

SOUTH AFRICA / JUDGMENT

Maiphwanya v Commission for Conciliation, Mediation And Arbitration and Others (JR 2297/07) [2014] ZALCJHB 21 (23 January 2014)

[2014] ZALCJHB 21

COURT

Labour Court Johannesburg

BEFORE

Wilken

CASE / FILE NUMBER

JR 2297/07

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REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA ,JOHANNESBURG

JUDGMENT

Case no. JR 2297/07

DATE: 23 JANUARY 2014

REPORTABLE

In the matter between:

SEANI REBECCA MAIPHWANYAApplicant

And

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION.....First Respondent

COMMISSIONER SAMUEL KHAKHATI N.O.....Second Respondent

THE SOUTH AFRICAN POST OFFICE.....Fourth Respondent

Heard: 7 January 2014

WILKEN, AJ

Introduction

- [1] This is an application to review the arbitration award handed down by the Second Respondent (“the Commissioner”) dated 4 July 2007 in Case LP 3382/05 finding that the dismissal of the Applicant was substantively unfair and ordering the Third Respondent to compensate the Applicant by paying her an amount of R60 469.70, which equates to 10 months salary. The Applicant seeks to set aside on review the Commissioner’s award in respect of sanction and costs. The Employee seeks to be reinstated, alternatively to be re-employed, and the Employer pay her costs incurred at the arbitration proceedings.
- [2] The review is opposed by the Third Respondent. The Third Respondent launched applications in terms of Rule 11 on 27 October 2008 and 30 April 2012 seeking the dismissal of the Applicant’s review and an order making the arbitration award handed down by the Commissioner an Order of Court.

Background

- [3] The chronology of the events as they unfolded from the dismissal of the Applicant, the review and Third Respondent’s Rule 11 applications are particularly relevant in relation to the determination of the Rule 11 and review applications.
- [4] The Third Respondent terminated the Applicant’s employment after a disciplinary enquiry on 14 July 2005. The Applicant’s

employment was terminated after having been found guilty of dishonesty and fraud. The charges emanated from a banking shortage in the sum of R170.43 which occurred on 10 December 2004.

- [5] The Applicant was aggrieved by her dismissal and referred a dispute to the CCMA. The arbitration as held over 5 days spanning over a period of 18 months, the first sitting being 7 December 2005 and the last sitting being 6 June 2007. The award dated 4 July 2007 was issued on or about 5 July 2007. The award was accordingly issued approximately 2 years after Applicant’s dismissal.
- [6] The 6 week period within which the Applicant had to launch her review lapsed on 16 August 2007. The Applicant launched her review

approximately 1 month later, viz. on 18 September 2007. No application for condonation was brought at the time of launching the

review, but the Third Respondent has not challenged the Applicant in this regard. At the hearing of the matter the Applicant’s

attorney, attempted to seek condonation from the Bar. No explanation other than his lack of proficiency in labour law (resulting in him relying on Counsel drafting the necessary founding affidavit) was advanced for the delay in launching the application late.

- [7] The First Respondent filed a notice informing the parties that it had delivered the mechanical recording of the arbitration proceedings and documents called at the arbitration proceedings as required in terms of Rule 7A(3) with the Court on 21 September
2007. On or about 19 October 2007 the Employee's Attorney transmitted a letter to Third Respondent's attorneys informing the Third Respondent that it stands by its affidavit.
- [8] On or about 29 October 2007, the Third Respondent advised the Applicant that it was not able to deal with the review in the absence of having received the transcript and in the absence of compliance by the Applicant with Rule 7A(6) and 7A(8).
- [9] What then follows is a series of letters between the parties regarding the transcription of the arbitration proceedings culminating in the Third Respondent launching its first application to dismiss in terms of Rule 11 on 27 October 2008, approximately 1 year after the CCMA had complied with Rule 7A(3).
- [10] The Applicant contends it made a copy of the transcript available to the Third Respondent. No proof of service of the record as is required by Rule 7A(6) is contained in the Court file. Whilst a transcript was filed in Court, none of the documents referred to in the transcript of the arbitration proceedings forms part of the record filed in Court. The record is accordingly incomplete, to the extent that a record was filed.
- [11] The Third Respondent filed its answering affidavit on 3 April 2009. It seems from a letter by Third Respondent's attorney that there was an understanding between the parties that the Rule 11 launched by it on 18 September 2007 would not be proceeded with by Third Respondent.
- [12] On 23 June 2009, the Applicant applied to the Registrar of the Labour Court to enrol the matter for trial. It is not evident what, if any, steps were taken by the Applicant to ensure the matter would be ready for hearing, such as paginating and indexing the Court file (as was the practice then 1) or ensuring that the full record of the proceedings were before the Court prior to 9 March 2010.
- [13] As from 9 March 2010 a number of letters were exchanged between the Applicant's Attorneys and Third Respondent's Attorneys concerning the Applicant's failure to ensure that the matter is further prosecuted, ie. enrolled for hearing. It transpires that the Third Respondent's Attorneys discovered that the papers had been removed from the court file. The Applicant's Attorneys adopted a cavalier approach to ensuring that the papers were returned to the Court file. A duplicate file was prepared to re-instate the court file.
- [14] The Third Respondent's Attorneys then launched a further Rule 11 application on or about 30 April 2012, some 3 years since having filed its answering affidavit and almost 3 years since the Applicant had sought enrolment of the matter, if the Applicant had not taken any further steps to prosecute the review. The further Rule 11 application is brought on the basis of it supplementing the initial application and repeats the allegations contained in the initial Rule 11 application. Once again the Third Respondent's attorneys sought an order to have

