NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICAN
EASTERN CAPE – PORT ELIZABETH

Case No: 300/13

In the matter between

HERBERT ROBERT JAMES FALCONER FISCHAT Applicant

and

NELSON MANDELA BAY MUNICIPALITY Respondent

JUDGMENT

REVELAS J

[1] The applicant approached this court in urgent proceedings seeking firstly, condonation for his non-compliance with the Uniform Rules of Court relating to time periods, forms and service and secondly, condonation for his non-compliance with section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, No 40 2002 (the Act), relating to written notice of intended proceedings against an organ of state, such as the respondent municipality. In addition, the applicant sought leave to institute legal proceedings in this court against the respondent for the recovery of the balance of certain remuneration, which

he contends is owing to him. He also sought a costs order against the respondent who has opposed this application.

[2] Section 3 of the Act requires a party who wishes to institute legal proceedings against an organ of State, to serve written notice thereof within six months from the date on which it became due on. Where this requirement has not been met, and the organ of state relies on the failure to give such notice timeously, a court may on application, grant condonation for such failure "***if it is satisfied*** *that –*

(i) the debt has not been extinguished by prescription

(ii) ***good cause exists*** *for the failure by the creditor and;*

(iii) the organ of state was not unreasonably prejudiced by the failure".

(emphasis added)

[3] The applicant, an advocate and former attorney, was appointed as chairperson of the respondent's Valuation Appeal Board ("the board") with effect from 9 November 2009 for a period of four years. His appointment was made in terms of section 56 of the Local Government: Property Rates Act, No 6 of 2004 (the Rates Act) on or about 23 October 2009 and he was also eligible for re-election. The applicant maintained that he performed work for the respondent during the period 14 January 2010 to the end of August 2010, as chairperson of the board. It is common cause that the respondent remunerated the applicant for his work at the end of October 2010. The amount paid was not given, but the applicant

maintains that the respondent did not pay him in full as remuneration for 149 work days and certain travel costs remained unpaid.

[4] The applicant's remuneration was regulated by the National Treasury of the Republic, Government Notice No 99 issued in terms of the Rates Act which provides that a municipality, for which an appeal board was established in terms of section 56 of the Rates Act, must remunerate and compensate the chairperson of that appeal board. Fixed daily tariffs, applicable to commissioners who sit in committees of enquiry and commissions and appeal board chairpersons, are circulated from time to time. The tariff applicable to him, according to the applicant, was set out in a circular issued by the National Treasury, dated 30 April 2009 attached to his founding affidavit, being R3327.00 per day. After April 2010 the applicant claimed R3526.00 per day. The remuneration referred to, is according to regulation 3 of the Government Notice "*for an eight hour working day, and where more or less hours of service of service is rendered, a chairperson of an appeal board and a committee of an appeal board or other member, as the case may be, must be remunerated for such hours of service in proportion to an eight hour working day".* Regulations 4 and 5 of the aforementioned notice makes provision for the type of travel and accommodation expenses for which they may be reimbursed by the relevant department.

[5] The applicant alleges that he commenced with his duties on 14 January 2010, at his own premises when his secretary handed to him approximately seven hundred and eight files which qualified as appeals. The applicant says he commenced his duties prior to the other board members and prepared for the appeals by *inter alia,* acquainting himself with the applicable legislative principles and had meetings with various municipal valuators.

[6] No appeal board hearing was held during January 2010, but the applicant was nonetheless remunerated. The applicant alleges that during February and March 2010 he surveyed files and set up a programme for the Valuation Appeal Board hearings which commenced on 24 March 2010, and was entitled to be remunerated for this type of work. To obtain his remuneration, his register of attendance was submitted as his claim form to the respondent at the end of each calendar month. For every day in February, save Saturdays, Sundays and Wednesday 3 February 2010, the attendance register (completed by the applicant) reflected that he arrived every day at 8h00, took lunch from 13h00 to 13h30, and departed at 16h30. It is not clear where he arrived or departed from. The same entries are made for January as from Wednesday 13 January 2010. With minor exceptions, the entries for the remaining months are by and large the same. Regulation 3 of the Rates Act provides that the chairperson of an appeal board must be paid within (30) thirty days of the submission of a claim to that municipality.

[7] The respondent disputes that a chairperson such as the applicant is entitled to claim for administrative and preparatory work, and alleges that a large portion of his claim relates to such work and, in as much as he was paid for such claims in terms of his January claim, this was paid in error. Later this payment was set off against the next legitimate claim. The respondent's case is that the applicant and other board members were only entitled to claim for the days on which they rendered their services at appeal hearings, which only as from 24 March 2010 when the hearings actually began. Therefore, the applicant was not entitled to any remuneration for January 2010, February 2010 and the period preceeding 24 March 2010. In addition thereto, the respondent alleges that the time sheets submitted by the applicant contradicted the respondent's electronic data which revealed that the applicant materially overstated the time he spent on work. The respondent believes that it paid the applicant in full in October 2010 for services he lawfully rendered between 24 March 2010 – 30 October 2010, and for which he was lawfully entitled to be paid.

