

SOUTH AFRICA / JUDGMENT

CITASA obo Phajane v Commission for Conciliation, Mediation and Arbitration and Others (JR677/2004) [2021] ZALCJHB 393 (12 October 2021)

[2021] ZALCJHB 393

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

JR677/2004

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR 677/2004

In the matter between:

CITASA
obo S L
PHAJANE Applicant
and
THE COMMISSION FOR
CONCILIATION,
MEDIATION AND
ARBITRATION First
Respondent
N CAWE
N.O Second
Respondent
GOLD REEF CITY CASINO
RESORTS
(PTY)
LTD Third
Respondent
Heard: 6
October 2021
Delivered: 12
October 2021
In

view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties by email. The date for hand-down is deemed to be on 12 October 2021.

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicant filed an application to review and set aside an arbitration award, dated 15 February 2004 and issued under case number

GA23650-02. The review application was filed on 2 April 2004. The Third Respondent (the Respondent) filed a notice of intention to oppose the review application on 20 April 2004.

[2] On 27 November 2020 the Respondent filed an application in terms of Rule 11 of the Rules for the Conduct of Proceedings in the Labour Court (the Rules) for the dismissal of the review application on account of undue delay in the prosecution of the review application, which application is opposed by the Applicant.

[3] On 10 December 2020 the Applicant filed an application to condone the late filing of the record, which the Applicant submitted was filed 16 years out of time. The Respondent opposed the condonation application.

[4] The matter was enrolled for hearing on 6 October 2021 and in accordance with the provisions of the directive issued in respect of access to the Labour Court and the conduct of proceedings during the Covid-19 pandemic, the parties agreed to present arguments virtually via Zoom.

[5] Before I deal with the merits of the applications before me, it is prudent to set out the general and applicable principles.

General principles applicable to review applications

[6] The purpose of the Labour Relations Act[1] (LRA) is inter alia the effective resolution of labour disputes and the processes introduced by the LRA are intended to bring about the expeditious resolution of labour disputes. The detrimental implications of delays are obvious[2].

[7] This Court has accepted that a review application is by its nature an urgent application and that it requires prosecution with diligence

and urgency[3]. This is supported by the 'Practice Manual of the Labour Court'[4] wherein an applicant in a review application is required to ensure that all the necessary papers in the application are filed within

twelve months of the date of the launch of the application and where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown as to why it should not be archived.

[8] The amendments to section 145 of the LRA which took effect on 1 January 2015 are specifically aimed at expediting the prosecution of review applications and inter alia requires that an applicant on review must apply for a hearing date within six months of launching the review application.

[9] In *Macsteel Trading Wadeville v Francois van der Merwe N.O and Others*[5] the Labour Appeal Court (LAC) emphasised the underlying objective of the LRA and held that:

A primary object of the Act is to promote the effective resolution of labour disputes, integral to which is the speedy resolution of disputes. As stated by the Constitutional Court in *Toyota*:

“Any delay in the resolution of labour disputes undermines the primary object of the LRA. It is detrimental not only to the workers who may be without a source of income pending the resolution of the dispute but ultimately, also to the employer who may have to reinstate workers after many years.”

[10] A review application requires urgent prosecution without undue delay and that had always been the case. This is evident from the attitude the Court adopted as far back as 2006 when it held in *Bezuidenhout v Johnston N.O and Others*[6] that:

‘If applicant parties have unduly delayed prosecuting their applications, and fail to provide acceptable reasons for the delays, the ultimate penalty of dismissing such applications should be used in appropriate cases. This will hopefully help creating a culture of compliance and ensure that disputes are expeditiously dealt with.

