IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C375 &539 /2017 (2)

In the matter between

STANLEY MAX ROGOW	1st Applicant
RAYMOND ALEXANDER AITCHISON	2nd Applicant
ERIK-OTTO-MARIA APPELBOOM	3rd Applicant
BRETT RUSSEL BALDWIN	4th Applicant
ALEXANDER REID BREMNER	5th Applicant
THERESA BUCHREITER	6th Applicant
PETER JACOBUS BOONZAAIER	7th Applicant
JOHN HORAN	8th Applicant
DENNIS PATRICK JORDAN	9th Applicant
ELIZABETH ANN MAY	10th Applicant
PETER COLIN McCARTHY	11th Applicant
SIVAPRAKASAN NAICKER	12th Applicant
ABRAHAM JOHANNES HENDRIKUS REIJNDERS	13th Applicant
IAN GEORGE SIDDALL	14th Applicant
SOOBRAMONEY MADURAY	15th Applicant
DAVID JOHN SPEIRS	16th Applicant
LEONARDUS CORNELIUS VAN ONSELEN	17th Applicant
PETER JOHN WAKES	18th Applicant
ROGER MICHAEL WALTON	19th Applicant

PETER LEONARD WATSON	20th Applicant
ERNEST FREDERICK WILLIAMS	21st Applicant
STUART CHARLES	22nd Applicant
KUBENTHIRAN GOVENDER	23rd Applicant
PREEYEVRUTH DEOCHANDER ISSERI	24th Applicant
KRISHNA NAIDOO	25th Applicant
DAVID ALAN OGG	26th Applicant
and	
SUN CHEMICAL SOUTH AFRICA (PTY) LIMITED	Respondent

Heard: September 7 2022

Delivered: January 19 2023 by means of email to the parties. The Judgment is deemed received by 10.00hr on January 20 2023.

JUDGMENT

RABKIN-NAICKER J

[1] The respondent company has brought two applications to dismiss before me. I deal with that under case C375/2017 at the outset. This involved a 'semi-urgent application' which the applicants have not prosecuted for a period of over five years.

[2] Their application sought to interdict an event which on their own version, would have already taken place, before the application could have been heard. In addition, the applicants proceeded to disregard a Directive by the Judge President to file an affidavit setting out, *inter alia*, whether the conduct of the applicants' legal representatives amounted to unethical conduct, and whether fees paid to them stood to be recovered. A letter was filed in place of an affidavit. The content of this letter cannot be considered as an answer to the said Directive.

[3] The respondent relies on the prejudice occasioned by the fact that this application has never been withdrawn by the applicants in that the company has had to reflect it in a special entry in its audited financial statements, as pending litigation. This it submits is a matter of concern to its management and international investors. Before bringing the application to dismiss, the respondent requested the applicants to remove the semi-urgent application from the roll and tender costs. This was never done. It was submitted on behalf of the applicants that it is perplexing as to why the respondent has brought this application. I disagree. The respondent is entitled to have finality in this matter, and to seek an appropriate costs order.

[4] The costs order I shall make in respect of C375/2017 reflects that I am satisfied that there has been negligence to a serious degree by applicants' attorneys which warrants an order of costs *de bonis propriis* being made, as a mark of the court's displeasure. In exercising my discretion in this respect, I am of the view that this order should not be, in addition, on an attorney and own clients scale, as sought by the respondent company. It is trite that the scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible conduct.

[5] In so far as the dismissal of the action under case number C539/2017 is concerned, the respondent company submits that the action is still pending because the applicants have consistently evaded, delayed and obstructed at every step of the litigation, and have refused to do the necessary in order to have the matter set down. There is also a condonation application before me in respect of the late filing of confirmatory affidavits by the individual applicants which condonation application was opposed. Such opposition was not vigorously pursued in argument before me and I grant condonation for the late filing of same.

[6] An exception to the statement of claim in the action was heard by this Court and a judgment handed down in which the entire statement of claim was struck out. The respondent relies on the exception and ancillary applications to submit that this is an example of the mockery of court process which should be taken into account

for the purposes of the application to dismiss. I am however in agreement with Mr Leslie for the applicants that these issues have been dealt with in my earlier judgment and costs order and should not be revisited.

[7] In what is described by respondent as a tactic by the applicants' attorneys to obstruct the trial readiness of the action, there has been a long period during which the applicants' attorneys have failed to sign and file the pre-trial minute. On the 15 January 2019, the respondent called for a pre-trial conference. Over a month later on 22 February 2019, applicants' attorney indicated that they would respond to the letter on that same day. The first draft of the pre-trial minute was only sent on 7 March 2019.

[8] The respondent underlines that it sent a response to the pre-trial minute on the 15 March 2019 containing proposed changes. Nothing was heard for two months, and the respondent again urged the applicants to respond. It was only on the 17 May 2019 that they did. There followed a delay until 27 June 2019 when the applicants sent an amended version to the respondent. On 31 July 2019, the respondent suggested that given the extent of issues in dispute a telephonic pre-trial conference should be held. Attempts were made to arrange a date with applicants' attorneys during August and September 2019 but, it is averred, the appointments made were cancelled. The conference was eventually held on 21 October 2019 over nine months after the respondent had first asked for a pre-trial conference.

