



**THE LABOUR COURT OF SOUTH AFRICA
JOHANNESBURG**

Not Reportable
Case No: JR 2033/11

In the matter between:

CHUBB ELECTRONIC SECURITY SA (PTY) LTD

Applicant

and

SIMON M. MOKOENA

Respondent

In re:

SIMON M. MOKOENA

Applicant

and

CHUBB ELECTRONIC SECURITY SA (PTY) LTD

First Respondent

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

Second Respondent

COMMISSIONER LUNGILE MATSHAKA, N.O.

Third Respondent

Heard: 18 March 2015

Judgment: 01 March 2016

Summary: Application to dismiss review proceedings on account of delay in their prosecution; No exculpatory explanation for the delay; Application succeeding with costs.

JUDGMENT

VOYI AJ.

Introduction

- [1] This is an application launched by Chubb Electronic Security South Africa (Pty) Ltd (hereinafter “*Chubb*”) for the dismissal of review proceedings that were instituted by Mr Simon M. Mokoena (hereinafter “*Mokoena*”) on or about 23 August 2011 under case number JR2033/11.
- [2] The application to dismiss was launched, under Rule 11 of the Labour Court Rules, on 9 February 2012. It is opposed by Mokoena.

Background

- [3] The need to launch the application arose after Mokoena failed to comply with the provisions of Rule 7A(6) of the Labour Court Rules. In terms of the said Rule 7A(6), Mokoena had to “...*furnish the registrar and each of the other parties with a copy of the record or portion of the record, as the case may be, and a copy of the reasons filed...*”.
- [4] With the review application having been served on both the Commission for Conciliation, Mediation and Arbitration (hereinafter “*the CCMA*”) and Commissioner Lungile Matshaka (hereinafter “*the Commissioner*”) on or around 23 August 2011, the CCMA duly complied with the provisions of Rule 7A(3) of the Labour Court Rules.

[5] According to the aforementioned Rule 7A(3), the CCMA and the Commissioner had to “...*timeously comply with the direction in the notice of motion*” calling upon them to *inter alia* dispatch to the Registrar of this Court the record of the proceedings sought to be reviewed. This they did on or about 31 October 2011. Thereafter, it was the responsibility of Mokoena to fulfil the provisions of Rule 7A(6) of the Labour Court Rules.

[6] As mentioned herein above, there was no compliance with the provisions of Rule 7A(6) by Mokoena. This was notwithstanding a letter from the CCMA dated 27 October 2011, wherein the following was stated:

‘The above-mentioned Review application refers.

In compliance with Rule 7A(3) of the Rules of the Labour Court, the CCMA has dispatched the record of the proceedings in the above-mentioned application to the Registrar of the Labour Court.

...

In terms of Rule 7A(6) you must furnish the Registrar and each of the others parties (sic) with a cop of of the record or portion of the record.

In terms of Rule 7A(9) (sic) you must advise the Registrar whether you stand by your notice of motion or otherwise wish to amend, add or vary it.

Yours faithfully.’

[7] On 9 November 2011, Chubb’s attorneys of record addressed a letter to Mokoena’s attorneys requesting ‘a copy of the transcribed records’, ‘the arbitration records’ as well as a ‘supplementary affidavit’, if any. There was no response to this letter. A subsequent letter was, apparently, dispatched by Chubb’s attorneys. In a letter dated 12 January 2012, Mokoena was placed on terms with regards to delivery of the record of the arbitration proceedings. In this particular letter, the following was stated:

'We refer to the above mentioned matter and our letter dated 9 November 2011.

Kindly take note that although we have requested your transcribed records and supplementary affidavit numerous times, you failed to respond to any of our requests.

Kindly serve our office with your transcribed records and supplementary affidavit within 10 days. We hereby advise that your failure to respond to our numerous requests will authorise our client to launch an application for the dismissal of your client's application. We will proceed with an application for dismissal should you not serve your records and supplementary affidavit within 10 days.

We trust you find the above in order.

Yours faithfully'

- [8] There was no reaction to the aforementioned letter of 12 January 2012 by Mokoena and/or his attorneys. On 9 February 2012 and after the lapse of the ten (10) days period stated in the said letter, Chubb launched its application to dismiss Mokoena's review application.
- [9] The application to dismiss was served on Mokoena's attorneys of record on 6 February 2012 via registered post. Under Rule 4(1)(a)(vii) of the Labour Court Rules and unless the contrary is proven, it is presumed that service via registered post was effected on the seventh day following the day on which the document was posted.
- [10] In terms of Rule 7(4)(b) of the Labour Court Rules, Mokoena had to deliver his notice of intention to oppose Chubb's application as well as his answering affidavit within ten (10) days from the day on which the application to dismiss was served. In this matter, the date of service is presumed to have been the seventh day after 6 February 2012.

