IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 1308/09 JS 419/10

In the matter between

SASOL TECHNOLOGY **First Applicant**

SASOL SOUTH AFRICA (PTY) LTD **Second Applicant**

and

PETROS FAKAZI ZWANE **Respondent**

In *re:*

PETROS FAKAZI ZWANE **Applicant**

and

SASOL TECHNOLOGY **First Respondent**

SASOL LIMITED **Second Respondent**

Heard: **1 March 2018**

Delivered: **8 March 2019**

JUDGMENT

MAHOSI. J

Introduction

[1] Before me are two similar applications brought by the applicants, Sasol Technology and Sasol South Africa (Pty) Ltd, who will together be referred to in this judgment as (Sasol). The applications are held under case numbers JS 1308/09 and JS 419/10 respectively and therein, Sasol seeks an order for the dismissal of proceedings instituted by the Respondent Mr Petrus Fakazi Zwane (Mr Zwane) against Sasol.

[2] Mr Zwane opposed both applications.

[3] The dispute between the parties has a long and rough history and has served before a number of Judges of this Court for a period of almost a decade. The relevant background pertaining to this dispute is set out below.

Background

Case number JS 419/10

[4] The dispute under case number JS 419/10 relates to Mr Zwane's referral of an automatically unfair dismissal dispute against Sasol. In this regard, he sought compensation in an amount of 24 months for the alleged automatically unfair dismissal and a further 24 months remuneration for the alleged victimization suffered. There were numerous attempts to finalize the pre-trial minute between the parties, however no minutes were ultimately finalized.

[5] The matter was set down for trial on 4 August 2014 before Tlhotlhalemaje AJ (as he then was) where numerous points *in limine* were raised. Tlhotlhalemaje AJ handed down judgment on 06 August 2014 and made the following order:

> 'i. The application to bar the respondents from defending the applicant's claim is dismissed
>
> ii. The application for judgment by default is dismissed
>
> iii. The applicant's purported amended statement of case filed with this Court on 20 July 2010 is declared a nullity and of no force and effect. The applicant is however not barred from filing a proper application in that regard.
>
> iv. The matter is postponed *sine die* to enable the parties to address and resolve all matter raised by the Court on its own accord under paragraph 18, 19 and the whole of paragraph 24 of this judgment.
>
> v. The parties are directed to settle all the matters as raised above, and to file a signed pre-trial minute on or before 30 September 2014.
>
> vi. Wasted costs occasioned by the postponement of the hearing of this matter are to be in the cause.'

[6] Mr Zwane did not comply with the said directives and did not take any further steps to pursue these proceedings since the said judgment was handed down. Instead, he filed an application for leave to appeal against the abovementioned judgment, which application was dismissed with costs on 17 December 2014. Subsequently, Mr Zwane petitioned the Labour Appeal Court (LAC), which petition was refused on 27 March 2015.

[7] Dissatisfied with the decision of the LAC, Mr Zwane filed an application for leave to appeal to the Supreme Court of Appeal (SCA), which application was dismissed on 21 August 2015. Mr Zwane then applied to the Constitutional Court for leave to appeal and also to be granted direct access. This application was also unsuccessful.

Case number JS 1308/09

[8] The dispute under case number JS 1308/09 related to an application in terms of which Mr Zwane sought an order to review and set aside the jurisdictional ruling. Coupled with this application was the condonation application for late filing of the review application. The matter served before Basson J on 2 February 2012 who dismissed the condonation application with costs.

[9] Subsequently, Sasol presented a bill of costs and taxation which was set down for 3 July 2013 and proceeded on that day. The writ of execution was issued on 4 November 2013 and unsuccessful attempts were made to execute it. Mr Zwane filed an application dated 3 February 2014 in terms of which he sought an order to set aside the taxing master's allocator and to set aside or alternatively rescind the writ of execution issued as a result thereof. This application was not successful.

