IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Reportable

Case No: J2367/06

In the matter between:

NACBAWU	1st Applicant
GM DIKGALE & OTHERS	2nd Applicant

And

SPRINGBOX BOX (PTY) LTD t/a	
SUMMIT ASSOCIATED INDUSTRIES	Respondent

JUDGMENT

Molahlehi J

Introduction

[1] The applicant who is the respondent in the main application, seek and order to have the application for the declaratory order by the applicants in the main application, and respondent in this application dismissed by reason of delay in prosecution of the matter to finality.

[2] The applicants in the main application sought a declaratory order on the following terms:

"1.1 That it be declared that:

1.1.1. Respondent imposed a lockout as defined in the Labour Relations Act 66 of 1995 ("the LRA95") upon the individual applicants as from 2 October 2006 until a date to be determined by this Court ("the lockout").

1.1.2. That the lockout does not comply with the provisions of Chapter 4 of the LRA95.

1.2 That Respondent be interdicted and restrained from:

1.2.1. imposing the lockout on the individual applicants.

1.2.2. Employing replacement labour as envisages by section 76 of the LRA95 for as long as the lockout prevails.

12.3. dismissing the individual applicants pending the outcome of this application.

1.3 That Respondent be directed to:

1.3.1. allow the individual to return to work, ***alternatively,*** *to remunerate the individual*

applicants as from the date of the order in return for tendering of their services as long as their employment contracts with Respondent prevail.

1.3.2. pay Applicants' legal costs in this application on the attorney and client scale.

1.4. that the late delivery of the confirmatory affidavits of the individual applicants be condoned.

1.5. that Applicants be granted such further and/or alternative relief as this court deem fit."

[3] The applicants have also applied for condonation for the late filing of the heads of argument. For ease of reference the first applicant will hereinafter be referred to as the "union", the second applicants as "employees" and the respondents as the "employer."

[4] The dispute between the parties in this matter arose because of a deadlock in the wage negotiations which the parties embarked upon during July 2005. The employer had refused to meet the 12% wage increase demand by the union. On the 27th July 2005, employer referred a dispute to the CCMA concerning an allegation of refusal to

negotiate by the union. In that referral the employer summarized the dispute as follows:

> *"the company proposed possible options to unlock the impasse to this date union has not responded to the company's proposal."*

[5] The dispute was conciliated on the 29th July 2005, at the CCMA. At the proceedings the employer offered a wage increase of 1.5% with effect from 1st July 2005 and a further increase of 2% with effect from 1st January 2006. The matter could not be finalized on that day and the parties agreed to postpone the matter to 5th August 2006.

[6] A further conciliation meeting was held on the 29th August 2005. The parties having again failed to reach a compromise, the conciliating commissioner issued a certificate of outcome in which it is indicated that the dispute concerned "*refusal to bargain."*

[7] The union, made its referral of a dispute on the 8th August 2005, to the CCMA. The dispute was described in the referral forms as concerning "mutual interest." The conciliation hearing of that dispute was scheduled for a hearing on 2nd September 2005. At that conciliation meeting the parties agreed to extend the period of the conciliation to

give themselves enough time to seek a negotiated settlement of dispute. The conciliation was postponed to 30th September 2005.

[8] The parties again failed to reach a consensus at the conciliation meeting of the 30th September 2005. The commissioner then issued a certificate of outcome indicating that the dispute between the parties remained unresolved. And on the 10th October 2005, the union gave the employer a notice of intention to embark on a protected industrial action in terms of s 64 (1) (b) of the Labour Relations Act 66 of 1995 (the LRA). Later on the same day the employer issued the employees with a notice of intention to lock them out in terms of s 64 (1) (b) of the LRA. Both industrial actions commenced on the 13th October 2005.

[9] About a week after the commencement of the strike the employer obtained an interdict from the Labour Court interdicting the violent conduct on the part of the employee. That interim order was discharged on the 23rd November 2005.

[10] Two months after the interim order was discharged the employer obtained another interim order from the High Court interdicting and restraining the union and the employees from committing certain acts of violence.

[11] The South African Police Services booked a meeting between the parties on the 17th January 2006, in an attempt to have the parties resolve their differences. At that meeting the employer's proposal that employees who were on strike should be retrenched was rejected by the union.

[12] On the 4th April 2006, the union believing that certain of its members were dismissed by the employer for participating in the industrial action filed an unfair dismissal case in the Labour Court seeking their reinstatement. The employer denied having dismissed any of the union's members. However, in the application for an interdict in the High Court the employer alleged that certain of the employees' contract which were fixed term contracts had at that stage expired by virtue of the effluxion of time. To the contrary the employees contended that their contract could not have expired because there was a legitimate expectation that they would be renewed.