- [11] No opposing papers were received from Mokoena and, as a result, the application to dismiss was enrolled for hearing on the unopposed motion roll for 12 June 2012. On this date, the matter was removed from the roll on account of non-appearance.
- [12] Shortly thereafter, Chubb's attorneys launched an application for the re-enrolment of the application to dismiss on the unopposed motion roll. Pursuant thereto and on 4 June 2013, an Order was issued that the application to dismiss be enrolled for hearing on notice to both parties.
- [13] The application to dismiss was, indeed, enrolled for hearing by the Registrar and the date allocated was 6 August 2013. Before this date and on or about 30 July 2013, Mokoena delivered his notice of intention to oppose the application to dismiss. The answering affidavit followed suit on 1 August 2013.
- [14] The matter was removed from the unopposed motion roll on 6 August 2013 with costs reserved. The removal was occasioned by the matter being, all of a sudden, opposed by Mokoena.
- [15] On 15 August 2013, Chubb delivered its replying affidavit. In as much as Mokoena's answering affidavit was way out of time, no notice of objection as contemplated by paragraph 11.4.2 of the Practice Manual of the Labour Court of South Africa ("*the Practice Manual*") was delivered.
- [16] Instead, Chubb raised a point *in limine* regarding the late delivery of the answering affidavit in its replying affidavit. The latter affidavit was also delivered outside the prescribed five (5) days' time frame under Rule 7(5)(a) of the Labour Court Rules.
- [17] I do not intend to dwell much on the late delivery of the answering and replying affidavits. If either of the parties had an issue with the late delivery of the said affidavits, the necessary notice of objection envisaged by paragraph 11.4.2 of the Practice Manual had to be delivered. I therefore regard both affidavits as being properly before me.

Evaluation

[18] The review application was launched on 28 August 2011. After a period of over five (5) months with no action on the part of Mokoena, the application to dismiss was launched.

[19] The application was launched after Mokoena failed to comply with the provisions of Rule 7A(6) of the Labour Court Rules.

[20] Mokoena only caused the transcript of the arbitration proceedings to be delivered on 30 July 2013, which was almost two (2) years after the review proceedings were initiated.

[21] At this juncture I wish to recall the following statement in *United Plant Hire (Pty) Ltd v Hills and Others*,¹ which is apt in the context of this matter:

‘Litigation is a serious matter and, once having put a hand to the plough, the applicant should have made arrangements to see the matter through.’

[22] The 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*.²

[23] In *Toyota SA Motors (Pty) Ltd (supra)*, the Constitutional Court passed the following relevant remarks:

‘Any delay in the resolution of labour disputes undermines the primary object of the LRA. It is detrimental not only to the workers who may be without a source of income pending the resolution of the dispute but, ultimately, also to an employer who may have to reinstate workers after many years.’

¹ 1976 (1) SA 717 (A) at 721E-G.

² (CCT 228/14) [2015] ZACC 557 (15 December 2015).

[24] With the above passage, the Constitutional Court was echoing similar sentiments expressed by Ngcobo J in *Commercial Workers Union of SA v Tao Ying Metal Industries and Others*,³ wherein he held thus:

‘Any delay in resolving a labour dispute could be detrimental not only to the workers who may be without a source of income pending the resolution of the dispute, but it may, in the long run, have a detrimental effect on an employer who may have to reinstate workers after a number of years.’

[25] The relevant principles for consideration when dealing with an application to dismiss review proceedings on account of delay in their prosecution were extensively dealt with by this Court in *Sishuba v National Commissioner of the SA Police Service*.⁴

[26] The factors to be taken into account in considering whether or not to grant the dismissal of a matter due to unreasonable delay in its prosecution were stated by this Court in *Baldwin Steel and Another v National Union of Metalworkers of SA and Others*⁵ as being:

‘...the length of the delay; the explanation for the delay; and the effect of the delay on the other party and the prejudice that party will suffer should the claim not be dismissed.’

[27] The prospects of success in the main case were also pointed out as a relevant factor by this Court in *Meintjies v New Tyre Manufacturers Bargaining Council and Others*.⁶

³ (2008) 29 ILJ 2461 (CC) at para 63.

⁴ (2007) 28 ILJ 2073 (LC). See also: *Karan t/a Karan Beef Feedlot and another v Randall* (2009) 30 ILJ 2937 (LC); *BP Southern Africa (Pty) Ltd v National Bargaining Council for the Chemical Industry and Others* (2010) 31 ILJ 1337 (LC); *Moraka v National Bargaining Council for the Chemical Industry and Others* (2011) 32 ILJ 667 (LC).

⁵ (2011) 32 ILJ 2116 (LC) at para 15.

⁶ (2012) 33 ILJ 1725 (LC) at para 30(d). See also: *Equity Aviation Services (Pty) Ltd v SA Transport and Allied Workers Union and Others* (2009) 30 ILJ 2912 (LC) at para 27.

