Reportable

REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-REV-2020/00507

In the matter between:

PHARMACEUTICAL SOCIETY OF NAMIBIA	**APPLICANT**

and

PHARMACY COUNCIL OF NAMIBIA	**1ST RESPONDENT**
DIS-CHEM PHARMACIES LIMITED	**2ND RESPONDENT**
DIS-CHEM NAMIBIA (PTY) LIMITED	**3RD RESPONDENT**
DIS-CHEM WERNHILL (PTY) LTD	**4TH RESPONDENT**
DIS-CHEM SWAKOPMUND (PTY) LTD	**5TH RESPONDENT**
DIS-CHEM WALVISBAY (PTY) LTD	**6TH RESPONDENT**
PLATZ AM MEER PHARMACY (PTY) LTD	**7TH RESPONDENT**
DUNES WALVISBAY PHARMACY (PTY) LTD	**8TH RESPONDENT**
WERNHILL PHARMACY (PTY) LTD	**9TH RESPONDENT**
JACO ZAH	**10TH RESPONDENT**
WILLEM ALBERSUS JORDAAN	**11TH RESPONDENT**
RIANDA MARI HOLMBERG	**12TH RESPONDENT**

Neutral citation: *Pharmaceutical Society of Namibia v Pharmacy Council of Namibia* (HC-MD-CIV-MOT-REV-2020/00507) [2022] NAHCMD 588 (27 October 2022)

Coram: Ndauendapo J
Heard: **8 September 2022**
Delivered: **27 October 2022**

Fly note: Interlocutory application – Review-Application to amend grounds of review – Time within which such application should be instituted – Whether delay unreasonable – Whether delay should be overlooked – No full and satisfactory explanation provided to condone – Court dismissing application.

Summary: On 9 December 2020, the applicant instituted the main review application seeking to review and set aside the decision of the first respondent, taken on 13 July 2020 not to terminate the registration of the third, seventh, eighth and ninth respondents as community pharmacies in terms of section 35(17) (g) of the Pharmacy Act, 9 of 2004 ("the Act"). It now seeks to amend the relief sought in the notice of motion in the main application to review and set aside the decisions of the first respondent to register, *ab initio,* the third, seventh, eighth and ninth respondents ("the relevant respondents") as community pharmacies in terms of section 35 of the Act. The applicant states that it only became aware in November 2021 that the relevant respondents' registrations were unlawful. The applicant delivered the notice to amend in November 2021 and the application in February 2022.

The respondents opposed the application. They submitted that there was an unreasonable delay in instituting the application as the applicant had a preliminary view in December 2019 that the registrations were unlawful and failed to launch the application by then.

Held that, there was an unreasonable delay in instituting the application as the applicant had a preliminary view that the registrations of the relevant respondents were unlawful and failed to launch the application by then.

Held that the court cannot condone the delay as there is no application for condonation.

Held further that the application is dismissed with costs.

ORDER

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1. The application is refused.
2. The applicant is ordered to pay the costs of the first respondent, such costs to be costs of one legal practitioner and such costs not to be capped in terms of rule 32(11).
3 The applicant is ordered to pay the costs of the second, third, ninth and tenth respondents, such costs to include the costs of one instructing and two instructed counsel and such costs not to be capped in terms of rule32(11).

JUDGMENT

NDAUENDAPO,J

Introduction

[1] This is an interlocutory application in which the applicant seeks an order in the following terms:

'1. That leave be granted to Applicant to amend its Notice of Motion in the review application:
1.1 By the insertion of a new paragraph 1 to read as follows:
'Reviewing and setting aside the decision of the First Respondent dated 8 May 2014 in terms of which it purported to register the Third Respondent as a community pharmacy in terms of section 35 of the Pharmacy Act 9 of 2004 ("the Act").'
1.2 By the insertion of a new paragraph 2 to read as follows:
"Reviewing and setting aside the decision of the First Respondent dated 18 November 2016 in terms of which it purported to register the Seventh Respondent as a community pharmacy in terms of section 35 of the Act.
1.3 By the insertion of a new paragraph 3 to read as follows:

"Reviewing and setting aside the decision of the First Respondent dated 22 October 2019 in terms of which it purported to register the Eighth Respondent as a community pharmacy in terms of section 35 of the Act."

