IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 10870/17

In the matter between:

BOSFOR CC	FIRST APPLICANT
FIBRETECH CC	SECOND APPLICANT

and

NCT FORESTRY CO-OPERATIVE LTD	RESPONDENT

ORDER

Having read the papers and after hearing counsel, the following order is made:

(a) In respect of the first point in limine regarding locus standi of the second applicant, the respondent succeeds and the second applicant's application is dismissed with costs.

(b) On the second point in limine regarding *lis alibi pendens*, the respondent is partially successful and is awarded costs up to and including the date of the withdrawal of the first application.

(c) In respect of the third point in limine relating to condonation, the respondent succeeds and the first applicant is to pay the respondent's costs including costs of two counsel.

(d) As regards the fourth point in limine regarding the jurisdiction of this court to review the matter, the respondent succeeds and the first applicant is to pay the respondent's costs including costs of two counsel.

JUDGMENT

Date Delivered: 8 April 2019

MASIPA J

The facts

[1] This a review application brought by the applicants. Being a review of an administrative decision taken by the respondent, the relief sought by the applicants is the following:

'1. That the respondent's decision taken on 1 February 2017 to suspend the applicants from trading with the respondent is hereby reviewed and set side.

2. The respondent's decision taken on 26 July 2017 to expel the applicants as members of the respondent and to cancel the applicants' shares, is hereby reviewed and set aside.

3. That the lateness of the review application of the respondent's decision taken on 1 February 2017 and referred to in prayer 1 *supra,* be condoned as far as it may be necessary.

4. That the costs of this application be paid by the respondent.

5. Further and/or alternative relief.'

[2] The applicants trade in timber which they procure from growers in the Mpumalanga and KwaZulu-Natal Provinces. The first applicant was a member of and held shares in the respondent for a period of 16 years. Ownership in the first applicant is held by two shareholders who hold equal shares, being Daniel Johannes Bosman (Bosman) and his wife Dina Bosman. The second applicant belongs to the two shareholders of the first applicant who each hold fifty per cent of the member's interest. The second applicant is not a member of the respondent. In terms of the applicants' procurement procedure, once they receive timber from their numerous suppliers, they

supply it to the respondent who will pay them for it, and in turn, the applicants pay their supplier/agents.

[3] The respondent's objective was to market pine, waste, eucalyptus and other forestry products and to render necessary services to its members in relation to forestry and farming, and was regulated by its own statute, being the statute of an undertaking formed as a primary agricultural co-operative with limited liability in terms of the provisions of the Co-Operatives Act 91 of 1981.

[4] The respondent provided the applicants with a monthly quota of timber to be delivered for the next month. The applicants estimated that together they supplied 66 000 tons of gum and 35 000 tons of waste to the respondent annually. In order to facilitate the transactions, the applicants were provided with delivery notes. When the timber was ready for delivery, the grower would inform the applicants who would go to where the timber was to inspect it in order to vet the origin, location and ownership of the timber, take photographs of the timber and record their location on the GPS co-ordinates. The applicants thereafter arranged for the transportation of the timber. As time went by the applicants used sub-agents including Lagalela which employed Bongani Boyzie Zondo (Zondo) and Thokozani Cele (Cele) as its drivers. The applicants implemented security checks and verified their agents.

[5] After inspecting the timber, the applicants' supplier or transporter was issued with a delivery note(s) and regular checks were conducted to verify the timber. According to the respondent, due to the vast number of members, there are continual challenges regarding what it calls "a chain of custody", with some members and suppliers being implicated in delivering stolen timber. As one of the measures taken to prevent this, it issues delivery notes to members who are warned to safeguard them. It appears that unbeknown to the applicants, two of the drivers from Lagalela, Zondo and Cele, were involved in the delivery of stolen timber which the respondent attributes to poor verification procedures.

[6] On 2 February 2017,[1] the applicants were informed that they were suspended from trading with the respondent with effect from 6 February 2017 until the annual general meeting scheduled for 26 July 2017, at which time the respondent's board would recommend that the applicants be permanently expelled. Despite there being no provision for internal remedies in the respondent's statute, the applicants appealed against the decision on 3 February 2017. On 9 February 2017, the applicants were informed that the appeal would be heard during March 2017. Consequently, a more detailed letter challenging the suspension was forwarded to the respondent on 27 February 2017. On 3 March 2017, the applicants received a letter to the effect that the respondent's board had resolved to maintain the suspension.