[8] The applicant engaged officials of the respondent in discussions about the payment of the remainder (the unpaid portion) of his claims on two occasions. These were apparently short meetings held on 15 December 2010, with Mr Tau, and on 15 January 2011 with Mr Weyers and Mr Nogqala of the respondent. He said Mr Nogqala conceded that he was not paid for the 149 days. At the last meeting, the applicant said an offer was made to pay him for 50 days (25 full days and 50 half days),

but not for the other 74 days he believed he was entitled to. This offer was not acceptable to the applicant. He said Mr Nogqala then undertook to revert to him after first obtaining a legal opinion, but did not. Mr Weyers, the deponent to the answering affidavit, said it was made clear to the applicant, in unequivocal terms at the first meeting (which according to the respondent's records took place on 14 December), and which Mr Tau and Mr Nogqala also attended, that the respondent was not going to pay him for an additional 149 days. Mr Nogqala then reverted to the applicant at the second meeting, (in the new year as arranged at the previous meeting), and reiterated the respondent's position as previously stated at the December meeting.

[9] Six months later, in July 2011 the applicant travelled to Bhisho to discuss his remuneration issue further with Mr Tau, who was not in. He then spoke to Mr Jamekwana of the respondent about the matter. The latter said he would speak to Mr Tau about it. Mr Tau subsequently phoned the applicant and a meeting was arranged for a time towards the end of the year. In the interim, on 25 October 2011, the applicant said he had written to Mr Tau, who did not attend the arranged meeting. After calling Mr Tau "*once or twice during the beginning of 2012*" the applicant said he wrote to Mr Tau on 3 April, 23 April and 29 October 2012. The respondent denies receipt of these letters (copies of the first and second letters were attached to the founding affidavit). The applicant explained that since he was still the chairperson of the Valuation Appeals Board, he

was disinclined to become embroiled in legal proceedings against the respondent. He therefore did not place the respondent on terms or threaten with litigation. He tried to persuade the respondent's officials that they ought to pay him so that he could avoid litigation.

[10] The applicant's interaction with the respondent's officials on the question of full payment of his accounts was rather limited if one has regard to the time frame in which they occurred. Not much is explained by him as to the nature of the objection to paying the amount claimed was, or at least his understanding of the basis on which there was an objection and his response thereto. Unfortunately nothing is said by the respondent about the computation of the amount actually paid to the applicant. In my view, an explanation for the basis upon which the actual payment made was arrived at, would have contributed substantially to my understanding of the applicant's prospect of success in a trial.

[11] On 18 December 2012, the applicant through his attorneys, gave notice of his claim in terms of section 3 of the Act, being R583 472.00 computed as follows:

> "(a) Forty-two working days during February-March 2010 at R3 327.00 per day = R139 734.00.
>
> (b) Hundred and seven working days from April- October 2010 at R3526.00 per day = R377 282.00.
>
> (c) Distance travelled daily thirty six km @ R4.00 per km = R21 456.00".

[12] The letter is concluded with an invitation – obviously in terms of section 3(1)(b) of the Act- which reads:

"To consent in writing to the institution by our client of the envisaged action to claim his arrear remuneration aforesaid despite the fact that the notice does not comply with all the requirements of section 3 of Act 40 of 2002".

[13] The notice should have been delivered on 30 August 2010, more than two years before this letter. The date on which the first debt became due was at the end of February 2010, and it would prescribe at the end of February 2013. Hence this urgent application which was instituted by the applicant, three weeks prior to prescription interrupting his claim.

Urgency

[14] The respondent disputed that the matter was urgent. Alternatively, it argued that any urgency was self-created by the applicant. The respondent also denied that good cause was shown by the applicant or that a proper explanation was given for the applicant's failure to give timeous notice in terms of section 3(2) of the Act. According to the respondent, the applicant knew on 10 May 2011, when he was formally advised by a Mrs Vermaak that the respondent contested his claims. The applicant denies having received this letter. His subsequent actions, it was submitted, supported his version, because he did pay the

visit to Bhisho to speak to Mr Tau and wrote at least two letters to the respondent requesting payment (copies of two of the three letters he said he wrote were attached to the founding affidavit) thereafter. Even though the applicant the applicant did not persue his claim with the vigour one would have expected from someone who was not paid for his work, it cannot be said that he was completely supine.

[15] Relying on the well-known judgment in *Caledon Street Restaurants CC v Monica D'Aviera* [1998] JOL 1832 (SE) at p 11, the respondent submitted that even though the matter was ripe for hearing the applicant should be non-suited for not according the respondent and its lawyers proper respect by adhering to the time periods stipulated in Uniform Rule 6. The respondent stressed that the applicant was an advocate and former attorney, who was not ignorant of the requirements of section 3 of the Act, but had nonetheless remained supine for more than two years before launching this application, and then only in the face of looming prescription. Clearly, the applicant was the maker of his own urgency. I do not agree however, that should be non-suited on this ground alone.

Good Cause for the Delay and a Proper Explanation

[16] In *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) it was said that the phrase *"if the court is satisfied"* has long been

recognised as setting a standard which is not proof on a balance of probability. Heher JA put it thus in para 8 at 316 E-F:

> "Rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties".

