

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR1162/05

In the matter between:

DONA JULA

APPLICANT

AND

COMMISSIONER KHOZA S, N.O.

1ST RESPONDENT

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

2ND RESPONDENT

SOUTH AFRICAN POST OFFICE LTD

3RD RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application to review and set aside the arbitration award, made by the First Respondent (the Commissioner), under case number GA 18292-04, dated the 31st of March 2005.

[2] The Third Respondent (the Post Office) applied for condonation for the late filing of its answering affidavit. The explanation provided for the late filing of the answering affidavit is both reasonable and acceptable, particular regard being had to the period of delay which was only ten days. The late filing of the answering affidavit is accordingly condoned.

Background facts

- [3] The Post Office operates as one of its services the bank with its head office located in Bloemfontein. The bank was established to target the poor and to give them banking facilities at affordable rates.
- [4] The Applicant who was employed as a cashier/ teller at the bank's De La Rey branch was dismissed on 26th April 2004, for misconduct related to fraud. She was charged with the fraudulent withdrawals from the bank's accounts belonging to seven account holders (*"the clients"*). The fraudulent withdrawals were discovered further to an investigation which was triggered by a complaint made by one of the seven clients. The client complained that a fraudulent withdrawal had been made from her account. She alleged that she had never visited the De La Rey branch of the bank to make any transaction on her account.
- [5] The investigations which had been instituted by the Post Office during 2003, revealed that all seven transactions in question were processed by the Applicant and that the total amount withdrawn from the clients' accounts, within a very short period of about seventeen days, was approximately R72 000.00, broken down as follows:
- R9 000,00 on 14 October 2003;
 - R6 000,00 on 21 October 2003;

- R20 000,00 on 21 October 2003;
- R7 500,00 on 23 October 2003;
- R11 000,00 on 24 October 2003;

[6] The charge against the Applicant was formulated as follows:

“(F3) fraud - wilful and unlawful misrepresentation by an employee in whatever form that will have the effect of damaging/harming or potentially damaging/harming the company. In that on various dates you performed fraudulent withdrawals out of savings bank accounts, the account holders are disputing the transactions, no entries were made in the SB6 book. No corresponding surpluses were recorded.”

[7] Mr Brechman on behalf of the Post Office testified that the clients' SB6 books were never reported lost or stolen. The same applies to the clients' book. This was confirmed in an affidavit deposed to by one of the clients, whose complaint triggered the investigation.

[8] He testified further that there was no circular that had been circulated by the Post Office to its various branches including the De La Rey branch, regarding duplication of SB6 books. This evidence contradicted a claim by the Applicant that there were duplicate books that could have been used to get her to process the fraudulent transactions. The testimony of Brechman was that the employer would have circulated a circular to

warn staff members about the existence of such duplicate SB6 books if they indeed existed.

[9] According to Brechman, the withdrawals of the *“huge amounts of money”* within a space of a period of about "a week and a half" should have raised *“alarm bells”* on the part of the Applicant.

[10] Ms Swanepoel confirmed that there was no evidence of any duplicate SB6 books in circulation. She also confirmed that there would have been a *“warning circular”* if that had been the case.

[11] She said that it was possible for a teller to withdraw money from a client's account without a client's SB6 book. She explained the manner in which this can be done. According to her all that you need is the information regarding the client account number, the identity number and the balance that is available in that book. What the teller would then do is to withdraw a mini statement from the computer. The mini statement will show the personal details of the account holder namely, the person's name, address, identity number and the balance available in that account.

Grounds for review and award

[12] The Applicant complained that the Commissioner failed to take into account the defect in the administration or management system of the Post Office. In this respect the Applicant's representative argued during the arbitration

hearing that there was no specimen signature and photograph of the customer on the computer.

[13] The second complaint of the Applicant is that the Commissioner failed to comprehend that the duplicate saving books were in circulation and because of the weakness in the system it was easy to perpetuate fraud against the bank. The third complaint is that the Commissioner failed to take into account the concessions made by the Post Office witnesses.

[14] The other factors which the Applicant contends should have been taken into account by the Commissioner are:

- That the Post Office was aware well before the incident that there was a syndicate operating within the bank;
- The uncontested evidence of the Applicant that she is the one who alerted the Post Master about the suspicious customer, including the impounding of the book;
- That the balance of probabilities in particular because the Post Office failed to institute criminal proceedings against her favoured her;
- The Commissioner ignored the facts which were put before him.

[15] The Commissioner in his arbitration award rejected the version of the Applicant that she did not commit the offence but was a victim of a syndicate which used to duplicate savings books and false identity documents to obtain money from the bank. The Commissioner also rejected the document alleged to be a memo introduced by the Applicant which sought to suggest that the management of the bank was aware of the duplicate books. The Commissioner rejected the document for two reasons. The first is that the Applicant failed to show how she obtained this document except to say that she obtained it from the shop-steward. The second reason for rejecting the Applicant's version was that she did not dispute the Post Office's version that its memo's are required to be signed by the author thereof.

