IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 067/2009

HELD AT MBABANE
In the matter between:

NTSETSELELO HLATSHWAKO	**Applicant**
And	
COMMISSIONER GENERAL OF THE CORRECTIONAL SERVICES	**Respondent**
In Re:	
COMMISSIONER GENERAL OF THE CORRECTIONAL SERVICES	**Appellant**
And	
NTSETSELELO HLATSHWAKO	**Respondent**

Neutral Citation: *Ntsetselelo Hlatshwako vs Commissioner General of the Correctional Services* (067/2009) [2021] *SZSC* 40 (18/01/ 2022)

Coram: **S.P. DLAMINI JA, R.J. CLOETE JA, S.B. MAPHALALA JA, J.P. ANNANDALE JA AND M.J. MANZINI AJA.**

Heard: 01st November, 2021.

Delivered: 18th January, 2022.

SUMMARY : *Civil Procedure – Application for Review in terms of Section 148 (2) of the Constitution – Application to Review Supreme Court Judgment delivered 11 years prior to date of hearing – Whether defence of undue delay applicable – Principles of defence of undue delay discussed and applied – Held that on the facts of this matter delay in bringing review proceedings unreasonable – Condonation declined – Application for review dismissed with costs.*

JUDGMENT

M.J. MANZINI – AJA

Introduction and factual background

[1] This is an application for review brought in terms of Section 148 (2) of the Constitution of the Kingdom of Eswatini.

[2] The Applicant is a one time prison warder who served under His Majesty's Correctional Services. The Respondent is the Commissioner General of the Correctional Services.

[3] The impugned Judgment was delivered by this Court on the 28th May, 2010 – exactly eleven (11) years, six (6) months to the day on which the application for review was argued before this Court. The delay in bringing the review application, which was launched on 17th March, 2021, is a major hurdle in the Applicant's path to have the Judgment set aside, and the reasons for this proposition shall be dealt with presently. However, before dealing with these, a brief excursion into the facts leading up the impugned Judgment is necessary in order to put matters into perspective.

3.1 The Applicant instituted motion proceedings in the High Court challenging, by way of review, the outcome of disciplinary proceedings to which he had been subjected at the instance of his then employer;

3.2 The relief prayed for in the High Court, as gleaned from the impugned Judgment, was *inter alia*:

3.2.1 *Reviewing, correcting and setting aside the decision of the First Respondent of terminating the Applicant's employment in August 2008*;

3.2.2 *Directing the Second Respondent to pay Applicant his salary for the months of January, February, March, April, May 2008, respectively;*

3.2.3 *Directing and ordering the First Respondent to reinstate the Applicant to his employment as a Warder.*

3.3 The disciplinary offences alleged to have been committed by the Applicant related to absenteeism, and he was charged under Regulation 3 (bb) of the Prisons (Disciplinary Offences) Regulations 1965 read together with Regulation 7 thereof. It was alleged in the charge sheet that the Applicant had absented himself from duty for seventy seven (77) days without a reasonable explanation, thereby acting in a manner prejudicial to good order and discipline of the service (in contravention of Regulation 3 (bb)).

3.4 The Disciplinary Board which conducted the proceedings recommended the dismissal of the Applicant, and the Commissioner of the Correctional Services upheld the recommendation and proceeded to dismiss the Applicant;

3.5 After hearing the review application the High Court, per Mabuza J, granted an Order in the following terms:-

3.5.1 *The decision of the Disciplinary Board is hereby set aside;*

3.5.2 *The decision by the First Respondent terminating the Applicant's Employment is hereby set aside;*

3.5.3 *The First Respondent is hereby ordered to reinstate the Applicant forthwith and to restore all his benefits and pay;* [own underlining]

3.5.4 *The Respondents are ordered to pay the costs hereof;*

3.6 The Order granted by the High Court triggered an appeal to this Court which upheld the appeal and substituted it with an Order dismissing *"the application with costs."*

Arguments by the parties

[4] The Applicant contends that the decision of this Court ought to be reviewed and set aside in terms of section 148 (2) of the Constitution, as it *"was wrong in law and in fact"*. The grounds for the review can be summarised as follows:

4.1 Firstly, that Applicant was charged with one offence (absenteeism) and tried for a different offence (contravening Regulation 3 (bb)) which is unrelated to the offence he was charged with. It is alleged that the Court approached the appeal on the ground that the Applicant did not report to his new station where he was transferred to, being Mankayane Correctional Services. The Applicant contends that *"this approach was wrong and erroneous in law because the Applicant did report to Mankayane Correctional Services and was housed in a Store Room as there was no accommodation available for him there."*

4.2 Secondly, that this Court incorrectly found that the Applicant had indeed absented himself from work for seventy seven (77) days, in the absence of any evidence to substantiate the finding. The Applicant contended that he was charged for absenteeism from Matsapha, his original duty station, yet he was reporting for duty at Mankayane, where he had been transferred to. He also contended that he was denied entry to the Matsapha Correctional facilities.

