IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH

CASE NO P479/2005

In the matter between:

SONTSHAPO SOLOMON SISHUBA **APPLICANT**

(First Respondent in the main application)

and

NATIONAL COMMISSIONER OF
THE SOUTH AFRICAN POLICE SERVICE **RESPONDENT**

(Applicant in the main application)

JUDGMENT

MOLAHLEHI AJ

Introduction

1] The applicant, who is the respondent in the main application for review, brought an application in terms of which he sought an order barring the respondent from taking any further step in the prosecution of the review application filed

under case number P479/2005. The applicant further sought to have the arbitration award issued under the same case number made an order of court. The applicant and the respondent are referred to as "employee" and the "employer" respectively in this judgment.

2] After his dismissal on the 12 August 2002, the employee referred the dispute concerning an unfair dismissal to the Safety and Security Sectoral Bargaining Council (SSSBC). The matter was referred to arbitration under the auspices of the SSSBC, conciliation having failed.

Background facts

3] On the 12 October 2005, the SSSBC issued an award in terms of which it ordered the employer to reinstate the employee effective from the 1st November 2005. The employer not being satisfied with the outcome filed an application to have the award reviewed and set aside.

4] Because of the delay in the prosecution of the review by the employer, the employee filed an application with this court to compel the employer to file the record of the proceedings in terms of rule 7A (8) of the rules of this court.

5] Arising from the application to compel was an agreement between the parties which was made an order of court. In terms of the order the employer was required to file the record and the rule 7A (8) notice, which was subsequently filed on the 31st August 2006.

6] The complaint of the employee is that the employer has been dilatory in that it did nothing since 31st August 2006, to prosecute the review to the next step. In this regard the employee contended that at the time of filing the record, 217 (two hundred and seven) calendar days had already passed since the filing of the review.

7] As stated earlier, the employee contended that the conduct of the employer exhibited a degree of neglect which warranted the barring of the respondent from taking any further step in the prosecution of the review application.

Legal principles

8] 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. The trend seems to be developing into a practice or a norm in cases involving reviews of arbitration awards.

9] While there is no rule that specifically address 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, administration of justice may dictate that if an applicant party unduly delays prosecuting its claim, and fails to provide acceptable reasons for the delay, the penalty may be that of dismissing the claim. See *National Union of Metal Workers of South Africa obo Nkuna & Others v Wilson Drills-N Bore (PTY.) LTD.T/A A & General Electrical-* unreported Case No J268/98, See *Mothibi v Western Vaal Metropolitan Substructure* (2000) 13 BLLR 85 (LC) and *NUMSA and Others v As Transmission and Sterling (Pty) Ltd* (1999) 12 BLLR 1237 (LAC) and *Molala v Minister of Law and Order and Another* 1993 (1) SA 673.

10] Inordinate delays in litigating protract the disputes, damage the interests of justice and prolong the uncertainty of those affected. The consequences that may

follow if an applicant fails to diligently pursue its claim, are dealt with in the case of *Bezuidenhout v Johnston No & Others* (2006) 27 ILJ 2337 (LC), where Stratford AJA in *Pathescope Union of SA Ltd v Mallinick* 1927 AD 292 is quoted in as having said:

> "*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 subveniunt...*"

The court went further to say:

> "*Where there has been undue delay in seeking relief, the court will not grant it when in its opinion it would be inequitable to do so after the lapse of time constituting the delay. And in forming an opinion as to the justice of granting the relief in face of the delay, the court can rest its refusal upon potential prejudice, and that prejudice need not be to the defendant in the action but to third parties.*"

11] The policy consideration that informs this approach was considered in

Mohlomi v Minister of Defense 1997 (1) SA 124 (CC), at 129H-130A, wherein Didcott J 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."*

12] There are two principal reasons why the court should have the power to dismiss a claim at the instance of an aggrieved party who has been guilty of unreasonable delay. The two reasons are cited in the case of *Radebe v Government of the Republic of SA & others* 1995 (3) SA 787 (NPD), as follows:

> "*The first is that unreasonable delay may cause prejudice to the other parties. Hanaker v Minister of the Interior 1965(1) SA 372 (C) at 380D; Wolgroeiers Afslaers (EDMS) Bpk v Munisipaliteit Kaapstad 1978 (1) SA 13 (A) at 41.* The second reason is that it is both desirable and important that finality should be reached within a reasonable time of judicial

administrative decisions. *Sampson v SA Railways and Habour 1933 CPD 335 at 338;* the *Wolgroeiers' case at 41D-E; cf Kingsborough Town Council v Thirlwell and Another 1957 (4) SA 533(N) at 538."*

13] The impact of delay in prosecuting cases was analyzed and looked at in a much more critical manner by Flemming DJP, as he then was, in the *Molala v Minister of Law and Order and Another* 1993 (1) SA 673. After assessing the approaches adopted by the various divisions of the High Court, the court found that in the Transvaal the approach followed was the one setout in the case of *Bernstein v Bernstein* 1948 (2) SA 205 (W) where the court 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 further agreed with the case of *Kuiper and 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."*

14] With regard to the approach adopted in *Kuiper's case*, the court found that because proving abuse of court process would be difficult, such an order would be a rarity. It would appear that the other divisions also accepted that the court had an

inherent discretion whether or not to allow the party guilty of delay to continue with its dispute but that such discretion was to be exercised sparingly.

15] In assessing the overall approach of how our system deals with delays, the court in *Molala's case* at 679D-F said:

> "*I should not refer to "system" but to the total lack in our system of attention to the effective counteracting of slackness. Our system leaves the defendant with three poor choices. One is to incur the costs of applications, perhaps not recoverable from the other party, in order to forge ahead with litigation started by a plaintiff who to all outward appearances shows clear signs of lack of interest in the whole business. The second alternative is to hope that the surrounding facts will develop sufficient cogency to enable him to convince the Court in a formal application, often also at the defendant's expense, that the plaintiff is abusing the Court process to an extent which warrants dismissal of the action.*"

16] The focal point in considering whether to grant the order barring the employer, in this case, from proceeding further with the review application is the issue of justice and fairness to both parties. The question that then arises is

whether the interest of the administration of justice in this instance dictates that the employer be barred from proceeding further with the review application.

17] Rule 7(6)(a) of the Labour Court Rules provides that the Registrar must allocate a date for the hearing once the time for delivering a replying affidavit has lapsed. Rule 18 of the Labour Court Rules provides that the court may at any time call on the parties to deliver heads of argument on the main point that they intend to argue. It is not undisputed that the Registrar, in this case did not allocate a date nor has the court called upon the parties to deliver their heads of argument.

18] 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 any 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 activating 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.

19] Having concluded that there is no rule prescribing the time within which

the heads of argument are to be filed, I do note that the employer is *dominus litus* and thus is obliged to ensure that the review progresses forward at every level of its prosecution. I have also taken into account the prospect of success as appears from the papers filed in this court.

20] In the circumstances of this case, I do not belief that a cost order would be appropriate.

21] The following order is made:

a. The application is dismissed.

b. There is no order as to costs.

c. The application to make the arbitration an order of court is stayed pending the outcome of the review application.

d. The Registrar is to prioritize the enrollment of the review application.

MOLAHLEHI AJ

DATE OF HEARING: **23 MARCH 2007**

Date of judgment: **24 May 2007**

APPEARANCES

FOR THE APPLICANT: **ADV P KROON**

INSTRUCTED BY: **WHEELDAN RUSHMERE & COLE**

FOR THE RESPONDENT: **ADV G H BLOEM**

INSTRUCTED BY: **STATE ATTORNEY**