



**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN**

**JUDGMENT**

Case no: C148/2013

Not Reportable

In the matter between:

**POPCRU obo VINCENT NYANISO SONTLABA**

**Applicant**

and

**THE NATIONAL COMMISSIONER OF  
THE SOUTH AFRICAN POLICE SERVICE  
MARTINUS CHRISTOFFEL VAN AARDE N.O.  
SAFETY & SECURITY SECTORAL BARGAINING COUNCIL**

**First Respondent  
Second Respondent  
Third Respondent**

**Heard: 5 May 2016**

**Delivered: 27 October 2016**

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## JUDGMENT

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RABKIN-NAICKER, J

- [1] This is an opposed application to dismiss a review application under the above case number. The review application was filed by the SAPS on the 5 March 2013 in respect of an award issued on the 2 October 2012.
- [2] The SAPS subsequently filed its Notice of Compliance in terms of Rule 7A (2) (b) at court but did not serve same on the applicant. Approximately 13 months then elapsed during which SAPS failed to take further steps to prosecute the review.
- [3] On 2 May 2014 applicant's attorneys of record wrote to the SAPS legal representatives informing them that:
- 3.1 Their review was materially defective as it failed to call upon the Third Respondent to dispatch the record of the proceedings to the registrar in terms of Rule 7A (2) of the Rules;
  - 3.2 SAPS had failed to furnish the registrar and the first, second and third respondent with a copy of the record in terms of Rule &A (6) of the Rules of the Labour Court; and
  - 3.3 That failure to adhere to the requests to file the record would result in the lodging of an application to compel.
- [4] The applicant eventually itself lodged an application to compel which was opposed by the SAPS. When the matter came to the Labour Court on the 17 October 2014, the parties were granted an order by agreement as follows:

- “1. That the parties shall meet within 30 (thirty) days of date of this order to reconstruct the record;
2. That the reconstructed record will be filed with the Registrar of Court within 60 (sixty) days of this order.
3. That costs will stand over for later determination.”

[5] The parties held a round table conference at the office of the State Attorney on 31 March 2015 to give effect to the court order. The state attorney had no documents that could be used for the reconstruction of the record and requested time to try and trace more documents. It appears from a letter annexed to the founding papers that the state attorney wrote to the third respondent on the 8 April 2015 requesting that it re-send the record of the proceedings stating that “We have inspected the court file and have found no cd or handwritten notes.”

[6] Another letter was sent by the State Attorney on the 23 July 2015 to which the third respondent replied stating as follows:

“Please note that the following records regarding the above mentioned matter (C148/2013) were filed at the Labour Court in Cape Town on the 8 April 2013:

- Copy of the SSSBC file
- Bundle of documents
- Arbitrator's handwritten notes, and
- CD x 1

Attached is the Index and the courier slip from Postnet to show that what we file the above mentioned records at the Labour Court.

Kindly also note that the SSBC is not in possession of any other records of proceedings on this matter as we have submitted all the records that were forwarded to us by the arbitrator..”

[7] According to the applicant herein the SAPS then threatened to apply to compel the third respondent to provide the record but did not take any steps to do so.

[8] In the answering papers filed in this application it is worth recording the following averments on behalf of the SAPS:

“12. This is not a case where the applicant<sup>1</sup> can be accused of being dilatory, as will become clearer below, the applicant took active steps to prosecute the review. At first blush, the overall view of the three year period may seem long, however, a close examination of the sequence of events that took place over this period reveals a different picture. The applicant did not adopt a passive attitude in prosecuting the review but sent regular reminders to the Bargaining Council. The debacle with the record of the proceedings was beyond the control of the applicant.

13. Alternatively, in the event that this court finds that there has been a delay in prosecuting the review, it is not the extent that the review may be dismissed. I submit that the applicant is not the sole party to Blame. In arriving at this conclusion the court is obliged to examine the extent to which the First Respondent's<sup>2</sup> inaction contributed to the delay.”

[9] SAPS also submits that the period relevant to this application is from the period 13 March 2015 when the consent order was granted, to the date on which the application to dismiss was filed 21 January 2015.

[10] It appears that the deponent for APS, although assisted in his legal submissions by counsel, has not appreciated the role of a dominus litis i.e. that as the applicant in the review application, SAPS is master of the process it has initiated. In addition the answering affidavit makes no specific allegations supporting the “Blame” to be laid at the door of the applicant *in casu*, which SAPS suggest this court “is obliged” to consider.

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<sup>1</sup> i.e. SAPS, the applicant in the review

<sup>2</sup> i.e. Pppcru obo V.N. Sontlaba

[11] I am also of the view that there is no legal basis for the submission that the material period the court is to consider dates from the court order dated 17 September 2014. The SAPS had, as dominus litus, opposed an application to compel the production of the record in order for the review application to proceed. Extraordinary as this is, the parties then agreed to reconstruct the record. The agreement is contained in the order and has no wider import than its clear wording. It did not change the date on which the application to review the award was launched nor did it affect the period I must consider regarding the time taken in prosecuting the review. The period is thus an excessive delay of some three years.

[12] The law as set out in the matter of *Karan t/a Karan Beef Feedlot & another v Randall*<sup>3</sup> applies:

“[14] In summary: despite the fact that the rules of this court make no specific provision for an application to dismiss a claim on account of the delay in its prosecution, the court has a discretion to grant an order to dismiss a claim on account of an unreasonable delay in pursuing it. In the exercise of its discretion, the court ought to consider three factors:

- the length of the delay;
- the explanation for the delay; and
- the effect of the delay on the other party and the prejudice that that party will suffer should the claim not be dismissed.

This is subject to the consideration that an application to dismiss is a drastic remedy, and should not be granted unless the dilatory party has been placed on terms, and when appropriate, after any further steps as may have been available to the aggrieved party to bring the matter to finality have been taken. “

[13] It is evident that the length of the delay and the explanation by the SAPS do not assist its case. The prejudice it will suffer should this application be granted is

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<sup>3</sup> (2009) 30 ILJ 2937 (LC)

limited to a situation where the main dispute between the parties will go to a condonation hearing at the bargaining council. I am not required to consider the merits of the review application in exercising my discretion in this matter. However, I note that the review is not properly before court as condonation has not been granted for its late filing.

[14] In all the above circumstances, and taking into account the ongoing relationship between the applicant union and SAPS, I make the following order:

Order

1. The review application under case number C148/2013 is dismissed.
2. There is no order as to costs.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant in the application to dismiss: K. Allen instructed by Sontlaba Attorneys

First Respondent: A.I.B Lechwano instructed by the State Attorney Kimberley.