

**IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH**

Not reportable

Case No: PS 56/2013

In the matter between:

**COCA-COLA FORTUNE (PTY) LTD**

**Applicant**

And

**FOOD & ALLIED WORKERS UNION**

**First Respondent**

**ERIC TATI & 72 OTHERS**

**Second – Further Respondents**

**Heard: 14 June 2018**

**Delivered: 26 March 2019**

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**JUDGMENT**

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**TLHOTLHALEMAJE, J**

Introduction:

- [1] The applicant (the respondent in the Main Claim) seeks an order in terms of Rule 11 of the Rules of this Court to have the respondents' claim of an alleged unfair dismissal be dismissed for want of timeous and diligent prosecution. The applicant further seeks condonation for the late filing of replying affidavit in the Rule 11 application. The respondents opposed both the Rule 11 and condonation applications.

Condonation:

- [2] The parties at the commencement of these proceedings had agreed that condonation was no longer an issue except for the issue of costs in that regard. However, to the extent that costs in that regard remains an issue, it is noted that the Rule 11 application was delivered on 6 December 2017. The respondents' answering affidavit was served on 20 December 2017 in the afternoon, after the applicant's attorneys of record's offices were closed on the same day for the holiday season. The replying affidavit was filed and served on 17 January 2018. On 25 January 2018, the respondents filed a notice of objection to the late delivery of the replying affidavit, thus compelling the applicant to file an application for condonation.
- [3] The delivery of the replying affidavit was some 12 days out of time. Given the timing and serving of the Rule 11 application and the answer thereto, I failed to appreciate the strenuous nature of the objection to the late filing of the replying affidavit and opposition to the condonation. Ordinarily, condonation would have been granted.

Background and the basis of the Rule 11 application:

- [4] The individual respondents were on 25 April 2013 charged with embarking on unprotected strike action on 16 April 2013. Following a collective disciplinary

hearing held on 24 May 2014, the individual respondents were dismissed on 19 July 2013.

- [5] Having referred a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA), a certificate of non-resolution was issued on 12 August 2013. The respondents' statement of claim was then delivered on 20 January 2014, some two months outside of the statutory time frames. An application for condonation for the late delivery of the statement of claim delivered on 13 February 2014 was granted by this Court on 19 February 2015. The applicant however contends that the respondents have delayed the prosecution of the claim based on the following;

5.1 On 6 June 2015 the respondents' erstwhile attorneys of record (B Macingwane Attorneys) withdrew from the matter. When no further steps were taken in regard to the matter, the applicant's attorneys of record (Kirchmanns) addressed correspondence to the respondents' new attorneys (Brett Purdon Attorneys) to ascertain whether they were on record. They were then advised that the respondents' current attorneys (Gray Moodliar Attorneys) were on record.

5.2 In a response dated 3 November 2015, Kirchmanns advised Brett Purdon that two years had gone by since the claim was lodged and no further steps were taken on the matter including that a pre-trial meeting had not been convened, and further that urgent steps needed to be taken to address the delay.

5.3 On 8 December 2015, Gray Moodliar advised Kirchmanns that they were acting on instructions of Brett Purdon and indicated an intention to seek an amendment to the statement of claim. On the same day, Kirchmanns addressed correspondence Gray Moodliar and *inter alia* complained about the delays in finalising the matter, further pointing

out that six months had gone by since the attorneys were seized with the matter and that no steps were taken to advance the matter.

5.4 Despite undertakings to file a notice to amend, nothing was done in that regard.

5.5 On 26 May 2016, Kirchmanns then addressed correspondence to Gray Moodliar, outlining the history of the matter and further warning that an application to dismiss the main claim may be brought if the matter is not finalised.

5.6 It was only on 29 June 2017 that Gray Moodliar formally placed themselves as the respondents' attorneys of record. Six months later, and despite an undertaking having been made on 8 December 2015, the notice of intention to amend the statement of case was delivered on 6 December 2017, and this was after the Rule 11 application was launched.

