IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO: JS347/06

In the matter between:

IVOR MICHAEL KARAN t/a
KARAN BEEF FEEDLOT **1st Applicant**

KARAN BEEF (PTY) LIMITED **2nd Applicant**

and

JOHN WILLIAM CHARLES RANDALL **Respondent**

JUDGMENT

VAN NIEKERK J

Introduction

[1] The applicants seek an order that the respondent's referral of an unfair dismissal dispute to this court, made on 18 May 2006, be dismissed. The applicants contend that the respondent has unreasonably and unjustifiably delayed pursuing his claim, and that they have been prejudiced as a result of the delay.

The facts

[2] The respondent was employed by the first applicant as its group financial director. His employment terminated on 28 February 2006. The respondent referred a dispute to the CCMA, asserting that he

had been dismissed for a reason that constituted an act of unfair discrimination (his age), a reason that is automatically unfair in terms of section 187 of the Labour Relations Act, 1995 ("the LRA").

[3] After a failed conciliation, on 25 May 2006, the respondent served a copy of his statement of claim on the applicants. The applicants filed a replying statement on 8 June 2006. On 25 August 2006, the parties' respective legal representatives, Mr Dion Masher and Mr Tim Mills, met to conduct a pre-trial conference. A week or so later, Masher wrote to Mills regarding a settlement proposal that had been made during the pre-trial conference. Masher received no response to the letter, nor did he receive a draft pre-trial minute, which Mills had undertaken to provide. On 31 October 2008, more than two years later, Mills forwarded the pre-trial minute to Masher. The applicants then launched this application.

[4] An explanation for the delay in the finalisation of the pre-trial minute has been proffered by both the respondent and his attorneys of record. After the pre-trial conference, on 6 September 2006, Rudolph Chetty, a candidate attorney employed by the respondent's attorneys of record drafted a minute and gave it to Mills. The pre-trial minute was incomplete and returned to Chetty. In January 2007, Mills states that Chetty was no longer dealing with the matter and that another candidate attorney, Priyan Pillay, was requested to attend to supplement the draft pre-trial minute by incorporating into the draft the requirements of the Practice Directive issued by the Judge President of this court dealing with discrimination claims. In February 2007, Pillay was transferred to another department. In August 2007, the matter was allocated to yet another candidate attorney, Nicole Bijoux. On 17 September 2007 Bijoux forwarded an amended pre-trial conference minute to Mills. Bijoux was requested to attend to the formalities of securing a trial date with the Registrar of this court. In

January 2008, the file was returned to Mills. Mills states that he believed that the pre-trial conference minute had been signed and placed in the court file, and that a trial date would be allocated during the latter half of 2008. The respondent had in the interim made regular contact with Mills and was informed that a trial date was awaited. The respondent addressed communications to Mills in May 2008 and again in October 2008. Upon receipt of an email dated 20 October 2008 from the respondent, Mills states that he requested a candidate attorney, Thenjiwe Mbatha, to attend at the Registrar's office to ascertain why a trial date had not been allocated. Mbatha reported to Mills that the pre-trial conference minute had not been placed in the Court file and she could not locate a signed minute. On 31 October 2008, Mills took steps to forward the pre-trial conference minute to the applicants' attorneys of record.

The applicable legal principles

[5] 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. The court has recognised and adopted the rule based on the maxim *vigilantibus non dormientibus lex subveniunt*, 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 the claim. In *Pathescope Union of SA Ltd v Malllinik* 1927 AD 292, Stratford AJA said the following about the *vigilantibus* rule:

> *" That a Plaintiff may, in certain circumstances, be debarred from obtaining relief to which he would ordinarily be entitled because of unjustifiable delay in seeking it is a doctrine well-recognised in English Law and adopted in our Courts. It is an application of the maxim vigilantibus non dormientibus lex*

subveniunt. The very nature of the doctrine necessitates it being stated in general terms. I take the following extraction from the judgment in Lindsay Petroleum Company v Hurd (L.R.5P.C.239) quoted in the Court below-

