THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 1041 / 2010

In the matter between:

NEHAWU obo TEBATSO JOHANNA LEDUKA **Applicant**

and

NATIONAL RESEARCH FOUNDATION **Respondent**

Heard: 5 August 2016

Delivered: 18 November 2016

Summary: Practice and procedure – failure to properly prosecute a statement of claim – principles considered – excessive delay may non suit the applicant

Practice and procedure – clause 16 of the Practice Manual – provisions considered – applicants' matter archived and having the same consequences as being dismissed

Practice and procedure – imperative of expeditious resolution of employment disputes – principles considered

Application for condonation – principles considered – material delay without proper explanation – application dismissed

JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter is a clear illustration on how not to prosecute a case in the Labour Court, and will hopefully serve to highlight the consequences of an applicant failing to expeditiously prosecute a statement of claim to finality.

[2] This matter has as its origin a claim instituted by the applicants in the Labour Court, by way of a statement of claim filed on 22 November 2010, which claim is founded on an allegation of discrimination, in the form of unequal treatment where it came to employment conditions and prospects. The claim was later amended to include allegations based on discrimination founded on the individual applicant's HIV status.

[3] What I must now decide is not the merits of this claim, but whether the applicants have become non suited where it comes to this claim, because of the material delay and complete inaction that existed on the part of the applicants in prosecuting the matter further, after having simply filed the statement of claim.

Relevant background

[4] The evidence as ascertained from the Court file and the pleadings exhibit an unfortunate pattern of dilatory conduct where it comes to the prosecution of this case by the applicants, from the very outset. The applicants, in general terms, seem to have no consideration for time limits and seem to believe that they can act further when they want to and as they please, without any consequence.

[5] The applicants' dilatory conduct is apparent from events even preceding the referral of the matter to the Labour Court. Firstly, the applicants had referred the dispute to the CCMA some four months' late and needed to apply for

condonation, which was granted on 28 May 2010. The matter then proceeded to conciliation, and on 21 July 2010, the CCMA resolved that the applicants' unfair discrimination dispute remained unresolved and should be referred to the Labour Court for adjudication. The statement of claim only followed on 22 November 2010, once again four months later. It was not accompanied by a condonation application.

[6] The respondent filed an answering statement on 24 March 2011. Nothing further happened and there was no attempt by the applicants to convene pre-trial proceedings in terms of Rule 6(4) of the Labour Court Rules.

[7] In the interim, and as from 1 April 2013, the Practice Manual of the Labour Court ('Practice Manual') had come into existence. It contained, as will be further addressed hereunder, specific provisions relating to the archiving of statements of claim that were not timeously and diligently prosecuted. The respondent seized on this opportunity, in the absence of any action taken by the applicants, to request the Registrar on 15 May 2015 to place this matter into archives. This request was copied to the applicants. This matter was then archived.

[8] Despite this course of action by the respondent, the applicants were still not spurred into immediate action. It was only on 11 September 2015, again close on 4(four) months later, that the applicants served a notice in terms of Rule 6(4) on the respondent to attend a pre-trial conference, together with a notice of intention to amend the applicants' statement of claim. There was no application made to condone the material delay up to that point, which delay was two months' short of 5(five) years, and no explanation provided for that delay. The applicants simply proceeded as if they were entitled to do so as a matter of course.

[9] The applicants then effected the proposed amendment to the statement of claim 9 October 2015, and proceeded to exert pressure on the respondent to attend pre-trial proceedings which the respondent, not surprisingly, was reluctant to do, considering that the matter had been placed in archives. On 18 November 2015, the applicants then approached the Labour Court requesting a directive that the parties be compelled to hold a pre-trial. On 8

January 2016, Baloyi AJ issued a directive to the effect that the parties had to hold a pre-trial conference and file a minute in 14(fourteen) days.

[10] Upon being served with this directive only at the beginning of February 2016, the respondent complained by way of letter to the Court on 10 February 2016. It pointed out that the matter had already been permanently archived pursuant to its efforts, and that the applicants had to have brought a substantive application first to remove the matter from archives. The respondent complained that Baloyi AJ had clearly not been appraised of all the above events, and in particular, the archiving of the matter. The respondent requested that the matter be revisited.

