

REPUBLIC OF SOUTH AFRICA



Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C490/2006

In the matter between:

NUMSA

FIRST APPLICANT

MCLAREN HOLLOWAY

SECOND APPLICANT

and

ATLANTIS FOUNDRIES (PTY) LTD

FIRST RESPONDENT

URSULA BULBRING N.O

SECOND RESPONDENT

MEIBC

THIRD RESPONDENT

Heard: 1 December 2011

Delivered: 9 December 2011

Summary: Application to dismiss review application due to unreasonable delay in prosecuting application for a period exceeding four and half years. Review application dismissed with costs.

JUDGMENT

SAVAGE AJ

Introduction

[1] This is an application in terms of rule 11 in terms of which the third respondent seeks the dismissal of the review application filed by the applicants on 2 August 2006. This application came before me more than more than six years after the dismissal of the second applicant, Mr McLaren Holloway (“the employee”).

[2] The employee, who was employed as a universal cutter/grinder, was dismissed for assaulting a fellow employee on 4 August 2005. On 19 June 2006 the second respondent found that the dismissal of the employee was both procedurally and substantively fair. On 2 August 2006, an application to review the arbitration award was filed by the

applicants in which the review and setting aside of the arbitration award was sought.

[3] On 3 November 2006, the third respondent opposed the review application. On 12 August 2008, almost two years after launching the review, the applicants appointed Ranamane Phungo Incorporated as their attorneys of record. By this date the record of proceedings had not been filed by the applicants. On 4 May 2011, Phungo Incorporated were substituted as attorneys of record. On 4 May 2011 a supplementary affidavit in terms of Rule 7A(8)(a) was filed at the same time as the transcript of oral evidence presented at the arbitration hearing. This was more than four and a half years after the review application had been filed.

[4] The company seeks that the review application be dismissed given the length of the delay in prosecuting the matter and given further the incomplete record of proceedings filed.

The facts

[5] Mr Lavhelesani Phungo, a practising attorney who was a former director of Ramamane Phungo and is a current director of Phungo Incorporated, deposed to the answering affidavit in this matter. In this affidavit he stated that until 30 March 2011 he was responsible for all labour law matters at Ramamane Phungo, as one of the two directors of the firm. He allocated the review application to Ms Z Tuswa and Ms J Hlungwane, an associate and a candidate attorney respectively. On 30 March 2011 Mr Phungo left Ramamane Phungo to establish Phungo Incorporated. It was only on inheriting the matter at Phungo Incorporated that he “read a handover memorandum from Tuswa and Hlungwane to familiarise himself with the state of play in all the matters” he had inherited.

[6] The applicants in terms of rule 7A(8) were required to file a notice amending or supplementing their notice of motion, or a notice that they stand by the notice of motion, within 10 days of the record being made available. On 4 May 2011 Mr Phungo served a notice of substitution and filed the transcription of oral evidence led at the arbitration hearing. He did not file the documents which formed part of the record as he “had not realised that there had been any documents which had also formed part of the record at arbitration” as these documents were not in a physical file and had remained at Ramamane Phungo.

[7] On 23 May 2011, the applicants through Mr Phungo sought a date of set

down of the review application on the unopposed roll given that no answering affidavit had been served by the company. On 24 May 2011, Mr Phungo became aware of the application to dismiss the review application which had been served on him on 19 May 2011. On 14 June 2011 the outstanding documents were filed by Mr Phungo on behalf of the applicants, together with a notice of opposition in respect of the application to dismiss the review application.

The legal principles

[8] In *Sishuba v National Commissioner of the South African Police Service* (2007) 28 ILJ 2073 (LC) it was held that there are two principal reasons why the court should have the power to dismiss a claim at the instance of an aggrieved party where the other has been guilty of unreasonable delay. The first is that the unreasonable delay may cause prejudice to the other parties; and the second is that it is “both *desirable and important that finality should be reached within a reasonable time in respect of judicial administrative decision*”.¹ This is because it is not always possible to adjudicate satisfactorily on cases that have gone stale.² The court holds a discretion as to whether to *allow proceedings to continue where there has been this lapse of time*.³ This discretion

1 *Radebe v Government of the Republic of South Africa* [1995 \(3\) SA 787](#) (N)

