REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D 477/09

In the matter between:

VISHRAM RAMPHAL **Applicant**

And

KAREN CHARLES **First Respondent**

MEIBC **Second Respondent**

HULAMIN LTD **Third Respondent**

Heard: **9 March 2012**
Delivered: **13 March 2012**

JUDGMENT

VAN NIEKERK J

[1] This is an application filed by the third respondent to dismiss an application for review filed by the applicant in respect of an arbitration award made by the first respondent on 14 May 2009. Prior to the hearing application, the applicant withdrew the review application without any tender of costs, with the consequence that the parties presented argument only in relation to the issue of costs.

[2] I do not intend to burden this judgment with a recitation of the facts – the material facts are not in dispute and are recorded in the papers. It suffices to say that the application was dismissed in March 2008. The first respondent upheld his dismissal. The application for review was filed on 30 June 2009, in which the applicant challenged the award in a number of respects. The basis for the application to dismiss is that the applicant had failed to prosecute the review application with the required degree of diligence and in particular, that he failed to take effective steps to reconstruct missing portions of the record of the arbitration proceedings. It is not disputed that the tape recordings of the proceedings on 20 And 21 January 2009 are missing. This state of affairs was established in or about August 2009. On 2 November 2009, in response to a letter from the applicant's attorneys, the second respondent advised that it was unable to locate the tapes concerned. This was confirmed in mid-January 2010. There was an exchange of correspondence regarding the missing record, in which the third respondent's attorneys expressed their dissatisfaction at the lack of any progress in the matter. In August 2010, the third respondent's attorneys again complained about the lack of progress, and indicated that unless further steps were in respect of the review application, an application to dismiss would be filed. Arrangements were then made for a meeting to attempt a reconstruction of the record. A meeting took place during which the first respondent was contacted to ascertain whether she had any notes that might assist in a reconstruction of the record. It was also agreed that the third respondent's attorney would transcribe his notes of the proceedings. These were sent on 2 November 2010. Nothing further was done by the applicant's attorneys and on 15 December 2010, the third respondent's attorneys again complained that no further steps regarding the reconstruction of the record had been taken. The third respondent's attorneys contacted the second respondent on 4 January 2011 to confirm that the first respondent's handwritten notes had been despatched to the applicant's attorneys of record. Since then, no further steps were taken by the applicant to reconstruct and finalise the record.

[3] The applicant's case is that he could not file the record in the absence of the missing tapes, and thus that he .cannot be blamed for the failure to file a complete record. The third respondent contends that it is entitled to costs on account of the applicant's failure to prosecute the review with due diligence. In particular, when the second respondent indicated unequivocally in February 2010 that the record was missing, the applicant's attorneys of record took in further steps to prosecute the matter until the third respondent's attorneys were constrained in July 2010 to threaten an application to dismiss. This letter was sent some seven months after it had became apparent to the applicant's attorneys that the recordings for 20 and 21 January 2009 were missing.

[4] The discretion to make an order for costs is broad (see s 162 of the LRA) and must necessarily account for the requirements of law and fairness. The starting point is that the application to dismiss has become academic by virtue of the withdrawal of that application. The general rule is that a litigant who withdraws an action has the consequence that the other party is entitled to its costs unless there are sound reasons to the contrary (see *Germishuys v Douglas Besproeingsraad* 1973 (3) SA 299 (NC)). Although as I understand the third respondent, it does not seek the costs of the review application, the applicant's liability for the costs of the application to dismiss must necessarily be viewed in a context that accounts for the withdrawal of the application for review, without a tender for costs. I am persuaded that the applicant was less than diligent in the prosecution of the review application, and that he application to dismiss was a justifiable response by the third applicant, which had clearly been frustrated by the applicant's lack of diligence. Although the Rules establish no time limit for the filing of a record, an applicant in a review application is required to act diligently and with due expeditiousness in obtaining and transcribing the record, and attending to its service and filing. It is regrettably not uncommon, as occurred in the present instance, for tapes to go missing, and for a record to be incomplete, in whole or in part, for that reason. This court has held that in those circumstances, it is incumbent on the parties to attempt a reconstruction of the record.

[5] In the present instance, the running was done by the third respondent's attorney. The applicant's attorneys failed, as they were required to do, to take any initiative to in relation to the reconstruction of the record. Such actions as there were on account of complaints by the third respondent's attorneys and threats to file an application to dismiss. Even when the application to dismiss was filed, the applicant was content to oppose the application rather than seek consensus with the third respondent on how matters could be taken forward. It does not help the applicant to say given the pattern of inactivity on his part that the failure to file a record is solely the fault of the first or second respondent. The applicant must accept some blame for his dilatory conduct and that of his attorneys.

[6] In all the circumstances, I am satisfied that an order to the effect that the applicant bear 50% of the costs of the application to dismiss will satisfy the requirements of the law and fairness. To be clear, that liability extends to 50% of the costs of this application.

[7] I accordingly make the following order:

1. The applicant is to pay 50% of the costs of the application to dismiss the application for review, such costs to include the costs of the opposed application argued on 9 March 2012. .

_____

Van Niekerk J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: P Blomkamp, instructed by Govidasamy & Pillay

THIRD RESPONDENT: I Lawrence Edward Nathan Sonnenbergs