IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1)REPORTABLE: YES/NO
(2)OF INTEREST TO OTHERS JUDGES: YES/NO
(3)REVISED

[redacted]

DATE SIGNATURE

23/01/2015

CASE NUMBER: 33853/2007

In the matter between:

RAMOSHIBUDI STRANGER MATLAPENG	Applicant
And	
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Respondent
SS MTHIMKHULU	Second Respondent

JUDGMENT

STRAUSS, AJ:

1. The applicant seeks review and setting aside of the 1st respondents decision, in terms whereof the applicant was not, pursuant to the recommendation of the Magistrate's Commission, appointed to the vacant post of Magistrate for the Magisterial District of Pretoria, but the second respondent was appointed in the vacant post.

2. The applicant seeks appointment as Magistrate at entry Level for the Magisterial District of Pretoria, and seeks this court to substitute its decision for that of the first respondent, with costs.
3. On 7 November 2013, the applicant amended his notice and sought condonation that the period of 180 days referred to in section 7(1) of the Promotion of Administrative Justice Act, 3 of 2000, (PAJA) is extended insofar as it may be necessary.
4. The first respondent opposes the review application, and also the amended relief for condonation, and raises the defence that there was unreasonable delay both in bringing of the application, and a substantial delay in prosecution of the application, and that the applicant therefore should be non-suited.

BACKGROUND FACTS

5. The background facts which are common cause, between the parties, are that the applicant was a Regional Magistrate in the Gauteng Regional Division before he vacated his office on account of ill health due to depression in April 2001.

6. After having received treatment for his depression the applicant served articles of clerkship with Verwey's Attorneys from middle 2002 until 2004, where after he wrote and passed his attorneys' admission examinations. On 1 October 2004, the applicant was appointed in a temporary capacity as an Acting Regional Magistrate until 31 March 2005, i.e. a period of six months.

7. The provision for acting appointments of the applicant were not repeated due to the fact that the first respondent could not reconcile the conflict with the

appointment of the applicant in an acting position, while his employment had been ended willingly due to ill health.

8. In 2005, 75 vacant posts of Magistrate Entry Level were advertised by the Magistrate's Commission. The applicant duly applied for appointment in such a position. Attached to his application were annexed medical reports, from Dr JW Vermaak, Dr JJ Grove, both psychiatrists, and also from clinical psychologist, Russel Matthews.

9. All these reports were dated in January 2004, and were seemingly compiled to support the good health of the applicant. All of the reports were one page reports simply stating that the applicant had been seen by the mentioned doctors during 2000, was treated for major depression, he had received psychotherapy for two years from 2000 to 2002, and that the applicant was fit to resume his position as Magistrate, and was in remission from his illness.

10. The short listing of candidates and interviews were conducted by the Provincial Judicial Committee for the Lower Courts, which recommended candidates for appointment to the vacant post, to the Appointments Committee of the Magistrate's Commission, which in turn presented its recommendations for the filling of the vacant post to the Executive Committee of the Magistrate's Commission.

11. After considering the motivations of the Provincial Judicial Committee and Appointments Committee, the Magistrate's Commission recommended candidates in order of preference to the first respondent for appointment to the vacant post. In terms of the recommendations of the Magistrate's Commission the applicant was recommended as the first candidate in order of preference

for appointment as Magistrate Entry Level for the Magisterial District of Pretoria. The second respondent was recommended as the second candidate in order of preference for the filling of that specific post.

12. Notwithstanding the recommendation of the Magistrate's Commission the Deputy Director General of the first respondent submitted a memorandum to the minister wherein he endorsed all of the recommendations of the Magistrate's Commission, save in respect of the vacant post of the applicant, and stated in the memorandum as follows:

"*THE RECOMMENDATION FOR THE VACANT POSITION IN PRETORIA.*

With regard to this position, the Magistrate's Commission recommended as its first candidate Mr RS Matlapeng who the Minister approved that he be medically boarded in 2001. When Mr Matlapeng was retired he was a Regional Magistrate in Pretoria, and now he is recommended for an Entry Level position in the same office...

In the absence of medical evidence that Mr Matlapeng had fully recovered from his illness it may be ideal for the Minister to consider the second recommended candidate for the position, Ms SS Mhtimkhulu.

13. The first respondent then on 31 July 2006, appointed Ms Mthimkhulu the second candidate instead of the applicant. The applicant on 10 October 2006 requested written reason in terms of Section 5(1) of PAJA, from the first respondent for the decision not to appoint him in the vacant post. It is common cause that no response was received for this request for reasons.

