
SOUTH AFRICA / JUDGMENT

Mashiya v Minister of Justice and Correctional Services and Others (JR2740/13) [2021] ZALCJHB 165 (28 June 2021) [2021] ZALCJHB 165

COURT

Labour Court Johannesburg

BEFORE

G N Moshwana

CASE / FILE NUMBER

JR2740/13

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The Labour Court of South Africa, JOHANNESBURG

Not Reportable

case no: JR2740/13

In the matter between:

NKOSINJANI WALTER MASHIYA

Applicant

and

MINISTER OF JUSTICE AND

CORRECTIONAL SERVICES

First Respondent

M J MATLALA N. O

Second Respondent

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

Third Respondent

Heard: 17 June 2021 (matter heard via zoom application)

Delivered: 28 June 2021 (This judgment was handed down electronically by emailing a copy to the parties. The 28th June 2021 is deemed to be the date of delivery of this judgment).

Summary: Application to dismiss a review application due to inordinate delay in prosecution of the application. The practice manual regulates the prosecution of review applications and deals with the issue of delays and its consequences. Where the provisions of the practice manual has taken effect – review deemed withdrawn or lapsed – the Labour Court lacks jurisdiction to dismiss a review application unless reinstated by a Court. At common law unreasonable delay in prosecuting an action constitutes an abuse of process and warrants the dismissal of an action. The dismissal involves an exercise of discretion. Section 34 read with section 39 (2) of the Constitution of the Republic of South Africa^[1] limits the exercise of the discretion. Factors to be considered are

- (a) there must be a delay; (b) the delay must be inexcusable;
- (c) the defending party must be seriously prejudiced by the delay. The enquiry involves (a) close and careful examination of all the relevant circumstances, inclusive of the period of the delay, the reasons thereof and the prejudice if any suffered by the defending party, (b) reasons for the defendant's inactivity to avail itself of remedies which might reasonably have been expected to use in order to bring the action expeditiously to hearing.

An applicant is not to blame for systematic delays caused by the office of the Registrar and or the defendant itself. The duty to enrol a review application lies with the Registrar of the Court and not the applicant for review. Intransigent and obstinate conduct by the defendant cannot benefit the defendant to achieve a dismissal based on an inordinate delay. Held: (1) The application to dismiss the review application is refused. (2) There is no order as to costs.

Judgment

MOSHOANA, J

Introduction

^[1] The dispute underlying this application is archaic. This application is plagued with an unfortunate history. It is a classical demonstration of how not to resolve a labour dispute. It is at odds with the provisions of section 1 of the LRA. The onset of this application is the dismissal of Nkosinjani Walter Masiya (Masiya) on 24 October 2011. Masiya successfully overturned his dismissal and obtained an arbitration award to that effect on 15 November 2013. Aggrieved by the arbitration award, the Minister of Justice and Correctional Services launched a review application on 20 December 2013. To date of this judgment the application has not been entertained by this Court. This judgment will fully examine the reasons why such is the case. The present application came before me as an unopposed application.

[2] The matter came before me during the last week of term as a special allocation from the office of the Judge President. The file was not properly organised and it contained various interlocutory applications which were heard by my colleagues in the past. It was thus difficult to decipher as to what exactly was before me since the matter was enrolled for two days. The Registrar's

office informed my secretary that before me was the review application as well as a rule 11 application seeking to dismiss the

review application on the grounds of delay. I then directed the parties to prepare the file accordingly in order for me to have

regard only to the relevant papers. Attempts were made by my secretary, who at time was under quarantine after being diagnosed of Covid-19, to have the parties to comply with my directive. Nothing was heard from the office of the State Attorney. Ultimately, a day before the hearing, Masiya presented an indexed rule 11 application which he indicated stands unopposed.

[3] The matter was heard over zoom application. On the day, counsel for Masiya informed the Court that the video-conferencing link was shared with the State Attorney yet they made no appearance. Thus to the extent that the review application was also enrolled for hearing, there was no one to move it. Despite the fact that the rule 11 application is seeking to dismiss that review application, the appropriate order to make with regard to the enrolled review application was to strike it off the roll due to non-appearance.

