IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JR2113/05

In the matter between:

NATIONAL UNION OF METAL WORKERS OBO WITBANK NTOBENG & 5 OTHERS **Applicant**

And

WITBANK FOUNDRY **1ST Respondent**

METAL AND ENGINEERING INDUSTRY BARGAINING COUNCIL **2nd Respondent**

D G LEVY N O **3RD Respondent**

JUDGMENT

MOLAHLEHI J
Introduction

1] This is an interlocutory application in terms of which the applicant, National Union of Metal Workers of AA (NUMSA), the third

respondent in the main application, seeks an order dismissing the review application filed by the first respondent, the applicant in the main application, under case number JR 2113/05. The application to dismiss is based on the complaint that the first respondent has failed to prosecute its review application timeously.

2] The applicant also sought an order to make the arbitration award, issued under case number MEGA 6877 and dated 26 July 2005, made an order of court.

Back ground facts

3] The first respondent has foundry business which it runs through receiving orders from customers. According to the first respondent, during December 2004 one of its customers placed an order and required its delivery before the 20 December 2004. Because of this order the first respondent required the further applicants who were about to go on their annual leave to report for work on 17, 18, and 20 December 2004. The further applicants failed to report for work on those days. They were charged and dismissed for disobeying a lawful instruction.

4] The first and further applicants referred an unfair dismissal dispute to the second respondent after their dismissal by the first respondent. That dispute was referred to the arbitration following

the failure to reach consensus at the conciliation hearing.

5] The arbitrator found that in terms of clause 12 (3) (g) of the bargaining council main agreement, an employer is obliged to grant leave to employee within four months of its due date. The arbitrator found that the first respondent had no right to unilaterally revoke their three days leave which had already been agreed upon. It was for this reason that the arbitrator found the dismissal of the further applicants to have been unfair and ordered their reinstatement with compensation.

6] The first respondent instituted the review proceedings on the 22nd September 2005, in terms of which he challenged the finding of the commissioner. The first respondent challenged the arbitration award on the following grounds:

> "Whether the Second Respondent's award and conclusion that the Applicants alleged undertaking to do the work themselves, ***convined*** *the Third Respondent's members not to delay their leave was reasonable justifiable to in relation to the evidence before them (sic).*

Whether the Second Respondent's conclusion that the instruction given by the Applicant to the Third Respondents members was a legal instruction that was disobeyed by the Third Respondent's members

work for the Second Respondent's the finding that aforementioned did not comply with a legal instruction, was reasonably justified in relation to the evidence before him.

Whether the Second Respondent's finding that the Third Respondent's member's dismissal was substantively unfair was reasonably justified in relation to the evidence before him".

7] Subsequent to receiving the notice of intention to oppose the review application, the first respondent addressed a letter dated 11 May 2006 to the first applicant requiring proof that it had the authority to act on behalf of the further applicants. The first applicant indicated in its reply that it did not understand the first respondent's question.

8] On the 11th July 2006, the first applicant addressed a letter dated 11th July 2006 in which it indicated that the first respondent has failed to expeditiously prosecute its review application and that it (the first applicant) intended taking further steps in this regard.

9] The application to dismiss the first respondent's application to

review and set aside the award was served on the 16th May 2007. However, despite the direction that those of the respondents who wished to oppose the application should do so within 10 (ten) days, the first respondent's answering affidavit was filed on the 22nd June 2007, and some 27 days outside the prescribed time limit. The first respondent has not filed a condonation application explaining this delay.

10] In its answering affidavit the first respondent indicates that notice in terms of rule 7A never came to its attention and that is why on the 24th November 2006, it addressed a letter to the second respondent requiring it to deliver the records of the proceedings.

11] On the 14th March 2007, the first respondent's attorneys received the letter from their correspondent advising as follows:

> "We refer to the above matter and the letter dated 14*th March 2007.*
>
> *Kindly advise that we attend the Labour court on the 14th March 2007, to uplift the envelope filed by the Metal and*

Engineering Industries Bargaining Council (MEIBC). Please be advised that the only document in the envelope was a Notice of Filling in Compliance with Rule 7A (2) (b), 7A (3) & 7(9), a copy of which is charged here to for your records. They (sic) were also 2 (two) tapes in the envelope which were taken to Lubbe & Meitjies for purposes of or obtaining the quotation. We trust you find the above in order now we see the instructions.

