

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Reportable
Case No: JR2766/04

In the matter between:

AON SOUTH AFRICA (PTY) LIMITED

Applicant

and

THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION

First Respondent

KHAYALAKHE MNGEZANA N.O.

Second Respondent

YVONNE MABJAIA

Third Respondent

Date of Hearing: 26th day of July 2011

Date of Judgment: 21 September 2011

JUDGMENT

COOK AJ

Introduction

1. The Third Respondent [“the employee”] was dismissed in November 2003. The matter was referred to the CCMA and an award was issued on 13th of October 2004 in terms of which the commissioner found that the dismissal of the employee by the Applicant was both procedurally and substantively unfair [“the award”]. In terms of the award, the employee was awarded R126 400, 00 which is the equivalent of 12 months’ salary.

2. The Applicant was unsatisfied with the award and with alacrity filed a

review application on 11th of November 2004.

3. In October 2011, the employee filed an application to have the review application dismissed with costs and to have the award made an order of Court. In answer to this application, the Applicant sought to have the dismissal application dismissed on two grounds:

3.1 that the award had prescribed

3.2 and in addition, the employee's erstwhile attorneys had "dilly dallied" over the reconstruction of the record and thus had caused the delay

4. *Applicable law*

4.1 *Prescription*

4.1.1 Arbitration awards prescribe within three years.¹ The party who raises prescription has to prove prescription.² Review proceedings do not automatically stay enforcement of an arbitration award.³ Review proceedings are not a bar to enforcing the arbitration award, by having it made an order of Court.⁴

4.1.2 In terms of section 14 of the Prescription Act⁵:

¹ *Solidarity and Others v Eskom Holdings Ltd* (2005) 26 ILJ 338 (LC) *PSA obo Khaya v CCMA and Others* (2008) 29 ILJ 1546 (LC).

² *ABSA Bank Bpk v De Villiers* 2001 (1) SA 481 (SCA) at 486 G and 487 A-C.

³ *Police and Prisons Civil Rights Union on behalf of Sifuba v Commissioner of the SA Police Service and Others* (2009) 30 ILJ 1309 (LC) *NUMSA v Espach Engineering* (2010) 31 ILJ 987 (LC).

⁴ See: *NUMSA and Another v Espach Engineering* (2010) 31 ILJ 987 (LC) at para 15.

⁵ 68 oF 1969.

“(1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.

(2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due.

4.1.3

“Inordinate delay on the part of the Plaintiff to bring the action to finality does not in itself constitute a ground for application of section 15(2). The implications for the Defendant are not unduly prejudicial, because to a certain extent he also has a say in the running of the proceedings. He can enforce the period within which pleadings have to be filed or particulars furnished. If, for example, Plaintiff fails to furnish further particulars to his claim for an inordinate length of time, Defendant for some reason does not compel the furnishing of further particulars, the Defendant cannot rely on section 15(2) as basis for a special plea of prescription.

Inordinate and inexcusable delay therefore does not in itself constitute failure to prosecute a claim successfully.”⁶

4.2 *Failure to prosecute*

⁶ Extinctive Prescription, Interruption, Loubser, Juta, page 138

4.2.1 In the matter of *Karan t/a Karan Beef Feedlot and Another v Randall*,⁷ (Van Niekerk J set out the applicable legal principles regarding applications for dismissals:

“The rules of this court make no specific provision for an application to dismiss when a party fails diligently to pursue a claim referred to the court for adjudication. The Court has recognized and adopted the rule based on the maxim *vigilantibus non dormientibus lex subvenit*, in terms of which a party may in certain circumstances be debarred from obtaining the relief to which that party would have been entitled because of an unjustifiable delay in prosecuting the claim.”

4.2.2 In *National Construction Building and Allied Workers Union and Others v Springbok (Pty) Limited t/a Summit Associated Industries*⁸ the Court held that:

“The unreasonable delay rule has received attention in a number of judgments of the Labour Court. It has generally been accepted that where a litigant delays in the prosecution of his or her claim he or she may be barred from obtaining the relief sought for that reason.

.....

The factors which the court will take into account in

⁷ (2009) 30 ILJ 2937 at para 5. .