Background

facts

[4] As indicated earlier the genesis of this matter is the dismissal of Masiya for reasons related to misconduct. It is not necessary for the purposes of this judgment to traverse the facts leading to the dismissal. It suffices to mention that Commissioner Mashoro James Matlala (Matlala) in an award dated 15 November 2013 found that the Department has failed to prove that the dismissal of Masiya was substantively and procedurally fair. He ordered the Department to reinstate Masiya by 6 January 2014 and to pay him back-pay and salary increments so implemented.

[5] The Department was displeased with the award and launched an application on 20 December 2013 seeking to review and set aside the arbitration award of Matlala. Owing to the fact that Masiya wished to enforce the terms of the arbitration award, the Department launched an application seeking to stay the enforcement of the arbitration award. The application served before my departed brother Steenkamp J. He ordered the stay of the enforcement. In the meanwhile, Masiya took a view that the Department having failed to file the record in terms of the provisions of the practice manual, it was opportune for him to seek enforcement and to take executionary steps.

[6] Such steps prompted the Department to launch another application to set aside those executionary steps. The said application served before my brother Molahlehi J. Having considered that the review application had lapsed, Molahlehi J ordered the reinstatement of the review application and condoned the late filing of the record and the supplementary affidavit. I pause to mention that it is apparent from the written judgment of Molahlehi J that the record and the supplementary affidavit were filed in July 2014 and were late. Therefore, in terms of rule 7A (9) of the Labour Court Rules, any person, in this instance Masiya, wishing to oppose

the granting of the order must within 10 days after receipt of supplementary affidavit deliver an affidavit in answer to the allegations made by the applicant. Before me there is no allegations made that Masiya has delivered an answering affidavit to the founding affidavit in the review application and if he did so when.

[7] The written judgment of Molahlehi J was made on 5 March 2015. It is apparent that since the judgment nothing happened with regard to the review application. It is also apparent that Masiya had prematurely delivered an answer to the founding affidavit and chose not to deliver an answer to the condoned supplementary affidavit. It is unclear as to whether this choice was made known to the Department. Nevertheless, it is apparent that Masiya took a view that the review application has once again lapsed.

[8] Having taken that view, on 8 November 2016, a missive was addressed to the Judge President to direct the Registrar to archive the review application within the contemplation of clause 16 of the practice manual. Apparently Masiya did not receive joy from the Judge President. As a result, on or about 12 December 2016, Masiya recommenced executionary steps. Such steps yet again prompted the Department to launch an urgent application. Such an application served before my brother Tlhotlhemaje J. On 5 May 2017, Tlhotlhemaje J issued a written judgment setting aside the writ of execution and ordered the Department to approach the Registrar for a set down in respect of the review application.

[9] On or about 12 May 2017 the Department requested enrolment as per the order of Tlhotlhemaje J. In the meanwhile, on 11 October 2018, for reasons not altogether clear, Masiya launched the present application. The Department did not file an answering affidavit to this application. On 13 December 2019, Masiya issued a rule 12 (2) notice seeking to compel the Department to file an answer. I pause to mention that this was completely unnecessary. Instead, Masiya could have simply requested that the rule 11 application be enrolled on an unopposed roll.

[10] As requested by the Department and directed by Tlhotlhemaje J, on 15 March 2019, the Registrar enrolled the review application for hearing. In the meanwhile, Masiya launched another application seeking to have the present application to be heard first before the review application, directing the Registrar to archive the review application and that the Registrar must recuse herself from performing duties related to the review application. I pause to mention that this approach was completely unnecessary. There was nothing

preventing the Registrar from enrolling the review application, moreso when the enrolment is directed through a Court order. Apparently, the Judge President, for good reasons in my view did not entertain this ebullient approach by Masiya.