[7] Attempts were made thereafter through the applicants' attorneys to request an audience with the respondent's board but to no avail. The applicants subsequently sent an objection to the suspension as provided for in the respondent's statute and the respondent replied saying that the suspension would remain.

[8] On 26 July 2017, a special resolution was passed by the members of the respondent to expel the first applicant and the second applicant (a non-member) in terms of clause 34(1)(c) of the statute and for the cancellation of the first applicant's member's interest in terms of clause 36(3). A letter was issued on 26 July 2017 informing the applicants of their expulsion. Mention was made in the letter of an intensive forensic investigation report which the applicants contend was never availed to them. The applicants were only informed that their delivery notes were used to deliver stolen timber.

[9] Prior to the incident leading to the suspension and expulsion of the first applicant and during 2013, Bosman was advised of certain security concerns regarding the applicants' supply system. Bosman was informed that the primary agent was responsible for the supply chain and behaviour of their sub-agents and he was requested to propose a sanction which was sufficient to deter agents against

[1] Despite the prayer referring to the suspension date as 1 February 2017, the letter of suspension is dated 2 February 2017. The correct suspension date is therefore 2 February 2017.

complaisant control during timber sourcing. The sanctions which were accepted were for the agent to pay to the respondent three times the timber value of the load for the first offence, five times the timber value of the load for the second offence and automatic dissociation of the agent from the respondent's supply chain for the third offence.

[10] The applicants contend in this review application that the respondent's decision to suspend and subsequently expel them was irrational and was not supported by the evidence. Further, that no reasonable person could have arrived at such a conclusion that the applicants were involved in stealing and supplying stolen timber to the respondent. According to the respondent, the expulsion of the first applicant was not because it was guilty of stealing or supplying stolen timber but rather that the first applicant through poor verification procedures, allowed the supply of timber proven to be stolen. Bosman admitted in his supplementary founding affidavit that the sub-agents of the first applicant used its delivery notes to deliver 23 loads of stolen timber. Notably, the resolution to expel the first applicant was in respect of 25 loads while the information provided to the applicants was that it related to only 23 loads which were treated as a single case.

[11] According to the applicants, a similar incident took place with a sub-agent of Khulanathi Forestry (Pty) Ltd, also a member of the respondent. However, the resolution to expel was only taken against the applicants. The reason provided for this was that the respondent contends that the applicants were guilty of repeated incidents and the sanction imposed was as had been agreed with the applicants in 2013. Despite allegations of delivering stolen timber against other members of the respondent, no steps were taken against such other members.

[12] It is common cause that a hearing was held prior to the respondent's decision to expel the applicants. What is in dispute is the substance of that hearing. According to the applicants, the decision was based on a formal disciplinary hearing on 7 December 2016. It is undisputed that the notice for the disciplinary hearing did not inform the applicants of their rights to call witnesses. On the day of the disciplinary hearing the

applicants' representatives, Bosman and his wife, were advised that they had not been summoned to a hearing but that the hearing was intended to hear their side and find alternative ways to resolve the issue and mitigate the delivery of stolen timber. Further, Mr and Mrs Bosman noted upon perusal of the record for the hearing that despite the hearing sitting for two days, the applicants were only invited to the second day of the proceedings.

[13] Dissatisfied with these decisions, the applicants lodged an application for the decisions to be reviewed and set aside. In lodging their application, the applicants contended that the review fell within the ambit of s 7 of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA) which required that reviews be filed within 180 days failing which, there must be an application for condonation. The applicants contend that the respondent's failure to provide them with the investigation report was a violation of the preamble to the PAJA which calls for openness and transparency in public administration or in the exercise of public power or the performance of public function.

Points in limine

[14] The respondent raised four points in limine against the applicants' case. The points will be considered individually as they each raise separate and distinct legal issues which necessitate that they be dealt with in this manner.

Locus standi

[15] It is common cause that the second applicant is not a member of the respondent. This being so, the respondent raised a point in limine that the second applicant lacked locus standi to bring this case. Mr *Combrink* for the respondent submitted that at no stage had the second applicant submitted to the jurisdiction of the respondent. In support thereof he relied on *Herbex (Pty) Ltd v Advertising Standards Authority*[2] where the court found the decision taken by the respondent against a non-member to be an infringement of the non-member's constitutional rights to freedom of association and expression. This was despite the applicant (non-member) having for a number of years,

[2] *Herbex (Pty) Ltd v Advertising Standards Authority* 2016 (5) SA 557 (GJ).

subjected itself to the procedures and rulings of the respondent. The facts in *Herbex* are very similar to the current matter.