[11] The Court in *BP Southern Africa (Pty) Ltd v National Bargaining Council for the Chemical Industry and Others*[7] found that:

‘... the applicant is free to bring an application to dismiss the application for review. The rules of this court make no specific

provision for an application to dismiss when a party fails diligently to pursue a claim referred to the court for adjudication, but the court has recognized and adopted the rule based on the maxim *vigilantibus non dormientibus lex subvenit*, in terms of which a party may in certain circumstances be debarred from obtaining the relief to which that party would have been entitled because of an unjustifiable delay in prosecuting their claim....’

The Rule 11 dismissal application

General principles

[12] It is a common practice in this Court that where an applicant has delayed unduly to prosecute a review application for the respondent

to bring an application dismissing the review proceedings under the provisions of Rule 11 of the Labour Court Rules.

[13] In *Autopax Passenger Services (Pty) Ltd v Transnet Bargaining Council and Others*[8] it was held that an application to dismiss a review application, is a remedy designed to address abuse of this court's process in the form of unjustifiable delays. The Court held:

‘... the rule that the court has the power to dismiss proceedings due to a delay in the prosecution thereof lies in the court's inherent power to prevent an abuse of its own process.’

[14] In *Karan t/a Karan Beef Feedlot and Another v Randall*,[9] it was held:

‘In summary: despite the fact that the rules of this court make no specific provision for an application to dismiss a claim on account

of the delay in its prosecution, the court has a discretion to grant an order to dismiss a claim on account of an unreasonable delay in pursuing it. In the exercise of its discretion, the court ought to consider three factors:

- the length of the delay;
- the explanation for the delay; and
- the effect of the delay on the other party and the prejudice that that party will suffer should the claim not be dismissed.

[15] This Court has a discretion to grant an order to dismiss an application on account of an unreasonable delay in pursuing it and in the exercise of its discretion, the Court ought to consider the factors set out in *supra*.

[16] It was recently confirmed in *Mthembu v CCMA and Others*[10] that even where a review application is deemed withdrawn in terms of the provisions of the Practice Manual, the Court retains its discretion to dismiss the application due to lack of prosecution. It was held that:

‘In circumstances such as in this case, where the applicant was notified of the intention to oppose the review application, and further where no steps were taken either to prosecute the review application, or to reinstate the review after it was deemed withdrawn, or worst still, where the applicant was aware of the Rule 11 application and took no steps in either opposing that application or taking any steps that indicated any intention that there is still an interest in pursuing the review application, it cannot for all intents and purposes, be concluded that any such conduct on the part of the applicant contributes in any meaningful way towards the expeditious resolution of disputes. In my view, such conduct is the antithesis of the very objectives of the LRA. It constitutes an abuse of the Court's process and cannot for whatever reason be countenanced.

The facts of this case as already outlined elsewhere in this judgment are clearly materially distinguishable from those in *Macsteel, Ralo and SAPU obo Mnisi v SSSBC & Others*. Inasmuch as the applicant is entitled to have his case finally determined by this Court, this Court cannot come to his assistance if he practically did nothing to pursue his matter. The fact that his review application was deemed withdrawn, does not imply that South Deep is precluded from taking steps to bring it to finality. South Deep is entitled to continue with its affairs, without having to wonder when the applicant will ever take any steps in prosecuting the review application and bringing the matter to finality. The applicant's review application has been plagued by delays from the moment it was launched. It was launched some 16 months outside of the statutory time periods, and no efforts whatsoever have been made to prosecute it to finality. In these circumstances, the interests of expeditious resolution of disputes in line with the primary objectives of the LRA dictate that the Rule 11 application be granted.'

