THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 636/2012

In the matter between:

POPCRU **Applicant**

and

L G P LEDWABA *N.O.* **First Respondent**

MINISTER OF CORRECTIONAL SERVICES **Second Respondent**

SACOSWU **Third Respondent**

GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL ("GPSSBC") **Fourth Respondent**

Heard: Considered in Chambers

Delivered: 14 October 2015

Summary: Application for leave to appeal – delay in prosecution – steps to be taken in prosecuting leave to appeal

Practice and procure – prosecution of leave to appeal – diligent litigant principle – nothing done to prosecute leave to appeal for some two years – leave to appeal dismissed

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter concerned, on the merits, an application by the applicant to review and set aside an arbitration award of the first respondent in his capacity as arbitrator of the GPSSBC (the fourth respondent). The substance of the matter was about the entitlement of the third respondent to organisational rights and the validity of a related collective agreement, and concerned a dispute between the applicant, and the second and third respondents in this regard. The dispute ended up before the first respondent for arbitration, who found that the third respondent as minority union is entitled to organisational rights in the second respondent and that the collective agreement concluded in this regard between the second and third respondents was valid.

[2] In a judgment handed down on 5 September 2013, I upheld the applicant's review application, set aside the award of the first respondent, and substituted such award with a determination that the third respondent was not entitled to organizational rights in the second respondent and that the collective agreement concluded in this regard between them was invalid.[1]

[3] It is now more than two years later, and I only recently became aware that the third respondent had filed an application for leave to appeal against my judgment referred to above. I find it concerning that the application for leave to appeal was never brought to my knowledge. It is critical that these kinds of applications are dealt with as expediently as possible. In fact, I would have never been aware of the application for leave to appeal was it not for an article written by Professor John Grogan in the Employment Law publication headed

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[1] The judgment is reported at [2013] 11 BLLR 1137 (LC) and (2014) 35 ILJ 1037 (LC).

"Majority Rules – of thresholds and extended agreements'. This article *inter alia* discussed my judgment in this matter. A copy of this article was given to me by Professor Stefan Van Eck at the ISLSSL conference in Cape Town on 16 September 2015, where I presented a paper on majoritarianism where it comes to organizational rights.

[4] Having then read this article, I noticed in the concluding paragraph thereof that it was said that 'SACOSWU has applied for leave to appeal against the judgment, but at the time of writing Snyman AJ had yet to decide whether leave should be granted.' Having now been alerted to the possible existence of an application for leave to appeal by way of this article, I took it upon myself to follow up with the Registrar's office whether such an application existed, and was informed that the file in this matter was missing. I then caused the parties to prepare a duplicate file, which only came to me some two weeks ago. This file contained copies of the original pleadings and all the process relating to the leave to appeal application, which thus indeed existed.

[5] The entire situation is unsatisfactory. It is simply unacceptable that an application for leave to appeal is left languishing and that two years must come to pass before it is dealt with. I will deal with this hereunder.

[6] I note from the file that the application for leave to appeal is dated 13 September 2013. There is no clear indication as to when it was actually served and filed, but I will accept for the purposes of deciding this application that it was filed within the time limit prescribed by Rule 30[2]. The file also contained written submissions by both the applicant for leave to appeal (the third respondent in the main matter) and the first respondent (the applicant in the main matter) in the application for leave to appeal, filed as far back as 26 September and 17 October 2013, respectively. I will, for sake of convenience, continue to refer to the parties in this application for leave to appeal, as they are cited in the main application.

[7] Clause 15.2 of the Practice Manual provides that an application for leave to appeal will be determined by a Judge in chambers, unless the Judge directs

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[2] Rule 30(2) reads: 'If leave to appeal has not been made at the time of judgment or order, an application for leave must be made and the grounds for appeal furnished within 15 days of the date of the judgment or order against which leave to appeal is sought ....'

otherwise. I see no reason to direct otherwise and will therefore determine the third respondent's leave to appeal application in chambers.

