



REPORTABLE

CASE NO: LCA 32/2003

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION

HELD AT WINDHOEK

In the matter between:

LIOBA NESILLY AKWENYE

APPLICANT

and

CORVIMA INVESTMENTS (PTY) LTD

1ST RESPONDENT

MR GAROY SEPTEMBER

2ND RESPONDENT

CORAM: HOFF, J

Heard on: 13 March 2012

Delivered on: 16 March 2012

JUDGMENT

HOFF, J: [1] This is an interlocutory application in which the applicant prays for an order that the second respondent be joined as the second respondent in case number LCA 32//2003.

[2] The applicant was employed by the first respondent as an office assistant and following a disciplinary hearing the applicant's services were terminated on 16 March 2001. A complaint was lodged at the district labour court and the matter was set down for hearing on 16 October 2001. The particulars of the complaint were the following:

- “1. Unfair dismissal in terms of section 45 of the Labour Act of 1992;
2. Overtime N\$374.54; and
3. Severance pay N\$1 700.00 ”

[3] The applicant stated in her affidavit that a day prior to the court hearing a document from first respondent's legal representative was delivered to her informing her that an amount of N\$2 074.54 had been paid into court in terms of Rule 18 of the Rules of the Magistrates Court.

[4] On 16 October 2001 Mr van Wijk, the legal representative of the first respondent, enquired whether she had received the document from the messenger of the court. They were then called by the second respondent who informed her that money had been paid into Court and that she had signed therefor. She denied that she had signed any document. She was then informed that the Court proceedings had ended and that there was nothing more that she could do about it. She then related what further action she took including the fact that through the Legal Aid Board she obtained the services of a legal practitioner Mr Hennie Kruger who subsequently represented her in the district labour court, Walvis Bay in respect of the same matter but the dispute remained unresolved since the Court decided that the matter had been finalised under Rule 18 and nothing further could be done. This hearing was on 14 May 2003.

[5] On 9 November 2004 a review application in terms of Rule 15(3) of the Labour Court was heard by Angula AJ. During this application the point of non-joinder was taken

since the second respondent had not been cited as a party to the proceedings. This point succeeded and the review application was struck from the roll.

[6] The applicant in her founding affidavit stated that later that year (i.e 2004) she applied to the Directorate of Legal Aid for assistance and the law firm Ueitele & Hans Legal Practitioners was appointed as her legal practitioner of record. Subsequently B.D. Basson Incorporated, assisted her in this matter.

[7] The applicant thereafter filed a notice of motion on 29 June 2011 in which she prays for the joinder of the second respondent. This application was set down on 22 July 2011 and subsequently postponed to a date to be arranged with the Registrar. This matter was subsequently argued before me on 13 March 2012. This application is opposed by both first and second respondents.

Mr Boesak, who appeared on behalf of the applicant, submitted that the only issue which needs to be decided in this application is whether the second respondent should be joined as a necessary party in the review application. He submitted that the second respondent has a direct and substantial interest in the review application since it was his decision as chairperson of the district labour court that is the subject matter of the review application. In addition it was submitted that Rule 15(4) of the Rules of the Labour Court, promulgated under the Labour Act (Act 6 of 1992), which regulates applications for review provides that the notice of motion setting out the proceedings or decision sought to be reviewed shall, *inter alia*, be directed and delivered to the chairperson of the district labour court. Mr Boesak submitted furthermore that the very reason why this Court had struck the previous review application from the roll during the year 2004 was because second respondent had not been joined as a party to the proceedings.

[8] Regarding the issue of delay in bringing this application and the submission by second respondent that there are no prospects of success on review on the basis that he

had been *functus officio* in terms of Rule 18 of the Magistrates Court Rules, it was submitted that the second respondent may deal with these issues in the review application once he has been joined as a litigant in those proceedings.

Mr Boesak finally submitted that this Court as a court of equity should not require strict compliance with the Rules of Court but must look at what is fair to the parties in the circumstances, and applicant only asks for her day in Court.

