that no prejudice was suffered, if indeed there was prejudice to the Respondent, it would be expected of the Respondent to raise such prejudice for a proper determination to be made on the point.

(vii) There would be no prejudice to the Respondent were this matter to proceed on the merits, considering that the court can make an appropriate order in order to ameliorate any prejudice that may well be present.

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[8] Gqwetha v Transkei Development Corporation Limited and others 2006 (2) SA 603 SCA at para 14 where it was inter alia held on the issue of onus, that the onus of showing absence of such prejudice was on the Plaintiff. "It may well be that the party seeking condonation of his or her delaying unreasonably to institute review proceedings bears the overall onus of persuading a court to so condone such delay, but I do not think that a decision as to whether or not the other party in proceedings would suffer prejudice can be made only when evidence is placed before it….
There may very well be cases where an applicant for review is unable, due to circumstances, to say under oath that the other party will not suffer prejudice as a result of what might be found to be an unreasonable delay. In the present matter the Respondent raised the issue of unreasonable delay, but no mention whatsoever was made by them that because of such delay the first respondent would be prejudiced in any way were the delay to be condoned."

[C] Prospects of success

(i) The arguments on the merits by the Appellant's counsel were sufficiently persuasive to demonstrate that these points might well be decided in favour of the Applicant.

(ii) Whether or not these points will be decisive of the matter, or result in a decision in favour of the Appellant, is open to argument especially in light of the fact that no arguments were advanced in this respect by the Respondent.

(iii) The argument, albeit uncontroverted, at this stage, does demonstrate a reasonable prospect of success.

(iv) The Appellant accordingly even on this point has established a basis for condonation.

(v) The factors argued by the Appellant's counsel constitute sufficient grounds to justify this court, in the exercise of its discretion, to condone the undue delay and allow the matter to proceed on the merits.

(vi) This Court however, as indicated already, was not required to determine the merits of the matter and it is trite that the parties are confined to their grounds of appeal, which does not disclose an appeal on the merits.

(vii) The Appellant cannot be criticised for this as there could not have been an appeal on the merits since the court *a quo* had not made a ruling on the merits. Similarly the Respondent's cannot be criticised for failing to present argument on the merits.

5. In the circumstances the following order is made:
    a) The Appeal is upheld;
    b) The order of the court *a quo* is set aside;
    c) The matter is remitted to the court *a quo* for hearing of the merits of the application on a date to be arranged with DJP, Mthatha; and
    d) The fourth respondent is ordered to pay the costs of the appeal and of the hearing before the court *a quo*, which costs are to include the costs of two counsels.

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DAWOOD J

JUDGE OF THE HIGH COURT

I AGREE:

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MAKAULA J

JUDGE OF THE HIGH COURT

I AGREE

_____

GRIFFITHS J

JUDGE OF THE HIGH COURT

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| DATE HEARD: | 13 NOVEMBER 2017 |
| DATE JUDGMENT DELIVERED: | 24 NOVEMBER 2017 |
| FOR THE APPLELLANT: | MR ZILWA SC WITH |
| | MS DA SILVA |
| APPLELLANTS ATTORNEYS: | MVUZO NOTYESI INC |
| | NO 14 DURHAM STREET |
| | MTHATHA |
| | Ref: Mr Notyesi-17 |
| FOR THE RESPONDENTS: | MR MSTHABE WITH |
| | MR BODLANI |
| RESPONDENTS ATTORNEYS: | N Z MTSHABE INC |
| | 137 YORK ROAD |
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