2 *Mohlomi v Minister of Defence* [\[1996\] ZASCA 82](#); [1997 \(1\) SA 1](#) to 4 (CC), at 129H-130A

3 *Bernstein v Bernstein* 1948(2) SA 205 (W) referred to in *Molala v Minister of Law and Order &*

arises as a consequence of the court's *inherent power to control its own proceedings and that accordingly the Court should assess whether the Plaintiff is guilty of an abuse of process*".⁴

[9] In *Bezuidenhout v Johnston NO & others*⁵, Nel AJ held:

"When an Applicant party has been dilatory in pursuit of his relief, and finds himself outside prescribed periods, it is vital that a good explanation needs to be provided for such delays as may have occurred in order to warrant the granting of an indulgence to the defaulting party. The prejudice suffered by parties as a result of undue delays is another fact to consider".

[10] In *Ivor Michael Karan t/a Karan Beef Feedlot and Another v Randall*⁶ Van Niekerk J concurred with the approach adopted in the *Bezuidenhout* and *Sishuba* cases. It follows therefore that this Court in the exercise of its discretion ought to consider three factors: the length of the delay; the explanation for the delay; and the effect of the delay on the other party and the prejudice that that party will suffer should the claim not be dismissed.⁷

another [1993 \(1\) SA 673](#) (W)

⁴ *Kuiper & others v Benson* 1984(1) SA 474 (W)

⁵ (2006) 27 ILJ 2337 (LC)

⁶ [2009] ZALC 120

⁷ At para 14

[11] In *Smith v Olivier*⁸ Fourie J noted that while “courts are generally slow to penalise a litigant for an attorney's negligent conduct of litigation, but as stated in *Colvn v Tiger Foods Industries Limited*⁹, there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his or her attorneys”. Melamet J in *De Wet v Western Bank Beperk*¹⁰ expressed the view that a litigant “cannot divest themselves of their responsibilities” in relation to a matter “and then complain “that their agents, in whom they have apparently vested sole responsibility, have failed them”.

Evaluation

[13] The applicants' notice in terms of rule 7A(8)(a) was filed more than four and a half years after the application to review was filed with this Court on 2 August 2006. This is an extraordinary period of delay and an unusually substantial one. The applicants could do no more than accept that this was so since no steps were taken for over four and a half years to prosecute the matter.

8 (22887/2010) [2011] ZAWCHC 166 (8 March 2011)

9 [2003 \(6\) SA 1](#) (SCA) at 9H

10 [1977 \(4\) SA 770](#) (T) at 780C-G

[14] What is remarkable in this matter is the absence of any proper explanation from both the applicants and their attorneys to explain the inordinate delay. No explanation was placed before this Court by the union as to what caused the delay in prosecuting the review application after it was filed on 2 August 2006 until the appointment of attorneys Ranamane Phungo Incorporated almost two years later on 12 August 2008. Thereafter, Mr Phungo's explanation provided amounts to a bald submission that his subordinates, Ms Tuswa and Ms Hlungwane experienced difficulties in procuring the record. No confirmatory affidavits are provided by either Ms Tuswa or Ms Hlungwane and Mr Phungo cannot take the matter any further or provide the necessary facts to support this allegation. In fact, he admits that he only familiarised himself with the matter once he had left Ranamane Phungo to establish his own practice. There is an absence of any explanation provided to this Court regarding the nature of the difficulties experienced by Ms Tuswa or Ms Hlungwane or the steps taken to resolve these difficulties.

[15] A further delay was occasioned when on 4 May 2011 Mr Phungo finally filed the transcription of oral evidence but not the documents which formed part of the record of proceedings. It took him until 14 June 2011 to file these outstanding documents. The reason provided for this was that he "had not realised that there had been any documents which had also formed part of the record at arbitration" and these documents were

not in a physical file and had remained at Ramamane Phungo. Why this process should take almost five weeks is simply unexplained.

[16] There is furthermore no explanation placed before this Court as to any steps taken by the applicants to secure the prosecution of the review application by their attorneys of record.

