THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 987/2017

In the matter between:

HANS SEUNTJIE MATOTO **APPELLANT**

and

FREE STATE GAMBLING AND LIQUOR AUTHORITY **FIRST RESPONDENT**

THE CHAIRPERSON, FREE STATE GAMBLING AND LIQUOR AUTHORITY **SECOND RESPONDENT**

THE CHIEF EXECUTIVE OFFICER, FREE STATE GAMBLING AND LIQUOR AUTHORITY **THIRD RESPONDENT**

THE MEMBER OF THE EXECUTIVE COUNCIL ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENT **FOURTH RESPONDENT**

Neutral citation: *Matoto v Free State Gambling and Liquor Authority and others* (987/2017) [2018] ZASCA 110 (12 September 2018)

Bench: Ponnan, Zondi, Van Der Merwe and Makgoka JJA and Nicholls AJA

Heard: 17 August 2018

Delivered: 12 September 2018

Summary: Promotion of Administrative Justice Act 3 of 2000 (PAJA) – whether in the interests of justice for the 180 days envisaged in s 7(1) to be extended in terms of s 9 – nature of discretion to be exercised – whilst prospects of success may be an important consideration they are by no means decisive.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (per Molitsoane AJ, Rampai J concurring, sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Ponnan JA (Zondi, Van Der Merwe and Makgoka JJA and Nicolls AJA concurring):

[1] On 21 September 2012 a special liquor licence for a eating house, namely Senti's Lounge, then conducted by Ms Senti Jane Mathekeng at Erf No 132, Vetman Street, Jacobsdal (the first premises) was transferred by the first respondent, the Free State Gambling and Liquor Authority (the Authority) to the appellant, Mr Hans Seuntjie Matoto, in terms of s 116 of the Liquor Act 27 of 1989 (the Act). Some 7 months later, on 3 May 2013, the appellant lodged an application in terms of s 41 of the Free State

Gambling and Liquor Act 6 of 2010 (the FSGLA) with the Authority for the permanent removal of that registration from the first premises to Erf No 338, Wolf Street, Ratanang, Jacobsdal.

[2] The appellant's application was refused on 13 November 2013. The appellant, thereupon, lodged a review application with the Free State Division of the High Court, Bloemfontein (the high court), which came to be settled between the parties on 5 June 2014. In accordance with the settlement agreement, the high court issued an order by consent:

(a) rescinding the decision to refuse the appellant's application in terms of s 41 of the FSGLA; and

(b) referring the matter back to the first respondent to be reconsidered within 30 days.

[3] On 17 September 2014 the appellant was notified that his application will be reconsidered on 2 October 2014. According to the appellant, on the latter date both parties were afforded an opportunity to present their case, whereafter the proceedings were postponed ostensibly for the purposes of obtaining further affidavits from interested parties. That apparently did not happen. Instead, by letter dated 12 March 2015, which was received on 18 March 2015, the appellant's attorney was informed:

'We regret to inform you that your application was refused on the following grounds;

1. The proposed premises are situated in close proximity to two places of worship namely, Roman Catholic Church and Dutch Reform Church there is therefore a non-compliance with Regulation 8(2),

2. Proposed premises are in close proximity to an institution of learning namely, Ikanyegeng Combined School, which fact also indicate non-compliance with Regulation 8(2) read with s 28 of the Free State Gambling and Liquor Act;

3. The proposed premises are also located in an area where there is an already existing similar liquor outlet, in its close proximity.'

(The second decision.)

[4] Two days after receipt of that letter, the appellant's attorney wrote to the Authority on 20 March 2015:

'Kindly advise as a matter of extreme urgency as to when the decision was taken to refuse the above application and also please advise as to who made the decision to refuse the application. We await your urgent reply.'

That letter went unanswered, prompting the appellant's attorney to once again write a month later:

'We need your reply urgently as we need the information to proceed with the review application.'

