THE SUPREME COURT OF APPEAL

REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 261/09

In the matter between:

PRICEWATERHOUSE COOPERS INC	**First Appellant**
HOEK & WIEHAHN	**Second Appellant**
WIEHAHN MEYERNEL	**Third Appellant**
PRICEWATERHOUSE MEYERNEL	**Fourth Appellant**
PRICE WATERHOUSE	**Fifth Appellant**

and

G M VAN VOLLENHOVEN N.O.	**First Respondent**
NATIONAL POTATO CO-OPERATIVE LTD	**Second Respondent**

Neutral citation: *Pricewaterhouse v Van Vollenhoven NO* (261/2009) [2009] ZASCA 166 (1 December 2009)

Coram: Streicher, Brand, Bosielo JJA and Leach and Griesel AJJA

Heard: 24 November 2009

Delivered: 1 December 2009

Summary: Administrative law – Promotion of Administrative Justice Act 3 of 2000, s 9(2) – whether high court correctly concluded that not in interests of justice that time within which review application to have been brought be extended.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Botha J).

Order:

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

GRIESEL AJA (STREICHER, BRAND, BOSIELO JJA

AND LEACH AJA concurring):

[1] This is not the first time that these parties have come to this court in the course of the present litigation.[1] As observed by Hurt AJA in the opening sentence of one of the previous judgments,[2] '(t)he parties are locked in litigation of marathon proportions'. The present appeal arises from an unsuccessful application for review of the taxing master's decision in respect of security for costs. The taxing master was cited as the first respondent herein, but played no role in the proceedings. For the sake of convenience, I refer to the parties by their description in the main action, namely as plaintiff (for the second respondent) and defendants (for the appellants) respectively.

[2] The factual background appears fully from the two previous judgments of this court. It is accordingly not necessary for me to repeat it for present purposes save to set out the following brief chronology:

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[1] See *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA); *Aartappel Koöperasie Bpk v Pricewaterhousecoopers* [2007] SCA 166 ('the 2007 judgment').
[2] The 2007 judgment, para 1.

- On 5 December 2006 the trial judge (Botha J in the North Gauteng High Court in Pretoria) granted an order directing the plaintiff to provide security in an amount to be determined by the taxing master. The appeal against that order was subsequently dismissed by this court on 29 November 2007. This formed the subject matter of the 2007 judgment.

- Meanwhile, the defendants had presented a pro forma bill of costs to the taxing master to determine the amount of security to be furnished by the plaintiff. After argument, on 15 December 2006, the taxing master determined security in an amount of R7,56 million. In so doing, he disallowed an item in respect of forensic auditors' fees amounting to some R5,46 million. It is this latter decision that forms the subject matter of the instant appeal.

- On 3 June 2008 the trial court ruled that the trial was to recommence on 2 February 2009.

- On 6 June 2008 – ie almost 18 months after the decision of the taxing master not to provide for forensic auditors' fees as part of the security to be furnished by the plaintiff – the defendants launched an application to review and set aside that decision.

- On 1 December 2008 the court below dismissed the defendants' application with costs. Hence this appeal, which comes before us with leave of this court.

[3] Uniform rule 47(2) provides that '(i)f the amount of security only is contested the registrar shall determine the amount to be given and his decision shall be final'. Notwithstanding this provision, however, it is settled law that the

registrar's decision, 'being in the nature of an administrative act, was always susceptible of review provided the necessary grounds for review existed'.[3]

[4] In the court below it was common cause that the decision of the registrar constituted 'administrative action' for purposes of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). The principal issue between the parties was whether the court should entertain the application at all in view of the lapse of time. The court declined to do so and dismissed the application on the basis that it had been brought outside the period of 180 days prescribed by s 7(1) of PAJA.[4] In coming to its conclusion, the court also refused the defendants' application to extend the 180-day-period in terms of s 9(2) of PAJA.[5]

[5] On appeal, it was argued on behalf of the defendants that the court below had erred, *inter alia*, in that it had not properly considered the requirement of the 'interests of justice' referred to in s 9(2) of PAJA.