[13] The parties then held several meetings where the issue of wages was discussed. At none of these meetings did the union modified their demand of 12% wage increase across the board. The employer still rejected that demand and proposed that the employees should accept a

reduced rate of payment of R7.50 per hour. At that stage the lower rate of payment was apparently, R16.00 per hour.

[14] The employees say that the issue of the reduction of the hourly rate payment as was proposed by the employer and rejected by the union as was never referred to conciliation.

[15] On the 21st September 2006, the union in a letter addressed to the employer indicated that they had terminated their strike as of that date. The employer replied to that letter and indicated that the strike could not be resolved pending the outcome of the matter which had been referred to the Labour Court and that they could not offer their services in the face of the High Court interdict. Despite the position taken by the employer, the employees tendered their services to the employer on the 2nd October 2006. The employees were refused access to the workplace by a manager of the employer.

[16] It would seem that in an attempt to resolve or bring to an end the stalemate brought about by the referral of the matter to the Labour Court, the union withdrew their claim in the Labour Court on the 4th October 2006. Thereafter, the employees on a number occasions sought to tender their services to the respondent but were at all times refused access to the workplace by the employer. In the meantime the

employer employed replacement labour to perform the work of the employees who had been locked out of the workplace.

[17] The union contended that the employer has not uplifted the lockout even though the issue that gave rise to the dispute was resolved by virtue of the union uplifting the strike action and offering to return to work.

[18] The union further contended that the conduct of the employer was unlawful because it was in breach of 64 (2) of the LRA, in that no advisory award had been obtained on the basis of the dispute raised by the employer. The dispute of the employer concerned the allegation, as mentioned earlier, that the union was refusing to bargain.

[19] The union further contended that the employer was in breach of the provisions of s 76 (1) of the LRA in that the employer continued the use of replacement of applicants whilst they were locked out.

Unreasonable delay rule

[20] As stated above the union has brought an application for the late filing of their heads of argument. The essence of the explanation for the late filing of the heads of argument is that the delay was occasioned by lack of funds to pay for their legal representatives in

particular the counsel who has over the years done their legal matters and at that stage there was still outstanding payment to him.

[21] As concerning the delay in prosecuting the present claim the union in their supplementary heads of argument which they submitted after being directed by the court to address the issue of the reasons for the delay, start by referring to the decision in ***Solidarity v Eskom (2008) 29 ILJ 1450 (LAC)***. In that judgment Zondo JP as he was then at paragraph [14] says the following:

> *"[14] The first one is right, the second one not. In my view the answer to the respondent's second 'special plea' is that the 'unreasonable delay' rule does not apply in this case. Firstly, this is not a review application, and the rule applies to reviews only. Secondly, such rule does not apply to a case that is subject to a statutory limit in terms of the period within which it should be instituted. In this case the Prescription Act applies and the prescription period had not even begun to run when the appellants instituted court proceedings. That being the case, it would be a contradiction in terms to hold that the appellants had delayed unreasonably in instituting*

the application that they instituted in the Labour Court and, yet to also say, as it has been said in respect of the first special plea, that the appellants' claim had not prescribed in terms of the Prescription Act. To apply the 'unreasonable delay' rule where the Prescription Act applies would, it seems to me, amount to the court legislating another prescription period in addition to the one prescribed by the Prescription Act. In my view there is no reason or justification in law for that additional prescription period and it can only serve to sow confusion as to when the one period applies and when the other does not apply."

[22] The distinction between this matter and ***Solidarity*** is that in that case the court was dealing with failure to institute the matter in time. In this matter the court is dealing with failure to prosecute the matter timeously once the litigation has been instituted.

[23] After referring to the ***Solidarity*** matter, the union then submits that in exercising its discretion as to whether or not to dismiss a matter due to delay in its prosecution, the court should take into account as to who bears the primary responsibility to enroll an application for hearing

before the Court. Unlike in the High Court where the primary responsibility in terms of the rules in motion proceedings rests with the applicant, the rules in the Labour Court do not require a party in motion proceedings to enroll matters for hearing. The responsibility to have the matter heard in the Labour Court rests with the Registrar.

[24] The applicant further argued that because in the present matter the pleadings had closed within the prescribed time limit, the unreasonable delay rule should not be applied.

Evaluation

[25] The unreasonable delay rule has received attention in a number of judgments of the Labour Court. It has generally been accepted that where a litigant delays in the prosecution of his or her claim he or she may be barred from obtaining the relief sought for that reason.

