

**IN THE LABOUR COURT OF SOUTH AFRICA**  
**HELD IN JOHANNESBURG**

**REPORTABLE**

**CASE NO: JR927/01**

In the matter between:

**NEDCOR BANK LIMITED**

**APPLICANT**

**AND**

**JAMES GEORGE HARRIS**

**1<sup>ST</sup> RESPONDENT**

**COMMISSIONER BHEKI KHUMALO**

**2<sup>ND</sup> RESPONDENT**

**COMMISSION FOR CONCILIATION**

**MEDIATION AND ARBITRATION**

**3<sup>RD</sup> RESPONDENT**

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**JUDGMENT**

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**Molahlehi J**

**Introduction**

[1] This is an opposed application to review and set aside the arbitration award issued by the second respondent (the commissioner) under case number GA115998 and dated 14<sup>th</sup> May 2001. In that arbitration award the commissioner found the dismissal of the first respondent to have been unfair and directed that he be reinstated.

**Background facts**

[2] The first respondent resigned his employment with the applicant on 12<sup>th</sup> October 2000, in circumstances which he alleged constituted a constructive dismissal.

Thereafter, he referred the dispute regarding the alleged constructive dismissal to the second respondent (the CCMA) in terms of the provisions of the Labour Relations Act, number 66 of 1995 (the LRA). Failure to resolve the dispute at conciliation resulted in it being arbitrated upon by the commissioner.

- [3] The resignation by first respondent concerned in general his dissatisfaction with his immediate superior, Mrs Schroeder and in particular centered on the implementation of a performance improvement program (the PIP). The essence of the case of first respondent is that his resignation was induced by the conduct of Mrs Schoeder in particular because of the manner in which she applied the PIP both before and after his transfer.
- [4] The problem between the two seems to have started with the low performance rating which Mrs Schoeder gave to first respondent, implying that his performance was poor. Because of this the first respondent instituted grievance proceedings against Mrs Schoeder. Being unhappy with the outcome the grievance process the first respondent request a transferred to another branch of the respondent. Soon after joining the Randburg branch his senior resigned and was replaced by Mrs Schoeder.
- [5] According to the first respondent, immediately on resumption of duties at Randburg, Mrs Schoeder changed the system and added more responsibilities to his job description. She also raised the targets which the first respondent had to meet per month to R5 million. The added responsibilities were according to the first respondent time consuming and had a negative influence on him reaching

those targets. The first respondent further complained that Mrs Schoeder placed him on the PIP and gave him a rating of 1 (one).

[6] The first respondent then lodged a grievance against Mrs Schoeder which was referred to the internal Ombudsman for adjudication. The Ombudsman found the conduct of Mrs Schoeder to be unfair and unjust. It seems the applicant was not satisfied with the decision of the Ombudsman and accordingly referred the matter to arbitration which found that there was nothing unfair about the conduct of Mrs Schoeder.

[7] The first respondent being unhappy with the outcome of the arbitration award requested another transfer. He was transferred to what is referred to as the Boss team in Edgardale. On his arrival there he found Mrs Schoeder who insisted that his immediate supervisor should place him on the PIP program resulting in tension developing between the two of them. It was for this reason that the first respondent resigned and thereafter referred a constructive dismissal dispute to the CCMA. And as indicated the CCMA, arbitrated upon the dispute, found the dismissal to have been unfair and directed that the applicant to reinstate the first respondent.

### **Point in limine**

[8] The first respondent in his heads of argument raised a point *in limine* concerning the delay on the part of the applicant in prosecuting the review application. The applicant filed an affidavit wherein it sought to explain the delay. The first respondent opposed admission of the affidavit of the applicant explaining the delay. On 24<sup>th</sup> April 2009, this Court ruled against the opposition and admitted

the affidavit. The first respondent was granted leave to file his answer to that affidavit.

[9] The brief background to the delay is as follows: As indicated above after resigning from his employ the first respondent referred a dispute to the CCMA which was ultimately arbitrated on and the award issued on the 16<sup>th</sup> May 2000. The applicant challenged the outcome of the arbitration award by launching the review application on 9<sup>th</sup> July 2001.

