REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 100/2013

In the matter between:

PETER LIMBADUNGILA PETER	**APPLICANT**

And

MAGISTRATE SAREL JACOBS	**FIRST RESPONDENT**
JOHANNA SALIONGA	**SECOND RESPONDENT**
SEBASTIAN HAITOTA NDEITUNGA	**THIRD RESPONDENT**
THE MAGISTRATES' COMMISSION	**FOURTH RESPONDENT**
THE MINISTER OF JUSTICE	**FIFTH RESPONDENT**

Neutral citation: *Peter v Jacobs* (A 100-2013) [2016] NAHCMD 11 (28 January 2016)

Coram: PARKER AJ
Heard: **28 October 2015**
Delivered: **28 January 2016**

Flynote: Review – Of act of administrative body – Delay in instituting proceedings – Whether delay was unreasonable – Applicant launching review proceedings some five years after his dismissal as a magistrate despite the delay having been raised in respondents' legal representatives' letter to applicant's legal representatives – Court held that since applicant had been legally represented throughout and since applicant has placed before the court no explanation for the

delay, it would be unjudicial, unreasonable and unjust for court to condone the unreasonable delay, particularly where there is no application to consider in that regard – Consequently, application dismissed with costs.

Summary: Review – Of act of administrative body – Delay in instituting proceedings – Whether delay was unreasonable – Applicant informed of dismissal as magistrate in December 2007 but applicant launched review application in April 2013 – The delay of some five years was raised in a letter from respondents' legal representatives to applicant's legal representatives – Applicant persisted in launching and pursuing the application – Nothing was placed before the court to explain the delay – It would, therefore, be unjudicial, unreasonable and unjust for court to condone the delay, particularly where there is no condonation application to consider – Consequently, court refused to condone the unreasonable delay – Application dismissed with costs.

ORDER

The application is dismissed with costs.

JUDGMENT

PARKER AJ:

[1] On 9 December 2010 the applicant launched an application by notice of motion and prayed the court to grant the relief set out in the notice of motion. On 6 July 2012, the applicant's legal representatives, Mbaeva & Associates, filed a 'Notice of Withdrawal of Action' in the following terms:

'BE PLEASED TO TAKE NOTICE that, Applicant hereby withdraws his review application in this matter set down for hearing on the 10th of July 2012.'

[2] Thus, barely four days before the hearing of the application the applicant withdrew the application. That application is the review application under case no. A 379/2010. Since no consent to pay costs by the applicant was embodied in the Notice of Withdrawal of the application, the respondents brought an application in terms of rule 42(1)*(c)* of the repealed rules of court; now, rule 97(3) of the rules of court. The respondent's rule 41(1)*(c)* application was successful; and so, the court granted the following order:

'1. That the respondents' rule 42(1)*(c)* application is granted with costs on a party and party scale.

2. That the applicant shall pay the respondents' costs in the main application on a party and party scale.'

[3] To date, as Mr Ncube, counsel for the respondents submitted, the applicant has not paid the taxed costs. That is not the end of the unfair and unreasonable treatment that the applicant has subjected the respondents in this matter. By his legal representatives, Mbaeva & Associates, the applicant on 15 April 2013 launched selfsame application – this time under case no. A 100/2013 when the applicant was aware that he had not paid the respondents' taxed costs. The applicant is belabouring under the warped view that the application under case No. A 100/2013 has absolved him from paying the taxed costs. He is palpably wrong.

[4] The chicanery of the applicant is laid bare when one considers the fact that the relief sought in case no. A 379/2010 is exactly the same as the relief sought in the present case, ie case no. A 100/2013.

[5] It is not indicated in the papers if the fact of the sameness of the relief in case no. A 379/2010 and the relief in case no. A 100/2013 and the fact that the applicant

had not paid the taxed costs in case no. A 379/2010 were brought to the managing judge who managed the case before the file was transferred to me. These facts should surely have led to an order that case no. A 100/2013 could not be heard unless and until the taxed costs were paid in full.

[6] Be that as it may, I now proceed to consider the instant application which is a review application, that is, an application to review the decision of the fifth respondent (an administrative official) within the meaning of art 18 of the Namibian Constitution.

[7] It is important to make this point which ordinarily ought to have a bearing on the issue of costs. In a letter dated 10 May 2013, the Government Attorney *qua* respondents' legal representatives wrote a letter to the Mbaeva & Associates, legal representatives of the applicant, drawing the attention of the latter to the fact that there has been an unreasonable delay in the launching of the application, citing authority for their view. The relevant paragraphs of the letter reads *verbatim* as follows:

'Please be advised that not only is your Application misplaced, but is also an abuse of court process. It is in our view a frivolous and vexatious application and we are thus giving to ask the court for order of costs *de bonis propriiss* against you for the following reasons if you do not withdraw your Application:-

There is an unreasonable delay in the Application. The authorities are clear on that aspect. Your review application seeks to review a decision that was taken in 2006, 7 years after and that cannot stand in a court of law. See: *Ebson Keya* matter similar judgment, *Thomas Kanime* matter (a magistrate who brought a review after 11 months and it was held as an unreasonable delay).