⁸ [2011] 32 ILJ 689 (LC) at para 25 and 28. .

considering whether or not to dismiss a matter due to unreasonable delay in its prosecution are the following: the length of the delay; the effect of the delay on the other party and the prejudice which the other party will suffer if the matter is not dismissed for that reason. 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 defence 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 has also contributed to the delay. In this regard often judgments relied upon are those of *Bezuidenhout v Johnston NO & others* (2006) 27 ILJ 2337 (LC); [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 defence. The contribution to the delay by the party seeking to have the matter dismissed for delay in prosecution must be objectively assessed with a view to 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.”

Prescription

5. Unless prescription was interrupted, the award would have prescribed on 13th of October 2007.

6. In terms of the notice of opposition to the application to have the award made an order of Court, the Applicant sought an order:

“2. That the Applicant's claim has prescribed in terms of Section 13(1) (f) and (l) read with Section 11(d) of the Prescription Act 68 of 1969.”

7. The Applicant states:

“During November 2009, the Third Respondent attempted to bring an application to have the award made an order of Court and to dismiss the review application. She did so under case number J2411/09. That application was opposed and has never been heard. For the sake of completeness, I attach marked “A”, a copy of the opposing papers in that application. As can be seen, Aon South Africa (Pty) Ltd raised the issue of prescription in those papers. The application, as I understand it, still pending.”

8. I am satisfied that the Applicant has raised the issue of prescription appropriately in terms of section 17(2) by raising the issue in the answering

affidavits to the application to have the award made an order of Court in November 2009 and in the answering affidavit to the current application to have the review application dismissed.⁹

9. The debt in this matter is created by the arbitration award. The Applicant, by launching the review application, acknowledged the debt created by the award, but seeks to have the debt reviewed, corrected or set aside by the Court. I am of the view that the filing of the review application by the Applicant, the debtor, amounts to express acknowledgement of liability by the Applicant to the employee, the creditor. Accordingly, the running of prescription was interrupted by an express acknowledgement of liability by the debtor on 11th of November 2004.

10. The review application came before court on 30th of March 2006, when it was postponed *sine die* and in terms of the court order was not to be set down until the record of the arbitration proceedings was reconstructed and typed. On 14th of June 2007, the matter was yet again postponed *sine die* for the purposes of the parties to reconstruct a common record. On 16th of September 2009, the matter was struck off the roll for the non appearance of the Applicant. (The Applicant states that the matter was meant to be removed from the roll by agreement.)

11. I am of the view that the above subsequent steps taken by the Applicant in

⁹ *Minister of Justice and Constitutional Development v Mathobela and Others* (1185/05) [2007] ZAN WHC 5 (25th January 2007) unreported at para 27.

prosecuting the review application amount to a tacit acknowledgement of the debt. It was only in November 2009 that the Applicant raised the issue of prescription and therefore no longer acknowledged the debt. Accordingly, the Applicant has acknowledged the debt up until at least September 2009, and accordingly prescription has been interrupted and can only commence to run a fresh from the earliest September 2009.

12. If I am wrong in the view that the review application interrupted prescription by acknowledging liability for the debt, then I need to consider whether prescription has not being interrupted on any other basis.

13. The Applicant states:

“The point however is that for 5 years, the Third Respondent at no stage attempted to enforce the award by having the award made an order of Court in terms of section 158 of the LRA or by certifying it in terms of section 143 of the LRA.”¹⁰

14. However, on 7th of June 2005, the employee filed an application to dismiss the Applicant’s review application. In terms of the notice of motion, the employee sought an order in the following terms:

¹⁰ Paragraph 7, page 9 of the indexed bundle.

“1.1 Dismissing the Applicant’s application for review of the arbitration award issued by Commissioner Khayalakhe Ngezana. Re-enforcing the existing CCMA award.” [“the 2005 application to dismiss”]

15. Again on 13th of July 2006, the employee filed an application to dismiss the Applicant’s review application. In terms of the notice of motion, the employee yet again sought an order in the following terms:

“1.1 Dismissing the Applicant’s application for review of the arbitration award issued by Commissioner Khayalakhe Ngezana. Re-enforcing the existing CCMA award.” [“the 2006 application to dismiss”]

16. The Applicant makes no mention of the 2005 and 2006 applications to dismiss the review application in its answering affidavit to the application to have the review application dismissed that was launched in October 2010.

17. From the founding affidavit to the 2006 application to dismiss the 2005 application to dismiss was abandoned by the employee when a copy of transcriptions was received on 9th of June 2005. It does not seem that the 2006 application to dismiss has been heard. I do not find any notice of withdrawal of the original application to dismiss. It would therefore appear that the 2006 application to dismiss is still pending. Similarly, I do not find anything in the Court file indicating that the Applicant has taken steps to dismiss the original

application to dismiss the review application for lack of prosecution or any steps to have the matter set down for hearing. Further the Applicant has not pleaded the issue of *lis pendens*.

