REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 371/06

In the matter between:

FAWU **First applicant**

Anna TSHINITSHI and 23 others **Second to 25th applicants**

and

COUNTRY BIRD **Respondent**

Heard: **7 November 2011**

Delivered: **8 November 2011**

Summary: Points *in limine:* Prescription – jurisdiction – condonation.

JUDGMENT

STEENKAMP J

Introduction

1] This matter has been set down for trial from 7 to 9 November 2011. It concerns the dismissal of 24 members of FAWU, the first applicant, for participation in an unprotected strike. The strike dates back to January 2006, almost 6 years ago. The delay in getting to trial becomes pertinent in the context of a number of points *in limine* raised by the respondent ("the company ").

Preliminary points.

2] On 27 October 2011 – just more than a week before the matter was set down for trial – the company delivered an application in terms of rule 11. It prayed for the dismissal of the union's[1] claim on four grounds:

2.1 the union's claim has prescribed; alternatively

2.2 the union's excessive delay in the prosecution of claim is severely prejudicial to the applicant;

2.3 this court does not have jurisdiction to entertain the claims of the second to fifth applicants who were dismissed for being absent from duty without permission;

2.4 the union's statement of claim is late, and it only brought a condonation application five years after filing it.

3] I shall deal with each of these points in turn.

Prescription

4] The employees were dismissed on 30 January 2006, five years and nine months ago. The union referred an unfair dismissal dispute to the CCMA on 22 February 2006, within the 30 day period prescribed by section

1 I shall refer to the applicant at trial (the Food and Allied Workers' Union) as "the union" and to the respondent as "the company" in order to avoid confusion. The company is the applicant in the rule 11 application. The union acts on its own behalf and on behalf of 24 of its members who are cited as the second to 25th applicants.

191(1)(b)(i) of the LRA.[2] Conciliation was unsuccessful and, on 26 May 2006, the CCMA issued a certificate to that effect. The union delivered its statement of claim to the company on 7 August 2006. The company delivered its response on 22 August 2006. However, the union only filed its statement of claim at the Labour Court on 29 August 2006. That was about three days outside of the time period prescribed by section 191(11)(a) of the LRA. I will deal with that aspect under the heading of condonation.

5] The company's first complaint, though, is that the claim has prescribed. For this submission, it appears that Ms *Cheroux* relies on the provisions of s 11(d) of the Prescription Act.[3] In terms of that section, a debt is extinguished by prescription after three years.[4]

6] In *Mpanzama v Fidelity Guards Holdings (Pty) Ltd*[5] this court held that the Prescription Act applies to disputes arising from the LRA – in that case, section 143 read with section 158(1)(c) of the Labour Relations Act. Whatever the rationale may be for the doctrine of prescription or the limitation of actions, the court held, the Labour Relations Act compels the effective resolution of disputes (section 1(d)(iv) of the Labour Relations Act). This implies that labour disputes must be resolved or finalised expeditiously. For this reason too, it would not be inconsistent to apply the Prescription Act to sections 143 and 158(1)(c) of the Labour Relations Act.

7] In coming to that conclusion, Pillay J applied the provisions of s 11(d) of the Prescription Act. I agree with that reasoning.

8] What Ms *Cheroux* seems to have overlooked, though, are the provisions of s 15 of the Prescription Act. In terms of that section, the running of prescription is interrupted "...by the service on the debtor of any process whereby the creditor claims payment of the debt." And "process" is defined

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2 Labour Relations Act 66 of 1995.

3 Act 68 of 1969.

4 The exceptions outlined in the rest of that section do not apply to a claim for reinstatement or compensation arising from unfair dismissal in terms of the LRA.

5 [2000] 12 BLLR 1459 (LC) paras 9-10.

to include –

"...a notice of motion, a rule *nisi* ... and any document whereby legal proceedings are commenced."

9] The phrase "any document whereby legal proceedings are commenced" must surely include the delivery of a statement of claim in terms of rule 6 (read with s 191) of the LRA. And a claim for reinstatement or compensation in terms of the LRA must also be envisaged under the meaning of a "debt" in the Prescription Act. As Prof Max Loubser[6] has pointed out, the term 'debt' has a wide and general meaning and the three year prescription period in terms of s 11(d) of the Prescription Act applies to any liability of whatsoever kind, whether contractual, delictual or otherwise. Therefore, by referring the matter to the Labour Court and delivering a statement of claim in terms of rule 6, extinctive prescription of the union's claim was clearly interrupted in my view.

