

Not reportable

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

CASE NO.J269/08

In the matter between

J J VAN TONDER

Applicant

and

THE MINISTER OF LABOUR

First Respondent

THE DEPARTMENT OF LABOUR

Second Respondent

**THE DISTRICT GENERAL OF THE
DEPARTMENT OF LABOUR**

Third Respondent

JUDGMENT

BHOOLA J:

Introduction

[1] This is an application in terms of Rule 11 of the Rules for the Conduct of Proceedings in the Labour Court (“the Rules”), for an order dismissing the review instituted by the first respondent as well as an order in terms of section 158(1)(c) of the Labour Relations Act 66 of 1995 (“the LRA”), making the arbitration award of the arbitrator dated 24 October 2007 (under case number PSGA1453-0-06/07) an order of this court.

[2] The application is opposed by first and second respondents (“the respondents”).

Factual Background

[3] The applicant was dismissed on 12 March 2007 from his employment as an official of the second respondent. He referred a dispute based on his unfair dismissal to arbitration under the jurisdiction of the General Public Service Sectoral Bargaining Council ("the Bargaining Council"). An award was issued on 24 October 2007 ordering the respondents to reinstate him.

[4] The applicant was informed when he tendered his services to the second respondent ("the Department") on 5 November 2007 that the respondents were seeking a review of the arbitration award.

[5] On 12 February 2008 the applicant served and filed his application in terms of section 158(1)(c) to make the award an order of court. The respondents filed a notice of opposition on 14 March 2008. However, the notice was not accompanied by an opposing affidavit. The State Attorney filed correspondence stating that the opposing affidavit as well as the review application would be filed "*in due course*".

[6] On or about 14 March 2008 and in response to the s 158(1)(c) application the Bargaining Council filed the record of the arbitration with the Registrar. The applicant reminded the respondents on 18 June 2008 that the record was available. The respondents however only became aware of this on 4 September 2008.

[7] On 12 May 2008 the respondents' brought a review application. This was more than six months after the award and only after being requested by the applicant to proceed with the review and after he had filed his s 158(1)(c) application. Although the notice of motion did not set out any relief sought in respect of condonation, the founding affidavit of Ms Roqoza set out a detailed explanation for the delay, which related mainly to the lack of capacity and resources in the Department.

[8] The s 158(1)(c) application was enrolled for hearing on 4 September 2008. The court ordered that it be heard together with the review and set a time table for the filing of further pleadings process. It is common cause that the first respondent did not comply with the court order.

Delay in prosecution of the review

[9] After 4 September 2008 the parties engaged in correspondence regarding the record. On 23 September the respondents' attorneys advised the applicant that the record would only be available by 15 October 2008 and proposed alternative dates for progressing the matter contrary to the order of 4 September. On 2 October 2008 the applicant's attorneys suggested that the matter is being willfully delayed and made a counter-proposal to the dates suggested. No reply was forthcoming. The applicant's attorneys send further correspondence on 15, 21 and 31 October 2008 as well as making various telephonic attempts to contact the State Attorney. The State Attorney alleges that a reply had in fact been sent on 14 October explaining the delay with the record and rejecting the counter proposal regarding the amended time periods for filing further pleadings. This letter appears to only have been received by the applicant on 6 November 2008.

[10] On 10 November 2008 the applicant was informed that the record had been filed on 13 October 2008. This notification followed more than a month after the actual filing.

[11] On 17 December 2008 the first respondent filed a notice in terms of Rule 7A seeking an order to the effect that the applicant should assist with reconstructing the record as well as an order that "*condonation be granted for the late filing of this affidavit as well as the founding affidavit*". This was followed by a Supplementary Founding Affidavit in terms of Rule 7A(8)(a) which the respondents sought to substitute for the founding affidavit of Ms Roqoza who had since left the Department. The respondents submitted that the reference to Rule 7A(8)(a) had been an error in that the Supplementary Founding affidavit was in fact a pleading in the review application. In this affidavit the numerous delays are explained but once again there is no notice of application in which condonation is sought.

