

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

Case No: JR1205/07

CHEP SOUTH AFRICA (PTY) LTD

Appellant

And

COMMISSIONER FOR CONCILIATION

First Respondent

MEDIATION AND ARBITRATION

S TOLI N.O.

Second Respondent

MPHO GIVEN RATHELELE

Third Respondent

JUDGMENT

Molahlehi J

Introduction

[1] The applicant who is the third respondent in the main review application seeks an order dismissing the review application filed by the applicant on the 11 September 2008, on the grounds of undue delay in its prosecution.

[2] The review application arose from the arbitration award issued by the second respondent (the commissioner) in terms of which he found the dismissal of the employee to have been unfair and ordered his reinstatement.

[3] The employee who was employed as a dispatch controller prior to his dismissal was charged and dismissed for distributing through an e-mail the speech of the former president of South Africa Mr PW Botha to other employees. The applicant was charged with an offence concerning:

“disregard of company department rules/ regulations by forwarding an E-Mail of a racist manner to other members of Chep staff and Client’s staff.”

[4] The relevant policy for which the employee was accused of breaching reads as follows:

“Any Chep activity on the Internet (including sending, forwarding or receiving E-Mail messages or maintaining a presence on Chep’s web-site) must be conducted in accordance with existing Chep policies and any applicable laws and regulations, and Chep’s own standard for compliance relating to content, disclosure and supervisory approvals, as well as standards for corporate identity and appropriate business conduct.”

[5] The policy document goes further to prohibit;

“The accessing, displaying, downloading, transmitting or forwarding of obscene, racist, sexist or offensive material. The sending of general interest E-Mails not related to Chep to large groups ie political, religious, slandering, appeals for charity, health warnings, etc.”

[6] Apparently, one of the respondent’s customers complained, that the e-mail in question was offensive and contained material of racist, and or political and sensitive nature.

[7] After his dismissal the employee referred a dispute concerning an alleged unfair dismissal dispute to the CCMA. The commissioner found the dismissal to have been substantively unfair and ordered the respondent to reinstate the applicant including payment of arrear salary of the employee.

[8] The respondent contends in its founding affidavit in the review application that the commissioner committed a gross irregularity in reasoning that:

“The contents of the E-Mail will always be subjective in that readers of any articles would likely have different interpretations or comprehensions as to what is acceptable and the distributions of any statements by a Head of State whether such was made by an apartheid leader or not is irrelevant in that such statements are part of our history and are

already been made in the public domain. Such are not offensive.”

[9] The respondent further contends that the commissioner failed to apply his mind to the actual contents of the e-mail. In this respect the respondent contended that the contents of the e-mail were clearly an offensive publication.

[10] The other contention of the respondent is that the commissioner exceeded his powers by concluding that for a statement to be inappropriate it needs to have been declared obscene or unwanted by the Court of Law or Human Rights Commission. The respondent says that the award is also illogical and irrational if regard is had to the contents of the e-mail which contains language and material which contains ethnic, slurs and racial comments forbidden by its policy.

[11] The complaint that the respondent delayed in prosecuting its review application has to be assessed in the context where the arbitration award was issued on the 1st February 2007 and the review application was instituted on the 31st May 2007. It also has to be assessed in the context of what happened thereafter.

[12] After receiving the notice of motion the CCMA as required by law filed on the 6th June 2007 its notice in terms of rule 7 of the Rules of the Court. The first respondent served the record of the arbitration proceedings on the applicants’ attorneys on the 29th August 2007.

[13] The employee says that on the 12th September 2007 when he consulted his attorney he realized that the transcript of the arbitration hearing did not represent what was said at the arbitration hearing. The employee then requested the tapes so that he could have them transcribed by his transcriber and for the purpose of determining whether or not the transcript furnished by the respondent did correctly represent what transpired at the arbitration hearing. Because the respondent’s attorneys did not respond to the applicant’s request to let him have the tapes he sought to retrieve the same from the CCMA files to no avail.

[14] On the 31st July 2008 the first respondent filed its notice indicating that it

stood by its notice of motion and on the 21st August the applicant served and filed the answering affidavit which was followed by a reply by the respondent on the 29th August 2008.

[15] The employee contends that the applicant did nothing since the 29th August 2008 till to date in terms of ensuring progress of its review application.

[16] About a year later, on the 29th July 2009 the employee's attorneys addressed a letter to the respondent's attorneys informing them that since the respondent did not pursue the matter they were intending to apply to have the matter dismissed. The respondents attorney responded by indicating that they were still interested in pursuing the matter.