[9] Mr Mouton, who appears on behalf of both respondents, submitted that in terms of Rule 15(2) of the Rules of the Labour Court, an application for review must be brought promptly and in any event within three months from the date when grounds for the application first arose. This the applicant failed to do.

He submitted that there must at some stage be an end to litigation and criticised the applicant for providing no reason at all for bringing this application at such a late stage.

Mr Mouton pointed out, correctly so, that the applicant had not only failed to comply with the Rules of Court but there is not one application for condonation for such non-compliance.

The Court was referred to relevant case law in support of his submissions. Mr Mouton submitted that there are no prospects of success on review since the amount the applicant claimed in her complaint to the district labour court is the exact amount paid into court in terms of Rule 18(1) of the Magistrates Court Rules by the first respondent.

[10] Mr Boesak in reply to this submission stated that the relief the applicant sought in the district labour court did not only cover aspects of overtime and severance pay but also any further relief applicant is entitled to as a consequence of her unfair dismissal by the first respondent.

[11] It is not disputed that the second respondent resigned as magistrate in the Ministry of Justice on 31 December 2001 and is currently in private practice.

[12] I am of the view that the second respondent ought to have been cited as a respondent in the review proceedings during the year 2004. In terms of the provisions of Rule 15(4) of the Labour Court it was obligatory to do so and in addition in his capacity as the chairperson of the district labour court he had a direct and substantial interest in any order which the review court might have made.

The question for consideration, in my view, is whether the application for joinder should succeed *at this stage* ?

The answer to this question is in turn dependant upon the consideration whether or not there was an unreasonable delay not only in *instituting* review proceedings but also subsequently in the *prosecution* of such review proceedings to its logical conclusion.

[13] In *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011 (2) NR 437 Damaseb JP expressed himself on the question of unreasonable delay at 449 (paragraph 41) with reference to an unreported judgment Case No. A 29/2007 and delivered on 20 February 2009, as follows:

“In *Ebson Keya v Chief of Defence Force and Three Others* the court had occasion to revisit the authorities on unreasonable delay and to extract from them the legal principles applied by courts when the issue of unreasonable delay is raised in administrative law review cases. The following principles are discernable from the authorities examined:

- (i) The review remedy is in the discretion of the court and it can be denied if there has been an unreasonable delay in seeking it: There is no prescribed time limit and each case will be determined on its facts. The discretion is necessary to ensure finality to administrative decisions, to avoid prejudice and promote the public interest in certainty. The first issue to consider is whether on the facts of the case the applicant's inaction was unreasonable: That this is a question of law.
- (ii) If the delay was unreasonable, the court has a discretion to condone it.

- (iii) There must be some evidential basis for the exercise of the discretion. The court does not exercise the discretion on the basis of an abstract notion of equity and the need to do justice between the parties.
- (iv)
- (v)
- (vi) “

[14] I disagree that the issue to be considered by this Court should be limited to the question of joinder as submitted by Mr Boesak. Should this Court in spite of an inordinate delay for which there is no explanation at all, as in the present instance, reward a dilatory litigant by granting such a litigant the relief prayed for? I think not.

[15] The application for the joinder (which is incidental to the review application) of the second respondent cannot in my view be considered in isolation in view of the particular circumstances of this case.

[16] In order to emphasise the requirement of finality in litigation I find it apposite to quote some extracts from a case which also considered the issue of a delay in prosecuting a case.

[17] In *Molala v Minister of Law and Orders and Another* 1993 (1) SA 673 (WLD) Flemming DJP remarked as follows on 678 H – 679 A:

“I conclude by underlining that to any Court the correct finding of facts is difficult enough. It is unjustifiably exacerbated and made more complicated by delays during litigation, sometimes with no more excuse than that it suits both sets of practitioners. It is clear that this country is a generation behind in embracing the view that the administration of justice – also the judicial officers charged therewith and the general public paying therefor – has an own interest in the elimination of avoidable delay. Despite the perception of some practitioners, the parties and their legal representatives are not the only persons with an interest in a particular suit.