Special Plea

[16] The Post Office has raised as a point *in limine* relating to the unreasonable delay in prosecuting the review application. The Applicant together with her representatives seems to have confused this point with Rule 11 of the Rules of this Court.

[17] It is now well established in this Court that a litigant that fails to prosecute his or her claim speedily could be barred from

proceeding further with the matter unless good cause is shown for the delay. It has also been held in this respect that depending on the circumstances of a given case, administration of justice may dictate that if an Applicant party delays in the prosecution of its claim and fails to provide a satisfactory explanation, penalty may be that of dismissing the claim. See *National Union of Metal Workers of South Africa obo Nkuna and Others v Wilson Drills-Bore (Pty) Ltd t/ a A & G Electrical* (2007) 28 ILJ 2030 (LC) and *NUMSA and Others v AS Transmission and Steering Pty Ltd* (1999) 12 BLLR 1237(LC).

[18] In *Solidarity & Others v Eskom Holdings Limited* (2008) 29 ILJ 1450 (LAC), Zondo JP, writing a separate judgment to that of Khampepe AJA held that “*the unreasonable delay rule does apply in review matters*”. The learned Judge President however found that the rule did not apply to the case that was subject to the Prescription Act 68 of 1969.

[19] The applicant in the present instance instituted the review application on 20th May 2005. The notice in terms of Rule 7A (3) by CCMA was filed on the 30th August 2005, a period of three months from the date of filing the review application.

[20] There is no evidence of the applicant taking any steps to enquire or call upon the CCMA to file the notice in terms of Rule 7A (3) of the Rules of the Court.

[21] It took the Applicant a period of not less than ten months (10) to transcribe the record when the CCMA had made the same available. The arbitration proceedings were transcribed on 8 June 2006. After transcribing the record the applicant took 22 months to serve and file the record together with the supplementary affidavit and that was done on the 30th April 2008.

[22] The Third Respondent raised the point *in limine* regarding the delay in the prosecution of the review application in his answering affidavit served and filed on the 17th June 2008.

In the answering affidavit the Post Office contended that:

“6. By judging from the manner in which the applicant has handled this matter and in the absence of any condonation application, I submit that there are unreasonable, unjustified and unacceptable delays, which occurred due to the applicant’s tardiness in pursuing the review application expeditiously. Accordingly I respectfully contend that the applicant is barred by the vigilantibus non dormientibus lex

subverniant [the law comes to the aid of the vigilante and not the indolent) from proceeding with the review application.”

[23] The deponent to the answering affidavit Mr Joubert, of the attorneys of record of the Applicant sought to explain this delay. The essence of the explanation is that the Applicant did not have funds to pay her attorneys of record as she was unemployed and had a huge medical bill to pay for. Attempts at borrowing money from the family were unsuccessful according to Mr Joubert. The attorneys of record assisted at its own costs to have the record transcribed but did not, according to Mr Joubert, proceed further because the Applicant was still ill with depression.

[24] In his affidavit Mr Joubert does not dispute the delay which he states was approximately eighteen months but contend that it was due to the loss of tapes, lack of financial resources on the part of the Applicant and her health problems.

[25] In *NUMSA obo Ntobeng & others v Witbank Foundry & others [2008] JOL 22092 (LC)*, this Court dealing with the issue of delay in prosecuting disputes had this to say:

“[14] It has been accepted that inordinate delays in prosecuting

review to finality, protract disputes, damage the interest of justice and prolong the uncertainty of those affected by the delay. See Sontshabo Solomon Sishuba v National Commissioner of Police Service (2007) 10 BLLR 988. It has also been held that depending on the circumstances of a given case, administration of justice may dictate that if an applicant party delays in prosecuting its claim and fails to provide acceptable explanation for the delay; the penalty may be that of dismissing the claim. See National Union of Metal Workers of South Africa obo Nkuna Others v Wilson Drills-N Bore (PTY) LTD t/a A & General Electrical- (2007) 28 ILJ 2030 (LC) and Numsa and Others v AS Transmission and Sterling (Pty) Ltd (1999) 12 BLLR 1237 (1) SA 673.”

[26] This Court went further to indicate that there are two principal reasons why the Court should have the power to dismiss a claim at the instance of an aggrieved party who has been guilty of unreasonable delay. The two reasons are cited in the case of *Radebe v Government of the Republic of South Africa & others* 1995(3) SA 787 (NPD), as follows:

“The first is that unreasonable delay may cause prejudice to the other parties. See Hanaker v Minister of the Interior 1965 (1) SA 372 (C) at 380D; Wolgroeiers Afslaers (EDMS) Bpk v Munisipaliteit Kaapstad 1978 (1) SA 12 (A) at 41. The second reason is that it is

both desirable and important that finality should be reached within a reasonable time of judicial administrative decisions. Sampson v SA Railways and Harbour 1933 CPD 335 at 338; the Wolgroeiers' case at 41D-E; cf Kingsborough Town Council v Thirwell and Another 1957 (4) SA 533 (n) at 538."

