REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case No. JR1697/11

In the matter between:

BOE STOCK BROKERS (PTY) LTD **Applicant**

and

ANDRIES VAN DEN HEEVER **First Respondent**

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **Second Respondent**

COMMISSIONER NAMISILE KHESWA N.O. **Third Respondent**

Heard: **23 April 2013**

Delivered: **08 August 2013**

Summary: Application in terms of Rule 11 granted

JUDGMENT

VISAGIE, AJ

Introduction

[1] This is an unopposed application in terms of Rule 11 of the Labour Court Rules to dismiss a review application of an arbitration award due to unnecessary delay.

Background facts

[2] The first respondent was employed by the applicant as the Head of Online Share Trading for the period 5 May 2005 to 10 May 2010. In March 2010, first respondent was suspected of creating a new online stock broking business in contravention of the applicant's conflict of interest policy. He was suspended on 2 March 2010, pending the finalisation of the disciplinary enquiry.

[3] The first respondent resigned on 10 May 2010. On 19 May 2010, the applicant acknowledged receipt and accepted the first respondent's resignation and informed the first respondent that the disciplinary enquiry would be proceeding on 9 June 2010. Various charges were brought against the first respondent relating to the creation of a business, the assistance provided by third parties and other employees and, in so doing, the disclosure of sensitive information to these third parties without authority to do so. In the charges, it was alleged that the first respondent allowed a conflict of interest to develop between his own interest and that of the applicant. The first respondent was also charged with continuing his unlawful conduct even after his suspension by the applicant.

[4] The first respondent referred a dispute to the CCMA claiming that he was constructively dismissed and/or that the applicant committed an unfair labour practice. In December 2010, the second respondent concluded that the first respondent had not been constructively dismissed but that he had resigned. The second respondent dismissed his dispute. On 14 April 2011, the applicant concluded the disciplinary enquiry and the first respondent was found guilty on all charges of dishonesty. Although there was a finding on the charges, the chairperson did not provide a recommendation for sanction in light of the fact that the first respondent was no longer employed by the applicant after his resignation. The disciplinary enquiry proceeded in order to keep a record on the register of the employer's dishonest system as is required by the Banking Council of South Africa and for purposes of the JSE disbarring the first respondent from acting as a stock broker for being found guilty of dishonesty.

[5] On 12 May 2011, the first respondent referred another dispute to the second respondent this time claiming that he was unfairly dismissed. On 13 June 2011, the second respondent made a ruling that the matter was *res adjudicata* and that the second respondent did not have jurisdiction to hear the dispute. In light of the second respondent's ruling, the first respondent instituted review proceedings on 25 July 2011. The applicant filed a notice of opposition on 28 July 2011. On 25 August 2011, the second respondent filed part of the record of the proceedings and the remainder of the record on 21 November 2011. It was only on 9 February 2012 that the first respondent's attorneys, Deon de Bruyn Attorneys ("de Bruyn") requested Lubbe and Meintjies, a transcribing company, to uplift the record of the proceedings in the matter and to provide de Bruyn Attorneys with a quotation for transcribing the record. A copy of this letter was sent to the applicant's attorneys, Cliffe Dekker Hofmeyr ("Cliffe Dekker"). In reply, Cliffe Dekker indicated to de Bruyn that the delay in prosecuting the matter by their client was prejudicial to the applicant. Cliffe Dekker also requested that de Bruyn inform them by return when the applicant can expect the fully transcribed record. In addition, Cliffe Dekker indicated to de Bruyn that should the first respondent neglect to comply with the provisions of Rule 7A of the Rules of this Court, Cliffe Dekker had instructions to apply to this Court to compel the first respondent to expeditiously prosecute his review.

[6] After informing Cliffe Dekker of the fact that they had requested the first respondent to provide a deposit to cover the costs of proceeding with the matter on 8 March 2012, de Bruyn filed a notice of withdrawal as the first respondent's attorneys of record on 22 May 2012. Since the notice of withdrawal has been received by the applicant, no further action has been taken by the first respondent in order to pursue his review.

