



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no. JR 2422/08

In the matter between:

GEORGE TOBA

Applicant

and

MOLOPO LOCAL MUNICIPALITY

First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL ("SALGBC")

NORTH-WEST DIVISION

Second Respondent

ADVOCATE T.L. MABUSELA N.O

Third Respondent

Heard: 25 August 2016

Delivered: 28 March 2017

JUDGMENT

MAHOSI AJ

- [1] This is an application in terms of Rule 11 of the Labour Court Rules for an order to dismiss the first respondent's application to review and set aside the arbitration award issued by the third respondent ("the arbitrator") under the auspices of the SALGBC ("second respondent") under case number NWD090708 dated 12 September 2008. The applicant further seeks an order declaring the said arbitration award to be made an order of court in terms of section 158(1)(c) of the Labour Relations Act¹ ("LRA").
- [2] The factual backgrounds to the present dispute may be summarised thus. The applicant was employed by the first respondent as a personal assistant to its Mayor from the 1st of October 2006 until his dismissal on the 1st of August 2007.
- [3] The applicant referred an unfair dismissal dispute to the second respondent, South African Local Government Bargaining Council (SALGBC), for conciliation but it remained unresolved. The matter was then referred to arbitration that was heard on the 2nd of June 2008 and the 1st of August 2008. The arbitrator found that the dismissal of the applicant was substantively unfair. He ordered that the applicant be reinstated retrospectively from the date of his dismissal. The first respondent allegedly received the arbitration award on the 18th of September 2008 and had six weeks within which to file the review application. Therefore, the last day to launch a review application was the 30th of October 2008.
- [4] The applicant submitted that the first respondent filed its review application to set aside the arbitration award of the arbitrator on the 11th of November 2008. The applicant further submitted that the review application was 11 days out of the prescribed period and that it was not accompanied by an application for condonation of its late filing. However, the first respondent submitted that the review application was served by facsimile to the applicant and filed at this Honourable Court on the 30th of October 2008. The original papers were allegedly forwarded on the same day by overnight mail to an advocate in

¹ Act 66 of 1995.

Pretoria who would assist with the filing thereof. The original papers could allegedly not reach him the following day. After an enquiry, the said papers were allegedly located at the Post Office on the 10th of November 2008 and were filed with the Registrar of this Court on the 11th of November 2008. However, the first respondent did not submit a proof of fax to the Registrar or a confirmatory affidavit from the said advocate. As such, the first respondent did not prove that the review was lodged on the 30th of October 2008.

- [5] On the 21st of May 2009, the applicant brought an application to dismiss the first respondent's review application together with an application to make the award an order of the Court. The first respondent opposed the said applications. It is common cause that the record was not filed at the time the applicant filed the Rule 11 application, some six months after the first respondent had filed the review application. The applicant submitted that the conduct of the first respondent and its attorneys in failing to prosecute the review application within a reasonable time has and still continues to prejudice him. Accordingly, the applicant submitted that no adequate grounds exist to overlook the excessive delay on the part of the first respondent to prosecute its review application.
- [6] On the 3rd of June 2016, this matter was set down on the pre-enrolment roll where the court heard brief submissions of the parties regarding the status of the matter and the issues in dispute. Judge Van Niekerk made the order in terms of which the parties were to file heads of arguments on the issue of prescription by not later than the 19th of August 2016. It was on this basis that the first respondent required this Court to consider the issue of prescription prior to considering the application of dismissal of the review application and the application to make the award an order of the court. The applicant argued that the issue of prescription was not properly raised as it was only raised in the letter to the applicant's attorney and in the heads of argument.
- [7] As aforesaid, the applicant launched an application to make an award an order of the court and an application for the dismissal of the review application on the 21st of May 2009. He was represented by his then attorney, Mr. Stefan

van Rensburg. Both the Rule 11 and section 158 applications were enrolled to be heard on the 17 February 2011. However, the matter was struck off the roll due to failure to attend by all parties. The applicant appointed his current attorney, Mr Goldberg, on the 18th of September 2014. Mr. Goldberg wrote letters to the first respondent's attorneys on the 13th of January 2015 and on the 6th of March 2015. The first respondent's attorneys responded to the said letters on the 16th of March 2015. It was in this letter in which they communicated that the matter has prescribed. The applicant's attorneys filed indexes for the rule 11 and section 158(1)(c) applications, but they were advised to file an explanatory affidavit. It was then filed on the 27th of July 2017. The matter was then set down for hearing.

