



REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA

PORT ELIZABETH

CASE NO: PR 204/16

In the matter between

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BUFFALO CITY METROPOLITAN MUNICIPALITY

APPLICANT

and

SALGBC

FIRST RESPONDENT

PHUMULELE DHLODHLO N.O.

SECOND RESPONDENT

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LUTHER TEMBINKOSI KOKOSE

THIRD RESPONDENT

Heard: 25.10.2017

Delivered: 25.10.2017

SUMMARY: *Ex tempore* judgment – review – undue delay.

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JUDGMENT

STEENKAMP J:

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Introduction

1. This is an application to have a fairly unusual ruling by a panellist of the South African Local Government Bargaining Council, Ms Phumele Dhlodhlo, reviewed and set aside. It stems from the application by the applicant in this application, Buffalo City Municipality, to have an unfair dismissal referral by an employee, Mr Luther Tembinkosi Kokose, the third respondent, dismissed because of undue delay.
2. The arbitrator found that neither party could be directly held responsible for the delay and that the arbitration should proceed. In effect, therefore, she dismissed the municipality's application. It is that ruling that the municipality now seeks to have reviewed and set aside.
3. The matter has a sorry history, conveniently summarised by Mr *Schultz*, who acts for the municipality, in his heads of argument. I am indebted to him for his concise summary and I will draw from that in setting out the brief and unfortunate background.

20 Background

4. Mr Kokose, the employee, was dismissed on the 3rd of August 2010. Seven years later it has not been decided whether that dismissal was fair or not. And it is not for this court to decide either.

5. He did immediately, or at least within the prescribed time period, refer an unfair dismissal dispute to the bargaining council on the 17th of August 2010. Matters proceeded swimmingly at that stage.
- 5 6. Conciliation was scheduled for the 8th of October. It failed. Mr Kokose requested arbitration on the 25th of November. He then applied for legal representation on the 6th of January 2011. A pre-arbitration meeting took place in September 2011. During all of this time it appears that
- 10 there was no undue delay by either party and the arbitration hearing was scheduled for the 26th of January 2012. That initial delay, as Mr *Schultz* submitted, appears to have been a systemic delay and again, not due to the fault of either party.
- 15 7. The arbitration was set down for a further two days in May 2012 and it is at that stage that matters went awry. In May 2012 the municipality asked for a postponement in order to launch contempt of court proceedings against a witness who refused to comply with a subpoena, a Ms Fergus, who
- 20 had relocated to Botswana. Again, it appears due to systemic delays that the contempt proceedings in this court were only concluded in July 2013 when the witness agreed to make herself available.
- 25 8. Then, on the 9th of January 2014, the municipality asked the bargaining council to set the matter down afresh. That

was done. It was set down for hearing on the 7th of May 2014, but it was again postponed, and although it appears to have been due the unavailability of the employee's attorney, it must be noted that that postponement was by
5 agreement.

9. The arbitration was then set down for the 4th of June 2014, but then neither party's attorney was available. (As an aside, this is perhaps one of the reasons why the default position for misconduct arbitration proceedings is that no
10 legal representation is allowed).

10. Be that as it may, it appears -- and Mr *Schultz* quit properly conceded -- that up until this stage the employee cannot really be faulted for the delays that had by now spanned almost four years.

15 11. However, in July 2014 the employee terminated his then attorneys' mandate -- Russell Incorporated -- and appointed Ntshabe Attorneys. It is at this stage where the employee was let down by his legal representative. The new attorney, Ntshabe, told the municipality's attorneys,
20 Smith Tabata Inc, that he (Nthsabe) would apply to the bargaining council to have the matter set down afresh, but he invited settlement proposals. He asked the municipality to respond within 20 days. The municipality did not.

12. Despite that, for 16 months Ntshabe Attorneys did nothing.

25 It was left to the municipality in January 2016 to set the

matter down for arbitration again. It is really that delay that forms the crux of the application before the bargaining council and subsequently the review before this court.

13. The arbitrator, faced with that sorry history, accepted that she did have the discretion to rule on the application to have the dismissal referral dismissed because of undue delay. But as I have said, she found that it should proceed.

14. In doing so the main factors that she took into account were the following: Firstly, she says, *"It is my view that throughout these proceedings the delays cannot be attributed to one party but circumstances due to the control of the parties."* It seems that what she meant was circumstances out of the control of the parties. In this regard she took into account the resignation of an earlier commissioner from the council; the unavailability of records for the employee's then legal representatives; the reconstruction of the record – something that the commissioner thought would be a futile exercise; and the fact that the council had closed the file. She also took into account that postponements were at various times requested by both legal representatives and concluded that neither party could be held directly responsible for the delay. It is in those circumstances that she ordered the council to reschedule the arbitration before another commissioner.