[11] The matter was then brought before Lagrange J for further attention. The learned Judge, after properly considering the matter, now directed that the directive of Baloyi AJ dated 8 January 2016 be substituted with a new directive. This substituting directive read that the applicants first had to make an application in terms of Rule 7 as read with Clause 16.2 of the Practice Manual before any further steps could be taken in this matter. The directive of Lagrange J was dated 9 March 2016.

[12] The applicants then brought an application in terms of Rule 7 on 8 June 2016. In this application, the applicants ask for the relief that the lack of prosecution in this matter be condoned, the non compliance with the Labour Court Rules and the Practice Manual be condoned, and that the matter be removed from archives and reinstated. The application was opposed by the respondent.

[13] The respondent's answering affidavit to the applicant's application was filed some 4(four weeks) late, being filed on 25 July 2016, necessitating the respondent to in turn apply for condonation, which was opposed by the applicant. When the matter came before me on 5 August 2016, I first considered argument on the application for condonation for the late filing of the respondent's answering affidavit, and I granted an order to the effect that the late filing of the respondent's answering affidavit was condoned with no order as to costs.

[14] What now remains is the deciding of the applicant's application for condonation as coupled with the prayer of the removal of the matter from archives and the reinstatement thereof.

The requirement of expedition

[15] It is now trite that there exists a particular requirement of expedition where it comes to the prosecution of employment law disputes. Skweyiya J in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal*[1] said: '… the importance of resolving labour disputes in good time is thus central to the LRA framework. ….'. Similarly, and in *Aviation Union of SA and Another v SA Airways (Pty) Ltd and Others*[2], Jafta J held: '….Speedy resolution is a distinctive feature of adjudication in labour relations disputes ….'.

[16] In *National Education Health and Allied Workers Union v University of Cape Town and Others*[3] Ngcobo J said:

> '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 …'.

The message conveyed, respectfully, is clear.[4]

[17] The above being the case, a matter dating back to 2010 and where a pre-trial had not yet even been held by 2016 must set the alarm bells loudly ringing. This kind of delay in itself can lead to a matter being disposed of, just because of the excessive delay.[5] In total, and taken to the point when the matter came before me, it is in excess of 7(seven) years since the matter first arose (on the applicants' own version), and more than 6(six) years since litigation was initiated, without the matter even being ripe for hearing. Common sense applied against the imperative of expeditious dispute resolution in employment

[1] (2014) 35 *ILJ* 613 (CC) at para 42.
[2] (2011) 32 *ILJ* 2861 (CC) at para 76.
[3] (2003) 24 *ILJ* 95 (CC) at para 31.
[4] See also *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* (2010) 31 ILJ 273 (CC) at para 46; *Strategic Liquor Services v Mvumbi NO and Others* (2009) 30 ILJ 1526 (CC) at paras 12 – 13.
[5] See *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2016) 37 ILJ 313 (CC) at para 47; *Khumalo* (*supra*) at paras 68 – 69.

disputes would inform any reasonable observer that, absent truly exceptional considerations, the matter must be regarded as closed.

[18] How did the applicants then explain this grossly excessive delay? The answer is terribly, to the extent of hardly being an explanation at all. In the founding affidavit to the condonation application, the applicants set out the events relating to the merits of the matter, in some detail. But this does not assist the explanation, as it only takes matters up to August 2009. Then, as I have referred to above, what follows the event is a further four month delay occasioned at the CCMA for which the applicants needed condonation, the conciliation proceedings following that, and then the further four month delay in referring this matter to the Labour Court (which is entirely unexplained). This takes matters to the end of 2010.

[19] In the founding affidavit to the condonation application, there is no explanation of any kind for the period from the end of 2010 until the beginning of 2014. This is a delay of more than 3 (three) years, totally unexplained. All the applicants say is that the individual applicant was 'told' the matter was pending at the Labour Court. A three year unexplained delay should in itself be fatal to the applicants' case.