1.4 By the insertion of paragraph 4 to read as follows:

"Reviewing and setting aside the decision of the First Respondent dated 22 October 2019 in terms of which it purported to register the Ninth Respondent as a community pharmacy in terms of section 35 of the Act."

[2] The application is opposed by the first, second, third, ninth and tenth respondents. From the onset, I must make it clear that given the conclusion that this court has arrived at, the focus in this judgment will only be on the objection relating to the delay in instituting the application within a reasonable time.

Grounds of opposition

[3] The respondents opposed the application on the basis, *inter alia*, that there was an unreasonable delay in launching the application and on that basis alone the application must be refused.

Background facts

[4] On 9 December 2020, the applicant instituted the main review application seeking to review and set aside the decision of the first respondent, taken on 13 July 2020 not to terminate the registration of the third, seventh, eighth and ninth respondents as community pharmacies in terms of section 35(17)*(g)* of the Pharmacy Act, 9 of 2004("the Act"). It now seeks to amend the relief sought in the notice of motion in the main application to review and set aside the decisions of the first respondent to register, *ab initio,* the third, seventh, eighth and ninth respondents ("the relevant respondents") as community pharmacies in terms of section 35 of the Act.

Applicant's case

[5] Mr Ritter deposed to the founding affidavit in support of the relief sought. He avers that the factual circumstances upon which the amendments are sought only reasonably

became known to the applicant on or about 21 November 2021. Prior thereto, the first respondent deliberately sought, impermissibly and in breach of the Pharmacy Act, 9 of 2004, to avoid disclosure of, *inter alia*, the identity of the entities through which the second respondent purported to establish its presence and business in Namibia and the applications made by the respondents to be registered in Namibia as pharmacies.

[6] The information sought was never forthcoming and was deliberately suppressed. He avers that when the initial discovery of documents was made by the first respondent in terms of rule 76(2) the applicant reasonably was focused on identifying shortcomings in the record relating to the impugned decision taken by first respondent in terms of section 35(17)*(g)* of the Act. It was never contemplated that the registration of the four relevant pharmacies was illegal and defective.

[7] The applicant was furnished with the registration certificates of the four pharmacies of the relevant respondents and it was not possible upon mere perusal to determine that the registrations were defective, accordingly neither the applicant nor its legal representative appreciated that the registrations were irregular.

[8] He avers that it was only upon receipt of additional documents relating to the registration of eight and ninth respondents that the applicant for the first time became aware of the flawed registration process. In the premises, and prior to November 2021, there was no basis upon which it could ever be suggested that the applicant did not act reasonably and that any failure on its behalf to refer to the irregular and unlawful registration of the third, seventh, eighth and ninth respondents prior to the filling of its replying affidavit could, ever be said to be attributable to any culpable conduct or remissness on its behalf. And because of the deliberate conduct of first respondent in suppressing documentation relating to the registration of the four relevant respondents, it cannot be said, that more than a reasonable period of time has elapsed since the applicant first reasonably became aware of the fatal defects in the registration of the four relevant pharmacies.

[9] He avers that because of the conduct of first respondent in suppressing the information sought and the fact that no culpable conduct can be attributed to the applicants no justiciable prejudice can be occasioned to the respondents and any prejudice that may

be suffered by the respondents can be cured by the filling of further set of affidavits. The amendment sought will allow justice to be done and expose the unlawful conduct of the respondents in breach of the Act.

First respondent's case

[10] Ms Coetzee, the president of the first respondent, depose to the affidavit in opposition to the relief sought by the applicant. She avers that the respondent will be prejudiced by the amendment as that is not the case it was called upon to answer in the first place. With the amendment, the applicant seeks to introduce a new cause of action. The review must be brought within a reasonable time and failure to do so, will result in undue delay. The delay in seeking the review relief is egregious and unreasonable and stands to be refused on that ground alone. There is no condonation application in respect of the delay setting out a full explanation and on that basis it should be refused.