[10] For a period of close to two years after filing the review the applicant did nothing to progress that application. The first time that some action was taken by the applicant was on 1<sup>st</sup> April 2003, when the applicant filed the record of the arbitration proceedings. Two days or so after filing the record of the arbitration proceedings the applicant filed a notice in terms of Rule 7A (8) (b) of the Rules of the Court indicating that it stands by the notice of motion. In response the first respondent filed his answering affidavit which as indicted earlier was three days late, on the 7<sup>th</sup> May 2003. It may also be worth mentioning that the applicant never filed a replying affidavit.

[11] A year after the filing of the answering affidavit, nothing having happened, the Registrar of the Labour Court issued a directive on 3<sup>rd</sup> June 2004 which recorded that the review was unopposed and calling upon applicant to file heads of argument within 5 days. The directive was sent only to the applicant. The applicant did not respond to this directive.

[12] Again, almost a year later and on 29<sup>th</sup> July 2005 the Registrar issued the second directive which now recorded the matter as opposed and called upon both parties

to file their heads of arguments. There was no response to that directive from both parties.

[13] A further directive was issued almost a year later on 12<sup>th</sup> July 2006, by the Registrar which also solicited no response from any of the parties. The same was repeated on 9<sup>th</sup> February 2008 by the Registrar calling upon both parties to deliver their heads of argument within 7 days. The applicant filed its head of argument on 5<sup>th</sup> May 2008 and the first respondent his on 27<sup>th</sup> June 2008.

[14] The matter was then set down on notice to both parties for the 12<sup>th</sup> July 2006. On that day the matter was postponed *sine die* apparently at the instance of the applicant. The matter came before this Court on the 24<sup>th</sup> April 2009. The matter was on that date postponed further to afford the first respondent an opportunity to answer to the applicant's affidavit explaining the delay in the prosecution of its review application.

### **The applicable legal principles**

[15] 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. The approach to be adopted when dealing with the issue of unreasonable delay was discussed in *Solidarity & Others v ESKOM Holdings Ltd* (2008) 29 ILJ 1450 (LAC). In that case the LAC quoted with approval what was said in *Associated Institutions Pension Fund & others v Van Zyl & others* 2005 (2) SA 302 (SCA), where the Court in dealing with the issue of unreasonable delay in initiating proceedings had the following to say:

*“[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'être 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).*

*[47] The scope and content of the rule has been the subject of investigation in two decisions of this Court. They are the Wolgroeiers case and Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n ander 1986 (2) SA 57 (A). As appears from these two cases and the numerous decisions in which they have been followed, application of 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 at 39C - D.)*

[48] *The reasonableness or unreasonableness of a delay is entire dependent on the facts and circumstances of any particular case (See eg Setsokosane at 86G). The investigation into the reasonableness of the delay has nothing to do with the Court's discretion. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of that case, the delay was reasonable. Though this question does imply a value judgment it is not to be equated with the judicial discretion involved in the next question, if it arises, namely, whether a delay which has been found to be unreasonable, should be condoned (see Setsokosane at 86E.)*

[16] In *Ivor Michael Karan t/a Karan Beef Feedlot v John William Randal* unreported case number JS347/06, the Court held that from a policy perspective there are two principle 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. The first reason 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 *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).

[17] It is trite that the Court has the power to grant an indulgence for 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).

[18] It is clear from the above that the applicant has a duty to ensure that a claim is processed without unreasonable delays to avoid prejudice on the other party. However, as Van Niekerk J observed in *Karan Beef Feedlot* supra at paragraph [9] of that judgment:

“[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.”*

*[10] 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.”*

[19] In the present instance there is no doubt that the applicant has been dilatory in the prosecution of its review application. The facts also reveal that the first respondent also contributed to the delay which suggests that he was not keen in having the matter finalized as soon as was possible. Whilst the explanation tendered by the applicant is not satisfactory there are however good prospects of success on the merits of the review. It is for this reason and the fact that the first respondent contributed to the delay, failed take any step to compel the applicant to take further steps in the further prosecution of the review, that this Court declines to intervene in favour of the first respondent.

