THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 2380 / 2016

In the matter between:

SELAELO KENNETH EDWARD MATSHA

AND 2 OTHERS **Applicants**

and

PUBLIC HEALTH AND SOCIAL DEVELOPMENT

SECTORAL BARGAINING COUNCIL **First Respondent**

RONNIE BRACKS N.O. (AS ARBITRATOR) **Second Respondent**

DEPARTMENT OF SOCIAL DEVELOPMENT,

GAUTENG **Third Respondent**

Heard: 4 June 2019

Delivered: 7 June 2019

Summary: Practice and procedure – rule 11 application to dismiss review – principles considered – excessive delay may non suit an applicant

Practice and procedure – Practice Manual – clause 11.2.7 considered – purpose of provision considered – contemplates imperative of expeditious resolution of employment disputes

Review application – excessive delay in prosecution – no explanation provided – applicants non suited by failure to prosecute – review application dismissed

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JUDGMENT

SNYMAN, AJ

Introduction

[1] In *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[1] the Court expressed the following sentiment:

> '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. …'

[2] However, and despite this sentiment, this Court is still being inundated by applications in terms of Rule 11 of the Labour Court Rules to dismiss review applications for a lack of diligent prosecution thereof by litigants. Not only does this unnecessarily clog up the Court roll, but it leaves a dispute which was always intended to be expeditiously resolved, hanging in the air. This kind of situation creates uncertainty, may compound liability and serves to disappoint parties before this Court seeking nothing else but justice. After all, justice delayed is justice denied.[2]

[3] This case now before me concerns, yet again, one of these kind of matters. It involves a review application that is now more than two and a half years old, where there has in reality been nothing further done on it since it was first filed. The matter originated in an unfair labour practice claim pursued by the applicants to the first respondent, concerning a dispute about their translation into a level 7 position at the third respondent. This unfair labour practice dispute came before the second respondent for arbitration, and in an award dated 13 September 2016, the second respondent concluded that the applicants were correctly translated and he dismissed their claim. The applicants' review application was then filed on 4 November 2016 as a result of this award.

[4] This matter does not concern the merits of this review application. It concerns an application in terms of Rule 11 brought by the third respondent to dismiss the applicants' review application.[3] The third respondent's Rule 11 application

[1] (2016) 37 ILJ 313 (CC) at para 45.
[2] See *Langa and Others v Active Packaging (Pty) Ltd* (2001) 22 ILJ 397 (LAC) at para 6.8; *Khoza v Sasol Ltd* (2002) 23 ILJ 1567 (LC) at para 12.
[3] Rule 11(1) reads: '*The following applications must be brought on notice, supported by affidavit:*

was filed as far back as 12 March 2018. Other than simply filing a notice to oppose this application on 17 April 2018, the applicants did not even file an answering affidavit to this Rule 11 application. I will now decide the third respondent's Rule 11 dismissal application by first setting out the relevant chronology, as it appears from the founding affidavit and from what I was able to extract from the Court file.

The relevant facts

[5] As stated above, the applicants' review application was filed on 4 November 2016. I may add that the applicants were represented and assisted in this review application by their current attorneys of record, who also represented them in the arbitration proceedings before the second respondent.

[6] Having filed the review application, the applicants did nothing to further prosecute the matter. What of course must follow the filing of a review application is the discovery of the record of the arbitration proceedings by the first respondent.[4] Considering that the arbitration proceedings were electronically recorded, the duty was on the applicants to obtain such recording, have it transcribed, and then discover this transcription along with the documentary evidence in the arbitration as the record of the proceedings in terms of Rule 7A(6).

[7] I could find no trace in the Court file of the record of the proceedings having been discovered by the first respondent. It was then of course up the applicant to institute proceedings to compel the first respondent to discover the record of the proceedings, which compel proceedings would be brought in terms of Rule 7A(4).[5] But the applicants did nothing to obtain the record or bring such a compel application.

(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'. What must also be considered is Rule 11(4), which reads: '*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.*'

[4] See Rule 7A(2) and (3) of the Labour Court Rules.

[5] Rule 7A(4) reads: *'If the person or body fails to comply with the direction or fails to apply for an extension of time to do so, any interested party may apply, on notice, for an order compelling compliance with the direction*'. See also *National Education Health and Allied Workers Union on behalf of Vermeulen v Director-General: Department of Labour* (2005) 26 ILJ 911 (LC) at para 14.

