



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case NO: JR 2619/07

In the matter between:

SATAWU obo DELPORT TSHALANA

Applicant

and

TRANSNET BARGAINING COUNCIL

First Respondent

ADV. G DUNN-DE BRUYN

Second Respondent

TRANSNET FREIGHT RAIL

Third Respondent

Heard: 30 October 2014

Delivered: 1 October 2015

Summary: An inordinate delay in the prosecution of a review application and failure to apply for condonation of non-compliance with Rule 7A (6) and (8), may lead to the dismissal of the review application.

JUDGMENT

LALLIE J

Introduction

- [1] The applicant approached this Court for an order reviewing and setting aside an arbitration award of the second respondent who I will refer to in this judgement as the arbitrator. In her arbitration award dated 13 September 2007, the arbitrator dismissed the applicant's unfair labour practice claim. The application is opposed by the third respondent.

Factual background

- [2] The individual applicant is an employee of the third respondent. On 10 February 2006, he was charged with six counts of misconduct and subjected to a disciplinary enquiry. He was found guilty of four and demoted to the position of section manager. He challenged the third respondent's decision at the first respondent on the basis that his demotion constituted an unfair labour practice. The arbitrator found that he had failed to prove that the third respondent had committed an unfair labour practice and dismissed his claim. In this application the applicant seeks to have the award reviewed and set aside.

Point in limine

- [3] Opposing the application, the third respondent raised a *point in limine* that the review application stands to be dismissed because of the applicant's inordinate delay in prosecuting the review application and failure to file a proper application for condonation for the late filing of the notices in terms of Rule 7 A (6) and (8). It is common cause that the arbitration award was issued on 13 September 2007. The application for review was filed on 25 October 2007. An amended notice of motion, a further notice in terms of Rule 7A (6) with the bundle of documents used in the arbitration proceedings and a supplementary affidavit were filed on 1 March 2012.
- [4] The applicant opposed the *point in limine* on the basis that it has no basis in law. In addition, the applicant submitted that if there is non-compliance it should be condoned because of the first respondent's failure to dispatch the record of the arbitration proceedings to the Registrar of this Court. It was therefore impossible for the applicant to comply with provisions of Rule 7A (6). Nothing

precluded the third respondent from raising the *point in limine* as both the letter and spirit of the Labour Relations Act 66 of 1995 (the LRA) require disputes to be resolved expeditiously. The third respondent may also raise a *point in limine* when it is reasonably of the view that the applicant has flouted the Rules. In determining the validity of the third respondent's *point in limine* it is necessary to consider whether the applicant was responsible for the inordinate delay.

- [5] It is common cause that the review application was launched within the six weeks period prescribed in section 145 (1) of the LRA on 25 October 2007 as the arbitration award dismissing the individual applicant's unfair labour practice claim was issued on 13 September 2007. The first respondent should have dispatched the record of the arbitration proceedings to the Registrar within 10 days after receipt of the review application. The applicant was required to have furnished the Registrar and the respondents, in terms of Rule 7A (6), with a copy of the record or relevant portions thereof. This step should have been taken by the applicant within reasonable time. The applicant submitted that it was impossible to comply with Rule 7A (6) as no record was dispensed to the Registrar. The first respondent informed the applicant on 29 October 2007 that it did not maintain a record of arbitration proceedings as it was the responsibility of parties to do so. As early as 29 October 2007 therefore, the applicant was aware that the first respondent would not be filing a record of the arbitration proceedings as it had not been generated. The applicant union facilitated the appointment of its attorneys of record who on 7 April 2008 addressed a letter to the third respondent's attorneys indicating the need to have the arbitration record constructed. The third respondent responded on 16 April 2008 by furnishing the applicant's attorney with a CD it believed to be the mechanical record of the arbitration proceedings. On 14 May 2008, applicant's attorneys informed the third respondent that it had forwarded the CD to transcribers.
- [6] On 14 July 2008, the third respondent's attorneys addressed a letter to the applicant's attorneys expressing their concern about the applicant's delay in prosecuting the review application. They further indicated that the delay was prejudicial to the third respondent which needed finality on the matter. It took a letter of reminder for the applicant's attorneys to respond to the letter on 4

August 2008 and inform the third respondent's attorneys that they were awaiting the transcription. On 11 September 2008, the applicant's attorneys informed the third respondent's attorneys that the transcribers were encountering problems in their efforts to transcribe the CD. They requested the cassette tapes of the arbitration proceedings. They further intimated that they would only be in a position to provide the arbitration record as soon as a proper record had been completed.