- [11] On 19 June 2019, correctly so in my view, the Judge President issued a directive that the review application be heard on 12 July
2019. On 12 July 2019, the enrolled application featured before Acting Justice Basson. Apparently the Department failed to deliver heads of argument. Owing to that failure, Basson AJ refused to hear the review application and instead entertained the rule 12
- (2) application, which I had remarked earlier was unnecessary. I pause to mention that the State Attorney has completely failed the Department in this regard. I take a view that the conduct of the State Attorney involved in this matter must be investigated by the Legal Practice Council. The Department has been indulged by this Court on several occasions yet same or similar monumental errors evincing sheer ignorance and or negligence keep cropping up. However, that being said, the practice manual is very clear that failure to file heads of argument does not lead to the matter not being heard. Tlhotlhemaje J and the Judge President ordered and directed respectively that the review application be enrolled for hearing. In my view Basson AJ must have heard the matter instead of refusing to hear the matter.
- [12] According to Masiya, the Registrar had refused to enroll the rule 12 (2) application. However, it remains a mystery why that application was entertained by Basson AJ. Nevertheless, Basson AJ made an order to the following effect: (a) the Department was ordered to deliver an opposing affidavit within five days of the order; (b) Masiya was granted leave in the event there is no opposing affidavit to apply on the same papers for appropriate further relief; and (c) the Department was ordered to pay the costs of the application. I again interpose. In terms of the rules of this Court if an application is not opposed, the applicant may request that such an application be enrolled on an unopposed roll. Further, in terms of the practice manual if an affidavit is filed late or out of the prescribed time, the party receiving it has a right to object. With such provisions, it was in my view unnecessary for Basson AJ to have firstly entertained the rule 12 (2) application and secondly to issue an order for a delivery of an affidavit.
- [13] It is apparent that the Department failed to comply with the order of Basson AJ. There seem to be a dispute around the question of compliance with Basson AJ's order. Nevertheless, given the view I take at the end, it is academic to resolve such a dispute. After Basson AJ's order, Masiya unrelentley continued with his undying quest to have the dismissal application enrolled on an unopposed roll. All these attempts were appropriately met by a refusal from the office of the Registrar and the Judge President. As ordered and directed before the review application was enrolled for 19 September 2019.

[14] Ironically, the same Masiya who laments a delay in prosecuting the review application, on 5 September 2019, launched yet another application, suggesting that setting the review application down for hearing whilst there is a pending interlocutory application to dismiss the review application is an irregular step. I pause to mention that no irregular step took place in this instance. It is increasingly becoming clear that, on the contrary, Masiya is not looking forward to the expeditious hearing of the review

application. Launching an irregular step process is an intransigency that is not consistent with a party allegedly “prejudiced”

by the delay. Perhaps, it has since dawned on Masiya that the Department possess excellent prospects of success on the review, and he is pulling every trick in the book to prevent the hearing of the review application. Molahlehi J has already expressed a view that the review enjoys some measure of prospects of success. A party who employs such intransigent stratagem cannot succeed in an application to dismiss on the grounds of delay. Such intransigent stratagem contributes to the delay complained of. A party cannot benefit from its own actions contributing towards a delay.

[15] In my view, the more Masiya pulls these type of stunts, he is shooting himself in the foot. It is apparent that the review application has been ripe for hearing since the order of Tlhotlhamaje J. By now, the review application could have long being heard.

[16] Nevertheless Masiya persisted with his conduct and launched an application three days before the date allocated to hear the review application. The said application was to serve before my brother Lagrange J. It appears to be the case that the matter was removed from the roll of 19 September 2019 and enrolled on 08 October 2019. It is not readily apparent as to what happened to the matter on 8 October 2019. Ultimately, the matter was allocated to me for consideration.

Evaluation

[17] Before I consider the merits of this application it behooves me to deliver a comment on the conduct of the State Attorney in this matter. As indicated above, the State Attorney delivered to the Department a shoddy and despicable service. It is increasingly becoming a norm that the State Attorney without fail has mastered the art of failing to file heads of argument in many of the matters coming to this Court. In casu, no heads of argument were made available to me. From what I can gather, the review application was also enrolled to be considered by me, hence the application was enrolled for two days. Despite being duly sent a link for the virtual hearing, the State Attorney or a briefed counsel failed to make an appearance. This conduct is unbecoming. It requires censure from the Legal Practice Council

(LPC). A copy of this judgment must be availed to the secretary of the LPC to consider an appropriate action against the relevant State Attorney and counsel on brief.