[6] The concept 'interests of justice' has been considered by the Constitutional Court on a number of occasions in the context of applications for condonation. Most recently, in *Van Wyk v Unitas Hospital & another*,[6] the court expressed itself as follows:

'This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and

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[3] *Trakman NO v Livshitz & others* 1995 (1) SA 282 (A) at 289G and the cases referred to therein.

[4] The relevant part of s 7(1) provides:
'(1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date – . . . (b) . . . 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.'

[5] Section 9(2) provides that the court may extend the period of 180 days 'where the interests of justice so require'.

[6] 2008 (2) SA 472 (CC).

cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.'[7]

[7] With regard to the explanation for the delay, the court further held:[8]

'An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable.'

[8] The explanation proffered on behalf of the defendants in this case, as contained in an affidavit by its attorney, was that the decision not to launch review proceedings at an earlier stage was a deliberate one. The attorney explained that until December 2007 he and his clients had believed that, in the event that the appeal to this court should fail, the plaintiff would not be able to furnish security and that would be the end of the case. In these circumstances, so he claimed, 'there was little point in my client incurring the cost of launching the present application to require additional security'. He stated further:

'A substantive application, such as the present, is a time consuming and expensive process. I considered it reasonable and appropriate not to mulct the applicants in such costs unless and until security was furnished.'

[9] This explanation clearly does not hold water. First, preparing the founding affidavit, the body of which comprises a mere 15 pages of the record, was the work of not more than a few hours at the most. Second, the cost involved in preparing an application for review would have been trivial in the context of the present litigation and the scale of costs involved. Third, the defendants obviously deemed it useful and expedient to obtain the taxing master's determination while the appeal was pending. I fail to see why it would not have been equally useful and expedient to have the determination reviewed pending the appeal. Fourth, even if the defendants did not want to launch a

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[7] Para 20 (footnotes omitted).
[8] Para 22.

substantive application for review while the appeal was pending, a simple letter or telephone call asking for an extension of the 180-day-period or at least informing the plaintiff of the defendants' intention to launch an application for review could have been directed to the plaintiff. Instead, nothing at all was done to take the registrar's decision on review while the appeal was pending. Finally, even after the plaintiff's appeal was dismissed by this court, a further 180 days elapsed before the review application was eventually launched. There is simply no explanation for this further inexplicable delay.

[10] Counsel for the defendants referred to a letter written on behalf of the defendants to the plaintiff on 7 January 2008 in which, so it was claimed, the plaintiff was informed of the intention on the part of the defendants to bring an application for review of the taxing master's earlier decision. There are two answers to this submission: the first is that the letter is, at best for the defendants, ambiguous and does not pertinently alert the plaintiff to the possibility of a review. Secondly, and in any event, the letter was written more than a year after the taxing master's decision which it is sought to review and long after the 180-day-period contemplated by s 7 of PAJA had elapsed.

[11] The court below also made reference to the fact that, while the appeal was pending, the plaintiff – after much effort – had finally managed to obtain outside finance and that it had concluded an agreement with an Australian company to put up the security originally ordered by the court. In the circumstances, so the court held, the plaintiff would be prejudiced if the original security were now to be substantially increased. Much was made by counsel for the defendants of this finding in an attempt to persuade us that the court below had misinterpreted the terms of the funding agreement. Suffice it to say that, in my view, there is no merit in the point, nor can it be found that the court below erred in finding that the respondent would be prejudiced if the registrar's decision were now to be overturned.

[12] In my view, the explanation furnished by the defendants for its delay does not comply with any of the three requirements laid down in *Van Wyk v*

Unitas Hospital.[9] In the result, the defendants have failed to prove that it would be in the interests of justice to extend the period of 180 days contemplated by s 7 of PAJA. It follows that there are no grounds for interfering with the order of the court below.

[13] In the circumstances, the appeal is dismissed with costs, including the costs of two counsel.

B M GRIESEL
Acting Judge of Appeal

[9] Para 7 above.

APPEARANCES:

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