

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Reportable

CASE NO.: JR 598/07

In the matter between:

GENERAL INDUSTRIAL WORKERS

UNION OF SOUTH AFRICA

First Applicant

MCUBUSE

Second Applicant

and

J. MHAPHULI N. O.

First Respondent

NATIONAL BARGAINING COUNCIL

FOR THE CHEMICAL INDUSTRY

Second Respondent

AFRICAN EXPLOSIVES LIMITED

Third Respondent

Judgment

Molahlehi J

Introduction

1]The applicant who is the respondent in the main review application has

brought an application in terms rule 11 of the rules of the court. In terms of this application the respondent is seeking to have the review application dismissed due to unreasonable delay in its prosecution.

2]The review application was the result of the dissatisfaction of the applicant with the outcome of the arbitration award that had been issued by the first respondent, (the arbitrator) in terms of which he had found the dismissal of the applicant to have been fair and accordingly dismissed the applicant's claim of unfair dismissal.

Background facts

3]The second applicant who was prior to his dismissal employed as a machine operator was charged and dismissed for being under the influence of alcohol. The alcohol test which was conducted on the applicant according to the respondent on the day in question indicated that he was under the influence of alcohol as his blood alcohol content had been 2 and .229 which reflected that the applicant had consumed alcohol in great quantity. The second applicant will for ease of reference be referred to as the "employee" and the third respondent as the "employer".

4]Following his dismissal the employee referred a dispute concerning an alleged unfair dismissal to the second respondent. The matter was arbitrated upon by the arbitrator who found that the dismissal of the applicant was for a fair reason and confirmed the dismissal as being fair.

5]The employee was unhappy with the decision of the arbitrator and accordingly launched a review application on the 22nd March 2007. In this regard the employee challenged the arbitration award on several grounds. The grounds of review are set out in the applicant's founding affidavit as follows:

“13.1 *The [Panelist] committed a gross irregularity and misapplied his mind when, arriving at the decision that the dismissal of [Mcubuse] was fair, he attached undue importance on the fact that the alcohol level of [Mcubuse] higher than the employee that was not dismissed;*

13.2 *The award was defective for these reasons because the [Panelist] attached undue importance to the argument of the Third Respondent that [Mcubuse] unlike the other employee held a position that, if [Mcubuse] was under the influence, would become extremely dangerous*

133 *The [Panelist] decision in this regard was unjustifiable and irrational in that the rule laid down by the Third Respondent concerning the consumption of alcohol did not distinguish between the amount of alcohol*

consumed and the level of alcohol in the blood but stated unambiguously that anyone, no matter the percentage of alcohol in the blood, found to be under the influence of alcohol would be dismissed;

134The [Panelist] committed a gross irregularity and a gross error of law when he failed to apply the law in relation to the parity principle which states that like cases should be treated alike and that deviation from this principle is only justified if there are material factors that distinguish the case of employees who commit the same offence but are punished differently;

135In this matter there were no material factors that distinguished [Mcubuse]'s case from the other;

136The [Panelist] committed a gross irregularity and misapplied his mind when he regarded the level of alcohol in [Mcubuse]'s blood and the nature of [Mcubuse]'s work, apropos whether it was dangerous or not, as material factors that justified distinguishing between the two cases;

137The [Panelist] committed a gross irregularity in this regard because he merely accepted that these factors were

relevant and failed to inquire into whether these factors had been raised for the first time in the arbitration or whether these factors had been raised in [Mcubuse's] disciplinary inquiry and had informed on the Third Respondent decision to dismiss [Mcubuse];

138If he had conducted such an inquiry he would have found that he was precluded from taking these factors into account as the allegations had only surfaced at the arbitration and had not been raised in the disciplinary inquiry;

139The [Panelist] committed a gross irregularity and a gross mistake of law when he accepted the evidence concerning why the Third Respondent differentiated between the two cases and failed to consider whether the allegations placed before him by way of argument and not through evidence under oath, was admissible in terms of the rules of evidence and failed to consider that if so, what probative value, if any, he should attach to such evidence;

1310Had the [Panelist] properly applied his mind to all the evidence and conducted the arbitration in a manner

required of him by law he would not have reached the conclusion that he did but would have found that the dismissal of [Mcubuse] was unfair."

6]The bargaining council dispatched the notice in terms of rule 7A (2) (b) of the Rules of the Court to the Registrar on the 30th March 2007 and a further notice was filed on the 4th April 2007.

7]According to the employer the employee did nothing of substance that would have progressed to review application any further since the rule 7A notice.

The case of the employee

8]The case of the employee is that shortly after being made aware that the bargaining council had filed the record with the Court in terms of rule 7A, instructions were given to the transcribing company to uplift the same and provide a transcription fee quote.

9]The request for the transcription was made on the 25th May 2007 and the quotation was received on the 4th June 2007. Thereafter, the employee's attorney of record uplifted the transcribed record during July 2007. The attorney says after uplifting the transcribed record he noticed that the record was defective and in several areas it was inaudible and apparently a large portion of the oral evidence was not captured.