[16] Mr *Snyman* for the applicants correctly conceded that the second applicant is not a member of the respondent and that it therefore lacked the necessary locus standi. He conceded that the second applicant's case should be dismissed with costs.

Lis alibi pendens

[17] The second point in limine of *lis alibi pendens* was raised on the basis that there had been an earlier, similar application for review between the same parties. However, after the respondent took the point in its court papers for the current application, the applicants withdrew the earlier application with the result that this point fell away. Mr *Combrink* submitted that the point was justifiably taken and was the reason for the withdrawal of the initial application. Consequently, the respondent was entitled to an order for costs up to and including the date of the withdrawal of the initial application.

Condonation

[18] The third point in limine relates to whether there was a need for the applicants to apply for condonation for the late filing of the review. The condonation issue is restricted to the challenge in respect of the respondent's decision to suspend the applicants on 2 February 2017[3]. It is apparent from the relief sought by the applicants that condonation was part of the prayer. However, this was sought with the understanding and belief held by the applicants at the time, that the review was in terms of the PAJA which requires review applications to be launched within a period of 180 days. Mr *Snyman* conceded in the replying affidavit that the PAJA was not applicable and that the review was a common law review in accordance with the provisions of rule 53 of the Uniform rules of court. In so far as this was the case, Mr *Combrink* submitted that review applications in terms of rule 53 had to be brought within a reasonable time.

[19] Mr *Combrink* further submitted that the correct approach in considering whether there was a delay is to calculate from the date of the decision sought to be impeached

[3] The suspension letter referred to both applicants being suspended despite the second applicant being a non-member of the respondent.

being 2 February 2017 to 22 September 2017 when the application was launched. According to Mr *Combrink* this amounts to a delay of 233 days. He argued that a useful guideline would be that set out in s 7(1) of the PAJA which sets out 180 days as being the reasonable time within which to launch a review application (see *Thabo Mogudi Security Services CC v Randfontein Local Municipality*).[4]

[20] It is the awareness of the administrative action that sets the clock ticking (see *Camps Bay Ratepayers' and Residents' Association & another v Harrison & another*[5] and *Aurecon South Africa (Pty) Ltd v City of Cape Town*).[6] There was no explanation for the delay in bringing the application. In the absence of such condonation application, the application ought to be dismissed with costs, such costs to include costs of two counsel.

[21] Mr *Snyman* submitted that since the respondent contends that the PAJA is not applicable, then the computation of 180 days cannot apply. This is because the review is in terms of common law which requires proceedings to be instituted within a reasonable period. It was argued that the review application was brought within a reasonable time.

[22] As set out in *Erasmus Superior Court Practice*,[7] there is no statutory period prescribed for review proceedings in terms of rule 53. Such a review must however be brought within a reasonable time.[8] As is the case in this matter, the issue of a delay in launching a review application is pre-eminently a point raised by the respondent. The applicant will then deal with this in its replying affidavit. The applicants in their replying affidavit contend that the review application was launched within a reasonable time and therefore the point in limine on condonation is irrelevant.

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[4] *Thabo Mogudi Security Services CC v Randfontein Local Municipality* 2010 JDR 0525 (GSJ) paras 59-60.
[5] *Camps Bay Ratepayers' and Residents' Association & another v Harrison & another* 2011 (4) SA 42 (CC) para 49.
[6] *Aurecon South Africa (Pty) Ltd v City of Cape Town* 2016 (2) SA 199 (SCA) para 16.
[7] *Erasmus Superior Court Practice* 2 ed Vol 2 D1-701.
[8] *Lion Match Co Ltd v Paper Printing Wood & Allied Workers Union & others* 2001 (4) SA 149 (SCA) paras 25-26; *Madikizela-Mandela v Executors, Estate Late Mandela & others* 2018 (4) SA 86 (SCA) paras 9-10.

[23] In *Khumalo & another v Member of the Executive Council for Education: KwaZulu-Natal*[9] the court had opportunity to consider a similar issue which was before the Labour Court on review in terms of the PAJA. The issues related to the promotion of two employees under different circumstances but related to the same position. Despite the existence of the alternative compulsory dispute resolution mechanisms, the trade union NUPSAW approached the MEC to investigate these promotions. After a report that these were unlawful or irregular, the MEC filed a review 21 months after receiving the report. The Labour Court entertained the matter and found the two promotions to have been unlawful and ordered amongst other things that they be set aside.

