



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P 386/14

In the matter between

ZOLILE WILLIAM KULA

Applicant

and

NXUBA LOCAL MUNICIPALITY

First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Second Respondent

Heard: 3 September 2015

Delivered: 30 October 2015

Summary: Inordinate delay in the prosecution of a review application may lead to its dismissal.

JUDGMENT

LALLIE, J

- [1] The applicant sought an order for the consolidation of his application to make an arbitration award an order of court in terms of section 158 (1) (c) of the Labour Relations Act 66 of 1995 as amended (the LRA) and the review application launched by the first respondent under case number PR 234/2014. He also filed an application to dismiss the review application. The factual background of this matter is that the applicant was employed by the first respondent in 1990 until his dismissal on 13 September 2013 for inappropriate allocation of houses constructed by the Department of Human Settlements. He challenged the fairness of his dismissal at the second respondent which found his dismissal substantively and procedurally unfair and ordered his reinstatement and payment of an amount of R 157 668. 00 in an award dated 27 August 2014.
- [2] On 22 October 2014, the first respondent filed an application to review and set aside the arbitration award under case number PR 234/2014. On the same day, the applicant filed an application to make the arbitration award an order of court. On 10 November 2014, the applicant opposed the review application. After persuasion by the applicant's attorneys, an incomplete record was filed on 19 January 2015. On 2 February 2015, the applicant's attorneys placed the first respondent's attorneys on terms for the filing of the complete record and threatened to move an application to have the award made an order of court. The first respondent's attorneys replied in a letter dated 12 February 2015 by advising that they were awaiting the record from transcribers. After waiting for further communication from the first respondent for over three months, the applicant filed the application to have the review application dismissed on the grounds that the first respondent had abandoned the review application owing to its inordinate delay in its prosecution when it was aware of his application to make the arbitration award an order of court.
- [3] On 31 August 2015, only two days before the hearing of the application to make the arbitration award an order of court and the application to dismiss the review application, the first respondent filed its answering affidavit opposing the latter application. It filed an application for condonation of the late filing of the record simultaneously. The first respondent submitted that it served the

transcribed record of the arbitration proceedings on 27 August 2015. It expressed the view that it would have been meaningless to oppose the application without filing the record. It took no issue with the facts of the application as presented by the applicant. It, however, took issue with the submission that it had abandoned the review application as its filing of the record and the notice in terms of Rule 7A (8) was conclusive proof of its intention to pursue the review application. The reason advanced by the first respondent for filing, on 27 August 2015, a record which was delivered to its attorneys on 3 February 2015 is that it was misplaced and not brought to the attention of the first respondent's attorney responsible for the matter. When the error was discovered the record was served on the applicant without delay.

- [4] The application for the order consolidating the application to make the arbitration award an order of court and the application to dismiss the review application is not opposed. I am satisfied that the applicant has established that it would be expedient and just for the order to be granted. Both applications have the effect of bringing the matter to finality and consolidating them will save both parties time and legal costs.
- [5] The application to dismiss the review application was served on the first respondent on 12 May 2015. The first respondent was required to have filed its answering affidavit thereto within 10 days thereafter. It, however, filed it on 31 August 2015 more than three months out of time. The first respondent did not apply for condonation of the late filing of the answering affidavit. It is, therefore, not properly before Court. I have considered the arguments on behalf of the first respondent to the effect that without the record which was filed on 31 August 2015, there were no grounds to resist the application to dismiss the review application. Having perused the record, the first respondent is convinced that it has a *prima facie* case on review. It was further argued that the application to condone the late filing of the record should succeed particularly because the first respondent has taken all the steps to cure defects in the review application. Any prejudice the applicant

stands to suffer will be cured should the review application fail as he will be reinstated.

- [6] The condonation application was opposed by the applicant on the basis that it was too little too late. The applicant submitted that he warned the first respondent shortly after the application was filed in November 2014, that if there was any delay in the prosecution of the review application, the application to make the arbitration award an order of court would be set down. The first respondent was reminded by the applicant to file the record on 21 November 2014 and informed, on 19 January 2015, that the record was incomplete. The complete record was finally filed on 31 August 2015. The applicant argued that the delay was excessive. Its explanation that the record was delivered at the first respondent's attorneys in February 2015 but misfiled and discovered in August 2015 is unacceptable. The applicant relied on the unreported decision of the Labour Court in *Makuse v Commission for Conciliation, Mediation and Others*,¹ where the Court referred with approval to a number of cases which highlight the need for litigants to act promptly and in terms of the Rules of Court. One such decision is *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*,² where the Court held as follows:

'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. After an inordinate delay a litigant is entitled to assume that the losing party has accepted the finality of the order and does not intend to pursue the matter any further.'