- [7] After an exchange of correspondence between the attorneys, the third respondent's attorneys informed the applicant's attorneys on 13 January 2009 that the tapes were ready for collection at their offices for purposes of transcription. It turned out that the tapes contained the record of the individual applicant's disciplinary enquiry. Between 17 March 2009 and 13 July 2009, an attempt was made to reconstruct the record. On 17 July 2009, the second respondent informed the third respondent's attorneys that she was unable to locate her notes of the arbitration proceedings. The information prompted the third respondent's attorneys to address a letter to the applicant's attorneys on the same day, asking whether there was still a need for the parties to have another meeting with the second respondent or to propose a way forward. The attorneys agreed to hold a meeting to reconstruct the record on 31 July 2009 on which date, owing to the unavailability of the individual applicant's notes of the arbitration proceedings, the applicant's attorneys made an undertaking to locate and make them available to the third respondent.
- [8] After about eight months without hearing from the applicant the third respondent addressed a letter to the applicant's attorneys on 29 March 2010 requesting a copy of the record of the individual applicant's notes by 23 March 2010. They again expressed their concern about the delay and asked whether the applicant still intended pursuing the matter. The applicant's attorneys responded on 6 April 2010 that the applicant was finalising the transcription of the notes. The third respondent's attorneys put pressure through correspondence on the applicant's attorneys to provide the notes and on 17 May 2010, the applicant's attorneys informed the third respondent's attorneys that they were still awaiting the applicant's instructions. After further prompting

the applicant's notes were provided on 29 July 2010. The third respondent's attorneys confirmed the notes and requested the applicant to file them in compliance with Rule 7A (6). After more pressure had been exerted on the applicant, the record, without the applicant's notes was filed in compliance with Rule 7A (6) on 27 February 2012 with an amended notice of motion and a supplement affidavit in compliance with Rule 7A (8). The third respondent submitted that the inordinate delay in complying with Rule 7A (6) and (8) and the applicant's failure to apply for condonation of the delay justify the dismissal of the review application.

- [9] A number of material factual averments on the *point in limine* are not opposed. The applicant's approach that the third respondent should have challenged its delay in prosecuting the review application through a Rule 11 application which it would have opposed instead of raising a *point in limine* does not assist it. Nothing precluded the applicant from opposing the *point in limine*. It in fact opposed it but chose the factual averments it elected to deal with from the allegations the third respondent relied on. It did so at its own peril. When the most lenient approach to the applicant's delay is adopted, it may be absolved for the delay up to 30 July 2009 the day preceding the date the parties had set aside to reconstruct the record. No reasonable explanation was given by the applicant for the individual's failure to search for his notes on time and make them available at the meeting to reconstruct the record scheduled for 31 July 2009. The meeting had to be postponed to afford the individual applicant an opportunity to find the notes and have them served on the respondent. The delay between the 31 July 2009 and 6 April 2010 the date on which the applicant's attorneys informed the third respondent's attorneys that the individual applicant was still finalising the notes is substantial and inexcusable particularly because but for the third respondent's attorneys prompting, the delay might have been longer. After further prompting by the third respondent's attorneys, the applicant's attorneys advised on 17 May 2010, that they were awaiting for the applicant's instructions. It took a further prompting by the third respondent's attorneys for the notes to be served on the third respondent on 29 July 2010. No reasonable explanation was proffered for this substantial delay as well. When the meeting to reconstruct the record collapsed on 31 July 2009,

the individual applicant became aware that for the review application to proceed, he had to provide his notes. The most plausible inference that can be drawn from his year's delay is that he had lost interest in the review application.

[10] As if the year's delay was not enough, the applicant filed its Rule 7A (6) notice on 27 February 2012 without the individual applicant's notes after the third respondent's attorneys had exerted enormous pressure for the notice to be filed. It therefore took the applicant over a year and five months and pressure from the third respondent's attorneys, from making the notes available to decide to comply with Rule 7A (6). No reasonable explanation was offered for the substantial delay. All the delay which can be attributed to the applicant is excessive and without reasonable explanation. The applicant refused to accept responsibility for the delay and sought its condonation grudgingly. Condonation may be refused without considering prospect of success where there is failure to provide a reasonable and acceptable explanation for the delay. *Collet v Commission for Conciliation Mediation and Arbitration and Others*¹.

[11] I have considered the prejudice that upholding the *point in limine* may have on the applicant. I am however of the view that the applicant is the author of its own inconvenience. Any prejudice it may suffer is self-created as it flows directly from its failure to prosecute the review application by complying with Rule 7A (6) within reasonable time. Prejudice caused by delays to respondent parties should not be underestimated. I find the following *dictum* in: *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*² apposite:

‘...A litigant is entitled to have closure on litigation. The principle of finality in litigation is intended to allow parties to get on with their lives...’.

The third respondent communicated its concern over the delay, its prejudice and its intention to have the matter brought to finality as early as 14 July 2008.

[12] As no reasonable explanation has been proffered for the excessive delay in complying with Rule 7A (6) the *point in limine* must succeed. The third

¹ [2014] 6 BLLR 523 (LAC).

² 2008 (2) SA 472 (CC)

respondent sought a costs order against the applicant. As the parties have a continuing relationship, granting the order will not be appropriate.

[13] In the premises the following order is made:

13.1 The application for review is dismissed.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Mr Baloyi of Baloyi Attorneys

For the Respondent: Maserumule of Maserumule Attorneys

LABOUR COURT