[17] The extent of the delay in prosecuting the review application is patently inordinate and substantial. The explanation provided by both the applicant and its attorney is either completely absent or, where an attempt is made by Mr Phungo to explain the delay in respect of certain of the periods of the delay, extremely thin. So thin, in fact, that it does no more than confirm the negligent conduct of the matter by the attorneys of record.

[18] In *MM Steel Construction*¹⁶ Nugent JA noted:

“In my view the failure to provide any explanation for [the labour consultant’s] failure to file the papers necessary to defend the claim is in itself sufficient reason to dismiss the application (Chetty’s case).

...I might add that it has been held that negligence on the part of an

attorney... will not necessarily constitute an acceptable explanation. An applicant who relies on the ineptitude or remissness of his attorney should at least satisfy a court that none of it is to be imputed to himself (Saloojee & another v Minister of Community Development¹¹)."

[19] There is no evidence provided by applicants as to why for two years the review application was not prosecuted and the record of proceedings filed. This undue delay on its own could have provided sufficient basis upon which to dismiss the application. For the period thereafter, it is patently clear that the conduct of the applicants' attorneys was negligent.

[20] In *Pathescope Union of SA Ltd v Mallinick*¹² in considering the maxim of *vigilantibus non dormientibus subveniunt* the appellate division held:

"...a plaintiff may, in certain circumstances, be debarred from obtaining relief to which he would ordinarily be entitled because of unjustifiable delay...where...in seeking relief...it would be inequitable to do so after the lapse of time constituting the delay. And in forming an opinion as to the justice of granting relief in the face of the delay, the court can rest its refusal upon potential prejudice, and that prejudice need not be to the defendant in the action but to third parties."

¹¹ 1965 (2) SA 135 (A) at 141B-H

¹² 1927 AD 292

[21] Given the extent of the delay and the explanation for it, I accept that the company stands to be prejudiced should it be required to proceed with its opposition to the review application. The length of time that has elapsed since the dismissal of the employee is now inordinate. This has a material impact on the litigants and I am satisfied that the company stands to be prejudiced by having to oppose an application now four and a half year old when the delay was not of its own making. The fact that there is no express rule of this Court requiring of an applicant that a record be filed within a prescribed period and no express rule which permits the dismissal of an action or application before this Court is of no assistance to the applicants. This court has the inherent power to manage its own processes. In doing so, it must seek to advance and serve one of the fundamental purposes of the Labour Relations Act, namely the expeditious resolution of disputes.

[22] Section 34 of the Constitution is of no assistance to the applicants. The constitutional right to have a matter adjudicated in a court of law does not permit an applicant to take no reasonable steps to prosecute its claim timeously. Were parties to be permitted to take no steps to prosecute matters brought to this Court for inordinate and substantial periods of time with no good cause shown for such delay, this would have an unacceptable impact on this Court's ability to administer justice in accordance with the prescripts and fundamental values of our

constitutional order. The default of the applicants, and that of their attorneys, is of their own making and their constitutional rights in terms of section 34 do not stand to be infringed. In the circumstances, the application succeeds.

Costs

[23] With regards to the issue of costs, this Court holds a discretion in terms of section 162 of the Labour Relations Act as to whether or not to award costs taking into account considerations of law and fairness. In exercising this discretion, ordinarily, it is the party that is wholly successful in an action or application that is awarded costs.

‘...In other words, the judicial officer may not, as he or she pleases, deprive a successful party of its costs. He or she must do so for reasons which he or she must set out or state. It similarly follows that, although ordinarily a successful party will be awarded its costs, it does not follow that that will always be the case.’¹³

[24] I can find there to exist no reason as to why costs, given considerations of law and fairness, should not follow the result.

¹³ *The Trustees of the Time Being of the Biowatch Trust v Registrar Genetic Resources and Others* (Open Democracy Advice Centre as Amicus Curiae) (A831/2005) [2008] ZAGPHC 135 (13 May 2008) 2008 JDR 0442 (T) at para 31

Order

[25] In conclusion, I order as follows:

1. The application to dismiss the review application is granted.
2. The applicants are ordered to pay the third respondent's costs.

K M Savage
Acting Judge

APPEARANCES

APPLICANT:

K Lengane

Instructed by Phungo Incorporated

FIRST RESPONDENT:

N F Rautenbach

Instructed by Maserumule Incorporated