- [7] It is, at this stage, trite that in the absence of reasonable explanation for the delay, there is no need to consider prospects of success. The first respondent's explanation for the delay between February and August 2015 that the record was misfiled is rendered unreasonable by the absence of the explanation of the steps taken to find and serve the record earlier than August 2015. The first respondent adopted a laid-back approach when it was aware

¹ (JR2795/11) [2015] ZALCJHB 265 (18 August 2015) at paras 4-9.

² 2008 (2) SA 472 (CC) at para 31.

that the applicant had filed an application in terms of section 158 (1) (c) and after the applicant had expressed his unwillingness to tolerate delays. As the delay is excessive and its explanation unreasonable the late filing of the record cannot be condoned.

Amongst the authority the applicant sought to rely on in arguing for the dismissal of the review application is *Novo Norsdick (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*³ where it was held that employers who launch spurious review applications and then fail to prosecute them with due diligence will not receive assistance or sympathy from courts. In *Meities v New Tyre Manufacturers Bargaining Council and Others*,⁴ it was held that the following factors have to be taken into account in considering whether to uphold an application for the dismissal of a review application for want of prosecution:

- '(a) Is the delay in the prosecution of the matter excessive?
- (b) Is there a reasonable explanation for the delay?
- (c) What prejudice will the other party suffer if the dismissal is not granted?
- (d) Are there prospects of success in the main case?'

[8] The applicant's submission that the delay in the prosecution of the review application is excessive cannot be denied. The review application was filed in October 2014. The first respondent was required to have taken the necessary steps to file the record of the arbitration proceedings shortly thereafter. Clause 11.2.2 of the Practice Manual of the Labour Court provides that for purposes of Rule 7A (6), records must be filed within 60 days of the date on which the applicant is advised by the Registrar that the record has been received. Clause 11.2.3 provides that an applicant who fails to file the record within the prescribed period will be deemed to have withdrawn the review application. The record in the review application was filed on 27 August 2015 more than nine months after the review application was filed and after being prompted by

³ (2011) 32 ILJ 2663 (LAC).

⁴ (2012) 33 ILJ 1725 (LC) at para 30.

the applicant. In the absence of an answering affidavit, there is no explanation for the delay.

- [9] The first respondent will suffer prejudice should this application be granted. The first respondent's argument that any prejudice that the applicant stands to suffer will be cured by his reinstatement should the review application not succeed overlooks the reality that the applicant obtained an arbitration award in his favour in August 2014. He was entitled to be gainfully employed shortly thereafter. He last received an income when he was dismissed in September 2013. The first respondent cannot expect the applicant to continue leaving without an income any further. The prejudice the applicant continues to suffer because of the impediments in the enforcement of the arbitration award in his favour should not be underestimated. So is his right to have the review application brought to finality without undue delay. The prejudice the first respondent suffers is self-created. On the applicant's version, which is the only version before me, the first respondent has no prospects of success. The applicant has established valid grounds for the dismissal of the review application owing to the first respondent's inordinate delay in prosecuting it.
- [10] The applicant has an arbitration award ordering his reinstatement. He was prevented by the first respondent from reporting for duty in terms of the arbitration award. There are no impediments to his reinstatement. His application to have the arbitration award made an order of court should, therefore, succeed.
- [11] I could find no reason both in law and fairness for costs not to follow the result.
- [12] In the premises, the following order is made:
- 12.1 The order to consolidate the application to make the arbitration award under case number ECD 101307 and dated 27 August 2014 an order of court and the review application instituted by the First Respondent under case number PR 234/2014 is granted.

- 12.2 The arbitration award under case number ECD 101307 and dated 27 August 2014 is made an order of court.
- 12.3 The review application under case number PR 234/2014 is dismissed.
- 12.4 The first respondent pay the applicant's costs.

Lallie, J

Judge of the Labour court of South Africa

Appearances:

For the Applicant: Advocate Grogan

Instructed by Wheeldon, Rushmere & Cole Attorneys

For the First Respondent: Advocate Grobler

Instructed by Wikus Van Rensburg Attorneys

LABOUR COURT