[12] The further delays in prosecuting the review are explained in Supplementary Founding Affidavit *inter alia* as follows :

- (a) *The transmittal of the record to the Registrar only came to the attention of the first respondent's attorneys of record ("the State Attorney") when the matter was enrolled on 4 September 2008 as it was filed as a result of the Bargaining Council being cited as a party to the section 158(1)(c) application;*
- (b) *On the same day the record was uplifted and sent for transcription. In addition, the parties agreed to certain timeframes for the expeditious prosecution of the review. This included obtaining a transcript of the record on or before 25 September 2008 and filing a supplementary affidavit on 14 October 2008. This agreement was duly made an order of court;*
- (c) *Thereafter various attempts were made to obtain the record from the transcribers without success and correspondence between the parties ensued. The transcriber's certificate lists the numerous problems encountered during the transcription and the record was finally only ready on 19 October 2008 and made available to the State Attorney on 29 October 2008. It was collected and served on the applicant on 30 October 2008. The first respondent's supplementary affidavit would then have been due within 10 days of receipt thereof i.e. on 14 November 2008.*
- (d) *Thereafter it transpired that the documentary evidence submitted to the arbitration did not form part of the record and the State Attorney sought assistance from the applicant in this regard. Despite several requests no assistance was forthcoming from the applicant or his legal representatives.*

[13] Despite these allegations, as at 5 January 2009 the applicant informed the respondents that the record had not been filed with the Registrar, and suggested that the State Attorney meets with the applicant's advisor for the purposes of reconstructing the bundle of documents comprising part of the record. In a reply dated 8 January 2009 the State Attorney denied that it is in willful default and stated that numerous enquiries had been made from the transcribers in regard to the availability of the record without success.

[14] The respondents' filed a Rule 7A notice on 17 December 2008 which was allegedly only received by the applicant's attorneys on 6 January 2009 since it did not contain a reference number and was sent to the wrong office of the applicant's attorneys.

[15] On 19 January 2009 the applicant informed the respondents that it had attempted to uplift a copy of the record from the Registrar without success. After further correspondence and telephone calls (that appear to have been ignored by the respondents' attorneys) the applicant finally obtained a copy of the record from the respondents on 22 January 2009. However, since the documentary bundles were missing the applicant invited the respondents to meet for purposes of preparing a complete record. This request appears to have been made on 12 February, 20 February and 20 March 2009. No response appears to have been forthcoming. Thereafter the respondents were notified of the applicant's intention to bring this Rule 11 application. Still no response was forthcoming.

[16] On 27 May 2009 the applicant served its Rule 11 application in which it also sought ancillary relief compelling the respondents to meet for the purposes of preparing a complete record. The parties met on 14 July 2009 when agreement was reached as to steps to secure the expeditious resolution of the dispute. It was agreed, *inter alia*, that the documentary bundles required to complete the record would be copied by the applicant's attorney for the respondents at their cost; that a Rule 7A(8)(a) notice would be filed by the respondents on or before 7 August 2009 and that thereafter the time periods in Rule 7A would apply. A dispute then ensued about copying costs and delivery of the documentary bundles necessitating further correspondence in July 2009. It would appear that the respondents took more than ten days to collect the documentary bundles after being informed that they were ready.

[17] On 11 September 2009 the respondents filed a further Supplementary Founding Affidavit in terms of Rule 7A(8)(a), seeking that this be substituted for all previous affidavits. This affidavit was filed more than a month later than was agreed between the parties but again no condonation was sought nor was any good cause shown otherwise for the delay.

[18] Given the fact that the parties had by this stage made progress with reconstructing the documentary bundles this relief was no longer necessary and the applicant filed an amended Rule 11 application on 21 September 2009. On 14

October 2009, seven day's out of the ten day period required for notice of opposition the respondents' noted their opposition. However, yet again the notice of opposition was not accompanied by an opposing affidavit and this only followed more than a month later on 18 November 2009. Once again the respondents' did not apply for condonation for the late filing and in these circumstances the applicant submitted that there was no opposition to the Rule 11 application before the court.