- [18] The State Attorney as the trusted legal representative of the State is expected to function optimally. Being understaffed, if that is the reason to be advanced at all times, does not license shoddiness. In this Court, parties are given sufficient advanced notice to file heads. Thus, it is expected of practitioners to appropriately make use of that advanced notice period. Therefore, this Court cannot countenance shoddiness when it comes to the filing of heads of argument. Practitioners should not take advantage of the provisions of the practice manual that a matter would still be heard without heads of argument being filed. Heads of argument still serve an important purpose in the administration of matters in this Court.
- [19] In any event, this Court is compelled to strike the review application off the roll due to the unexplained non-appearance of the State Attorney and its counsel. In as much as it appears to be Masiya's commitment not to have the review application heard, the review application could have been heard on its merits on this day. It bears mentioning that this Court has a serious backlog of review matters. As a result, the Registrar could have enrolled another deserving matter had it been known that the State Attorney and its briefed counsel would have failed to make an appearance and move the review application.

The merits

- [20] As indicated earlier, Masiya is hell-bent to not have the merits of the review application not heard. This is supported by his application in terms of rule 12 (2), application for irregular proceedings and his ebullient view that the review application cannot be enrolled before the application to dismiss is enrolled. Withal, the relevant question in matters of this nature is whether factually there is a delay in prosecuting the review application or not?
- [21] The common law position is such that an inordinate or unreasonable delay in prosecuting an action may constitute an abuse of process and warrant the dismissal of an action.[2] In considering applications of this nature a Court exercises discretion. First there must be a delay in the prosecution. This is a factual enquiry. Secondly the delay, if factually present, must be inexcusable. Thirdly the other party must be seriously prejudiced by the delay. The enquiry involves a close and careful examination of all the relevant circumstances which includes the period of delay the reasons thereof and the prejudice if any caused to the other party.[3]
- [22] In this Court, the delay in prosecuting review applications is regulated by the practice manual. In the circumstances of this matter, there was a delay in prosecuting the review that was first launched in December 2013, hence its lapse. The application was instead reinstated by Molahlehi J. At that time, the record and the supplementary affidavit was filed. In terms of the rules, the next step was for Masiya to deliver an answer to the allegations made. Masiya chose not to file an answer to the supplementary affidavit. It is unknown whether this choice was vocalized by Masiya. Nevertheless, the next step was for a replying affidavit if any to be filed by the Department. In this application it is unclear when if any was the replying affidavit filed. However, by March 2017, when the matter emerged before Tlhotlhamaje J, the review application was ripe for hearing. If the application was not,

Tlhotlhemaje J could not have directed the Registrar to expedite the enrolment of the application. In and around March 2017, the Department as ordered requested a set down of the application.

- [23] Enrolment of applications is the duty of the Registrar and not that of an applicant for review. Masiya with full knowledge that the Department made a request to have the review application heard, on 11 October 2018, without cause, in my view, launched the present application. This was unnecessary. At this juncture, what is awaited is a set down date from the office of the Registrar. At this point, the department had fully prosecuted the review application. The period of delay in enrolling the matter is not attributable to the Department. After requesting enrolment, matters are no longer in the hands of the parties but that of the Registrar. It is for that reason that clause 11.2.7 reckons the 12 months period in exclusion of the period for filing heads of argument and notification of allocation of a hearing date by the Registrar. On the facts of this case, almost a year later, which is usual in this Court for ready reviews to be enrolled, the Registrar enrolled the review application. The intervening steps by Masiya to bring the application to dismiss and the rule 12 (2) application were signs of intransigency and wholly unnecessary.
- [24] Fact that Basson AJ refused to hear a ripe and ready to be heard review application does not suggest any delay in prosecuting the review application. It is apparent that this refusal served the ebullient view held by Masiya and his legal team that a review application cannot be heard before hearing of an application to dismiss. There is no legal basis for such a view. In support of this baseless argument, Masiya's counsel placed store on the judgment of *Numsa and Others v Paint and Ladders (Pty) Ltd and Another*[4]. As a point of departure this judgment does not support the view that a review application cannot be heard before hearing an application to dismiss. In that matter, a referral as opposed to an application was involved. A period of 15 years was involved. In casu, had it not been for the refusal to hear the review application by Basson AJ, the application would have been heard within a period of a year after Tlhotlhemaje J's order.
- [25] In an instance where the provisions of the practice manual has taken effect a review application is deemed withdrawn or lapsed, archived and dismissed. In such an instance, the review application on that account ceases to exist and the Labour Court lacks jurisdictional powers over it. Masiya took all the steps within his means to ask the Registrar to archive the application but all those steps understandably drew blank. Since the review application was withdrawn at some stage and reinstated it still exists. Thus what would find application in this application is not the provisions of the practice manual but the common law principle of