- [8] The first respondent argued that on the strength of the LAC judgment in *Myathaza v Johannesburg Metropolitan Bus Services Soc Ltd t/a Metrobus In re: Mazibuko v Concor Plant; Cellucity (Pty) Ltd v Communications Workers Union obo Peters*,² the interruption of the prescription had lapsed because the applicant failed to successfully prosecute his application to make the award an order of court, notwithstanding that a period of more than seven years has lapsed since he launched his application. As such, it was the first respondent's view that the application to make the arbitration award an order of the court should be dismissed with costs. The application to make the award an order of the court was filed before the lapse of the three-year period of prescription. In *Magaila v Coca Cola Fortune (Pty) Limited*,³ the Constitutional Court restated the principles relation to the prescription of a claim arising from an order of reinstatement in dismissal dispute and stated as follows:

'[27] Because of the parity of votes in *Myathaza*, in which none of the judgments secured a majority, no binding basis of decision (ratio) emerges from the Court's decision. But, on either approach, that of Jafta J and Zondo J, or that of Froneman J, Ms Mogaila is entitled to an order declaring that the arbitration award ordering her reinstatement has not prescribed. She is

² [2016] 1 BLLR 24 (LAC).

³ [2017] ZACC 6.

entitled to secure its certification under section 143(3) of the LRA, and its enforcement under section 143(1).

[28] Whether the arbitration award in her favour could not have prescribed because the Prescription Act does not apply at all to LRA matters, as the first and third judgments held (or because, even if that statute were applicable, the reinstatement order was “not an obligation to pay money, deliver goods or render services”), or because, as the second judgment held, the CCMA referral interrupted prescription, persisting until the finalisation of the review proceedings in October 2013, Ms Mogaila must succeed.

[29] On the second judgment's approach, the arbitration award would have prescribed only in October 2016. Ms Mogaila filed her application in this Court timeously, in April 2016. Prescription was therefore interrupted, again, pending the finalisation of these proceedings. On either approach, Ms Mogaila is entitled now to proceed with the certification of the award under section 143 of the LRA.'

[9] In the light of the above judgment, this Court finds that the applicant's claim arising from the arbitration award has not prescribed. I now consider the application to dismiss the review application.

[10] The principles relating to the application to dismiss the review application due to unreasonable delay in its pursuit were recently dealt with in the judgment of *Toyota SA Motors (Pty) Ltd v CCMA and Others*⁴ where the Constitutional Court stated as follows:

'It needs to be stressed that when assessing the reasonableness of a delay, sight must not be lost of the purpose of the LRA. This purpose was articulated by Ngcobo J in CUSA:

"The LRA introduces a simple, quick, cheap and informal approach to the adjudication of labour disputes. This alternative process is intended to bring about the expeditious resolution of labour disputes. These disputes, by their very nature, require speedy resolution. 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

⁴ (2016) 37 ILJ 313 (CC).

an employer who may have to reinstate workers after a number of years. The benefit of arbitration over court adjudication has been shown in a number of international studies. (Footnote Omitted)'

- [11] In opposing this application, the first respondent did not dispute that there was a delay in prosecution of the review application. It, however, submitted that the delay was caused by the fact that the second respondent failed to inform it that the record was filed with the Registrar of this Court. This, according to the first respondent, is evident from the fact that the applicant's then attorney, Mr. van Rensburg, discovered that the record was filed with the Registrar only during his inspection of the file on the 25th of March 2009. The first respondent argued that if the applicant's attorneys' intention was to expedite the finalisation of this matter, he could have notified the first respondent of his discovery. The first respondent allegedly became aware that the record was filed with the Registrar when the application for the dismissal of the review was served on it.
- [12] As aforesaid, at the time of the filing of this rule 11 application, the record of the arbitration ruling was not made available. The second respondent discharged the record to the Registrar on the 5th of February 2009 and it is not clear if it notified the parties. The applicant's then attorneys discovered on the 25th of March 2009 that the record was dispatched on the 5th of February 2009. The applicant then filed this dismissal application on the 20th May 2009. This prompted the first respondent to uplift the record and to deliver it to the transcribers. This was done on the 26th of May 2016. The first respondent took issue with the fact that the applicant's attorney failed to inform it that it discovered that the record was dispatched to the Registrar on the 5th of February 2009. The first respondent suggested that his attorney's failure to inform it that the record was dispatched was motivated by his intention to use the further delay to gain a tactical advantage against it.
- [13] The first respondent admitted that six months have lapsed since the dismissal application had been launched but denied that it delayed the process. It is the first respondent's view that the second respondent contributed to the delay in the prosecution of the review application and that this application is