[10] Mr Zwane filed an application for leave to appeal the judgment of Basson J which application was not granted. He then approached the Labour Appeal Court (LAC) and the Constitutional Court unsuccessfully. Mr Zwane did not pursue the matter any further. A directive, dated 22 February 2016, was issued directing the parties to file Heads of Arguments. Mr Zwane directed a correspondence to the Registrar and Sasol's erstwhile attorneys in which he stated, *inter alia*, the following:

> '3. With reference to the above-mentioned directive I advise that because of the following circumstances, the application is not decided, is moot, dead and buried; and I as the Applicant will not participate in any proceedings before the Labour Court whether pertaining to that application or the above case.
>
> 3.1 In that your office would not set the matter down when requests for set down were made instead together with the Respondents your office unlawfully re-issued on 22 October 2015 the very same impugned writ of execution sued out again using the very same impugned tax master's *allocatur*, and on 28 October 2015, the

Respondent unlawfully executed that unlawful writ, despite this pending application and without the court having granted an order to do so.

3.2 I (the Applicant) then sued the Respondents and the Labour Court for the above unlawful actions and damages caused by the Labour Court (your office) and the Respondents, at the Constitutional Court, under case CCT 208/15, which court, as caused by the Respondents dismissed my case there as per its decision, dated 17 March 2016, which attached hereto for ease of reference.

3.3 According to the abovementioned Constitutional Court decision, which is binding to all the courts and is final, it would be incompetent for any lower court to make another decision in this matter or in this application, alternatively the order that was applied for there cannot be made as it would be against the above Constitutional Court.

3.4 That Constitutional Court decision also means that it is okay for the Respondents and the Labour Court to [have] colluded, fraudulently issue and execute warrant of executions against myself, without prior taxation and despite pending application for leave to appeal or to rescind and without prior court order granted to do so.

3.5 Accordingly, to Labour Court, including your office is conflicted and implicated in these issues with the effect that I cannot get justice in the Labour Court, and therefore to protect myself from further injustice I will not file any heads of arguments nor will I participate in any proceedings before the Labour Court anymore.

3.6 The above directive, the application referred to therein and the writ of execution and tax master's *allocatur* sought to be rescinded therein, are all outdated or have been overtaken by events, have been decided by the Constitutional Court and rendered moot, dead and buried, you may as well remove that application from your roll

as there is no need for me to withdraw an application that has been decided, is moot, dead and buried.

But those responsible and liable for the damages incurred due to the above unlawful actions shall eventually be held accountable when justice, where it may still be found, is eventually done to get the damages paid.'

High Court proceedings

[11] Mr Zwane instituted an action in North Gauteng High Court under case number 91849/15. The contents of paragraph 2 of the particulars of claim are important to these proceedings and read as follows:

> '2. JURISDICTION AND THE COMPETENCY OF THE HIGH COURT
>
> 2.1 The plaintiff brings a case to this Court that started off at the Labour forums or Labour Fora as two cases (Labour Court cases JS 1308/09 and JS 319/10). Both of the plaintiff's cases at the labour fora, consisted of aspects of concurrent jurisdiction between the Labour Fora and High Courts and aspects of exclusive jurisdiction to the Labour Fora. The cases involved violation and threatening of the Plaintiff's rights, both Constitutional/human rights and common law rights, unfair discrimination, victimization and the latter also involved an unlawful, unfair (procedurally and substantively) dismissal (which in terms of the LRA is automatically unfair as it involved violation and threatening of fundamental constitutional rights), which cases were based on inter alia, the Labour Relations Act 66 of 1995 (hereinafter called "the LRA"), Employment Equity Act No. 55 of 1998 (hereinafter called "the EEA") Basic Conditions of Employment Act No. 75 of 1997 (hereinafter called "the BCEA"), Act No. 108 of 1996 (hereinafter called "the Constitution") and the common law.
>
> 2.2 The Plaintiff first sought recourse to protect, enforce and vindicate his violated and threatened rights (both constitutional / human and common law rights) through the remedies provided by enacted legislations (Inter alia: LRA, EEA, BCEA), as a litigant may not bypass enacted legislation to give effect to constitutional rights and rely directly on the Constitution.' (footnotes omitted).
>
> 2.3 Hence the Plaintiff first started with the structures provided for in the LRA, EEA, BCEA and thus approached the Labour Fora, and after having been refused or denied access to court and to fair justice at those Labour Fora – such that those Labour Fora provided, with regard to the Plaintiff's cases, to be inadequate in providing protection, enforcement and vindication of the rights he sought to protect, enforce and vindicate, and after having followed all remedies and procedures provided in the LRA,

