

SOUTH AFRICA / JUDGMENT

NUMSA and Others v Paint and Ladders (Pty) Ltd and Another (J4106/00) [2016] ZALCJHB 127 (18 March 2016) [2016] ZALCJHB 127

COURT

Labour Court Johannesburg

BEFORE

Whitcher

CASE / FILE NUMBER

J4106/00

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

no: J4106/00

In

the matter between:

NUMSA
First Applicant
RAMOREI & 16
OTHERS
Second and Further Applicants
and
PAINT
& LADDERS (PTY) LTD
First Respondent
SUPERMOVE
Second Respondent

Heard:

30 November 2015

Delivered:

18 March 2016

JUDGMENT**WHITCHER J**

[1] This is an opposed application in terms of Rule 11 brought by the First Respondent (Respondent) for the dismissal of the Applicants’

unfair dismissal claim (a retrenchment dispute) under the above case number in consequence of what the Respondent claims is a failure to timeously and diligently prosecute the claim.

[2] The Applicants were retrenched on 31 May 2000. Accordingly the events that form the basis of the main dispute occurred almost 15 years ago.

[3] The statement of claim was filed on 23 October 2000 and the statement of defence on 11 November 2000.

[4] The matter was set down for a pre-trial before a judge on 16 May 2001, but was struck from the roll due to the Applicants’

non-attendance.

[5] Eight months after the referral, on 20 June 2001, the Applicants’ filed an application for the condonation of the late filing of the statement of claim. This was granted on 5 May 2003.

[6] On 26 November 2003, more than three years after the case was filed, the Applicant filed a pre-trial minute.

[7] The matter was set down for the trial to proceed on 24 May 2004, but postponed on application by the Respondent on the basis that one of its principal witnesses, Fouche, was out of the country.

[8] In April 2015 the Registrar set the matter down for trial on 3 August 2015.

[9] On 3 August 2015, the Respondent applied for the dismissal of the case on a submission that the Applicants had failed to prosecute the case timeously and diligently. The trial judge directed the Respondent to file this Rule 11 application within ten (10) days “if it elects to proceed therewith”.

[10] On 25 August 2015, following the expiry of the 10 day period, the Applicants, with notice to the Respondent, applied for a trial date on an expedited basis.

[11] On 25 August 2015, the Respondent filed the Rule 11 application.

[12] The Respondent submits therein that there has been extraordinary and inexcusable delays in the prosecution of the Applicants’ claim. It claims that it will suffer severe prejudice should the dismissal dispute proceed to trial as it cannot locate a principal witness, one Khoza, and another principal witnesses, one Conradie, is no longer in its employ and has little recollection of the matter.

- [13] In support of its application the Respondent referred to the judgments in *Cassimjee v Minister of Finance*[1] and *Golden International Navigation SA v Zebra Maritime Company Limited*. [2]
- [14] In *Cassimjee*, the SCA held that when exercising its discretion in an application to dismiss an action for want of prosecution the court must examine all the relevant circumstances, including the period of delay, the reasons therefor, the failure of the defendant to avail itself of remedies which it might reasonably have exercised in order to bring the action expeditiously to trial and the prejudice, if any, caused to the defendant. There may be instances in which the delay is relatively slight but serious prejudice is caused to the defendant and in other cases the delay may be inordinate but prejudice to the defendant is slight.
- [15] According to *Golden International Navigation SA*, unless a credible excuse is provided by an inordinate delay, the action will be dismissed. The court held:
- “However, it is undisputed on the papers before me that, during the entire period between 2001 and 2006, the plaintiff did not set the matter down for trial, nor did it take any further steps to bring the matter to finality...The crisp question for decision is whether the delay in this instance has been so unreasonable or inordinate as to amount to an abuse of the process of the court ... Judged by all these yardsticks, it is clear to me that the delay on the part of the plaintiff in the present matter is unreasonable and should not be condoned by this court. I am fortified in this conclusion by the dictum of Denning LJ in *Krakauer v Katz* 1 All ER 244 (CA) at 246A, to the effect that “if a plaintiff allows an action to go to sleep for six years, the Court in its discretion will usually dismiss the case for want of prosecution, unless the plaintiff can show some good reason why it should be allowed to go on with it”.*
- [16] The Applicants submit that the Respondent was also to blame for the delays. They point out that the matter could have been finalised in 2004, but was postponed on application by the Respondent.
- [17] Further, they submit, the Respondent also had an obligation to take steps to facilitate the finalisation of the case, which it failed to do. Instead it sat supine, waiting, opportunistically, to ambush the Applicants with this application after the matter was again set down for trial.
- [18] In support of their submissions, the Applicants referred the court to the judgment in *Karan Beef Feedlot & another v Randall*[3] in which the Labour Court, dealing with a review application, said the following:
- “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.”