14. On 27 February 2007, the Minister directed a letter to the applicant personally, referring to a previous letter from the applicant. The minister stated in essence that the first respondent was not going to revoke the second respondent's appointment as magistrate, and that the Minister could not simply appoint the applicant in a current vacancy without the position being properly advertised, as to provide all candidates with an equal opportunity to apply and to be considered for such an appointment. It was reiterated in the letter that there was no obligation on the Minister to appoint the applicant in the next round of appointments, and that the applicant had to apply for any position in the next round of applications.

15. A circular, dated 2005, was once again brought under the applicant's attention. In the circular referred to, the Regional Court Presidents and Chief Magistrates where once gain reminded that (a) they must properly consider the necessity for acting appointments and if such acting appointment were indeed necessary, they should take into account the development potential of the candidates in the sense of investment for the future as well as the demographics of the country and (b) only utilise retired Magistrates in the most exceptional circumstances.

16. The applicant states that he became aware of the decision of the first respondent in October 2006, it seems hereafter some correspondence took place between the applicant and director of the first respondent. The review application was launched on 19 September 2007. Attached to the application were all the memoranda of the Minister, as well as the internal memoranda of the Magistrate's Commission, dated July 2006. In these various memoranda

to the Minister and the Magistrate's Commission, the reason for not appointing the applicant as set out *supra*, was set out in the memorandum of the Minister, dated 31 July 2006.

17. The first respondent opposed the review application and filed its replying affidavit on 28 February 2008, approximately five months after the application for the review was brought and it had already in November 2007, filed the record of the proceedings. Hereafter the applicant only on 8 April 2013, filed his replying affidavit, thus, approximately five years after the receipt of the opposing affidavit of the first respondent.

CONDONATION FOR LATE APPLICATION AND DELAY IN PROSECUTION OF REVIEW

18. The review application was brought approximately 6 months after the 180 days prescribed in PAJA, had ran out, having regard to the applicant version that he became aware of the decision in October 2006, and he launched the review in September 2007. The applicants reasons for the delay for bringing the application outside the prescribed period, firstly was the first respondent neglected to respond to the written request for reasons and he was awaiting same, and secondly that he was incorrectly advised by his first set of attorneys to approach the CCMA. Only after he had approached his current attorneys of record was he advised that a review application should be brought and it was to thus brought within a relatively short time thereafter, although the applicant does not state when in 2007 he approached his current attorneys.

19. On the above mention explanation of the applicant, although it is not set out with particularity, the court will exercise it's discretion in favour of the applicant

and accept his explanation as plausible. I therefore, find, that there was not undue delay in bringing of the review application and that insofar as it is necessary the court does extend the period of 180 days referred to in section 7 of PAJA, and condonation is granted for the late application.

20. As to the delay in prosecution and the applicant only filing his replying affidavit after the expiry of 5 years, no reasons were set out in the replying affidavit to explain the delay of five years, and the applicant also did not request condonation from the court in regards to the late prosecution and/or late filing of his replying affidavit.

21. The first respondent on 3 October 2013, filed a supplementary affidavit indicating to the court and raising the point of unreasonable delay and prejudice in, first of all, the late bringing of the review application and the late, or subsequent neglect, to prosecute the matter from 2008 up until 2013. Only hereafter did the applicant file a supplementary replying affidavit to the defence raised, and also filed a notice seeking condonation in terms of Section 7(1) of PAJA for extension of the 180 days.

22. The applicant in the supplementary reply deals with the facts, and disputes that he should be non suited and raises *in limine* the authority of the deponent of the first respondent, however the applicant made no application for condonation for the delay in prosecution, I however, accept by his denial of the facts as set out by the first respondent, his intention was to seek the courts indulgence and acceptance of the reasons provided for the long delay, and dismiss the point of unreasonable delay raised by the first respondent.

23. The first reason given by the applicant for the delay in the prosecution of the matter was that during 2007 he was employed by the Legal Aid and although he received a salary of R28,000.00 per month, he did not have the necessary funds to continue with the application and to instruct counsel and/or his attorney. It was conceded during argument that besides this salary the applicant had throughout received a salary from the Department, since his termination of employment due to ill health in 2001. Counsel could not confirm the specific amount in salary the applicant received throughout, and it was also not set out in the papers of the applicant.

24. The applicant further set out that he had applied for Magistrate's posts in November 2009 and December 2010 up until 2012. On all three occasions he thought that this application would become moot due to his application for Magisterial posts with the Department.