EEA, BCEA to the very end, and having exhausted all those remedies and procedures provided in the LRA, EEA, BCEA without his cases having been *res judicata*. He therefore now approached the High Court of South Africa to continue the case on the aspects of concurrent jurisdiction between Labour Fora and the High Courts of South Africa. This Court therefore has jurisdiction. (footnotes omitted)

2.4 The Plaintiff has also sued the Labour Court for being party to fraudulent and unlawful actions, involving impartiality, related to the same cases JS 419/10 and JS 1308/09; accordingly, the Plaintiff cannot have recourse at a justice institution which he is also suing or has sued.'

Analysis

[12] In relation to JS 419/10, Sasol's case is that it would be in the interest of justice to dismiss Mr Zwane's cases as he failed to take steps to pursue his matter since August 2014 and no reasonable explanation has been given. It submitted that the continued existence of the dispute is highly prejudicial to Sasol as it continues to deny it closure to the matter.

[13] Similarly, in relation to JS 1308/09, Sasol submitted it was not enough for Mr Zwane to submit that the Registrar could remove the matter from the roll without withdrawing it because with the existence of the pending rescission application, it is unable to enforce its rights flowing from the writs of execution issued by this Court. In relation to both cases, Sasol submitted that Mr Zwane has made it clear in his papers filed at the High Court and in the correspondence directed to the Registrar that he has no intention of pursuing his matters at this Court to finality. For the above reasons, Sasol prayed for both cases to be dismissed with costs.

[14] In opposing the dismissal applications, Mr Zwane filed a notice of intention to oppose in which he stated that he would not be filing any reply of pleadings in answering Sasol's application. Instead, he chose to argue from the heads of arguments. He further raised the following objections and questions of law:

14.1 The Labour Court is conflicted and is not an independent forum to hear the matter. In this regard, he submitted that this Court must recuse itself as it has no jurisdiction.

14.2 There is no valid statement of claim under case number JS 419/10 as Sasol caused Thlothlalemaje J to unlawfully nullify or invalidate his amended statement of claim.

14.3 The application is unnecessary, frivolous, vexatious, duplicate or a parallel process.

14.4 The dispute pending in the High Court precludes the Labour Court from deciding the applications due to the possibility of contradicting decisions.

14.5 The application is a *mala fide*, unlawful attempt to persecute him and prevent him from prosecuting Sasol in the High Court.

[15] Mr Zwane, in his heads of arguments, submitted that he seeks an order declaring Sasol's dismissal applications unfair, prejudicial, irregular and unlawful. He further submitted that this application should be permanently stayed on condition that Sasol seeks leave in terms of paragraphs 10.4.4 and 16 of the Practice Manual of this Court showing good cause why leave of this Court should be granted for its applications to be heard and further that such leave may only be sought after finalization of case 91849/15 filed in the High Court and case 11196/17P filed in Pietermaritzburg High Court. The legal issues raised by Mr Zwane will be considered first.

Jurisdiction

[16] The first issue is that of jurisdiction. In this regard, Mr Zwane's contention is that this Court is conflicted and therefore not independent. Rule 11 of the Labour Court Rules provides for interlocutory applications and procedures not

specifically provided for in other rules as follows:

> '(1) The following applications must be brought on notice, supported by affidavit:
>
> (a) Interlocutory applications;
>
> (b) other applications incidental to, or pending, proceedings referred to in these rules that are not specifically provided for in the rules; and
>
> (c) any other applications for directions that may be sought from the court.
>
> (2) The requirement in subrule (1) that affidavits must be filed does not apply to applications that deal only with procedural aspects.
>
> (3) If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems appropriate in the circumstances.
>
> (4) In the exercise of its powers and in the performance of its functions, or in any incidental matter, the court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act.