10]The employee's attorney, Mr. Cartwright says once he discovered the defect

in the transcription of the record, he wrote a letter to the bargaining council and requested the commissioner's notes with the view to reconstructing the record. Unfortunately the bargaining council did not heed to the request and thus did not furnish the hand written notes of the commissioner.

11]According to Mr. Cartwright the bargaining council responded to his letter by contacting him telephonically during July 2007. After that nothing happened until October 2008 when Mr. Cartwright again contacted the bargaining council to enquire as to what happened to his request for the hand written notes of the commissioner. He was advised to put his request in writing which he did on the 1st October 2008. Except for acknowledging receipt of that letter the bargaining council did nothing with regard to the hand written notes of the arbitrator.

12]The next follow up with the bargaining council regarding the hand written notes of the arbitrator by the applicant, which also did not produce any result, was on the 29th March 2009. Mr. Cartwright says after that he received advice from another attorney who advised that he should approach the Labour Court on an urgent basis and that an order compelling the bargaining council to produce the hand written notes. It would seem that whilst pondering an application to compel production of the hand written notes, Mr. Cartwright received a telephone call from the bargaining council regarding the same issue and that made him believe that the matter will then

be resolved and presumably the need to institute an application to compel production of the hand written notes was no longer relevant for that reason.

Unreasonable delay rule

13]The application of the unreasonable delay rule has received attention in several cases in our law. In terms of this rule a party that institute the proceedings but then fails to prosecute it timeously may lose the right to proceed further with his or her claim if it is shown that objectively assessed from the point of view of the delay he or she has lost interest in pursuing the matter. In general the courts, in considering whether or not to grant dismissal of a matter due unreasonable delay, takes the following factors into account: (a) is the delay in the prosecution of the matter excessive; (b) is there a reasonable explanation for the delay; (b) what prejudice will the other party suffer if the dismissal is not granted; and (c) are there prospects of success in the main case.

14]There are several Labour Court decisions that have taken the inquiry further to include inquiring into what steps did the respondent take in ensuring that there is no delay in the prosecution of the matter. In *Sishuba v National Commissioner of SAPS (2007) 10 BLLR 988 LC* and *Bezuidenhout v Johnston No & Other (2006) 12 BLLR 1131 LC*, it was held that the respondent party, when confronted by the delay in the prosecution of a claim needs to place the offending party on terms or seek the intervention of

the Registrar or file an application to compel. This approach was endorsed in *Karan Beef Feedlot & Another v Randall* (2009) 30 ILJ 2937 (LC), where the court held that the respondent party is “*not 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 other words the court in that regard placed the responsibility also on the respondent to ensure that there is compliance with the time frames within which a matter is brought to finality.

15] In *NACBAWU and Another v/s Springbok Box (Pty) Ltd t/a Summit Associated Industries and others* Case No: J2367/06, this court held that it is not every inaction or failure on the part of the respondent to place the applicant on terms that would result in the failure to obtain claim for dismissal due to unreasonable delay. The court in dealing with this issue had the following to say:

*“The other factor which needs to be weighed together with these factors is the inaction or otherwise of the respondent in ensuring that the matter is brought to finality. The defense of a party opposing an application for the dismissal of a claim on the basis of unreasonable delay is quite often that the other party in not taking action to progress the matter to the next step also contributed to the delay. In this regard often judgments relied upon are those of **Buzuidenhout v***

Johnston NO & others [2006] 12 BLLR 1131 (LC) and Karan Beef Feedlot & Another v Randall (2009) 30 ILJ 2937 (LC). I do not read those judgments as saying that the inaction of the applicant in an application to dismiss a matter on the basis of unreasonable delay is necessarily an absolute defense. The contribution in the delay by the party seeking to have the matter dismissed for delay in prosecution must be objectively assessed with the view of evaluating the extent to which the inaction of the applicant contributed towards the excessiveness or otherwise of the delay. The inaction has to be weighed against the objective facts that may point towards loss of interest in pursuing the matter by the party opposing such an application. It may well be that the facts and the circumstances objectively point to a case where the respondent can be said to have abandoned or lost interest in the matter. In that instance I do not believe that it would be correct and fair to blame the applicant for contributing to the delay due to his or her inaction.”

16]As indicated earlier the view that it is not in every case that inaction or failure by the respondent to put the applicant on terms that would result in failure to obtain an order dismissing the claim for delay in prosecution has support in the *Karen Beef Feedlot* where at paragraph [10] of that judgement the court had the following to say:

“[10] It seems to me that the approach adopted both in the

Buzuidenhout 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.”

17]It is thus my view that in an unreasonable delay claim refusal to grant the relief due to the inaction of the respondent or failure to put the applicant on terms will depend on the facts and the circumstances of a given case.

Evaluation

18]There is no doubt that the employee in the present instance has unreasonably delayed in the prosecution of his review application. The delay is excessive and explanation proffered by Mr Cartwright is unsatisfactory and unreasonable. The facts and circumstances of this case are such that the review application stands to be dismissed for unreasonable delay even though the employer had not placed the employee on terms regarding the speedy prosecution of the review application.