[7] It is the applicant's submission that the first respondent has failed to comply with his obligations to prosecute his review in accordance with the Rules of this Court and that he has been dilatory in his conduct.

Legal principles and analysis

[8] In the case of *Frans Meintjies New Tyre Manufacturers v Bargaining Council and Others*,[1] the court set out the approach to be adopted in dealing with an application to dismiss a review application for want of timeous prosecution thereof. The court stated the following:

> 'It is trite that the Court has discretion to bar an applicant who fails to provide a reasonable and satisfactory explanation for the delay in timeous prosecution of his or her review application. The approach to be adopted when dealing with the issue of unreasonable delay has received attention in number of both the Labour and Appeal Court cases. The Courts in considering whether to uphold an application for the dismissal of a review on the ground of want of prosecution take into account the following: (footnote omitted)
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> (a) is the delay in the prosecution of the matter excessive;
>
> (b) is there a reasonable explanation for the delay;
>
> (c) what prejudice will the other party suffer if the dismissal is not granted; and
>
> (d) are there prospects of success in the main case.
>
> The other principle which the Courts have taken into account in considering whether an undue delay warrants dismissal of a review application is that there is a mutual obligation on both parties to ensure that the review application progresses expeditiously towards its finalisation. It has been held in this regard that when confronted with the delay in prosecution of a review application, the respondent needs to place the offending party on terms or seek the intervention of the Registrar or file an application to compel.'

[9] Although there were correspondence between the first respondent's attorneys and the applicant's attorneys in early 2012, the first respondent has not done anything to transcribe the record of proceedings since at least November 2011 when the record of proceedings was filed by second respondent with the Registrar of this Court. After the last correspondence from the first respondent's attorneys, when they withdrew as the first respondent's representative on 22 May 2012, there have been no further steps taken by the first respondent to prosecute

[1] [2012] 6 BLLR 558 (LC) at paras 30-31.

the review application. In my view, there is no doubt that first respondent has unreasonably delayed in the prosecution of his review application. The only explanation that one can gather from the correspondence between the parties, is that the applicant did not have funds at least in May 2012 to pay his attorney's costs and by implication, pay for the transcription of the record. It is, however, one thing not to have funds to pay for an attorney's costs, but it is a totally different thing to not pay for the transcribing of the record of the proceedings. This Court has seen numerous individual applicants who have, by their own steam, attended to transcribing the record of proceedings in pursuant of their review applications whether individually or with the assistance of attorneys. In my view, therefore, there is no reason why the first respondent, had he been diligent and intent on pursuing the review application, could not have made the necessary arrangements to transcribe the record of the proceedings and pursue the matter himself. Even if he did not have funds at the time to pay for his attorneys' costs.

[10] In light of my above conclusion that there has been an unreasonable delay, on that basis alone, the review application stands to be dismissed. I am also of the view that the first respondent has in any event no prospects of success in the review application. It is clear from the facts that the first respondent resigned in the face of disciplinary proceedings that were instituted against him by the applicant after he was suspended. When he claimed that he was constructively dismissed, that unfair dismissal dispute was rightly dismissed by the second respondent, in my view. Quite significantly, this arbitration took place almost seven months after he resigned. Four months later, when the disciplinary proceedings were concluded in order for the applicant to comply with its internal administrative processes, the applicant saw it fit to declare a further unfair dismissal dispute in May 2011. It is with regard to this unfair dismissal dispute that the second respondent found that it did not have jurisdiction and that the matter was *res adjudicata.* I cannot see under these circumstances how a review court would set aside this ruling of the second respondent.

[11] The review application instituted by the first respondent under case number JR16974/11 is dismissed for want of prosecution.

Order

[12] The review application is dismissed for want of prosecution.

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Visagie, AJ

Judge of the Labour Court

APPEARANCES

For Applicant: Zinhle Ngwenya of Cliffe Dekker Hofmeyr Attorneys