IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO JR 853/06

In the matter between

M M MORAKA **1st Applicant**

and

NATIONAL BARGAINING COUNCIL FOR THE CHEMICAL INDUSTRY **1st Respondent**

ZARINA WALELE (*N.O.*) **2nd Respondent**

AFROX MEDISPEED **3rd Respondent**

JUDGMENT

LAGRANGE, J

Background

1. The applicant in the main review application seeks condonation for the late filing of his founding affidavit and notice of motion in a review application. He was dismissed on 20 May 2005. He referred a claim of unfair dismissal to the first respondent. On 30 March 2006 the second respondent issued an award dismissing his claim.

2. On 29 May 2006 he then filed a review application to set aside the award. This was done a couple of weeks after the expiry of the six week deadline for doing

so. In turn, the respondent filed a notice of intention to oppose the application on 1 June 2006.

3. By 6 June 2006, the bargaining council had dispatched the record of proceedings to the registrar of this court, under Rule 7A(2)(b) of the Labour Court rules. It was only on 26 January 2007 that the applicant eventually filed a copy of the transcript with the court. Until the hearing of this matter, there was no proof the record had also been served on the third respondent, Afrox. At court the applicant's legal representative handed up a filing sheet, dated 29 January 2007, which indicated that the transcript appears to have been served directly on the third respondent, instead of its attorneys of record. Whatever was apparently served on the third respondent directly never reached Afrox's attorneys.

4. On 12 December 2008, nearly two years after the applicant had filed the transcript with the court and apparently delivered it to Afrox, he filed a supplementary affidavit confirming that he stood by his notice of motion and founding affidavit. It was only in mid-December 2009 that his attorneys enquired if Afrox's attorneys of record were still representing it. There is no record of any correspondence about the matter between December 2008 and this letter of enquiry in December 2009.

5. Another attorney at Afrox's attorneys of record had taken over the matter. She confirmed that the firm remained on record. The new attorney also raised the perceived lack of activity in the matter on the part of the applicant since the record was dispatched to the bargaining council in June 2006, and warned that if no explanation was received by 15 February 2010, instructions would be taken from Afrox whether or not to proceed with an application to dismiss the review proceedings.

6. The applicant's attorneys confirmed that he was proceeding with the application and advised Afrox's attorneys to check the court file in which all the documents could be found. He could simply have confirmed the steps taken and sent a copy of the supposed service of the transcript on Afrox but was clearly not going to assist in shedding light on the issue. His reply said nothing about what the applicant had done since the bargaining council had dispatched the record to

the registrar of the court. When Afrox's attorneys inspected the court file they found the court's copy of the transcript in the file, but no notice by the applicant in terms of Rule 7A(8). They advised the applicant's attorney of what they had found. Seemingly by way of reply, the applicant filed another notice in terms of Rule 7A(8)(b) on 4 March 2010.

7. On 12 May 2010, Afrox filed its notice of intention to dismiss the review application which the applicant opposed. In his answering affidavit the applicant asserts for the first time that the transcripts were served on Afrox on 29 January 2007, but did not attach any proof of this service to his affidavit.

8. Since the start of proceedings, the applicant had been represented by the Johannesburg Justice Centre. In its notice of opposition, in June 2006, Afrox had made it clear that it had appointed its current attorneys of record to represent it in the matter and that all service of documentation and process in the matter should be served on its attorneys. With the exception of serving the record, the applicant's attorneys sent every other document or item of correspondence to Afrox's attorneys of record. Although the attorney handling the matter for the third respondent left the attorney's firm in June 2009, Afrox's attorneys of record never changed in the course of the litigation.

9. In summary, the applicant's representatives appear to have ignored using the address of Afrox's attorneys of record when serving the transcript, whereas in all other respects they had communicated with them and served process at their address. No explanation for this important anomaly is provided by the applicant's representatives. Once a party has elected an address for service and properly notified the opposing party of that address, it is entitled to assume that any service will be effected at that address and nowhere else. The applicant's representatives ought to have realized that delivering a transcript to the company without even indicating a responsible person to whom it should be sent, or without mentioning the attorneys it should be forwarded to, could well result in it not reaching the persons designated by Afrox to deal with the matter, namely its attorneys of record.

10. Quite apart from the improper service of the record, the applicant only filed his first supplementary affidavit in December 2008, just under two years later. It

must be noted that this did not expand on the grounds of review but merely confirmed the contents of the founding affidavit, so there is no obvious reason why this could not have been filed in February 2007.

11. On 12 May 2010, the applicant filed an application to dismiss the review proceedings under Rule 11 of the Labour Court rules. Only the Rule 11 application was set down for hearing but, of necessity, the applicant's condonation application also has to be dealt with.

