REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Reportable

Case no: P137/07

In the matter between:

FRANS MEINTJIES.	**Applicant**
NEW TYRE MANUFACTURERS	
and	
BARGAINING COUNCIL	**First Respondent**
CHARINE SMITH	**Second Respondent**
GOODYEAR SA (PTY) LTD	**Third Respondent**

Heard: **20 October 2011**

Delivered: **17 January 2012**

Summary: Application to dismiss review for want of prosecution. Explanation for undue delay in prosecuting the review not satisfactory.

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application in terms of which the applicant seeks an order reviewing the arbitration award made by the second respondent (arbitrator) under case number NTBC04/06 dated 27 March 2007. In terms of that arbitration award, the arbitrator found the dismissal of the applicant by the third respondent to have been fair and according dismissed the applicant's unfair dismissal claim.

[2] It is as a result of being unhappy with that outcome that the applicant has instituted the present proceedings.

[3] In opposing the review application, the third respondent contends firstly that the review should be dismissed for want of timeous prosecution thereof. And in relation to the merits, the respondent contends that the findings made by the arbitrator were within the range of outcomes that could have been reached by a reasonable decision-maker.

Background facts

[4] The applicant who prior to his dismissal had been in the employ of the third respondent for a period of about 38 years, was charged and dismissed for misconduct related to an alleged act of dishonesty.

[5] The incident that gave rise to the charge against the applicant arose early in March 2005 when the applicant approached both Mr Marais and Mr Jafter and indicated his interest in obtaining an old tool box together with old tools which the respondent may have wished to discard.

[6] According to the applicant, Mr Marais informed him that there was an old trolley available but that if he wished to have it he should approach Mr Hoffman for an authorisation note (pass) for the purposes of being able to remove the trolley from the third respondent's premises. After obtaining the pass which recorded that ‘scrap trolley and scrap tools,’ were to be removed from the premises, the applicant went back to Mr Jargens who also signed the pass. Thereafter, the applicant approached Mr Marais who undertook to arrange to let the applicant have the items in question but however took several months before keeping to his undertaking.

[7] After receiving the approval to remove the items from the respondent's premises, the applicant approached the security for final authorisation to remove the items which he

received. Because of the size of the items, the applicant left them at the security to fetch a car to collect them. On his return, he was told that there was some suspicion about the items. Thereafter, the following charges were proffered against the applicant:

> 'It is alleged that you committed gross misconduct in breach of the trust relationship in that on 17 August 2005, you attempted to remove a toolbox belonging to the company under the presences of a scrap material pass, when such property was in actual fact not scraped by the company.'

[8] At the disciplinary hearing, the applicant applied for legal representation which was refused by the chairperson of the disciplinary enquiry.

[9] The applicant was subsequent found guilty and dismissed. The applicant being unhappy with the outcome of the disciplinary hearing referred a dispute concerning an alleged unfair dismissal to the first respondent which after the failure of the conciliation was referred to arbitration.

Grounds for review

[10] The applicant challenges the arbitration award on both substantive and procedural fairness. In relation to substantive fairness the applicant contends that the arbitrator made certain factual findings which are not justified having regard to the evidenced which was presented during the arbitration hearing. The applicant also contends that the conclusion reached by the arbitrator is not justified in relation to what was presented to her.

[11] As concerning procedural fairness, the applicant complains that the process followed by the arbitrator was unfair in that:

> '3.1 It was patently obvious that Botha was not impartial as chairperson of the disciplinary enquiry;
>
> 31.2 The second respondent concludes that the outcome of the hearing would have been the same even if no aggravating factors were considered;
>
> 31.3 It is trite that no difference principle has been consistently rejected by our courts . . .'

The arbitration award

[12] In rejecting the version of the applicant, the arbitrator said that the applicant adopted an:

> 'Opportunistic approach to say in retrospect that the individuals certifying the item as a scrap were negligent and his attempt in removing the item is therefore not dishonest.'

[13] The arbitrator further found that the applicant was fully aware of the failures of those who authorised the removal of the items but did nothing because it benefited him.

[14] In relation to the role of Mr Marais, the arbitrator observed that the applicant capitalised on the long standing trust relationship between the two of them in obtaining authorisation of the removal of the items.

[15] The other finding of the arbitrator concerning the intention of the applicant is that:

> ' Even if I were to find that the applicant was not aware of the exact nature or state of the toolbox at the time of applying for the Waste Disposal Certificate, he was most definitely aware of the fact that the item cannot be deemed as a scrap at the time he attempted to remove the toolbox. His submission that he did not look at the toolbox when it was showed to him by Mr Jafta does not ring true. It is highly unlikely that the applicant would go to great lengths to obtain a Waste Disposal Certificate, wait a number of months or the item and then, when shown the long waited toolbox, elected not to look.'

[16] The other defence of the applicant during the arbitration hearing was that the respondent had applied discipline inconsistently. This, the arbitrator rejected on the basis that Mr Marais, the person who was allegedly treated favourably in the outcome of his disciplinary hearing, was not an employee but a contractor and further he was simply negligent.