The facts

- [17] In consideration of the applications before this Court, the sequence of events is relevant.
- [18] The Applicant was dismissed for misconduct in 2002 and she referred an unfair dismissal dispute to the First Respondent (CCMA). An arbitration award was issued on 15 February 2004 wherein the Second Respondent found that the Applicant's dismissal was fair. The Applicant filed a review application on 2 April 2004.
- [19] On 26 April 2004 the CCMA filed a notice of compliance in terms of Rule 7A(3). The Applicant attempted to transcribe the record almost a year later and on 8 April 2005 discovered that the tape that was filed, did not contain the relevant record of the merits of the case presented. On 19 August 2005 the Applicant filed an application to compel the CCMA to make the record of the arbitration proceedings available and on 22 February 2006, this Court (per Ngcamu AJ) issued an order to that effect.
- [20] On 1 November 2007 the Applicant's attorney, Kgotleng Attorneys, addressed a letter to the CCMA requesting for a meeting to be arranged for the reconstruction of the record. On 20 November 2007 the CCMA responded that it would not be possible to reconstruct the record as the presiding arbitrator had left the CCMA and her whereabouts were unknown. The CCMA suggested to the Applicant's attorneys to approach the Labour Court for a determination as to how the review application must be dealt with in the absence of the commissioner to reconstruct the record. The Applicant was requested to appraise the CCMA of the Labour Court's determination in order to action it immediately.
- [21] It is evident that at this point the Applicant should have approached the Labour Court for a directive or pronouncement on how the review application is to be dealt with. This was however not done.

- [22] No further steps were taken until 8 February 2018, when the Applicant had approached Jan Kemp Nel Attorneys to pursue an application to hold the CCMA in contempt. After receiving correspondence from the CCMA, the contempt application was withdrawn.
- [23] No further steps were taken until 22 September 2020, when the Applicant served a notice of enrolment for the review application to be heard.
- [24] On 27 November 2020 the Respondent filed an application to dismiss the Applicant's review application because the Applicant had failed to comply with the provisions of the LRA, the Rules or the Practice Manual.
- [25] In my view, the Rule 11 application to dismiss the review application on account of lack of prosecution, is to be considered first. If the Rule 11 application succeeds, it is the end of the matter.

Analysis

Length of the delay

- [26] The first factor to be considered is the length of the delay.
- [27] It is evident that since the filing of the review application in April 2004, the Applicant has not filed the record or a notice in terms of Rule 7A(6) or (8) of the Rules of this Court. In her application for condonation for the late filing of the record, the Applicant stated that the record is 16 years out of time.
- [28] Considering the sequence of events and the facts placed before this Court holistically, it is evident that more than 17 years after the filing of the review application, this matter is not one step closer to finality. It is further evident that the condonation application was filed in response to the Respondent's application to dismiss the review application.
- [29] The delay in prosecuting the review application is more than 17 years, which is excessive, given the provisions of section 145(5) of the LRA and of the Practice Manual.
- [30] In casu none of the time frames prescribed in the Rules or the Practice Manual had been complied with and none of the available steps had been taken to rescue the application from the consequences of the delay.
- [31] The delay in prosecuting the review application is excessive and it has fatal consequences for the further prosecution of the Applicant's

review application, more so considering the aim of the LRA and the mandate of this Court to resolve labour disputes expeditiously.

Explanation for the delay

- [32] The second factor to be considered is the explanation for the delay.

