THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR 909/2016

In the matter between:

MPS TOURS **Applicant**

and

TASWU obo M JELE AND 5 OTHERS **First Respondent**

THOMAS NTIMBANA N.O **Second Respondent**

SOUTH AFRICAN ROAD PASSENGER

BARGAINING COUNCIL **Third Respondent**

Enrolled: 15 April and 30 June 2020

Delivered: 07 July 2020

In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 07 July 2020.

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicant filed an application to review and set aside an arbitration award issued by the Second Respondent (arbitrator) on 6 May 2016 under case numbers RPNT3177 and RPNT3178. The review application was filed on 24 May 2016.

[2] On 14 November 2017, the First Respondent (Respondent) filed an application in terms of Rule 11 of the Rules of the Labour Court for the dismissal of the review application.

[3] The following applications are before this Court: a review application and an application to dismiss the review application. I will deal with the application to dismiss the review application first because if that application succeeds, it would be the end of the matter and there will be no need to consider the application for review. If the dismissal application fails, the review application has to be considered.

[4] This matter was initially enrolled for hearing on 15 April 2020 but due to the level 5 lockdown measures that were in place during April 2020, the matter was removed from the roll. The matter was re-enrolled on 30 June 2020. In accordance with the provisions of the 'Urgent directive in respect of access to the Labour Court' dated 28 April 2020, which is applicable with effect from 4 May 2020 until the end of the July 2020 recess, this matter was disposed of without oral argument. I have considered the papers filed as well as the written heads of argument submitted by the parties.

General principles applicable to review applications

[5] The purpose of the Labour Relations Act[1] (LRA) is *inter alia,* the effective resolution of labour disputes and the processes introduced by the LRA are intended to bring about the expeditious resolution of labour disputes. The detrimental implications of delays are obvious[2].

[1] Act 66 of 1995.
[2] *Commercial Workers Union of South Africa v Toa Ying Metal Industries and others* 2009(2) SA 204, (2008) 29 ILJ 2461 (CC), (2009) 1 BLLR 1 (CC) where the Constitutional Court held that: "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 the employer who may have to reinstate workers after a number of years."

[6] This Court has accepted that a review application is by its nature an urgent application and that it requires prosecution with diligence and urgency[3].

[7] This is supported by the "Practice Manual of the Labour Court'[4] wherein an applicant in a review application is required to ensure that all the necessary papers in the application are filed within 12 months of the date of the launch of the application and where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown as to why it should not be archived.

[8] The amendments to section 145 of the LRA which took effect on 1 January 2015 are specifically aimed at expediting the prosecution of review applications and *inter alia,* require that an applicant on review must apply for a hearing date within six months of launching the review application.

[9] A review application requires urgent prosecution without undue delay and that has always been the case. This is evident from the attitude adopted by the Court as far back as 2006 when the Court in *Bezuidenhout v Johnston NO and Others*[5] held that:

> '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.

[10] The Court in *BP Southern Africa (Pty) Ltd v National Bargaining Council for the Chemical Industry and Others*[6] found that:

> '…. the applicant is free to bring an application to dismiss the application for review. 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

[3] Unreported case no JR 1912/2012. *Lehola v Nkadimeng N.O and others*.
[4] Practice Manual effective 2 April 2013.
[5] (2006) 27 ILJ 2337 (LC) at paras 31-32.
[6] (2010) 31 ILJ 1337 (LC) at paras 10-11.

> that party would have been entitled because of an unjustifiable delay in prosecuting their claim….'

The Rule 11 application

[11] It is a common practice in this Court that where an applicant has delayed unduly prosecuting a review application, that the respondent would bring an application dismissing the review proceedings under the provisions of Rule 11 of the Labour Court Rules.

[12] In *Autopax Passenger Services (Pty) Ltd v Transnet Bargaining Council and Others*[7] it was held that an application to dismiss a review application, is a remedy designed to address abuse of this Court's process in the form of unjustifiable delays. The Court held:

> '…. the 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.'

[13] In *Karan t/a Karan Beef Feedlot and Another v Randall*,[8] it was held:

> '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. In the exercise of its discretion, the court ought to consider three factors:
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> - the length of the delay;
> - the explanation for the delay; and
> - the effect of the delay on the other party and the prejudice that that party will suffer should the claim not be dismissed.'

[14] This Court has a discretion to grant an order to dismiss a review application on account of an unreasonable delay in pursuing it and in the exercise of its discretion, the Court ought to consider the factors set out *supra.*

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[7] (2006) 27 ILJ 2574 (LC) at paras 7 and 14.
[8] (2009) 30 ILJ 2937 (LC) at para 14.

[15] In consideration of the application to dismiss, the sequence of events is relevant. *In casu,* the Applicant filed a review application on 24 May 2016. In November 2016, the Respondent's attorneys addressed a letter to the Applicant indicating that the application was incomplete and not commissioned.