10] There is one other aspect. Section 17 of the Prescription Act specifies that prescription must be raised in the pleadings. In this case, the company did not raise the issue of prescription in its response, delivered in terms of rule 6(3) on 22 August 2006. It was raised for the first time on 27 October 2011, shortly before trial, in an application brought in terms of rule 11.

11] Rule 11 reads as follows:

"11. Interlocutory applications and procedures not specifically provided for in other rules.—

(1) The following applications must be brought on notice, supported by affidavit:

(*a*) Interlocutory applications;

(*b*) other applications incidental to, or pending, proceedings referred to in these rules that are not specifically provided for in the rules; and

(*c*) any other applications for directions that may be sought from the court.

(2) The requirements in subrule (1) that affidavits must be filed does not apply to

6 MM Loubser, *Extinctive Prescription* (Juta 1996) p 43.

applications that deal only with procedural aspects.

(3) If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems appropriate in the circumstances.

(4) In the exercise of its powers and in the performance of its functions, or in any incidental matter, the court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act.

12] The application to dismiss the union's claim was brought in terms of this rule. In considering its merits, I must act in a manner I consider expedient in the circumstances to achieve the objects of the Act, including expeditious dispute resolution.

13] Section 17(2) of the Prescription Act provides that:

"A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings: Provided that a court may allow prescription to be raised at any stage of the proceedings."

14] In terms of s 17(2) of the Prescription Act read with rule 11(4) of the Labour Court rules, I have considered it expedient to allow the question of prescription to be raised at this late stage. However, it does not have any merit, given that prescription was interrupted by the delivery of the statement of claim.

Excessive delay

15] In the alternative, Ms *Cheroux* submitted that the union's claim should in any event be dismissed because of the excessive delay from the time it delivered its statement of claim – ie August 2006 – until the matter now comes to trial in November 2011, five years later. In the interim, she says, some of the company's witnesses have left its employ; some can no longer be found; and in the event that the union is successful in its claim for retrospective reinstatement, it would have severe operational and financial consequences for the company.

16] At first blush, the company's argument appears to have merit. By analogy, the relevant principles governing this court's treatment of ongoing delays in conducting review proceedings have been set out by Molahlehi J in the case of *Sishuba v National Commissioner of the SA Police Service*[7] in which he stated:

'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.

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 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 Metalworkers of SA on behalf of Nkuna & others v Wilson Drills-Bore (Pty) Ltd t/a A & G Electrical* [(2007) 28 ILJ 2030 (LC)]. See *Mothibi v Western Vaal Metropolitan Substructure* [2000] 1 BLLR 85 (LC) and *NUMSA & others v AS Transmissions & Steerings (Pty) Ltd* (2000) 21 ILJ 327 (LAC); [1999] 12 BLLR 1237 (LAC) and *Molala v Minister of Law & Order & another* 1993 (1) SA 673 (T).

Inordinate delays in litigating protract disputes, damage the interests of justice and prolong the uncertainty of those affected. The consequences that may follow if an applicant fails diligently to 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 305 is quoted 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* ."

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7 (2007) 28 *ILJ* 2073 (LC) paras 8-16, cited with approval in *Moraka v National Bargaining Council for the Chemical Industry & others* (2011) 32 *ILJ* 667 (LC). See also *National Construction, Building & Allied Workers' Union and others v Springbok Box (Pty) Ltd t/a Summit Associated Industries* (2011) 32 *ILJ* 689 (LC).

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."

The policy consideration that informs this approach was considered in *Mohlomi v Minister of Defence*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."

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 (N), as follows:

"The first is that unreasonable delay may cause prejudice to other parties. *Harnaker 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 in respect of judicial and administrative decisions. *Sampson v SA* A *Railways and Harbours* 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."

The impact of delay in prosecuting cases was analysed and looked at in a much more critical manner by Flemming DJP, as he then was, in *Molala v Minister of Law & Order & another* 1993 (1) SA 673 (T). 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 set out 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 & 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".

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.

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."

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] In order to consider whether the union is to blame for the delay in prosecuting this matter and bringing it to trial, I have to consider the steps it has taken since delivering its statement of claim in August 2006. I will also consider the dicta of Molahlehi J in *Springbok Box*[8]. In that case, he dismissed a trade union's application for a declaratory order in these circumstances:

"The pleadings in this matter were closed on 31 January 2007. There is no evidence that the applicants have since then requested the registrar to have the matter set down for hearing. It was incumbent on the union to ensure

8 Supra fn 6 para [31].

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 21 July 2008, the registrar called for the parties to file heads of argument. The union filed its heads of argument on 2 June 2009, a period of delay amounting to 11 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 it that the delay would result in serious prejudice to the employer."