- [33] The Applicant's explanation in short is that her previous attorneys did not communicate with her and she was not informed as to how to proceed with a case that has incomplete records. She was unaware of the Rules of this Court. The Applicant also submitted that she was not financially stable.
- [34] In opposition the Respondent stated that the Applicant had been represented by attorneys from the inception of her review application. In November 2007 the CCMA informed the Applicant that it would not be possible to reconstruct the record and suggested to the Applicant's attorneys to approach the Labour Court for a determination as to how the review application must be dealt with in the absence of a reconstructed record. The Applicant was requested to appraise the CCMA of the Labour Court's determination in order to action it immediately.
- [35] No further steps were taken until 8 February 2018, when the Applicant had approached attorneys to pursue an application to hold the CCMA in contempt. There is no explanation for a period of 11 years of inaction when the Applicant did nothing but sat back and failed to place any facts before this Court to show what steps she had taken during this period.
- [36] The gist of the Applicant's explanation is to blame her attorneys.
- [37] In *Waverley Blankets Ltd v Ndimma & others; Waverley Blankets Ltd v Sithukuza & others*[11] the LAC held that:
- 'Although the employees were not to blame for this state of affairs, it has frequently been emphasized by our courts - including this court - that an attorney's neglect of his client's affairs may be so inexcusable that condonation may, despite the blamelessness of his client, be refused. In my view, this is precisely such a case. The attorney displayed such gross ineptitude in dealing with the appeal that this court cannot extend any indulgence to the employees.'
- [38] In *Superb Meat Supplies CC v Maritz*[12] the LAC held that:
- 'In this court and the Supreme Court of Appeal there have been frequently repeated judicial warnings that there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. It has never been the law that invariably a litigant will be excused if the blame lies with the attorney. To hold otherwise might have a disastrous effect upon the observance of the rules of this court and set a dangerous precedent. It would invite or encourage laxity on the part of practitioners. The courts have emphasized that the attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.'
- [39] In casu the limit beyond which a litigant can escape the result of an attorneys lack of diligence, had been exceeded. The Applicant herself did nothing for 11 years, without any averment that she had made enquiries from her attorneys about her case. The Applicant did not explain her own tardiness in following up on the progress of her matter and it is

inexcusable that she did nothing for a period exceeding a decade. Furthermore, the Applicant chose her attorneys and unfortunately she has to live with the consequences of the choice she made, as she could have instructed different attorneys if she was not satisfied with the way her matter was handled. The Applicant cannot escape the consequences of the laxity and lack of diligence displayed by herself and her legal representatives.

- [40] The Applicant should provide a full explanation for every period of the delay and she had to provide a comprehensive explanation to enable this Court to assess the reasonableness of the delay and the explanation for that. She failed to do so and instead the Applicant provided a sketchy explanation, without any detail that enabled this Court to understand the reason for the delay and the reasonableness thereof. The explanation tendered is entirely bereft of substance and material periods in the lengthy delay are left unexplained. The Applicant blames her attorneys without telling this Court what she did to pursue her own case.
- [41] The fact that the review application is since its filing, more than 17 years ago, not one step closer to finality, is not indicative of an applicant who is serious to pursue and finalise the review, but it is the conduct of a party who has no intention to pursue the application expeditiously and who displayed nothing but a flagrant disregard of the Rules of this Court and the LRA.

Prejudice

- [42] The last factor to consider is the effect of the delay on the Respondent and the prejudice it would suffer should the application for review not be dismissed.
- [43] The Applicant submitted that the Respondent would suffer no prejudice if her review application is to be adjudicated because the Respondent will be allowed an opportunity to explain the reasons for dismissing her. The Applicant lost sight of the fact that the outcome of the review application may have further consequences for the Respondent, apart from tendering an explanation.
- [44] The Applicant's averment is denied by the Respondent. The Respondent's case is that it is entitled to finality in respect of a dismissal that took place in 2002 and it would be significantly prejudiced should the matter be remitted to the CCMA for a hearing de novo.
- [45] This Court has a discretion, which must be exercised judicially on a consideration of the facts of each case and in essence it is a matter of fairness to both sides. While the dismissal of the review application will have the result that the Applicant will be denied the opportunity to pursue her review application before this Court, the Constitutional Court pointed out in *Toyota SA Motors (Pty) Ltd v CCMA and others*[13] that excessive delays in litigation may induce a reasonable belief on the part of a successful litigant that the order or award had become unassailable. As the Constitutional Court observed, this principle applies with even greater force in labour disputes.

[46] In my view the prejudice that the Respondent will suffer if the review application is not dismissed, is obvious. The review application was filed more than 17 years ago, in respect of an arbitration award that was issued as far back as February 2004 and in respect of a dismissal that took place in 2002. In October 2021, almost twenty years after the Applicant's dismissal, the review application is not one step closer to finality.

