CASE NO.: SA 3/95

IN THE SUPREME COURT OF NAMIBIA

In the matter between

JOHAN KRUGER — APPELLANT

and

TRANSNAMIB LTD (AIR NAMIBIA) — FIRST RESPONDENT

FRANCOIS UYS — SECOND RESPONDENT

KEITH PETCH — THIRD RESPONDENT

GERHARD VAN DER MERWE — FOURTH RESPONDENT

Coram: Mahomed, C.J.; Dumbutshena, A.J.A. et Frank, A.J.A. Heard on: 1995/10/09 Delivered on: 1996/02/07

APPEAL JUDGMENT

FRANK. A.J.A.: Appellant was employed by First Respondent as an airline pilot. On the 31st March 1992 he was dismissed. This dismissal followed upon certain internal hearings and appeals which commenced much earlier. In review proceedings served on the Respondents on 27 October 1994, some 2% years after the dismissal, the Appellant sought to set aside certain findings made in some of the proceedings which led to his dismissal as well as his dismissal and also sought to be reinstated as a pilot by the First Respondent. In the alternative the Appellant sought special leave pursuant to the provisions of section 48 of Act 21 of 1987 to institute an action for damages against First Respondent. In the court a quo the question as to whether Appellant delayed unreasonably in bringing the review was raised in limine

and the court found that he did and dismissed the application on that grounds. The question, as to whether leave should have been granted to the Appellant to institute action against the First Respondent in terms of section 48 of Act 21 of 1987 was not addressed at all by the court a quo.

The Appellant's actions relating to his dismissal subsequent thereto and prior to the institution of the present review proceedings were the following according to him. He took the matter to the Ombudsman during April 1992 and was informed by letter dated 6 May 1992 that the Ombudsman would not take the matter further as he was apparently lawfully dismissed. During May 1992 he changed attorneys and counsel was instructed to furnish an opinion. During August 1992 Appellant was informed by his attorneys that counsel could not furnish an opinion as counsel was on a retainer for First Respondent. Appellant terminated this attorneys mandate on 3 August 1992 and approached his brother in South Africa who is an attorney. Hereafter the brother attempted to negotiate with First Respondent but in a letter dated 17 November 1992 the attorneys acting for First Respondent indicated to Appellant that it was not prepared to reconsider its decision. During January 1993 the Appellant once again instructed Namibian attorneys to act for him. At this stage the Appellant's financial position was such that he ran into difficulties. Because he had an insurance policy which made provision for the financing of legal costs in certain circumstances the insurer was approached and on 23 March 1993 an amount was approved" to obtain counsel's opinion.

Counsel's opinion was given at the end of June 1993 whereafter the insurer indicated that it would grant no further assistance. During July and August 1993 the Appellant had discussions with a representative of an international organisation representing airline pilots in South Africa (IFALPA). During November 1993 Appellant instructed his present attorneys of record to approach the Namibia Air Pilot's Association (NAPA) for support. This approach was apparently decided upon because of Appellant's impecuniosity. NAPA was approached during December 1993 and at the end of January 1994 replied that as it had not yet signed a recognition agreement with First Respondent it could not act for Appellant. In the beginning of March 1994 IFALPA informed Appellant that they did not assist individuals. On 27 April 1994 Appellant instructed his attorneys to obtain yet a further counsel's opinion which was forthcoming on 30 June 1994. Hereafter on 18 July 1994 copies of the records of the proceedings leading to his dismissal were requested from First Respondent which was made available on 9 September 1994 which led to further consultations with counsel during September and the institution of these proceedings as stated during October 1994.

The question as to how a court should approach a matter such as the present one is succinctly set out by Booysen, J. in Radebe v Government of the Republic of South Africa and Others, 1995(3) SA 787(N) at 798 G - 799 E as follows:

11 ...,the Court has first to determine whether a reasonable time has elapsed prior to the institution of the proceedings, or, to put it differently, whether there had been an unreasonable delay on the part of the applicant (Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad. 1978(1) SA 13 (A) at 42 A; Setsokosane Busdiens (Edms) Bpk v Voorsitter. Nasionale Vervoerkommissie. en 'n Ander. 1986(2) SA 57(A) at 86 B - D).

In deciding whether a reasonable time has elapsed, a Court does not exercise a discretion. The enquiry is a factual one, that is, whether the period which has elapsed was, in the light of all the relevant circumstances, reasonable or unreasonable (Wolgroeiers Afslaers case, supra at 42 C - D; Setsokosane*s case, supra at 86 (E).)

If the court were to arrive at the conclusion that there has been an unreasonable delay, the court exercises a discretion as to whether the unreasonable delay should be condoned.

What a reasonable time is, is of course dependent upon the circumstances of each case...