premature. The first respondent submitted that the applicant ought to have first compelled any party which he believed were delaying the process, to comply with its obligation. Rule 7A of the Labour Court Rules reads as follows:

- ‘(1) A party desiring to review a decision or proceedings of a body or person performing a reviewable function justiciable by the court must deliver a notice of motion to the person or body and to all other affected parties.
- (2) The notice of motion must-
 - (a) call upon the person or body to show cause why the decision or proceedings should not be reviewed and corrected or set aside;
 - (b) *call upon the person or body to dispatch, within 10 days after receipt of the notice of motion, to the registrar, the record of the proceedings sought to be corrected or set aside, together with such reasons as are required by law or desirable to provide, and to notify the applicant that this has been done;*

[14] On the issue of record, the first respondent argued that it had no obligation to bring an application to compel the second respondent to dispatch the record of the arbitration.⁵ It was of the view that the applicant could have brought an application to compel the second respondent to dispatch the record if he was of the view that the second respondent's failure to file the record delayed the prosecution of matter. In its opposing affidavit, the first respondent's attorney submitted that on the 2nd of December 2008, he sent a letter to the applicant's attorney in which it was confirmed that the second respondent was requested to attend to the record speedily. It is apparent that Rule 7A(5) requires the applicant in the review application to make copies of the record or portion of the record necessary for the purpose of the review and sub-rule (6) requires it to furnish the record or portion of the record to the registrar or other parties. Further, sub-rule (8) provides that:

- ‘(8) The applicant must within 10 days after the registrar has made the record available either-

⁵ Page 4 of First Respondent's Heads of Argument para 5.2.

- (a) by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit; or
- (b) deliver a notice that the applicant stands by its notice of motion.'

[15] The delay between the 30th of October 2008 and the 21st of May 2009 is excessive and there is no explanation for delay of over six months. The first respondent simply attributed blame to the second respondent for its failure to dispatch the record within the prescribed period. It cannot be said that the first respondent had an intention to prosecute its review application within a reasonable period. This is evident from its submission that it had no obligation to bring an application to compel the second respondent to dispatch the record of the arbitration. There is no indication that the first respondent made enquiries from the Registrar of the Labour Court whether the record was received. This is so because there is no indication of any letter or telephonic conversation and relevant dates when those enquiries were made. Had any follow-up been made, evidence would have been adduced. I agree with the applicant that it remains the duty and the responsibility of the applicant in the review application to ensure compliance with Rule 7A(2)(b). The first respondent failed to do that.

[16] The record was only filed on the 4th of March 2010. However, it was incomplete. The parties undertook to reconstruct the record but could not agree on how to proceed and the second respondent informed the parties that the arbitrator's handwritten notes were missing. The applicant's attorney of record in an effort to seek finality to the matter wrote to the first respondent's attorneys to place the first respondent on terms to set the matter down for reconstruction, to apply for condonation and to comply with Rule 7A(8) of this Court. However, the first respondent informed the applicant that there would be no further purpose in any further communication between the parties as the matter had prescribed.

