THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J2055/14

In the matter between:

PHILLIP LEBELO AND 406 OTHERS **Applicant**

and

THE CITY OF JOHANNESBURG **Respondent**

Heard: **09 March 2022 (On paper).**

Delivered: **17 March 2022**

Summary: Interlocutory applications – application to dismiss the action due to inordinate delay – the referral has not been archived in terms of the Practice Manual of the Labour Court – until the Registrar archives the file a matter shall not be archived or considered to be dismissed. Dismissing a claim due to inordinate delay in prosecution requires application of stringent test. On the facts of this case, there has not been an inordinate delay in prosecuting the dispute. Application to amend the statement of case – no prejudice shown to exist – no new cause of action is introduced.

Held: (1) The preliminary application to dismiss is dismissed. (2) The amendment is granted. (3) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This matter was enrolled for trial on 7 March 2022. Before the commencement of the trial, parties informed the Court of a family bereavement that befell the appointed lead counsel of the respondent. Parties further informed the Court that a decision is required in respect of two interlocutory applications. They intended to argue the applications on Wednesday 09 March 2022. Having debated the manner in which the matter may proceed, parties ultimately agreed that the interlocutory applications shall be determined on paper and they both shall augment their written submissions on or before Wednesday. This Court sanctioned the agreement and further postponed the trial action *sine die*. As agreed, both parties filed further written submissions.

Background facts

[2] For the purposes of this judgment, it is needless to recount the material facts of this dispute. It suffices to mention that on or about 22 August 2014, Mr Phillip Lebelo (Lebelo) and 406 others referred a dispute in terms of rule 6 of the Rules for the Conduct of Proceedings in the Labour Court (the Rules) for adjudication. Lebelo and others sought an order declaring that the failure to pay an annual wage increase and service bonus to them constituted an unfair discrimination within the meaning of section 6 (1) of the Employment Equity Act (EEA)[1]. They sought payment of those increments and bonuses as well as compensation in terms of section 194 of the Labour Relations Act (LRA)[2].

[3] Pleadings closed and parties concluded a pre-trial agreement on 08 August 2019 and 17 October 2019 respectively. After pleadings were closed, it emerged that the City of Johannesburg (COJ) raised two preliminary points.

[1] No. 55 of 1998.
[2] No. 66 of 1995.

As required by the Practice Manual of this Court[3], those preliminary points were enrolled for the Court's determination. On 26 August 2016, my Sister Mahosi J ordered that the preliminary points must form part of the trial. Additionally, she granted Lebelo and others leave to amend the statement of claim. On the version of Lebelo and others, the COJ failed to co-operate in the holding of a pre-trial meeting. Such prompted them to invoke the provisions of the Rules and requested a pre-trial before a judge. Indeed, on 6 August 2019, the matter featured before the roll of my brother Cele J who then ordered the parties to hold a pre-trial and file a minute within 14 days of the order, whereafter the registrar to enrol the matter for trial within 5 days of the filing of the pre-trial minute. On 16 April 2021, the registrar of this Court informed the parties of a set down date in March 2022. On or about 8 December 2021, Lebelo and others gave notice of an intention to amend the statement of case. The respondent, COJ objected to the proposed amendment. On or about 27 January 2022, Lebelo and others launched an application seeking leave to amend. The application is opposed by the COJ. On 28 January 2020, the COJ launched an application seeking to dismiss the referral on the basis that the referral is considered dismissed in terms of clause 16 of the Practice Manual and that Lebelo and others have delayed in prosecuting the claim. The application to dismiss is equally opposed by Lebelo and others.

[4] The purpose of this judgment is to determine those two interlocutory applications. Dismissing the referral would spell the end of this dispute. The granting of the amendment would lead to a postponement of the trial because the COJ would require amending their response.

Evaluation

[5] In this matter two issues come to the fore; namely the applicability of clause 16 of the Practice Manual and the application of the unreasonable delay rule or delay in prosecuting a claim. This judgment shall deal with those two issues first, whereafter consider the application for leave to amend.