[16] The parties subsequently entered into settlement negotiations but they ultimately failed to settle the matter.

[17] On 16 October 2017, the Respondent's attorneys addressed another letter to the Applicant, reiterating the content of the first letter sent in November 2016 and informing the Applicant that due to its failure to take any further steps in pursuing the review application, an application in terms of Rule 11 would be filed.

[18] The Respondent filed a Rule 11 application on 14 November 2017, seeking the dismissal of the Applicant's review application for failure to comply with the Rules of this Court. The Respondent submitted that a review application must be prosecuted expeditiously and that the Applicant has no interest in pursuing its review application. The Applicant has not filed the record of the arbitration proceedings in pursuance of the review application. It was further submitted that the Respondent is prejudiced by the delays in the prosecution of this matter.

[19] The Applicant opposed the application and submitted that it has complied with all the steps required in the pursuit of a review application. It is evident from the opposing affidavit that the Applicant has tendered no more than a statement that it has complied with the requirements of section 145 of the LRA and that it has filed all the papers. The Applicant provided no details as to what it had filed in pursuit of the review application or when the record and the Rule 7A(6) and (8) notices were filed.

[20] The Respondent filed a replying affidavit wherein it was reiterated that the record was not filed. A perusal of the Court file shows that the only document filed by the Applicant was the review application and that no further documents had been filed. The record was never filed and to date there is no Rule 7A(6) or (8) notice filed.

[21] The Applicant seeks the dismissal of the review application on the grounds that since the filing of the review application, no steps were taken to prosecute the review application.

[22] This brings me to the first factor that I have to consider namely; the length of the delay. The review application was filed on 24 May 2016, where after no further steps were taken to prosecute and finalise the pending review application. Not even after the Rule 11 application was filed in November 2017, did the Applicant take any further steps to prosecute the review application. The delay is thus from May 2016 until June 2020 when the matter was enrolled for adjudication. As at June 2020, the record was still not filed and the review application was far from ripe for hearing. The delay in prosecuting the review application is more than four years, which is no doubt excessive.

[23] The second factor to be considered is the explanation for the delay. Notwithstanding the fact that the Applicant opposed the Rule 11 application, it provided no explanation for the delay. In fact, it tendered a bare denial and insisted that there was compliance with the applicable prescripts in the prosecution of the review application.

[24] The Applicant has not filed the record for a period in excess of four years, in circumstances where the Practice Manual prescribes that the record should be filed within 60 days and has not taken a single step to take this matter closer to finality. Worst of all, it provided no explanation whatsoever for its failure to prosecute the review application that was filed as far back as May 2016.

[25] The last factor to be considered is the effect of the delay on the Respondent and the prejudice they would suffer should the application for review not be dismissed.

[26] The Respondent obtained an arbitration award in their favour in terms of which they were reinstated retrospectively and had to report for duty on 23 May 2016. The prejudice of a pending review application is obvious as the order for reinstatement will not be given effect to whilst the review application remains pending.

[27] The Applicant did not take any steps for more than four years to prosecute its review application. Even after the application for dismissal was filed and enrolled for hearing, it did not trigger the Applicant to take steps to convince this Court that it was seriously pursuing the pending review application.

[28] The application for review has to be dismissed for lack of prosecution.

Costs

[29] This Court has a wide discretion in respect of costs.

[30] In *Zungu v Premier of Kwa Zulu-Natal and Others*[9] the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand allowing those parties to bring to this Court (or oppose) cases that should not have been brought to Court (or opposed) in the first place.

[31] The general accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation.

[32] In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and Others*[10] it was emphasized that:'…unless there are sound reasons which dictate a different approach, it is fair that the successful party be awarded its costs. The successful party has been compelled to engage in litigation and incur legal costs. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in the Labour Court, whether as an applicant in launching proceedings or as a respondent opposing proceedings.'

[33] This is a case where the Court has to strike a balance.

[34] In its founding affidavit in the Rule 11 application, the Respondent sought an order for the Applicant to pay the costs. In its heads of argument, the

[9] (2018) 39 ILJ 523 (CC) at para 24.
[10] (2012) 33 ILJ 2117 (LC) at para p 2119 I-J.

Respondent persisted with the argument that the review application should be dismissed with costs.

[35] In my view this is a case where it is appropriate to make a cost order. The Applicant filed a review application as far back as May 2016 and took no steps to take it to finality, which compelled the Respondents to bring this Rule 11 application. They are entitled to the costs incurred in doing so.

[36] In the premises the following order is made:

Order

1. The review application is dismissed for lack of prosecution;

2. The Applicant is to pay the First Respondent's cost.

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Connie Prinsloo

Judge of the Labour Court of South Africa

Representatives:

Applicant:	Self-represented
First Respondent:	Higgs Attorneys