IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO: JR902/06

In the matter between:

SURICATE SECURITY	**Applicant**
and	
KENNY RAMBUDA	**1st Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**2nd Respondent**
SIMON K KOKA	**3rd Respondent**
SATAWU	**4th Respondent**

JUDGMENT

LAGRANGE A J:

Introduction

1. This is an application by the third and fourth respondents in the above matter to dismiss the review application instituted by the applicant ('the employer') in July 2006.

2. The question that must be determined is whether the application should be granted or whether the review should be allowed to proceed to finality.

Chronology of Events

3. The application to dismiss the review application was launched on 15 May 2008 by the third and fourth respondents in the review application. They allege that the employer had failed to ensure that it had taken further steps to finalise the preparation of the transcript of the arbitration records causing undue and prejudicial delay to it's member, the first respondent. Accordingly it requested the dismissal of the review application.

4. The employer alleges in its answering affidavit that it had taken certain steps to obtain the record of the proceedings of the unfair dismissal dispute arbitration conducted under the auspices of the Commission for Conciliation, Mediation and Arbitration ("CCMA").

5. The sequence of events as described by the employer, much of which the union had no knowledge of, can be summarised as follows:

5.1. At some stage after filing the rule 7A(2) notice requiring the CCMA to serve a filing notice in respect of the record, the CCMA "indicated" to the employer's attorney of record that the tapes of the arbitration proceeding had indeed been filed with the Registrar of the Labour Court. However, there is no evidence of any notice of the record being filed with the registrar by the CCMA at that time.

5.2. On the record, the second respondent sent two letters to a transcription service in August requesting a quotation for transcription of the record and time taken to finalise it. The

attorneys were then advised by the transcribers that when they went to the Labour Court no tapes had been filed.

5.3. On 10 August 2006, it appears that the employer's attorneys wrote to the CCMA presumably about the missing tapes and received a reply advising them to locate transcribers within the Polokwane area to liaise with the CCMA. Inexplicably, the employer's attorneys' letter to the CCMA is not included in the bundle, but from the CCMA's letter of reply it would appear that the applicant at that stage was still engaged in a process of trying to obtain a transcript of the proceedings.

5.4. On 24 August 2006, the union had written to the applicant's attorneys requesting an urgent response as to progress with transcription of the record, to which the applicant replied the following day confirming that they were still awaiting a quotation from the transcribers.

5.5. In October 2006 the applicant's attorneys claimed to have been advised by the CCMA that the tapes were lost and that the CCMA undertook to search for the file contents and file the necessary notice once it had been located. The attorneys duly advised SATAWU of the position in a letter dated 10 October 2006.

5.6. On 11 April 2007 SATAWU's attorneys of record sent a brief letter simply recording that:

> *"During July 2006 you filed a review application in the Labour Court on behalf of your client. To date you have not taken steps to finalise the preparation of the transcript."*

It appears that this letter was intended as a reminder to the applicant's attorneys of it's obligations regarding the filing of the record, but no indication is given the letter of the action contemplated by the union.

5.7. The next occasion when the employer's attorneys did anything demonstrable was later in June 2007 when they again wrote to the CCMA office in Polokwane requesting the CCMA to file the record as a matter of urgency. Clearly between October the previous year and this letter there is no record of anything being done to expedite the production of the record.

5.8. Again from June 2007 until 29 May 2008, when the applicant filed the application to dismiss the review application no tangible progress was made by the applicant in finalising the record. By way of explanation, the applicant claims it's attorneys of record regularly followed the matter up with the CCMA who indicated they were conducting a diligent search for the file which they believed was in a warehouse. No details such as the dates of the telephonic conversations between the applicant's attorneys and the CCMA, nor the details of whom they spoke to at the CCMA, are provided. In matters of this nature one might expect, as a matter of good practise and for billing purposes, that an attorney's office would keep a reasonably detailed record of such communications.

6. The absence of such detail in an affidavit seeking to explain the lack of progress over the course of eleven months leaves a distinct impression that no meaningful effort was in fact made during this period to take matters forward. It is also telling that there is no indication that the employer's attorneys confirmed in writing with the CCMA any of their supposedly frustrated attempts to obtain the record,

nor is there evidence that the applicant tried to escalate the importance of the matter with the relevant CCMA office.