[3] Effective April 2013.

Does clause 16 of the Practice Manual find application?

[6] The COJ contends that on application of clause 16, given the alleged inaction on the part of Lebelo and others for a prolonged period of six months, the referral is automatically archived and considered dismissed. Without necessarily making a factual determination that there was indeed inaction, the question that arises is whether the archiving is automatic or it requires an action from the registrar. The COJ contends that it happens automatically; whilst Lebelo and others contend that, an action from the registrar is required.

[7] In support of its contention, the COJ place heavy reliance on the judgment of this Court per Acting Justice Snyman of *November and others v Bvuma Plant Hire (Pty) Ltd.*[4] The learned Acting Justice reached the following conclusions:

> "[26] Therefore, and where clause 16.1 of the Practice Manual finds application, the unfair dismissal claim is in effect automatically dismissed when the prescribed time period expires…"

[8] This Court agrees with the learned Acting Justice that the first issue to determine is the application of the clause. How then does the clause apply? The language employed in the clause is clear. The power to archive lies with the registrar. The clause clearly states: '*the registrar will archive a file'*. This Court in the unreported judgment of *Marweshe v Financial Sector Conduct Authority and others*[5]*,* stated the following:

> "[3] I fail to understand the basis of this application. In terms of clause 16.1 of the Practice Manual, the power to archive a file lies with the Registrar of this Court. Nowhere in the papers before me, is it alleged by the applicant that the Registrar took a decision to archive the file. It seems that the applicant himself brought to the fore the circumstances that would enable the Registrar to archive a file. The situation here is

[4] (2020) 41 ILJ 1177 (LC).
[5] Unreported decision. Case no: JS575/16. Delivered: 4 June 2020.

like where a player who committed a clear foul presents himself or herself with a red card without waiting for the referee to call for a foul. Clause 16.2 of the Practice Manual is clear. It applies to files that has been archived. The only person authorised by the Practice Manual to archive a file is the Registrar. This Court in *MEC Department of Health Eastern Cape Province v PHSDSBC and others,* had the following to say:

> [12] …Much as *Samuels* held that an application for retrieval is effectively an application for condonation, the application before me has not been archived yet, thus it does not require a retrieval application.

(My own emphasis)

Similarly, I take a view that this Court's jurisdiction has not been engaged. The jurisdictional fact to engage this Court's jurisdiction is a step formally taken by the Registrar…."

(Footnotes omitted)

[9] With considerable regret, I part ways with the Acting Justice when he concludes that the expiry of the six months period effectively leads to an automatic dismissal of the claim. Accordingly, the conclusion this Court reaches is that clause 16.1 does not find application in this instance. I do state in passing that a party faced with the situation where the prescribed period in clause 16 expires, he or she may approach the registrar of this Court to exercise his or her powers. Should the registrar fail to do so, a party may bring an equivalent of a *mandamus* to compel the registrar to do so. Otherwise, a party may bring an application to dismiss based on the common law principle of delay in prosecuting a claim.

Does the unreasonable delay rule find application?

[10] The rule of undue delay is a common law rule, which finds application in matters not regulated by the Prescription Act[6]. This Court in a judgment, marked reportable, of *SG Bulk, a division of Supergroup Africa v Khumalo and another in re Nkuna v NBCRFLI and others*[7], had the following to say:

> "The principle of unreasonable delay finds no application where the time period is regulated by a statute or the Prescription Act. With regard to the first matter, section 191 (11) of the LRA provides that a referral must be made within a 90 days' period. Once a dispute is so referred, thereafter it gets regulated by the rules and directives of the Labour Court. In terms of rule 4 (a) of the Labour Court Rules when a response is delivered, the parties to the proceedings (applicant and respondent) are obligated to hold a pre-trial conference within 10 days of the delivery of the response. It is common cause in this matter that the parties failed to hold or convene a pre-trial conference. Sub-rule (7) provides that if any party fails to attend a convened pre-trial conference a matter may be enrolled for hearing on the directions of a judge. In terms of sub-rule (5), a judge may direct the parties to hold a pre-trial conference. Instead of requesting the registrar to enroll the matter for pre-trial conference before a judge, the applicant brought a rule 11 application seeking a dismissal. That is inappropriate. Rule 11 is there to cater for situations not dealt with in the rules. The situation obtaining in this matter has been catered for in the rules.
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> Further, the Practice Manual provides that if six months lapses without any step taken the Registrar is empowered to archive a file. Once archived a matter is as good as being dismissed. In order to achieve a dismissal of a referral, the respondent party must request the Registrar to archive the file and not approach this Court to seek a dismissal.
>
> For all the above reasons, the rule 11 application brought under case number JS393-19 stands to be dismissed."

[11] In *casu*, pleadings closed in September 2014 when the COJ filed its response. The parties held a pre-trial whereafter the matter was in the hands

[6] No. 68 of 1969.
[7] [2021] ZALCJHB 310 (13 April 2021).

of the registrar and no longer of the parties. The delay rule finds application on the initiation of a claim. Once, as it is the case in this matter, a claim is initiated, the life of a claim is navigated by the provisions of the Rules of the Court as amplified by the Practice Manual. As indicated earlier, in this Court the common law rule of delay is edified and codified in the Practice Manual. However, it is worth mentioning that the delay rule has the effect, once upheld by a Court of law, of putting the claim to bed much the same way a prescription does[8]. Of course where the Practice Manual clauses find application the demise is momentary in that the claim may be revived in the event a *good cause* is shown.

[12] Accordingly, the conclusion this Court reaches is that the unreasonable delay rule finds no application in this instance.

Delay in prosecuting the claim.

[13] This appears to be the COJ's high watermark contention for the dismissal of this claim. It is important to highlight that litigation in this Court is regulated by rules 6, 7 and 7A. In this matter, only rule 6 finds application. The COJ contends that Lebelo and others delayed in prosecuting the claim. As indicated above, the pleadings closed on 23 September 2014. Contrary to the rules of this Court, the parties entered into some agreement that a further document not contemplated in the rules of this Court – replication – shall be filed by 27 October 2014. In terms of the rules of this Court two documents are contemplated; namely; (a) statement of case and; (b) statement of response. Once these two documents are in place; *litis contestatio* will be reached.

[14] Once *litis contestatio* is reached, in terms of the rules of this Court both parties are obligated to ensure that a pre-trial conference is held in order to advance the case to a trial stage. Rule 6 (4) (a) specifically provides that

[8] *Mamabolo v Rustenburg Regional Local Council* [2000] 4 All SA 433 (A) and *Khumalo and another v MEC for Education KwaZulu Nata*l (2014) 35 ILJ 613 (CC).

when a response is delivered, the parties to the proceedings (Lebelo and others and the COJ) must hold a pre-trial conference within 10 days of the date of the delivery of the response. Therefore, by 4 October 2014, both Lebelo and others as well as the COJ were obligated to hold a pre-trial. None of the parties convened a pre-trial conference until February 2017. Instead, a blaming business and finger pointing ensued. Lebelo and others contends that the COJ was un-cooperative. Nevertheless, during the intervening period some other proceedings were commenced at other forums. Ultimately and in consonant with the rules of this Court, a pre-trial conference was convened before Cele J on 6 August 2019. Ultimately, the pre-trial minutes were filed on 19 August 2019.

[15] Once this stage is reached – pre-trial minutes are filed – the rules of this Court provides in rule 6 (8) (a) that when a judge decides that any directions given in terms of this rule have been satisfied, the judge must direct the registrar to enrol the matter for a hearing. Subrule (8) (b) provides that when the registrar receives a direction in terms of paragraph (a), the registrar must enrol the matter and notify the parties. From this point on, matters are no longer in the hands of the parties. In this Court, there is no requirement for a *dominus litis* to apply for a trial date.