It is understandable that several jurisdictions have introduced some method of excluding a party from further use of the facility of public courts if his inactiveness has caused his litigation to undergo marked hibernation, a development which, for reasons upon which I have partially touched, mars the reaching of the truth.”

and at 679 C:

“Overseas jurisdictions employ fixed time limits created by Court Rules or by judicial decree and plaintiffs must respect such time limits or suffer loss of the right to proceed. To instill in every plaintiff the realisation that it is not tolerated that he may use available process in a dilatory fashion is achieved by such time limits with more certainty, predictability and fairness than our system.”

(See also *Kruger v TransNamib Ltd (Air Namibia) and Others* 1996 NR 168 (SC)).

[18] It is clear from *Molala (supra)* that the administration of justice has an own interest in the elimination of avoidable delay over and above the interests of the litigating parties.

[19] The applicant in this matter prays for the joinder of the second respondent in his capacity as chairperson of the district labour court in order to review his decision taken on 16 October 2001. In terms of Rule 15(2) the applicant should have instituted review proceedings within three months. Review proceedings were heard by this Court only on 9 November 2004 when the application was struck from the roll.

[20] The applicant has known since 9 November 2004 that it is imperative to join the second respondent in her review application. She filed her application for the joinder of the second applicant with the Registrar of this Court on 29 June 2011, more than six and a half years later. Applicant stated in her founding affidavit that already during the year 2004 she had obtained the services of a legal practitioner through the Directorate of Legal Aid. She thus could have utilised the services of her legal practitioner already during those early stages – this she failed to do.

[21] There is no explanation at all in applicant's founding affidavit what caused her to bring this application more than six and a half years after her review application had been struck from the roll.

[22] There was a suggestion by Mr Boesak that the record of the proceedings in the district labour court went missing and this required the reconstruction of the record of the court proceedings. On the court file is a filing notice of the filing of a reconstructed record of proceedings. This filing notice bears the Registrar's date stamp of 29 September 2011, three months after the notice of motion was filed in respect of the application for the joinder of second respondent. However no such reconstructed record was filed.

[23] I find it extreme unlikely, having regard to the nature of the proceedings in the district labour court (or rather the lack of such proceedings as claimed by the applicant) that the applicant only managed to obtain the reconstructed record more than six and a half years after 9 November 2004. One should not lose sight of the fact that the applicant needed this very same record as part of her documents in the review application. It is not clear to me whether the record of the proceedings in the district labour court was part of the documents filed in her review application during the year 2004 and if so, under what circumstances it subsequently went missing.

[24] Nevertheless the record of the proceedings in the district labour court, in my view, could not have comprised of more than a few lines and it is hard to believe that the lack of a reconstructed record could have been cause of such a long delay.

[25] In any event, had the application to join the second respondent been successfully brought within a reasonable time, the applicant could have obtained the court record from the second respondent in terms of Rule 15(4) of the Rules of the Labour Court (which is similarly worded than Rule 53 of the Rules of the High Court).

[26] The delay by the applicant in prosecuting review proceedings is an unreasonable delay in the extreme, by any standard, and the bringing of the present application after several years of unexplained inaction amounts to an abuse of court process to the extent of warranting the dismissal of the present application.

[27] I am convinced that this unreasonable delay cannot be condoned at all by this Court, lest a message be conveyed to hibernating litigants that this Court would be sympathetic to their plight to have their day in court, irrespective of the prejudice which an opposing party may suffer, and in disregard of the interests of the administration of justice.

[28] In the result the following orders are made:

1. The application for the joinder of the second respondent is dismissed.
2. There is no costs order.

HOFF, J

ON BEHALF OF THE APPLICANT:

ADV. BOESAK

Instructed by:

B D BASSON INC.

ON BEHALF OF THE 1ST AND 2ND RESPONDENTS:

ADV MOUTON

Instructed by:

M B DE KLERK & ASSOCIATES