



**THE LABOUR COURT OF SOUTH AFRICA
JOHANNESBURG**

Not Reportable
Case No: JR941/14

In the matter between:

EDCON LIMITED

Applicant

and

**THE COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER VIVI MASINA, N.O.

Second Respondent

SIMANGELE YVONNE SEKGOBELA

Third Respondent

Heard: 03 September 2015

Judgment: 12 February 2016

Summary: Application to dismiss an application for review on account of delays in its prosecution; Explanation for the delay wholly unsatisfactory; Application for review dismissed with costs.

JUDGMENT

VOYI AJ.

- [1] The Third Respondent (*“the employee”*) was dismissed by the Applicant (*“Edcon”*) on or about 21 January 2014. She challenged her dismissal before the First Respondent (*“the CCMA”*) and an arbitration award reinstating her with back pay was ultimately issued by Commissioner Vivi Masina (*“the Commissioner”*) on or about 29 April 2014.
- [2] Being discontent with the Commissioner’s award, Edcon launched an application for review in terms of section 145 of the Labour Relations Act.¹ The application for review was instituted on or about 9 June 2014.
- [3] After the launching of the review in June 2014, Edocon took no steps whatsoever to prosecute the review. This resulted in the employee launching an application to dismiss the review application on account of Edcon’s non-compliance with, *inter alia*, the relevant provisions of Rule 7A of the Labour Court Rules.
- [4] In addition to the dismissal of the review, the employee also seeks an order making the arbitration award an order of court as envisaged by section 158(1)(c) of the LRA.²
- [5] Before me is the application to dismiss and to also make the arbitration award an order of court. The present application is opposed by Edcon. It would appear that the matter was being handled internally within Edcon throughout. At the hearing of the application to dismiss, Edcon was represented by Mr H Nieuwoudt of Norton Rose Fulbright SA.

¹ Act No. 66 of 1995 (*“the LRA”*).

² Section 158(1)(c) reads as follows:

“The Labour Court may –

(a) ...

(b) ...

(c) make any arbitration award ...an order of the Court.”

- [6] Understandably, there was not much that Mr Nieuwoudt could say in resisting the application as he came on record in this matter shortly before it was heard before this Court.
- [7] As stated herein above, the application for review was launched on or about 9 June 2014. Within a few days later and on 17 June 2014, the CCMA filed with the Registrar of this Court the record of the arbitration proceedings.
- [8] The CCMA's notice of compliance with Rule 7A(3) of the Labour Court Rules lists the documents forming part of the record delivered. Included in the list is one (1) compact disc. On or about 18 June 2014, the Registrar of this Court efficiently notified Edcon of the availability of the record as follows:
- '1. This serves to notify you in terms of Rule 7A(5) of the Labour Court rules that the CCMA/ Bargaining Council have delivered the Records at the Office of the Registrar of this Court.
 2. You are hereby called upon to come and collect same within 7 days from the date of this letter, failing which the Registrar shall thereafter return them back to the CCMA / Bargaining Council, which could in turn, unnecessarily delay the hearing of your case.'
- [9] Quite significant to this matter, Edcon never bothered to uplift the record from the Registrar as envisaged by Rule 7A(5) of the Labour Court Rules. The record filed by the CCMA is still intact in the court file and was also never returned to the CCMA as intimated in the above notification.
- [10] The application to dismiss was launched on or about 08 October 2014, after a period of almost four (4) months had elapsed with no tangible steps being taken by Edcon to prosecute the review. After the application to dismiss was launched, Edcon was quick to deliver its notice of intention to oppose and answering affidavit. These were delivered well within October 2014.

[11] Even when faced with an application to dismiss its review, Edcon still took no steps whatsoever to prosecute the review. The explanation for the delay is quite bizarre. Edcon admits to having received the CCMA's notice of compliance with Rule 7A(3). The deponent to Edcon's answering affidavit, however, proffers the following justification for the delay in prosecuting the review:

13.1 '...had the Third Respondent bothered to enquire about alleged delays from [Edcon], they would have found out that [the deponent] was out of the country at the time on holiday in Brazil to watch the Fifa Soccer World Cup. See email confirmation marked "ED1". My holiday began on 10 June 2014 and I returned to the South Africa on or about 25 June 2014. I was due to return on 29 June 2014 but I cut my trip short in order to return to work and attend to the outstanding matters, and also in anticipation of my wife going into labour with our first child in the beginning of July. Upon my return to office on 26 June 2014 I discovered that the record was ready for collection at the Labour Court. The following day on 27 June 2014 the record was indeed uplifted and collected.'³

13.2 'On 4 July 2014 whilst still in the process of attempting to sort out the transcription with the transcribe, my wife went into labour and delivered the most amazing baby boy. I was on maternity leave during this time and would return to work after a couple of days. However, during my wife delivery there were complications as a result of a medical condition which forced her to remain in hospital for weeks on end intermittently. This added a lot of stress and unavailability of my part in terms my (sic) commitments at work. I would have to be looking after the baby and caring for my wife during this period upon release from hospital which has led neglecting (sic) of work, I sincerely apologise for my part in failing to attend to delivery of the record within a reasonable time'⁴

³ Answering Affidavit, at p. 61, para 10.