[17] As concerning the reason for the delay the respondent disputes that it is to be blamed for it. The respondent contends that it did everything which was required of it and the matter had progressed to the stage where the pleadings were closed. It had also in preparation to prepare the matter for a hearing had prepared and indexed the file. This is confirmed in a letter dated 29 July 2009 wherein in response to the letter from the employee's attorney the respondent's attorneys stated that court file had been indexed.

[18] The respondent further contends that once the pleadings were closed it had to wait for the directive from the Registrar as to the next step.

[19] On 26 May 2010 the applicant addressed a letter to the Registrar requesting that the matter be set down urgently.

[20] The approach to follow in dealing with an application to dismiss a review application due to unreasonable delay was reaffirmed in the recent unpublished case of *Member of the Executive: Department of Housing and Local Government Limpopo Province v General Public Service Sectoral Bargaining Council case number JR 1985/2006*. In that case the court summarized the principles to be applied in considering whether or not to dismiss an application due to unreasonable delay in its prosecution as follows:

“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 Wilson Drills-N Bore (Pty) Ltd T/A A & General Electrical – unreported case number J268/98;*

Mothibeli v Western Vaal Metropolitan Substructure [\[2000\] 1 BLLR 85](#)[\[2000\] 1 BLLR 85](#) (LC); *NUMSA & others v AS Transmissions & Steerings (Pty) Ltd* [\[1999\] 12 BLLR 1237](#)[\[1999\] 12 BLLR 1237](#) (LAC) and *Molala v 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.”

[21] 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.

[22] In *Sishuba* (supra), 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.”

[23] 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), *Bezuidenhout v Johnston NO & others* [\[2006\] 12 BLLR 1131](#)[\[2006\] 12 BLLR 1131](#) (LC)[\[2006\] 12 BLLR 1131](#) (LC)[\[2006\] 12 BLLR 1131](#) (LC) and *Karan t/a Beef Feedlot & another v Randall* (2009) 30 ILJ 2937 (LC).”

Evaluation

[24] In my view justice and fairness would not prevail if the respondent was to be denied the opportunity to have application to review the arbitration award due to the time it has taken to finalize the matter for the reasons set out below

[25] Firstly on the facts and the circumstances of this case I seen no reason why the applicant should also not be blamed for failing to take further steps to have the matter heard as soon as possible. In my view as soon as the pleadings were closed nothing stopped the applicant from approaching the registrar and requested to have the matter set down for a hearing. This is what was envisaged by Van Niekerk J in *Karen Beef*(supra) when he said:

“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.

[26] This is also in line with what this court said in *Sishuba*(supra) when it held that:

“Whist 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 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 caledl upon him to file his heads of argument before bringing this application.”

[27] Returning to the facts of this case, in September the employee complained about the quality of the transcription of the record. He then requested that the tapes be made available to him so that he could verify the accuracy of what was transcribed from them. In this respect the employee did nothing when both the CCMA and the respondent failed to respond to his request. There is also no indication as to which portion of the record was not properly transcribed and why the reconstruction of the record was not considered if the record indeed did not reflect what transpired at the arbitration hearing.

[28] The employee never reverted back to the respondent to say what his stand was about the alleged defective record. If he believed that the tapes were with the respondent of the CCMA for that matter he could have instituted proceedings to compel them to produce the record. The other thing which the employee could have done was to have indicated to the respondent that the record was defective and placed them on terms. Of course he would have had to indicate in what respect the record was defective. The complaint about the transcript and the indication that the employee needed to verify its accuracy, contributed to the delay.

[29] I guess the principles that arises from the facts of this case is that the

application to dismiss cannot be sustained where the respondent (applicant in the dismissal application) introduces a factor that has a bearing on the speedy resolution of the matter and then later turns around to blame the other party for the delay.

[30] The pleadings in this matter closed during August 2008, when the respondent filed its replying affidavit. After that the applicant could have approached the registrar and requested that the matter be set down for a hearing. It has also to be noted that the respondent did at some stage request the registrar to have the matter set down for a hearing.

[31] As indicated earlier it would not be just and fair to dismiss the respondent's review on the basis of the delay in its prosecution. However, I do not believe that it would be fair to allow the costs to follow the results.

[32] In the premises the applicant's application to dismiss the respondent's review application is dismissed with no order as to costs.

Molahlehi J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

Date of Hearing: 16 September 2010

Date of Judgment : 17 February 2011

Appearances:

For the applicant: Mr Noveni Kubayi from Noveni Eddy Kubayi Incorporated
For the respondent: Irvin Lawrence from Edward Nathan Sonnenbergs