THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO. J 841/09

In the matter between:

BP SOUTHERN AFRICA (PTY) LTD	**Applicant**
and	
THE NATIONAL BARGAINING COUNCIL FOR THE CHEMICAL INDUSTRY	**1ST Respondent**
WILLIE M RALEFETA N.O.	**2ND Respondent**
KELEPILE ISRAEL MARUPING	**3RD Respondent**

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application brought in terms of s 158 (1) (c) of the Labour Relations Act in which the applicant seeks to have an arbitration award made by the second respondent an order of Court. In his award, the second respondent ruled that 'the dismissal of the applicant is upheld'. On 19 September 2007, the third respondent filed an application to review and set aside the second respondent's award. The application was filed in the Labour Court in Cape Town. The applicant seeks an order in terms of section 158 (1) (c) on the basis that the third respondent has been dilatory in prosecuting the application for review, and that it is in the interests of justice that the third respondent be precluded from further pursuing that application.

Preliminary point: jurisdiction

[2] Shortly before the hearing of this application, the applicant filed supplementary heads of argument in which it submitted that the Cape Town Labour Court does not have jurisdiction to adjudicate the review application, since none of the traditional *ratio jurisdictiones* applicable in the civil Courts are present in that application. In particular, the applicant avers that the third respondent worked in the North West province, that his contract was terminated in that province, that the third respondent has cited the applicant's principal place of business in Johannesburg as the applicant's address, and that the proceedings before the bargaining council were conducted in Johannesburg. Accordingly, the applicant argues that the review proceedings are a nullity and that this disposes of the application for review.

[3] Mr Boda, who appeared for the applicant, relied on a judgment of this Court (per Sibeko AJ) in *HG Botha v Whitey Bester t/a Sakulwasi Electrical* (Labour Court, P107/03) in which it was held that an applicant was not at liberty to institute proceedings at any seat of the four Labour Courts established in the Republic. The Court appears to have applied the common law rule that a claimant is required to seek out the defendant, or to have instituted proceedings in a place that has a connection with the cause of action. Applying the rules for practice in the High Court, and since the only connection with the Port Elizabeth Court was the fact that the applicant resided in that city, the Court held that it lacked jurisdiction and dismissed the application on that basis.

[4] Section 151 of the LRA establishes the Labour Court as a superior Court with the authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a provincial division of the High Court has in relation to matters under its jurisdiction. Section 156 provides:

> *"156 Area of jurisdiction and seat of Labour Court:*
>
> *(1) The Labour Court has jurisdiction in all the provinces of the Republic.*
>
> *(2) The Minister of Justice, acting on the advice of NEDLAC, must determine the seat of the Labour Court.*
>
> *(3) The functions of the Labour Court may be performed at any place in the Republic."*[1]

[5] There are material differences between the enabling provisions contained in the Supreme Court Act conferring jurisdiction upon a High Court and the relevant provisions of the LRA conferring jurisdiction upon the Labour Court. The enabling provisions (apart from the fact that the High Court also has jurisdiction in terms of the common law) are so materially different in that an analogous form of interpretation would lead to an absurdity. Any division of the High Court has jurisdiction in terms of the provisions of section 19 (as the relevant provision dealing with persons over whom and matters in relation to which provincial and local divisions have jurisdiction) of the Supreme Court Act. The jurisdiction of the High Court is determined by reference to the common law, the inherent jurisdiction in the High Court or any relevant statute.[2] The Labour Court, on the other hand, is a creature of statute and has no inherent jurisdiction and may do only what is prescribed to it in terms of the enabling legislation.[3]

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[1] Section 156 of the Labour Relations Act, 66 of 1995

[2] *Bison Board Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) at 486 H – J.

[3] See: *Gomba v Associated Mine Workers Union* (2008) 29 ILJ 1839 (ZH) on p. 1842; See further: *Hatfield Town Management Board v Mynferd Poultry Farm (Pty) Ltd* 1962 (RNN) 799 at 802.

[6] Secondly, the High Court has different divisions.[4] The whole of the Republic of South Africa falls by means of the provisions of the Supreme Court Act, or further regulations and proclamations, within the jurisdictional area of a specific division of a provincial or local division of the High Court. This is the reason why the original jurisdiction of each division of the High Court is territorial.[5] The Labour Court, however, has four seats in the Republic of South Africa; it does not comprise divisions which cumulatively extend to the whole of the territorial area of the Republic. Furthermore, there are no provisions of the Labour Relations Act or statute or law, conferring upon any specific four seats of the Labour Court a geographically defined area of jurisdiction, apart from the whole of the Republic. Rule 2 establishes what are termed 'branch offices of the registrar' at those venues (other than Johannesburg) where the Labour court has premises i.e. Durban, Port Elizabeth and Cape Town. The fact that branch offices of the registrar and the physical trappings of the Court exist in these cities is motivated by considerations of convenience, not jurisdiction.