[26] In ***Autopax Passenger Services (Pty) Ltd v Transnet Bargaining Council & Others (2006) 27 ILJ 2574 (LC),*** the court in dealing with the issue of the unreasonable delay in the prosecution of the matter had the following to say:

"[10] In Gopaul v Subbamah 2002 (6) SA 551 the approach adopted was one where the court would weigh up the period of the delay and the reasons therefore, on the one hand, and the prejudice, if any, caused to the defendant, on the other. In Sanford v Haley NO 2004 (3) SA 296 (C) a similar approach was adopted. The court held that the 'prerequisites for the exercise of such discretion are, first, that there should be a delay in the prosecution of the action; secondly, that the delay is inexcusable and, thirdly, that the [defendant] is seriously prejudiced by such delay'. It was further held that the court will exercise its power to dismiss an action on account of a delay for want of prosecution only in exceptional circumstances because the dismissal of an action seriously impacts on the constitutional and common-law right of a plaintiff to have the dispute adjudicated in a court of law by means of a fair trial."

[27] In ***NAPTOSA & Others v Minister of Education, Western Cape & others (2001) 22 ILJ 889 (C***) at 900 F, Conradie J is quoted with approval, by Zondo JP as he then was, in ***Solidarity*** as having said:

"I consider that the substantial delay in bringing these proceedings is another reason for exercising our discretion against the grant of a declaratory order. It is well-established law that undue delay may be taken into account in exercising a discretion as to whether to grant an interdict or a mandamus or to grant relief in review proceedings. The declaratory order being as flexible as it is, can be used to obtain much the same relief as would be vouch safe by an interdict or a mandamus. Whether it is not necessary that a record of proceedings be put before the court, a declaratory order could serve as a review. A court, in exercising its discretion whether to grant a declaratory order should accordingly, in an appropriate case, weigh the same considerations of "justice or convenience" as it might do in the case of an interdict or a review."

[28] The factors which the court will take into account in considering whether or not to dismiss a matter due to unreasonable delay in its prosecution are the following:- the length of the delay; the effect of the delay on the other party and the prejudice which the other party will suffer if the matter is not dismissed for that reason. 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 belief that it would be correct and fair

to blame the applicant for contributing to the delay due to his or her inaction.

[29] In the present matter the explanation tendered by the respondents relates only to the delay in filing the heads of argument. The respondent has not provided any explanation for the 29 (twenty nine) months delay in bringing this matter to finality. They contend that they were not responsible for setting the matter down but that the person responsible for that was the Registrar.

[30] The union is correct when it says that the rules provide that it is the Registrar who has to set the matter down for a hearing. It was however incumbent on them as the *dominus litis* to ensure that the Registrar does enrol the matter for a hearing. In fact the general rule is that the Registrar will only enrol a matter once the heads of arguments have been filed.

[31] The pleadings in this matter were closed on the 31st January 2007. There is no evidence that the applicants have ever since then requested the Registrar to have the matter set down for a hearing. It was incumbent on the union to ensure that the matter was timeously brought to finality regard being had to the fact that the relief sought was in the form of a declarator. On the 21st July 2008, the Registrar

called for the parties to file the heads of argument. The union filed their heads of argument on the 2nd June 2009, a period of delay amounting to 11 (eleven) months. In this respect having regard to the nature of the relief that the union was seeking it ought to have been reasonably clear to them that the delay would result in the serious prejudice to the employer. The explanation for the delay in filing the heads of argument is wholly unsatisfactory and should for that reason be rejected. I also have serious doubts about the prospects of success on the part of the union and its members.

[32] In my view the delay of 29 (twenty nine) months before ensuring the matter was progressed further was an unreasonable delay which caused the respondent a significant prejudice. The issue of the delay was brought to the attention of the union by the employer in its heads of argument. This in my view amount to the employer having placed the union on terms in an effort to ensure that the matter is brought to finality within a reasonable time. In the absence of an explanation as to why it took so long to bring the matter to finality the delay on the part of the union and the employees is regarded as being unreasonable and unacceptable.

[33] I am therefore of the view that the applicants' application for a declarator stands to be dismissed due to the unreasonable delay in its prosecution. I see no reason in law and fairness why costs should not follow the result.

[34] In the premises, the applicants' claim is dismissed with costs.

Molahlehi J

Date of Hearing : 4 March 2010

Date of Judgment : 1st October 2010

Appearances

For the Applicant : Adv F J Wilke

Instructed by : Ramushu Mashile Twala Inc

For the Respondent: Adv R Venter

Instructed by : Schoeman Bosch Inc