[27] In *National Savings Investments SA (Pty) Ltd v Commissioner for Conciliation, Mediation and Arbitration & Others* (unreported case number JR171/02), Basson J when dealing with the issued had this to say:

"[13] The first question to be considered in exercising the discretion is whether there has been undue or unreasonable delay and secondly whether the delay should be condoned. Whether any steps were taken during the interval, will also be an important factor [as] that may indicate the seriousness or commitment of a litigant in bringing his or her claim to finality."

The learned Judge went further to say:

"In respect of the question of whether or not the delay was reasonable or unreasonable, the Court will have to make a value judgment in the light of all the circumstances. Once it has been found that the delay was unreasonable, the Court will then have to exercise a discretion which must be exercised judicially as to whether or not the unreasonable delay should

be condoned.”

[28] In my view the explanation proffered by the applicant is not satisfactory, and is not compensated by the excessive delays. It is for this reason the Applicant’s review application stands to be dismissed.

[29] Even if the above conclusion was to be incorrect, the Applicant’s review application would still stand to be dismissed because the facts and the circumstances of this case do not support the contention of the Applicant that the Commissioner committed a misconduct or gross irregularity.

There is also no support that the arbitration award should be set aside for failing to meet the reasonableness standard.

[30] In considering whether or not to interfere with the arbitration award, the Court must ask itself the question whether or not the conclusion reached by the Commissioner is one which a reasonable decision maker could not reach. See *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC).

[31] The defence which the Applicant sought to present during the arbitration hearing was in essence that she could not be guilty of the misconduct because she is the first person to disclose or expose the fraudulent transaction. However a

closer analysis of the facts reveals that the fact that she informed the Postmaster is not material in the assessment of the reasonableness of the conclusion reached by the Commissioner. In fact the facts indicate that the person who triggered the process that finally lead to the Applicant's discipline was the client who apparently complained to someone else at the Middlelands Post Office about the drawings that had been made on her savings. In this regard the Applicant testified as follows:

"... It was on Friday a teller from Middlelands Post Office phoned me, it was around four o'clock. He phoned the Post Office and then I was left alone at that time. And then he asked me that did I perform, there is a client in front of him and that lady says he has (inaudible) money and that she wanted to withdraw money and that money the customer said it was insufficient funds. And then he can go to the system and check and then it was registered to the Delarey Post Office and then because of that ...(inaudible) that you saw this."

".... And then he just saw my reference number. And then he just asked me do you know a person by the name of, there is a reference number that is the ID

number 2094 and then I said, he said 2090 I say 4 at the end, I said I am the one, I am Dona Jula and that is my number that I use, that is my ...(inaudible) reference number.”

[32] Thus the facts do not support the contention of the applicant that she originated and initiated the information about the fraud to the Postmaster. In any case I know of no principle in law or public policy that says that because a person is the first to report an offence he or she will for that reason be exonerated from any wrongdoing that may relate to that report. The circumstances of this case do not rule out the possibility that in informing the Postmaster the Applicant was seeking to divert attention from herself.

[33] The other defence which the Applicant sought to rely on was that she was a victim of the fraud with which she was charged. She claimed in this regard that she might have been conned by a fraudster who may have belonged to a syndicate operative in the bank. She claimed that she may have processed the transaction believing that she was doing so for a genuine account holder when in fact that was not the case. In support of this version the Applicant's representative at the arbitration hearing sketched out a number of scenarios. One of the scenarios was that the

Applicant may have been misled by a fraudster who had duplicated the SB6 book. This does not assist the Applicant's case when regard is had to the fact that the substantial withdrawals were being made within a very short space of time which should have raised the alarm bells for the Applicant. The contention of the Applicant that the Post Office was aware of a syndicate that was operative within it does not take the case of the Applicant any further. On the facts the Commissioner correctly found that firstly the Applicant did not prove how she obtained the document she alleged to have been a memo from the Post Office. She also did not dispute the evidence of the Post Office that all its memos are required to be signed by authors thereof and that the one produced by her, in her defence, could not be accepted because it was unsigned. The Commissioner also correctly found that the Post Office was not required to prove beyond reasonable doubt that the Applicant was guilty of the offence but had to only prove that fact on the balance of probabilities.

[34] In the light of the above discussion, I am unable to find that the Commissioner committed a misconduct or gross irregularity, or for that matter that his award was

unreasonable. It is further for this reason that the review application of the applicant stands to be dismissed.

[35] In the circumstances of this case, my view is that there is no reason why costs should not follow the result.

[36] Accordingly the Applicant's application to review and set aside the arbitration award issued by the first respondent under case number GA18292-04 dated 31st March 2005 is dismissed with costs.

Molahlehi J

Date of Hearing : 16th October 2008

Date of Judgment: 16th March 2009

Appearances

For the Applicant: Adv M S H Docrat

Instructed by : Joubert Attorneys

For the Respondent: Adv N H Maenetje

Instructed by : Mabuza Attorneys