12. It will be useful to deal with the condonation application first as it only addresses the brief delay in launching the initial application on 29 May 2006. In short the applicant does not provide as chronology of the steps he took but pleads that he was unable to afford legal assistance in launching an application and it appears it took the best part of April to obtain legal aid to pay for legal advice. The advice he obtained was discouraging of his prospects of success, and it was only after obtaining a second legal opinion that the matter proceeded. Although this explanation is not detailed when dealing with dates and times, it seems plausible that it could have led to some delays in initiating proceedings. Weak though the prospects are, I am willing to condone the delay in launching the review application.

13. However, the condonation application only addresses a relatively short period of delay which pales into almost complete insignificance beside the applicant's much greater delay in prosecuting the review further. After filing the founding affidavit at the end of May 2006, and even though the record was made available soon afterwards in early June 2006, the applicant took six months to file the transcript of the proceedings with the court by the end of January 2007. without serving it on Afrox's attorneys of record. No explanation is provided by the applicant for the six month delay. Even if there might have been an acceptable reason for this delay and even if he had assumed that the record had been properly served on Afrox, it was only in December 2008, nearly two years later, that the applicant filed his supplementary affidavit. Moreover, that affidavit added nothing to the grounds of review set out in the founding affidavit of May 2006, and there is no reason why it could not have been filed soon after the transcript of roughly 200 pages was obtained.

14. In terms of rule 7A(8) of the labour court rules, a supplementary affidavit and any amended notice of motion, must be filed within 10 court days of the registrar making the record available. This period expired in February 2008 and the applicant never sought condonation for his failure to comply with the rule, nor has he even tendered any explanation for the delay in course of his reply to Afrox's application to dismiss the review application. This is not a case in which the party prosecuting the matter has been a bit slow but nonetheless consistent in pursuing the matter: it is a case where the matter has effectively been allowed to die, and is then resuscitated again as and when it suited the applicant or his representatives.

Legal principles

15. The relevant principles governing this court's treatment of ongoing delays in conducting review proceedings have been set out by Molahlehi J in the case of ***Sishuba v National Commissioner of the SA Police Service*** **(2007) 28** ***ILJ*** **2073 (LC)**, in which he stated:

> *"[8] The issue of delays in prosecuting disputes in the Labour Court has become an issue of concern and judges have expressed their concern at a trend that seems to have emerged in this regard. The trend seems to be developing into a practice or a norm in cases involving reviews of arbitration awards.*
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> *[9] While there is no rule that specifically addresses the issue of delays in prosecuting a case by an applicant, there are decisions of both this court and other courts which have held that depending on the circumstances of a given case, the administration of justice may dictate that if an applicant party unduly delays prosecuting its claim, and fails to provide acceptable reasons for the delay, the penalty may be that of dismissing the claim. See National Union of Metalworkers of SA on behalf of Nkuna & others v Wilson Drills-Bore (Pty) Ltd t/a A & G Electrical - unreported case no J268/98.* See Mothibi v Western Vaal Metropolitan Substructure [2000] 1 BLLR 85 (LC) and NUMSA & others v AS Transmissions & Steerings (Pty) Ltd (2000) 21 ILJ 327 (LAC); [1999] 12 BLLR 1237 (LAC) and Molala v Minister of Law G & Order & another 1993 (1) SA 673 (T).*

[10] Inordinate delays in litigating protract disputes, damage the interests of justice and prolong the uncertainty of those affected. The consequences that may follow if an applicant fails diligently to pursue its claim are dealt with in the case of Bezuidenhout v Johnston NO & others H (2006) 27 ILJ 2337 (LC), where Stratford AJA in Pathescope Union of SA Ltd v Mallinick 1927 AD 305 is quoted as having said:

> *'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 own courts. It is an application of the maxim vigilantibus non dormientibus lex subveniunt.'*

The court went further to say:

> *'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.'*

[11] The policy consideration that informs this approach was considered in Mohlomi v Minister of Defence 1997 (1) SA 124 (CC) at 129H-130A, wherein 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 ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared.'*

[12] 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 SA & others 1995 (3) SA 787 (N), as follows:

> *'The first is that unreasonable delay may cause prejudice to other*

parties. Harnaker v Minister of the Interior 1965 (1) SA 372 (C) at 380D; Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit Kaapstad 1978 (1) SA 13 (A) at 41. The second reason is that it is both desirable and important that finality should be reached within a reasonable time in respect of judicial and administrative decisions. Sampson v SA Railways and Habour 1933 CPD 335 at 338; the Wolgroeiers' case at 41D-E; cf Kingsborough Town Council v Thirlwell and Another 1957 (4) SA 533 (N) at 538.'