[24] In an appeal to the Labour Appeal Court, the order of the Labour Court was confirmed. Having failed in a petition to the Supreme Court of Appeal for special leave, the applicants approached the Constitutional Court. There Skweyiya J found firstly that the nature of the review application by the MEC was not a review of administrative action under the PAJA. Further that the MEC was correct in investigating the matter but had delayed unreasonably in bringing her application and there was no explanation for the unreasonable delay. The court also found that in the absence of a proper explanation for the delay, the Labour Court should have dealt with and determined this issue.

[25] The court noted that the review fell under s 158(1)*(h)* of the Labour Relations Act 66 of 1995 (the LRA), which has no prescribed time limits for bringing reviews under the section, but that the review has to be launched within a reasonable time. It held that courts have the power to refuse a review application in the face of an undue delay in initiating the proceedings and that the Labour Court had misdirected itself in overlooking the delay. The court held that the delay was of such a nature that it should non-suit the MEC.

[26] The condonation issue turns on what a reasonable period is as envisaged by rule 53(1) of the Uniform rules of court. This issue was considered in the Labour Court in

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[9] *Khumalo & another v Member of the Executive Council for Education: KwaZulu-Natal* 2014 (3) BCLR 333 (CC).

respect of reviews in terms of s 158(1)*(g)* of the LRA which provides for reviews in terms of the LRA without setting any prescribed period as against a review in terms of s 145 of the LRA which requires a review be brought within six weeks. It has been accepted that in the context of reviews in terms of s 158(1)*(g)* and s 158(1)*(h)*, that these must be launched within a reasonable period and that a reasonable period is that which is set out in s 145, being the six week period (see *Chetty v Rafee N.O. & others*[10] and *Qandana v National Bargaining Council for the Road Freight Industry & others*).[11]

[27] In *Lutchman v Pep Stores & another*[12] a review application in terms of s 158(1)*(g)* of the LRA was brought eight months after conciliation on the basis that there were no time frames set. There the court found that the application had to be brought within a reasonable time and where it was not, an application for condonation had to be filed. In the absence of this the application could not stand and had to be dismissed. In *Associated Institutions Pension Fund & others v Van Zyl & others*[13] the court stated that the reasonableness or unreasonableness of a delay depends on the facts or circumstances of a particular case.

[28] In *Thabo Mogudi*[14] the court referred to s 7(1) of the PAJA as 'having attempted to curb the uncertainty of the common law position by placing a time limit on the period within which judicial review proceedings must be instituted'. The court found an application for review launched two months after the 180 days had expired to have been unreasonable. It is common cause that there are no prescribed time frames within which review proceedings not covered by the PAJA must be brought. It has been accepted they must be brought within a reasonable period.[15] Following from the Labour Court judgments where a reasonable period was accepted to be that which was prescribed by its statute and after considering *Thabo Mogudi*, I am satisfied that the period of 180

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[10] *Chetty v Rafee N.O. & others* (JS755/13) [2016] ZALCJHB 400 (14 October 2016) para 11.
[11] *Qandana v National Bargaining Council for the Road Freight Industry & others* (P331/11) [2012] ZALCPE 11 (19 November 2012) para 5.
[12] *Lutchman v Pep Stores & another* (2004) 25 ILJ 1455 (LC).
[13] *Associated Institutions Pension Fund & others v Van Zyl & others* 2005 (2) SA 302 (SCA) paras 47-48.
[14] *Thabo Mogudi Security Services CC v Randfontein Local Municipality* 2010 JDR 0525 (GSJ) para 57.
[15] Erasmus above at D1-701 and *Chairperson, Standing Tender Committee & others v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) para 28.

days set out in s 7(1) of the PAJA, which is a period in excess of six months, is a reasonable period for purposes of a review in terms of rule 53(1).

[29] Where it is alleged that the review was not brought within a reasonable time, as is the case in this matter, it is for the court to decide this and to determine whether the unreasonable delay, if any, should be condoned.[16] Where an objection is raised regarding the delay the applicant can deal with this in reply. Despite the respondent raising this issue in the matter before me, the applicants elected not to address this issue. As stated above, Mr *Snyman* submitted that since there were no time frames set, it was unnecessary for the applicants to apply for condonation. I disagree with him in this regard. Even if I agreed with him, it is clear from the authorities that it was incumbent on the applicants to place relevant facts before the court to show that the review was launched within a reasonable period. In the absence of this the court is left only with the respondent's version on the issue. On the facts presented, I find that the applicants' delay in launching the review was out of time and that an application for condonation was necessary. In the absence of such an application, the application falls to be dismissed.

