

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO. J 5256/00

In the matter between:

BALDWIN STEEL

1st Applicant

BALDWIN METAL LAND

2nd Applicant

and

NUMSA

1st Respondent

J MATHYE AND 3 OTHERS

2nd Respondent

JUDGMENT

LAGRANGE J:

Introduction

- [1] This matter was enrolled to consider an application for the late filing of the respondent's heads of argument in the first applicant's application to dismiss their claim, and to consider the latter application. In considering the condonation of the late filing of the respondent's heads, it is necessary to consider the merits of the first applicant's application to dismiss the respondents' referral of their unfair dismissal dispute as one of the factors

having a bearing on the condonation application. Accordingly, the merits of the first applicant's application for dismissal of the referral will be dealt with first.

The chronology of events

- [2] The dispute concerned the alleged unfair retrenchment of the four individual respondents in the condonation application on 30 June 2000. Once the initial steps in the matter had been taken, the history of this matter is a chronicle of neglect. If the matter had been properly handled any adjudication of this dispute would ordinarily have taken place by the end of 2001 or at least early in 2002. An unfair retrenchment dispute was referred to the Metal and Engineering Bargaining Council and on 18 September 2000 the bargaining council issued a certificate indicating that the dispute remained unresolved.
- [3] On 8 November 2000, a statement of case was lodged with the registrar of the Labour court by NUMSA ('the union'). However, it appears that the statement of case was not served on the first applicant ('the company') before it was lodged with the registrar. The evidence shows that the company first became aware of the statement of case when the union wrote to it on 15 June 2001 asking for its response and advising that it was considering setting the matter down for default judgement. The company immediately filed a notice of intention to oppose the referral.
- [4] Despite this initial quick response, it was only on 17 September 2001 that the company filed its answering statement, which was some 73 days after it should have, assuming that it received the referral for the first time on

15 June 2001. As with the referral of the statement of case, no condonation application was filed for the late referral of the answering statement.

[5] On 24 April 2002, a pre-trial meeting was held between the parties at court, but the minute was not finalised on that occasion. The union sent a draft pre-trial minute on the company. On 13 May 2002, the company requested further details from the respondents on a number of questions before it could respond on the outstanding issues. It appears that no response was ever received to this letter. It was only more than two years later on 24 August 2004 that the union sent a further draft pre-trial minutes to the company's attorneys. Over this period, it appears that the same union official, Mr T Faku, was dealing with the matter. In response to this latest initiative, the company indicated that it was reserving its rights to apply for dismissal of the referral because the union had failed to pursue the matter timeously. It also reiterated that it had still not had a response to its previous request of May 2002 for further information from the union and pointed out that the latest draft pre-trial minute did not differ substantially from the previous one. The respondent repeated its request for a response on the outstanding matters.

[6] It appears that nothing further was done by the union until it appointed attorneys of record in the matter in November 2005, over a year later. Despite the appointment of attorneys to handle the matter, it was only eight months later on 21 July 2006 that a further draft pre-trial minutes was filed. This minute differed materially from the one last filed by the union in August 2004, two years previously. The company contends that even this third draft pre-trial minutes did not address the outstanding queries it had first raised in 2002. The union's attorneys were only first

aware of the outstanding queries when they received the company's answering letter of 28 August 2006. Approximately six weeks later, on 12 October 2006, the union's attorneys of record wrote to the company's attorneys the following:

"We refer to our previous correspondence. The Numsa officials who dealt with the matter are no longer in the employ of Numsa. The workers themselves are unable to assist with the completion of the pre-trial minute. We are proceeding to take instructions from a client with regard to holding the pre-trial afresh and suggest that you do the same. We will revert with our instructions".

- [7] In its answering affidavits to the dismissal application, the union's attorneys attributed the inability to finalise the pre-trial minutes to the fact that the officials who dealt with the pre-trial minutes had also left Numsa before they could be finalised, but no specific details are provided as to when Mr Faku actually left, making it difficult to understand how much of the delay was attributable to his absence. The company contends that this reason is insufficient to explain the delay of over two years in attempting to finalise the pre-trial minutes.
- [8] The union submits that it is improbable that the union did not serve a copy of the referral on the respondent company, but there is no evidence in the form of an affidavit of service or even a fax confirmation slip indicating that this was in fact the case. In the circumstances, the union should have filed a condonation application for the late referral of statement of case.