18] In the present case, the company delivered its response in terms of rule 6(3) on 22 August 2006. The very next day, on 23 August 2006, the union sent it a letter proposing that the parties meet for a pre-trial conference on 29 September 2006. The company did not respond.

19] It is not clear whether either of the parties took any further steps until the matter was set down for a pre-trial conference at the Labour Court on 26 March 2007. However, the company asked that the pre-trial conference be postponed and noted that "the parties will agree on a date for filing of minutes."

20] On 28 February 2008, the union wrote to the company again. The legal officer, Mr JS Sondiyazi, noted the following:

"You will remember that I wrote you a fax in which I was requesting a meeting for the purpose of completing the pre-trial conference minutes. Further, you will note that you failed to respond to such request, nevertheless the Labour Court set down the proceedings for such conference, in which your representative requested a postponement.

It is almost a year since I have furnished your representative with a draft of the minutes. There is no comment and such is viewed as deliberately delaying this matter.

In the circumstances I attach for your convenience the new draft of conference minutes of which I want you to peruse and comment. If I do not hear from you and or your representative within a week of receipt of this fax I will apply to the court for set down of pre-trial."

21] Despite this plea, the company still did nothing. Eventually, on 17 September 2008, the union wrote to it again. By now, the Labour Court

had again set the matter down for a pre-trial conference before a judge scheduled for 21 October 2008. The union's Mr Sondiyazi wrote as follows:

"I refer to my correspondence dated 28 February 2008 in which I reminded you that I have requested a pre-trial conference meeting and that you have failed to such request despite the Labour Court setting down the matter for hearing and that your representative requested a postponement of such proceedings.

Further I also attached to my correspondence another draft of pre-trial conference minutes. Up to date I did not receive any response.

You will note that this matter has been set down for pre-trial on 21 October 2008 at Labour Court Cape Town and we can only be excused by the court if we can file the minutes two clear days prior to the date of hearing before the judge.

…

Therefore you are requested to peruse the attached draft minutes and revert to me as a matter of urgency for purposes of finalising the minutes. Also attached is the court set down."

22] On 16 October 2008, a few days before the pre-trial meeting was to be held at the Labour Court, the company's employer's association, the South African United Commercial and Allied Employers' Organisation, eventually responded on its behalf and attached a draft pre-trial minute. The signed pre-trial minute was eventually filed at the Labour Court on 21 October 2008.

23] About two weeks later, on 4 November 2008, Francis J issued a directive in terms of rule 6(5)(a), directing the registrar set the matter down for trial.

24] Despite this directive, the notice of set down for the trial to commence on 7 November 2011 was only sent to the parties on 24 June 2011. It is not clear from the court file or from the evidence before me what occasioned this delay. I must accept, though, that it appears to be due to the registrar of the court and not to any further delay by the union.

25] In the period from August 2006 to October 2008, the delay in ensuring that

a pre-trial minute was filed in terms of rule 6(4) can be attributed mainly to the company and its employer's organisation. One could, in hindsight, argue that the union should have done even more to spur the company into action; but in circumstances where the company and its employer's organisation simply ignored at least four attempts by the union to convene a pre-trial conference, it does not lie in the mouth of the company to blame the union for the delay.

26] The further delay of three years from November 2008 to November 2011 appears to be attributable to the "systemic delays" that have plagued this court for a number of years. (I should add that most of those delays have been addressed, *inter alia* by appointing more permanent judges to the court in the last two years, and delays such as this is nowadays the unhappy exception). The only criticism of the union can be that it did not press the registrar to set the matter down for hearing. However, I would not consider it fair to non-suit the employees because of a delay attributable to the court's functionaries and not to the employees or their union.

27] In these circumstances, the application to dismiss the claim due to the extensive delay cannot succeed.

Jurisdiction: second to fifth applicants

28] The next point *in limine* raised by Ms *Cheroux* is that the court has no jurisdiction to entertain the claim by the second to fifth applicants, viz

28.1 Anna Tshintshi;

28.2 Lena Monemi;

28.3 Moses September; and

28.4 Dennis Ramafikeng.

29] It is common cause that the sixth to 25th applicants were dismissed for their participation in an unprotected strike on 16 January 2006. With regard to the second to fifth applicants, though, it was recorded in the pre-

trial minute that they were dismissed for being absent from duty without permission for the period of 17 to 30 January 2006. Therefore, said Ms *Cheroux*, the court lacked jurisdiction to entertain their dismissal dispute, as it relates to misconduct which does not resort under section 191(5)(b)(iii) of the LRA.