On 8 May 2015 the appellant's attorney wrote yet a further letter which inter alia stated:

'After we received Mr Lejone's letter of 12 March 2015 we discuss[ed] the above matter with your Mr Johan de Bruyn. We informed him that it is our instructions to once again proceed with a court application and that we have to cite the MEC the reason being that the MEC must appoint another board to hear the application again.

. . .

[W]e are willing to settle the matter on the basis that we have explained to him that if the authority gives us an undertaking that they will not oppose the review application we will not cite the MEC but we will still be asking for an attorney and client cost order as it is clear from the above that the CEO erred in refusing the application without referring the matter to a hearing again as the matter was never finalised at the previous hearing.

. . .

If we do not receive before or on close of business on 12 May 2015 a letter from the authority that the authority will not oppose the applicant's second review application we have been instructed to then proceed with such an application without the letter in which event we will be asking for an appropriate *de bonis propriis* cost order and we will have to cite the MEC so that he could appoint somebody else to hear the application afresh.'

That letter elicited the following reply from the Authority on 12 May 2015:

'Please be advised that the Authority will not litigate on correspondence but will however oppose your client's application for review. Kindly further be advised that allegations contained in your above letter are denied as far as they relate to what ought to have been done by both officials and/or the Board and correct facts will be placed before the courts at the relevant time.'

[5] On 29 September 2015 the appellant launched a fresh application seeking to review and set aside the second decision of the Authority. The Authority was cited as the first respondent, the Chairperson of the Authority as the second, the Chief Executive Officer of the Authority, as the third and the Member of the Executive Council Economic

Development, Tourism and Environment, as the fourth. By then, the 180 days envisaged in s 7(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) had expired. The appellant accordingly sought an order that the period be extended in terms of s 9 of PAJA. The high court (per Molitsoane AJ, Rampai J concurring) refused the extension and consequently dismissed the application without entering into the substantive merits of the review. The appeal against that order is with the leave of this court.

[6] In terms of s 7(1) of PAJA:

'Any proceedings for judicial review in terms of s 6(1) must be instituted without unreasonable delay and no later than 180 days after the date –

(a) subject to ss (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in ss 2(a) have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.'

Section 9(1) of PAJA, however, provides that the 180 day period may be extended for a fixed period by agreement between the parties or, failing such agreement, by a court on application. In terms of s 9(2) a court may grant an application in terms of s 9(1) where the interests of justice so require.

[7] It is important to first determine whether the discretion exercised by the high court in refusing the extension sought by the appellant was one in the 'true' or 'loose' sense.[1] The importance of the distinction is that it dictates the standard of interference by this court. In *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22[2] (26 June 2015), the Constitutional Court explained:

'[84] In *Media Workers Association*, the Court defined a discretion in the true sense:

---

[1] *Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd and others* [2013] ZASCA 68; 2013 (4) SA 539 (SCA); 2013 (3) All SA 303 (SCA) paras 18-20.

[2] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 119 (CC).

> "The essence of a discretion in [the true] sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him."

[85] A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this Court in many instances, including matters of costs, damages and in the award of a remedy in terms of section 35 of the Restitution of Land Rights Act. It is "true" in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible.

[86] In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. Instead, as described in *Knox*, a discretion in the loose sense –

> "means no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision."

[87] This Court has, on many occasions, accepted and applied the principles enunciated in *Knox* and *Media Workers Association*. An appellate court must heed the standard of interference applicable to either of the discretions. In the instance of a discretion in the loose sense, an appellate court is equally capable of determining the matter in the same manner as the court of first instance and can therefore substitute its own exercise of the discretion without first having to find that the court of first instance did not act judicially. However, even where a discretion in the loose sense is conferred on a lower court, an appellate court's power to interfere may be curtailed by broader policy considerations. Therefore, whenever an appellate court interferes with a discretion in the loose sense, it must be guarded.

[88] When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised –

> "judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles."