[8] On 8 June 2017, the State Attorney wrote to the applicants' attorneys. This letter *inter alia* dealt with the issue of the outstanding record. It was indicated that there had been no activity on the part of the applicants since the review was filed and that the third respondent had not received the record. This letter was followed up by a further letter dated 30 June 2017, asking when the third respondent may expect to receive the record. Finally, and on 26 July 2017, the applicants' attorneys were sent a letter indicating that if the record was not received by 31 July 2017, an application to dismiss the review would be brought.

[9] This letter of 26 July 2017 was not complied with by the stipulated deadline, but it at least extracted a response from the applicants' attorneys. In a letter dated 8 August 2017, an indulgence of two weeks was requested to file the record. Despite this, the record was still not forthcoming, even in terms of this undertaking.

[10] The 12 month time limit as contemplated by clause 11.2.7 of the Practice Manual then expired on 5 November 2017, with no record in sight. The applicants took no steps to secure a further indulgence, as contemplated by this provision.[6]

[11] Finally, and on 12 March 2018, the third respondent filed its Rule 11 application to dismiss the applicants' review application. In this application, the third respondent specifically relied on clause 11.2.7 of the Practice Manual and contended that the applicants' review had lapsed. It was also specifically stated that since the filing of the review application, the applicants had done nothing and had no taken any further steps to prosecute the review application.

[12] Not even this dismissal application spurred the applicants into action. Other than simply filing a notice to oppose the Rule 11 application more than a month later, the applicants filed no answering affidavit. They did not attempt to explain what they had done in seeking to procure the record, and that the third respondent's allegations about their conduct was incorrect. They also still not seek an indulgence as contemplated by clause 11.2.7 of the Practice Manual.

[6] Clause 11.2.7 of the Practice Manual will be dealt with in more detail later in this judgment.

[13] The set down notice for the Rule 11 application was sent to the parties on 11 May 2019, setting this matter down for hearing on 4 June 2019. One would have expected that staring down this barrel, the applicants' attorneys would then at least take some proper effort to try and regularize the aforesaid unacceptable state of affairs. Such effort should have included a proper condonation application and answering affidavit. But still they did nothing.

[14] In fact, all that happened is that on 29 May 2019, less than a week before the hearing, the applicants simply filed the record. They did it as a matter of course, without any attempt to explain why it had taken more than two years to do so.

[15] Instead, and in Court on 4 June 2019, Mr Mamathuntsha, who represented the applicants, appeared and stated that as far as the applicants was concerned the matter was now opposed, the record had been filed, and the applicants should be allowed to continue with their review, as it would be most unfair to deprive them of their right to do so. He was unable to explain why no answering affidavit or condonation application had been filed.

[16] The above is then the factual basis upon which the third respondent's application to dismiss the applicants' review application must be decided. I will now proceed to apply the applicable legal principles to these facts.

Analysis

[17] The point of departure in deciding this dismissal application has to be the consideration of the particular requirement of expedition where it comes to the prosecution of employment law disputes.[7] Whilst there exists a plethora of judgments that specifically emphasize the need for expedition in employment law disputes, I would like to highlight three judgments of the Constitutional Court (CC). In *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal*[8], Skweyiya J said: *'… the importance of resolving labour disputes in good time is thus central to the LRA framework. ….*'. Further, Jafta J in *Aviation Union of SA and Another v SA Airways (Pty) Ltd*

[7] See Toyota (*supra*) at para 34; *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) and Others* (2015) 36 ILJ 232 (LC) at para 25.
[8] (2014) 35 *ILJ* 613 (CC) at para 42.

and Others[9], held: *'… Speedy resolution is a distinctive feature of adjudication in labour relations disputes …*'. And finally, in *National Education Health and Allied Workers Union v University of Cape Town and Others*[10] Ngcobo J said:

> 'By their very nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organize their affairs accordingly. They affect our economy and labour peace. It is in the public interest that labour disputes be resolved speedily …'