[16] Despite reaching the stage for directives for trial, on 28 January 2020, the COJ launched an application to dismiss the action. At this stage, the action was ripe for a hearing. It is unclear why this application was launched, given the stage of the litigation process. The COJ expresses surprise as to why this Court directed that this matter be enrolled for trial when an application to dismiss was launched. The short answer lies in rule 6 (8) (a) outlined above. As indicated above, in this Court motion, proceedings are initiated in terms of rule 7 and 7A (reviews) of the Court Rules. When this Court issued a directive to enrol the action for trial, the proceedings commenced in terms of rule 6 were ripe for hearing.

[17] Turning to the law applicable to delay in prosecution of a claim, Lord Denning M.R. in *Allen v Sir Alfred McAlpine and Sons*[9] had the following to say:

> "The principle on which we go is clear, when delay is prolonged and inexcusable and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away, leaving the Plaintiff to his remedy against his own solicitor who has brought him to this plight."

[18] It is clear that grave injustice is the only factor, which will propel a Court to exercise its discretionary powers to dismiss a claim. In *Sanford v Haley*[10] Moosa J had the following to say:

> "…It has an inherent jurisdiction to control its own proceedings and as such has power to dismiss a summons or an action on account of the delay or want of prosecution. The Court will exercise such power sparingly and only in exceptional circumstances because the dismissal of an action seriously impacts on the constitutional and common-law right of the plaintiff to have the dispute adjudicated in a court of law by means of a fair trial. The Court will exercise such power in circumstances where there has been a clear abuse of the process of Court."

[19] In *casu*, the COJ has not alleged any abuse of Court process. What this Court observes is a party who has been "playing along". Since *litis contestatio* – September 2014 – the Rules of this Court availed to the COJ options to ensure that a delay does not occur. Surprisingly, it took the COJ almost four years to launch an application to dismiss at the time when the matter is ripe for hearing. There are three requirements for an application to dismiss to be granted; namely; (a) there must be a delay in the prosecution of the case; (b) the delay must be inexcusable; and (c) there must be serious prejudice to the defendant. On the facts of this case, there is no indication that the COJ will suffer any serious prejudice in this matter. It is indeed, so that this litigation took long to conclude. It commenced in 2014 and eight years later, it has not

[9] [1968] 1 All E.R 543
[10] 2004 (3) SA 296 (C).

been resolved. This is an antithesis for labour disputes. However, the veritable question is whether there is behaviour, which oversteps the threshold of legitimacy[11]. In my considered view, there is no such overstep of the legitimacy threshold. The COJ has not demonstrated serious prejudice.

[20] The two claims presented by Lebelo and others are to a large degree predicated on the terms of a collective agreement. It is apparent that this will be a paper trial as opposed to strictly *viva voce* evidence. In relation to the non-payment of the bonus, the COJ relies on the provisions of the collective agreement to justify the non-payment of the bonus. Similarly, in relation to the wage increment claim, the COJ relies on the provisions of the 'sunset clause' in the collective agreement. Regard being had to the above, it is difficult to observe any serious prejudice, which the interests of justice would propel this Court to a draconian exercise of discretion. Diplock LJ in *McAlpine* observed thus:

> "It is then a Draconian order and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue…"

[21] Lord Atkin in *Ras Behari and Others v The King Emperor*[12] aptly stated the following: *"Finality is a good thing, but justice is better*". Dismissing the action even in the absence of grave injustice and serious prejudice will faithfully serve finality but it shall not serve the interests of justice. It is indeed, so that labour disputes require speedy resolution, however, one of the purposes of the LRA is to advance social justice. A balancing exercise is therefore required. The advancement of social justice cannot be outweighed by speedy

[11] See: *Molala v Minister of Law and order and Another* 1993 (1) SA 673 (W)
[12] [1993] 102 LJ (PC).

resolution and or effective resolution of labour disputes, particularly where grave injustice and serious prejudice is not imminent. The situation that obtained in *Toyota SA Motors (Pty) Ltd v CCMA and Others*[13] is distinguishable from the present one. In *Toyota*, a review application was involved. The *litis contestatio* was not reached because Toyota failed to reconstruct the review record. It would certainly not be in the interests of justice to dismiss a claim where *litis contestatio* has been reached, particularly where serious prejudice is not demonstrated.