4.3 Thirdly, the Applicant contended that this Court wrongly concluded that he had violated Regulation 3 (bb) of the Prisons (Disciplinary Offences) Regulations 1965 read with Regulation 7, as there was no evidence adduced at the disciplinary hearing to prove the commission of this particular offence.

4.4 Fourthly, that this Court wrongly concluded that the non-payment of the Applicant's salary was due to the fact that he had absented himself from duty. The Applicant contended that he was reporting for duty at Mankayane where he had been transferred to, yet he was marked for being absent at Matsapha Correctional Services, where he was in fact denied entry.

4.5 Lastly, the Applicant contended that the Commissioner General had no power to discipline him in terms of section 190 (5) of the Constitution read together with section 267 (a) (iii) thereto which, it is claimed, has the effect of protecting and giving effect to section 21 as read with section 33 of the Constitution in so far as the right to a fair hearing before an independent and impartial tribunal is concerned. It is further contended that this Court mainly concerned itself with the evidence of the Commissioner General and ignored evidence adduced by the Applicant. He argued that the disciplinary tribunal failed to apply its mind to the issues before it and consequently came to an irrational decision which was not just and fair.

[5] On the issue of delay in instituting the Review Application the Applicant contended that due to the fact that he was unemployed, he could not obtain the services of an attorney. The Applicant contended that the delay was unintentional. He argued that there was no fixed time frame within which to launch review proceedings, so long as they were brought within a reasonable time. He argued that on the peculiar facts of his case, the review proceedings had been brought within a reasonable time.

[6] The Applicant further contended that the Respondent stood to suffer no prejudice if the relief prayed for is granted, *"as all the pleadings are on record and the issues are common cause"*. During the course of his oral arguments Counsel for the Applicant, Mr. Nhlabatsi was specifically invited by this Court to address us on the potential financial prejudice which would materialise if the Respondent were to be directed to re-engage the Applicant as a Warder. His immediate response was that there would be no financial prejudice to the Respondent. In the Supplementary Submissions (filed with leave of this Court) the Applicant submitted that in exercising its discretion the Court should consider issuing an order *"to re-engage the Applicant rather than him being paid for the years out of service – in consideration of the delay in launching the review application and the injustice committed"*. The Court was further urged to consider that *"the Respondent continues to hire and roll in the future employ warders (sic). Therefore, there is no much prejudice if the Applicant is re-engaged as the decision to remove was unlawful, therefore, void."*

[7] In her opposing papers the Respondent raised the inordinate delay in instituting the review proceedings as a preliminary point (the defence of

undue delay), and on that basis alone argued that it should be dismissed. The Respondent contended that the eleven-year delay was grossly unreasonable. The Respondent further contended that the Applicant faced an insurmountable difficulty by his failure to deal with the incompetent Order issued by the High Court, that is to say, the Order setting aside the decision of the Disciplinary Board, whereas it had not been prayed for in the review application serving before the Court *a quo*. Mr. Dlamini, appearing for the Respondent, argued that the decision of this Court on appeal could not be set aside on this score based on the trite principle that a Court cannot grant relief which has not been prayed for by a litigant.

[8] On the issue of prejudice it was contended that granting the relief sought by the Applicant would be inherently prejudicial to the Respondent as his position was filled up with a replacement way back in 2010.

[9] On the merits of the Review Application, the Respondent contended that all the grounds in support thereof were untenable and stood to be dismissed. Firstly, that the challenge to the Commissioner General's (Respondent's) disciplinary powers over the Applicant was not determined by this Court on appeal, as the Applicant had failed to file a cross-appeal challenging the

same. It is contended that in the appeal hearing this point that is the failure to file a cross-appeal was conceded to by the then Applicant's legal Counsel. Secondly, that the Applicant was correctly convicted of contravening Regulation 3 (bb) of the Prison Regulations of 1965 because by absenting himself for seventy seven days his conduct was *"prejudicial to good order and discipline"* and *"likely to bring discredit to the service"*, as prescribed in the aforesaid Regulation. That is to say, he was properly convicted.