[18] In the light of these clear sentiments, the applicants surely have a mountain to climb. The record was due, applying the most generous application of the Practice Manual and Rule 7A, and considering the intervening December 2016 holiday season,[11] by the end of January 2017. However, and even from this date, it took some two years and three months to file the record. This kind of delay can comfortably be described as grossly excessive. Some examples bear mention. In *Makuse v Commission for Conciliation, Mediation and Arbitration and Others*[12] the Court described an 8(eight) month delay as '*egregious*'. The Court in *Moila v Shai NO and Others*[13] described a delay of just more than a year as '*an excessive delay*', as did the Court in *Maseko v Commission for Conciliation, Mediation and Arbitration and Others*[14] for a delay of 18(eighteen) months.[15] In *Khumalo supra*[16] the Court was in fact seized with a similar delay of 20(twenty) months as is the case *in casu*, and said it was '*unreasonable*' and '*significant*'. In the end, and as said in *Police and Prisons Civil Rights Union v Ledwaba NO and Others*[17]:

> 'The delay of some two years, as matters currently stand, especially considering the short time-limits imposed by the Labour Court Rules and the

[9] (2011) 32 *ILJ* 2861 (CC) at para 76.
[10] (2003) 24 *ILJ* 95 (CC) at para 31. See also *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* (2010) 31 ILJ 273 (CC) at para 46; *Strategic Liquor Services v Mvumbi NO and Others* (2009) 30 ILJ 1526 (CC) at paras 12 – 13.
[11] See *Transport and General Workers Union and Others v Hiemstra NO and Another* (1998) 19 *ILJ* 1598 (LC) at para 7.
[12] (2016) 37 ILJ 163 (LC) at para 15.
[13] (2007) 28 ILJ 1028 (LAC) at para 27.
[14] (2017) 38 ILJ 203 (LC) at para 15.
[15] See also *Transport and Allied Workers Union of SA and Others v Unitrans Fuel and Chemical (Pty) Ltd* (2015) 36 ILJ 2822 (LAC) at para 34 where the Court dealt with a delay of a year, and *GIWUSA on behalf of Heyneke v Klein Karoo Kooperasie Bpk* (2005) 26 ILJ 1083 (LC) at para 14 where the delay was 11 months.
[16] Id at paras 50 and 68.
[17] (2016) 37 ILJ 493 (LC) at para 21.

> Practice Manual, is grossly excessive and unpalatable. The situation is contrary to the important interest of finality of litigation.'

[19] Such an excessive delay could competently in itself lead to a matter being disposed of, especially in the absence of any explanation.[18] Because of the imperative of expeditious dispute resolution in employment disputes, such an excessive delay would normally lead, as a matter of general principle and barring truly exceptional considerations and good cause, to a situation where the application can competently be disposed of for this reason alone.[19]

[20] The above general principle is then given practical application in clause 11.2.7 of the Practice Manual.[20] This is evident from the following *dictum* in *Samuels v Old Mutual Bank*[21], where the Court said, with specific reference to the Practice manual:

> '… Its purpose is, inter alia, to provide access to justice by all those whom the Labour Court serves; promote uniformity and/or consistency in practice and procedure and set guidelines on standards of conduct expected of those who practise and litigate in the Labour Court. Its objective is to improve the quality of the court's service to the public, and promote the statutory imperative of expeditious dispute resolution. …'

[21] Clause 11.2.7 reads:

> 'A review application is by its nature an urgent application. An applicant in a review application is therefore required to ensure that all the necessary papers in the application are filed within twelve (12) months of the date of the launch of the application (excluding heads of arguments) and the registrar is informed in writing that the application is ready for allocation for hearing. Where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown why the application should not to be archived or be removed from the archive.'

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[18] See *Toyota* (*supra*) at para 47; *Khumalo* (*supra*) at paras 68 – 69.
[19] *National Education Health and Allied Workers Union on behalf of Leduka v National Research Foundation* (2017) 38 ILJ 430 (LC) at para 17.
[20] Which became operative on 2 April 2013.
[21] (2017) 38 ILJ 1790 (LAC) at para 14. See also *Macsteel Trading Wadeville v Van der Merwe NO and Others* (2019) 40 ILJ 798 (LAC) at paras 21 – 22.

[22] The Practice Manual is not just some sort of guideline which litigating parties may or may not comply with at their leisure, but has binding force, just like the Labour Court Rules.[22] It follows that the applicants were obliged to comply with clause 11.2.7. Compliance means, in the context of the current matter, that the record had to have been filed within 12 months of the date when the applicants brought the review application. That due date was therefore 5 November 2017, and was clearly not met.