When considering what a reasonable time is to launch proceedings, one has to have regard to the reasonable time required to take all reasonable steps prior to and in order to initiate those review proceedings. Such steps include steps taken to ascertain the terms and effect of the decision sought to be reviewed; to ascertain the reasons for the decision; to consider and take advice from lawyers and other experts where it is reasonable to do so; to make representations where it is reasonable to do so; to attempt to negotiate an acceptable compromise before resorting to litigation (Scott and Others v Hanekom and Others, 1980(3) SA 1182(C) at 1192); to obtain copies of relevant documents; to consult with possible deponents and to obtain affidavits from them; to obtain real evidence where applicable; to obtain and place the attorney in funds; to prepare the necessary papers and to lodge and serve those papers.

When considering whether the time taken to prepare the necessary papers was reasonable or unreasonable, allowances have to be made for the differences in skill and ability between various attorneys and advocates."

Counsel for the Appellant submitted that the Court a quo faulted both in finding that'the delay was unreasonable and

if it was unreasonable not to condone it. Before I deal with these two features of the matter it should be stated that it is clear from the judgment of Teek, J. that the Court a quo was alive to the dual nature of the approach to the matter at hand. Thus it is stated that:

> "The test which the Court has to apply is of a dual nature, namely whether the proceedings were instituted after expiration of unreasonable time and if so, whether the unreasonable delay should be condoned. The Court has a judicial discretion in respect of condoning an unreasonable delay."

First Respondent is a creature of statute created by Act 21 of 1987. Claims against it is also regulated in the same Act and specifically by Section 48 thereof which reads as follows:

> "Notwithstanding anything to the contrary contained in any law, no claim against the Corporation shall be enforced and the Corporation shall not be liable unless the claim has been lodged in writing, by hand or registered post, with the Corporation within 3 months from the date on which it became due. Provided that if a competent court is satisfied an application being made to it, which application shall be made 3 months before the expiration of the relevant period of prescription in terms of the Prescription Act (Act 68 of 1969) , that the Corporation shall not be prejudiced by reason of failure by the Plaintiff or Applicant to so lodge such claim within the said 3 months and that, having regard to special circumstances, the plaintiff or applicant could not reasonably have been expected so to have lodged such claim within such period, such court may grant the Plaintiff or Applicant special leave to institute such claim, and the court may make such order as to the costs of the application as it may deem reasonable."

The section seems to suggest that action should in the normal course of events be taken within 3 months i.e. the First Respondent should be apprised within this period as to what

it could expect in relation to anything done by it. Where a Respondent in review proceedings ..is given, notice that a decision is about to be taken on review such Respondent knows it is as at risk and can arrange it's affairs so as to be the least detrimental. Thus in the present case, e.g. no other pilot would be employed on a permanent basis or no restructuring of the organisation based on the assumption that the Appellant would not return, to its employ would be undertaken.

Failing any notice to the contrary First Respondent would be entitled to assume after the lapse of the three months period that its action or decision was accepted by those affected by it. That the question of notice of an impending review may be relevant in deciding whether a reasonable time has elapsed seems to be clear. Thus in Chesterfield House (Ptv) Ltd v Administrator of the Transvaal and Others. 1951(4) SA 421 (T) a delay of 12 - 13 months was held not to be unreasonable partly because the Applicant's attorney had informed the Respondent within a month that Applicant intended taking the matter on review. Such notification was also a factor in the Setsokosane' s case (supra at 87 G - H) . In the present matter the Appellant did not have to undertake massive research or lengthy and detailed consultations with potential deponents and the relevant documentation could be obtained in terms of Rule 53 of the Rules of Court pertaining to reviews. This is so because it is clear from the letters Appellant's attorney wrote to First Respondent at the end of 1992 that he knew what his cause of action was at that stage.

In a letter addressed to First Respondent dated 11 September 1992 Appellant's attorney states:.....

> "My preliminary view is that his dismissal is unjustified and that at least two alternatives present themselves: Johan may proceed for either reinstatement or damages."

In a further facsimile dated 23 August 1992 even the facts forming the basis of the contention that the Appellant was wrongfully dismissed are set out.

Bearing in mind that the Appellant was fully aware of the facts forming the basis of the present application as well as the possible remedies at least at the end of 1992 the question to be decided is whether a further delay of nearly 2 years in bringing the review during October 1994 was a reasonable delay. In my view it was not. As pointed out above the Appellant knew what his case was at least two years before launching the present review and there was nothing which required more time in the line of tracing deponents, documents or real evidence or in respect of any of the factors mentioned in the Radebe case, supra at 799 B - E.