Delay in prosecution

[8] Where it comes to applications for leave to appeal, there is simply no basis for such applications to become protracted. The substance of the matter giving rise to the leave to appeal has already been heard, a Judge has been dedicated to it, and in normal circumstances no further hearing or argument on it would be required. As touched on above, and unless exceptional circumstances dictate otherwise, a courtroom and hearing date is not even needed, as applications for leave to appeal are decided in chambers. There is thus little chance of the systemic delays plaguing the labour law dispute resolution system intervening in disposing of leave to appeal applications.

[9] The need for expedition is amplified by short time limits prescribed in the case of leave to appeal applications. The time limit within which to bring the application is 15 days from handing down of judgment. The application is then prosecuted by prescribed written submissions to be filed by the parties[3]. Equally, the time limits for filing these written submissions are short, being 10 days by the applicant for leave to appeal after bringing the leave to appeal application, and 5 days for the respondent thereafter.[4]

[10] All the above being considered, a Judge should be in the position to decide, and then dispose of, the leave appeal application within two months after leave to appeal was applied for.

[11] The above being the case, I must state that I find the manner in which the third respondent prosecuted its application for leave to appeal to be deplorable. As the applicant in such application, the third respondent was compelled to take all reasonable steps to diligently prosecute the same to finality. The third respondent, being competently legally represented throughout, must have realized and appreciated that its application for leave to appeal was ready for determination by November 2013, at the latest. Having heard nothing after that, it needed to take positive steps to prosecute the same to finality.

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[3] See Rule 30(A).
[4] Clause 15.2 of the Practice Manual.

[12] This prosecution would entail regularly following up with the Registrar about the progress in the application, and if that failed to achieve an outcome in a reasonable time, then raise the issue even with the Judge President to solicit an outcome. In simple terms, the applicant for leave to appeal must press the issue, so as to ensure finality in the Court proceedings as soon as possible. It is entirely unacceptable to file an application for leave to appeal, file written submissions, and then adopt a 'come what may' attitude with regard to the outcome of the same.

[13] If the third respondent had followed up on its application for leave to appeal on a regular and expedited basis, it would have come to my attention much sooner, and I would have dealt with it immediately. The third respondent would have also come to realise much sooner that the file was missing, and taken steps to remedy this. It should not be up to the presiding Judge to divine the existence of an application for leave to appeal, and then ask for the file to be reconstructed, based on what fortuitously comes to the attention of the Judge.

[14] I am convinced that regular follow up by the third respondent with regard to its application for leave to appeal would have resulted in it being disposed of early in 2014, at the latest. But instead, and I have said above, it is now October 2015, close on two years later.

[15] I consider that the third respondent has not acted in the manner a diligent litigant is expected to act, where it comes to its application for leave to appeal. To remain supine for two years without even trying to explain what was done to prosecute the application for leave to appeal is inexcusable. The failure by the third respondent to diligently prosecute its application for leave appeal could have the effect that the application must fail for this reason alone, based on the maxim '*vigilantibus non dormientibus lex subvenit*'. This maxim was dealt with in *Pathescope (Union) of South Africa Ltd v Mallinick*[5], where Stratford AJA said the following:

> 'That a plaintiff may, in certain circumstances, be debarred from obtaining relief to which he would ordinarily be entitled because of unjustifiable delay in seeking

[5] 1927 AD 292.

it is a doctrine well recognised in English law and adopted in our own Courts. It is an application of the maxim: *'vigilantibus non dormientibus lex subvenit.'* The very nature of the doctrine necessitates its being stated in general terms. I take the following apt extract from the judgment in *Lindsay Petroleum Company v Hurd (L.R.* 5 PC 239) quoted in the court below: --- "The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would he practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where, by his conduct and neglect he has, though perhaps not waiving that remedy yet put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.'