7. What did take matters further with a jolt was the filing of the union's application to dismiss the review proceedings. On 29 May 2008, a letter from the CCMA was sent to the applicant's attorneys, advising the applicant's attorneys that the CCMA had requested the *"necessary tapes from Document Warehouse and are awaiting them to arrive"*. This CCMA letter refers to a letter from the applicant dated 19 May 2008 (a mere four days after the application to dismiss had been filed). Once again, the letter of 19 May 2008 is missing from the founding papers in the review application, without any explanation for the omission being provided by the employer.

8. On the face of it, the tone and content of the CCMA's letter does not suggest a communication which is the culmination of many months of interaction between the employer's attorneys and the CCMA. This tends to reinforce the impression that the employer had done little or nothing to take the matter forward after receiving the communication from the CCMA in June the previous year that an effort was still being made to locate the file and that this new round of correspondence was prompted only by the launching of the union's application.

9. A couple of weeks after the application to dismiss the review proceedings was served, the long awaited filing notice was finally issued by the CCMA. The notice made it clear that there were indeed no tapes to be transcribed but offered the commissioner's hand-written notes as part of the record.

10. Approximately six weeks later, the applicant's attorneys confirmed various telephonic conversations had taken place between them and the union's attorneys, and advised that they were in the process of

retyping the commissioner's notes to be forwarded to the union's attorneys for consideration.

11. Ten days later, the employer's attorneys forwarded a copy of the Commissioner's handwritten notes together with a typed version to the union's attorneys.

12. On 25 August 2008, the union's attorneys advised their counterparts that the respondents had nothing to add or delete on the Commissioner's notes after perusing them. This ought naturally to have paved the way for the final reconstruction of the record.

13. At the hearing of this matter, the applicant sought leave to hand up a supplementary affidavit effectively confirming the communication of a further piece of correspondence to the union's attorneys in March 2009. Despite the objections of Mr Mathebathe who appeared for the union I agreed to admit this affidavit even though it has been filed only a couple of days prior to the hearing of this matter. I agreed to admit it because it appeared to have some bearing on the respondents' attempts to advance the matter further even though it must be said this was after the union had already requested the enrolment of the matter on the opposed roll in December 2008.

14. In a matter of this nature where the issue at hand is specifically concerned with the steps taken or not taken by the parties in advancing the progress of the review application, it would be wrong, in my view, to simply ignore anything that occurred after pleadings had closed. In this instance, I deemed it necessary in the interest of justice to admit the supplementary affidavit attesting to the last piece of correspondence with the union.

15. The letter ostensibly records a conversation with the union's attorneys on 13 March 2009 and confirms that the applicants' attorneys had

submitted a reconstruction of the record to the union's attorneys but that the union's attorneys had indicated that they were not in total agreement with the same. The letter goes on to request further details regarding the areas of disagreement.

16. According to the affidavit the union did not respond to this request, and it was not suggested at the hearing of the application that there had been any response.

The Legal Principles

17. Increasingly this Court is having to consider a situation which frequently arises in review proceedings where it would seem that the proceedings are initiated merely as a dilatory tactic to delay the implementation of the award against the applicant. In certain instances, the Court will be unwilling to stay the implementation of an award in these circumstances.[1]

18. In a few decisions in recent years this Court has had to consider whether a party can effectively be barred from proceeding with a matter where it allows it to stagnate through it's own inaction or it drags its feet when taking the steps necessary to prosecute the matter to finality (See ***Sishuba v National Commissioner of the SA Police Service*** **(2007) 28 ILJ 2073 (LC),** ***Bezuidenhout v Johnston NO & others*** **(2006) 27** ***ILJ*** **2337 (LC),** and ***Ivor Michael Karan t/a Karan***

[1] See e.g, ***National Education Health & Allied Workers Union on behalf of Vermeulen v Director-General of Labour*** **(2005) 26 ILJ 911 (LC)**

***Beef Feedlot and Another v Randall* (JS347/06) [2009] ZALC 120 (22 July 2009)** unreported[2]).

19. Much of the jurisprudence in this regard is usefully summarised in the recent decision of **Molahlehi J** in the case of ***Nedcor Bank Ltd v James George Harris & others (case no. JR 927/01)*** dated 14 December 2009 (unreported)[3], [at para's 15 to18] as follows:

> "[15] It is now well established that an applicant who delays in the prosecution of his or her review application could be barred from proceeding any further with the application unless a satisfactory explanation is tendered for the delay. The approach to be adopted when dealing with the issue of unreasonable delay was discussed in *Solidarity & Others v ESKOM Holdings Ltd (2008) 29 ILJ 1450 (LAC*). In that case the LAC quoted with approval what was said in *Associated Institutions Pension Fund & others v Van Zyl & others 2005 (2) SA 302 (SCA),* where the Court in dealing with the issue of unreasonable delay in initiating proceedings had the following to say:
>
> > *"[46] It is a longstanding rule that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party had been guilty of unreasonable delay in initiating the proceedings. The effect is that, in a sense, delay would 'validate' the invalid administrative action (See eg Oudekraal Estates (Pty) Ltd v City of Cape Town & others 2004 (6) SA 222 (SCA) ([2004] 3 All SA 1) at para [27]). The raison d'étre of the rule is said to be twofold. First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality*

[2] Available online at http://www.saflii.org.za
[3] Available online at http://www.saflii.org.za

of administrative decisions and the exercise of administrative functions (See eg Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 41).

[47] The scope and content of the rule has been the subject of investigation in two decisions of this Court. They are the Wolgroeiers case and Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n ander 1986 (2) SA 57 (A). As appears from these two cases and the numerous decisions in which they have been followed, application of the rule requires consideration of two questions:

(a) Was there an unreasonable delay?

(b) If so, should the delay in all the circumstances be condoned? (See Wolgroeiers at 39C - D.)

[48] The reasonableness or unreasonableness of a delay is entire dependent on the facts and circumstances of any particular case (See eg Setsokosane at 86G). The investigation into the reasonableness of the delay has nothing to do with the Court's discretion. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of that case, the delay was reasonable. Though this question does imply a value judgment it is not to be equated with the judicial discretion involved in the next question, if it arises, namely, whether a delay which has been found to be unreasonable, should be condoned (see Setsokosane at 86E."

[16] In *Ivor Michael Karan t/a Karan Beef Feedlot v John William Randal unreported case number JS347/06,* the Court

held that from a policy perspective there are two principle 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. The first reason concerns the prejudice that the aggrieved party may suffer as a result of the delay and the second is about the importance and the need to reach finality within a reasonable time in the administration of justice. See *Radebe v Government of the Republic of South Africa 1995 (3) SA 787 (N) and Sishuba v National Commissioner of the South Africa Police Service (2007) 28 ILJ 2073 (LC).*

[17] It is trite that the Court has the power to grant an indulgence for the defaulting party once good cause is shown for the unreasonable delay. The authorities indicate that in assessing whether to grant the indulgence the Court will take into account the prejudice that the other party may have suffered as a result of the delay in the prosecution of the claim. See *Bezuidenhout v Johnston NO & others (2006) 27 ILJ 2337 (LC).*

[18] It is clear from the above that the applicant has a duty to ensure that a claim is processed without unreasonable delays to avoid prejudice on the other party. However, as Van Niekerk J observed in *Karan Beef Feedlot* supra at paragraph [9] of that judgment:

> *"[9] This is not to say that a respondent party is entitled to lie in wait, intending to ambush the applicant once a period of delay becomes sufficiently protracted to justify the filing of an application to dismiss. In the Bezuidenhout judgment, Nel AJ observed that the respondent party also bears a responsibility to ensure that disputes are resolved expeditiously, inter alia by ensuring that the applicant party complies with the time*

periods applicable to it, for example, by compelling compliance. In Sishuba, Molahlehi AJ noted that the Rules as they related to the filing of process in review applications did not preclude a dilatory party or representative from being placed on terms, nor was a degree of self-help prohibited:

> "Whilst there is indeed a practice well-known in this Court that a matter will be set down only once the Applicant has filed the Heads of Argument, there is no rule governing this practice. There is, however, in my view, no reason why an Employee faced with a delay on the part of the Applicant cannot file Heads of Argument prior to that of the Employer, and thereby activate the process of the Registrar setting the matter down. I also see no reason why the Employee did not, in the circumstances of this case, place the Employer on terms and called upon him to file his Heads of Argument before bringing this application."