[20] However, and what the applicants then do in 2014, on their own version, is astounding. They deliberately do not seek to prosecute their case in the Labour Court. Instead, the individual applicant approaches the Human Rights Commission for assistance, and on 24 April 2014 she is *inter alia* advised by the Human Rights Commission in writing that the matter can only be dealt with by the CCMA and the Labour Court. This set back did not discourage the individual applicant from having her matter dealt with anywhere else but the Labour Court. On 12 November 2014 she writes to the Minister of Science and Technology, the Honourable Naledi Pandor. In this letter, the individual applicant sets out her tale of woe, and concludes by saying that her case at the Labour Court has reached a 'dead end'. She asks the Minister to intervene and come to her assistance. On 28 November 2014, the Minister writes back to the individual applicant, promising to look into the matter, by referring it to the chairperson of the board of the respondent, which was then done.

[21] The chairperson tasked attorneys Norton Rose Fulbright to investigate the applicant's complaints and submit a report. These attorneys then attend to what they were tasked to do and in a letter dated 6 March 2015 also gave feedback to the individual applicant, to the effect that no substance to the complaint of the individual applicant had been found. Importantly, these attorneys informed the individual applicant in this same letter that she should rather prosecute her Labour Court case further, by taking steps to convene pre-trial proceedings.

[22] Instead of taking what was good advice to heart, the applicant union complained on 23 April 2015 in a letter to the chairperson about the investigation by Norton Rose Fulbright, accusing the firm of being biased, and recorded that the applicants would revert back to the Minister. However, nothing further happened until 11 September 2015, when the applicants attempted to resurrect the Labour Court case, on the basis dealt with above.

[23] Even in the context of the above explanation by the applicants relating to 2014 and 2015, as it stands, there are vast unexplained periods. There is the period of 7 (seven) months from when the individual applicant received the response from the Human Rights Commission until she writes to the Minister. Then there is the further period of some 6 (six) months from the outcome letter by Norton Rose Fulbright until the applicants take further steps in the Labour Court. In total, therefore, a further 13 (thirteen) month period is completely unexplained.

[24] All considered, this means that a total period of delay of about four and a half years has no explanation of any kind. But worse still, the evidence shows that in 2014, the individual applicant chose not to prosecute her case in the Labour Court, but pursued alternative means because she considered her Labour Court case 'closed'. In simple terms, this is a deliberate decision on her part not to prosecute the matter in the Labour Court. In total therefore, not only is there an undue delay, but also a deliberate decision not to pursue the Labour Court case.

[25] It is equally well established that the failure on the part of an applicant to prosecute a case in an expeditious manner, resulting in an undue delay, may

in itself non suit the applicant, and thus dispose of the matter. This consequence is founded on the maxim *'vigilantibus non dormientibus lex subvenit'*. This maxim was dealt with in *Pathescope (Union) of South Africa Ltd v Mallinick*[6], 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 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.'

[26] 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[7]. 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

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[6] 1927 AD 292.

[7] 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); *Mantshiyane v Kopanong Local Municipality and Others: In re Kopanong Local Municipality v Mantshiyane and Others* (2016) 37 ILJ 1695 (LC).

resolved, as I have referred to above. The Labour Court has simply not shied away from disposing of applications on the basis of a failure to diligently prosecute the same. In *Autopax Passenger Services (Pty) Ltd v Transnet Bargaining Council and Others*[8] 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.'.

[27] Similarly and in *Karan t/a Karan Beef Feedlot and Another v Randall*[9] 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….'.

[28] In the end, and when pondering the question whether the applicants' application should be dismissed for an unjustified and undue delay in the prosecution thereof to finality, it would be most useful to apply the following *dictum* in *BP Southern Africa (Pty) Ltd v National Bargaining Council for the Chemical Industry and Others*[10]:

> '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 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:

[8] (2006) 27 ILJ 2574 (LC) at para 14.
[9] (2009) 30 ILJ 2937 (LC) at para 14.
[10] (2010) 31 ILJ 1337 (LC) at para 10.

'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'.'

[29] A total unexplained delay of in excess of four years would in my view have a significant prejudicial impact on the ability of the respondent to conduct an effective trial, and is certainly an abuse of process. In *Mohlomi v Minister of Defence*[11], the Court said:

'Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses 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.'