Yours faithfully".

12]The applicants contended that the second respondent filed a notice in terms of rule 7A (3) and 7A (9) of the rules of the Labour Court on the 22nd September 2005, and since then the first respondent failed to file the record of the arbitration hearing with the court.

Evaluation

13]It as already been indicated that the first respondent filed its review application on the 6th September 2005. The bargaining council filed a notice in terms of rule 7A (2) (b), 7A (3) and 7(9) on the 22nd September 2005. At the time of hearing this application the first respondent had not over a period of approximately 22 (twenty

two) month taken any serious step to ensure that its review application is prosecuted to finality.

14]It has been accepted that inordinate delays in prosecuting review to finality, protract disputes, damage the interest of justice and prolong the uncertainty of those affected by the delay. See **Sontshabo Solomon Sishuba v National Commissioner of Police Service (2007) 10 BLLR 988**. It has also been held that depending on the circumstances of a given case, administration of justice may dictate that if an applicant party delays in prosecuting its claim and fails to provide acceptable explanation 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- (2007) 28 ILJ 2030 (LC) and Numsa and Others v AS Transmission and Sterling (Pty) Ltd (1999) 12 BLLR 1237 (1) SA 673.**

15]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), w**here **Stratford AJA in Pathescope Union of SA Ltd v Mallinicks**

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 unjustified 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 it 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 prejudiced, and that prejudice need not be to the defendant in the action but to third parties".

16]The policy consideration that informs this approach was considered in **Mohlomi v Minister of Defense 1997 (1) SA (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".

17]There are 2 (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 2 (two) reasons are cited in the case of **Radebe v Government of the Republic of SA & Others 1995 (3) SA 787 (NOD),** 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 12 (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 Thirwell and Another 1957 (4) SA 533 (n) at 538".***

18]I agree with AC Basson J in **National Savings Investments (SA) (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & Others (unreported case number JR171/02)** when she held that:

> "[13] The first question to be considered in exercising the discretion is whether there has been undue or unreasonable delay and secondly whether the delay should be condoned. Whether any steps were taken during the interval, will also be an important factor [as] that may indicate the seriousness or commitment of a litigant in bringing his or her claim to finality".

The learned Judge went further to say:

> "In respect of the question of whether or not the delay was reasonable or unreasonable, the Court will have to make a value judgement in the light of all the circumstances. Once it has been fond that the delay was unreasonable, the Court will then have to exercise a discretion which must be exercised judicially as to whether or not the unreasonable delay should be condoned".

19]In considering whether to grant the order barring the first

respondent in the present instance from proceeding further with its review application the focal point in terms of the authorities cited above is the issue of justice and fairness to both parties. Because of the unreasonable delay on the part of the first applicant, the further applicants who were successful in having their labour rights reinstated by the arbitrator have not been able to enjoy those rights and remain unemployed with no income.

20]Thus, having considered the fact that the first respondent has failed to provide a satisfactory and acceptable explanation for its delay and the weak prospect of success, it is my view that for this reason alone, the application to review the award of the arbitrator stands to be dismissed.

21]In addition to the above, there is authority that this Court is not precluded from exercising its discretion to make an arbitration award an order of Court in terms of s158 (1) (c) of the Labour Relations Act 66 of 1995 simply because there is a pending review application. In **Ntshangane v Speciality Metal CC (1998) 3 BLLR 305 (LC)** the court held that:

> "Indeed it is so that the mere fact of a pending review is not

a bar to this court making an award an order of court. It is for whoever relies on the pending review argument to instil in the mind of the court that the prospects of success of the review are reasonably good".

22]In the premises the following order is made:

1. The review application brought under case number JR2113/05 is dismissed.

2. The arbitration award of the third respondent issued under case number MEGA 6811 and dated 26th July 2005 is made an order of this Court.

3. The first respondent is ordered to pay the costs of the application to dismiss the review application.

MOLAHLEHI J

DATE OF HEARING **:** 26 FEBRUARY 2008

DATE OF JUDGMENT : 17 MAY 2008

Appearances

For the Applicant : NUMSA

Instructed by : BM MASHEGO
For the Respondent: JD VERSTER
Instructed by : BRAUCKMANN JOOMA ATTORNEYS