> *"the doctrine of laches in Courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by its conduct done that which might fairly be regarded as equivalent to a waiver of it or where, by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But, in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. ….. circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as it relates to the remedy… From the nature of the enquiry, it must always be a question of more or less depending upon the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question*

> *must largely depend on the turn of mind of those who have to decide, and therefore be subject to uncertainty, but that, I think, is inherent in the nature of the enquiry."*

Thus, the Court is left free in the 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 opinion, it would be inequitable to do so after the lapse of time constituting the delay. And in forming an opinion as to the justice of granting the relief in face of the delay, the Court can rest its refusal upon potential prejudice, and that prejudice need not be to the Defendant in the action, but to third parties."

[6] In *Sishuba v National Commissioner of the South African Police Service* (2007) 28 *ILJ* 2073 (LC), Molahlehi AJ (as he then was) summarised the applicable case law. 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* 1995 (3) SA 787 (N), the court said the following:

> *"The first is that unreasonable delay may cause prejudice to the 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…"*

The practical considerations that inform this approach were considered in *Mohlomi v Minister of Defence* 1997 (1) SA 1 to 4 (CC), at 129H-130A where Didcott J said:

> *"Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of those whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared."*

[7] In *Molala v Minister of Law and Order & another* 1993 (1) SA 673 (W), the High Court held that the approach to be followed was the one set out in *Bernstein v Bernstein* 1948(2) SA 205 (W), where it was held that "*it is in the discretion of the Court to allow proceedings to continue where there has been this lapse of time."* The court referred with approval to *Kuiper & others v Benson* 1984(1) SA 474 (W), where it was held that the court has "*an inherent power to control its own proceedings and that accordingly the Court should assess whether the Plaintiff is guilty of an abuse of process".*

[8] In *Bezuidenhout v Johnston NO & others* (2006) 27 *ILJ* 2337 (LC), Nel AJ set out the relevant factors:

> *"When an Applicant party has been dilatory in pursuit of his relief, and finds himself outside prescribed periods, it is vital that a good explanation needs to be provided for such delays as may have occurred in order to warrant the granting of an indulgence to the defaulting party… The prejudice suffered by parties as a result of undue delays is another fact to consider…. "*

[9] This is not to say that a respondent party is entitled to lie in wait, intending to ambush the applicant once a period of delay becomes sufficiently protracted to justify the filing of an application to dismiss. In the *Bezuidenhout* judgment, Nel AJ observed that the respondent

party also bears a responsibility to ensure that disputes are resolved expeditiously, inter alia by ensuring that the applicant party complies with the time periods applicable to it, for example, by compelling compliance. In *Sishuba*, Molahlehi AJ noted that the Rules as they related to the filing of process in review applications did not preclude a dilatory party or representative from being placed on terms, nor was a degree of self-help prohibited:

> *"Whilst there is indeed a practice well-known in this Court that a matter will be set down only once the Applicant has filed the Heads of Argument, there is no rule governing this practice. There is, however, in my view, no reason why an Employee faced with a delay on the part of the Applicant cannot file Heads of Argument prior to that of the Employer, and thereby activate the process of the Registrar setting the matter down. I also see no reason why the Employee did not, in the circumstances of this case, place the Employer on terms and called upon him to file his Heads of Argument before bringing this application."*

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.

[10] However, there is a significant difference between the circumstances in which the present application is brought and those that pertained in the *Bezuidenhout* and *Sishuba* matters. Both those applications sought to dismiss applications to review and set aside arbitration awards. The present application concerns a referral to this court in

terms of Rule 6. Rule 6 (4) (d) provides that the party initiating the proceedings must ensure that a copy of the minute is delivered within five days of the conclusion of the pre-trial conference. Rule 6 (5) also provides that when the minute of a pre-trial conference is delivered or the time limit for its delivery lapses, whichever occurs first, the Registrar must (*my emphasis*) send the file to a Judge for directions in terms of this sub rule. The Judge who receives the file from the Registrar may, direct the Registrar to enrol the matter for hearing if the Judge is satisfied that the matter is ripe for hearing; or direct that an informal conference be held before a judge in chambers to deal with any pre-trial matters; or direct the parties to convene a further formal pre-trial conference at a date, time and place fixed by the Registrar, at which a Judge must preside, to deal with any pre-trial matters.