30] Despite the assertion to the contrary in the pre-trial minute, there does appear to be some confusion as to the reason for the dismissal of these four employees. In a letter sent to the union by the company with the heading, "Namelist of FAWU members participated [sic] in illegal strike action on 16 January 2000", the names of those four employees are included.

31] In these circumstances, I asked the parties to consider whether I should not hear the evidence with regard to the reason for the dismissal of these four employees; and if it should appear that the dispute should have been referred to arbitration, whether it would not be more expeditious and less costly for the parties if this court were to continue sitting as an arbitrator in order to decide on their claim, in terms of s 158(2)(b) of the LRA. Ms *Cheroux* readily conceded that such a course of action would be more sensible and the parties therefore gave the necessary consent as contemplated in that subsection.

Condonation

32] That brings me to the remaining preliminary point, i.e. the question of condonation for the late filing of the statement of claim. In considering the union's application for condonation, I will apply the well-known principles set out in *Melane v Santam Insurance Co Ltd.*[9]

Extent of the delay

33] On the union's calculations, the statement of claim was filed at the Labour Court three days out of time. The company says it was five days. On either version, the delay is not excessive.

9 1962 (4) SA 531 (A).

34] The other significant factor is that the statement of claim was served on the company well within the prescribed time period. In terms of section 191(11)(a), the dispute had to be referred to the Labour Court within 90 days after the CCMA had certified that the dispute remains unresolved; and in terms of section 191(5)(b) the court may condone non-observance of that timeframe on good cause shown.

35] The referral is governed by rule 6. In terms of rule 6(1)(f) the statement of claim must "be delivered". And "deliver" means "serve on other parties and file with the registrar".[10]

36] In this case, the union served its statement of case on time. It filed it with the registrar, at most, five days out of time. It is not an unreasonable delay.

Reasons for late filing

37] The union's administrator in Bloemfontein erroneously sent the statement of claim to its head office in Cape Town, instead of the Labour Court. When its legal officer, Mr Sondiyazi, realise the mistake, he rectified it immediately. At that stage, the company had already delivered its response.

38] Although the administrator was negligent, the legal officer was not. There is no prejudice to the company. Considered together with the short period of strict non-compliance, the reason for late filing is acceptable.

Prospects of success

39] This matter has been set down at trial. At this stage, I can only consider the pleadings, together with the affidavit in support of the application for condonation. I do not have the benefit of extensive affidavits setting out the full evidence to be led at trial. On the facts set out in the pleadings, the affidavit and the pre-trial minute, though, the union and its members have at least some prospects of success. Even though it is common cause that

10 Rule 1.

the employees participated in an unprotected strike, that is not in itself sufficient reason for dismissal. The allegations by the union – such as an inadequate ultimatum and provocation by the company – can only be considered after I had heard the evidence. At this stage, on a full conspectus of all the factors – especially the short delay and the absence of prejudice to the company – I consider the prospects of success at trial to be sufficient so as to give the employees an opportunity to pursue their claim.

40] The remaining issue raised by Ms *Cheroux* is that the application for condonation was itself only delivered a few days before trial. For this, the union can and should be criticised; however, the company did not raise the issue of condonation at any stage until it brought the current application in terms of rule 11. Even when the parties signed an agreed pre-trial minute in October 2008, the parties specifically noted that there were no preliminary points to be decided. The belated application for condonation has caused the company no prejudice.

Importance of the case

41] It is self-evident that the case is important to the employees. That is usually the case for any dismissed employee. In this case, though, a large number of 24 employees are affected. The case has added importance because it deals with the question of the circumstances in which dismissal for participation in an unprotected strike can be held to be fair.

42] For all of these reasons, condonation for the late filing of the statement of case is granted.

Conclusion

43] In conclusion, I rule as follows with regard to the points in limine:

43.1 The company's application in terms of rule 11 is dismissed.

43.2 The union's application for condonation is granted.

43.3 The costs relating to the preliminary points are to be costs in the cause of the trial.

A J Steenkamp
Judge

APPEARANCES

APPLICANTS:	Attorney MJ Ponoane, Bloemfontein.
RESPONDENT:	Ms L Cheroux Instructed by Yusuf Nagdee, Johannesburg.