[30] In the end in this respect, the following *dictum* from the judgment in *Sishuba v National Commissioner of the SA Police Service*[12] is apposite:

'The issue of delays in prosecuting disputes in the Labour Court has become an issue of concern and judges have expressed their concern at a trend that seems to have emerged in this regard. …

While there is no rule that specifically addresses the issue of delays in prosecuting a case by an applicant, there are decisions of both this court and other courts which have held that depending on the circumstances of a given case, the administration of justice may dictate that if an applicant party unduly

[11] 1997 (1) SA 124 (CC) at 129H-130A.
[12] (2007) 28 *ILJ* 2073 (LC) at par 8 – 10.

> delays prosecuting its claim, and fails to provide acceptable reasons for the delay, the penalty may be that of dismissing the claim. ….
>
> Inordinate delays in litigating protract disputes, damage the interests of justice and prolong the uncertainty of those affected'

I cannot agree more. But despite this clear warning, the applicants did not conduct themselves accordingly.

[31] In addition to the wealth of jurisprudence as set out above, the Practice Manual has added a further clear dimension to the consequences of a failure by an applicant to prosecute a claim under Rule 6 to finality. In reality, the Practice Manual was adopted to give concrete effect to these very requirements of expedition. Of direct application *in casu* is Clause 16.1 which reads:

> 'In spite of any other provision in this manual, the Registrar will archive a file in the following circumstances: … in the case of referrals in terms of Rule 6, when a period of six months has elapsed from the date of delivery of a statement of case without any steps taken by the referring party from the date on which the statement of claim was filed, or the date on which the last process was filed.'

The Practice Manual is binding on litigating parties and must be complied with. It is not just a guideline, but an actual prescript.[13]

[32] Even though the Practice Manual only came into effect on 1 April 2013, it in my view nonetheless applied to this matter as least as from that date in inception. It should have been a clear warning to the applicants to immediately do something about this matter. Despite this, further process was only filed by the applicants on 11 September 2015, being 29(twenty nine) months later. Worse still, and even though the respondent pursued the issue of the matter being finally archived in May 2015, it once again took a further unexplained

[13] See *Tadyn Trading CC t/a Tadyn Consulting Services v Steiner and Others* (2014) 35 ILJ 1672 (LC) at para 11; *Butana v South African Local Government Bargaining Council and Others* [2016] JOL 36088 (LC) at paras 8 – 9; *Edcon (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others: In re Thulare and Others v Edcon (Pty) Ltd* (2016) 37 ILJ 434 (LC) at para 24; *3G Mobile (Pty) Limited v Raphela NO and Others* [2014] JOL 32479 (LC) at para 36.

4(four) months for the applicants to be spurred into action. As said in *Ralo v Transnet Port Terminals and Others*[14]:

> '… The Practice Manual contains a series of directives, which the Judge President is entitled to issue. In essence, the manual sets out what is expected of practitioners so as to meet the imperatives of respect for the court as an institution, and the expeditious resolution of labour disputes (see clause 1.3). While the manual acknowledges the need for flexibility in its application (see clause 1.2), its provisions are not cast in the form of a guideline, to be adhered to or ignored by parties at their convenience.'

[33] Applying Clause 16.1 of the Practice Manual, and by the time the applicants sought to resurrect and take further steps in this matter in September 2015, it had been archived. This archiving had the same effect, as in turn prescribed by clause 16.3 of the Practice Manual, as the matter having been dismissed.

[34] All considered, and based on the grossly excessive delay in this matter (most of which is unexplained), the almost complete failure by the applicants to expeditiously prosecute the matter, being considered together with the provisions of the Practice Manual, there can only be one realistic outcome. That outcome is that the matter must be finally dismissed.

[35] The only possible saving grace available to the applicants is the application for condonation, which was only brought after the applicants were directed to do so by Lagrange J. The possibility of condonation is also contemplated by clause 16.2[15] of the Practice Manual and Rule 12[16] of the Labour Court Rules. In this condonation application, the applicants must now convince the Court to depart from the normal consequence of a final dismissal of the matter, in cases such as these. I will now consider this condonation application.

Condonation

[14] (2015) 36 ILJ 2653 (LC) at para 9.

[15] Clause 16.2 reads: 'A party to a dispute in which the file has been archived may submit an application, on affidavit, for the retrieval of the file, on notice to all other parties to the dispute. The provisions of Rule 7 will apply to an application brought in terms of this provision.'