[17] The issue concerning procedural fairness relates to two issues. The one issue concerns the complaint by the applicant that the chairperson of the disciplinary hearing took into account aggravating factors which were never put before her by the initiator of the disciplinary hearing. The other issue concerns the interaction between the chairperson of the disciplinary hearing and the respondent's attorneys regarding the issue of legal representation.

The point in limine

[18] The third respondent has raised two preliminary points. The first point which I am of the view disposes of this matter, concerns the unreasonable delay by the applicant in prosecuting his review application. The other point relates to the issue of the defective record. The applicant has applied for condonation for his late filing of part of the record.

[19] The question that needs to be considered in this matter is whether the applicant should be barred from proceeding further with the review application in light of the delay in its prosecution.

[20] The starting point in contextualising the delay in the prosecution of the review application is to note that the review application was timeously filed on 8 May 2007. However since then for a period of over two and half years the applicant did little, if at all, to ensure that the review application progressed to the next stage. This happened despite numerous reminders and being placed on terms about doing certain things that would ensure progress of the application.

[21] As early as 31 May 2007, the Registrar addressed a letter to the applicant in which she reminded his attorneys of the requirements of rule 7 (2) (b) and 7 (A) (4) of the Rules of the Court.

[22] The Registrar sent another letter dated 18 June 2007 indicating that the record of the arbitration proceedings and the cassettes had not been filed with the Court. In the same directive, the Registrar reminded the applicant's attorney of their failure to comply with the previous directive.

[23] On 23 July 2007, the registrar addressed a directive to the applicant's attorneys informing them that the Court has received one disc of the recording of the arbitration hearing. A month later, the applicant had done nothing in relation to this issue and consequently the Registrar reminded his attorneys of their failure to comply.

[24] After a period of 10 months since being notified about the availability of part of the record nothing happened. The applicant’s attorneys were then required by the Registrar to indicate their stand in relation to the further conduct of the review. They were required to do so by 3 July 2008. Again having not responded to this enquiry the Registrar addressed another directive indicating that she intended achieving the application.

[25] On 21 December 2009, the respondent's attorneys addressed a letter to the applicant's attorneys and amongst others raised the issue of the delay by the applicant in pursuing his application. The issue of the delay was again raised by the respondent's attorneys in a letter dated 5 August 2010. In that letter, the respondent's attorneys pointed out the failure by the applicant to comply with rule 7(6) of the Labour Court Rules. The respondent further indicated in the same letter that the applicant failed to deal with the issue of the delay in his supplementary affidavit.

[26] The supplementary affidavit was filed on 4 August 2010. It has to be noted that the applicant filed the supplementary affidavit without taking any further steps of ensuring that the record of the arbitration proceedings was filed. This, applicant did despite previous reminders for him to file the record.

[27] The applicant has filed two condonation applications. The first relates to the preliminary point raised by the respondent and that is dated 23 November 2010. The second application which relates to the late filing of the Exhibit A which was part of the documents relied upon during the arbitration hearing, was filed about four years since the filing of the review application and that was on 19 October 2011.

[28] In the first application for condonation, the applicant seems to assume that the issue raised by the respondent relates to the period between the filing of the answering affidavit and the replying affidavit. The reason for that delay according to the applicant's attorneys was due to an oversight which was due to an administrative error caused by the misfiling of the of the answering affidavit. The applicant further says:

> 'Despite the Respondent's vehement protest at late delivery of the outstanding part of the record, it follows from what I have said that at all material times the Third Respondent was possessed of the missing part of this record, also at the time it prepared its Heads of Argument for the purposes of this review. The Third Respondent's present counsel and instructing attorney represented the Third Respondent during the arbitration proceedings and were therefore very familiar with what had occurred.'

[29] The applicant further contends that the respondent was also duty bound to place before the Court the missing part of the record and not seize upon the missing part of the record as a ground for seeking to have the review application dismissed for that reason.

Unreasonable delay rule.

[30] It is trite that the Court has discretion to bar an applicant who fails to provide a reasonable and satisfactory explanation for the delay in timeous prosecution of his or her review application. The approach to be adopted when dealing with the issue of unreasonable delay has received attention in number of both the Labour and Appeal Court cases. The Courts in considering whether to uphold an application for the dismissal of a review on the ground of want of prosecution take into account the following:[1]

(a) is the delay in the prosecution of the matter excessive;

(b) is there a reasonable explanation for the delay;

(c) what prejudice will the other party suffer if the dismissal is not granted; and

(d) are there prospects of success in the main case.

[31] The other principle which the Courts have taken into account in considering whether an undue delay warrants dismissal of a review application is that there is a mutual obligation on both parties to ensure that the review application progresses expeditiously towards its finalisation. It has been held in this regard that when confronted with the delay in prosecution of a review application, the respondent needs to place the offending party on terms or seek the intervention of the Registrar or file an application to compel.[2]

[32] In *Karan Beef Feedlot and Another v Randall,*[3] the court held that the respondent party is 'not entitled to lie in wait, intending to ambush the applicant once a period of delay becomes sufficiently protracted to justify the filing of an application to dismiss.'