Second, third, ninth and tenth respondents' case

[11] Messrs Saltzman, Zah and Ms Meyer on behalf of the respondents deposed to affidavits in opposition to the relief sought by the applicant. Their stance is that there was an unreasonable delay in instituting the review application and on that basis alone, the application should be dismissed. They submit that the applicant planned to launch proceedings *inter alia* against first respondent, to revoke the registrations of the "Dis-Chem" pharmacies as far as December 2019 as it believed that much work and planning had already been done towards such an application. The third respondent was registered in 2014; the seventh respondent on 6 July 2016; the eighth and the ninth respondents on 22 October 2019 and the applicant was, at all relevant time, aware of that. To wait until November 2021 to deliver the notice to amend and to launch the application in February 2022, is difficult to fathom. It will be highly prejudicial to them to grant the relief sought.

Issues for determination

[12] The main issues for determination are whether there was an unreasonable delay in instituting the review application (the amendment), and if so, whether such delay should be overlooked?

Submissions by the applicant

[13] On the issue of delay, counsel referred this court to South *African Poultry Association and others v Minister of Trade and Industry and Other*[1] where the legal principles relevant to the issue of delay in review proceedings were restated.

[14] Counsel also relied *on Keya v Chief of the Defence Force and Others*[2] where the court in summary, held that the question whether a litigant had delayed unreasonably in instituting proceedings involves two enquires: the first is whether the time that it took the litigant to institute proceedings was unreasonable. If the court concludes that the delay was unreasonable, then the question arises whether the court should, in the exercise of its discretion grant condonation for the unreasonable delay. (Paragraph 22) 'In deciding to condone an unreasonable delay, the court will consider whether the public interest in the finality of administrative decisions is outweighed in a particular case by other considerations.'

[15] Counsel submitted that the seventh and eighth respondents no longer oppose this application.

[16] Counsel submitted that the applicant accepts that the third respondent was registered as a community pharmacy on 8 May 2014 and that the ninth respondent was registered on 22nd October 2019. However there was no basis prior to November 2021 'upon which it could ever be suggested that the applicant did not act reasonably, and that any failure on its behalf to review the irregular and unlawful registration of the third, seventh, eighth and ninth respondents prior to the filing of its replying affidavit could ever be said to be attributable to any culpable conduct or remissness of its part.'

[17] Counsel further argued that 'because of the deliberate conduct of the first respondent in supressing documentation relating to the registration of the four relevant

[1] *African Poultry Association and others v Minister of Trade and Industry and Other* 2018(1) NR 1 (SC).
[2] *Keya v Chief of the Defence Force and Others* 2013 (3) NR 770 (SC).

pharmacies, it cannot be said, that more than a reasonable period of time has elapsed since the applicant first reasonably became aware of the fatal defects in the registration of the four relevant pharmacies.'

[18] Counsel contended that both Coetzee in paragraph 53.8 (g) of the answering affidavit of the first respondent at record page 77 and Jaco Zah in paragraph 17.8.1 of the answering affidavit filed on behalf of the third and tenth respondents at record page 111 seek, by reference to Annexures UR46 and UR49 of the replying affidavit at record pages 959 and 967, respectively, of the main application, contend that by 19 December 2019 the applicant knew of the identities and dates of registration of the relevant respondents. Counsel submitted that what is being ignored are the further references in the Replying Affidavit in the main application to annexure UR46 at record page 959, where it is recorded that the Applicants legal representatives requested copies of all the applications made by Dis-Chem (or any entity or person directly or indirectly related to that group) to date for registering pharmacies within Namibia and Annexure UR47 at record page 963 where, in summary, the Registrar of the first respondent on the letterhead of HPCNA on 25 October 2019 refused the request for registration documents of Dis-Chem related pharmacies.

[19] Counsel submitted that it is correct that in terms of annexure UR49 to the replying affidavit in the main application at record page 967, the Registrar of the first respondent, on the letterhead of HPCNA, disclosed the fact of the registration of the relevant respondents and the dates thereof but did not disclose any other information relevant to their registration.