18. I am of the view that the application to dismiss the review application satisfies the definition of process in terms of 15(6) of the Prescription Act No. 68 of 1969. The delay in prosecuting the original dismissal application does not in itself constitute failure to prosecute a claim successfully.

19. The Applicant fails to make any mention of the original application to dismiss the review application, nor any submissions in respect of the status of this application. Accordingly, I am of the view that the Applicant has failed to prove that the arbitration award has prescribed.

Failure to prosecute

20. The award is dated 13th of October 2004. It is now July 2011. The employee was meant to be paid the sum of R125 400, 00 or no later than on 30th of October 2004. The Applicant filed its review application on 11th of November 2004. A period of 2512 days (as of 30 August 2011) has expired since the granting of the award.

21. The Applicant's explanation for the delay in prosecuting the review, is that as there were no tape recordings of the arbitration proceedings available to be transcribed, the Applicant had to reconstruct the record. The Applicant states that the reconstruction took absolutely ages not least of all because of the

recalcitrance of the employee and her attorney at the time. The Applicant informs the Court that the record is still not completely reconstructed purely as a result of the employee's failure to approve the reconstructed record or to supply a reconstructed record of her own.

22. The Applicant submits the prejudice that the employee suffers, was caused as a direct result of her dilly-dallying over the reconstruction of the record. The Applicant informs the Court that,

"The Applicant had a reconstructed record ready for approval, discussion and debate years ago. The Third Respondent and her attorney did nothing to concretise the finalisation of that record."

23. The Labour Appeal Court has held:

"A reconstruction of a record (or part thereof) is usually undertaken in the following way. The tribunal ... and the representatives ... come together, bringing their extant notes and such other documentation as may be relevant. They then endeavour to the best of their ability and recollection to reconstruct as full and accurate a record of the proceedings as the circumstances allow. This is then placed before the relevant Court with such reservations as the participants may wish to note. Whether the product of their endeavours is adequate for the purpose of the appeal or review is for the court hearing same to decide, after listening to argument in the event of

a dispute as to accuracy or completeness.”¹¹

24. Nothing prevented the Applicant from launching an application to compel the CCMA or the employee to co-operate in the reconstruction of the record. Nothing further prevented the Applicant from filing its version of the complete record and informing the Court that the employee had been uncooperative and that the record filed was as accurate as could be in the circumstances and the best endeavours of the Applicant.

25. The record could have been placed before the Court with such reservations as the Applicant wished to note. The employee would then have had to deal with the record and note any objections to the accuracy of the record if the employee had any such reservations. The Court hearing the review, then would have made a decision in the event of a dispute as to the accuracy or completeness of the record.

26. The argument that the employee is to blame for the delay in the prosecution of the matter, due to her uncooperativeness in respect of the reconstruction of the record can only assist the Applicant to a certain point. The Applicant should have realised that it was not going to receive any joy from the employee and her erstwhile attorneys, and should have taken steps to prosecute the review. The Applicant clearly had no desire to prosecute the review, as it was of the view that the award had prescribed, and therefore was not in a rush to

¹¹ *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v Commission For Conciliation, Mediation and Arbitration and Others* (2003) 24 ILJ 931 (LAC) at paragra 17

proceed with the matter. The employee on the other hand has launched four applications in order to attempt to bring this matter to finality.

27. The answering affidavit to the application to dismiss fails to provide a full and reasonable explanation for the delay as to demonstrate to the Court that it has an excusable explanation.

28. The effect on the delay in this matter has been extremely frustrating for the Applicant. The employee appeared before Court unrepresented, as her attorneys of record had withdrawn due to lack of funds. Due to the substantial and unjustifiable delay in this matter, in my view justice will not be served if the application for dismissal is not granted.

29. Accordingly, I make the following order:

1. The matter has not prescribed.
2. The review application instituted by the Applicant under case number JR2766/2004 is dismissed.
3. The arbitration award dated 13th of October 2004 under case number GA41204-03 is made an order of Court.
4. The Third Respondent is awarded costs of opposing the review application together with costs of this application.

ASHLEY LYLE COOK
Acting Judge of the Labour Court

Appearances:

For the Applicant: Donald Graham

For the Third Respondent: In person

LABOUR COURT