[33] In *NACBAWU and Another v Springbox Box (Pty) Ltd t/a Summit Associated Industries,*[4] this Court held that it is not every inaction or failure on the part of the respondent to place the applicant on terms that would result in the failure to obtain an

[1] See *Solidarity and Others v ESKOM Holdings Ltd* (2008) 29 ILJ 1450 (LAC); *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA), *and Sishuba v National Commissioner of the South Africa Police Service* (2007) 28 ILJ 2073 (LC), *NAPTOSA and Others v Minister of Education, Western Cape and Others* (2001) 22 ILJ 889 (C) and *Autopax Passenger Services (Pty) Ltd v Transnet Bargaining Council and Others* (2006) 27 ILJ 2574 (LC).

[2] . See *Sishuba v National Commissioner of SAPS* [2007] 10 BLLR 988*, and Buzuidenhout v Johnston NO and Others* [2006] 12 BLLR 1131 (LC).

[3] (2009) 30 ILJ 2937 (LC) at para 9.

[4] (2010) JOL 26401 (LC).

order for the dismissal of a review due to unreasonable delay. The court in dealing with this issue had the following to say:

> 'The other factor which needs to be weighed together with these factors is the inaction or otherwise of the respondent in ensuring that the matter is brought to finality. The defence of a party opposing an application for the dismissal of a claim on the basis of unreasonable delay is quite often that the other party in not taking action to progress the matter to the next step also contributed to the delay. In this regard often judgments relied upon are those of *Buzuidenhout v Johnston NO & others* [2006] 12 BLLR 1131 (LC) and *Karan Beef Feedlot & another v Randall* (2009) 30 ILJ 2937 (LC). I do not read those judgments as saying that the inaction of the applicant in an application to dismiss a matter on the basis of unreasonable delay is necessarily an absolute defence. The contribution in the delay by the party seeking to have the matter dismissed for delay in prosecution must be objectively assessed with the view of evaluating the extent to which the inaction of the applicant contributed towards the excessiveness or otherwise of the delay. The inaction has to be weighed against the objective facts that may point towards loss of interest in pursuing the matter by the party opposing such an application. It may well be that the facts and the circumstances objectively point to a case where the respondent can be said to have abandoned or lost interest in the matter. In that instance I do not believe that it would be correct and fair to blame the applicant for contributing to the delay due to his or her inaction.'[5]

[34] I have previously stated that in an unreasonable delay claim refusal to grant the relief due to the inaction of the respondent or failure to put the applicant on terms will depend on the facts and the circumstances of a given case.

Evaluation

[35] In as far as the delay is concerned, it is apparent from the facts of this matter that the delay was largely due to the gross negligence of the attorney of the employee. The question that then follows is whether the employee should for this reason be exempted from responsibility for the delay. It is trite in our law that a litigant can blame his or her attorney up to a point and thereafter he or she has to take responsibility.

[36] There is no doubt that the applicant has unreasonably delayed in the prosecution of his review application. Whilst the delay is largely due to the negligence of his attorney, the principle that a litigant can up to an extent not escape the negligence of his or her legal

[5] *Springbox Box (Pty) Ltd t/a Summit Associated Industries* at page 13-15.

representative[6] is in my view, applicable in this matter. The delay is excessive and the explanation thereof is unsatisfactory and unreasonable.

[37] In analysing and evaluating the delay in the prosecution of the review application, the starting point is to note that the arbitration award was issued on 2nd February 2007 and the review application was thereafter filed on 22nd March 2007. In essence, the employee has done nothing since 22nd March 2007 to 4th June 2010 when this matter was heard by this Court.

[38] The facts and circumstances of this case are such that the review application stands to be dismissed for unreasonable delay. The explanation for the delay in filing part of the record a year late is completely unsatisfactory. The contention that the third respondent is also to blame for the delay is in my view, unsustainable as the third respondent had placed very early the applicant on terms in relation to the delay in prosecuting the review application. It is apparent, from the papers before this Court, that the respondent did not seat back and wait for the delay in the prosecution of the review application to present itself as an opportunity to exploit. The respondent raised the issue of the delay in correspondence with the applicant and in its answering affidavit.

[39] In light of failure to provide reasonable and acceptable explanation there is no need to consider the issue of prospects of success. Accordingly, the applicant's application to review and set aside the arbitration award stands to fail. I do not however belief that it would be fair to allow the costs to follow the result.

[40] In the premises, the applicant's review application is dismissed for want of prosecution.

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Molahlehi J

[6] See in this regard *Saloojee and Another v Minister of Community Development* 1965 (2) SA 135 at 141 C-E where the court held that there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered . see also *Old Mutual Life Assurance Co SA Ltd v Gumbi* (2007) 28 ILJ 1449 (SCA) at para 20.

APPEARANCES:

FOR THE APPLICANT:	Wikus Van Rensburg Attorneys
FOR THE THIRD RESPONDENT:	Adv B Wade instructed by Chris Baker and Associates