[16] Rule 12 reads: '(1) The court may extent or abridge any period prescribed by these Rules on application, and on good cause shown, unless the court is precluded from doing so by an Act. … (3) The court may, on good cause shown, condone non-compliance with any period prescribed by these Rules.'

[36] The granting of condonation will result in the applicants' matter being resurrected and removed from archives. Considering that archiving has the effect of a dismissal of the matter, the situation is actually more akin to that of rescission than condonation.[17] The Practice Manual and Rule 12 however do render it competent to obtain the relief sought by the applicants by way of a condonation application. In any event, and since the applicants were directed by Lagrange J to bring an application for condonation, I shall decide whether or not to grant the applicants the relief sought based on the principles applicable to condonation applications.

[37] Where it comes to deciding condonation applications, the law in this regard is now well settled on the basis of the following principles as set out in the case of *Melane v Santam Insurance Co Ltd*[18]:

> 'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation.'

[38] In the case of condonation applications brought in the Labour Court, and by applying the *ratio* in *Melane*, the Court in *Academic and Professional Staff Association v Pretorius NO and Others*[19] summarized the principles for consideration as follows:

> 'The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply with time frame; (c) prospects of success or bona fide defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; and (g)

[17] See *Builders Trade Depot v Commission for Conciliation, Mediation and Arbitration and Others* (2012) 33 ILJ 1154 (LC) para 22 where it was said: 'It is so that not only judgments (or awards) granted by default can be rescinded ….'.
[18] 1962 (4) SA 531 (A) 532C-E.
[19] (2008) 29 *ILJ* 318 (LC) paras 17–18.

> avoidance of unnecessary delay in the administration of justice. …. It is trite law that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay.'

I am satisfied this this ratio in *Academic and Professional Staff Association* properly and succinctly summarizes all the Court must consider when exercising its discretion whether or not to grant condonation.

[39] What is clear from the ratio in *Academic and Professional Staff Association* is that the providing of a proper explanation for any default or delay is a critical component to any condonation application. As to how this explanation must be provided, the Court in *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others*[20] held:

> 'In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay. ….'

[40] I add that the discretion to be exercised by the Court in deciding whether or not to finally dismiss a matter because of a failure to diligently prosecute the same to finality, is very similar to the discretion exercised where it comes to condonation applications. In *Karan*[21] the Court held:

> '… 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:
>
> - the length of the delay;
> - the explanation for the delay; and

[20] (2010) 31 *ILJ* 1413 (LC) para 13.
[21] (*supra*) at para 14. See also *Baldwin Steel and Another v National Union of Metalworkers of SA and Others* (2011) 32 ILJ 2116 (LC) at para 15; *National Construction Building and Allied Workers Union and Others v Springbok Box (Pty) Ltd t/a Summit Associated Industries* (2011) 32 ILJ 689 (LC) at para 28; *National Union of Mineworkers v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 2913 (LC) at para 24.

- the effect of the delay on the other party and the prejudice that that party will suffer should the claim not be dismissed.'

I venture to say that deciding this matter on the basis of a condonation discretion, for the want of a better description, would fully cover all the above considerations as well.

[41] Applying the aforesaid considerations, I shall firstly deal with the length of the delay. As I have already said above, the delay is grossly excessive. It is excessive to the extent that it infringes on a fair and just determination of the matter. The delay is now close on 6(six) years, with no end in sight yet. As I said in *Police and Prisons Civil Rights Union v Ledwaba NO and Others*[22]:

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

The current delay is triple that in *Ledwaba*. It is the kind of delay that would in itself lead to the dismissal of a case, especially considering that there is simply no justification for it.