[28] In *Moraka v National Bargaining Council for the Chemical Industry and Others*,⁷ this Court held as follows:

‘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.’

[29] In resisting the application to dismiss, Mokoena proffers the following explanation for his delay:

‘9.2 Since my dismissal, I am not working and I depend on my wife who is getting children grant R720.00 per month to survive.

9.3 I could not raise money for the transcript of CCMA record as required by rules, hence, it took time for me to finally be able to pay for the record to the transcribers.

9.4 I always wanted to take the matter on review and the transcribers could not proceed with the transcript without the payment of the money for transcript.

9.5 I could only manage to make payment in May 2013 hence the record has only been finalised on the 18 July 2013.’

[30] Somewhere in his answering affidavit, Mokoena goes on to state that he is “...*unemployed and it took time for [him] to get the amount required to the transcript which is R5000.00*”.

[31] As to how he eventually obtained the required funds, Mokoena states that he was “...*ultimately assisted by [his] mother who is a pensioner and [his] brother...*”.

⁷ (2011) 32 ILJ 667 (LC) at para 20.

[32] In essence, Mokoena simply advances lack of funds as an explanation for the delay. In *Gaoshubelwe and Others v Pie Man's Pantry (Pty) Ltd*,⁸ this Court held thus:

‘...as a general approach the lack of funds should not on its own constitute a reasonable explanation.’

[33] With regard to the explanation proffered by Mokoena, I am afraid there is not much detail. There is not a single correspondence between Mokoena or his attorneys and the transcribers concerned.

[34] Proof of the payment that was eventually made in May 2013 is also not attached. Mokoena does not even attach confirmatory affidavits from the individuals that eventually assisted him with the required funds. In my considered opinion, the explanation tendered is superficial.

[35] There is also no explanation as to why Mokoena never saw it fit to advise Chubb, through the attorneys on record, of the alleged difficulties he was experiencing in raising the required funds to have the record transcribed.

[36] If the difficulties with prosecuting the review were solely with regard to raising funds to have the record transcribed, the least that Mokoena could have done was to deliver the documentary part of the record of the arbitration proceedings.

[37] When delivering the record on 30 July 2013, Mokoena simply served and filed the transcript of the arbitration proceedings. The other documents that served before the Commissioner at the arbitration proceedings were not delivered as part of the record.

[38] In this matter, I am not satisfied that there is a satisfactory and reasonable explanation for the delay in prosecuting the review. Although the delay was not that excessive when the application to dismiss was launched, I cannot turn a

⁸ (2009) 30 ILJ 347 (LC) at para 36.

blind eye to the fact that the record was only delivered almost two (2) years after the review proceedings were launched.

- [39] In his answering affidavit, Mokoena addresses only one aspect of his prospects of success in the review proceedings sought to be dismissed. He does so by contending that the Commissioner made an arbitration award for one 'Karin Louise Truebody' and not for him. This contention arises from the fact that the Commissioner's award makes reference to 'Karen Louise Truebody' at paragraph 35 thereof.
- [40] Purely on account of the mentioning of 'Karin Louise Truebody' in the award, Mokoena contends that the Commissioner's award stands to be reviewed and set aside. It seems to me that this contention is an exaggeration. The reference to 'Karin Louise Truebody' in the Commissioner's award is nothing but an obvious error.
- [41] The award itself deals with the dispute between Mokoena and Chubb. Throughout his award, the Commissioner makes reference to Mokoena, albeit under the name 'Simon'. In my view, Mokoena is being disingenuous in alleging that the arbitration award he seeks to review does not relate to him.
- [42] Other than reliance on the erroneous reference to 'Karin Louise Truebody' in the Commissioner's award, Mokoena does not address any other aspect of his prospects of success in the main review proceedings.
- [43] In the circumstances of this matter, I am satisfied that a case has been made out for the dismissal of the review. The incident which resulted in Mokoena being dismissed by Chubb occurred in June 2008. Mokoena has failed to tender an exculpatory explanation for the delay in prosecuting his application for review. He equally failed to advance prospects of success in his review. In both regards, he was remiss.
- [44] There is, in my view, no reason why in law and fairness costs should not follow the results. This also applies to the costs that were reserved on 6 August 2013.

Order

[45] I, accordingly, make the following order:

- 45.1 The application for review launched by the Respondent (being Simon M. Mokoena) on or about 23 August 2011 under case number JR2033/11 is hereby dismissed.
- 45.2 The Respondent is ordered to pay the Applicant's costs in respect of both the application for review as well as the application to dismiss on a party-and-party scale.

NP Voyi

Acting Judge of the Labour Court of
South Africa

Appearance:

For the Applicant: Advocate M Meyer

Instructed by: Nothnagel Attorneys

For the Respondent: T Faku (Attorney) of Faku Attorneys

LABOUR COURT