25. During this time in a bizarre turn of events, a certain Ms Singh obtained an interim order in the Equality Court of the North Gauteng High Court that the first respondent should not make any appointments to vacant posts of Magistrates. This order was granted on 13 January 2012. The applicant therefore sets out for a period of about 7 months in 2012, the first respondent was barred from appointing Magistrates due to this pending order obtained in the Equality Court. He thus explains why the first respondent could not appoint him in a magisterial position up until July 2012.

26. He further sets out that from July 2012 to at least October 2012, he attempted to have his replying affidavit finalised by counsel. The first counsel did not attend to the brief from July up until September 2012, and another counsel

was approached who also did not draft the replying affidavit for another 5 weeks. The applicant and the attorney of record then drafted the replying affidavit which was filed and served in April 2013. The applicant does not provide and explanation for the expiry of the period from end of October 2012 up until April 2013.

27. The applicant concedes that there has been a long delay, but denies that he should be non-suited. The applicant contends that the first respondent could have set the application down, when he became aware of the undue delay. The first respondent argues that the explanation given by the applicant for the delay is insufficient and unreasonable.

28. I do not agree with the applicant in his contention, the applicant is *dominus litis* and the one who instituted the proceeding against the first respondent. This fact that the respondent could set the matter down is no answer, and does not provide factors on which this court can relay to exercise its discretion in favour of the applicant .The natural conclusion if any applicant neglects to proceed with a matter for at least a year is that such an applicant has lost interest in his application, and does not want to continue with the matter, unless the applicant gives reasons at a later stage that proves otherwise.

29. The further consequences of unreasonable delay, is that through the efflux of time the relief claimed could become irrelevant, or not applicable to any of the respondents, or prejudicial to another party. Further through the efflux of time, circumstances change and factors in favour of either party could become less applicable and or less important, and could carry less weight.

30. The test for considering condonation in an application is mainly the interest of justice. This was set out in ***Van Wyk v Unitas Hospital 2008 (2) SA 472 (CC) at 477.***

[20] "*This court has held that the standard for considering an application for condonation is the interest of justice. Whether it is in the interest of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this inquiry include, but are not limited to the nature of the relief sought, the extent and cause of delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, and the importance of the issue to be raised in the intended appeal on the prospects of success.*"

[22] "*In general terms the interest of justice plays an important role in condonation applications. An applicant for condonation is required to set out fully the explanation for the delay, the explanation must cover the entire period of the delay and must be reasonable.*"

31. The first respondent argues in its heads, that the applicant's purported explanation does not cover even a quarter of the period of delay and the attempt by the applicant to render the application moot by applying for various Magistrate posts, somehow evidences the abuse of process in that:

31.1 *"the applicant never applied for extension of time from the first respondent or from court, but wanted to keep the proceedings hanging while he was pursuing other avenues;*

31.2 *The applicant never attempted to withdraw or stay the proceedings or inform the first respondent that he is attempting to render the proceedings moot and that should he obtain a post somewhere else he would withdraw or abandon the application;*

31.3 *the applicant resuscitated the present proceedings with a view to spite the Department after it had turned down his application for the post as referred to in his supplementary affidavit;*

31.4 *the attempts to secure the post, while deliberately neglecting the present proceedings clearly point to the intention on the part of the applicant to abandon these proceedings, which the first respondent argues, is one of the reasons the applicant should be non-suited."*

32. The respondents argue that the prejudice in the case is self-evident having regard to the fact that the applicant seeks not only the review of the decision not to appoint him, but also the review of the decision to appoint the second respondent and to that particular post in the Magisterial District of Pretoria.

33. The respondent argue further, that the applicant seeks the substitution of the decision of the first respondent to a court order appointing him in that particular post in Pretoria, in which the second respondent had been appointed in September 2006. The allegation that there are other posts of Magistrates in Pretoria that may be vacant and that the applicant had applied for posts in other districts within Gauteng, cannot avail the applicant in that the relief that he seeks relates to the specific post to which the second respondent had been appointed.

34. I agree with the first respondent's argument that through the efflux of time the applicant has rendered the specific relief he claims, moot. This is more evident after the court was informed that the second respondent is currently no longer in the post she was appointed in originally in 2006 , and that the relief the applicant therefore now seeks, will have to granted against another Magistrate appointed in the specific post.

35. The applicant relied on the case of ***Molala v Minister of Law and Order & Another 1993 (1) SA 673 (W)*** where Flemming J stated at page 677 (C)

"The approach which I am bound to apply is therefore not simply whether more than a reasonable time has elapsed. It should be assessed whether a facility which is undoubtedly available to a party was used, not as an aid to the airing of disputes and in that sense moving towards the administration of justice, but knowingly in such a fashion that the manner of exercise of that right would cause injustice.