[22] In summary, the provisions of clause 16 finds no application in this matter. The common law rule of delay in relation to initiation of proceedings equally finds no application. With regard to delay in prosecuting the claim, the COJ failed to demonstrate a grave injustice and/or serious prejudice. Having taken almost four years to launch the application to dismiss, the COJ will be hard-pressed to demonstrate prejudice nor not 'playing along'. The requirements for the granting of the draconian order are absent.

The amendment application

[23] Generally, Courts will ordinarily grant an application for an amendment. The only time a Court would refuse an amendment is where the other party demonstrates serious prejudice that cannot be cured by an appropriate order as to costs. The COJ advances two bases why the amendment sought must not be granted. Firstly, it states that since the matter is archived, Lebelo and others are incapable of taking a further step in this matter. Earlier in this judgment, this Court reached a conclusion that the referral is not archived. Accordingly, this base is not upheld.

[24] Secondly, it states that a prejudice will be caused to it should an amendment be granted. In demonstrating the prejudice, the COJ alleges that an extension of the claim for a further eight years raises a different issue. It laments that in order to put a defence, it will have to dig into its records, which it '*cannot be*

[13] (2016) 37 ILJ313 (CC).

certain that it is in possession of all the relevant records'. This lament is too speculative to amount to a real prejudice. Effectively, the complaint of the COJ comes to this: "*our officials will not find time to scour the available records in order to investigate our defence*". A prejudice in an amendment situation exists when (a) an amendment would render a pleading excipiable[14]; (b) an amendment involves a withdrawal of an admission; (c) an amendment introduces a new cause of action; and (d) an amendment introduces new parties.

Does the amendment introduce a new cause of action?

[25] With sufficient ambivalence, the COJ alleges that the amendment '*raise different issues'*. The COJ does not allege that a different cause of action shall be introduced. For that reason, this Court understands why the ambivalence. The cause of action pursued by Lebelo and others is that of failure to pay increments and bonuses in a prohibited discriminatory manner. The amendment seeks to amplify the periods when the discriminatory failures occurred. Such does not amount to a new cause of action. Where a pleading insufficiently or imperfectly set out the original cause of action an amendment will be allowed[15]. At the time when the original cause of action was placed before the COJ, the other financial years had not yet arrived. Lebelo and others plead the same basis in the added financial years. The defence put for the 2012/13 financial year, if upheld, is good enough to defeat the other financial years. The discrimination pleaded by Lebelo and others is one that is ongoing. If this matter is finalised in 2024/25 financial year and the Court concludes that Lebelo and others were entitled to increment and bonuses all those years, that financial year will be included. If the objection is upheld, the '*once and for all rule'* shall be compromised.

[26] Accordingly, the amendment does not introduce a new cause of action. Thus, for all the above reasons, the amendment ought to be granted.

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[14] *Tengwa v Metrorail* 2002 (1) SA 739 (C).
[15] *Wavecrest Sea Interprises (Pty) Ltd v Elliot* 1995 (4) SA 596 (SE)

[27] In the result the following order is made:

Order

1. The application to dismiss the referral is dismissed.
2. The amendment sought by the applicants is granted.
3. There is no order as to costs.

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G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the applicant	: Advocate F A Boda SC
Instructed by	: Dockrat Inc
For the respondent	: Advocate V Peer
Instructed by	: Mchunu Attorneys