19]In analysing and evaluating the delay in the prosecution of the review application the starting point is to note that the arbitration award was issued on the 2nd February 2007, and the review application was thereafter filed on

the 22nd March 2007. In essence the employee has done nothing since the 22nd March 2007 to the 4th June 2010 when this matter was heard by this court.

20]The only thing that Mr Cartwright did was to write letters requesting the bargaining council to provide him with the hand written notes of the arbitrator. In fact even then he waited for a year and three months before formally writing to the bargaining council requesting for the hand written notes of the arbitrator. After the first letter a period of six months went pass without the employee doing anything.

21]Another letter was addressed to the bargaining council on the 20th March 2009, in which the employee made a follow up with regard to the hand written notes of the arbitrator. There is nothing in the letter showing exigency or desire to have the notes in question made available so as to bring the review application to finality. The letter is silent in as far as placing the bargaining council on terms with regard to producing the hand written notes. If indeed the employee was interested in reaching finality in the matter then it would have been expected at that stage for the employee to have put the bargaining council on terms or at least to have indicated the prejudice that the delay has on the parties' interest. In my view it is apparent from the reading of this letter that the employee was not interested in the prejudice that the employer would suffer as a result of the delay occasioned

by the unreasonable delay in bringing this matter to finality.

22]Whilst it is apparent that the major portion of the blame is on Mr. Cartwright, the employee and the union also take a significant aspect of that blame. There is no evidence as to what the employee or his union did for over a year to show interest in having his review application brought to finality. There is no evidence that both the employee and the union are still interested in this matter and if so why did they not follow up their attorney to find out the reason for the delay in finalising their matter. As reasonable and diligent litigants, the union and the employee ought to have taken steps in the period of a year to have also put their attorney on terms in terms of progressing their matter. Had they enquired as to the cause of the delay they would have noticed that Mr Cartwright did not know what to do with the failure to produce the written notes of the arbitrator. A reasonable litigant would on that score have sought second opinion from another attorney.

23]As concerning the prospects of success, as indicated earlier one of the points relied upon by the employee is the alleged inconsistent application of the discipline. In this respect the employee contended that another employee who was also found guilty of being drunk at work was not dismissed but was given a written warning.

24]The approach to be adopted by arbitrators when confronted with the issue of inconsistent application of discipline or in the application of what is

sometimes referred to as the parity rule is well established. It is trite that the complaint about the inconsistent application of discipline is a matter that needs to be taken into account in the assessment and evaluation of the fairness of the dismissal of the employee complaining about the same. In the review application on the other hand what the court needs to do is to determine whether or not the arbitrator in dealing with the complaint about inconsistent application of the discipline applied his or her mind that as part of the consideration of the fairness of the dismissal. The other consideration is whether or not on the facts and the circumstances which were presented during the arbitration hearing, the decision of the commissioner is one which a reasonable decision maker could not reach. See *Sidumo Rustenburg Platinum Mine (2007) 27 BLLR 1027 (CC)*.

25]In *SACCAWU and Others v Irvin v Johnson Ltd(1999) 20 ILJ 2303(LAC)* at 2313 (paragraph 29) the court in dealing with the issue of inconsistent application of discipline had the following to say:

“ . . . Where, however, one is faced with large number of offending employees, the best that one can hope for is reasonable consistency. Some consistency is the price to be paid for flexibility, which requires the exercise of discretion in each individual case. If a chairperson (of disciplinary hearing) conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular

way, it would mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of a plurality dismissal, a wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy.”

26]There can be no doubt from the reading of the arbitration award that the arbitrator considered and applied his mind to the complaint of the employee about the alleged inconsistent application of discipline. In accepting the differentiation between the case of the employee and that of the other employee who was given only a written warning the arbitrator considered the different features between the two cases in this respect the commissioner applied the necessary criteria of assessing the fairness of the dismissal in the context of the allegation of inconstancy. The arbitrator found that the case of the other employee was different to that of the other employee as his case was more serious in the following respect:

“Where it concerned similar cases the affected employees were not exposed to similar job hazards, did not pose a danger to themselves or fellow workers and their blood alcohol was lot less compared to the Applicant’s blood alcohol content.”

27]It therefore cannot be said that the arbitrator failed to apply his mind to the complaint of the employee that he was unfairly treated because of the differentiation in the sanction imposed. The arbitrator appreciated the task he was ceased with and properly applied the principle of fairness in relation to the application of discipline regarding the two cases.

28]In light of the facts and circumstances of this case I am of the view that the respondent has made out a case justifying the dismissal of the review application on the ground of unreasonable delay. In my view there is no reason in law and fairness why the costs should not follow the results.

29]In the premises the applicant's review application is dismissed with costs.

MOLAHLEHI

JUDGE OF THE LABOUR COURT JOHANNESBURG

Date of Hearing: 4th June 2010

Date of Judgment: 13th January 2011

Appearances

For the applicant: Mr. D Cithi of Parrot- Van Niekerk-Woodhouse-
Matyolo Inc

For the respondent: Mr. D Cartwright of David Cartwright Attorneys