REPORTABLE

CASE NO.:SA7/2009

IN THE SUPREME COURT OF NAMIBIA

In the matter between

EBSON KEYA	**Appellant**
and	
CHIEF OF THE DEFENCE FORCE	**First Respondent**
MINISTER OF DEFENCE	**Second Respondent**
PERMANENT SECRETARY, MINISTRY OF DEFENCE	**Third Respondent**
PRESIDENT OF THE REPUBLIC OF NAMIBIA	**Fourth Respondent**

CORAM:	MAINGA JA, STRYDOM AJA and O'REGAN AJA
Heard on:	05 November 2012
Delivered on:	19 March 2013

APPEAL JUDGMENT

O'REGAN AJA (MAINGA JA and STRYDOM AJA concurring)

[1] The appellant, Mr Ebson Keya, appeals against a decision of the High Court in which the High Court held that he had delayed unreasonably in instituting proceedings against the respondents to set aside three decisions that had led to his discharge from the Defence Force. The High Court also held that as the

appellant hadnot provided any reasons for his delay, it could not condone it. The High Court accordingly dismissed his application.

[2] The respondents are the Chief of the Defence Force, the Minister of Defence, the Permanent Secretary in the Ministry of Defence and the President of the Republic of Namibia.

Facts

[3] Mr Keya served as a member of the Namibian Defence Force from May 1990 until his discharge in July 2007, first as a Staff Sergeant and, from 2001, as a Warrant Officer II. From 2001 he served as the Chief General Storeman at the Military School in Okahandja. In July 2005, he was arrested and detained by the Namibian Police on suspicion of having stolen goods from the Namibian Defence Force. In October 2005, he was suspended from his position and instructed not to report for work until the criminal charge had been finalised.

[4] On 20 March 2007, the appellant received a letter written by the Chief of the Defence Force stating that his service with the Defence Force had been terminated as a result of the theft of property from the Military School. Mr Keya's legal practitioner wrote to the Chief of the Defence Force on 26 March 2007 pointing out that Mr Keya had not been given an opportunity to make representations in terms of section 23(2) of the Defence Act, 1 of 2002 (the Defence Act) and urging that the letter of 20 March be withdrawn.

[5] On 13 April 2007, Mr Keya received a further letter from the Chief of the Defence Forcewithdrawing the letter of 20 March 2007. This letter also stated that, in terms of section 23(2) the Chief of the Defence Force intended to terminate Mr Keya's services with the Defence Force and that he had two working days to make representations to the Defence Force as to why the termination should not take effect. Further correspondence followed between Mr Keya's lawyers and the Defence Force. Then on 28 May 2007, the Chief of the Defence Force once again gave notice that he intended to terminate the services of Mr Keya, and gave Mr Keya five days to make representations as to why his service should not be terminated. On 1 June 2007, Mr Keya's legal practitioner wrote to the Chief of the Defence Force and to the President of Namibia providing representations as requested as to why Mr Keya's service should not be terminated.

[6] In these representations it was stated that Mr Keya has not stolen goods from the Defence Force but had purchased all the goods found in this possession on public auction. On 7 June, the Chief of the Defence Force replied requesting Mr Keya to provide the dates and places of the public auctions where he had purchased the Defence Force equipment as well as the name of the auctioneers and receipts for the purchase of the goods. On 8 June, Mr Keya's legal practitioner replied stating that the requested information would be provided within fourteen days. However, although further correspondence ensued, Mr Keya's legal practitioner did not furnish the details requested.

[7] On 4 July 2007, Mr Keyareceived a further letter stating that as Mr Keya had not provided information to establish that he had purchased the Defence

Force goods in his possession on public auction, the Chief of the Defence Force had decided not to change his decision to terminate Mr Keya's services with the Defence Force and stating that Keya was discharged with immediate effect.

[8] On 30 October 2007, the charges against Mr Keya were withdrawn and on 13 November he was required to clear out from the Defence Force. Following the letter of 4 July in which he had been notified of this immediate discharge from the Defence Force, Mr Keya took no further steps for more than seven months. On 13 February 2008, he launched these proceedings.

High Court proceedings

[9] Mr Keya sought an order reviewing and setting aside the three decisions of the Chief of the Defence Force purporting to terminate his service with the Defence Force and communicated to him on 20 March 2007, 13 April 2007 and 4 July 2007. He also sought a declaratory order declaring that he was still a Warrant Officer II in the Defence Force.

[10] In their answering papers, the respondents raised three points *in limine*. The first two related to the challenges to the decisions of 20 March and 13 April 2007. The respondents argued that neither decision was amenable to review proceedings as the first decision (that of 20 March) had been withdrawn and the second decision (that of 13 April) never implemented. The third preliminary issue raised by the respondents was that the review proceedings had not been instituted within a reasonable time.

[11] In his replying affidavit the appellant did not provide any explanation for his failure to institute proceedings for more than seven months after 4 July 2007 when he was discharged from the Defence Force with immediate effect. He merely stated that the preliminary challenge based on his 'unreasonable' delay was baseless and would be dealt with in legal argument.