Applicable legal principles

[10] Section 148 (2) of the Constitution does not prescribe any time limits within which review proceedings brought in terms thereof must be launched. Be that as it may, review proceedings launched in terms of the above section must be brought within a reasonable time, as is required by the common law. From a reading of decided case law, both local and comparable jurisdictions, the following may be postulated as guiding to principles be taken into account in determining whether a Court should uphold a defence of undue delay in launching review proceedings:

10.1 In the absence of any statutory time limits, this Court has inherent powers to regulate its own procedures, that is to say, it has power to refuse to entertain an application for review at the instance of a party who is guilty of unreasonable delay. There are two principal reasons for this rule. The first is that unreasonable delay may cause undue prejudice to other parties. The second is that it is both desirable and important that finality should be reached within a reasonable time in respect of judicial and administrative decisions. Thus, where it is alleged that an applicant did not bring the matter to Court within a reasonable time, the Court has to decide (a) whether the proceedings were in fact instituted after the passing of a reasonable time and (b), if so, whether the unreasonable delay ought to be overlooked or condoned.

See: **Wolgroeiers Afslaers (Edms.) BPK v Munisipaliteit Van Kaapstad 1978 (1) SA 13(A.D.); African Echo (Pty) Ltd t/a Times of Swaziland v Inkhosatane Gelane Simelane (77/2013) [2016] SZSC 20 (30th June, 2016); Debbie Sellstrohm v Ministry of Housing and Urban Development and 4 Others (25/2014) [2018] SZSC 02 (27th February, 2017)**; **Mandela v The Executors, Estate Late Nelson**

Rolihlahla Mandela and Others (131/17) [2017] ZASCA 02 (19January 2018);

10.2 It is for this Court to decide whether there has been unreasonable delay. In deciding whether a reasonable period has elapsed, the Court does not exercise a discretion. The enquiry is factual – it is an investigation into the facts of the matter in order to determine whether, in all the circumstances of the case, the delay was reasonable or unreasonable, including any explanation that is offered for the delay.

See: **Radebe v Government of the Republic of South Africa and Others 1995 (3) SA 787 (NPD) at 798 G-I; Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa (5th edition) 2009 at page 1297.**

10.3 What a reasonable or unreasonable time is, is dependent upon the peculiar circumstances of each case. Whilst circumstances differ, it is nevertheless instructive to have regard to the time periods which have been found to be either reasonable or unreasonable in prior cases. In **Debbie Sellstrohm v Ministry of Housing and Urban Development and 4 Others** (supra), Annandale JA, colloquially likened the concept of a reasonable time *"to the length of a piece of string"*, adding *that "it all depends on the prevailing circumstances, a mixed bagful of inputs"*.

10.4 In determining whether in all the circumstances of each case the delay was reasonable or unreasonable, a Court makes a value judgment, which should not be equated with the judicial discretion involved in deciding whether or not to condone a delay which has been found to be unreasonable. In **Associated Institutions Pensions Fund & Others v Van Zyl and Others 2005 (Z) SA 302 (SCA)** at paragraph 48:

"48. The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case (see e.g. Setsokosane 86G). The investigation into the reasonableness of the delay has nothing to do with the court's discretion. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of that case, the delay was reasonable. Though this question does imply a value judgment it is not to be equated with the judicial discretion involved in the next question, if it arises, namely, whether a delay which has been found to be unreasonable, should be condoned (see Setsokosane 86E-F)".

10.5 In making a value judgment the Court must consider any explanation that is offered for the delay. The Court must also consider the nature of the decision which is being challenged, that is, the consequences of it being set aside. In **Gqwetha v Transkei Development Corporation Ltd and Others 2006 (2) SA 603 (SCA)** Nugent JA, in delivering the majority Judgment, stated at 613 B-C that:

"A material fact to be taken into account in making that value judgment – bearing in mind the rationale for the rule – is the nature of the challenged decision. Not all decisions have the same potential for prejudice to result from their being set aside."

10.6 If the Court concludes that the delay is unreasonable, it must then consider whether to condone the unreasonable delay and entertain the application for review. In doing so, the Court exercises an inherent judicial discretion, and takes into account all the relevant circumstances of the case. Among these are the giving of a satisfactory explanation for the delay; the prospects of success; the absence of prejudice; and the public interest in the finality in judicial and administrative decisions.

Application of the relevant legal principles to the facts.

