REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR 3211/09 +J 1241/13

In the matter between -

ELLERINE FURNISHERS (PTY) LTD **Applicant**

and

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **First Respondent**

COMMISSONER KHUTSO ELIAS MPAI **Second Respondent**

SACCAWU OBO LEBCHARS MAKHUBELE **Third Respondent**

Heard: **15 May 2014**

Delivered: **05 August 2014**

Summary: Review application. Unreasonable delay in the prosecution of the review application. Principles governing unreasonable delay.

JUDGMENT: (VARIED)

MOLAHLEHI J

Introduction

[1] The Judgment below was made on 5 August 2014. It has come to my attention that the spelling of the names of the applicant and the individual third respondent are incorrect. At paragraph [21] of the Judgment the Court found that there was no reason in law and fairness why costs should not follow the result. However, the order made by the Court is silent on this aspect.

[2] In my view the errors referred to above are obvious mistakes which I have decided to correct in terms of Section 165 of the Labour Relation Act of 1995.

[3] This is a review application in terms of which the applicant seeks an order to review and set aside the arbitration award made under case LP1565-09 dated 18 October 2009. In terms of the arbitration award the second respondent (the Commissioner) found the dismissal of the individual third respondent (hereinafter referred to as 'the employee') to have been unfair. It was for that reason that the applicant was ordered to reinstate him.

[4] The third respondents have opposed the review application and subsequent thereto filed an application to dismiss the review application on the ground of unreasonable delay in its prosecution. The third respondents have also applied to have the arbitration award made an order of the Court.

The background facts

[5] The employee who was prior to his dismissal employed as a driver was dismissed for contravening the rule that prohibits transporting people who are not employees in the applicant's vehicles. The charges which were proffered against the employee reads as follows:

> "5.3.1 Unauthorised the use of company motor-vehicle in that on 12th February 2009 at approximately 7h15 you were seen driving the company vehicle, registration number . . ., For which you had no authority to use this vehicle on that day at that time and had no authority to take this vehicle home on the evening of 11th of February 2009.
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> 5.3.2 Serious Breach of Company policy and procedure in that on 12th of February 2009 at approximately 07h15 you were seen driving the company vehicle registration number . . . , in which you were carrying passengers who are not members of staff of Ellerines, thereby breaching company policy and procedure."

[6] The facts that gave rise to the charges against the employee arose from the incident that occurred on 12 February 2009 when the employee was observed by the regional manager, Mr Pretorius, driving the applicant's vehicle with a passenger at the back thereof. Before stopping the employee and confronting him about the infraction of the policy, Mr Pretorious contacted the control office to enquire about the use of the vehicle by the employee. The employee explained to Mr Pretorious that the passenger was his sister.

The arbitration award

[7] The Commissioner found that the applicant had failed to show that the dismissal of the employee was for a fair reason. As stated earlier it was for this reason that the Commissioner ordered the applicant to reinstate the employee. The Commissioner further ordered the applicant to compensate the employee in an amount equivalent to 8 months' compensation.

The grounds of review

[8] The applicant challenges the arbitration award of the Commissioner on several grounds of review which may be summarised as follows:

i. The Commissioner failed to analyse the evidence regarding the disciplinary hearing.

ii. The Commissioner failed to appreciate that the transgression committed by the employee was serious.

iii. The Commissioner erred in the interpretation of the inter-store memorandum.

iv. The Commissioner failed to consider the 'devious manner in which the emperor he presented his evidence during the arbitration hearing.'

v. The Commissioner exceeded his powers in order to bring the reinstatement of the employee.

The delay in the prosecution of the review application

[9] The following dates are important in the consideration of the application to dismiss the review application which if successful would end the review application.

[10] The review application was launched on 30 November 2009. Thereafter, the employee launched an application to have the arbitration award certified as if it was an order of Court in terms of section 143 of the Labour Relations Act of 1995 (the LRA), on 5 February 2011.

[11] The applicant filed the record in terms of rule 7A (6) of the rules of the Court consisting only of the arbitration award and the heads of arguments which had been filed during the arbitration proceedings on 7 October 2011. The transcript of the record of the arbitration proceedings was not filed. On the same day the applicant filed notice in

terms of rule 7A (8) of the rules indicating that it stood by its notice of motion.

[12] The applicant's goods were attached in execution in terms of the writ of execution which was issued on 12 January 2012. On 28 May 2012 the respondent launched an urgent application to have the execution of the writ stayed pending the review application.

[13] On 12 June 2013, the employee filed an application to have the arbitration award made an order of the Court. Both the application to have the arbitration award made an order of Court and the application to dismiss the arbitration award are opposed by the applicant.

The principles applicable – unreasonable delay

[14] It is now well established that the Court has discretion to dismiss a review application for unreasonable delay in the prosecution thereof. From a policy perspective there are two principle reasons why the Court should have the power to dismiss a claim at the instance of an aggrieved party where the other has been guilty of unreasonable delay.[1] The first reason concerns the prejudice that the aggrieved party may suffer as a result of the delay and the second is about the importance and the need to reach finality within a reasonable time in the administration of justice.[2]

[15] In *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal*,[3] the Constitutional Court had to consider the issue of unreasonable delay in the context where the MEC for Health in Kwa Zulu- Natal had delayed in instituting a review of an alleged unlawful decision to promote an employee who did not have the necessary qualification. The MEC was unsuccessful in challenging the decision to promote the employee at the Labour Court. Having

[1] *Ivor Michael t/a Karen Beef Feedlot v John Randal* [2009] ZALC 123.

[2] *Radebe v Government of the Republic of South Africa* 1995 (3) SA 787 (N) *and Sishuba v National Commissioner of the South African Police Service* (2007) 28 ILJ 2073.