[23] What is then the consequences of such a failure to comply? First, and upon the expiry of the time period, it caused the review application to lapse, and following on, the archiving thereof. The result of this was described in *Macsteel Trading Wadeville v Van der Merwe NO and Others*[23] as follows:

> 'As indicated, the review application was archived and regarded as lapsed as a result of NUMSA's failure to comply with the Practice Manual. There was also no substantive application for reinstatement of the review application, and no condonation sought for the undue delay in filing the record. As contended for by Macsteel, the Labour Court was, as a matter of law, obliged to strike the matter from the roll on the grounds of lack of jurisdiction, alternatively, give Macsteel an opportunity to file a separate rule 11 application demonstrating why the matter should be dismissed or struck from the roll on the basis of undue delay.'

[24] *In casu*, the third respondent exercised the right afforded to it upon the lapsing of the applicants' review application, by indeed bringing the Rule 11 dismissal application.[24] In the face of this application, the applicants only had one choice to save their review application, and that is to show good cause to resurrect it. The concept of '*good cause*' as contemplated by clause 11.2.7 of the Practice Manual was describes in *Samuels supra* as follows:[25]

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[22] See *Sepheka v Du Pont Pioneer (Pty) Ltd* (2019) 40 ILJ 613 (LC) at para 7; *National Education Health and Allied Workers Union on behalf of Leduka v National Research Foundation* (2017) 38 *ILJ* 430 (LC) at para 31. See also *Ralo v Transnet Port Terminals and Others* (2015) 36 ILJ 2653 (LC) at para 9; *Tadyn Trading CC t/a Tadyn Consulting Services v Steiner and Others* (2014) 35 ILJ 1672 (LC) at para 11; *Butana v SA Local Government Bargaining Council and Others* [2016] JOL 36088 (LC) at paras 8-9.

[23] (2019) 40 ILJ 798 (LAC) at para 25.

[24] It is competent to use Rule 11 for this purpose – see *Toyota* (*supra*) at paras 25 and 46; *Macsteel* (*supra)* at para 24.

[25] Id at para 17.

> 'In essence, an application for the retrieval of a file from the archives is a form of an application for condonation for failure to comply with the court rules, time frames and directives. Showing good cause demands that the application be bona fide; that the applicant provide a reasonable explanation which covers the entire period of the default; and show that he/she has reasonable prospects of success in the main application, and lastly, that it is in the interest of justice to grant the order. It has to be noted that it is not a requirement that the applicant must deal fully with the merits of the dispute to establish reasonable prospects of success. It is sufficient to set out facts which, if established, would result in his/her success. In the end, the decision to grant or refuse condonation is a discretion to be exercised by the court hearing the application which must be judiciously exercised.'

[25] The applicants, despite being forewarned, did not seize this opportunity. They never applied for condonation, they did not offer an explanation for the delay, and certainly did not show any good cause. The delay in this case cried out for the applicants taking the Court into their confidence and providing an explanation.[26] Consequently, when the matter came before me, it remained lapsed and archived. What must follow, as said in *Macsteel supra*,[27] is:

> '… The Labour Court determined the 'lapsed application' in the absence of a substantive reinstatement application and an order reinstating the review application. Put simply; the Labour Court determined the review application when it had no jurisdiction to do …'

[26] Because the third respondent indeed filed a Rule 11 application as contemplated by the judgment in *Macsteel supra*, and in the complete absence of any condonation application or attempt to show good cause by the applicants, a simple consequence must follow. That consequence is that the review application must now be dismissed.

[27] I also feel compelled to make some comments about the manner in which the applicants approached this entire matter. They did not comply with their own earlier undertaking to file the record. They did nothing, as said, when specifically warned that they were on dangerous ground. They did not even

[26] Compare *Toyota* (*supra*) at para 42.
[27] Id at para 27.

react to the Rule 11 application and at least then file the record with a proper condonation application showing good cause. What they did was to simply file the record on the eve of the hearing of the Rule 11 application, and come to Court on the day of the hearing and say that they have now filed the record and be given the chance to proceed with the review. This is an entirely unacceptable state of affairs.

[28] In my view, this kind of attitude adopted by litigants is a side effect of the notion of fairness that underlies all decision making in this Court. Judges want to be seen to act fairly, and are often loathe to visit a litigant with the culling of the matter on the merits because of failures committed by the litigant in the course of the litigation process. Often, legal practitioners who so fail, plead that their individual clients should be prejudiced by this and will suffer if the Court does not come to their aid. That way, litigants get away with things they should not get away with, and this creates the fertile soil in which this kind of conduct continues to thrive. At some point one has to say – enough is enough. The Practice Manual has been in effect for six years. It says a review application is urgent. It also says the prosecution of the review must be completed in 12 months. It provides that if this cannot be complied with, then at least good cause must be shown – i.e. a proper condonation application must be brought. Where this does not happen, and the other party asks for the dismissal of the review, then fairness to the review applicant and its right to review must for once sit in the back seat and the review application must be dismissed.