Whereas Appellant's approach to the Ombudsman and letters by his attorney kept First Respondent informed about his contention that his dismissal was wrongful there was a silence after November 1992 until July 1994 when copies of the records of proceedings were requested from First Respondent. During this time the Appellant, because of his

impecuniosity, pursued other remedies in order to gain redress, all in vain. While it is clear that Appellant never accepted the fact of his dismissal I am not totally convinced that he at certain stages did not accept that his remedy layed outside the realm of judicial remedies and within the realm of Trade Union activities and collective bargaining through such bodies. His lack of finances may have forced him to come to this conclusion but it is nevertheless clear that for a lengthy period when First Respondent was kept totally in the dark as to any steps that might be taken against it Appellant was pursuing this option. This option did not bear any fruits and as it turned out Appellant was pursuing the wrong remedy which contributed to the delay in instituting the present review.

I am thus satisfied that the court a quo was correct in it's finding that there was an unreasonable delay in the launching of the present application.

The next question to be decided is whether the court a quo was correct in not condoning this delay. Here it must be borne in mind that the court a quo exercised a discretion in this regard which means even if this Court would not have come to the same conclusion it would still not be free to interfere with the exercise of the discretion unless the discretion was not exercised judicially. The general principle in this regard is stated by Herbstein and Van Winson: The Civil Practise of the Superior Courts in South Africa; 3rd ed; at p. 790 as follows:

> "Where a lower court has given a decision on a matter within the discretion of such court, the Appellate Division will interfere only if it comes -to the conclusion that the court a quo has not exercised a judicial discretion, i.e. it has exercised its discretion capriciously or upon a wrong principle, it has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons."

Counsel for the Respondents referred us to authority in New Zealand for the proposition that pursuing the wrong remedy will not excuse a delay. Stated in these bold terms I am not convinced that such a principle applies in our law. While it certainly is a factor to be considered when deciding whether to condone a delay or not it will not necessarily by itself be the deciding factor. Thus in Stoner v S.A. Railways and Harbours, 1933 TPD 265 a delay caused by approaches to relevant authorities to have a dismissal set aside was one of the reasons why a delay was held not to have been unreasonable. Lack of financial means was also given as a reason in this case for holding the delay was not unreasonable. I cannot see why a litigant, especially one facing financial difficulties cannot initially make use of alternatives to litigation to seek redress where the opposing party is also involved in such processes. Thus where the Ombudsman, a creature of statute, is approached a respondent is always given the opportunity to answer charges and knows it may face a recommendation adverse to it. Similarly where a Trade Union takes up the cudgels on behalf of someone the employer is forwarned that adverse consequences may follow. Whereas these alternative remedies may also in some

circumstances cause a further delay in the bringing of review proceedings this will not in itself necessarily be a ground to refuse a review because of delay although it may, depending on the circumstances.

In refusing to condone Appellant's delay to launch these review proceedings the Court a quo dealt with certain periods for which there is no explanation by the Appellant. Thus for a period of 3 months Appellant awaited a legal opinion without making enquiries only to be told that counsel briefed could not furnish the opinion as he held a retainer for First Respondent. A further two months went by between terminating the mandate of one attorney and instructing new attorneys. There . was a five month delay between instructing the new attorneys and obtaining counsel's opinion. Then according to the court a quo "the fatal delay in Appellant's handling of this matter is the fact that subsequent to receiving counsel's opinion, at the end of June 1993, he failed to take purposive action until November 1993, a lapse of 5 months, for which he failed to furnish an explanation".

Counsel for Appellant submitted that reasons were furnished for these delays. Whereas something can be said for the delays prior to the "fatal delay" there is nothing to gainsay the reasoning of court a quo where it comes to the delay the court a quo termed the "fatal delay". The only thing that appears on the papers is that the Appellant had "discussions" during July and August 1993 with a representative of IFALPA. What these "discussions" entailed and how much time they consumed is not stated.

Counsel for appellant's main attack on the judgment a quo was that the merits of the application was not considered by that court. I interpose here to state that Appellant certainly seems to have an unassailable case on the merits in the sense that it is clear that he was wrongfully dismissed. Whereas it is true that the merits were not considered in the sense that a pronouncement was made upon it, it was considered as a factor when the court a quo decided not to condone the delay. This is clear from the following portion of the judgment of Teek, J.:

> "I am therefore, of the opinion that the delay in casu is a sufficient ground on its own for refusing to hear the rest of the points raised In limine or the merits, regardless of the prospects of success or otherwise of the application. This Court cannot now be expected in the circumstances of this matter [1] ... to drag a cow long dead out of a ditch'."