[17] In *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA (A) Schreiner JA said the following about good cause at 352 H-353A:

> "It is enough that for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives".

[18] The applicant's explanation for the delay is that he tried to avoid litigation with the respondent and was also ignorant of the provisions of section 3 of the Act. Mr Weyers, the deponent to the answering affidavit, who was present at the meeting with the applicant and Mr Nogqala, stated that it was conveyed to the applicant in unequivocal terms at the meeting of 15 January 2011 that a portion of his claim would not be paid (as stated by the applicant). The respondent argued that even if the applicant did not receive Ms Vermaak's letter of 11 May 2011, at least since 15 January 2011, the applicant knew that he would not be paid the full amount he sought from the respondent and should have acted then. I do not agree entirely with that submission. If that were the true position, the respondent need not have waited until May 2011 to formally

dismiss the applicant's claim in writing. The respondent had also made settlement proposals in January 2011 (December 2011 according to the applicant) which belies an unequivocal state of affairs.

[19] The applicant's explanation for the delay, that he was avoiding litigation by trying to persuade the respondent's officials to affirm his entitlement to a further payment is borne out by his correspondence to the respondent and the meetings he had. It may not have been the correct approach to adopt in the matter, but it is nonetheless an explanation. The delays between the applicant's three letters to the respondent and the meetings he had with the officials, were however spread over two and a half years, a very long period.

[20] Even though it is only mentioned in the applicant's replying affidavit, I believe the applicant when he says that he did not know of the statutory notice requirement in section 3 of the Act until he visited his attorneys in October 2012. The probabilities tend to support the veracity of that statement. His ignorance of the required notice period may have been a contributing factor causing the delay, but it is not necessarily a good explanation.

[21] Ignorance of the law, in my view, should not be open as an excuse to a lawyer, who was gainfully engaged by a municipality (or other organ of state) to do legal work on assumption of his legal expertise.

Particularly not ignorance of the legal and statutory procedures involved when he wishes to sue that organ of state for remuneration owing to him. It is fair to say that it can reasonably be expected from the applicant that he ought to have known of the statutory notice period.

[22] With regard to "good cause" for the delay the following held by the learned Judge of Appeal in *Madinda* at 317 C-G pertinent to this matter:

> "There are two main elements at play in section 4 (*b*), *viz* the subject's right to have the merits of his case tried by a court of law and the right of an organ of state not to be unduly prejudiced by delay beyond the statutorily prescribed limit for the giving of notice. Subparagraph (iii) calls for the court to be satisfied as to the latter. Logically, subparagraph (ii) is directed at least in part, to whether the subject should be denied a trial on the merits. If it were not so, consideration of prospects of success could be entirely excluded from the equation on the ground that failure to satisfy the court of the existence of good cause precluded the court from exercising its discretion to condone. That would favour an unbalanced approach to the two elements and could hardly favour the interests of justice. Moreover, what can be achieved by putting the court to task of exercising a discretion to condone if there is no prospect of success?"

[23] There can be little doubt that if the applicant had not been paid anything whatsoever in October 2010, he would have persued a claim for payment against the respondent with far more enthusiasm than displayed in the present scenario. The excuse that a party seeks to avoid litigation may explain a short delay. On the other hand, a long delay may suggest

that the party seeks to assert his claim outside court, because it has weak prospects of success at a trial.

[24] With regard to the prospects of success in this matter is, the following facts are significant: The daily remuneration for chairpersons of appeal boards is a fixed amount. The respondent was only prepared to pay for the work done at the actual hearings, as I understood it. The amount in dispute is for over half of a million rand for 149 days' work. The respondent disputed ever having paid fees to anyone on the basis claimed for by the applicant and alleged that he exaggerated the hours he worked.

[25] The basis of an entitlement to further payment, would be the main dispute at a trial hearing, but the applicant did not demonstrate such a basis. The applicant never submitted specified statements of account reflecting what kind of work he had actually done for the respondent. He only submitted copies of attendance registers specifying his arrival times, departure times, when he took lunch breaks and when he was on leave. He seemed to have charged per day. These documents do not link the nature of the work and the amounts charged therefore, neither do they explain how he arrived at 149 unpaid days.

[26] Of substantial significance in this enquiry into the applicant's prospects of success, is the fact that the applicant's remuneration is paid

from public funds. It could not have been up to him to dictate how his remuneration would be computed. Without proof of a precedent, or an agreement with the respondent, as to his entitlement to the fees in question, his prospects of success at a trial are limited.

[27] Based on considerations set out above, the applicant has not demonstrated good cause to the satisfaction of a court. The fact that the respondent may not have been prejudice by the delay does not assist the applicant.

[28] The application is therefore dismissed with costs.

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E REVELAS
Judge of the High Court
28 February 2013

Appearances:

Counsel for the Applicant, Adv HJ van der Linde SC, instructed by De Villiers & Partners, Port Elizabeth. Counsel for the Respondent, Adv SC Rorke SC, instructed by Gray Moodliar Attorneys, Port Elizabeth.

Date Heard: *21 February 2013*

Date Delivered: *28 February 2013*