[29] I conclude by saying that even if one may assume that the applicants' review application may have some merit, the existence of the excessive and unexplained delay in excess of two years, and the failure to show good cause, must trump all else. In my view, the following dictum in *Ferreira v Die Burger*[28] would find application *in casu*, where the Court said:

> 'I am sympathetic to the fact that the applicant may have a case but, were we to grant this application, this court would subvert a crucial principle in matters which deal with personal relationships, namely labour relations, that these disputes have to be dealt with expeditiously and finalized as quickly as

[28] (2008) 29 *ILJ* 1704 (LAC) at para 8.

possible. Where in a case such as this, there has been so flagrant of violation of the rules, then, as Myburgh JP correctly decided, a lack of any explanation at all shrugs off other considerations.'

[30] For all the above reasons, the third respondent's Rule 11 application to dismiss the applicants' review application must succeed. It follows that the applicants' review application must be dismissed. The grossly excessive delay, the failure to comply with the Practice Manual, and the complete absence of good cause being shown, must bring an end to the proceedings, once and for all, by way of the dismissal of the review application.

Conclusion

[31] In all the circumstances as set out above, there is no need to prolong this matter further. The actual need is to bring it to an end. It is in the interest of justice and in line with the requirement of the expeditious resolution of employment disputes that the review application must be finally dismissed.

[32] This only leaves the issue of costs. I have a wide discretion where it comes to the issue of costs, having regard to the provisions of section 162(1) of the LRA. I am aware of what the CC said with regard to costs in employment disputes as expressed in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[29]. However, the judgment in *Zungu* cannot serve as some or other blanket immunization from costs orders. There would always be circumstances in which a judicial exercise of the discretion, where it comes to costs, justifies costs being awarded. In exercising this judicial discretion, the CC recently re-affirmed the principle set in *Zungu* and stated that '*when making an adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties.'*[30]

[33] The applicants were legally assisted throughout these proceedings. I thus accept that where it comes to the intricacies of prosecuting a review application and the provisions of the Practice Manual, the applicants would be

[29] (2018) 39 ILJ 523 (CC) at para 25.
[30] *Long v South African Breweries (Pty) Ltd and Others* (CCT61/18) [2019] ZACC 7 (19 February 2019) at para 30.

very much in the hands of their attorneys, having gone through the trouble and expense of engaging them. The third respondent, when this matter was argued, did not move for a costs against the applicants, and considering what actually happened in this case, I believe justly so. This is not case where the applicants themselves should be burdened with a costs order, which I believe will not be fair. But I do believe the applicants' attorneys cannot escape scot-free, because of the manner in which they failed the applicants.

[34] The kind of approach adopted by the applicants' attorneys in this case flies in the face of clear authority by all the higher Courts and this Court, tasked with the adjudication of employment disputes. They acted in clear and direct violation of the Practice Manual, which the applicants' attorneys, when deciding to practice in this Court, must be fully familiar with. I once again highlight that they were warned by the State Attorney of the consequences of their conduct, but elected to do nothing. And then, to simply file the record on the steps of the Court, so to speak, without a hint of trepidation or seeking indulgences, speaks volumes. In terms of the broad discretion I have with regards to costs, I believe this is a situation where the applicants' attorneys must forfeit their fees in this matter.[31]

[35] For all of the reasons as set out above, I make the following order:

Order

1. The third respondent's application in terms of Rule 11 to dismiss the applicants' review application is granted.

2. The applicants' review application is consequently dismissed.

3. There is no order as to costs.

4. The applicants' attorneys shall not be entitled to charge the applicants any fees or disbursements for the review application and the Rule 11 application.

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[31] Compare *Mashishi v Mdladla NO and Others* (2018) 39 ILJ 1607 (LC); *Sepheka v Du Pont Pioneer* (Pty) Ltd (*supra*).

S Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants:	Mr C Mamathuntsha of Mamathuntsha Inc Attorneys
For the Third Respondent:	Adv Mlambo
Instructed by:	The State Attorney