## Grounds for review

[20] The applicant contended that the decision reached by arbitrator is one which “*no reasonable arbitrator could have come to.*” The applicant contended in this regard that the commissioner in considering whether the employee was constructively dismissed or not, accepted evidence outside of the ambit of the agreed issue. According to the applicant because of the agreement reached in the pre-arbitration minutes it did not adduce evidence to rebut the employee’s allegations that:

- (a) he was dissatisfied about his performance ratings,
- (b) dissatisfaction with the applicant's Human Resources personnel,
- (c) he had a grievance with his manager,
- (d) he had referred his complaint to the applicant's ombudsman, and
- (e) the referral by the referral of the dispute to the CCMA regarding the application of the PIP program.

[21] It was also for the same reason that the applicant confined its evidence to the implementation and purpose of the PIP program to support the contention that the PIP program was a legitimate and designed to monitor the performance of an employee in circumstances where it was of the view that an employee's performance was unsatisfactory.

[22] The applicant further attacked the award on the basis that the commissioner failed to appreciate the nature of the dispute he was required to apply his mind to. This attack is based on the contention that the applicant’s version of events remained undisputed and therefore there was no basis for accepted the

employee's version that the applicant sought to use the PIP program notwithstanding the fact that the employee had been transferred to another department within the applicant's bank. The inquiry into employee's dissatisfaction with the applicant's human resources personnel, his grievance with his manager, the referral of his complaint to the applicant's ombudsman and the referral of the dispute to the CCMA regarding the implementation of the PIP program were according to the applicant entirely irrelevant to the enquiry before the commissioner.

[23] The other ground upon which the applicant relies on in its attack of the award is that the commissioner committed a gross misconduct in the arbitration proceedings in finding that the employee's version or evidence remains undisputed. The version of the employee was according to the applicant irrelevant to the enquiry as to whether or not the implementation of the PIP program constituted grounds for the employee to contend that he was constructively dismissed. The applicant did not dispute having implemented the PIP but argued that its implementation was not evidence that it had the intention to make the employee's continued employment intolerable.

[24] It was argued for the applicant that the award to reinstate the employee who had resigned his employment is not justifiable and neither were the provisions of Section 194(2) applicable as the applicant was precluded from implementing a fair procedure due to the fact that the applicant resigned.

### **The principles governing constructive dismissal**

[25] The duty to establish the existence of a dismissal in terms section 192 (1) of the Labour Relations Act 66 of 1995 (LRA), rests with the employee. The employee has to establish the existence of the dismissal by showing that he or she terminated the employment relationship because the employer had in terms of section 186(1) (e) of the LRA made continued employment intolerable. Thus the onus to show that the dismissal was constructive because the employer had made the continued working relationship intolerable rests with the employee. See *Sappi Craft (Pty) Ltd t/a Tugela Mills v Majaka NO & others* (1998) 19 ILJ 1240 (LC) and *Secunda Supermarket CC t/a Secunda Spar & others v Dreyer NO & others* (1998) 19 ILJ 1584 (LC); [1998] 10 BLLR 1062 (LC). To succeed in the claim that he or she was constructively dismissed the employee has to show that objectively assessed the conditions at the work place were so intolerable that he or she had no other option but to terminate the employment relationship.

[26] The test for determining whether or not an employee was constructively dismissed was set out in *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC), at paragraph [37] as follows:

*“[37] The enquiry [is] whether the appellant, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is not necessary to show that the employer intended any repudiation of a contract: the court's function is to look at the employer's conduct as a whole and*

*determine whether . . . its effect, judged reasonable and sensibly is such that the employee cannot be expected to put up with it.”*

[27] It is clear from the above that the objective assessment of the employer's conduct that may have made the continued employment intolerable has to be assessed in its totality and not piece meal. In this respect the Supreme Court of Appeal in the case of *Murray v Minister of Defense (2008) 29 ILJ 1369 (SCA)*, held that in assessing whether the conduct of the employer made the relationship with the employee intolerable, the Court should not fragment employee's complaints, in other words consider them one by one in isolation and conclude that each was neither pivotal to employee's resignation nor rendered his position intolerable. The Court held that the conduct of the employer must be considered as a whole including its cumulative impact on whether its effect judged reasonably and sensibly, was such that the employee could not be expected to put up with it. The intolerable conditions which the employee complained about must have been of employer's making.