[16] The maxim *vigilantibus non dormientibus lex subvenit'* has found fertile soil in the Labour Court in a number of judgments dealing with undue delays in prosecuting applications[6]. The elimination of unjustified and undue delays is even more of an imperative where it comes to employment law disputes, considering the fundamental principle that such disputes must be expeditiously resolved. I refer to *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal*[7] where the Court said: '.... The importance of resolving labour disputes in good time is thus central to the LRA framework. ....'. Further authorities in this regard are *Aviation Union of SA and Another v SA Airways (Pty) Ltd and Others*[8] where it was held: '....Speedy resolution is a distinctive feature of adjudication in labour relations disputes ....', and *National Education Health and Allied Workers Union v University of Cape Town and*

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[6] See *Bezuidenhout v Johnston NO and Others* (2006) 27 ILJ 2337 (LC); *Sishuba v National Commissioner of the SA Police Service* (2007) 28 ILJ 2073 (LC); *National Construction Building and Allied Workers Union and Others v Springbok Box (Pty) Ltd t/a Summit Associated Industries* (2011) 32 ILJ 689 (LC); *Moraka v National Bargaining Council for the Chemical Industry and Others* (2011) 32 ILJ 667 (LC).

[7] (2014) 35 ILJ 613 (CC) at para 42.

[8] (2011) 32 ILJ 2861 (CC) at para 76.

Others[9] where it was held: '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 ....'.

[17] The Labour Court has not shied away from disposing of applications on the basis of a failure to diligently prosecute the same. I will suffice with a few individual references in this regard. In *Bezuidenhout v Johnston NO and Others*[10] the Court said: '... If applicant parties have unduly delayed prosecuting their applications, and fail to provide acceptable reasons for the delays, the ultimate penalty of dismissing such applications should be used in appropriate cases. This will hopefully help creating a culture of compliance and ensure that disputes are expeditiously dealt with'. Similarly, and in *Autopax Passenger Services (Pty) Ltd v Transnet Bargaining Council and Others*[11] it was held: '... [T]he rule that the court has the power to dismiss proceedings due to a delay in the prosecution thereof lies in the court's inherent power to prevent an abuse of its own process.'. A final reference in this respect is to *Karan t/a Karan Beef Feedlot and Another v Randall*[12] where it was said that: 'In summary: despite the fact that the rules of this court make no specific provision for an application to dismiss a claim on account of the delay in its prosecution, the court has a discretion to grant an order to dismiss a claim on account of an unreasonable delay in pursuing it....'. I agree with all of this.

[18] In the end, one can do little better, when pondering the question whether an application should be dismissed for an unjustified and undue delay in the prosecution thereof to finality, than to apply the following *dictum* of Van Niekerk J in *BP Southern Africa (Pty) Ltd v National Bargaining Council for the Chemical Industry and Others*[13]:

> 'The rules of this court make no specific provision for an application to dismiss when a party fails diligently to pursue a claim referred to the court for adjudication, but the court has recognized and adopted the rule based on the maxim *vigilantibus non dormientibus lex subveniunt*, in terms of which a party may in certain circumstances be debarred from obtaining the relief to which that

[9] (2003) 24 ILJ 95 (CC) at para 31.
[10] (2006) 27 ILJ 2337 (LC) at para 31.
[11] (2006) 27 ILJ 2574 (LC) at para 14.
[12] (2009) 30 ILJ 2937 (LC) at para 14.
[13] (2010) 31 ILJ 1337 (LC) at para 10.

party would have been entitled because of an unjustifiable delay in prosecuting their claim. .... From a policy perspective, there are two principal 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. In *Radebe v Government of the Republic of SA* 1995 (3) SA 787 (N), the court said the following:

'The first is that unreasonable delay may cause prejudice to the other parties.... The second reason is that it is both desirable and important that finality should be reached within a reasonable time in respect of judicial administrative decisions....'