[47] The Applicant has not pursued this matter diligently, and that in circumstances where a review application is to be treated as an

urgent application and where a date for adjudication has to be applied for within six months after filing of the review application.

[48] I have to endorse the aim of the LRA namely; to resolve labour disputes speedily and without delay. To refuse the dismissal of the review application in a case like this would not be in the interest of justice as it would undermine the statutory purpose of expeditious

dispute resolution, a factor that weighs heavily in the Respondent's favour. The Respondent is also entitled to finality and the delay in casu induced the reasonable belief that the Applicant was no longer pursuing the matter. The Respondent is entitled to approach this Court for finality.

[49] The delay in this matter is so excessive that it is inexcusable and displays a spectacular undermining of the purpose of the LRA and the speedy resolution of labour disputes, more so where the Applicant was assisted by lawyers throughout.

Costs

[50] The last issue to be decided is the issue of costs. In so far as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness. The requirement of law has been interpreted to mean that the costs would follow the result. In considering fairness, the conduct of the parties should be taken into account and mala fides, unreasonableness and frivolousness are inter alia factors justifying the imposition of a cost order.

[51] In *Zungu v Premier of Kwa Zulu-Natal and Others*[14] the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand allowing those parties to bring to this Court (or oppose) cases that should not have been brought to Court (or opposed) in the first place.

[52] The general accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation.

[53] Mr Chavoos for the Respondent argued that the Applicant should be ordered to pay the costs as she was represented, she delayed the

prosecution of her review application and should not have persisted with it after such a long delay. The Respondent's attorneys had to go through great trouble to retrieve the file from the archives and a cost order would be appropriate.

[54] In my view this is a case where it would be appropriate to make a cost order. The Applicant filed an application for review and after that, there was a clear lack of effort to pursue the matter with speed and diligence. She was not pursuing this matter as an unassisted layperson, which is supported by the fact that she blames her attorneys for the delay.

[55] However, and although I am inclined to make a cost order in favour of the Respondent, I am alive to the fact that the Applicant is an individual, who indicated to me that she is unemployed and would not be able to pay any costs, even if she is ordered by this Court to do so. This is a matter where a cost order may burden the Applicant beyond what she may be able to bear. The interest of justice will thus be best served by making no order as to cost.

[56] In the premises the following order is made:

1. The review application is dismissed for lack of prosecution;
2. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Representatives:

For the Applicant: In
person

For the Third Respondent: Mr. M Chavoos from Norton Rose Fulbright SA Inc Attorneys

[1] Act 66 of 1995.

[2] Commercial Workers Union of South Africa v Toa Ying Metal Industries and others 2009(2) SA 204, (2008) 29 ILJ 2461 (CC), (2009) 1 BLLR 1 (CC) where the Constitutional Court held that: "These disputes, by their very nature require speedy resolution. Any delay in resolving a labour dispute could be detrimental not only to the workers who may be without a source of income pending the resolution of the dispute, but it may, in the long run, have a detrimental effect on the employer who may have to reinstate workers after a number of years."

[3] Unreported case no JR 1912/2012. Lehola v Nkadimeng N.O and others.

[4] Practice Manual effective 2 April 2013.

[5] (2019) 40 ILJ 798 (LAC).

[6] (2006) 27 ILJ 2337 (LC) at paras 31-32.

- [7] (2010) 31 ILJ 1337 (LC) at paras 10-11.
- [8] (2006) 27 ILJ 2574 (LC) at paras 7 and 14.
- [9] (2009) 30 ILJ 2937 (LC) at para 14.
- [10] (2020) 41 ILJ 1168 (LC)
- [11] (1999) 20 ILJ 2564 (LAC)
- [12] (2004) 25 ILJ 96 (LAC)
- [13] (2016) 37 ILJ 313 (CC).
- [14] (2018) 39 ILJ 523 (CC) at para 24.
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