5.7 When the applicant objected to the intended amendment, the respondents' raised an objection to that objection.

The legal framework:

[6] As at the hearing of this matter, it was five years since the individual respondents were dismissed. Central to the determination of the Rule 11 application are the steps taken or lack of thereof, after the respondents were granted condonation for the late delivery of the statement of claim on 19 February 2015.

[7] The principles applicable in circumstances where a party unreasonably delays the prosecution of a claim are well established. Thus, a Court in the exercise of its discretion may dismiss a claim which has not been timeously prosecuted having considered a variety of factors including but not limited to the extent of the delay, whether the delay was unreasonable; whether acceptable reasons have been proffered for the delay, and the effect or prejudice caused by the delay on the other party. At the end, the issue is whether the interests of justice demand that a matter that was prosecuted in a dilatory manner be dismissed or not.<sup>1</sup>

[8] In some instances, an inordinate or unreasonable delay in prosecuting an action may constitute an abuse of process and warrant the dismissal of an action<sup>2</sup>. An application to dismiss is a drastic remedy, and should not be

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<sup>1</sup> See *Molala v Minister of Law and Order & Another* 1993 (1) SA 673 (W); *NUMSA obo Nkuna & Others v Wilson Drills-Bore (Pty) Ltd* (2007) 28 ILJ 2030 (LC); *Member of the Executive Council, Department of Sport, Recreation, Arts & Culture, Eastern Cape v General Public Service Sectoral Bargaining Council and Others* [2012] 12 BLLR 1224 (LC); *Karan t/a Karan Beef Feedlot and Another v Randall 4* (2009) 30 ILJ 2937 (LC); *National Union of Metalworkers of South Africa (NUMSA) and Others v Paint and Ladders (Pty) Ltd and Another* (2017) 38 ILJ 2285 (LAC); [2017] 11 BLLR 1105 (LAC) at para [17], where it was held that;

‘[17] What can be observed from the long line of decisions in the Labour Court on applications for dismissal of the claims for want of timeous prosecution is that although the rules of the Labour Court make no specific provision for an application to dismiss when a party fails diligently to pursue a claim referred to it for adjudication, the court has recognised and adopted the rule based on the *maxim vigilantibus non dormientibus lex subvenit*. In terms of this *maxim*, a party may in certain circumstances be debarred from obtaining the relief to which that party would have been entitled to on account of an undue delay in prosecuting its claim because: Firstly, an unreasonable delay may cause prejudice to the other parties. Secondly, it is both desirable and important that finality be reached within a reasonable time in respect of judicial administrative decisions.’

And,

‘[20] In the end, it all comes down to the question of whether, in light of the delay, there would be a fair trial of the issues in this case. Put differently, whether on account of the delay there would be any prejudice to the parties which would impede the fair determination of the issues.’

‘[21] The statutory obligation in respect of expeditious resolution of labour disputes exists for a good reason: Any delay undermines the primary object of the Labour Relations Act. As illustrated in *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and Others*, failure to prosecute timeously labour disputes is detrimental not only to the workers who may be without a source of income pending the resolution of the dispute but, ultimately, also to an employer who may have to reinstate workers after many years. See also *Colett v Commission for Conciliation, Mediation & Arbitration and Others* (2014) 35 ILJ 1948 (LAC); *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC) at 223 para 63’.

<sup>2</sup> See *Cassimjee v Minister of Finance* 2014 (3) SA 198 (SCA) at para [10]

granted unless the dilatory party has been placed on terms, and when appropriate, after any further steps as may have been available to the aggrieved party to bring the matter to finality have been taken<sup>3</sup>.

- [9] The respondents contend that the matter should be allowed to proceed to trial on the basis that they had at all material times engaged with their legal representatives in the active and continuous preparation of the matter.