[28] In *Murray supra* the SCA was dealing with constructive dismissal of the SA Navy employee which is not covered by the provisions section 186(1) (e) of the LRA but by the common law contract of employment. In applying the concept of constructive dismissal as adopted from the English law and subsequently codified by the LRA, the SCA found that the concept was applicable to the common law contract of employment and in this regard found that the employer had the duty of fair dealing with an employee.

[29] The employee in *Murray supra* had in the proceedings before the High Court contended that he had been constructively dismissed following a series of incidents which occurred from September 1993 to June 1997, this ultimately led to his resignation. The incidents which the employee complained about included his arrest and the holding of a court martial which was discontinued because there was no *prima facie* evidence against him. The other complaints were about; his promotion to the rank of commander being withheld and being removed from his position of commander of the military police unit, Simon's Town, and posted as a supernumary at the naval staff college, Muizenberg, the downgrading of his post at the military police unit etc. The High Court, weighed each individual complaint of the employee and held that none of them rendered the appellant's position intolerable or caused him to resign. The decision of the High Court was overturned on appeal by the SCA which found that the cumulative incidents of the conduct of the employer created intolerable conditions for the employee. In arriving at that conclusion the SCA reasoned at paragraph 13 that:

*“[13] It deserves emphasis that the mere fact that an employee resigns because work has become intolerable does not by itself make for constructive dismissal. For one thing, the employer may not have control over what makes conditions intolerable. So the critical circumstance must have been of the employer's making. But even if the employer is responsible, it may not be to blame. There are many things an employer may fairly and reasonably do that may make an*

*employee's position intolerable. More is needed: the employer must be culpably responsible in some way for the intolerable conditions: the conduct must (in the formulation the courts have adopted) have lacked 'reasonable and proper cause. Culpability does not mean that the employer must have wanted or intended to get rid of the employee, though in many instances of constructive dismissal that is the case.'"*

[30] The other aspect to consider in determining the existence of constructive dismissal is whether or not the employee had no option but to resign in order, as Grogan in his Workplace Law (4 ed) at 105, puts it, "*to protect his or her interests.*" In *Foschini Group v Commission for Conciliation, Mediation & Arbitration & Others* (2008) 29 ILJ 1515 (LC), NeL AJ, as he then was, quoted with approval what was said in *Aldendorf v Outspan International Ltd* (1997) 18 ILJ 810 (CCMA), where the commissioner had the following to say:

*"[W]here employees could reasonably have lodged a grievance regarding the cause of the unhappiness, and failed to do so before resigning, they may be hard put to persuade the court or arbitrator that they had no option but to resign."*

[31] In addition to determining whether the conduct of the employer has made the continued employment relationship intolerable, the commissioner or arbitrator has to determine whether such a dismissal was unfair. *Smithline Beecham (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2000) 21 ILJ 988 (LC).

[32] Pillay AJA, in *Albany Bakeries v Van Wyk & others* (2005) 26 ILJ 2142 (LAC) in the middle of paragraph [28] observed as follows:

*“ . . . It is, firstly, also desirable that any solution falling short of resignation be attempted as it preserves the working relationship, which is clearly what both parties presumably desired. Secondly, from the very concept of intolerability one must conclude that it does not exist if there is a practical or legal solution to the allegedly oppressive conduct. Finally, it might well smack of opportunism for an employee to leave when he alleges that life is intolerable but there is a perfectly legitimate avenue open to alleviate his distress and solve his problem.”*

### **Evaluation of the arbitration award**

[33] In arriving at the conclusion that the dismissal of the first respondent was unfair the commissioner reasoned that it was senseless to apply the PIP generated from another section on the employee after he was transferred to another section. The commissioner further found with regard to the implementation of the PIP programme that *“the respondent acted unreasonably and unfair in that it sought to apply the programme arbitrarily.”*