Grounds for review

15. In considering the reasonableness of this ruling this court must take into account the well-known test set out in *Sidumo v Rustenburg Platinum Mines* 2008 (2) SA 24 (CC),
 5 *Herholdt v Nedbank Ltd* [2012] 11 BLLR 1074 (SCA) and subsequently summarised by the Labour Appeal Court in *Goldfields Mining SA (Pty) Ltd v CCMA* [2014] 1 BLLR 20 (LAC). In that judgment the LAC rejected the notion of a process-related review and ruled in paragraph 15:

10 *“What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by Sidumo. The gross irregularity is not a self-standing ground insulated or standing*
 15 *independent of the Sidumo test. That being the case it serves no purpose for the reviewing court to consider and analyse every issue raised at the arbitration and regard the failure by the arbitrator to consider all or some of the issues, albeit it*
 20 *material, as rendering the award liable to be set aside on the grounds of process related review. In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him or her; evaluated the facts presented at the hearing*
 25 *and came to a conclusion that is reasonable.”*

16. I will return to *Goldfields*, but will first consider the question whether the commissioner could in fact exercise the discretion that she did. In this regard Mr *Schultz* referred to a number of cases where a similar discretion in this court and other superior courts was accepted. It has its origin, as described as long ago as 1927, in *Pathescope Union of South Africa v Mallinick* 1929 (AD) as follows:

“*The plaintiff may in certain circumstances be debarred from obtaining relief to which he would ordinarily be entitled because of unjustifiable delay in seeking it. It is a doctrine well recognised in English Law and adopted in our own courts. It is an application of the maxim vigilantibus et non dormientibus lex subveniunt.*”

And the court then goes on to quote from the judgment in *Lindsay Petroleum Co v Hurd*:

“*The doctrine of laches in Courts of Equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which must fairly be regarded as equivalent to a waiver of it But in every case if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that*

defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other in so far it relates to remedy ... The determination of such a question must largely depend on the turn of mind of those who have to decide, and therefore be subject to uncertainty, but that I think is inherent in the nature of the inquiry.”

17. It is apparent from that *dictum* that it is in the discretion of the decisionmaker to grant the application or not, taking into account the length of the delay and the nature of the acts done during the interval, as well as the balance of justice or injustice.

18. That has been accepted also by the High Court in *Sanford v Haley* 2004 (3) SA 296 (C) where the late Moosa, J said:

“In terms of section 173 of the Constitution, the High Court has the inherent power to protect and regulate its own process and to develop the common law taking into account the interests of justice. It has an inherent jurisdiction to control its own proceedings and as such has power to dismiss a summons or an action on account of the delay or

want of prosecution. The court will exercise such powers sparingly and only in exceptional circumstances because the dismissal of an action seriously impacts on the constitutional and common law right of a plaintiff to have the dispute adjudicated in a court of law by means of a fair trial. The court will exercise such power in circumstances where there has been a clear abuse of the process of court.”

10 And he emphasised that the test is a stringent one.

19. It is against that background also that this court has to decide whether the arbitrator exercised her discretion properly.

20. At the hearing this morning Mr Schultz also referred to
 15 *Ferreira v Tyre Manufacturers Bargaining Council*, what he said was an unreported judgment of my brother Lagrange J, in this court, but that I found during the tea adjournment as having since been reported at (2013) 34 *ILJ* 364 (LC). In that case Lagrange J accepted that arbitrators in a
 20 bargaining council or the CCMA may entertain similar applications. But because a commissioner or panellist of the bargaining council performs a quasi-judicial statutory dispute resolution function and exercises no inherent jurisdiction like a court, their powers must be sourced in
 25 the provisions of the governing statutes. He then accepted

(in paragraph 14) that a commissioner or an arbitrator charged with the obligation to determine a dispute can only dismiss an applicant's claim on the basis of excessive delays in prosecuting the claim, if that is a power which is

5 expressly granted or is reasonably necessary for exercising their express powers. He accepted, and I am summarising, that a Commissioner of the CCMA or a panellist of the Bargaining Council does indeed have such a power. On the facts before him, where the arbitrator in that case did

10 indeed dismiss a referral because of undue delay, Lagrange J accepted (and I daresay correctly):

"There was nothing unreasonable about the arbitrator's exercise of his power to dismiss the applicant's claim for the reasons he gave on the

15 *facts before him."*

21. I respectfully agree with Lagrange J that an arbitrator of the Bargaining Council does have such a power. The question then remains whether in this case the arbitrator exercised that power and that discretion in a way that is so

20 unreasonable that no other arbitrator could have come to the same conclusion.