the review dismissed and the arbitration award be made an order of Court.

[15] The Applicant's Attorneys filed an affidavit opposing the relief but the Affidavit is once again filed late without any

condonation application. In the Replying Affidavit the Third Respondent's Attorneys take issue with the Applicant having

opposed the Rule 11 application outside the time periods permitted without filing an application for condonation .

[16] The Registrar of the Labour Court issued a directive to the parties on 12 November 2013 to file heads and on 27 November 2013 the Employee indexed and paginated the court file, but still failed to ensure that the full record is before court.

[17] Most notably in the answering affidavit to the Second Respondent, Rule 11 application the Applicant herself deposes to an affidavit

contending that she was dismissed having allegedly not accounted for an amount for R1 012.80 and that the Second Respondent issued a compensatory award of 6 months compensation. In reply, the Third Respondent's Attorneys correctly take issue with the Applicant

on the correctness of these two averments. On the other hand, the Third Respondent similarly got the relief granted wrong in its Heads of Argument.

[18] What is evident is that there has been a considerable delay in the proceedings from the onset and that this delay has resulted in the parties not recalling the facts surrounding the matter particularly well.

[19] It is not clear from the papers before the Court whether any party is to blame for the delay in finalising the arbitration proceedings, but it is evident from the facts set out above that from at least 21 September 2007 the Applicant and/or her attorney did very little to ensure that the dispute was properly prosecuted. When the Rule 11 application was launched in 2008 there was a flurry of activity, but sadly by the time the matter was enrolled for hearing there remained major obstacles in the matter being heard :

19.1 the review was launched outside the time period prescribed by Section 145 of the LRA;

19.2 there was no application for condonation for the late referral;

19.3 the full record, if any, was served upon the Third Respondent. The full record was never placed before the Court;

19.4 there was no Rule 7A(8) notice; and

19.5 the opposition to the condonation was filed late without a condonation application.

[20] Whilst the Applicant cannot direct the registrar to enrol the review, the Applicant could at least have ensured that steps were taken to satisfy the registrar that the matter was ripe for enrolment and have followed up with the registrar as to the enrolment of the matter. In the absence of any evidence of such steps having been taken the escapable conclusion to be draw from the Applicant's conduct is that the Applicant took no steps at all to progress the enrolment of the matter.

[21] On the face of it, the only attempts to bring the Court file in readiness for hearing was after a directive was issued by the

Registrar calling upon the parties to file Heads on 12 November 2013, approximately another 18 months after the second Rule 11 application was launched.

The Law

[22] The proper basis for approaching an application to dismiss for want of timeous prosecution of a dispute arises from an unjustifiable

delay by the party seeking to prosecute his dispute to finality. The approach to be adopted is an application of the maximum "vigilantibus

non dormientibus aequitas subvenit". This approach has long been recognised by our courts and is captured by the Appellate

Division in the following terms:

'Thus, the Court is left free in circumstances of each case to judge the equity of granting the relief in face of the delay in asking for it ... Where there has been undue delay in seeking relief, the Court will not grant it when in its option, it would be inequitable to do so after lapse of time constituting the delay. And informing an opinion as to the justice of granting the relief in the face of the delay, the Court can rest its refusal upon potential prejudice, and that prejudice need not be to the determinative action, but to third parties'. 2

[23] The Constitutional Court has sanctioned this approach in the following terms:

'Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage in the interest of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs..'. 3

[24] In exercising its discretion to grant an applicant to dismiss due to undue delay, the Court is called upon to consider, inter alia, the extent of the delay, the explanation proffered, the prejudice to the other party as well as third parties. 4 The test accordingly is similar to that which would ordinarily be applied in condonation matters.