[34] In considering the facts which were before him the commissioner found that:

*“On the probabilities therefore I accept that the applicant’s version that the respondent sought to use the (PIP) from the Vehicle Retention Unit on him while at Boss section. Therefore the applicant perceived the risk as real if he were to continue with employment (My underlying). Also the applicant’s version that the manager prohibited him from pursuing the*

*dispute through the CCMA while under his section was not refuted. This added to his reason for resignation. I therefore find that that the applicant was constructively dismissed within the definition of the Act referred to above.”*

- [35] In my view the arbitration award of the commissioner stands to be reviewed because it does not meet the reasonableness standard set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (2007) 28 ILJ 2405 (CC)*. The arbitration award further stands to be reviewed because the commissioner committed a gross irregularity in that he exceeded the powers given to him by the parties in their pre-arbitration minute and thereby misconceived the nature of the dispute before him.
- [36] The arbitration award is firstly unreasonable because the commissioner in a fundamental way misconceived the test to apply when considering the issue of constructive dismissal. The commissioner failed to determine whether the conditions at the workplace, at the time of the resignation of the first respondent, were so intolerable that he had no option but to resign. The commissioner in assessing the reason for the resignation did not do so in the context of evaluating the conditions that prevailed at the workplace at the time the applicant submitted his resignation but rather applied what may be referred to as the “*perception of real risk to the continued employment.*” This is not the test for determining constructive dismissal.
- [37] Secondly, the commissioner exceeded his powers and thus committed a gross irregularity in that he failed to confine himself to the terms of the pre-arbitration

agreement concluded by the parties. In preparation for the arbitration proceedings and with the view to expediting the proceedings the parties convened a pre-arbitration meeting and recorded their agreement in a pre-arbitration minute. The relevant part of the minutes of the pre-arbitration meeting reads as follows:

*“Whether the Performance Improvement Programme instituted by the Customer Retention unit made continued employment intolerable and constituted constructive dismissal.”*

- [38] The powers of the commissioner were thus confined to determining whether the implementation of the PIP programme, specifically on the work of the first respondent created conditions so intolerable that he had no option but to resign. The commissioner failed to appreciate the nature of the dispute he was required to apply his mind to. Had he appreciated the nature of the dispute before him he ought, in particular, to have considered the reason for resignation which was not based on the intolerable working conditions but on the poor performance rating and the implementation of the PIP. In this respect the first paragraph of the letter of resignation of the first respondent was critical in the assessment of whether or not the reason for the resignation was because of the intolerable working conditions or something else. The letter reads as follows:

*“Resignation J. G Harris Employee nb010799*

*I hereby confirm my resignation is due to the fact that I want to pursue the matter regarding my unfair Performance rating and PIP which were put in place by ABF Retention Unit, Branch no 9443.”*

[39] It is clear from the above that the first respondent resigned because he wanted to challenge the performance rating he had received and not because the conditions at the workplace were unbearable.

[40] In the light of the above the arbitration award of the commissioner as indicated earlier stands to be reviewed and set aside and be substituted with the appropriate award. I however do not believe that it would be appropriate to allow the costs to follow the results.

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

- (i) The point *in limine*, seeking to have the review application dismissed because of the delay in its prosecution is dismissed.
- (ii) The arbitration award issued by second respondent is reviewed and set aside.
- (iii) The arbitration award of the second respondent is substituted with the following award:

- “1. The applicant has failed to show that the reason for his resignation was due to the implementation of the PIP making the continued employment relationship intolerable.*
- 2. The applicant was not dismissed but resigned.*
- 3. The CCMA lacks jurisdiction to entertain this dispute.”*

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**Molahlehi J**

Date of Hearing : 12<sup>th</sup> August 2009

Date of Judgment : 14<sup>th</sup> December 2009

**Appearances**

For the Applicant : Adv Peter Buiski

Instructed by : Cliffe Dekker Hofmeyr Inc

For the Respondent: Adv G Fourie

Instructed by : Howes Incorporated Attorneys