[11] In relation to pre-trial conferences, Rule 6, to some extent at least, provides its own remedies. Rule 6 (6) provides that a Judge may, at a pre-trial conference held in terms of sub-rule (5) (b) or (5) (c), make any appropriate order for the further conduct of proceedings, including an order as to costs. Rule 6 (7) also provides that if any party fails to attend any pre-trail conference convened in terms of sub rule (4) (a), (5) (b) or (5) (c), or fails to comply with any direction made by a Judge in terms of sub-rules (5) and (6), the matter may be enrolled for hearing on the direction of a Judge and the defaulting party will not be permitted to appear at the hearing unless the court in good cause shown orders otherwise.

[12] It is clear from these provisions that Rule 6 establishes a model of case management in terms of which cases referred to this court, at least after the conclusion of a pre-trial conference or the lapse of the period allocated for a pre-trial conference, are to be managed by a Judge rather than the Registrar, the parties, or their representatives.

The clear intention was to ensure that Judges assume control of matters at an early stage, and that they actively manage cases to ensure that they are expeditiously and efficiently dealt with during the pre-trial phase and beyond. The time table is clearly spelt out in Rule 6 – a responding statement must be delivered within 10 days of the filing of the statement of claim, a pre-trial conference must be held within 10 days of the filing of the response, the referring party must deliver the pre-trial minute within 5 days of the conclusion of the pre-trial conference, and the Registrar must send the court file to a Judge when the pre-trial minute is filed or when the time period prescribed for its delivery lapses. There is no reason therefore why a contested referral should not be receiving the attention of a Judge six weeks after the filing of the statement of claim, with a view to active management of the file, including any pre-trial directives that are necessary or further engagement with the parties to explore the prospects of settlement.

[13] For reasons that are not immediately obvious, this model has not been implemented in practice. Case management (at least in relation to Rule 6 referrals and as the present matter illustrates so vividly) has become largely practitioner-driven. The Registrar has played a passive role, and permitted practitioners to dictate the pace at which litigation is conducted. In my experience, files are sent to Judges for directives generally only once one of the parties has requested the Registrar to allocate a trial date. The next point at which a Judge makes acquaintance with a file is often minutes before a scheduled hearing is to commence, without adequate time to read the papers, consider the issues in dispute, and to direct how the proceedings might best be conducted. To the extent that the system of active case management by Judges contemplates the Judge playing the role of mediator and encouraging the early settlement of disputes (I would venture to suggest that this is one of the primary drivers of the

model), this purpose has been entirely undermined. The failure to implement the system of active case management envisaged by Rule 6 and the Registrar's acquiescence in a practitioner-driven system may be one explanation (there are doubtless many more) for the delays in adjudicating disputes referred to this court. The present application illustrates the point. The dispute was referred to this court in May 2002. The replying statement was filed within the first week of June 2002. By end-June, in the absence of a pre-trial minute, the Registrar ought to have sent the file to a Judge for directions. This did not happen. Instead, after a pre-trial conference held some two months after the lapse of the prescribed period, the matter lay dormant for more than two years. Had the Registrar complied with the Rule and referred the file to a Judge, active case management might have ensured that the pre-trial conference was held sooner than it was and that the minute was finalised and filed within the prescribed five-day period.

[14] 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.

This is subject to the consideration that an application to dismiss is a drastic remedy, and should not be granted unless the dilatory party has 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. Theoretically, in the case of

referrals to this court in terms of Rule 6, matters ought never to get to this point - unlike the Rules of other courts, the Labour Court Rules contemplate a system of active case management by a Judge in the pre-trial phase. Properly applied, Rule 6 ought to ensure that tardy parties and representatives are held to account, and that matters are prepared and enrolled for trial without delay.