An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court.

[89] In *Florence*, Moseneke DCJ stated:

> "Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court

> has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making."'

(Footnotes omitted.)

[8] As it was put in *Camps Bay Ratepayers and Residents Association and another v Harrison* and another [2010] ZASCA 3[3] (17 February 2010) para 54 in respect of s 9(2) of PAJA: 'the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success.'

That, in my view, plainly contemplates the exercise of a discretion in the 'loose' sense.

[9] The high court found that the appellant had failed to furnish a reasonably satisfactory and acceptable explanation for both his primary delay in failing to meet the 180 day deadline, as also, his further delay subsequent to the expiry of the deadline. In *Opposition to Urban Tolling Alliance and others v The South African National Roads Agency Limited and others* [2013] ZASCA 148 (9 October 2013) para 26[4] this court observed:

'Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable *per se*. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been 'validated' by the delay . . . That of course does not mean that, after the 180 day period,

---

[3] *Camps Bay Ratepayers and Residents Association and another v Harrison* and another [2010] ZASCA 3; 2010 (2) All SA 519 (SCA).

[4] *Opposition to Urban Tolling Alliance and others v The South African National Roads Agency Limited and others* [2013] ZASCA 148; 2013 (4) All SA 639 (SCA).

an enquiry into the reasonableness of the applicant's conduct becomes entirely irrelevant. Whether or not the delay was unreasonable and, if so, the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not . . . .'

In this regard it is important to emphasise that s 7(1) does impose an obligation on an aggrieved party to institute proceedings for judicial review without unreasonable delay. Thus, whilst the launch of an application for review after the 180 days is unreasonable per se, the converse does not necessarily hold true. In other words, the launch of an application within 180 days is not reasonable per se.

[10] Here, as the correspondence exchanged between the parties shows, by 12 May 2015 the stance of the Authority had been made clear to the appellant's attorney. From that date the appellant still had in excess of 160 days before the 180 days contemplated in s 7(1) were to expire. As early as 8 May 2015, the appellant's attorney first intimated that he had 'instructions to once again proceed with a court application'. And then, notwithstanding the unambiguous assertion by the Authority that it would be opposing the contemplated application, the appellant's attorney reiterated his threats in further letters dated 9 June, 6 July and 11 September of that year. In the first of those three letters it was stated: 'If we do not receive your settlement proposals to dispose of this matter within the next 3 days we have been instructed to proceed . . . with a new review application of which the costs will be astronomical'. The second asserted that the matter is 'extremely urgent'. It added: 'We therefore await your urgent reply within the next 3 (three) days failing which we have no other choice but to proceed for a second time with a review application and we will most certainly ask for an appropriate cost order'. And, the third intimated 'we are proceeding with a court application if this matter is not resolved by 12.00 today'. Even then, a further eleven days were to elapse before the appellant's attorney came to depose to the founding affidavit in the matter on 22 September 2015. And, a further six days elapsed before the appellant signed his confirmatory affidavit. The explanation proffered is that he was 'far' from Bloemfontein. Where exactly, is not stated. Nor, why he could not be reached by courier or electronically. The application ultimately issued on 29 September 2015. By then, some

four months had expired from the time the appellant's attorney first intimated that he had 'instructions to once again proceed with a court application'.

[11] In this regard it is important to emphasise that in refusing the appellant's application, the Authority had made a final decision. It was accordingly functus officio. It was thus not open to it to reconsider the decision. Aggrieved, the appellant had no choice but to apply to court to review and set aside the decision. This, the appellant's attorney appeared to appreciate right from the outset. However, instead of simply instituting the review proceedings, he first sought an undertaking that the Authority would not oppose the threatened application. That, in circumstances where it was by then still unclear precisely what allegations would be levelled against the Authority.