Evaluation:

- [10] As at the hearing of the Rule 11 application, the delay in prosecuting the respondents' claim in the light of the dismissal having taken place some five years ago is inordinate in the extreme. The issue however as already indicated remains what steps, if any, were taken by the respondents upon being granted condonation for the late filing of the statement of claim on 19 February 2015. What follows below are the explanations for the delays as proffered by the respondents and a consideration of whether they are reasonable and acceptable or not:

10.1 The first explanation is that after Macingwane Attorneys withdrew from the matter on 18 May 2015, correspondence was exchanged between Brett Purdon, Gray Moodliar and Kirchmanns between 7 July 2015 and 28 September 2015 regarding the convening of a pre-trial conference and the possibility of amending the statement of claim.

10.2 The difficulty however with the above explanation is that no effort is made by the respondents to explain the initial delay between

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<sup>3</sup>Member of the Executive Council, Department of Sport, Recreation, Arts & Culture, Eastern Cape v General Public Service Sectoral Bargaining Council and Others at 2899 para 27.

19 February 2015 and 18 May 2015. Furthermore, no effort was made to explain in full, the delay between the appointment of Brett Purdon and Gray Moodliar, and the delay in filing the amended statement of claim despite having indicated on 8 December 2015 that such an amendment would be sought.

10.3 Other explanations pertaining to the delay after the appointment of Brett Purdon included that between 7 July 2015 and 28 September 2015, there were various exchanges between Brett Pardon and Gray Moodliar regarding the convening of a pre-trial conference and the possibility of amending the respondents' statement of case.

10.4 Even then however, that explanation pertains to mere exchange of correspondence between the two attorneys, and as at the hearing of this application, the pre-trial conference had not been convened, and the amended statement of claim was only delivered on 8 December 2017, some two years since the exchanges, and at about the same time that the Rule 11 application was served and delivered.

10.5 The explanation of the delay between 30 September 2015 and 8 December 2015 as being due to an exchange of correspondence between Brett Pardon, Gray Moodliar and Kirchmanns about confirmation of who the instructing attorneys were or whether an amended statement of case was to be filed, is hardly a reasonable one based on the ground that when Macingwane Attorneys withdrew on 6 June 2015, they had indicated that Brett Purdon had been appointed as the respondents' attorneys of record. Only on 1 October 2015 did Brett Purdon confirm that they were the respondents' attorneys of record, but that they had appointed Gray Moodliar as correspondent. No explanation is proffered in regard to the period 6 June 2015 and 1 October 2015. Even then, Gray Moodliar despite being involved in

the matter only placed themselves formally on record on 8 December 2015. As to the reason confirmation of the attorneys of record could not have been made in June/July after Brett Purdon became attorneys of record is however not explained.

10.6 The respondents further attributed the delays commencing from December 2015 leading to the ultimate filing of the notice of amendment on 8 December 2017 to various exchanges of correspondence and communications between the respondents' attorneys, or with Union officials and/or with the respondents' counsel regarding instructions and consultations; the passing of one of the union officials involved in the matter; arranging of consultation dates with counsel or other union officials; and/or the respondents' attorney (Ms Roberts) being busy with other matters.

10.7 The above excuses as correctly pointed out on behalf of the applicant are clearly not adequate, particularly since they point to the respondents' own engagements with either their own attorneys, or with their counsel or union representatives, without outlining what urgent steps were taken in the course of all these consultations and correspondence, to ensure that the matter was timeously prosecuted.

10.8 Significant in this case however is that as far back as November 2015, Kirchmanns had advised Brett Purdon that there was a delay in prosecuting the matter and that despite Gray Moodliar being the correspondent attorneys, nothing was heard from the latter. Brett Purdon was advised to take urgent steps on the matter to address the delay.

10.9 Similar correspondence followed on 8 December 2015 in which complaints were made against the delays. A year later in May 2016,

Kirchmanns advised Brett Purdon and Gray Moodliar that an application to dismiss the claim was to be brought unless the matter was brought to finality. In my view, those were the available steps that the applicant could take at the time to ensure the expedited prosecution of the dispute. One would have thought that such correspondence would have prompted the respondents to act on their claim with some urgency. This however was not to be so.