Jurisdiction to review

[30] The fourth point in limine was that the administrative action sought to be reviewed was not open for review. This point relates mainly to the respondent's decision to expel the first applicant, since the issue of the lateness in filing the review application does not arise as the impugned decision was taken on 26 July 2017 and the review launched on 22 September 2017. It was submitted by Mr *Combrink* that the applicants admitted that the respondent is not an organ of State and that therefore the PAJA did not apply. As regards a common law review, the application in terms of rule 53(1) is limited to decisions of an inferior court, or any tribunal, board or officer performing judicial, quasi-judicial or administrative functions. The performance of administrative function relates to conduct of public or private entities exercising public powers, performing public functions or exercising authority in the public interest.

[16] *Erasmus* above at D1-701.

[31] Mr *Combrink* submitted that common law review now applies in a narrow field in relation to private entities that are required in their domestic arrangements to observe common law principles of administrative law. This relates to voluntary associations and religious organisations.[17] He submitted that according to the respondent's constitution, it is a private body, wholly owned and whose members share in the profits. It was argued that the respondent's decision sought to be impeached is not an administrative action or a decision susceptible to review.

[32] In *Pennington v Friedgood & others*[18] it was held that the rulings of the chairperson of a general meeting of a medical scheme registered in terms of the Medical Schemes Act 131 of 1998 did not constitute administrative action and were therefore not susceptible to review.[19] Relying on *Pennington,* Mr *Combrink* argued that by analogy, the decision of the shareholders of the respondent did not constitute an administrative action and was not susceptible to review. He submitted therefore that the application stood to be dismissed.

[33] As stated by Devenish, Govender and Hulme in *Administrative Law and Justice in South Africa*,[20] administrative action is defined in s 1 of the PAJA as relating to a decision taken or the failure to take a decision by an organ of State when exercising power in terms of the Constitution or a provincial constitution or exercising public power or performing public function in terms of any legislation. It also includes natural or juristic persons exercising public power or performing public function in terms of an empowering provision.[21]

[34] In *Pennington*, the court relying on *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange & others*[22] where it was found that just as a meeting of shareholders of a company was not subject to review of the high court, found that

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[17] GE Devenish, K Govender and D Hulme *Administrative Law and Justice in South Africa* (2001) at 25.
[18] *Pennington v Friedgood & others* 2002 (1) SA 251 (C).
[19] *Pennington* para 38.
[20] Devenish above at 24.
[21] *Pennington* para 19.
[22] *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange & others* 1983 (3) SA 344 (W). See *Pennington* para 38.

proceedings of an annual general meeting of a medical scheme was not subject to review and such did not constitute administrative action.

[35] Mr *Combrink* argued that since there was an agreed sanction between the first applicant and the respondent, which is set out earlier in this judgment, and the first applicant acknowledged impropriety when it signed the acknowledgment of debt in favour of the respondent, which acknowledgment was signed freely and voluntarily and co-signed by witnesses, the respondent applied the sanction as agreed. Consequently, the submission that the respondent did not comply with its statute was flawed since the agreement which was contractual, provided severance for a third offence. The respondent was clearly not exercising any judicial, quasi-judicial or administrative action when it imposed the sanction to the applicants. The processes it followed were purely contractual in nature and can therefore not be reviewed in terms of rule 53(1). This court therefore lacks the required jurisdiction to adjudicate on the matter.

Order

[36] In the premises, the following order is made:

(a) In respect of the first point in limine regarding locus standi of the second applicant, the respondent succeeds and the second applicant's application is dismissed with costs.

(b) On the second point in limine regarding *lis alibi pendens*, the respondent is partially successful and is awarded costs up to and including the date of the withdrawal of the first application.

(c) In respect of the third point in limine relating to condonation, the respondent succeeds and the first applicant is to pay the respondent's costs including costs of two counsel.

(d) As regards the fourth point in limine regarding the jurisdiction of this court to review the matter, the respondent succeeds and the first applicant is to pay the respondent's costs including costs of two counsel.

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MASIPA J

APPEARANCES:

For the Applicants:	Mr C J *Snyman* SC
Instructed by:	Van der Westhuizen Attorneys
For the Respondent:	Mr L E *Combrink* SC
Instructed by:	SKYE Forsyth Attorneys
Matter heard on:	7 December 2018
Judgment delivered on:	8 April 2019