[12] The High Court heard the application on 19 January 2009 and on 20 February 2009, Damaseb JP gave judgment dismissing the application with costs on the basis that there had been unreasonable delay by the applicant in launching the review application. Given its conclusion on the question of unreasonable delay, the High Court did not consider the merits of the review application.

Appeal

[13] The appellant lodged a notice of appeal on 9 March 2009. The record was lodged on 4 June 2009 and a bond of security and special power of attorney to appeal were lodged on 17 November 2009. On the same date, the appellant lodged an application for condonation for the late filing of the bond of security and the special power of attorney to appeal. And on 1 June 2012, the appellant lodged an application seeking condonation for the late filing of the appeal record and the reinstatement of the appeal.

[14] The matter was initially enrolled on 9 July 2012 but was removed from the roll because, according to the assistant registrar, it had lapsed as a result of the late filing of the appeal record. Once the application for condonation and

reinstatement was lodged on 1 June 2012, the matter was re-enrolled for hearing on 5 November 2012.

[15] The respondents did not oppose either application for condonation or the application for reinstatement of the appeal. They acknowledged that in May 2009 they had consented to the late filing of the record, in June 2009 they had agreed to waive the requirement for payment of security and in December 2009, they had indicated that they would not oppose the application for condonation for the late filing of the special power of attorney on appeal.

[16] Given that respondents do not oppose the applications for condonation, that no material prejudice was caused by the late filing and that the applicant lodged full applications setting out the reasons for the non-compliance with the rules, it is appropriate to grant the applications for condonation.

Appellant's submissions

[17] Counsel for the appellant spent little time in the written heads of argument addressing the judgment of the Court below and in particular the Court's conclusion that the appellant's delay in instituting these proceedings was unreasonable and that there were no grounds to condone that dilatory conduct. Instead, counsel for the appellant focussed on the merits of the appeal, in particular the question whether, once the Chief of the Defence Force had notified the appellant on 20 March 2007 of his decision to terminate the appellant's service in the Defence Force, he was *functus officio* and not able to make any further decisions, including the withdrawal of the decision of 20 March, until a court set

aside that decision. Counsel for the appellant also referred to article 18 of the Namibia Constitution that requires that administrative bodies and officials act fairly, reasonably and in compliance with the law.

[18] However, the issues relating to the merits of the appeal were not before this Court. The question this Court had to consider was whether the High Court erred when it dismissed the application for review on the ground that it had been instituted after an unreasonable delay. At the hearing, counsel for the appellant submitted that the delay of seven months was not unreasonable because the appellant had had financial difficulties and also on the ground that the period of seven months was not unreasonable.

Respondents' submissions

[19] Respondents' counsel argued that the decision of the High Court should not be interfered with on appeal. In particular, counsel argued that the Court was correct in concluding in the light of all the circumstances that the delay was unreasonable. Respondents' counsel also submitted that the High Court was correct in concluding that there was no basis made out on the record for the condonation of the unreasonable delay in launching the review proceedings. In the circumstances, respondents' counsel argued that the appeal should fail.

Issues on appeal

[20] The key issue for determination on appeal is whether the High Court was correct in concluding that the review application should be dismissed because it was instituted after an unreasonable delay.

Proper approach to the question of unreasonable delay

[21] This Court has held that the question of whether a litigant has delayed unreasonably in instituting proceedings involves two enquiries: 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 an exercise of its discretion, grant condonationfor the unreasonable delay.[1]In considering whether there has been unreasonable delay, the High Court has held that each case must be judged on its own facts and circumstances[2] so what may be reasonable in one case may not be so in another. Moreover, that enquiry as to whether a delay is unreasonable or not does not involve the exercise of the court's discretion.[3]

[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

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[1] See *Krüger v Transnamib Ltd (Air Namibia) and Others* 1996 NR 168 (SC) at 170 - 171, citing with approval the South African decision *Radebe v Government of the Republic of South Africa and Others* 1995 (3) SA 787 (N) at 798G – 799E. See also *Purity Manganese (Pty) Ltd v Minister of Mines and Energy and Others*2009 (1) NR 277 (HC)*; Global Industrial Development (Pty) Ltd v Minister of Mines and Energy and Another*2009 (1) NR 277 (HC); *Namibia Grape Growers and Exporters v Minister of Mines and Energy* 2002 NR 328 (HC); *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011 (2) NR 437 (HC) at paras 41 – 43 and *Ogbokor and Another v Immigration Selection Board and Others*, as yet unreported decision of the High Court, [2012] NAHCMD 33 (17 October 2012*)*. For other South African decisions, see*Wolgroeiers Afslaers v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 39 B – D, *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en 'n Ander* 1986 (2) SA 57 (A); *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) at paras 46 – 48; *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA) at paras 5 and 22.

[2] See *Disposable Medical Products (Pty) Ltd v Tender Board of Namibia and Others* 1997 NR 129 (HC) at 132 (per Strydom JP). See also *Purity Manganese (Pty) Ltd v Minister of Mines and Energy and Others; Global Industrial Development (Pty) Ltd v Minister of Mines and Energy and Another,* cited above n 1, at para [14].