Analysis of the facts and submissions

[15] In the present matter, the delay in delivering the pre-trial minute is approximately 2 years and 3 months, a period that is both substantial and unreasonably long. The statutory system of dispute resolution established by the LRA specifically incorporates time limits in terms of which dismissal disputes must be referred to conciliation and from the stage of a failed conciliation to arbitration or to adjudication by this Court. The time limits recognise that labour disputes are best resolved on an expeditious basis. A party that delays the prosecution of a claim to the extent that the respondent has in the present instance undermines this system.

[16] In so far as the explanation for the delay is concerned, the respondent concedes that the explanation proffered is open to criticism and even censure, but I accept that it is genuine. The only time period with which the respondent has failed to comply is Rule 6 (4) (d), the requirement that a pre-trial minute be delivered within 5 days. As I have noted, the remedy for that failure is for the Registrar to send the file to a Judge for directions in terms of sub rule (5). In the absence of the Registrar sending the file to a Judge for directions in terms of sub rule (5), it was at all material times available to the applicants' attorneys of record to request the Registrar to send the file to a Judge for directions in terms of Rule 6 (5). Had the applicants taken the steps contemplated in Rule 6 (5) by requesting the

Registrar to send the file to a Judge, these would have been dispositive of any prejudice or injustice which the applicants contend they may have suffered. In the present instance, the Registrar failed to forward the file to a Judge once the period for filing a pre-trial minute had elapsed. Had the Registrar done so, it is likely that this application would have been averted. Equally, the considerations of common courtesy that require a party's representative to address gentle (and if necessary, less gentle) reminders to a colleague who, through a lack of diligence or otherwise, fails to meet a requirement stipulated by the Rules, ought to ensure that the litigation process remains on track. At no stage did the applicants' attorney complain to the respondent's attorneys of record that the pre-trial minute was not forthcoming. It was open to the applicants' attorneys of record to address correspondence to the respondent's attorneys of record complaining that an unreasonable period of time had elapsed and that in the absence of receipt of the pre-trial minute, the applicants would consider that the respondent had abandoned his claim or that the applicants would procure that the Registrar invoke the provisions of Rule 6 (5) of the rules of this Honourable Court. The applicants' attorneys did neither. In particular, there is no explanation from the applicants why the applicants did not, at the very least, either place the respondent's attorneys of records on terms to file the pre-trial minute or request the Registrar to comply with the provisions of Rule 6 (5).

[17] Finally, in relation to the prejudice that the applicant will suffer should the claim not be dismissed, the applicants submit that it would be unjust to them if the respondent were to be granted reinstatement approximately over two years after the termination of his contract of employment. In the papers before the Court, the respondent states that he no longer seeks reinstatement and seeks only the remedy of compensation. Apart from reinstatement (which is no longer an

issue), the only prejudice which the applicants contend for is that after such a long delay the witnesses whose evidence would be required to enable the applicants to successfully defend the respondent's claim can no longer clearly remember the circumstances surrounding the termination of the respondent's employment. The facts which gave rise to the termination of the respondent's dismissal have been meticulously documented in the pleadings and in the exchange of correspondence between the parties. The termination of the respondent's employment was not preceded by a complicated or lengthy chronology of events. The applicants considered that the respondent had reached retirement age and gave him notice that his employment was to be terminated on the basis that he had reached retirement age. This is largely a matter for legal interpretation rather than a matter that is dependent on the memory by the applicants' witnesses. In my view, the applicants will suffer no substantial injustice or prejudice as a result of the delay.

[18] In relation to costs, although the respondent has succeeded in this application, the conduct of its legal representatives is such that it would be just and equitable to make no order as to costs. Although the applicants' representatives can be criticised for their inactivity for more than two years, only to spring into action by seeking the drastic remedy of dismissal the moment the pre-trial minute was filed, the lack of diligence displayed by the respondent's attorneys in their conduct of this matter warrants censure.

For these reasons, I make the following order:

1. The application is dismissed.
2. There is no order as to costs.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of hearing: 19 June 2009

Date of judgment: 22 July 2009

Appearances:

For the applicants: Mr D Masher from Bell Dewar and Hall

For the respondent: Mr T Mills from Cliffe Dekker Inc.