

REPUBLIC OF SOUTH AFRICA



THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not reportable

Case no: P462/09

In the matter between:

FAWU OBO MZILENI MORRIS

Applicant

(The respondent in the Rule 11 application)

and

SOUTH AFRICAN BREWERIES

First Respondent

(The applicant in the Rule 11 application)

ZOLASHE LALLIE N.O

Second Respondent

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Third Respondent

Heard : 15 May 2013

Order : 15 May 2013

Summary : Application in terms of Rule 11 granted with costs.

JUDGMENT-REASONS FOR ORDER

AC BASSON J

[1] This is an application in terms of Rule 11 of the Labour Relations Act¹ (“the LRA”) to dismiss a review application pending under case number P462/2009. The Applicant in the Rule 11 application is SA Breweries (Pty) Ltd and the Respondent in the Rule 11 application is FAWU on behalf of Mzileni Morris (I will refer collectively to them as the respondent. Where applicable I will refer to Morris in his capacity as an employee).

[2] Morris was dismissed in February 2009. He referred a dismissal dispute to arbitration. The Commission for Conciliation Mediation and Arbitration (“CCMA”) held that the dismissal was fair. Morris served and filed a review application in this Court on 29 September 2009. On 12 October 2009 the CCMA filed the record. On 22 October 2009 the applicant filed a notice of opposition. On 17 November 2009 the Labour Court in Port Elizabeth issued a directive to the respondent advising it of the availability of the record and 2 disks for transcription. The applicant’s attorneys addressed a letter to the respondent requesting the record. On 9 December 2009 the applicant was served with the transcript of the proceedings which included only a portion of the evidence. Despite the defects the respondent filed a Notice that they stand by its Notice of Motion. The applicant’s attorney realised that the evidence of two witnesses did not form part of the transcript. The respondent was advised of the defects and was requested by the applicant to provide the “full record”. The CCMA had also advised the respondent that there were in fact additional recordings that were found in the archives. The disks however did not contain the evidence of two of the witnesses. In May 2010 the applicant’s attorneys suggested to the

¹ Act 66 of 1995

respondent that should the missing evidence not be found, the parties should reconstruct the evidence of the two witnesses. Correspondence followed thereafter to arrange for a meeting to reconstruct the record. No reply was received from the respondent. A further directive was issued by the Labour Court directing the respondent to file the record. No reply was received from the respondent. No further steps were taken by the respondent. On 3 June 2011 Van Niekerk J issued a directive which informed the parties that the matter can only be remitted back to the CCMA with the consent of the parties. No reply was received from the respondent. In June 2011 the respondent was advised that the applicant is considering a dismissal application. Still no reply was received from the respondent.

- [3] It is clear from the papers that no steps were taken by the respondent to prosecute the review application with diligence. Moreover to make matters worse for the respondent is the fact that its answering affidavit in the present application was served only on 25 July 2012 approximately 10 months after the application was filed. There is no explanation whatsoever in the answering affidavit as to why the papers were filed out of time. Even if this Court was inclined to entertain the answering affidavit, the answering affidavit does not take the matter any further.
- [4] It was submitted on behalf of the applicant that it is prejudiced by the respondent's failure to pursue the review application. Furthermore, more than two years have passed since the issuing of the award. The respondent has not taken proper steps to prosecute the review.
- [5] I have considered the matter and I am satisfied that the respondent has not taken sufficient steps to secure a complete record and that the respondent has not pursued the review diligently. It is further of concern that the respondent has ignored Court Directives and that the respondent has not even explained why it only filed an answering affidavit in this application approximately 8 months after the application was launched. Clearly the respondent is not interested in prosecuting the matter.² I am therefore of the

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Bezuidenhout v Johnston NO & Others (2006) 27 ILJ 2337 (LC):

"[34] In arguing before me that the review application should be dismissed by reason of the applicant's failure diligently to pursue it, I was referred by Mr Rhodie, Ms Mostert's legal representative, to the case of *Pathescope Union of SA Ltd v Mallinik* 1927 AD 292 where

view that in light of the substantial delays, this is a matter where the review application should be dismissed.

[6] In the event the following order is made:

- 6.1 The Rule 11 application is granted.
- 6.2 The review application is dismissed.
- 6.3 The Applicant, in the review application, is ordered to pay the costs, including the costs occasioned by the postponement on 11 April 2013.
- 6.4 The Applicants are jointly and severally ordered to pay the costs, the one paying the other to be absolved

Stratford AJA had the following to say (at 305) about the doctrine *vigilantibus non dormientibus lex subvenit*:

'That a plaintiff may, in certain circumstances, be debarred from obtaining relief to which he would ordinarily be entitled because of unjustifiable delay in seeking it is a doctrine well recognised in English law and adopted in our own courts. It is an application of the maxim *vigilantibus non dormientibus lex subvenit*. The very nature of the doctrine necessitates its being stated in general terms. I take the following apt extract from the judgment in *Lindsay E Petroleum Company v Hurd* (L.R. 5 P.C. 239) quoted in the court below:

"The doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where, by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But, in every case if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.... From the nature of the inquiry, it must always be a question of more or less depending upon the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and therefore be subject to uncertainty, but that, I think, is inherent in the nature of the enquiry.'

Thus the court is left free in the circumstances of each case to judge the equity of granting the relief in face of the delay in asking for it.... Where there has been undue delay in seeking relief, the court will not grant it when in its opinion 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 the relief in 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.'

(The doctrine '*vigilantibus non dormientibus lex subvenit*' is in A English law called 'laches'.)

[35] When an applicant party has been dilatory in pursuit of his relief, and finds himself outside prescribed periods, it is trite law 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."

AC BASSON J

Judge of the Labour Court

05 August 2013

LABOUR COURT

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