Analysis

[25] Given that the Applicant's dismissal occurred almost 8 ½ years ago, and that the review was launched more than 6 years ago, the delay in ensuring that this matter comes before Court is significant, even taking into account the normal delays that would occur in matters of this nature. Given that the delays since the review was launched is largely to be ascribed to the tardiness of the Applicant (or her attorney, whose tardiness must necessarily be ascribed to her) 5, the delay in prosecuting the review and the non-compliance with the Rules of this Court. One would have expected the Applicant to be more diligent in prosecuting the review especially since the Third Respondent had previously launched a Rule 11 application on account of the Applicant's tardiness in prosecuting this review. Regrettably, the explanation tendered by the Applicant for her tardiness in the prosecution of the matter does not demonstrate any urgency of action, but at best an abdication of responsibility to a correspondent whom Applicant wants the Court to believe was equally lax in dealing with her matter. Even when Applicant's attorney was made aware of the state of the court file the steps taken by the Applicant to address the apparent laxity of its correspondent's

problematic situation possibly constituting unprofessional conduct was lack lustre.

[26] Given the Employee party's significant non-compliance with the Rules of Court, and the significant delays that occurred which could have been prevented or at least been severely curbed had the Applicant's Attorney taken the appropriate steps has resulted in the delay presenting the Third Respondent suffering significant prejudice if the Applicant was re-instated. Given it is ultimately the taxpayers who would be prejudice, should the relief sought by the Applicant be granted. The Commissioner's finding that the Employee ought have resulted in the re-instatement. Given that it is not in the interests of justice to overlook the significant non-compliance with the LRA (in relation to prosecuting the review timeously) and delays in prosecuting the review. The fact that no record was served upon the Third Respondent, and that material parts of the record does not even form part of the record filed in Court, the review stands to be dismissed on those grounds alone.⁶ Similarly, the lack of any plausible explanation for the delaying seeking condonation is enough reason to dismiss the review. ⁷ In the circumstances the Rule 11 application thus succeeds.

[27] When considering the issue of costs, I am disinclined to issue an order. The costs would follow the result given the facts advanced from the Bar by the Applicant's attorney that the Applicant has remained unemployed and given that her prospects of success in the review application were not without merit. This matter ought to have been dealt with by this Court as a review, but for the dilatoriness of the Applicant's attorney. No order for costs on a *de boni propriis* basis was sought and I shall therefore not consider such costs order, in prosecuting the review. In the circumstances I issue the following order:

27.1 the application for review is dismissed;

27.2 the arbitration award issued by the Second Respondent dated 4 July 2007 under Case LP 3382/05 is made an order of Court; and

27.3 there is no order as to costs.

[28] In considering whether the Rule 11 application should be granted or dismissed, it also requires the court to consider the nature of the non-compliance by the errant party with the rules of the court in prosecuting its case on the one hand, and such explanation tendered by the

Applicant why she has not been able to comply with the rules of the court.

Wilken, AJ

Acting Judge of the Labour Court of South Africa

23 January 2014

1This practice no longer applies given the Practice Manual of 2013

2Pathescope (Union) of SA Limited v Mallinick 1927 AD 292.

3Mohlomi v Minister of Defence [1996] ZACC 20; 1997

(1) SA 124 CC at para 11

4Cassimjee v Minister of Finance 2012 [ZASCA 101] (1 June 2012) at paragraphs 11 – 12.

5Saloojee and Another v Minister of Community Development 1965(2) SA 135(A) 135(A) at 140H – 141D, Buthelezi and Others v Eclipse Foundaries Ltd (1997) 18 ILJ 633 (A) at 638I – 639A .

6Solidarity on behalf of Botha v CCMA and Others (2009) 30 ILJ 1363 (LC) at para 14.

7Chetty v Law Society Transvaal 1985

(2) SA 756 A at 765A – C and NUM and Others v Western Holdings Gold Mine

(1994) 15 ILJ 610 (LAC) at 613 E.

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