[13] The impact of delay in prosecuting cases was analysed and looked at in a much more critical manner by Flemming DJP, as he then was, in Molala v Minister of Law & Order & another 1993 (1) SA 673 (T). After assessing the approaches adopted by the various divisions of the High Court, the court found that in the Transvaal the approach followed was the one set out in the case of Bernstein v Bernstein 1948 (2) SA 205 (W) where the court 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 further agreed with the case of 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'.

[14] With regard to the approach adopted in Kuiper's case, the court found that because proving abuse of court process would be difficult, such an order would be a rarity. It would appear that the other divisions also accepted that the court had an inherent discretion whether or not to allow the party guilty of delay to continue with its dispute but that such discretion was to be exercised sparingly.

[15] In assessing the overall approach of how our system deals with delays, the court in Molala's case at 679D-F said:

'I should not refer to "system' but to the total lack in our system of attention to the effective counteracting of slackness. Our system leaves the defendant with three poor choices. One is to incur the costs of applications, perhaps not recoverable from the other party, in

order to forge ahead with litigation started by a plaintiff who to all outward appearances shows clear signs of lack of interest in the whole business. The second alternative is to hope that the surrounding facts will develop sufficient cogency to enable him to convince the Court in a formal application, often also at the defendant's expense, that the plaintiff is abusing the Court process to an extent which warrants dismissal of the action.'

[16] The focal point in considering whether to grant the order barring the employer, in this case, from proceeding further with the review application is the issue of justice and fairness to both parties. The question that then arises is whether the interest of the administration of justice in this instance dictates that the employer be barred from proceeding further with the review application."[1]

16. Van Niekerk J, in the case of ***BP Southern Africa (Pty) Ltd v National Bargaining Council for the Chemical Industry & Others*** **(2010) 31 ILJ 1337 (LC)** cited the court's approach in *Sishuba* with approval, and added 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 SA 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....'

In Molala v Minister of Law & 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

1 At 2076-8. See also

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'." [2]

17. It is also important to make reference to the approach of the LAC in ***Queenstown Fuel Distributors CC v Labuschagne NO & Others*** **(2000) 21 ILJ 166 (LAC)**. In that judgment the court was considering whether the time limit of six weeks for launching a review application in section 145(1)(a) of the Labour Relations Act 66 of 1995 ('the LRA') was directory or peremptory. After a careful analysis of the approach of the legislature to labour dispute resolution, Conradie JA concluded that the provision was directory, but that:

> *"It follows, however, from what I have said above, that condonation in the case of disputes over individual dismissals will not readily be granted. The excuse for non-compliance would have to be compelling, the case for attacking a defect in the proceedings would have to be cogent and the defect would have to be of a kind which would result in a miscarriage of justice if it were allowed to stand."*[3]

18. Added to this, it is important to mention that one of the purposes of the LRA is to promote the effective resolution of disputes.[4] A number of decisions of this court have confirmed that part of what makes a dispute resolution effective is that it is expeditious.[5] 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 of a matter to lose momentum.

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2 At 2073,[10]

3 at 174, [24]

4 Section 1(d)(iv) of the LRA.

5 See for example, ***Police & Prisons Civil Rights Union obo Sifuba v Commissioner of the SA Police Service & Others*** **(2009) 30 ILJ 1309 (LC)** at 1317,[30]; ***Equity Aviation Service (Pty) Ltd v SA Transport & Allied Workers Union & Others*** **(2009) 30 ILJ 2912 (LC)** at 2915, [14], and ***Ruijgrok v Foschini (Pty) Ltd & Another*** **(1999) 20 ILJ 1284 (LC)** at 1287,[17] to name but a few examples.

19. I am mindful of the fact that the time limit under consideration in this instance is one contained in the rules of this court and not laid down in the LRA itself, unlike in the case of *Queenstown Fuel Distributors* case, where a statutory time limit was under deliberation. [6] Nonetheless, the rule that a supplementary affidavit must be filed within 10 days of the record being made available is clearly a subsequent step in the process of prosecuting a review application, which the LRA stipulates must start within 6 weeks of the award being issued. It would be completely anomalous if the policy dictates which inform the determination of the statutory time limit, had no relevance when considering whether or not to condone later delays in advancing a review application. The objects of stipulating a six week period for launching a review application can hardly be served if the subsequent progress of the application is marked by periods of months, or even years, of inactivity which are readily indulged by the court.

20. A party defending itself against an application to dismiss a review on account of undue delay is effectively asking the court to condone its dilatoriness and similar considerations which apply to the evaluation of applications for condonation ought to be relevant in the evaluation of these applications. In this instance, the long delay of nearly two years between the incorrect filing of the transcript and the filing of the supplementary affidavit which added nothing to the merits of the review, is unexplained. A significant consideration in deciding whether or not to dismiss this review application is the casual approach adopted to the litigation by the applicant which indicates that he viewed it as a matter that could be returned to from time to time when he or his representatives chose to do so. Such long periods of inactivity cannot be reconciled with the conduct of a party that has a consistent interest in pursuing a case and takes the necessary steps to do so without undue delay.

