

SOUTH AFRICA / JUDGMENT

Sibanye Gold Limited v Commission for Conciliation, Mediation and Arbitration and Others (JR2396/2008) [2017] ZALCJHB 40 (7 February 2017)

[2017] ZALCJHB 40

COURT

Labour Court Johannesburg

BEFORE

Naidoo

CASE / FILE NUMBER

JR2396/2008

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR2396/2008

In the matter between:

SIBANYE GOLD LIMITED (DRIEFONTEIN OPERATION) Applicant And THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION 1st Respondent SIBONGISENI HINTSHO N.O. 2nd Respondent MODUMEDI JAMES PHAROE 3rd Respondent Date heard: 18 January 2017 Date delivered: 7 February 2017

NAIDOO AJ

Background

- [1] The third respondent was dismissed from his employ with the applicant On 23 May 2008 following a disciplinary hearing. On 6 October 2008 the third respondent filed an unfair dismissal dispute with the first respondent. The second respondent arbitrated the dispute and issued an award on 15 October 2008 bearing case number GAJB21052-08 (“the award”). The second respondent found that that the dismissal was procedurally and substantively fair.

- [2] On 31 October 2008 the third respondent issued a review application in terms of section 145 of the Labour Relations Act of 1995 (LRA). He sought the setting aside of the award (“the review application”).
- [3] On 11 November 2016 the applicant issued the current application (“the application”). It sought the dismissal of the review application in terms of Rule 11 of this Court’s rules (“the Rules”). It also sought costs against the third respondent.
- [4] The third respondent did not file a notice to oppose the application. Nor did he file any answering affidavit. He, however, presented himself at the hearing to oppose the application. He was unrepresented.
- [5] The applicant averred that the third respondent had, following the issue of the review application, failed to comply with Rule 7A(6) and Rule 7A(8), which provides:
- “(6) The applicant must furnish the registrar and each of the other parties with a copy of the record or portion of the record, as the case may be, and a copy of the reasons filed by the person or body.*
- (7) The applicant must within 10 days after the registrar has made the record available either-
- (a) by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit; or
- (b) deliver a notice that the applicant stands by its notice of motion.”
- [6] The applicant explained that, after receiving the review application, its attorneys off record addressed a letter to the third respondent on 12 January 2012. In this letter the third respondent was notified that that he had done nothing to pursue the matter since he issued the review application about 38 months ago. He was asked, in the letter, whether he had any intentions to pursue the matter. The applicant’s attorneys explained to the third respondent that his conduct was prejudicing the applicant. The applicant did not respond to this letter.
- [7] On 18 January 2012 the applicant’s attorneys addressed a letter to the first respondent in which it enquired whether the recordings of the arbitration proceedings had been sent to this court. The first respondent did not respond to this letter.
- [8] On 5 September 2013 the applicant’s attorneys addressed another letter to the third respondent in which he was told that, unless he delivers the recordings of the arbitration proceedings by 16 September 2013; they would invoke the provisions of this court’s practice rule 11.2.7 (“practice rule”) to archive the review application. Practice Rule 11.2.7, which was applicable with effect from 2 April 2013, stated:
- “A review application is by its nature an urgent application. An applicant in a review application is therefore required to ensure*

that all the necessary papers in the application are filed within twelve (12) months of the date of the launch of the application

(excluding Heads of Arguments) and the registrar is informed in writing that the application is ready for allocation for hearing.

Where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown why the application should not to be archived or be removed from the archive.”

[9] On 2 September 2015 an official of the applicant’s attorney’s firm, Ms Schoeman, made an attempt to contact the third respondent by telephone. She explained that she used the telephone contact number set out in the review application. She spoke to the third respondent’s sister, Ms Bhekiseng, who had answered the call. Ms Bhekiseng informed Ms Schoeman that the third respondent lives with his other sister, Ms Ntabileng. Ms Bhekiseng provided a contact telephone number to Ms Schoeman. Ms Schoeman called this number. Ms Ntabileng answered the call. Ms Schoeman told Ms Ntabileng that the reason for the call was that she wanted to serve correspondences related this matter.

Applicant’s argument

[10] The applicant’s arguments are, in essence, that it would suffer sever prejudice to deal with the merits of such a long outstanding

matter and that the applicant had failed to make out a case in his founding affidavit to the review application. The applicant explained that it had, since receiving the review application, taken steps to the third respondent to comply with his duty in terms of Rule 7A.

Third respondent’s argument

[11] The third respondent argued, from the bar, that he was of the view that he had done everything necessary to file his review application. He was, since he issued the review application, waiting for the court to advise him further on when he should present himself at court. After he had filed his review application the Registrar’s office had contacted him to collect the arbitration recording. He did so. Recently he received a telephone call from the Registrar’s office again. He was told that the matter was set down for argument on 20 January 2017. He responded by presenting himself at court.

[12] During his argument he averred that he was dismissed for being absent from work. He explained that he got ill while at work and was referred to the applicant’s mine hospital. His absence was due to his illness. He was given a sick note by the hospital, which he delivered to the applicant’s human resource office on 8 April 2008.