[17] Section 151(2) of the LRA provides that:

> 'The Labour Court is a superior court that has authority, inherent powers and standing in relation to matters under its jurisdiction, equal to that which a court of a Division of the High Court of South Africa has in relation to the matters under its jurisdiction.'

[18] The powers of this Court are provided for in section 158 (j) of the LRA which provides, that this Court 'may deal with all matters necessary or incidental to performing its functions in terms of this Act or any other law'. In opposing Mr Zwane's contention, Sasol referred this Court to *Sibanye Gold v Sibiya and Another; In re: Sibiya and Another v Commission for Conciliation, Mediation and Arbitration and Others*[1] where Van Niekerk, J stated as follows:

[1] (JR1906/13) [2016] ZALCJHB 534 (6 September 2016) at para 2.

> 'It is well-established that this court is entitled to dismiss proceedings on account of a delay in their prosecution. The route of this power is the court's inherent power to prevent an abuse of its own process. The court has previously made reference to the policy considerations which entitle it to dismiss the claim for and justifiable delay. The first is the prejudice that is necessarily caused to other parties by delay. The second is the desirability that finality should be reached within a reasonable time. In regard to the letter consideration, review applications are treated more strictly (see *Queenstown Fuel Distributors CC v Labuschagne NO & others* [2000] 1 BLLR 45 (LAC), *Lentsane & others v Human Sciences Research Council* (2002) 23 *ILJ* 1433 (LC)). Consistent with this approach, and in an effort to address the systemic delays in the determination of matters serving before this court (for which this court has been reproached by both the Constitutional Court and the Supreme Court of Appeal on a number of occasions), the practice manual makes clear that an application to review and set aside an arbitration award must be treated as one would treat an urgent application. The applicant's conduct is clearly in breach of this requirement.'

[19] On the independence of the Court, the following is stated in Section 165(2) of the Constitution of the Republic South Africa[2]:

> 'The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.'

[20] In *Gcaba v Minister for Safety and Security and Others*[3]

> 'Following from the previous points, forum shopping by litigants is not desirable. Once a litigant has chosen a particular cause of action and system of remedies (for example, the structures provided for by the LRA) she or he should not be allowed to abandon that cause as soon as a negative decision or event is encountered. One may especially not want litigants to "relegate" the LRA

[2] Act 108 of 1996, as amended.

[3] 2010 (1) SA 238 (CC) 2010 (1) BCLR 35 (CC); (2010) 31 ILJ 296 (CC) ; [2009] 12 BLLR 1145 (CC) at para 57.

> dispensation because they do not "trust" its structures to do justice as much as the High Court could be trusted. After all, the LRA structures were created for the very purpose of dealing with labour matters, as stated in the relevant parts of the two majority judgments in *Chirwa*, referred to above.'

[21] It is apparent from the above authorities that this Court has jurisdiction to dismiss an application or action where a party has failed to take steps to diligently prosecute it. Most importantly, this Court is independent and subject only to the Constitution and the law, which it must apply impartially and without fear, favour or prejudice. The fact that this Court has adjudicated Mr Zwane's matters does not in any way put it in conflict with Mr Zwane. There is therefore, no merit in Mr Zwane's contention that this Court lacks jurisdiction to hear the dismissal applications brought by Sasol.

Lis alibi pendens

[22] As earlier intimated, Mr Zwane filed an application at the High Court seeking relief identical to that sought in the two applications filed in this Court. In making out a case for *lis alibi pendens*, Mr Zwane contended that the relief sought by Sasol was similar to the relief he sought at the High Court. In this regard, he submitted that Sasol should only be granted leave to bring dismissal applications after finalization of case number 91849/15 filed in the High Court. It is, therefore, necessary to consider the underlying principles of the defence *lis alibi pendens.* In *Nestlé (South Africa) (Pty) Ltd v Mars Inc,*[4] Nugent AJA said the following:

> 'The defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). By the same token the suit will not be permitted to revive once it has

[4] 2001 (4) SA 542 (SCA).