We therefore demand that within seven (7) days you withdraw your Application failing which we shall pray for costs to *de bonis propriis* and in addition costs on an attorney/client scale for abuse of court process. We advise accordingly.'

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[8] The respondents' position articulated by Mr Ncube, counsel for the respondents, in his submission is that there has been an unreasonable delay in the bringing of the present application. The respondents' view rests upon authority in *Keya v Chief of Defence Force* 2013 (3) NR 770 (SC).

[9] Mbaeva & Associates brushed aside the advice and warning without as much as reverting to the Government Attorney on the point. And in his submission Mr Mbaeva puts forth this Delphic response:

'D. MISCONCEPTION ON DELAY:

40. The withdrawn case which Counsel for the Respondents annoyingly keeps referring to was based on the fact that the two witnesses who testified as the hearing lied under oath. The date of dismissal was therefore a factor in that Application;

41. It is therefore Counsel for Respondents who labours under the misconception that the present case before Court is founded on the same grounds as the withdrawn one which served before a different Court; and is deliberately trying to confuse this Court with irrelevant issues, thus wasting the Court's valuable time.'

[10] Mr Mbaeva does not even begin to get off the starting blocks in his attempt to respond to the position of the respondents and the respondents' counsel submission that there has been an unreasonable delay in the launching of the application.

[11] In all this the irrefragable facts that remain are inevitably that (a) the decision to dismiss the applicant was communicated to the applicant on 28 March 2007, and (b) the applicant launched the present review application on 15 April 2013, that is, some six years later.

[12] *Keya*, para 21, per O'Regan AJA, tells us that -

> '[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 condonation for the unreasonable delay.
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> [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 citizen and government may act on the basis that administrative decisions are lawful and final in effect. It undermines that public interest if a litigant is permitted to delay unreasonably in challenging an administrative decision upon which both government and other citizens may have acted. If a litigant delays unreasonably in challenging administrative action, that delay will often cause prejudice to the administrative official or agency concerned, and also to other members of the public. But it is not necessary to establish prejudice for a court to find the delay to be unreasonable, although of course the existence of prejudice will be material if established.'

[13] As I have said previously, the relevant delay in the instant case was from 28 December 2007, when the applicant was informed that he has been dismissed as a magistrate, until 15 April 2013, when the instant proceeding was instituted. It should be remembered that the applicant, at all material times, including the period of the internal disciplinary hearing involving the applicant, has been represented by as many as five different legal representatives at various times. It is, therefore, not a case where the applicant did not know what to do when allegedly aggrieved by the decision of the fifth respondent; and *a fortiori*, there is no suggestion on the papers that genuine attempts were being made at a resolution of the dispute between the applicant and the respondents outside the surrounds of the court. (See *Keya*, para 25.)

[14] From all the aforegoing, I find that there has been an unreasonable delay in launching of the application. Having so found, I should, upon the authority of *Keya*,

consider whether, in the exercise of my discretion, I should grant condonation for the unreasonable delay.

[15] The applicant has not applied to the court to condone the unreasonable delay in bringing the application. In any event, it should be remembered that barely one month after launching the application, as I have mentioned previously, the Government Attorney, representing the respondents, not only drew the attention of the applicant's legal representatives to the fact that there had been an unreasonable delay in launching the application, but also referred the legal representatives to the highest authority in *Keya* on the issue of unreasonable delay in bringing review applications. And, as I have found previously, the applicant's legal representative simply ignored the advice and warning, and stuck by his guns, although there was no ammunition available, making his sticking by his guns a futile exercise.

[16] On these facts and in those circumstances it would be unjudicial, unjust and unreasonable for this court to condone the unreasonable delay in launching the application. Given the absence of any explanation for the unreasonable delay of over five years and applicant's legal representatives' ignoring of the Government Attorney's advice and warning, there is no consideration placed before the court that could possibly outweigh 'the public interest in the finality of (the) administrative decision'. (*Keya*, para 22) In words of one syllable; there is simply no condonation application to consider. The result is that the application falls to be dismissed; and it is dismissed. For this circus, the ring master's circus has come to an end!

[17] As respects costs; I should say that the applicant's conduct in launching the 2010 application which he withdrew without tendering costs and his refusal to pay the taxed costs involved, coupled with his launching the instant application when he was advised that there had, upon authority, been unreasonable delay in bringing the latter application amount to frivolous and vexatious conduct. In that event, an appropriate costs would have been costs on the scale as between attorney and client. I have restrained myself from making such special costs order only because the respondents did not ask for it and so it was not argued.

[18] In the result, the application is dismissed with costs on the scale as between party and party.

C Parker

Acting Judge

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APPEARANCES

APPLICANT :	T Mbaeva
	Of Mbaeva & Associates, Windhoek
RESPONDENTS:	J Ncube
	Of Government Attorney, Windhoek