[20] Counsel submitted that although, baldly denied in paragraph 53.10 of the answering affidavit of Coetzee at record page 78 on the basis that 'the applicant could reasonably have become aware of the registration of the impugned pharmacies', it cannot seriously be denied by the first respondent that it was only after receipt of the answering affidavits of the respondents and, more particularly, after receipt of the minute of the meeting of the Executive Committee of the first respondent of 22nd October 2019, on or about 2nd November 2021 as part of the further disclosure of its records, that the applicant was properly apprised of the true facts relating to the registration of the third and ninth respondents. In light thereof, counsel submitted that there was no unreasonable delay in

the bringing of this application to amend the nature of the relief sought to impugn the original registration of the relevant respondents.

[21] Counsel contended that in any event, in light of the judgment of the Supreme Court in *Keya*, supra, even if there was an unreasonable delay – which is denied – the interests of finality must yield to the particular circumstances of this case including the obvious illegality surrounding the registration of the relevant respondents and the deliberate suppression by the first respondent of the circumstances surrounding their registrations.

Submissions by first respondent

[22] On the issue of delay, counsel in his written submissions, submits that the applicant failed to bring the review application within a reasonable time, resulting in undue delay.

[23] Relying on *Keya*[3] and *Namibia Grape Growers and Exporters Association and Others*[4] counsel contended that in the present circumstances it is important to note that the applicant has not brought a condonation application in respect of such delay. More so, no reasonable explanation has been given in this regard for the delay.

[24] Counsel submitted that the applicant claims that it only became aware of the unlawful registration of the third, seventh, eighth and ninth respondents around November 2021,that cannot stand because already in October 2019 the applicant's informed the first respondent that 'because of suspicions that the Pharmacy Council of Namibia (PCN) misdirected itself in allowing the registration of all or some of the Dis-Chem pharmacies (under whatever name or entity) either registered or to be registered as Community Pharmacies in Namibia' and that 'there is a reasonable suspicion that the registration of one or more of the Dis-Chem pharmacies in Namibia have been allowed outside of the parameters of the applicable legislation as referred to in our opinion' and according to counsel that should have catapulted the applicant to lodge its application to challenge the said registrations already then. The assertion that the applicant only became aware of the true state of events around 21 November 2021 cannot stand. Counsel further contended that applicant should have explained this delay in its founding papers, but it failed to do so.

[3] See footnote 3 above,
[4] *Namibia Grape Growers and Exporters Association and Others* 2004 NR 194at 214C-E.

[25] On the issue of prejudice to be suffered by the first respondent, should the application be granted, counsel argued that the first respondent will have to spend more money on legal fees as more work will have to be done to deal with the amended grounds of review. Counsel argued that the proposed amendment stands to be refused on this ground of unreasonable delay alone.

Submissions by second, third, ninth and tenth respondents

[26] Dealing with the ground of delay, counsel submitted that what makes the delay in now seeking leave to introduce entirely novel review relief (reflecting a major change of front) all the more egregious, is that: by 22 October 2019, the applicant's legal practitioners referred to 'suspicions of our client, that the Pharmacy Council of Namibia (PCN) misdirected itself in allowing the registration of all or some of the Dis-Chem Pharmacies either registered or to be registered as community pharmacies in Namibia' and 'serious concerns regarding the legality of those applications.' By 4 December 2019, the names of the pharmacies registered and the dates upon which this was done, were known to the applicant. Counsel contended that nothing precluded the applicant from there and then initiating an application seeking review relief concerning the registration of the 'Dis-Chem Pharmacies' if it held the view that there was a basis to do so.

[27] Counsel contended that Mr Ritter's conclusion that 'there was no basis upon which the applicant could prior to November 2021 reasonably have become aware' of what he alleges (which is in any event denied by the opposing respondents), simply does not bear scrutiny.

