



IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case No: P403/11

In the matter between:

IMATU OBO MADIKANE AND 2 OTHERS

Applicant

and

MS FIATH NCUMISA BANTWINI

First Respondent

THE SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Second Respondent

INGQUZA HILL LOCAL MUNICIPALITY

Third Respondent

Heard: 20 March 2018

Delivered: 3 October 2018

Summary: An unexplained delay of 4 years in prosecuting a review application justifies its dismissal.

JUDGMENT

LALLIE, J

- [1] This is an application to dismiss an application to review and set aside the first respondents' arbitration award filed by the applicant on 25 August 2011. It is based on what the third respondent referred to as the applicant's unreasonable and excessive delay, over a considerable period, to prosecute its review application despite this Court's directive that the applicant take constructive steps to prosecute it. The application is opposed by the applicant.
- [2] The applicant filed its answering affidavit out of time and the third respondent objected to the late filing in terms of clause 11.4 of the Practice Manual of the Labour Court of South Africa¹ (the Practice Manual). Consequently, the applicant filed an application for condonation of the late filing of its answering affidavit. The third respondent did not file an opposing affidavit. The reasons proffered by the applicant for the late filing of the answering affidavit are that it became aware that the dismissal application had been filed upon receipt of the notice of set down on 5 February 2018. The dismissal application had been served on its correspondent who did not forward it to the applicant's attorneys. On 5 February 2018, the applicant had been engaged in settlement negotiations with the third respondent and the applicant was awaiting a response in respect of the negotiations from the third respondent. In addition, the applicant's attorneys were arranging the rescheduling of the reconstruction of the missing parts of the arbitration record with the second respondent. As the third respondent elected not to file opposing papers, the applicant's averments are unopposed. They constitute reasonable and excusable explanation for the delay. Condonation should in the circumstance be granted.
- [3] The factual background to this matter is that in 2007 the applicant conducted a restructuring exercise which resulted in the demotion of the individual third respondents (the respondents). The third respondent referred an unfair labour practice dispute to the second respondent regarding the respondents' demotion. On 25 June 2010, the first respondent issued an arbitration award in which she found in favour of the third respondent. She ordered the

¹ April 2013.

applicant to, *inter alia*, place the respondents in their former post level 6 positions with effect from 1 July 2010. On 25 August 2011, over a year after the award had been issued, the applicant filed an application to have the award reviewed and set aside. On 14 September 2011, the second respondent filed with the Registrar of the Labour Court (the Registrar), a record of the arbitration proceedings which consisted of the documents used during the arbitration proceedings, 2 compact discs and a portion of the first respondent's hand written notes. On 16 September 2011 the Registrar sent a notice to the applicant advising of the filing of the record and seeking the applicant to comply with Rule 7A (8) of the Labour Court Rules (the Rules). On 2 November 2011 the third respondent filed a notice of its intention to oppose the review application. On 10 February 2012 and before the complete record of the arbitration proceedings was filed, the applicant filed a notice in terms of Rule 7A (8).

[4] On 24 March 2012 a directive was issued for the applicant to comply with the Registrar's notice of 16 September 2011. On 28 August 2012, as a result of the applicant's non-compliance with the directive of 24 March 2012, a further directive was issued. It directed the applicant to show cause on 16 November 2012 why its review application should not be dismissed for failure to comply with previous directives and for non-compliance with Rule 7A (6) and (8). On 12 September 2012 the applicant filed the arbitrator's hand written notes. On 26 September 2012, the third respondent's attorney informed the applicant in a letter that the record it served on 11 September 2012 was incomplete. On 8 November 2012 the applicant filed a document which it referred to in the covering letter as a complete set of arbitration proceedings. The document turned out to be only a portion of the record.

[5] On 16 November 2012, when the applicant was required to show cause why its review application should not be dismissed, its attorney blamed the correspondents they relied on for failure to file the record and not conveying the court directives to his firm. Mr Ximbi, the applicant's attorney, took it upon himself to oversee the process of compliance. In a judgment handed down on 21 November 2012, the applicant's review application was not dismissed and

the applicant was ordered to file a complete transcript within 14 days and a fresh notice in terms of Rule 7A (8). A meeting to reconstruct the record scheduled for 5 February 2013 had to be postponed because the applicant's attorneys received the notification only on 4 February 2013. They could not approach Mr Guleni (Guleni) who represented the applicant at arbitration and could assist in the reconstruction of the record exercise as he had left the applicant's employ. The third respondent submitted that after the failed meeting of 5 February 2013, the applicant made no attempts to have the record filed by 18 May 2017 when the founding affidavit was attested to.