21. Thus, as far as the extent and unreasonableness of the delay are concerned, the applicant's conduct is found seriously wanting in both respects. It is not

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6 In this regard see ***Lentsane & Others v Human Sciences Research Council*** **(2002) 23 ILJ 1433 (LC)**

at 1438,[14], in which Sutherland AJ, correctly in my view, distinguished the approach to the time limit in the rules of court for filing an answering statement to a referral as a step in the initial phase of litigation, from the approach adopted in *Queenstown Fuel Distributors* which was dealing with a statutory time limit governing review proceedings in the context of a dispute already having been determined.

expressly articulated in *Sishuba'*s case, but 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. In setting out the grounds of review in his founding affidavit, the applicant did not set out any factual basis for those grounds, but merely sets them out in the form of conclusions. Examples of this are the first two grounds of review he mentions, namely:

> "2.1 The Commissioner committed misconduct by making findings not justified on the evidence;
>
> 2.2 Gravely misunderstood evidence presented before her;…" (sic)

22. The Labour Appeal Court has made it clear in the unreported case of ***Comtech (Pty) Ltd v Commisioner Shaun Molony N.O. & Others*** **(Case no DA 12/05, dated 21 December 2007)** that it is not sufficient for a party to simply relate conclusions of law in the founding papers for a review application. A party must set out the factual grounds on which it seeks to base its review. While it may be excusable in a founding affidavit to state limited grounds of review and in less detail, by the time an applicant has the record of proceedings it must then make up for the deficiencies in the founding affidavit and set out the factual basis for its grounds of review in full. When it came to his supplementary affidavit, the applicant did not supplement or amend the grounds of review set out in the founding affidavit, nor did he lay a factual foundation for the grounds set out in the founding affidavit. On the approach of the LAC in the *Comtech* case, no factual basis was provided for the review application. It was only in his heads of argument that the applicant for the first time set out a factual basis for his claim.

23. I am bound to follow the approach of the LAC in regard to the assessment of the prospects of success and conclude that the applicant failed to provide any factual basis for his grounds of review in his founding papers. Accordingly, it is not necessary, on the basis of the *Comtech* approach, to consider the merits of the case set out later, and for the first time, in the applicant's heads of argument. Even so, I am satisfied that a reading of the commissioner's award and the record shows that the commissioner did not act unreasonably in concluding that

the applicant's dismissal was substantively and procedurally unfair.

24. The essence of the case was that the applicant was dismissed for not completing physical stock counts which he had more than once been instructed to perform. His defence was that he was not properly trained and it was not part of his duties. The arbitrator carefully considered the evidence and concluded that performing physical stock counts was part of the applicant's duties and the instructions to him to conduct the same were reasonable. The arbitrator found that the applicant had not provided an acceptable explanation why he had never previously raised with his employer his alleged inability, lack of training, or that it was not part of his duties to perform physical stock counts. The arbitrator noted too the inadequacies of the applicant's own evidence at the hearing and his failure to put part of his defence to the employer's witnesses. Further, the arbitrator carefully analysed the evidence of alleged procedural unfairness before concluding that the dismissal was procedurally unfair. On balance, even if the grounds of review set out in the applicant's heads of argument had to be considered, contrary to the approach of the LAC in *Comtech*, I do not believe that they demonstrate the applicant would have a reasonable prospect of success if the review application were to proceed.

25. The applicant did point out that the confirmatory affidavit of Ms Saunders in Afrox's Rule 11 application had not been signed. As the material facts on which this matter is decided are largely not in dispute I do not think that alters the result. In any event, this defect was cured when a signed affidavit was subsequently filed.

26. In conclusion, whilst the late initial referral of the review application at the end of May 2006 is condoned, the delays in prosecuting the matter thereafter cannot be excused. For the reasons set out above, I find that there are good grounds for dismissing the applicant's review application in this matter, based on the extensive and repeated delays in the prosecution of the matter by the applicant, which he has not sought to explain. Moreover, even if consideration is given to the merits of the review application there seems to be little reasonable prospect of it succeeding. There is also nothing of special importance about the case, other than its obvious significance to the parties, which would warrant allowing the matter to proceed further.

27. On account of the applicant being a recipient of legal aid, no order is made as to costs.

Order

28. In the light of the aforegoing, it is ordered that:

    28.1. the late filing of the review application on 26 May 2006 is condoned;

    28.2. the application to dismiss the review application is granted, and

    28.3. no order is made as to costs.

ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of hearing: 21 September 2010

Date of Judgment: 29 September 2010

Appearances:

For the Applicant: Mr Khonou instructed by the Johannesburg Justice Centre

For the Third Respondent: Mr Van As instructed by Webber Wentzel Attorneys