- [9] Essentially what has happened here is that the matter was neglected by the union between May 2002 and August 2004, a period of well over two years. When the union did attempt to revive the matter in 2004, as soon as the respondent repeated its previous requests, the union did not pursue the matter further until it appointed attorneys in November 2005, more than a year after its last correspondence to the company. Even then, the seven month delay between the attorneys being appointed and the filing of a further draft pre-trial minute was excessive. It would be reasonable to have expected that in appointing attorneys to handle the matter everyone concerned would have appreciated the need to proceed rapidly to redeem the situation if that was possible.
- [10] If the attorneys were unable to obtain the necessary instructions from the union to take the matter forward, it should not have taken them so long to realise that. Moreover, there is nothing to indicate that any attempts were made to contact the previous organisers who were handling the matter for their assistance. It is true that the company like the union was late in attending to the pleadings, but those periods of lateness pale into insignificance beside the union's delay in its sporadic attempts to finalise the pre-trial minute. Effectively, this is a matter which the union made limited attempts to revive on three occasions. The first was in August 2004 after a hiatus of more than two years. This attempt at resuscitation ended almost as soon as it began. The second attempt, at least to the extent that it represented some action taken by the union to prosecute the matter further, was when it appointed attorneys to handle the matter in November 2005. The follow-through on that step was slow, as it was only several months later that communications with the company were reopened with the submission of a new pre-trial draft minutes.

- [11] The limited and cursory explanation offered for these long intervals of inactivity is very unsatisfactory and essentially relies exclusively on the departure of union officials responsible for the matter. Over such a long period of time, it is hardly surprising that the matter might have passed through the hands of different union officials. The rotation of staff in a big organisation is surely something to be expected and provided for to ensure continuity in the organisation's work. There is also nothing in the answering affidavits to explain why the individual respondents appeared to have done nothing to accelerate the pace of the litigation.
- [12] I accept that the union's attorneys probably faced difficulties in attempting to reconstruct events if there was no one employed by the union who could assist them, or if inadequate records of the matter existed. However, in such circumstances, if the union insisted on proceeding, it should have been explained to the respondent at an earlier stage that it was simply impossible to address some of the queries it had previously raised, and the union would have had to accept that they would need to concede their inability to deal with some of those issues.
- [13] In August 2004, the company clearly warned the union in August 2004 of the prospect of an application to dismiss the referral, but it was only in July 2006 that the respondents tried to take another step forward. It is true that the application to dismiss the referral was launched after the union's attorneys proposed yet another pre-trial meeting without directly addressing any of the long outstanding queries of the company. However, in the circumstances where it was apparent that the union's attorneys could not even get proper instructions at that late stage, there was no reason to believe that a further pre-trial meeting was likely to address the issues which concerned the company and take the matter forward. Given

the history of the matter and the union's attorneys' clear inability to take the matter forward for want of proper instructions, I do not think the timing of the application for dismissal was inappropriate.

[14] It is an exceptional remedy to dismiss an applicant's claim on account of long delays in prosecuting a matter referral, but where the circumstances justify it, it will be done.¹

[15] In general the courts, in considering whether or not to grant dismissal of a matter due to unreasonable delay in prosecuting the claim, take the following factors into account: the length of the delay; the explanation for the delay; and the effect of the delay on the other party and the prejudice that party will suffer should the claim not be dismissed.²

[16] There is no question that the successive delays in the faltering attempts to advance the prosecution of the case are excessive. Moreover, the explanation for the delays is thin and lacking in detail, apart from failing to explain why renewed attempts to revive the matter were not followed through. There is also no detail provided of any attempts made by the individual union members to stir the union to action. By 2010, the prejudice to the company of having to defend a case nearly a decade old is obvious. I appreciate that the four individual union members will suffer the prejudice of not having their claim heard, but they must share some of the responsibility for not seeing that their matter was pursued diligently

¹ See, for example, *Bezuidenhout v Johnston NO & others* (2006) 27 ILJ 2337 (LC) and *Sishuba v National Commissioner of the SA Police Service* (2007) 28 ILJ 2073 (LC) at 2076-2078 paras [9] - [16].

² *Karan t/a Beef Feedlot & Another v Randall* (2009) 30 ILJ 2937 (LC) at 2943-4 [14] and see also 2941, par [8].

by the union. Considering all these factors holistically this is a case which should be dismissed. In the result it is not necessary to consider the condonation application for the late filing of the heads of argument.

[17] On the question of costs, the failure of both parties to file condonation applications for their pleadings, disinclines me to consider any award of costs to either party for that stage of the proceedings. However, I do not believe that this application to dismiss the matter should have been necessary and it seems just and equitable for the union to bear the costs of this. No award of costs is made for the late filing of the heads of argument.

Order

[18] The application to dismiss the referral of this matter to the labour court is granted.

[19] The first respondent is ordered to pay the first applicant's costs of the dismissal application.



**ROBERT LAGRANGE
JUDGE OF THE LABOUR COURT**

Date of hearing: 21 May 2010

Date of judgment: 22 March 2011

Appearances:

For the Applicant: Ms M Chenia of Pienaar, Swart & Nkaiseng

For the Respondent: B Bodhania instructed by Naidoo Attorneys