[7] In my view, the LRA contemplates and establishes the Labour Court as a single Court with national jurisdiction, meaning that proceedings may be instituted at any of the Court's branches regardless of any 'connecting factors' that are relevant in the case of those Courts whose jurisdiction is more narrowly prescribed. Of course, if a party abuses the process of this Court, for example by choosing a venue simply to inconvenience other parties or to increase the costs of their defending any action, that is a matter that the Court can take into account in the exercise of its discretion in regard to costs. Alternatively, a party who takes issue with the branch office of the registrar at which particular proceedings are initiated may apply to have the matter heard at a more convenient venue (see Landman and Van Niekerk *"Labour court Practice"* at A-9). For

[4] By means of the Act and as found by the Appellate Division in *Estate Agents*, at pg.4, para 9 of the applicant's heads of argument.

[5] Erasmus *"Superior Court Practice"*, at pg.A1-23

these reasons, the *HG Botha v Whitey Bester* judgment is with respect clearly wrong, and I do not intend to follow it.

There is accordingly no merit in the point *in limine*.

[8] In so far as the merits of the application are concerned, I raised with Mr Grobler, who appeared for the third respondent, the question whether it was possible and/or appropriate for this Court to make an arbitration award an order of this Court in circumstances where the award is not capable of being executed. This Court regularly grants orders in terms of s 158 (1) (c) to enforce arbitration awards in circumstances where employers are ordered to reinstate an unfairly dismissed employee or to pay compensation. In these instances, a s 158 (1) (c) application is an integral part of the statutory dispute resolution system, designed to afford applicants the means to enforce the underlying award. In all of these cases, the awards are capable of being executed. In other words, they are orders *ad factum praestandum* or *ad pecuniam solvendam*.

[9] In the present instance, the award upholds the applicant's dismissal. In effect, it constitutes a dismissal of the applicant's claim. There is nothing in the award that is capable of being executed, not even a costs order. In these circumstances, it seems to me that an order in terms of s 158 (1) (c) is not a remedy that ought to be available to the applicant. For this reason, the application stands to be dismissed.

[10] Even if I am wrong in concluding that applications in terms of s 158 (1) (c) ought to be confined to the enforcement of arbitration awards, the present application should fail on the merits. It is trite that s 158 (1) (c) confers a discretion on this Court, a discretion to be exercised judicially, to grant or refuse the relief of making an award an order of Court. There are at least two reasons why I would exercise my discretion against the granting of the application. The first is the availability of a suitable alternative remedy - 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 recognised 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. In *Sishuba v National Commissioner of the South African Police Service* (2007) 28 *ILJ* 2073 (LC), Molahlehi AJ (as he then was) summarised the applicable case law. 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 South Africa* 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 and 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."*

[11] The applicant ought to have availed itself of an application to dismiss the review application, in terms of the principles to which I have referred. This is a remedy specifically designed to address an alleged abuse of

this Court's process in the form of unjustifiable delays occasioned by a litigant and avoids confusing procedures that have as their purpose the enforcement of awards with those that are intended to deal with litigants who fail to prosecute their claims with the required degree of diligence.

[12] In any event, and notwithstanding the conclusions that I have reached, I am not satisfied that the third respondent has failed to prosecute the review application to the extent that the interests of justice require that he be effectively barred from pursuing the relief that he seeks, whether by way of making the award an order of this Court or otherwise. The arbitration award under review was handed down on 24 August 2007. The application for review was filed on 19 September 2007. In January 2008, the third respondent's then attorney of record advised the applicant's attorney that there were difficulties in transcribing the record. The bargaining council filed a record on 10 January 2008, which, it appears, was incomplete. In March 2008, there was an exchange of correspondence during which the applicant's attorney indicated their willingness to assist in a reconstruction of the record. In November 2008, the third respondent's previous attorney of record undertook to furnish the applicant with the commissioner's hand written notes and confirmed once again its availability for the purpose of reconstructing the record. It appears that in mid-May 2009, the third respondent's attorney was able to have certain background noises lifted from the audio tapes in the creation of the transcript of the arbitration record, and that on 14 May 2009, the tapes were referred back to the transcribers with instructions to transcribe those portions of the tapes that had been 'cleared'. This application was filed, without further warning to the third respondent it would seem, on 25 May 2009.

[13] In these circumstances, while the third respondent's previous attorneys of record did not act as expeditiously as he might have in prosecuting the review application and the transcription of the audio tapes, his conduct was not so gross as to amount to an abuse of the process of this Court, nor was he specifically put on terms that the applicant would be seeking

a remedy that would have the effect of dismissing the review application. In these circumstances, I do not consider it in the interests of justice to deny the third respondent the opportunity to challenge the arbitration award.

I accordingly make the following order:

1. The application is dismissed, with costs.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT.

Date of hearing: 26 January 2010
Date of Judgment: 29 January 2010

Appearances:

For the Applicant: Adv F A Boda
Instructed by: Eversheds

For the third respondent: Adv Grobler
Instructed by: Horn & van Rensburg Attorneys