[10] It seems to me that the approach adopted both in the Bezuidenhout and Sishuba cases requires that a respondent party confronted by an unreasonable delay on the part of an applicant ought at least to place the offending party on terms, or to seek the intervention of the Registrar or file an application to compel (when these steps are appropriate), prior to filing an application to dismiss." ''

Evaluation

20. On the face of the record it is evident that initially the employer proceeded with reasonable expedition in it's prosecution of the review

application. The review application was filed timeously and the employer did take some limited steps to goad the CCMA to file the record of the proceedings, though it seems this was not pursued with any vigour, if at all, between October 2006 and June 2997.

21. Further, between June 2007 and the launching of the dismissal application on 15 May 2008, the best that might be said of the employer's efforts is that they were minimal. In fact, the absence of sufficient convincing detail in the answering affidavits tends to suggest they were probably non-existent during this period.

22. In the circumstances, even if it might be said that the union did not provide the applicant with an express warning that it was intending to launch an application to dismiss the review proceedings, it was understandable that it felt compelled to bring matters to a head. It had at least indicated its displeasure with the slow progress in procuring the record.

23. At the time the application to dismiss the review proceedings was launched, the respondent was supposedly in the process of obtaining the transcript according to its last communication to the union's attorneys. At that stage, or even much earlier, the union could simply have put the respondent on terms to produce a transcript within a reasonable time, failing which it would bring an application to dismiss the review application. If the problem lay with the CCMA not responding to the notice to dispatch the record of proceedings to the registrar in term of Rule 7A(2)(b), then the union could have put the employer on terms to take steps to compel the CCMA to produce the record, failing which it would do so itself and seek to recover the costs of that application from the CCMA and, or alternatively, from the employer.

24. Measures like these ought to be the first resort when dealing with a tardy applicant in review proceedings before having recourse to the ultimate sanction of dismissing the application. There is no reason to assume that steps of this nature would not have had the same effect as the launching of this application, which went too far at that stage, even if it undeniably had the positive effect of advancing the matter further than it would have gone if left up to the employer. The observations of Nel AJ, in ***Bezuidenhout v Johnston NO & others*** **(2006) 27 ILJ 2337 (LC)** at 2343-2435 paras [29] –[33] and the cautionary remark of Van Niekerk AJ (*supra*) about a respondent waiting until the delay becomes protracted, then relying on this to launch dismissal proceedings should be considered in such circumstances.

25. Another consideration is that at this point it should be possible for the review application to be quickly finalised given the most recent exchange of correspondence between the parties, and it would be not be in the interest of justice to deny the respondent the opportunity to ventilate its claim despite its previous conduct in the matter.

26. However, to dismiss the union's application, without trying to ensure that this matter is now brought to finality does not seem an appropriate outcome in the circumstances. Accordingly, as part of the Court's order certain directions are issued in the form of alternative relief.

Costs

27. The applicants' launching of the dismissal application was an understandable response to the employer's inactivity and even if it sought too achieve more than was possible, it was litigation prompted by the employer's abject failure to timeously take the necessary steps as *dominus litus* in the review proceedings. In the circumstances even though the application proved unsuccessful, this is one of those

occasions when it is appropriate for the successful party to pay the costs of the litigation it provoked by its own inertia.

Order

It is ordered that:

a) the third respondent's application to dismiss the applicant's review proceedings in this matter, is dismissed;

b) the applicant must pay the third respondent's costs of the dismissal application;

c) the parties are directed to endeavour to agree on a reconstructed record of the arbitration proceedings by 30 April 2010, failing which the applicant must serve and file its version of the reconstructed record, with any supporting documents by 15 May 2010, and the third and fourth respondents must either confirm the same in writing, or serve and file the details in respect of which they dispute the applicant's version of the record with any supporting documents, by 31 May 2010.

d) the registrar is directed to prioritise the enrolment of the review application after the above steps have been completed.

ROBERT LAGRANGE
ACTING JUDGE OF THE LABOUR COURT

Appearances:

For the applicant: Mr O Mooki
Attorneys: Verveen Attorneys

For the third and fourth respondents: Mr S Mathabathe
Attorneys: M M Baloyi Attorneys