⁴ *Ibid*, para 15.

- [12] The deponent proceeds further and apportions blame on the employee and her attorneys. It is even suggested in the answering affidavit that the employee's attorneys have '*...not once communicated with [Edcon] to push for the delivery of the record.*'⁵
- [13] In conclusion, Edcon's answering affidavit remarks that this Court should dismiss the application by the employee, with costs, on account of her failure to engage Edcon '*... to encourage prosecution...*' of the review.
- [14] Based the material before me, it is not correct that Edcon 'uplifted and collected' the record from the Registrar of this Court. As stated herein before, the record is still part of the Court file. The alleged attempts to transcribe the recordings of the arbitration proceedings were made before the launching of the review. They are, accordingly, no attempts to prosecute the review following its delivery.
- [15] It is nowhere mentioned in the answering affidavit as to why Edcon has not complied with Rule 7(6) of the Labour Court Rules. At paragraph 13 of Edcon's answering affidavit, the deponent thereto advances the following shocking proposition:
- 'In terms of the Rule 7A (6) of the Rules of the Labour Court the Applicant must furnish the registrar and each of the other parties with a copy of the record or portions of the record as the case may be. No time is prescribed in terms of this Rule as to when this ought to occur.' [own emphasis]
- [16] I do not hesitate to find that no reasonable explanation has been advanced by Edcon as to the cause of the delay in prosecuting the review. The explanation tendered is superficial, unacceptable and wholly unsatisfactory. In *Moraka v National Bargaining Council for the Chemical Industry and Others*,⁶ this Court held as follows:

⁵ *Ibid*, p. 63, para 17.

⁶ (2011) 32 ILJ 667 (LC) at para 20.

‘A party defending itself against an application to dismiss a review on account of undue delay is effectively asking the court to condone its dilatoriness and similar considerations which apply to the evaluation of applications for condonation ought to be relevant in the evaluation of these applications.’

[17] In the present matter, Edcon opted not to deal at all with its prospects of success in the review. At paragraph 25 of Edcon’s answering affidavit, the following is stated:

‘The relief sought in the notice of motion will be further considered in the main action but I wish to record that the merits of the main action as delay with by the [employee] in this application need not be dealt with at this stage.’

[18] Not only is there no reasonable explanation for the excessive delays in prosecuting the review application, the merits of the review itself are not even addressed.

[19] The prejudice to the employee on account of Edcon’s delay is glaringly obvious and cannot be overlooked.

[20] The power and authority of this Court to dismiss a case on account of delays in its prosecution was, recently, affirmed by the Constitutional Court in *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*.⁷

[21] The relevant principles for consideration when dealing with applications to dismiss proceedings on account of delays in their prosecution were extensively dealt with by this Court in *Sishuba v National Commissioner of the SA Police Service*.⁸

⁷ (CCT 228/14) [2015] ZACC 557 (15 December 2015).

⁸ (2007) 28 ILJ 2073 (LC). See also: *BP Southern Africa (Pty) Ltd v National Bargaining Council for the Chemical Industry & Others* (2010) 31 ILJ 1337 (LC); *Moraka v National Bargaining Council for the Chemical Industry and Others* (*supra*)

- [22] The overriding considerations in the present matter weigh heavily in favour of the dismissal of the review. I also find that a case has been made out for the arbitration award to be made an order of court as contemplated by section 158(1)(c) of the LRA.
- [23] With the review application not having been prosecuted as required by the Labour Court Rules, there is no hindrance to this Court making the arbitration award an order of court.
- [24] In conclusion, nothing prevents me from concluding that the application for review was simply launched as a stratagem to frustrate compliance with the Commissioner's arbitration award. The employee is being severely prejudiced in the process.
- [25] There is absolutely no explanation as to why Edcon failed to prosecute the review. The purported explanation is nothing but a daring and disdainful disregard of the Labour Court Rules.
- [26] A punitive costs order against Edcon is, therefore, warranted under the circumstances.

Order

- [27] I, accordingly, make the following order:

- 27.1 The application for review launched by Edcon Limited on or about 9 June 2014 under case number JR941/14 is hereby dismissed.
- 27.2 The arbitration award issued by Commissioner Vivi Masina on 29 April 2014 under case number GAJB 2489-14 is hereby made an order of court in terms of section 158(1)(C) of the Labour Relations Act, No. 66 of 1995 as amended.

27.3 Edcon Limited is ordered to pay the Third Respondent's costs in respect of both the application for review and the present application on an attorney-and-client scale.

NP Voyi

Acting Judge of the Labour Court of
South Africa

Appearance:

For the Applicant: Mr H Nieuwoudt (attorney) of Norton Rose Fulbright SA

For the Third Respondent: Advocate ZQ Majenge

Instructed by: TB Mtholo Attorneys

LABOUR COURT