> been brought to its proper conclusion (res judicata). The same suit between the same parties, should be brought once and finally.'

[23] It is quite clear that Mr Zwane launched an application at the High Court without withdrawing his similar matters before this Court. He has, therefore, failed to bring the matters he brought to this court to finality. In fact, it is apparent from his submissions that he has no intention of withdrawing his matters from this Court. This is despite the fact that he has refused and/or neglected to take any steps to prosecute his matters for more than two years, to adhere to Tlhotlhalemaje AJ's orders and to adhere to the directives of this Court. To make things worse, he wrote a correspondence to the Registrar in which he stated that he has abandoned litigation in this Court and has no intention of pursuing it.

[24] As if that was not enough, there are two mutually destructive objections he raised in his heads of argument. On the one hand, he submits that there is no pending statement of claim before this Court. On the other hand, he attempts to make out a case for *lis alibi pendens.* What is apparent is that Mr Zwane seeks to keep the Labour Court door open whilst he tries his luck at the High Court. This is far from being fair for Sasol and should not be allowed. It is quite clear that there is no dismissal application pending before the High Court and therefore the defence of *lis alibi pendens* has no merit.

<u>Delay in prosecuting matters in this Court</u>

[25] It is trite that in assessing the reasonableness of the undue delay in the prosecution of matters in this Court, the purpose of the LRA must be considered. This purpose was articulated by Ngcobo J in *CUSA v Tao Ying Metal Industries and Others*[5] and was recently restated in *Toyota SA Motors (Pty) Ltd v Commission for Conciliation Mediation and Arbitration*[6] as follows:

> 'The LRA introduces a simple, quick, cheap and informal approach to the adjudication of labour disputes. This alternative process is intended to bring

[5] [2009] 1 BLLR 493 (LAC).
[6] [2016] 3 BLLR 217 (CC).at para 34.

> 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 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.' (Footnotes omitted)

[26] In the same judgment[7], the Constitutional Court further stated that:

> 'excessive delays in litigation may induce a reasonable belief, especially on the part of a successful litigant, that the order or award had become unassailable. This is so all the more in labour disputes.'

[27] As aforesaid, at the time of the filing of the rule 11 applications, the delay in the prosecution of both matters under case numbers JS 419/10 and JS 1308/09 was almost three years which is excessive and unreasonable. The conduct of Mr Zwane fails to demonstrate his interest in prosecuting his matters. Equally, there is no explanation for the delay except that his matter under case number JS 1308/09 is moot, this Court is conflicted and that his matters must be held in abeyance pending the finalisation of his High Court application. Therefore, the prejudice for Sasol is obvious as it is faced with litigation that will never be obtained in the absence of this application being granted. As such, it is my view that Mr Zwane's matters under case numbers JS 419/10 and JS 1309/09 fall to be dismissed.[8]

Costs

[28] Sasol sought an order of costs against Mr Zwane. The rule of practice that costs follow the result does not apply in Labour Court matters.[9] However, in a case where the conduct of the litigant was frivolous, *mala fide* and forum shopping, the

[7] At para 45.
[8] See *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) at para 95.
[9] *Zungu v Premier of the Province of Kwa-Zulu Natal and Others* (2018) 39 ILJ 523 (CC).

Court must show its displeasure. In this matter, while Mr Zwane's matters were still in progress in this Court, he approached the High Court with a similar application making accusations that this Court is conflicted, not independent and lacked jurisdiction. The Court's displeasures aside, a consideration of the requirements of justice and equity guide me against making a costs order against Mr Zwane.

[29] In the circumstance, I make the following order:

Order

1. Mr Zwane's application under case number JS 419/10 is dismissed.

2. Mr Zwane's rescission application under case number JS 1308/09 is dismissed.

3. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances

For the Applicant	Advocate Louis Hollander
Instructed by	Johanette Rheeder Incorporated
For the Respondent	Mr Petros Fakazi Zwane (In person)