- [19] Further, in MEC, Dept of Sport, Recreation, Arts & Culture v GPSSBC & others,[4] the Labour Court held that a Rule 11 application should not be granted unless the dilatory party had been placed on terms, and when appropriate, after any further steps as may have been available to the aggrieved party to bring the matter to finality, have been taken. This means that the conduct of the aggrieved party is to be considered as well.
- [20] The Applicants contend that the basis of the so-called prejudice claimed by the Respondent is not only constitutive of inadmissible hearsay evidence, but also differs from the reason the Respondent relied on in order to obtain a postponement of the trial in May 2004.
- [21] They contend it is hearsay evidence because there is no confirmatory affidavit from Conradie that “he has very little recollection of the matter”. The Respondent’s contention also begs the question why it cannot refresh Conradie’s memory by reference to the pleadings and the minutes of the “restructuring meetings.”
- [22] They point out that in 2004 the postponement application by the Respondent was premised on the contention that its principal witness was Roy Fouche – the Respondent’s managing director - not Conradie. The Respondent has failed to explain why Fouche could not be called to testify.
- [23] As for Khoza, the Respondent has failed to explain why he could not be located and the steps it took to locate him. In any event, Khoza was merely a facilitator in the meetings, and cannot be a principal witness.
- [24] I do not agree with the submissions of the Applicants.
- [25] The Applicants were dismissed 15 years ago. From the chronology of events, it is evident that the Applicants took years to prosecute each stage of the litigation and after the matter was postponed they took no steps to facilitate the matter being set down for trial. As a result, there is an extraordinary lapse of at least 10 since it was postponed: an egregious delay on any account, made more so by the Applicants’ failure to exercise the remedies available to them to have a matter set down and brought to finality. Instead, their only response is to shift the responsibility to the Respondent. In essence, their case is
- that it was the Respondent’s responsibility to send reminders to them to timeously prosecute their case. This does not, in my view, constitute a valid excuse, and in the result I must infer that the inordinate delay is inexcusable (see Cassimjee, supra and Golden International Navigation SA, supra)
- [26] Labour law litigation is unique in that it takes place within a system designed to ensure the effective (and thus expeditious)
- resolution of labour disputes – this being one of the primary objects of the LRA.[5] The need for this, and the implications of delays, were explained as follows by Ngcobo J in CUSA v Tao Ying Metal Industries & others

[2009] 1 BLLR 1 (CC):

“The LRA introduces a simple, quick, cheap and informal approach to the adjudication of labour disputes. This alternative process is intended to bring about the expeditious resolution of labour disputes. 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 an employer who may have to reinstate workers after a number of years.”[6] (Emphasis added.)

[27] I also do not accept the Applicant’s approach to the issue of prejudice. The events which gave rise to this case occurred 15 years ago. It follows that, even with the assistance of pleadings and minutes of meetings, the memories of witnesses will have become unreliable. It is inevitable. It is human nature. Thus it is no answer that the Respondent must provide hard proof that the memory of its witnesses have not faded.

[28] In my view there comes a point in time where, on account of the effluxion of time, excuses and explanations for delays become

irrelevant and a party loses its right to continue to litigate because the case becomes obsolete and the quality of litigation

inevitably comprised. In my view this situation has arisen in this case.

[29] In *Road Accident Fund and Another v Mdeyide*, Justice Van der Westhuizen stated with regard to the purpose and necessity of time limits, the following:

“This Court has repeatedly emphasized the vital role time limits play in bringing certainty and stability to social and legal affairs and maintaining the quality of adjudication. Without [time] periods, legal disputes would have the potential to be drawn out for

indefinite periods of time, bringing about prolonged uncertainty to the parties to the disputes. The quality of adjudication by courts is likely to suffer as time passes ...”

[30] The Constitutional Court has also recognised that there comes a point at which a defendant party can feel secure in its decisions, arrange its affairs accordingly and cannot after this point in time in fairness be expected to defend its actions.

[31] As the court put it in *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC):

“... A litigant is entitled to have closure on litigation. The principle of finality in litigation is intended to allow parties to get on with their lives. After an inordinate delay a litigant is entitled to assume that the losing party has accepted the finality of the order and does not intend to pursue the matter any further ...”[7] (Emphasis added.)

[32] The Court was dealing with the issue of condonation, but the principles set out are appropriate to the issues raised in this case.

[33] In the premises, the Respondent has established grounds for the dismissal of the claim on account of a failure by the Applicants to timeously and diligently prosecute their claim.

Order

[34] The Rule 11 application to dismiss the Applicants' claim under case number J4106/00 is granted with no order as to costs.

Whitcher J

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants: Adv K Lengane

Instructed by:

Phongo Incorporated

For the First Respondent: Adv A J Nel

Instructed by:

Eric Bryer Attorneys

[1] 2014 (3) SA 198 (SCA).

[2] 2008 (3) SA 10 (C).

[3]

(2009) 30 ILJ 2937.

[4] Case Number P206-13, dated 26 June 2015.

[5] See section 1(d)(iv). The delay in the resolution of labour disputes is "one of the underlying problems that the LRA seeks to remedy": *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others* [2010] 5 BLLR 465 (CC) at para 45.

[6] At para 63.

[7] At para 31.

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