The delays and condonation

[19] Has good cause for the delays been shown notwithstanding the absence of a formal condonation application ? The respondents submitted that they were not able to comply with the 4 September court order in that the record was only completed on 19 October 2008 and received by them on 30 October. They then requested (on 6 November 2008) that the applicant meets with them for the purposes of reconstruction. However, as they were in default of the 4 September order they filed a Supplementary Founding Affidavit in terms of Rule 7A(8)(a) in December 2008 in which they sought condonation as well as an order compelling the applicant to meet with them in order to reconstruct the record. Thereafter the record was finally completed and on 11 September 2009 they filed the Further Supplementary Affidavit in terms of Rule 7A(8), and on 7 November 2009 a Supplementary Opposing Affidavit to the Rule 11 amended notice of motion. They submitted that in the absence of any opposition to the review application this court was obliged to treat it as unopposed. The submission in essence is that although no formal notice of application seeking condonation was filed condonation should be granted for the reasons set out in the Supplementary Founding Affidavit, Further Supplementary Affidavit and Supplementary Opposing Affidavit ('the latter affidavits').

[20] However, even if I am to have regard to whether good cause as required by Rule 12 (3) has been shown in the latter affidavits in line with an approach that prefers substance over form, the fact that the respondents have in so many instances failed to comply with the Rules of this court is disconcerting. Furthermore, only the most scant references are made in the latter affidavits to grounds for condonation. Although an explanation for the delay in instituting the review appears from the affidavit of Ms Roqoza, which refers mainly to lack of resources and

capacity in the Department, this cannot be considered to be relevant to condonation as her affidavit has been replaced by the (erroneously named) Supplementary Founding Affidavit in terms of Rule 7A(8)(a). The allegations made in the latter affidavits do not in my view meet the requirements for condonation set out in *National Union of Metalworkers of South Africa and others v Crisbuid (Pty) Ltd* (2008) 29 ILJ 694 (LC) para [5] –[9].

[21] The explanation for many of the delays (for instance the time taken to collect the documentary bundles, the two month delay in filing the review, the regular delays in filing affidavits, for example) is simply non-existent nor is any attempt made to explain the delays occasioned as a result of the lack of courtesy in replying to correspondence or returning telephone calls. This implies a rather complacent attitude to compliance with the Rules and procedures of this court, as well as an acrimonious attitude to litigation that is not conducive to labour dispute resolution. The failure to comply with the Rules for proceedings in this court can hardly be countenanced from an entity that is the custodian of legislation that has at its core the expeditious resolution of labour disputes. Although the delay in bringing the review application in itself is not unreasonable the tardiness and obstructiveness that prevailed in the prosecution of the review are unacceptable. It took more than a year for a semblance of progress to be made with finalising the record and making it available to the applicant. There is by no means an exculpatory explanation for these delays and in these circumstances it would be competent to dispose of the matter on the basis that no application for condonation for the late filing of the review, or late opposition to the section 158(1) (c) application, nor the late filing of the latter affidavits is properly before me. This would in itself justify the granting of relief.

[22] However, even if it might be competent to dismiss the Rule 11 application and consider the merits of the review, more than three years after the award reinstating the applicant the record is incomplete and the review is not ripe for hearing. In any event, I agree with the applicant that unless and until the respondents obtain condonation for the late filing of every pleading or notice in this matter there cannot be said to be a review properly pending before this Court.

[23] It has been accepted by the Labour Appeal Court that in certain

circumstances the conduct of the respondents and the lengthy delay in prosecuting the review should result in the drastic remedy barring their cause of action. In *Sacca (Pty) Ltd v Thipe & another* (1999) 20 ILJ 2845 (LAC) at paras [37] and [38] Conradie JA held, in the absence of a failure to comply with a time-limit imposed by a rule of court, that an applicant “*should put before the court an explanation of why the delay of three years and four months in producing a notice of application, a period which prima facie appeared to be outrageously long, should not in truth, and having regard to their circumstances, be regarded as so long that it deprived them of the right to proceed....*”. Conradie JA stated that what was required was for the applicant to show “*an exculpatory explanation which might have made the long delay less open to censure*”.