[9] The draft pre-trial minute was sent to the respondent on 28 October 2019 which according to the respondent required correcting. The 'corrected' minute was then sent to the applicants on 30 October 2019 for signing. Only after four reminders and on 4 February 2020, did the applicants' attorney react and that was to ask for information regarding whether one of the applicants had retired. At the time of instituting the application to dismiss on the 18 March 2021, the pre-trial minute was not yet signed.

[10] It was submitted by Mr Bishop for the respondent that the above points persuasively to a conclusion that the applicants have no intention of bringing their action to finality and are instead employing this litigation as a tool to delay and

evade its finality in perpetuity. The result is insurmountable prejudice to the respondent it is argued. The issue of the need to keep a special entry in its audited financial accounts pertaining to the pending litigation is raised once more.

[11] For the applicants, Mr Leslie argued that while the delay in the finalisation of the pre-trial minute is unreasonable, it is not without mitigation. The pre-trial minute could not simply be signed on the 30 October 2019 as the changes made to it by respondent had to be considered and, in addition further changes were necessitated because several of the applicants had passed away or subsequently retired from respondent's service. It is further submitted that a large part of the delay took place during the Covid epidemic and the disruptive effective of this should be taken into account. It was argued that the individual applicants, most of whom are elderly and reside across the country, are not themselves to blame. Much was made of the inability of several of them to communicate over virtual platforms with the first applicant who has performed the function of liaising with them.

[12] Mr Leslie referred the Court to correspondence dated 15 February 2019 that reflects that respondent's attorneys were well aware of the remedy of utilising Rule 6(5) of the Labour Court to have the file placed before a Judge in Chambers in order to ensure the finalisation of the pre-trial minute, before resorting to seeking the dismissal of the action.

[13] On the issue of prejudice, it was argued that the keeping of a special note in its financial statements could not be characterised as a cognisable prejudice. The respondents have not suggested that relevant witnesses are not available due to the delay. Mr Leslie submitted that the prejudice to the applicants should the action be dismissed far outweighs any prejudice to the respondent should the action proceed. The applicants would be deprived of having the merits of their contractual claim for post-retirement medical aid benefits adjudicated. Further, he submits, there is clearly a bona fide contractual claim to answer in the action given that it is common cause that the respondent unilaterally diminished the applicants' post-retirement medical aid benefits, with effect from July 2017.

[14] It is trite that dismissal of the action would be a drastic remedy for the Court to order. In addition, to the stated prejudice it has suffered, the respondent company relies on the what it terms an abuse of process by the applicants. The long standing authority of Goldberg v Goldberg[1] is apposite to revisit. In that matter the Court found that in the exercise of its inherent power to regulate its own proceedings, the High Court may decline to hear a matter which constitutes an abuse of process which would include instances where the High Court's process has been used for a purpose for which it was not intended, or designed to the potential prejudice of the other party.

[15] The respondent has sought to submit that "the evidence points persuasively to a balance in its favour that the correct conclusion to be drawn from the behaviour of the applicants is that they have no intention of bringing this action of theirs to finality and are, instead, employing this litigation of theirs as a tool to delay and evade its finality in perpetuity."

[16] In *MEC Department of Cooperative Governance & Traditional Affairs v Maphanga*[2], the SCA held that proceedings were an abuse of process if they were obviously unsustainable as a certainty, and not merely on a preponderance of probability. Courts have to proceed cautiously and could only in clear cases make orders prohibiting proceedings on this basis.[3]

[17] In the Court's view the delay in the prosecution of this contractual claim is not due to an abuse of process by the individual applicants who have an obvious interest in the finality of the litigation. I am also of the view that the prejudice to the respondent occasioned by the delay is not insurmountable. I note too that had the respondent sought that the trial file be placed before a judge for directions on the finalisation of the pre-trial minute, the Court would have handed down an Order and/or Directions in respect of the filing of the pre-trial minute. The delay in prosecution of the proceedings does not amount to an abuse of process by the

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[1] 1938 WLD at 85-86
[2] 2021 (4) SA 131 (SCA)
[3] At paragraph 27

individual applicants. I am also of the view that the interests of justice require that the action be heard on the merits.

[18] In as far as a costs order in respect of the application to dismiss under case number C539/17, I am of the view that these costs should be stood over for determination by the trial Court in the main action. I do not therefore express an opinion on the appropriate costs order. My order also puts the applicants to terms in regard to filing the Pre-Trial Minute as further delays cannot be tolerated.

[19] In all the circumstances I make the following orders:

Order in respect of C375/2017

1. The Rule 11 application brought by the Respondent is granted.
2. The attorneys for the Applicants, Herold Gie Incorporated, are to pay costs of the application, *de bonis propriis*.

Order in respect of C539/2017

1. The Rule 11 application brought by the Respondent is dismissed.
2. Costs of the application are to be determined by the trial Court.
3. The applicants in the main action are to ensure that a signed copy of the pre-trial minute is filed at Court within 10 days of the date of receipt of this Order failing which the respondent may apply for the dismissal of the action on an unopposed basis on these papers duly supplemented.

H Rabkin-Naicker

H. Rabkin-Naicker

Judge of the Labour Court

Appearances

Applicants: Graham Leslie SC instructed by Herold Gie Attorneys
Respondent: Anthony Bishop instructed by Merlish Haripal Attorneys