IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

NOT REPORTABLE

CASE NO: J2246/07

In the matter between:

NEHAWU	1ST APPLICANT
MOTLALENTOA SESILINYANA	2ND APPLICANT

AND

THE MEC FOR THE DEPARTMENT OF PUBLIC WORKS, ROADS AND TRANSPORT	1ST RESPONDENT
THE DEPARTMENT OF WORKS, ROADS AND TRANSPORT	2ND RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] The applicant seeks an order compelling the respondents to comply with the order granted by Tshiqi AJ, as she then was, under case number JS 103/04, on the 18th October 2004 in terms of which the settlement agreement between the parties was made an order of Court. The applicant specifically seeks to enforce

the provisions of paragraph 1.3 of the settlement agreement which deals with the payment his *pro rata* leave pay.

[2] The respondents have opposed the application and are on the other hand seeking condonation for the late filing of their answering papers. The reasons for the delay, which in my view need not be repeated in this judgment, are set out in the respondents' papers. Having read and considered the affidavit relating to the condonation application, I am satisfied that the explanation proffered by the respondents are acceptable and reasonable in that they meet the guidelines set out in *Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A) and PPWAWU and others v AF Dreyer and Co Ltd [1999] 9 BLLR 1141 (LAC).*

Background facts

[3] The background facts in this matter are generally common cause. The second applicant who is a former employee of the first respondent filed a statement of claim alleging that the first respondent had unfairly dismissed him. That claim which was defended by the respondents was set down for hearing on 18 October 2004. On the day of the hearing, the parties concluded a settlement agreement which was then made an order of Court on 18th October 2004.

[4] The issue in the present instance turns around the entitlement of the applicant in relation to payment of *pro rata* leave. The relevant parts of the agreement for the purpose of this agreement reads as follows:

> *"1. The Respondent agrees to pay to the Applicants (sic) the following:*

1.1 . . .

1.2 . . .

1.3 The first Applicant's pro rata leave."

[5] The dispute that arose between the parties subsequent to the settlement agreement being made an order of Court related to the calculations on the pro rata leave due to be paid to the applicant. In terms of the respondents' calculation, it was reflected that the applicant's leave days for the period 1st January 2000 to 31st December 2000, had been forfeited and that the amount payable for his leave days from 1st January 2001 to 11th October 2001, was a total of 19.50 days.

[6] The applicant through his erstwhile attorneys indicated to the respondents that their calculation of his accrued leave was incorrect and demanded that the calculation should take into account the period when he was on suspension. The respondents on the other hand contended that the applicant had forfeited his accrued leave because he did not apply for such leave during his suspension.

[7] The applicant argued that he could not have applied for leave whilst on suspension because part of the conditions of the suspension was that he was prohibited from entering the premises of the respondents without the written approval of the head of department.

The point in limine

[8] The respondents have in their opposition to the applicants claim raised two points *in limine.* The first point relates to the jurisdiction of this Court to entertain the matter and second to the delay in launching these proceedings. In my view the case of the applicant turns around the second point *in limine* raised by the respondents. It is for this reason that I do not deal with the merits of the application.

[9] The approach to adopt when dealing with the rule governing delays by a litigant in prosecuting a claim was discussed in the recent unpublished judgment of this Court in the case of *Nedcor Bank Limited v James George Harris and Others case number JR927/01.* In that case the Court found that it is now well established that an applicant who delays in the prosecution of his or her review application could be bared from proceeding any further with the application unless a satisfactory explanation is tendered for the delay. In arriving at this conclusion the Court relied on the authority of *Solidarity & Others v ESKOM Holdings Ltd (2008) 29 ILJ 1450 (LAC),* where the rule dealing with the issue of unreasonable delay was discussed. In that case the Court quoted with approval what was said in *Associated Institutions Pension Fund & others v Van Zyl & others 2005 (2) SA 302 (SCA),* as follows:

> "*[46] It is a longstanding rule that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party had been guilty of unreasonable delay in initiating the proceedings. The effect is that,*

in a sense, delay would 'validate' the invalid administrative action (See eg Oudekraal Estates (Pty) Ltd v City of Cape Town & others 2004 (6) SA 222 (SCA) ([2004] 3 All SA 1) at para [27]). The raison d'étre of the rule is said to be twofold. First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions (see eg Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 41)

[10] The rule requires consideration of two questions:

> *"(a) Was there an unreasonable delay?*
>
> *(b) If so, should the delay in all the circumstances be condoned? See Wolgroeiers case and Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n ander 1986 (2) SA 57 (A)"*

[11] The rule seeks to address two policy issues – the first concerns the prejudice that the aggrieved party may suffer as a result of the delay and the second is about the importance and the need to reach finality within a reasonable time in the administration of justice. See *Ivor Michael Karan t/a Karan Beef Feedlot v John William Randal unreported case number JS347/06, Radebe v Government*

of the Republic of South Africa 1995 (3) SA 787 (N) and *Sishuba v National Commissioner of the South Africa Police Service (2007) 28 ILJ 2073 (LC).*

[12] It is trite that the Court has the power to grant an indulgence to the defaulting party once good cause is shown for the unreasonable delay. The authorities indicate that in assessing whether to grant the indulgence the Court will take into account the prejudice that the other party may have suffered as a result of the delay in the prosecution of the claim. See *Bezuidenhout v Johnston NO & others (2006) 27 ILJ 2337 (LC).*

[13] In the present instance there is no doubt that the applicant has been dilatory in the prosecution of its claim. The applicant has not tendered any explanation for the delay in enforcing the claim he derived from the Court order made on 18th October 2004. It should have been clear to the applicant at least by November 2005, that there was a need to enforce the right he accrued as a result of the settlement agreement having been made an order of Court. The applicant only filed his claim without any explanation for the delay on 27th February 2008. In my view the applicant's claim stands to be dismissed for this reason alone. I am however of the view that it would not be fair to allow the costs to follow the results.

[14] In the premises the following order is made:

(i) The applicant's claim is dismissed.

(ii) There is no order as to costs.

Molahlehi J

Date of Hearing : 16th September 2009

Date of Judgment : 22nd December 2009

Appearances

For the Applicant : Mr Thaanyane of Thaanyane Attorneys

For the Respondent: Mr Gough of the State Attorney-Bloemfontein