The issue is whether there is behaviour which oversteps the threshold of legitimacy. Nor, in the premises, can plaintiff be barred simply because defendants were prejudiced. The increasingly difficult position of the defendants is a factor which may or may not assist in justifying an inference that plaintiff's intentions were directed to causing or to increasing such difficulties. But the enquiry must remain directed towards what plaintiff intended, albeit in part by way of dolus eventualis.

The increase in defendants' problems is, secondly, a factor insofar as the Court, on an overall view of the case, is to exercise a discretion about how to deal with a proven abuse of process."

36. The above mentioned judgment is not relevant to review applications as the plaintiff in the matter *supra* had launched an action, not a review application, the action was in any event dismissed due to the unreasonable delay.

37. The factors in exercising a courts discretion in favour of an applicant who delayed a review of a decision by a public body are set out in ***Setso Skosana Busdiens (Edms) Beperk v Voorsitter: Nasionale Vervoerkommissie & 'n Ander 1986 (2) SA 57 (A)***:

"Die ondersoek wat 'n Hof moet doen om vas te stel of 'n gemeenregtelike aansoek om hersiening in die afwesigheid van 'n besondere tydsbepaling, binne 'n redelike tyd aanhangig gemaak is, is tweeledig van aard. Die Hof moet naamlik beslis (a) of die verrigtinge wel na verloop van 'n redelike tydperk eers ingestel is en (b) indien wel, of die onredelike vertraging oor die hoof gesien behoort te word. Wat (b) aanbetref, oefen die Hof 'n diskresie uit, maar die ondersoek wat (a) betref, het niks te make met die Hof se diskresie nie; dit behels 'n blote ondersoek na die feite ten einde te bepaal of die tydperk wat verloop het, in die lig van al die omstandighede, redelik of onredelik was. Natuurlik impliseer die bevinding wat in daardie verband gemaak word dat die Hof'n waardeoordeel uitspreek in die sin van die Hof se beskouing van die redelikheid van die verstreke tydperk in die lig van die omstandighede. Gelykstelling van so 'n waardeoordeel met 'n diskresie is regtens en logies egter nie regverdigbaar nie."

"Dit volg hieruit dat wanneer daar aansoek om kondonasie gedoen word, die duur van die versuim en die omstandighede wat die versuim veroorsaak het,

dit wil sê die verduideliking vir die versuim belangrike oorwegings by die Hof sal wees. In die saak van ***United Plant Hire (Pty) Ltd v Hills and Others1976 (1) SA 717 (A) op 720E - H*** *vat HOLMES AR die posisie in hierdie verband as volg saam:*

"It is well settled that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's interest in finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive."

"These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong"

"In die geval waar 'n gegriefde persoon na die Hof kom om verrigtinge op hersiening te laat neem, oefen hy 'n reg uit en is hy in 'n heel ander posisie as die persoon wat 'n prosesreël nie nagekom het nie en daardeur 'n reg verloor het en die Hof om 'n vergunning moet nader vir die reg om weer met sy proses voort te kan gaan. In die laasgenoemde geval is die duur van die versuim en die verduideliking daarvoor 'n belangrike deel van sy aansoek om vergunning. In die eersgenoemde geval daarenteen, moet die Hof slegs 'n diskresie uitoefen of die gegriefde weens verloop van tyd verbied behoort te word om die hersieningsverrigtinge te bring. Dit sien ons dan ook uit die soort

van oorwegings wat in die meeste van die vorige beslissings gegeld het waar daar geen tydsbeperkings was nie.

In die saak van ***Sampson v SA Railways and Harbours 1933 CPD 152*** *het 'n spoorwegamptenaar die verrigtinge voor 'n raad van ondersoek, as gevolg waarvan hy uit sy pos ontslaan was, op hersiening gebring. Die raad het sy beslissing in September 1928 gegee en die aansoek om hersiening is vier jaar later in Oktober 1932 gebring. Beswaar is gemaak omdat daar te lank gewag is om die hersieningsverrigtinge in te stel. Die beswaar is gehandhaaf en GARDINER RP het hom op 154 as volg uitgelaat:*

"This Court has certain powers of review in proceedings of inferior tribunals, and they may be reviewed on the grounds of irregularity, but the extent of the irregularity required I need not deal with. It is important, when the Court is to be asked to exercise these powers, that no unreasonable time should be allowed to elapse, because, especially in the case of tribunals which are not courts of law, or conducted by legal men, it is important that proceedings should be taken promptly. There is not always the same careful or full record in proceedings which are not courts of law, and where the ground of review is irregularity in the proceedings, then, even in the case of a court of law, there may not be anything on the record to show an irregularity. In fact an irregularity may sometimes consist in refusing to put something on the record, refusing to record an exception taken, or something like that. It is therefore important that proceedings for review should be taken while the matter is fresh in the minds of the persons concerned, and while those persons are available to give testimony.... It seems to me that the Court cannot allow such an

extremely lengthy period as four years to elapse, and must hold that an unreasonable time has been allowed to pass without proceedings being taken."

