

SOUTH AFRICA / JUDGMENT

Bifawu and Another v Computershare Investor Services Ltd (J1345/04) [2015] ZALCJHB 70 (5 March 2015) [2015] ZALCJHB 70

COURT

Labour Court Johannesburg

BEFORE

Molahlehi

CASE / FILE NUMBER

J1345/04

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J1345/04

DATE: 05 MARCH 2015

Not Reportable

In the matter between:

BIFAWU.....First Applicant

MARIMUTHU.....Second Applicant

And

COMPUTERSHARE INVESTOR SERVICES LTD.....Respondent

Heard: 02 June 2014

Delivered: 05 March 2015

Summary: Application to dismiss statement of case in terms of Rule 11 of the Rules of the Court.

MOLAHLEHI, J

Introduction

- [1] It is now almost nine years since the individual respondent in this interlocutory application instituted the unfair dismissal claim against the applicants. The applicant seeks an order in terms of rule 11 of the Rules of the Labour Court, dismissing the respondents' claim on the grounds of unreasonable delay. For ease of reference, I shall refer to the individual respondent hereinafter as "the employee."

Background facts

- [2] The employee who was prior to his dismissal a shop steward was on 28 May 2003, dismissed for misconduct relating to allegations of unauthorised communication with staff; inciting or encouraging staff to refuse to work; and unauthorised use and abuse of the company's email facility.
- [3] The employee being unhappy with his dismissal referred a dispute concerning an alleged unfair dismissal dispute to the CCMA on 26 June 2003, for conciliation. The dispute was conciliated but remained unresolved. The attempt to have the dispute arbitrated was unsuccessful because the applicant objected to the jurisdiction of the CCMA to entertain the matter and that objection was upheld in the ruling by the CCMA on 14 May 2004.
- [4] It was following the ruling, that the CCMA did not have jurisdiction, that employee on 13 August 2004, instituted the main claim of unfair dismissal in this Court. The statement of claim was filed late and accordingly the employee applied for condonation. The condonation application was successful and was granted on 15 August 2006.
- [5] On 17 July 2009, the Registrar of the Labour Court issued a directive for the parties to hold a pre-trial meeting and file a pre-trial minute within 14 days of date thereof. The pre-trial meeting was, however, held on 04 November 2009. The parties did not, however, sign the pre-trial minute and accordingly on 28 January 2012, the applicants gave the employee notice of the intention to apply to the Labour Court to seek an order directing the finalisation of the pre-trial minute. It would appear that nothing came out of that notice.
- [6] The employee on the other hand also on 02 March 2012 notified the applicant of the intention of having the matter placed before a Judge for the purposes of finalising the pre-trial minute.
- [7] The matter was then set down for 11 June 2013 and, on that day, the Court ordered that a signed pre-trial minute be filed by 14 June 2013. The pre-trial minute was filed on 18 June 2013. The applicant then instituted these proceedings some 24 days thereafter, on 12 July 2013.

Principles governing unreasonable delay

[8] It is now well known that inordinate or unreasonable delay in the prosecution of a claim may justify its dismissal depending on the circumstances of each case.[1] The determination of the reasonableness or otherwise of the delay in the prosecution of a claim is dependent on the facts and the

circumstances of a particular case. The enquiry into the reasonableness or otherwise of the delay is not depended on the discretion of the Court as has been stated by the SCA in *Association Institution Pension Funding and Others v Van Zyl and Others*. [2] In dealing with an application for the dismissal of a claim due to unreasonable delay the Court exercise discretion to bar the dilatory party from proceeding further with his or her case once it has been established that the delay is unreasonable. [3]

[9] The case law and the basis for the unreasonable delay rule received attention by this Court in *Sishuba v National Commissioner of the South African Police Service*. [4] It was held in that case that from a policy perspective, there are two principal reasons why the Court should have the power to dismiss a claim at the instance of an aggrieved party where the other has been guilty of unreasonable delay. The reasons are set out in *Radebe v Government of the Republic of South Africa* [5], in the following terms::

‘The first is that unreasonable delay may cause prejudice to the other parties... The second reason is that it is both desirable and important that finality should be reached within a reasonable time in respect of judicial administrative decisions...’

[10] The policy consideration upon which the unreasonable delay rule is based on was also expressed in *Mohlomi v Minister of Defence*, [6] where the Court observed:

‘Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of those whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared.’

[11] The broad approach to adopt when dealing with a claim of unreasonable delay is set out in *Bezuidenhout v Johnston NO and Others*, [7] in the following terms:

‘35 When an Applicant party has been dilatory in pursuit of his relief, and finds himself outside prescribed periods, it is trite that a good explanation needs to be provided for such delays as may have occurred in order to warrant the granting of an indulgence to the defaulting party...