Strategy to delay

[24] It is apparent from the facts that in addition to the inordinate delays in prosecuting the review the fact that the review was brought more than six months after the arbitration award was issued and only after the applicant had filed its application in terms of section 158 (1)(c) could in itself be construed as a less than genuine intention to proceed with the review. This is a pattern of conduct on its part of concerted attempts, the applicant submitted, of the intention to frustrate him in seeking relief: see *NEHAWU obo Vermeulen v Director General : Department of Labour* [2005] 8 BLLR 840 (C). The respondents however denied that they have adopted a policy to review all awards or that the appointment of an incumbent to the applicant’s former position constituted a *per se* bar to compliance with the award should it be confirmed on review. The Department, it was submitted rather glibly, would simply have to bear the cost of employing two employees in the same position.

[25] Whether or not there is any strategy to delay such matters, the existence of which was denied by the respondents and which is not necessary for me to determine, it cannot be disputed that the applicant has suffered prejudice arising from the first respondent’s failure to date to comply with the award. The applicant alleges that he has not earned any income since his dismissal and that the tardiness and litigious attitudes prevalent from the respondents has frustrated him in his quest

for finality in the dispute. Moreover, the appointment of a permanent incumbent to his disputed position implies an intention on the part of the respondents' not to comply with any order in this regard. It cannot be disputed that the manner in which the prosecution of the review has been conducted has been tardy, that no good cause has been shown for much of the delays, and that the delays have compromised the objective of expeditious dispute resolution entrenched in the LRA. In this regard it was held as follows in *Professional Security Enforcement v Namusi* [1999] 6 BLLR 610 (LC) at 614 :

"The object of expeditiously resolving labour disputes would certainly be compromised were employers to be expected to act with impunity to ignore awards indefinitely without taking action under ss 144 or 145, and then block the employee when he ultimately seeks to have the award enforced under s158(1)(c)."

Rule 11 application

[26] It is clear from the facts that the respondents were dilatory in prosecuting the review. It is trite that labour disputes must be resolved expeditiously. The Supreme Court of Appeal in *Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 (SCA) recognized that an aggrieved party's undue and unreasonable delay in initiating review proceedings may cause prejudice to other parties to the proceedings and that in such cases, a court should have the power to refuse to entertain the review. It is clear that the applicant has been prejudiced by the unreasonable and continuous delays in his enforcement of his right to reinstatement arising from the arbitration award.

[27] Insofar as the respondents contend that the applicant is likewise remiss in that it had not to date filed its opposition to the review, the applicant submits that the review cannot proceed if the record is defective. In this regard it is trite that the first respondent is *dominus litis* in the review and as such bears a duty not only to file a record, but to file a complete record. In *NEHAWU obo Vermeulen v Director-General: Department of Labour* (Supra), Murphy AJ furthermore expressed the view that the *dominus litis* should act, and that in the context of its failure to do so, or to offer a convincing explanation for its inertia leads justifiably to the conclusion that it has been unacceptably tardy in prosecuting the case (at [27]). The court was there dealing with the employer's tardiness in proceeding with a review, and Murphy AJ

held : “*The applicants cannot be expected to bear the brunt of its tardiness, especially when legislative policy favours the expeditious resolution of disputes*”. Although the conduct of the applicant and his representatives (prior to appointment of his attorneys of record) could also have been more co-operative in various instances, this does not detract from the fact that the respondents are *dominus* in the review and it is their conduct that must be met with the ultimate sanction of barring of review. Indeed this is a drastic remedy but would in the circumstances appear to me to be justified.

[28] Therefore, I make the following order:

1. The Rule 11 application succeeds;
2. The arbitration award of 24 October 2007 is made an order of court in terms of section 158(1)(c) of the Act ;
3. The first and second respondents are to pay the applicant’s costs.

BHOOLA J

JUDGE OF THE LABOUR COURT

DATE OF HEARING: 2 November 2010

DATE OF JUDGMENT: 23 December 2010

APPEARANCE:

For the Applicant: Adv Raubenheimer instructed by Nelson Borman and Partners

For the First and Second Respondents: Adv L Pillay instructed by the State Attorney,
Pretoria