[28] Relying on *South African Poultry Association and Others v Minister of Trade and Industry and Others*[5], counsel submitted that the extent of the delay called for an upfront and full explanation (in the founding papers) and that is lacking. Also, in the context of delay in seeking an amendment, this Court held that:

'There is no sufficient, plausible or detailed explanation placed before Court why the relief now sought was not included in the original notice of motion, given the fact that

[5] See footnote 1 para 46.

on the applicant's own case the allegation of abandonment was made in the founding affidavit. Furthermore, there is also no explanation why the amendment was not sought at as provided by Rule76 (9)...The applicant appears not to appreciate that it is seeking an indulgence from the Court. The applicant was under an obligation to give a full and detailed explanation and not hold back any or further reasons or facts that explain the delay, as it appears to have decided in its wisdom. In my view, the explanation suffers from candour and forthrightness to justify an indulgence from the Court.'

The unreasonable delay in seeking leave to amend and in seeking review relief is patent and for this reason alone, counsel submitted that the proposed amendments should be refused.

[29] Counsel further contended that should the application be granted, it will be highly prejudicial to the respondents. Their businesses have been registered and established for many years now based on the impugned decisions. Counsel submitted the relevant respondents should be able to make choices taking their lives or businesses forward. The bringing of an application of review after such a lengthy period militates against parties having closure in their affairs.

Discussion

[30] The impugned decisions were taken in May 2014; 18 November 2016; 22 October 2019 and 22 October 2019, respectively. Many years have passed since those decisions were taken and the question is whether the delay in instituting the review (the amendment) was unreasonable and if so, whether it should be overlooked?

[31] The principles applicable in review proceedings where the point of delay is raised, have been succinctly summarised in *Namibia Grape Growers and Exporters Association and Others v The Ministry of Mines and Energy and Others*[6] where the Supreme court held that:

'Because no specific time is prescribed for the institution of review proceedings, the Courts, as part of their inherent power to regulate their own procedure, have laid down that review

[6] *Namibia Grape Growers and Exporters Association and Others v The Ministry of Mines and Energy and Others* 2004 NR 194 p214 C-E.

must be brought within a reasonable time. The requirement of reasonable time is necessary in order to obviate possible prejudice to the other party, and because it is in the interest of the administration of justice and the parties that finality should be reached in litigation. Where the point is raised that there has been unreasonable delay the Court must first determine whether the delay was unreasonable. This is a factual inquiry depending on the circumstances of each case. Once it is satisfied that the delay was unreasonable the Court must determine whether it should condone the delay. In this regard the Court exercises a discretion. Because the circumstances in each particular case may differ from the next case, what is, or what is not, regarded in other cases to be an unreasonable delay is not of much help, except to see perhaps what weight was given to certain factors'.

And at letter H the Court held that: *'Prejudice is, however, a relevant consideration in such matters.'*

The above legal principle was also restated in *Keya v Chief of the Defence Force and Others.*[7]

[32] In *Gecko Salt (Pty) Ltd v Minister of Mines and Energy*[8] the court held that:

'There is no sufficient, plausible or detailed explanation placed before Court why the relief now sought was not included in the original notice of motion, given the fact that on the applicant's own case the allegation of abandonment was made in the founding affidavit. Furthermore, there is also no explanation why the amendment was not sought at the time when the applicant supplemented its founding affidavit after receipt of the record is provided by Rule76 (9)...The applicant appears not to appreciate that it is seeking an indulgence from the Court. The applicant was under an obligation to give a full and detailed explanation and not hold back any or further reasons or facts that explain the delay, as it appears to have decided in its wisdom. In my view, the explanation suffers from candour and forthrightness to justify an indulgence from the Court'

Was the delay unreasonable?

[33] In a letter dated 22 October 2019 (UR46) from the legal practitioners of the applicant, Ellis & Partners, to the Chairman Pharmacy Council of Namibia (UR46) annexed to the affidavit of Mr Ritter the following is recorded:

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[7] *Keya v Chief of the Defence Force and Others* 2013(3) NR 770(SC).
[8] *Gecko Salt (Pty) Ltd v Minister of Mines and Energy* 2019 JDR 1130 (NM) at para 23.