36 The prejudice suffered by parties as a result of undue delays is another fact to consider...’

[12] In interpreting the above, *Van Niekerk J in Karen Beef t/a Karen Beef and Another v Randall*, [8] had the following to say:

‘[9] This is not to say that a respondent party is entitled to lie in wait, intending to ambush the applicant once a period of delay

becomes sufficiently protracted to justify the filing of an application to dismiss. In the Bezuidenhout judgment, Nel AJ observed that the respondent party also bears a responsibility to ensure that disputes are resolved expeditiously, inter alia by ensuring that the applicant party complies with the time periods applicable to it, for example, by compelling compliance. In Sishuba, Molahlehi AJ noted that the Rules as they related to the filing of process in review applications did not preclude a dilatory party or representative from being placed on terms, nor was a degree of self-help prohibited:

"Whilst there is indeed a practice well-known in this Court that a matter will be set down only once the Applicant has filed the Heads of Argument, there is no rule governing this practice. There is, however, in my view, no reason why an Employee faced with a delay on the part of the Applicant cannot file Heads of Argument prior to that of the Employer, and thereby activate the process of the Registrar setting the matter down. I also see no reason why the Employee did not, in the circumstances of this case, place the Employer on terms and called upon him to file his Heads of Argument before bringing this application."

It seems to me that the approach adopted both in the Bezuidenhout and Sishuba cases requires that a respondent party confronted by an unreasonable delay on the part of an applicant ought at least to place the offending party on terms, or to seek the intervention of the Registrar or file an application to compel (when these steps are

appropriate), prior to filing an application to dismiss.'

[13] The facts in the present matter are different to these of the above cases in the sense that in those cases the Court was dealing with the application to dismiss review applications on the grounds of unreasonable delay. Similar to Karen Beef, this matter has to do with the referral to this court in terms of Rule 6 of the Rules of this Court. As stated in that case, Rule 6(4)(d) provides that the party

initiating the proceedings must ensure that a copy of the pre-trial minute is delivered within five days of the conclusion of the

pre-trial conference. Rule 6(5) also provides that when the minute of a pre-trial conference is delivered or the time limit for its delivery lapses, whichever occurs first, the Registrar is required to send the file to a Judge for directions in terms of the sub-rule. The Judge who receives the file from the Registrar may, direct the Registrar to enroll the matter for a hearing if the Judge is satisfied that the matter is ripe for hearing; direct that an informal conference be held before a Judge in chambers to deal with any pre-trial matters; or direct the parties to convene a further formal pre-trial conference at a date, time and place fixed by the Registrar, at which a Judge must preside, to deal with any pre-trial matters.

Analysis

[14] The delay of about nine years is excessive and therefore, the applicant had an onerous duty of providing a satisfactory and

convincing explanation for that delay. However, the applicant, as indicated in the authorities cited above, also has the responsibility

of making sure that the prosecution of the matter is processed expeditiously with no hindrance from their part.

[15] Unlike in *Karen Beef*, there is no evidence in the present matter that the employee was ever placed on terms with regard to the delay in the prosecution of the claim. That would have gone a long way in weighing whether the interest of justice favored barring the employee from proceeding further with his claim. In fact, what is clear is that the delay was in all respect due to the disagreement over the finalisation of the pre-trial minutes. The applicant is not innocent in as far as this is concerned. There is no evidence that the applicant did put any effort towards the finalisation of the pre-trial minute.

[16] In my view, considering the facts and the circumstances of this matter in particular the fact that the delay was significantly caused by the failure of both parties to conclude a pre-trial minute, it would not serve the interest of justice to exercise my discretion in favour upholding the application. I have also taken into account the fact that the applicant has stayed and did nothing for all the years but instituted these proceedings only after about 24 days of the filing of the pre-trial minute. Whilst accepting that the delay is excessive, the facts do not support the suggestion that the employee has lost interest in his claim nor for that matter that he has waived his rights in that regard.

[17] In the circumstances, I am of the view that the application to dismiss the applicants' statement of case stands to be refused with no order as to costs.

Order

[18] In the circumstances, the following order is made:

1. The applicant's application to dismiss the respondent's unfair dismissal claim is dismissed with no order as to costs.
2. The Registrar is directed to arrange a judicial case management with both parties before a judge within 10 days of date of this order.

E, Molahlehi

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: MT Nhlapo of BIFAWU

For the Respondents: Advocate S. Tilly

Instructed by: Goldman Judin Inc.

[1] See *Verkouteren v Savage* 1918 AD 143 at 144, *Groupal v Subbamah* 2002 (6) SA 551 (D) at 558.

[2] [2004] 4 All SA 133 (SCA).

[3] See *Molala v Minister of Law and Order and Another* 1993 (1) SA 673 (W) at 676I-677A, where the Court said that the approach to be followed when dealing with unreasonable delay in the prosecution of a claim was the one set out in *Bernstein v Bernstein* 1948 (2) SA 205 (W), where it was held that ‘it is in the discretion of the Court to allow proceedings to continue where there has been this lapse of time.’ Reference was also made in that case to the decision in *Kuiper and Others v Benson* 1984 (1) SA 474 (W), where it was held that the court has ‘an inherent power to control its own proceedings and that accordingly the Court should assess whether the plaintiff is guilty of an abuse of process’.

[4]

(2007) 28 ILJ 2073 (LC).

[5] 1995 (3) SA 787 (N).

[6] 1997 (1) SA 1 to 4 (CC) at para 11.

[7]

(2006) 27 ILJ 2337 (LC) at paras 35-36.

[8] (2009) 30 ILJ 2937 (LC) at para 9.

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