22. Returning to *Goldfields*, the questions to be asked as set out in paragraph 20 are the following:

"1. In terms of his or her duty to deal with the

25 *matter with the minimum legal formalities, did the*

process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute?"

23. In this case there can be no contest as far as that is
5 concerned. Both parties had a full say and in fact both parties were legally represented.

"2. Did the arbitrator identify the dispute he or she was required to arbitrate?"

24. Again, the arbitrator did so and exercised that discretion
10 accordingly.

"3. Did the arbitrator understand the nature of the dispute her or she was required to arbitrate?"

Again, that is not disputed. The arbitrator did understand what she had to do.

15 *"4. Did he or she deal with substantial merits of the dispute?"*

The answer to this, again, is yes. She dealt with the substantial merits of the dispute and applied her mind to the issues and the evidence before her.

20 25. The overarching and remaining question is the last one, namely:

"Is the arbitrator's decision one that another decision maker could reasonably have arrived at based on the evidence?"

26. Mr *Schultz* submitted that she did not, in giving the reasons that she did in the paragraphs of the award that I have just referred to. Having had regard to those reasons, as well as the comprehensive evidence that served before the arbitrator, I must state that this court may -- and probably would -- have exercised its discretion differently. The primary issue that I debated with Ms Mphosa in her argument is the delay of some 16 months occasioned by the inaction of her predecessor, Mr Ntshabe. In that regard this court has held on numerous occasions, starting with *Saloojee's* case¹, more than 50 years ago, that there is an extent beyond which a litigant cannot escape the consequences of the negligence of his chosen representative. However, this court is not sitting as a court of first instance or as an arbitrator. It is sitting on review and it must decide whether the discretion that the arbitrator in this case exercised was done, not only in an unreasonable manner, but in a manner that was so unreasonable that no other arbitrator could have come to the same conclusion.

27. Of that I am not convinced. The arbitrator applied her mind to the evidence before her. She was alive to the delays caused by the employee, and more importantly by his then attorney. She noted that at various times during the

¹ *Saloojee NNO v Minister of Community Development* 1965 (2) SA 135 (A). See also *Silplat (Pty) Ltd v CCMA* [2011] 8 BLLR 798 (LC).
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process both parties asked for postponements. It is so that she does not expressly deal with the specific delay of 16 months, although she does take into account various factors that were occasioned by the closing of the file and other actions or inaction on the part of the bargaining council.

28. On balance, when considering the discretion exercised by the arbitrator, I must also consider the words of the Appellate Division in 1927 in *Pathescope Union* where they said:

"The determination of such a question must largely depend on the turn of mind of those who have to decide and therefore be subject to uncertainty, but I think that is inherent in the nature of the inquiry. The exercise of the discretion especially when considering a review rather than appeal must largely depend on the turn of mind of the decisionmaker, that is, the arbitrator."

In exercising that discretion, in my view, the arbitrator did not come to a conclusion that is so unreasonable that no other arbitrator could have come to the same conclusion. The award must therefore fail and it will be in the interests of justice that the original dispute be finally determined.

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Costs

29. That leaves the question of costs. This court is enjoined to take into account the requirements of both law and fairness. In that regard, although in law the municipality has been unsuccessful, I am not inclined to award costs. The court cannot close its eyes to the delays occasioned by the employee and his previous attorneys. It would be inequitable to order the municipality to pay costs in those circumstances. I also take into account that this ruling means that it is not the end of the matter and that it will have to be decided afresh. In those circumstances also, I do not think a costs award is warranted.

RULING

1. The application for review is dismissed.
2. There is no order as to costs.
3. The First Respondent, that is the South African Local Government Bargaining Council, must set down the unfair dismissal dispute down for arbitration before the 30th of November 2017.

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A J STEENKAMP
Judge of the Labour Court of South Africa

10 APPEARANCES:

FOR THE APPLICANT

ADV N C F SCHULTZ

INSTRUCTED BY

Smith Tabata Inc.

15 FOR THE THIRD RESPONDENT

Ms F A MAPHOSA
of Maphosa & associates.

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