It is clear, in my view, that the court a quo in its discretion decided that even an unassailable case on the merits would not have been sufficient to swing the scales to a condonation of the delay. This is a view that the court a quo was entitled to take (Wolqroeiers Case, supra) and one which in the circumstances of the present matter cannot be said to have been taken capriciously or upon a wrong principle. In the result the court a quo[1]s discretion not to entertain the review because of the unreasonable delay in bringing it cannot be interfered with on appeal.

The only question which remains is whether the court a quo should have granted the Appellant relief pursuant to the

provisions of section 48 of Act No. 21 of 1987. The section postulates four factors. . Firstly, First Respondent should not be prejudiced by the late claim. Secondly, these must be special circumstances shown by the Applicant. Thirdly, the special circumstances must indicate that it could not reasonably have been expected from Applicant to have lodged his claim within the prescribed 3 months period. Fourthly, even if the first three requirements are met the Court still has a discretion to either grant or refuse leave for the institution of a claim.

First Respondent admitted that it would "probably not be severely prejudiced by the delay". In view of the fact written records were kept of all the proceedings complained of the possible resignation of witnesses and recollection of events by witnesses are not of great importance. It was thus shown that the First Respondent would not be prejudiced if action is instituted against them. ' In my view it was also not reasonable to have expected of Appellant to institute a claim within 3 months of his final dismissal. After his dismissal he approached the Ombudsman whose office is a creation of statute to deal with matters stipulated in the enabling act which covered the dismissal of appellant. I can see no reason why a lay person cannot make use of the Ombudsman whom he can approach free of charge and where his case will be taken up if it has merits instead of having to choose from the beginning between utilising the Ombudsman and litigation. This does not mean that if the matter gets

bogged down that such person need not take other steps as the delay may preclude him from having recourse to litigation but there is nothing to prevent such person from approaching the office of the Ombudsman in an attempt to seek speedy redress. Be that as it may, in the present matter the Ombudsman informed him within a month that they could not assist him. Appellant immediately approached attorneys who instructed counsel. As pointed out already here a 3 months period elapsed prior to appellant being informed that counsel could not furnish an opinion. In a different context (Compulsory Motor Vehicle Insurance Act, No. 56 of 1972) but in interpreting a similar section it was held that an attorneys negligence may constitute "special circumstances" vis-a-vis his client (Webster & another v Santam Insurance Co.. 1977(2) SA 874 (A) . Furthermore it is clear from the response to Appellant's attorney's letter dated 11 September 1992 that First Respondent was clearly re-assessing its position as it's attorney asked Appellant's attorney to be patient as "we have already had consultations with certain of client's employees (and) we have not completed this". It was only per letter dated 17 November 1992 that Appellant is informed that First Respondent was "not prepared to reconsider" the matter. Up to that stage the impression I gain is that the parties were negotiating in good faith and it would have been unreasonable for the Appellant to institute action prior to getting a final response. The fact of the negotiations was also a special circumstance. (Kriel vs President Versekeringsmaatskappy en 'n ander, 1981(1) SA 103 (T) .)

Furthermore for some time after First Respondent's final answer that it would not reconsider the dismissal, of Appellant the latter just did not have the financial means to institute action. This was also a special circumstance. (Chilize v Commercial Union Assurance Co. Ltd. 1976 (1) SA 917 (D); Mashigo v Rondalia Assurance Corporation of SA Ltd. 1977 (3) SA 431 (W). In my view from the nature of the case where it was to be expected that the Appellant would seek legal advice before proceeding and because of the special circumstances mentioned one could not reasonably expect Appellant to lodge his claim within 3 months after his dismissal. The question which remains is whether a claim only lodged approximately *2%* years after the dismissal should be allowed to proceed. The Appellant did not mention when he got out of his financial predicament and there is no evidence on record as to when this special circumstance ceased to hamper him. It is thus impossible to say whether he purposively acted once this constraint fell away or not. In this regard he did not take the court into his confidence. From the time he received his final opinion it still took him nearly four months before bringing this application. There is nothing on record to suggest he was till labouring under financial constraints. Here it it must be born in mind that, in essence, Appellant's final case was a repeat of what his attorney already mentioned in his correspondence at the end of 1992. Furthermore any relevant documents could be obtained by launching of the review in which case the provisions of Rule 53 of the High Court Rules would have

compelled First Respondent to furnish the records of proceedings and the same rule would have allowed Appellant to amend his grounds of review, would he so have wished, after receipt of the said copies.

In my view the Appellant did not establish that he acted purposively to bring the application as soon as the special circumstances which prevented him from doing so fell away. This being so the fact that he complied with the other requirements set out in section 48 cannot assist him.

In the result the appeal is dismissed with costs and as the parties were ad idem in this regard, such costs shall include the costs consequent on the employing of two counsel.

FRANK, A. J. A

I agree.

MAHOMED, C.J. I agree.

DUMBUTSHENA, A.J.A.

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