- [17] To date, the record of the arbitration proceedings remains incomplete. The delay of almost nine years, that is between the date on which the arbitration award was issued to date, is extremely excessive. It cannot be said that the first respondent had the intention to reconstruct the record and to bring the matter to finality. The first respondent should have taken steps to ensure that the record is reconstructed. If the second respondent was not cooperating, it could have made an application to the Court for a direction on the further conduct of the review application.⁶ As the *dominus litis*, the first respondent had to ensure that the review application is prosecuted within a reasonable period.
- [18] Its explanation for the delay is flimsy, unsatisfactory and unreasonable and the review application stands to be dismissed for this reason alone. It is clear that the first respondent's conduct delayed the finalisation of the review application and by so doing, prejudiced the applicant in the process. The legal principles governing the unreasonable delay where review proceedings are concerned were also set out in the case of *Radebe v Government of the Republic of SA and Others*⁷ where it was stated as follows:

'Whilst an appeal has to be noted and prosecuted within specified time limits, no such time limits have been specified for the institution of review proceedings of this nature. In the absence of a statutory time limits the Court have, however, in terms of their inherent powers to regulate procedure, laid down that the review proceedings have to be instituted within a reasonable time. There are two principal reasons for the rule that the court should have the power to refuse to entertain a review at the instance of an aggrieved party who has been guilty of an unreasonable delay. The first is that the unreasonable delay may cause prejudice to the other parties. *Harnaker v Minister of Interior* 1965 (1) SA 372 (C) at 380D; *Wolgroeiens Afslalers (Edms) Bpk v Municipality van Kaapstad* 1978 (1) SA 13 (A) at 41. The second reason is that it is both desirable and important that finality should be reached within a reasonable time in respect of judicial and administrative decision.'

⁶ *Toyota SA Motors (Pty) Ltd v CCMA and Others* (2016) 37 ILJ 313 (CC); Rule 11(1)(c) of the Rules of the Labour Court; Clause 11.2.4 of the Practice Manual of the Labour Court.

⁷ 1995 (3) SA 787 (NPD).

[19] In the same judgment, it was stated that a Court does not exercise a discretion in deciding whether a reasonable time has elapsed. The enquiry is whether the period which has elapsed was, in the light of all the relevant circumstances, reasonable. Thus the enquiry is factual. Where the Court arrives at the conclusion that there has been an unreasonable delay, the Court exercises a discretion as to whether the unreasonable delay should be condoned. In *Moraka v National Bargaining Council for the Chemical Industry and Others*,⁸ Lagrange J restated the relevant principles governing this Court's treatment of ongoing delays in conducting review proceedings as stated in *Sishuba v National Commissioner of the SA Police Services*⁹ and further stated that:

'[21] Thus, as far as the extent and unreasonableness of the delay are concerned, the applicant's conduct is found seriously wanting in both respects. It is not expressly articulated in *Sishuba's* case, but in considering whether it would be in the interest of justice and fairness to dismiss the application, regard ought to be had to the merits of the review application.

[20] In its opposing affidavit to the dismissal application, the first respondent has not addressed the Court on the prospect of success in the review application. The first respondent has further not delivered a notice in terms of Rule 7A(8) to either supplement its founding affidavit or to state that it stands by its notice of motion. It is apparent that the first respondent disregarded the Rules of this Court and has failed to give a reasonable explanation for the delay in the prosecution of the review application. It has acted with a degree of dilatoriness and in a manner that is grossly remiss. The only inference to be drawn is that the review application was only brought with the intention to delay the compliance with the arbitration award. Consequently, its review application stands to be dismissed on this basis only.

[21] The first respondent prayed for the cost of this application and it is my view that it opposed this application without having a substantial explanation for the

⁸ (2011) 32 ILJ 667 (LC).

⁹ (2007) 28 ILJ 2073 (LC).

delay in prosecuting its review application. As a result, I do not see why it should not pay for the costs of this application.

Order

[22] Therefore, the following order is made:

- a) The review application in respect of the arbitration award issued by the third respondent under the auspices of the SALGBC (“second respondent”) under case number NWD090708 dated 12 September 2008 is dismissed.
- b) The arbitration award is made an order of the court.
- c) The first respondent, Molopo Local Municipality, is ordered to pay the costs of this application.

Mahosi AJ

Acting Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT: Mr. A. Goldberg of Goldberg Attorneys

FOR THE FIRST RESPONDENTS: Adv. Riaan Venter

Instructed by Venter, Booysen & Ferreira
Attorneys

LABOUR COURT