'2.One of the main reasons why the opinion was commissioned by our client, is because of suspicions of our client, that the Pharmacy Council of Namibia(PCN) misdirected itself in allowing the registration of all or some of Dis-Chem pharmacies(under whatever name or entity) either registered or to be registered as Community Pharmacies in Namibia. This suspicion could, after a number of years not yet be either confirmed or dispelled due to the manner in which enquiries relating thereto have been dealt with by the PCN and administration of PCN, through the Registrar.

3. For some four years now, our clients and its members have been kept in the dark as to the basis on which Dis-Chem has been allowed registration, or will be registered. Our clients are aware that the following Dis-Chem Pharmacies have either already opened their doors, or are in the process of doing so in the following locations:

3.1 The Grove Mall, Windhoek;

3.2 The Dunes Mall Walvis Bay;

3.3 Platz am Meer in Swakopmund; and

3.4 Wernhill Shopping Centre Windhoek.

5. During the abovementioned meeting, certain additional matters came to light which clearly indicate that there is a reasonable suspicion that the registration of one, more, or all of the Dis-Chem pharmacies in Namibia have been allowed, outside of the parameters of the applicable legislation as referred to in our opinion.

6…This fact, read together with the fact that our clients, who have a direct interest in this matter, is refused access to the applications lodged by Dis-Chem raises serious concerns regarding the legality of those applications.'

In another letter (UR48) dated 28 November 2019 from Ellis & Partners to the Registrar Pharmacy Council of Namibia, the following is recorded:

3. 'It remains our client's contention that Dis-Chem pharmacies cannot be legally registered in Namibia.

' 4 In order for our clients to therefore consider these steps which they may be entitled to take by law, which of those Dis-Chem pharmacies. .have in fact been registered with the Council and the exact dates…'

[34] On 4 December 2019 ('UR49') the Health Professions Council of Namibia (HPCNA) Office the Registrar responded to the aforesaid letter as follows:

'*4. The following entities have been registered as follow:*

4.1 Dis-Chem Namibia (Pty) was registered on the 8 of May 2014;

4.2 Dunes Walvis Bay Pharmacy (Pty) was registered on 22 October 2019

4.3 Platz am Meer pharmacy (Pty) was registered on 18 November 2016

4.4 Wernhil Pharmacy was registered on 22 October 2019.'

[35] In a document, on the letter head of the applicant, styled 'REFERENDUM DECEMBER 2019' addressed to members the following is recorded:

'Extensive work on the legality(or not) of the Dis-Chem Pharmacies established recently have been done by the PSN legal team and the preliminary view is that these pharmacies should not have been registered by the Pharmacy Council of Namibia, which registration should be reversed. The final decision on the probability of success is currently with senior counsel advising on the matter.'(My underlining).

[36] From the above letters, it is clear that not only did the applicant (and its legal representatives) have a reasonable suspicion by October 2019 that those pharmacies (including some of the respondents) have been registered 'outside the parameters of the law', but in December 2019 had a preliminary view that those pharmacies should not have been registered, which registration should be reversed. By then, nothing precluded the applicant to institute review proceedings. It delivered the notice of amendment only in November 2021 and the application in February 2022.

[37] In *Tulipamwe Consulting Engineers v Roads Authority and Others*[9] the court held that:

[5]*: 'The principle is that in considering whether a prima facie case has been made out or not the court will accept that the facts stated in the founding affidavit are correct. [6] I also bear in mind that in order to make out a prima facie case requires a fairly low threshold and it is sufficient if the facts set out in the founding affidavit is sufficient to conclude that a reasonable court may or could find in favour of the applicant.'*

[9] *(2015] NAHCCMD 103 09 April 2015.*

I fully associate myself with that dictum and in my respectful view by December 2019(the very least) the applicant had a prima facie case to institute review proceedings. The failure to do so was unreasonable in my view.

Should the delay be condoned?

[38] Having found that the delay was unreasonable, the next question is whether the court should condone it? To begin with, there is no application for condonation and in the absence of such an application, to assist the court, it is extremely difficult for the court to condone the delay as there is no full explanation for the delay.