vigilantibus non dormientibus lex subveniunt. The principles that guide application of this common law principle has been set out above. The principles applies to an extant review application and is a separate and distinct ground upon which a review application may within the discretion of a Court be dismissed. So for the ground to be entertained, it is not a requirement that the review application should not be enrolled. It is a ground that may independently lead to

the dismissal of a review application without considering its merits. In other words, if a Court is satisfied that there was a delay in prosecuting an action and the delay is one that is inexcusable and the other party demonstrates serious prejudice, then in its discretion a Court may dismiss a review application irrespective of its good merits.

[26] Of course in a constitutional climate the discretion of a Court must be exercised in exceptional circumstances.[5] Section 39 (2) of the Constitution enjoins a Court of law in interpreting and when developing the common law to promote the spirit, purport and objects of the Bill of Rights. Section 34 of the Constitution provides that everyone has a right –the Department included – to have any dispute that can be resolved by the application of law decided in a fair hearing before a Court. Section 36 of the Constitution does a place a limitation on the rights provided that the limitation is reasonable and justifiable in an open and democratic society. As a guide the Constitutional Court has already indicated that vexatious proceedings may be limited for the application of the right in section 34.[6] In this matter, there is already a judicial pronouncement that the Department possesses prospects of success. It must follow that the review application is not a vexatious and unmeritorious application. Therefore, the true legal position must be one that says the power to dismiss must be exercised with caution and sparingly having taken into account the interest of justice in a manner consistent with the Constitution.[7]

[27] In summary, the conclusion this Court reaches is that since the review application was reinstated there is no sufficient evidence to demonstrate that the Department adopted a supine attitude towards the prosecution of the review application. On the contrary, the intransigent and obstinate approach adopted by Masiya as spelled out above contributed immensely to the delay in finalizing the review application. As a result, Masiya cannot seek to benefit from such intransigency and obstinacy. This Court is not satisfied that there was any inexcusable delay that seriously prejudiced Masiya. This apparent meritorious review application has been ripe for hearing since March 2017.

[28] Since the review application is long ripe for determination, the Registrar must expedite its set down. As to the conduct of the State Attorney and the counsel on brief, the Legal Practice Council must investigate their conduct and where necessary action be taken.

[29] In the result the following order is made:

Order

1. The application to dismiss the review application is refused.
2. The Registrar must enroll the hearing of the review application as soon as possible.
3. The secretary of the Legal Practice Council (LPC) must investigate the conduct of the State Attorney officials responsible for this matter as well as the counsel on brief in this matter.
4. There is no order as to costs.

G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr M Ndziba

Instructed by:

Malahlela Attorneys Randburg.

[1] Act 108 of 1996.

[2] See Verkouten v Savage 1918 AD 143 at 144.

[3] See Cassimjee v Minister of Finance 2014 (3) SA 198 (SCA).

[4] [2017] 38 ILJ 2285 (LAC).

[5] See Sanford v Haley NO 2004 (3) SA 296 (C).

[6] See Beinash and Another v Ernst and Young and others 1999 (2) SA 116 (CC) at 123 para 17.

[7] See Minister of Safety and Security and Others v Ndaba case 481/1999 dated 10 November 2016 at para 12 and the authorities cited therein.

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