[42] The next issue to be considered is the explanation for the delay. I have dealt with this issue above as well. The explanation is abysmal. Despite it being required, the entire period of the delay was not explained, and in fact most of it is not explained. It was not explained why it took 4 (four) months from the date when the matter remained unresolved in the CCMA to refer it to the Labour Court. It was not explained why absolutely nothing happened between the filing of the statement of claim in 2010 up until the individual applicant approached the Human Rights Commission in 2014. It was not explained why it took a further 7 (seven) months to approach the Minister thereafter. And finally, it was not explained why, after it was made clear in March 2015 that the applicants had to pursue the Labour Court case to finality, it took a further 6 (six) months for the applicants to then only seek to prosecute the matter further. All this means that out of the total delay of some 6 (six) years, more

[22] (2016) 37 ILJ 493 (LC) at para 21.

than 5 (five) of these years are completely unexplained. This must mean the end of the matter for the applicants. As was said in *3G Mobile (Pty) Limited v Raphela NO and Others*[23]:

> 'In the end, the applicant has thus provided no explanation for what is a material delay. This should be the end of the matter for the applicant without even considering the requirement of prospects of success. …'

[43] But what must put this matter entirely beyond salvation (if even possible) is two further factors. The first is that when the respondent's attorneys apply in May 2015 that the matter be finally archived, the applicants do nothing until 11 September 2015 (four months later) and do not apply for condonation at that point in time of their own accord. The second is that when the applicants are directed by Lagrange J in March 2016 to file a condonation application, it takes a further 3 (three) months to do so. In *Ferreira v Ntshingila*[24] the Court said:

> 'An application for condonation is required to be made as soon as the party concerned realises that the Rules have not been complied with.'

The failure to immediately file the required condonation application, especially in the absence of any explanation for this, is a ground in itself to refuse the condonation application.[25] In *SA Commercial Catering and Allied Workers Union on behalf of Members v Entertainment Logistics Service (A Division Of Gallo Africa Ltd)*[26] the Court said:

> '… It is incumbent on a party to apply for condonation as soon as possible upon becoming aware of the default. This point has been repeatedly emphasized by the Supreme Court of Appeal … , an approach strongly endorsed by the Labour Appeal Court. Indeed the LAC has held that an application for condonation ought to be launched on the same day that the default is discovered …'

[23] [2014] JOL 32479 (LC) at para 32.
[24] 1990 (4) SA 271 (A) at 281.
[25] See *De Beer en 'n Ander v Western Bank Ltd* 1981 (4) SA 255 (A) at 257*; Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 129G *; P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799.
[26] (2011) 32 ILJ 410 (LC) at para 12.

[44] Overall, the conduct of the applicants *in casu* is indicative of a litigant that remains inactive for lengthy periods, acts when it chooses and how it chooses, and acts with complete impunity where it comes to the Rules of Court and the interests of the other party. In my view, the following dictum from the judgment in *Moraka v National Bargaining Council for the Chemical Industry and Others*[27] is most apposite to the matter now before me, where the Court said:

> 'A significant consideration in deciding whether or not to dismiss this review application is the casual approach adopted to the litigation by the applicant which indicates that he viewed it as a matter that could be returned to from time to time when he or his representatives chose to do so. Such long periods of inactivity cannot be reconciled with the conduct of a party that has a consistent interest in pursuing a case and takes the necessary steps to do so without undue delay.'

The Court in *Moraka* was dealing with a review application, but in my view the same sentiments would equally apply to cases prosecuted under Rule 6.

[45] Because the applicants have committed such a gross and flagrant violation of the Court Rules and processes, and have in effect provided no explanation for what is a grossly excessive delay, and did not even apply for condonation timeously when becoming aware of the default, any consideration of the issue of prospects of success evaporates. In simple terms, prospects of success become irrelevant, in deciding this matter. In *Colett v Commission for Conciliation, Mediation and Arbitration and Others*[28] the Court held as follows:

> 'There are overwhelming precedents in this court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success. …'

In the interest of being thorough, and in order to confirm how consistently this principle has been applied, I wish to highlight some further *dicta* from judgments of the Labour Appeal Court. It was said in *Mziya v Putco Ltd*[29] that:

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[27] (2011) 32 *ILJ* 667 (LC) at para 20.
[28] (2014) 35 *ILJ* 1948 (LAC) at para 38.
[29] (1999) 3 BLLR 103 (LAC) at para 9.

> '… there is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial'.

Also in *NUM v Council for Mineral Technology*[30] the Court held that:

> '… there is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial'.

Finally and in *National Education Health and Allied Workers Union on behalf of Mofokeng and others v Charlotte Theron Children's Home*[31] the Court held that:

> '… this Court has previously confirmed the principle that without a reasonable and acceptable explanation for a delay the prospects of success are immaterial'.