- [6] The applicant submitted that its attorneys made numerous phone calls and wrote letters to the second respondent requesting the scheduling of meetings for the reconstruction of the record. It attached one of those letters dated 7 December 2012. In a letter dated 22 March 2017, the applicant's attorneys confirmed their visit with their counsel to the second respondent's premises on 28 February 2017. They further requested records in respect of the respondents' cases.
- [7] The third respondent attacked the validity of the review application on the basis that it is fatally defective as it was filed over 12 months late with no prospects of success. The applicant denied and submitted that it is premature to determine the validity of the review application as it still has to file the full record and a supplementary affidavit.
- [8] The respondents further submitted that the review application should be dismissed as it was launched in 2011 as a stratagem to frustrate compliance with the arbitration award. The applicant disregarded court directives and a judgment to pursue its review application. It took no steps to pursue the review application for 4 years. The applicant denied being supine and submitted that it illustrated its efforts to have the record reconstructed but was let down by the non-cooperation of some respondents. It further relied on the settlement negotiations held in October 2017 and January 2018.

- [9] In *Sishuba v National Commissioner of the SA Police Service*² the court referred with approval to authorities in which it was held that there are two principal reasons for the court to have the power to dismiss a claim at the instance of an aggrieved party on grounds of unreasonable delay. The first is prejudice to the parties and the second is that it is both desirable and important that finality be reached within reasonable.
- [10] The third respondent did not file a replying affidavit. Allegations made in the answering affidavit went unchallenged. In the judgment issued on 21 November 2012, the applicant's delay in prosecuting its review application was excused up to that point. The respondent's averment that on 16 November 2012, the applicant's attorney made an undertaking in court to oversee the process of compliance in showing cause why the review application should not be dismissed was not refuted. The applicant did not succeed in refuting the third respondent's allegation that it delayed inordinately in prosecuting the review application after 21 November 2012. The applicant cannot be faulted for not attending the meeting to reconstruct the record scheduled for 5 February 2013 because it received a day's notice. The applicant's submission that after 5 February 2013, it made numerous phone calls and wrote letters requesting a date for the reconstruction of the record was not substantiated. The letter it sought to rely on in which it sought a date for the reconstruction of the record was written on 7 December 2012. It supports its efforts before the failed meeting of 5 February 2013.
- [11] A further letter which the applicant sought to rely on in disproving the respondent's claim that it is dilatory in prosecuting the review application was written on 22 March 2017. It confirms the visit by the applicant's attorney and counsel to the second respondent on 28 February 2017 and requests records of the respondents' case. It is silent on the reconstruction of the record. Other than addressing a letter to the second respondent on 21 February 2013 requesting reasonable notice of the reconstruction of the record, the applicant provided no proof of steps it took to prosecute the review application before the visit of 28 February 2017 which is referred to in the letter of 22 March

² (2007) 28 ILJ 2073 (LC)

2017. The applicant's explanation for the delay supports the third respondent's version that for 4 years after the letter of 21 February 2013 was written, the applicant took no steps to pursue the review application. The applicant's 4 year delay is rendered serious by its attorney's undertaking to oversee compliance with the Rules and directives as well as the judgment of 21 November 2012, in which the applicant was ordered to file a complete transcript of the arbitration proceedings and a fresh Rule 7A (8) notice within 14 days. The applicant failed to act either with the urgency referred to in the judgment or the necessary diligence in prosecuting its review application. The applicant's efforts to negotiate a settlement with the third respondent in October 2017 and January 2018 do not sanitise its failure to prosecute the review application for 4 years. The delay is inordinate and without reasonable explanation.

[12] It is common cause that both the letter and the spirit of the Labour Relations Act³ (LRA) require that labour disputes be resolved expeditiously. The applicant's failure to exercise its right to review, effectively supports the third respondent's version that the review application was filed as a stratagem to frustrate the respondents. The respondents continue to suffer the prejudice of not enjoying their rights in terms of the arbitration award for no valid reason. They cannot be expected to wait for an unreasonably extended period for the completion of the review application. The applicant is responsible for any prejudice it may suffer as a result of this application being granted. In the judgment of 21 November 2012, the applicant was afforded an opportunity to prosecute the review application it filed on 25 August 2011 to finality. It decided not to seize the opportunity. The review application is still not ripe for hearing. For these reasons the third respondent's application must succeed.

[13] The applicant's unexplained excessive delay in prosecuting the review application justifies a costs order in favour of the third respondent.

[14] In the premises the following order is made.

³ Act 66 of 1995 as amended.

Order

1. The late filing of the answering affidavit is condoned.
2. The application to review and set aside the first respondent's arbitration award under case number ECD050913 dated 23 June 2010 is dismissed with costs.

Z Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Boyens of Minnaar Niehaus Attorneys

For the Third Respondent: Advocate Notshe with Advocate Msiwa

Instructed by: Ximbi Ncolo Incorporated Attorneys

LABOUR COURT