In *Molala v Minister of Law & Order & another* 1993 (1) SA 673 (W), the High Court held that the approach to be followed was the one set out in *Bernstein v Bernstein* 1948 (2) SA 205 (W), where it was held that 'it is in the discretion of the Court to allow proceedings to continue where there has been this lapse of time'. The court referred with approval to *Kuiper & others v Benson* 1984 (1) SA 474 (W), where it was held that the court has 'an inherent power to control its own proceedings and that accordingly the Court should assess whether the Plaintiff is guilty of an abuse of process'.'

[19] I see no reason why these same considerations should not apply to applications for leave to appeal. In summary, this means that in considering whether to dismiss an application for leave to appeal because of an undue and unjustified delay in prosecution thereof, what must be considered is the length of the delay, any explanation for the delay, what steps have been taken to mitigate the delay or pursue the matter, as well as considerations of justice (or injustice for that matter) and prejudice.

[20] *In casu*, the third respondent has offered no explanation for the delay. I also could find no indication of any steps taken by the third respondent to try and have its application for leave to appeal decided. In fact, I am convinced that had I not taken action to deal with the application for leave to appeal, once I was fortuitously alerted to its existence, the third respondent would still have done nothing with regard to its prosecution. I consider this to be untenable, and an important factor in deciding whether to dismiss the application for leave to appeal for non prosecution thereof. In considering an application for leave to

appeal, the Court in *MCC Contractors (Pty) Ltd v Johnston NO and Others*[14] held:

> 'As already pointed out, the applicant in the present application made no attempt whatsoever to explain the delay and I am of the view that the application for leave to appeal should therefore be dismissed on this basis alone. ....'

I cannot agree more.

[21] The delay of some two years, as matters currently stand, especially considering the short time limits imposed by the by the Labour Court Rules and Practice Manual, is grossly excessive and unpalatable. The situation is contrary to the important interest of finality of litigation.

[22] I cannot help but think that the third respondent's design of non prosecution is perhaps deliberate, and affords the third respondents the enjoyment of organizational rights in terms of the original arbitration award despite this having been set aside by me on review. The reason for my view in this regard is that whilst the leave to appeal is pending, my judgment is suspended and the third respondent continues to enjoy organizational rights it should not. I am fortified in my views by what Professor Grogan says in the article I have referred to above, being: 'So SACOSWU retains its rights until; leave to appeal is granted ....'. This scenario is certainly to the prejudice of the applicant, POPCRU, and would constitute an injustice.

[23] In conclusion, I take some guidance from the following *dictum* by Davis JA in *Martin & East (Pty) Ltd v National Union of Mineworkers and Others*[15] where the learned Judge said:

> 'Before I conclude there is a further comment I wish to make. I indicated that the events in this case took place in 2010. The Labour Relations Act was designed to ensure an expeditious resolution of industrial disputes. This means that courts, particularly courts in the position of the court a quo, need to be cautious when leave to appeal is granted ....'

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[14] (2012) 33 ILJ 2096 (LC) at para 4.
[15] (2014) 35 ILJ 2399 (LAC) at 2405J-2406A.

In line with this reasoning, and in exercising such due caution intimated, this is an instance where this matter must be brought to an end.

[24] Considering all of the above, I have little hesitation in concluding that there has been an inordinate delay by the third respondent in prosecuting its application for leave to appeal. This delay is entirely unjustified and remains unexplained. The third respondent has taken no positive steps to ensure the finalization of the application for leave to appeal. All of this has led to an injustice and prejudice to the applicant. In the end, the application for leave to appeal has now become an abuse of process

[25] The third respondent's application for leave to appeal thus falls to be dismissed on this basis alone.

[26] As to costs, I shall follow the same approach as in my judgment on the merits of the matter, and make no order as to costs.

Order

[27] In the premises, I make the following order:

1. The third respondent's application for leave to appeal is dismissed.

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S Snyman

Acting Judge of the Labour Court