10.10 The respondent's approach as advanced by counsel is that there are no time periods within which such claims ought to be prosecuted. In the alternative, a submission was made that the applicant had not carried out its threats to bring this application until a year later. These submissions however lose sight of the fact that central to the main objectives of the LRA is expeditious resolution of disputes<sup>4</sup>, which can only be realised if parties on their own ensured that their matters are timeously and properly before the court and ready for determination. Furthermore, Rule 6 of the Rules of this Court regulates trial matters and procedures to be followed in order to ensure that matters are properly placed before the Court and allocated trial dates. These provisions are further augmented by those of Paragraph 10 of the Practice manual of this Court.

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<sup>4</sup> See *Toyota SA Motors (Pty) Ltd v CCMA and Others* (2016) 37 ILJ 313 (CC) at para [34] where it was held that;

"Toyota did not challenge the proposition that the Labour Court had the power to dismiss its review application if it unreasonably delayed in pursuing the review. 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 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.)"

10.11 The applicant had indeed placed the respondents on terms as it was required of it. There was no need for it to bring an application to compel the respondents to do what they were required to do, i.e., to expedite the prosecution of the matter.

10.12 Furthermore, the mere fact that the threats to bring the Rule 11 application were not carried out until a year later cannot be construed as latitude to the respondents to be more dilatory, or condonation of inaction. The threats, even carried out a year later were meant to jolt the respondents into action and to make them appreciate and act urgently on the matter. In any event, there is no prescribed time periods within which a Rule 11 application can be brought, as was evident from *National Union of Metalworkers of South Africa (NUMSA) and Others v Paint and Ladders (Pty) Ltd and Another*, where such an application was moved on the day of the trial. Accordingly, the respondents cannot hang on to the applicant's failure to carry out a threat to bring this application as an excuse for their dilatoriness.

[11] Having had regard to the particular circumstances of this case and the explanations proffered by the respondents, it is apparent that in two years and ten months, the latter did very little to prosecute their claim. The delay, which is wholly excessive, with some parts not explained and others inadequately explained, was unreasonable. I still fail to appreciate the reason it could have taken the respondents that long to settle an amendment to a statement of case or convene a pre-trial conference.

[12] Whether the respondents' statement of claim ought to be dismissed on account of the excessive and unreasonable delay, and the failure to adequately give an explanation for that delay is further dependent upon considerations surrounding the effect of that delay or prejudice caused by that delay. In other words, whether on account of the inordinate delay, there

would be any prejudice to the parties which would impede the fair determination of the issues<sup>5</sup>.

[13] In this regard, the applicant's contention was that delays in prosecution of claims are associated with inherent prejudice. To this end, it was submitted that one of the primary witnesses, Lynette Knoesen left the applicant's employ in September 2016, and further that with time, memories of available witnesses may have faded.

[14] The respondent's response to the issue of prejudice was that factors such as memories of witnesses fading or witnesses having left the applicants employ were not a bar to the matter proceeding to trial, particularly as Knoesen, who had intimate knowledge of the dispute was readily available and could recall the events of the matter.

[15] The respondents' dismissive approach to the prejudice caused by the delay to the applicant is misplaced. In the same vein, it was appreciated on their behalf that generally, delays in the prosecution of labour matters are undesirable and potentially prejudicial. To reinforce this appreciation, the Labour Appeal Court in *National Union of Metalworkers of South Africa (NUMSA) and Others v Paint and Ladders (Pty) Ltd and Another* had stated that;

"In *Mohlomi v Minister of Defence*, the Constitutional Court observed;

'Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses

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<sup>5</sup> *National Union of Metalworkers of South Africa (NUMSA) and Others v Paint and Ladders (Pty) Ltd and Another* At para [20]

may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.”<sup>6</sup>

[16] In the light of the above, there is no merit in the contention that the applicant would not suffer any prejudice as a result of the failure to diligently prosecute the respondents’ claim. The prejudice is self-evident. Seventy three employees were dismissed on 19 July 2013. Five years later and as at the hearing of this application, the pleadings and Pre-trial minutes had not been completed, and the matter was clearly nowhere to being ripe for a hearing.