Op appèl, in die saak ***Sampson v SA Railways and Harbours 1933 CPD 335,*** *het die Hof verwys na die aard van die onreëlmatighede wat na bewering voor die raad van ondersoek plaasgevind het en die moeilikhede wat ontstaan om na 'n lang verloop van tyd weer daarmee te handel. VAN ZYL R het daarna op 338 as volg verklaar:*

"Under these circumstances the Court will, by reason of the long lapse of time, be at a great disadvantage in going into the questions raised by the appellant, and it is right that it should refuse to do so, unless very exceptional circumstances are placed before it. It seems to me that it must be a matter of importance in the proper running of the railway service that there should be, except in exceptional circumstances, finality in matters of this nature after a lapse of a certain time."

38. Having regard to the above, I find the applicant's late application cannot be tolerated. The reasons for the delay are without substance, it is clear that the applicant must have had sufficient funds, earning two incomes, to at least attempt to prosecute the review, he has never been indigent. The fact that the first respondent was unable to appoint him for a period of seven months, has no bearing on the fact that the applicant chose to continue with the review application, but choosing not to prosecute it in the mean time. The applicant with respect had to choose which avenue he was pursuing and could not do both. Thus the delay from 2008 to 2012 was directly due to the applicant

choice. Further no reasons were given for the further delay of 7 months from October 2012 to April 2013.

39. The applicant has used available processes in a dilatory fashion and has negated time limits, this is against the spirit of certainty, predictability and fairness in our system. The first and second respondents also have an interest in the particular application and even if I find that there was no specific prejudice caused to the first respondent, there could be prejudice to the second respondent in the circumstances or any other Magistrate appointed in that position.

40. I therefore come to the conclusion that the matter *in causa* is not similar in facts to the matter of ***Kgoele v the Minister of Justice and Constitutional Development, Case No 26026/2006*** by Pretorius, J of this division. In the matter of *Kgoele*, condonation was granted for the late review application but the applicant in the above matter brought the review application and prosecuted its application within a very short time span, and the court in the matter of *Kgoele* could with no prejudice, substitute its decision for that of the respondents.

41. I am also not sure that the decision of the Minister would be a foregone conclusion, and I am mindful that correcting the decision should be done in exceptional cases. I might add that I do not intend to correct the decision in this application, the applicant could have corrected the position by providing better medical evidence, more recent and relevant when he re applied for positions from 2009 to 2012, with the first respondent.

42. The reason for the non appointment of the applicant is found in the memoranda of the minister referred to , there was also written communications between the parties as referred to *supra*, in regards to the applicant's non appointment, and the applicant was aware of the first respondent's stance and attitude towards the applicant's appointment as a magistrate.

43. I find, having regard to my discretion and considering all the reasons provided by the applicant for the delay in prosecuting the application, the applicant should be non-suited. His explanation for the delay was unsatisfactory, it is clear that the applicant was pursuing other avenues. It is important that review applications are brought to finality and the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice has been overlooked by the applicant.

44. The applicant can still make application in his own time, for appointment as Magistrate and his application can still be considered having regard to the current facts, and I suggest considerably more substantiated by medical evidence which sets out his current health.

I therefore make the following order:

1. **The review application is dismissed with costs.**

[redacted]

S STRAUSS,

ACTING JUDGE OF THE HIGH COURT, PRETORIA

HEARD ON: 18 AUGUST 2014

JUDGMENT DELIVERED ON: 23 JANUARY 2015

ATTORNEYS ON BEHALF OF APPLICANT:
SHAPIRO & SHAPIRO

ADVOCATE ON BEHALF OF APPLICANT:
ADV G BESTER

ATTORNEYS ON BEHALF OF FIRST AND SECOND RESPONDENT:
THE STATE ATTORNEY

ADVOCATE ON BEHALF OF FIRST AND SECOND RESPONDENTS:
ADV DT SKOSANA