[13] The third respondent did not dispute that he got the various letters and telephone messages from the applicant’s attorneys. He confirmed that he did nothing, other than file the review application.

Legal principles – delayed review proceedings

[14] The labour court has on numerous occasions reiterated the legal principles that should guide this Court when confronted with a delayed review application[1]. Molahlehi, J pointed out in *Bifawu and Another v Computershare Investor Services Ltd*[2] 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. In Radebe v Government of the Republic of South Africa[3] *the court said the following:*

“The first is that unreasonable delay may cause prejudice to 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....”

[15] It is trite that the Court has a discretion on whether to allow proceedings to continue where there has been this lapse of time[4]. Moreover, the court has an inherent power to control its own proceedings. The court should, in such an enquiry, first and foremost, resolve whether the alleged culprit party is guilty of an abuse of process.[5]

[16] This Court has stressed in, for example, *Moraka v National Bargaining Council for the Chemical Industry and Others*[6] (“the Moraka case”), that, in addition to the above common law requirements, the LRA decrees that labour disputes must be expeditiously finalised. An important purpose of the LRA is the promotion of effective resolution of disputes. The Court reasoned, in the Moraka case, that the expeditious resolutions of disputes is what makes dispute resolution effective. Lagrange J concluded[7] that:

“There is thus a statutory policy imperative in addition to all the common law precepts which effectively enjoins a party pursuing its rights under the LRA not to allow the prosecution to lose momentum.”

[17] Lagrange J further pointed out in the Moraka case[8] that:

“A party defending itself against an application to dismiss on account of undue delay is effectively asking the court to condone its dilatoriness and similar considerations which apply to the evaluation of condonation applications ought to be relevant in the evaluation of these applications. “

...

in considering whether it would be in the interests of justice and fairness to dismiss the application, regard ought to be had to the merits of the review application.” [9]

[18] Rule 7A imposes a duty on an applicant, in review proceedings, to file the record of the arbitration proceedings. Moreover, clause 11.2. of the Practice Manual provides that:

11.2 Applications to review and to set aside arbitration awards and rulings

11.2.1 Once the registrar has notified an applicant in terms of Rule 7A(5) that a record has been received and may be uplifted, the applicant must collect the record within seven days

11.2.2 For the purposes of Rule 7A(6), records must be filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received

11.2.3 If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given. If consent is refused, the applicant may, on notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties, and answering and replying affidavits may be filed within the time limits prescribed by Rule 7. The Judge President will then allocate the file to a judge for a ruling, to be made in chambers, on any extension of time that the respondent should be afforded to file the record."

[19] Tlhotlhemaje J pointed out in *South African Municipal Workers Union obo Mlalandle v South African Local Government Bargaining Council and Others*[10] that:

"The manual sets out what is expected of practitioners, so as to meet the imperatives of respect for the Court as an institution, and the expeditious resolution of labour disputes."

[20] At the premise of an enquiry as to whether the third respondent had complied with Rule 7A, read with clause 11.2 of the Practice Manual, is whether he had received the recording from the registrar. He admitted, from the bar, that he did receive the recording.

[21] He then had a duty to ensure that the transcription of the recording was delivered within 60 days. He failed to do so. The applicant's

attorneys made several attempts to alert of him of this duty. The fact that he is unrepresented does not excuse him from this essential

duty as set out in Rule 7A and clause 11.2 of the Practice Manual.

[22] The third respondent's failure to deliver the transcription left the applicant frustrated for about eight years. Even to this day, the third respondent has not provided any indication that he intends complying with his obligation in terms of Rule 7A and clause 11.2 of the Practice Manual.

[23] The review application stands to be dismissed. The lapse of time is severe. The third respondent has made practically no effort to heed the applicant's attorneys' several alerts to comply with Rule 7A.

The order

[24] The application for review launched by the third respondent (being Mr Modumedi James Pharoe) on or about 31 October 2008 under case number JR2396/08 is hereby dismissed.

[25] No order is made as to costs

Naidoo AJ

Acting Judge of the Labour Court

Appearances:

For the applicant: Ms Nivaani Moodley

Instructed by: Webber Wentzel

For the third respondent: Mr Modumedi James Pharoe

[1] See in this regard, for example, *Cashbuild (Pty) Ltd v Merwe NO and Others* (JR516-11, J2735/13) [2016] ZALCJHB 108 (22 March 2016) at [46]

[2] (J1345/04)

[2015] ZALCJHB 70 (5 March 2015) at [9]

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

[4] See, for example, *Molala v Minister of Law and Order and Another* 1993 (1) SA 673 (W) and *Bernstein v Bernstein* 1948

(2) SA 205 (W)

[5] See, for example, *Kuiper & others v Benson* 1984 (1) SA 474 (W)

[6] (2011) 32 ILJ 667 (LC) (29 September 2010)

[7] The Moraka case at [18]

[8] At

[20] to [21]

[9] At [21]

[10] [2017] 1 BLLR 99 (LC) at [5.1]

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