[12] The explanation proffered for the delay is woefully inadequate. The superficial manner in which the application was prepared, the lack of attention to matters which obviously called for an explanation and the significant gaps in the narrative obviously weigh heavily against the appellant. I would thus find it impossible to hold that the delay in bringing the review application has been explained in a manner which is even remotely satisfactory. On appeal, counsel for the appellant was accordingly driven to the contention that, notwithstanding the appellant's otherwise poor showing on this score, the prospects of success in the contemplated review are such as to tip the scales in his favour.

[13] In *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* [2017] ZASCA 23 (24 March 2017) it was pointed out:

'[12] Although a consideration of the prospects of success of the application for review requires an examination of its merits, this does not encompass their determination. In *Beweging vir Christelik-Volkseie Onderwys v Minister of Education* [2012] ZASCA 45; 2012 (2) All SA 462 (SCA) paras 42-44, the proposition that a court is required to decide the merits before considering whether the application for review was brought out of time or after undue delay and, if so, whether or not to condone the defect, was rejected. Thereafter, in *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] ZASCA 148; 2013 (4) All SA 639 (SCA) paragraphs 22, 26 and 43, it was decided that a court was compelled to deal with the delay rule before examining the merits of the review application, because in the absence of an

extension the court had no authority to entertain the review application . . . However, in *South African National Roads Agency Limited v Cape Town City* [2016] ZASCA 122; 2016 (4) All SA 332 (SCA); 2017 (1) SA 468 paragraph 81, a submission based upon this decision, namely that the question of delay had to be dealt with before the merits of the review could be entertained, was answered as follows:

"It is true that . . . this court considered it important to settle the court's jurisdiction to entertain the merits of the matter by first having regard to the question of delay. However, it cannot be read to signal a clinical excision of the merits of the impugned decision, which must be a critical factor when a court embarks on a consideration of all the circumstances of a case in order to determine whether the interests of justice dictates that the delay should be condoned. It would have to include a consideration of whether the non-compliance with statutory prescripts was egregious."

. . .

[15] A full and proper determination of the merits of the review application was accordingly dependent upon a finding that the respondent's failure had to be condoned. As stated in *Opposition to Urban Tolling Alliance* supra, paragraph 26:

"Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been "validated" by the delay . . . . "'

[14] Whilst the prospects of success may, in general, be an important consideration - they are by no means decisive.[5] I have not dealt with the appellant's prospects of success because, in my view, the circumstances of the present case are such that the high court was entitled to refuse the application for an extension irrespective of the appellant's prospects of success. When considering whether to condone a litigant's failure to comply with the rules, this court has said, that: (i) in cases of flagrant breaches of the rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal; (ii) the court is bound to make an assessment of an applicant's prospects of success as one of the factors relevant to the exercise of its discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation

[5] *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) All SA 155 (A) at 131E and *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited & others*, *National Director of Public Prosecutions & another v Mulaudzi* [2017] ZASCA 88; [2017] 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA) para 34.

obviously unworthy of consideration and (iii) this applies even where the blame lies solely with the attorney.[6] These considerations apply more so to the present enquiry, where the legislature has ordained that 'proceedings for judicial review . . . must be instituted without unreasonable delay'.

[15] As the explanation offered was so unacceptable and wanting it is not difficult to comprehend why the high court found against the appellant, irrespective of his prospects of success. In that, the high court showed due deference to the will of the legislature. There is accordingly no warrant for this court, sitting as a court of appeal, to interfere with the decision of that court.

[16] In the result the appeal is dismissed with costs.

_____

V M Ponnan

Judge of Appeal

[6] *Commissioner for South African Revenue Service v Van der Merwe* [2015] ZASCA 86; 2016 (1) SA 599 (SCA); 2015 (3) All SA 387 (SCA) para 19.

APPEARANCES:

For Appellant:	L le R Pohl SC (with him CD Pienaar) Instructed by: Honey Attorneys, Bloemfontein
Attorney for First, Second and Third Respondents:	NW Phalatsi NW Phalatsi & Partners, Bloemfontein