[3] (CCT 10/13) [2013] ZACC 49 (18 December 2013).

been unsuccessful at both the Labour Court and the Labour Appeal Court the MEC took the matter on appeal to the Constitutional Court where the employee raised the issue of unreasonable delay on the part of the MEC to have the decision to promote him set aside.

[16] It took the MEC 20 months to have the decision to promote the employee set aside and this was after he had occupied the post in question for over four years. The MEC provided no explanation for such a delay. In dealing with the issue of the unreasonable delay the Constitutional Court had the following to say:

> "[47] This requirement is based on sound judicial policy that includes an understanding of the strong public interest in both certainty and finality. People may base their actions on the assumption of the lawfulness of a particular decision and the undoing of the decision threatens a myriad of consequent actions.
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> [48] In addition, it is important to understand that the passage of a considerable length of time may weaken the ability of a court to assess an instance of unlawfulness on the facts. The clarity and accuracy of decision-makers' memories are bound to decline with time. Documents and evidence may be lost, or destroyed when no longer required to be kept in archives. Thus the very purpose of a court undertaking the review is potentially undermined where, at the cause of a lengthy delay, its ability to evaluate fully an allegation of illegality is impaired.
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> [49] In Gqwetha the majority of the Supreme Court of Appeal held that an assessment of a plea of undue delay involves examining: (1) whether the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in the light of "all the relevant circumstances"); and if so (2) whether the court's discretion should be exercised to overlook the delay and nevertheless entertain the application…"

The Court further stated that:

> "[69] The Labour Court erred in overlooking the delay. While the Court was correct to be cautious in permitting the delay to non-suit the MEC, its simple reference to promoting public accountability and the balance of convenience, as the basis on which to condone, is an inadequate consideration of the depth of difficulties faced by a court when confronted with a review in the labour context, following the passage of an extensive and unexplained delay of this nature. While the Court accurately acknowledged its ability to ameliorate prejudice to Mr Khumalo in the remedy, it did not adequately consider the fact that the MEC gave no explanation for the delay or the extent to which the delay constrained an accurate review. In the result, the Court misdirected itself in overlooking the delay and the grounds for this Court's interference with its exercise of discretion are established. The delay should non-suit the MEC in relation to her application for the review of Mr Khumalo's appointment."

[17] In my view, considering the facts and the circumstances of this case, there seem to be no reason why the applicant in the review application should not be nonsuited in its review application due to the unreasonable delay. There is no reasonable or satisfactory explanation as to why the applicant remained idle for such a long period in particular after obtaining the urgent interdict against the enforcement of the arbitration award. The delay is excessive and as indicated earlier no satisfactory explanation thereof has been tendered by the applicant.

[18] In considering the application to dismiss the review application due to unreasonable delay the following factors were also taken into account:

a. The review application is approximately 4 years old.

b. The review application was enrolled only after the application to dismiss it was made.

c. The applicant in the review application had obtained an order on an urgent basis to have the enforcement of the arbitration award stayed pending the outcome of the review but thereafter the applicant stayed idle and did nothing to have the matter progressed to the next step.

[19] The applicant's review application stands to be dismissed even if, for whatever reason, it was to be found that the delay in the prosecution was not unreasonable.

The review application would stand to fail on the ground of failure by the applicant to file the transcript of the arbitration proceedings. The Labour Appeal Court in *Life Care Special Care Centre v CCMA* and Others[4], held that the Court has a discretion to dismiss a review application if the applicant fails to file the transcript of the arbitration proceedings. The Labour Appeal Court has also cautioned parties that fail to file the transcript of the arbitration proceedings that they run the risk of the review being dismissed on that ground alone.[5]

[20] In the present instance the applicant has failed to file the transcript of what transpired during the arbitration hearing. The applicant has not tendered an explanation as to why the transcript of the arbitration hearing was not filed.

[21] The significant consideration in dismissing the review application on the account of failure to file the transcript, in the present matter, is the fact that the applicant's application is fact based. In the absence of the proper record as to what transpired during the arbitration proceedings, this Court is not in a position to properly assess the reasonableness or otherwise of the outcome of the arbitration hearing. In this respect the Court is deprived of the opportunity of being able to evaluate the evidence and the material concerning the following complaints by the applicant:

[4] (2003) 5 BLLR 416 (LAC).
[5] *See JDG Trading (Pty) Ltd t/a Russel v Whitcher NO and Others* (2001) 3 BLLR 300 (LAC).

a. The alleged failure by the Commissioner to consider the alleged 'devious manner' in which the employee 'presented his evidence at the arbitration proceedings' and in particular the allegation that the employee tabled a version at the arbitration hearing which he did not present during the disciplinary hearing.

b. That the Commissioner in his review of the evidence of the employee erred regarding the credit manager at Giyani who had received a final written warning.

c. That the Commissioner committed gross irregularity by drawing a comparison between the case of the employee and that of the credit manager.

[22] In light of the above discussion, the applicant's review application stands to fail. I also do not see why in law and fairness why costs should not follow the results.

Order

[23] In the premises, the following order is made:

1. The two preliminary points raised by the Third Respondents are successful and accordingly the application to review the arbitration award made under case LP1565-09 dated 18 October 2009, is dismissed with costs.

2. The arbitration award is made an order of the Court in terms of section 158(1)(c) of the Labour Relations Act of 1995 as amended.

E Molahlehi

Judge of the labour Court of South Africa

APPEARANCES:

For the Applicant: Mr James van den Heever

IR Consultant of Ellerine Furnitures (Pty) Limited

For the hird Respondent: Mr Goldberg of Goldberg Attorneys