[11] I now turn to applying the above legal principles to the facts at hand. As is apparent on its face, the impugned Judgment was delivered on the 28th May, 2010. The Application for Review was launched on the 17th March, 2021 – almost eleven years after the fact. The Applicant has not stated that he was

unaware of the Judgment and its adverse effects. The Applicant has not stated what steps, if any, were taken to ascertain if he could challenge the impugned Judgment by way of review. The Applicant has also not stated what happened to his previous attorneys. The only explanation offered by the Applicant for the delay is that he was impecunious. In my view, this, on its own, is insufficient reason.

[12] The consequences of setting aside the impugned Judgment are also a relevant consideration. If the Judgment were to be set aside, in its entirety, the High Court Order would be automatically reinstated. However, there is a fundamental flaw with the High Court Order, in that it purported to set aside the proceedings of the Disciplinary Board, which was not cited as a party, and without it (High Court) being asked to do so. The High Court erred in this regard. It is trite law that no court should grant relief which has not been prayed for. Thus, even if the Judgment were to be partially set aside, this Court cannot interfere with the proceedings and the outcome of the Disciplinary Board, with the result that nothing meaningful would be achieved thereby. Put differently, for so long as the proceedings and outcome of the Disciplinary Board stand, nothing can be achieved by the Applicant in partially setting aside the impugned Judgment, as the

Respondent would still be entitled to act upon its recommendations, that is, to dismiss the Applicant. This, in my view, would render setting aside the impugned Judgment an exercise in futility.

[13] The Respondent has raised the financial implications of setting aside the impugned Judgment. If it were to be set aside and the High Court Order reinstated (minus the purported setting aside of the Disciplinary Board proceedings) the Applicant would be reinstated as a warder with effect from the date of termination of his employment, with all his benefits and pay. This would clearly result in an onerous financial burden to the Respondent. The situation could be worsened by the fact that the Respondent would have to retain the officer engaged to replace the Applicant. Double jeopardy as it were.

[14] In light of all the above, I am of the opinion that the delay in launching the review application was long and unreasonable.

[15] Having concluded that the delay was long and unreasonable, the next issue to determine is whether in all the circumstances the unreasonable delay ought to be condoned and the Application for Review entertained by this Court. Regrettably, the Applicant has not done enough to convince this Court that the unreasonable delay ought to be condoned. In exercising my judicial discretion I have considered the following relevant factors:

15.1 Firstly, the Applicant has failed to furnish an adequate explanation for the inordinate delay in launching the review application;

15.2 Secondly, the Applicant has failed to file an application for condonation for the late filing of the review application;

15.2 Thirdly, the Respondent will be visited with significant prejudice if the impugned Judgment is set aside. The nature and extent of the prejudice has already been alluded to in previous paragraphs of this Judgment;

15.3 Fourthly, the review itself is premised on tenuous grounds with very little, if any, prospects of success. The Applicant did not challenge the proceedings of the Disciplinary Board or its outcome. All that he did was to challenge the decision of the Respondent, who only adopted the recommendations of the Disciplinary Board. Notwithstanding that the proceedings of the Disciplinary Board were unchallenged, the High Court granted an Order to have them set aside. There was absolutely no justification for the High Court Order in this respect, and the High Court Order was correctly reversed. Therefore, there is no basis on which this Court, on review, can set aside its Judgment.

15.4 In addition, the Applicant has failed to demonstrate the basis on which this Court should exercise its review jurisdiction in terms of section 148(2) of the Constitution, taking into account the requirements set out in **President Street Properties (Pty) Ltd v Maxwell Uchechukwu and Others (11/2014) [2014] SZSC 54 (03 December 2014)** and **Swaziland Revenue Authority v Impunzi Wholesalers (Pty) Ltd (06/2015) [2015] SZSC 06 (9th December 2015).**

[16] In the result, my considered view is that this Court should refuse to condone the unreasonable delay in bringing the review proceedings or to entertain the same. On that basis the application stands to be dismissed.

[17] In fairness to the Applicant, who appears to be unemployed and as is common in labour disputes not to award costs, each party should bear its own costs.

[18] Therefore, the Court hereby issues the following Order:

1. The Application for Review is dismissed.
2. Each party is to bear its own costs.

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M.J. MANZINI
ACTING JUSTICE OF APPEAL

I agree

S.P. DLAMINI
JUSTICE OF APPEAL

I agree

R.J. CLOETE
JUSTICE OF APPEAL

I agree

S.B. MAPHALALA
JUSTICE OF APPEAL

I agree

J.P. ANNANDALE
JUSTICE OF APPEAL

For the Appellants: MR. S. NHLABATSI FROM MOTSA MAVUSO ATTORNERYS

For the Respondent: MR. N.G. DLAMINI FROM ATTORNEY GENERAL'S CHAMBERS