[17] Other than the fact that the individual respondents are entitled to a speedy resolution of their dispute, the applicant is equally entitled to same, in order to plan for any eventuality arising from the outcome of the trial proceedings. Other than these considerations, the prospects of witnesses on both sides not having a proper recollection of events is not remote, nor is the unavailability of witnesses. These issues on their own have a detrimental effect on the proper adjudication and fair trial of the dispute. These are realities that the respondents cannot wish away with their dismissive approach. To this end, I am satisfied that the applicant has demonstrated that the effect of the delay in prosecuting the respondents’ claim is to prejudice it, and the overall fair determination of the dispute.

[18] In regards to prospects of success, and without dwelling too much into the merits of the claim, on the applicant’s version, the individual respondents were dismissed in circumstances which emanated from a complaint lodged by FAWU as far back as November 2011 against the applicant’s Distribution

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<sup>6</sup> At para [22]

team Leader, who was accused of having used racially offensive language or assaulted an employee. Following various interventions and meetings between the parties, and an investigation into the allegations against the team leader, central to the issue for determination is whether the dismissal of the individual was as a result of their participation in an unprotected strike on 16 April 2013.

[19] The applicant's contention was that on 16 April 2013, it was not business as usual contrary to the respondents' contentions that they were not on strike. It was submitted that the issue of sanction was not a consideration whether the prospects of success existed or not, and that the principal issue was whether the respondents had embarked on an unprotected strike, which in this case the facts demonstrated that there was.

[20] The respondents' contention on the other hand was that their claim enjoyed more than reasonable prospects of success in that they never embarked on a strike on 16 April 2013. It was further submitted on their behalf that since there were factual disputes surrounding whether an unprotected strike took place or not, those were factual issues which ought to be properly ventilated before the Court.

[21] As already indicated, it is not for the Court to determine the merits of the respondents' claim, particularly in the light of the material disputes of facts as to whether the strike took place or not. The issue of prospects of success on the merits is not in any event primary, and I agree with the submissions made on behalf of the applicant that this issue is to be considered when having regard to the concepts of fairness or justice.

[22] To conclude, the respondents failed to timeously prosecute their claim against the applicant. The delay in that regard was excessive in the extreme and thus unreasonable. The explanations proffered in regards to the delay were wholly

inadequate, and by all accounts, merely point to dilatoriness on the part of either the respondents' attorneys or union officials. In circumstances where there was inaction on the matter in the sense of ensuring that it was ripe for hearing, the failure to expeditiously prosecute the claim is the primary cause of prejudice should the matter proceed to trial. In the end, having taken into account the overall facts and circumstances of this case, it is my view that the overall interests of fairness or justice cannot be better served by having the matter proceed to trial. This is so in that there is a substantial risk that a fair trial of the issues will not be possible as a consequence of the inexcusable inordinate delays in prosecuting the matter.

[23] I have had regard to the question of costs, and upon a consideration of the requirements of law and fairness, I am of the view that a costs order is not warranted in this case.

[24] Accordingly, the following order is made;

Order:

1. The applicant's Rule 11 application is successful and the respondents' (Applicants in the main) claim of an alleged unfair dismissal is dismissed.
2. There is no order as to costs.

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Edwin Tlhotlhaemaje

Judge of the Labour Court of South Africa

**APPEARANCES:**

For the Applicant:

MC Kirchmann of Kirchmanns INC

For the 1<sup>st</sup> and 2<sup>nd</sup> – Further Respondents: L Voultsov

Instructed by:

Gray Moodliar Attorneys

LABOUR COURT