[46] In argument, the applicants suggested because the applicants' statement of claim raises Constitutional issues and because it is alleged that the individual applicant was discriminated against based on inter alia her HIV status, these are important and critical matters to decide, and of public importance as well, which must be considered by the Court no matter what. The suggestion of the applicants, in short, is that based on the nature of the case, all other considerations must be considered to be subordinate and in effect shrugged off. In other words, and because of the nature of the case, condonation is there for the asking. I cannot agree with such a proposition. Condonation is not just there for the asking, no matter what the case may be. In *Seatlolo and others v Entertainment Logistics Service* (*a division of Gallo Africa Ltd*)[32] the Court held:

> 'It is trite law that condonation should only be granted where the legal requirements have been met and is not a default option. It remains an

[30] (1999) 3 BLLR 209 (LAC) at 211G-H.
[31] (2004) 25 ILJ 2195 (LAC) at para 23.
[32] (2011) 32 ILJ 2206 (LC) at para 27. See also *3G Mobile* (*supra*) at para 33.

> indulgence granted by a court exercising its discretion whilst being cognizant of the criticism emanating from the Constitutional Court and the SCA and bearing in mind the primary objective of the expeditious resolution of disputes articulated in the Act.'

I agree with these sentiments. It was squarely in the hands of the applicants to ensure that this case was properly prosecuted, and if they failed in this respect, the nature of the case cannot save them. I must further emphasize that if this case was so important, and had the kind of impetus and consequences the applicants now suggests, it is simply inexplicable that the applicants allow it to in effect lay dormant for years. This argument is actually self-defeating.

[47] Finally, and even if the applicants have such an important case as they allege, and even if this case may have merit, it is my view that the following *dictum* in *Ferreira v Die Burger*[33] aptly describes what should equally apply *in casu*:

> 'I am sympathetic to the fact that the applicant may have a case but, were we to grant this application, this court would subvert a crucial principle in matters which deal with personal relationships, namely labour relations, that these disputes have to be dealt with expeditiously and finalized as quickly as possible. Where in a case such as this, there has been so flagrant of violation of the rules, then, as Myburgh JP correctly decided, a lack of any explanation at all shrugs off other considerations.'

[48] For all the above reasons, the applicants' condonation application is doomed to fail. The grossly excessive delays without any explanation for most of it, trumps all else. There is simply no basis to depart from the normal and accepted principle that in such circumstances, the matter must now be brought to an end, once and for all.

Conclusion

[49] In conclusion, therefore, the applicants have failed to make out a case for the removal of this matter from archives. The case has become stale beyond

[33] (2008) 29 *ILJ* 1704 (LAC) at para 8.

resurrection, no matter what the merits thereof may be. Not only is there no basis upon which to resurrect this matter, but it is entirely appropriate, and in the interest of justice, that it must be finally dismissed. Even though the archiving of the matter has an effect similar to that of dismissing the matter, I intend to put the issue beyond doubt by making an order to the effect that the applicants' case be finally dismissed.

[50] This only leaves the issue of costs. I have a wide discretion where it comes to the issue of costs, having regard to the provisions of Section 162(1) of the LRA. In this instance, I believe a costs order is indeed appropriate. It must have been clear to the applicants that the application had no merit, especially after the filing of the answering affidavit. The applicants made no effort to explain most the delay, and simply approached this matter on the basis that they are entitled to be heard above all else. This approach was always fatally flawed, especially considering what the Courts have said over and over again. I also consider that the applicants in 2014 deliberately chose to pursue other avenues, rather than pursuing the case pending in this Court, to obtain relief, which is not appropriate. The respondent acted properly when it called for the matter to be archived, and should be entitled to its costs in having to defend this action taken by it against an application that had no merit.

Order

[51] For all of the reasons as set out above, I make the following order:

1. The applicants' condonation application is dismissed.

2. The applicants' statement of claim is finally dismissed.

3. The applicants are ordered to pay the respondent's costs.

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S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicants:	Macgregor Kufa – Union Official
For the Respondent:	Adv L J Mboweni
Instructed by:	Masephule Dinga Inc Attorneys