

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

CASE NO: JR1985/2006

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL

DEPARTMENT OF HOUSING AND LOCAL

GOVERNMENT LIMPOPO PROVINCE

Applicant

AND

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL (GPSSBC)

1ST RESPONDENT

DENGA MULIMA

2ND RESPONDENT

MATSHIDISO JOHN MABALA

3RD RESPONDENT

TSHINYALANE ERIC RAMALAMU

4TH RESPONDENT

PANAN JOSEPH KEKANA

5TH RESPONDENT

JUDGMENT

Molahlehi J

INTRODUCTION

- 1] This is an application to dismiss the review application filed under case number JR1985/2006 on the ground of undue delay in its prosecution. I will in this judgement refer to the parties as cited in

the review application.

- 2] The review application arose from an award which was issued by the second respondent (the arbitrator) in terms of which it was found that the dismissal of the respondents to have been unfair and ordered that they be re-employed.
- 3] The respondents were prior to their dismissals charged with misconduct related to fraud and acts of dishonesty. They were all found guilty and dismissed. After an unsuccessful internal appeal against the decision of the disciplinary chairperson, the respondents referred an unfair dismissal dispute to the first respondent. The respondents were all charged with acts of dishonesty related to the alleged defrauding of the applicant.
- 4] As indicated earlier the arbitrator acting under the auspices of the first respondent issued an arbitration award in terms of which he found the dismissal of the respondents to have been unfair and ordered that they should be re-employed. It is apparent from the reading of the arbitration award that the arbitrator found the respondents guilty as charged but found that the dismissal was “unjustifiably too severe.”

The reasons for the delay

- 5] The State Attorney, representing the applicant attributes the delay to the company responsible for transcribing the record of the arbitration proceeds. The deponent to the applicant's answering affidavit says that he followed up with the Sneller Verbatim, the company that was commissioned to transcribe the tape recording of the arbitration proceedings. Sneller Verbatim informed him that the business had been sold as a going concern to Lom Business Solutions and they were no longer transcribing tapes for the bargaining council.
- 6] Mr Lategen, the deponent to the answering affidavit says that he thereafter arranged to have the 29 tape cassettes sent to Lom Business Solutions for transcription

Legal principles and evaluation

- 7] It has been held in a number of cases that depending on the circumstances of a given case, 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*

Metal Workers of South Africa obo Nkuna & others v Wilson Drills-Bore (Pty) Ltd t/a A & General Electrical [2007] JOL 19686(LC) ; *Mothibeli Western Vaal Metropolitan Substructure* [2000] 1 BLLR 85 (LC); *NUMSA & others v AS Transmissions & Steerings (Pty) Ltd* [1999] 12 BLLR 1237 (LAC) and *Molala Minister of Law & Order & another* 1993 (1) SA 673 (W). The basis for this approach can be found in *Sishuba v National Commissioner of SAPS* (2007) 10 BLLR 988 (LC), where in dealing with this principle the court had the following to say:

“Inordinate delays in litigating protract the disputes, damage the interests of justice and prolong the uncertainty of those affected.”

- 8] In considering whether or not to dismiss an application due to the delay in its prosecution the court takes into account factors such as, the extent of the delay, the reasonableness of the explanation thereof, the prejudice to be suffered if the application is or is not dismissed for that reason.
- 9] In *Sishuba*, the court summarised the approach to be adopted in dealing with whether a matter should be dismissed for undue delay in its prosecution as follows:

“The focal point in considering whether to grant the order barring the applicant, 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 applicant be barred from proceeding further with the review application.”

- 10] There is also clear authority that the court will exercise its discretion to dismiss an application due to unreasonable delay only in exceptional cases. See *Autopax Passenger Services (Pty) Ltd v Transnet Bargaining Council & others* (2006) 27 ILJ 2574 (LC), *Buzuidenhout v Johnston NO & others* [\[2006\] 12 BLLR 1131 \(LC\)](#) and *Karan Beef Feedlot & another v Randall* (2009) 30 ILJ 2937 (LC).
- 11] In the present instance the applicant contends that it is not necessary to file the complete record because it is seeking to review the arbitration award on a very limited ground of challenging the finding that the sanction of dismissal was inappropriate despite having found the respondent guilty of misconduct related to dishonesty. It was further submitted on

behalf of the applicant that the application can be determined on the basis of the portion of the record that has already been filed. In this respect the respondent is correct because rule 7(6) of the Rules of the court provides:

“ The applicant must furnish the registrar and each of the other parties with a copy of the record or portion of the record, as the case may be, and a copy of the reasons filed by the person or body”

12] It was further argued that the respondent has good prospects of succeeding if its case is allowed to proceed on review. The prospects of success have to be assessed in the context that the applicants were charged and found guilty of acts involving dishonesty. The respondent were charged and found guilty of conniving in defrauding the applicant by effecting unauthorised payments. The payments were effected on the basis of backdating payments for promotion.

13] The arbitrator found that the third respondent to have breached the rule and that he had no authority to perform the transaction he initiated. The arbitrator further found that the third respondent was aware that he needed authorisation before he could initiate the transaction as he did. The arbitrator rejected the version of the

third respondent on the basis that it was untruthful and riddled with contradictions.

- 14] As concerning the fourth and the fifth respondents the arbitrator found that their complaints regarding their alleged non payment for their promotion to have been driven by greed and did not care to check on the lawfulness of receiving the money as they did.
- 15] After the analysis of the evidence which was presented by the witnesses of the respective parties the arbitrator found the respondents to have been guilty as charged but found the dismissal in the circumstance to have been too harsh. It was for this reason that the arbitrator found the dismissal to have been unfair.
- 16] In the light of the above, whilst accepting that the delay was unreasonable, I am of the view that there are good prospects of the applicant succeeding when the main review application is considered and for that reason alone the respondents' application stands to fail. As concerning costs I am of the view that it would not be fair to allow them to follow the results.
- 17] In the premises the application to have the review application dismissed due unreasonable delay is struck off the roll with no

order as to costs.

Molahlehi J

Judge of the Labour Court

Date of hearing: 3 February 2011

Date of judgment: 10 February 2011.

Representation:

For the applicant: Mr SM Shaba -instructed by State Attorney

For the respondents: Counsel did not sign register -instructed by
Crafford Attorneys.