[3] See *Radebe*, cited above n 1, at 798 I; *Setkosane*, cited above n 1, at 86 E – F; *Gqwetha*, cited above n 1 at para 48.

final in effect.[4]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.[5] There may, of course, be circumstances when the public interest in finality and certainty should give weigh to other countervailing considerations. That is why once a court has determined that there has been an unreasonable delay, it will decide whether the delay should 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.

Was the delay unreasonable?

[23] In this case, the High Court concluded that the delay was unreasonable. In reaching this conclusion, the High Court noted, amongst other things, that the appellant had provided no explanation for the delay in instituting proceedings between 4 July 2007 and 13 February 2008, despite the respondents' raising the issue *in limine* in their answering affidavits. The appellant asserts that the High Court erred in this conclusion, though as mentioned above, in written argument on behalf of the appellant this issue was not fully addressed.

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[4] See *Wolgroeiers Afslaers*, cited above n 1, at 41 E - F; *Associated Institutions Pension Fund*, cited above n 1, at 321; *Gqwetha*, cited above n 1, at para 22.

[5] See *Wolgroeiers Afslaers*, cited above n 1, at 42C; *Gqwetha*, cited above n 1, at para 23.

[24] As set out above, the relevant delay in this case was from 4 July 2007, when appellant was informed that he has been discharged from the Defence Force with immediate effect, until 13 February 2008 when these proceedings were instituted in the High Court. As the High Court reasoned, the delay should be seen against the background of the fact that in the period immediately before the appellant was informed of his discharge, he was represented by a legal practitioner who was communicating with the respondent in relation to the question of his discharge. The same legal practitioner represents the appellant in these proceedings. Indeed, the appellant's legal practitioner had threatened as early as 26 March 2007 to launch High Court proceedings in relation to the appellant's discharge from the Namibian Defence Force and annexed to the appellant's founding affidavit is a draft notice of motion dated 31 May 2007.

[25] Given these facts, it is clear that when the appellant received the notice of discharge on 4 July 2007, he had already briefed his legal practitioner in relation to the question of his threatened discharge and counsel was fully aware of the issues surrounding the discharge. Yet no letter was written to the respondents challenging the decision or threatening legal action. Given the active engagement of a legal practitioner prior to 4 July 2007, this failure to act was surprising. Nor was any explanation for the inactivity and delay provided in the founding papers. Moreover, when the respondents raised the issue of unreasonable delay in their answering affidavit, the appellant chose not to deal with it in reply. Instead, he stated that the point was 'baseless'. No clear explanation was provided as to why he waited seven months to launch these proceedings. From the bar, counsel sought to suggest that the appellant may have had financial difficulties in pursuing the

appeal, but this allegation was not made on the affidavits and cannot be taken into account. There is no suggestion on the record that attempts at a resolution of the dispute between the parties were taking place or that any other relevant steps were taken that would explain the delay.

[26] Appellant's counsel sought to suggest that seven months was a reasonable delay by referring to section 24 of the Labour Act, 6 of 1992 which requires litigation arising from employment disputes to be initiated within twelve months and section 73(1) of the Defence Act, 1 of 2002,which provides that litigation in terms of the Defence Act must be instituted within two years. Neither of these time limitations is applicable to these proceedings. It may well be that these time periods provide some guidance as to what the Legislature would consider to be appropriate time periods, but they cannot be determinative of the question of 'unreasonable' delay, which must turn on the facts and circumstances of each case.

[27] On the facts of this case, it is clear that the appellant's legal practitioner was fully briefed in relation to the appellant's threatened dismissal from the Namibian Defence Force. There is no suggestion that it took the appellant some time to appreciate the implications of the letter of 4 July, or that it took him time to find legal advice. On the contrary, a copy of the letter of 4 July 2007 was sent to the appellant's legal practitioner. Nor is there any suggestion that there were any attempts to resolve the dispute between the appellant and the respondents. Indeed, there is no explanation at all for the delay.

[28] Given the absence of any explanation from the appellant as to the reason for the seven-month delay despite the matter pertinently being raised in the answering affidavit, the High Court cannot be faulted for concluding that the appellant had unreasonably delayed in launching these proceedings. The next question that arises is whether that delay should be condoned. In the absence of any explanation for the delay, it is not possible to conclude that this is a case in which the unreasonable delay should be condoned. For these reasons, therefore the appeal must be dismissed.

Costs

[29] The appeal has been dismissed. There is no reason why an order of costs should not be made. It is appropriate therefore that the appellant be ordered to pay the respondents' costs, which given that no counsel was instructed in this case, should be on the basis of one legal practitioner.

Order

[30] The following order is made:

1. The appeal is dismissed.
2. The appellant is ordered to pay the costs of the respondents on appeal, such costs to include the costs of one legal practitioner.

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O'REGAN AJA

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MAINGA JA

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STRYDOM AJA

APPEARANCES

APPELLANT:	Mr F C Brandt
	Instructed by Chris Brandt Attorneys
RESPONDENTS:	Ms C Machaka
	Instructed by Government Attorney