[39] In *Gecko Salt*[10] the court said**:** *'The applicant was under an obligation to give a full and detailed explanation and not hold back any or further reasons or facts that explain the delay, as it appears to have decided in its wisdom. In my view, the explanation suffers from candour and forthrightness to justify an indulgence from the Court.'*

In *South African Poultry Association*[11] *(201891) NR 1(SC) para46 para) the court said:*

> *'[46] It certainly called for a full explanation, and one which covered the entire period.'*

In this case, as alluded to, that was not done.

[40] Counsel for the applicant submitted that one of the reasons why there was a delay in instituting the review application was the deliberate suppression of information or refusal by the first respondent to provide them with the necessary information and documentation pertaining to the registration of the relevant respondents. Although the conduct of the first respondent may be criticized for not availing the information and documentation, the applicant had remedies in law to exert its rights, but that was not exercised to its own detriment.

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[10] See footnote 8.
[11] See footnote 1 above para 46.

[41] The reason that militates against instituting review proceedings after such an inordinate delay was aptly sum up in *Keya v Chief of Defence*[12] as follows:

'[22] The reason for requiring applicants not to delay unreasonably in instituting judicial review can be succinctly stated. It is in the public interest that both citizens and Government may act on the basis that administrative decisions are lawful and final in effect. It undermines that public interest if a litigant is permitted to delay unreasonably in challenging an administrative decision upon which both government and other citizens may have acted. If a litigant delays unreasonably in challenging administrative action, that delay will often cause prejudice to the administrative official or agency concerned, and also to other members of the public. But it is not necessary to establish prejudice for a court to find the delay to be unreasonable, although of course the existence of prejudice will be material if established. There may, of course, be circumstances when the public interest in finality and certainty should be given weight to other countervailing considerations. That is why once a court has determined that there has been an unreasonable delay, it will nevertheless be condoned. In deciding to condone an unreasonable delay, the court will consider whether the public interest in the finality of administrative decisions is outweighed in a particular case by other considerations.'

[42] On the issue of finality, Masuku J in *Hangula v Minister of Mines and Energy and Another*[13] put it thus:

'*[38] It is an accepted principle that people, including legal persons, need to be able*

to move on with their lives after some reasonable period has elapsed after a decision has been made. They should be able to make their choices taking their lives or businesses forward. The bringing of an application for review after such a lengthy period militates against parties having closure in their affairs. A point should come where they know that their conduct is accepted as valid in law and may not be easily set aside by persons who succumbed to paralysis and thus inaction for prolonged period of time."

I fully associate myself with the dictum of my Brother Masuku J

Conclusion

[43] Some of the respondents have been registered in 2014, 2016 and 2019 conducted their businesses on the basis of registration that is now sought to be upset. They have

[12] See footnote 2 above para 22.
[13] *Hangula v Minister of Mines and Energy and Another* 2020 (4) NR 1204 at 1211 par 38.

been in business for many years and over that period made substantial investment and have built up a client base that relies on them for medication. The prejudice to be suffered by the respondents will be substantial should the application be granted. For all those reasons condonation cannot be granted. In light of the conclusion, reached, it is not necessary to consider the other grounds and issues raised by the parties.

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

1. The application is refused;
2. The applicant is ordered to pay the costs of the first respondent, such costs to be costs of one legal practitioner and such costs not to be capped in terms of rule 32(11);
3. The applicant is ordered to pay the costs of second, third, ninth and tenth respondents, such costs to include the costs of one instructing and two instructed counsel and such costs not to be capped in terms of rule 32(11).

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G N NDAUENDAPO

Judge

APPEARANCE

APPLICANT:	Mr. M Fitzgerald SC and Adv. G Dicks Instructed by Ellis & Partners Legal Practitioners, Windhoek
1ST RESPONDENT:	Mr. K Kangueehi Of Kangueehi and Kavendji Inc, Windhoek
2ND, 3RD, 9TH AND 10TH RESPONDENTS:	Adv. R Tötemeyer SC and Adv. D Obbes Instructed by ENS Africa Windhoek