

SOUTH AFRICA / JUDGMENT

Festive, a division of Astral Operations Limited v Commission for Conciliation, Mediation and Arbitration and Others (JR1686/15) [2020] ZALCJHB 178 (31 August 2020)

[2020] ZALCJHB 178

COURT

Labour Court Johannesburg

BEFORE

P Nkutha-Nkontwana

CASE / FILE NUMBER

JR1686/15

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1686/15

In the matter

between:

FESTIVE, A DIVISION OF
ASTRAL
OPERATIONS LIMITED
Applicant
and
COMMISSION FOR
CONCILIATION, MEDIATION
AND ARBITRATION
First
Respondent
MALUBANE BUTI
N.O.
Second Respondent
MICHAEL MASELA
Third
Respondent

Enrolled:

07 July 2020
Decided on the papers

Delivered:	In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 31 August 2020.
Summary:	Review deemed to have been withdrawn or archived – no live matter to entertain, including the Rule 11 or condonation applications – the impugned final written warning has lapsed – review application is patently moot and cannot be reinstated.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

- [1] This is an interlocutory application in terms of Rule 11(1) read with 11(4) of the Labour Court Rules (Rules) wherein the applicant seeks an order dismissing the review application on account of the delay by the third respondent in prosecuting the review application. On the other hand, the third respondent launched a condonation application for the late filing of the transcribed record of the arbitration proceedings.

Factual background

- [2] The third respondent is employed by the applicant as a production manager with effect from 5 February 1988. On 4 March 2015, he was found guilty of various acts of misconduct. On 2 April 2015, he was issued with a final written warning. Disturbed by the outcome of the disciplinary enquiry, the third respondent referred an unfair labour practice dispute to the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA). 24 June 2015, the matter was set down for Con/Arb. When conciliation failed, the arbitration proceeded immediately thereafter. On 21 July 2015, the second respondent issued the impugned arbitration award under case number GATW 6522-15 wherein he found that the final written warning issued by the applicant on 2 April 2015, to be fair. It is common cause that the final written warning was valid for one year.
- [3] The third respondent then launched the review application on 3 September 2015, impugning the arbitration award mainly on the ground of reasonableness. On 14 September 2015, the applicant filed a notice of intention to oppose the review application. On 11 February 2016, the applicant's attorneys of record addressed a letter to the third respondent's attorneys of record informing them that the third respondent had failed to timeously file the record of the arbitration proceedings and put them to terms as to whether the third respondent still intended to pursue the review application. On 22 April 2016, the third respondent's attorneys responded, indicating that there were errors in the record and that they were referring the

matter back to the CCMA for correction.

- [4] On 9 September 2016, the applicant's attorneys of record wrote to the third respondent's attorneys of record enquiring about the progress in the matter as no correspondence had been received. On 22 September 2016, the third respondent delivered the transcribed record of the arbitration proceedings and his notice in terms of Rule 7A(8)(b) of the Rules, indicating the intention to stand by his Notice of Motion.
- [5] The applicant took issue with the state of the record as relevant portions of the record had not been delivered. Notwithstanding, on 7 October 2016, the applicant delivered its answering affidavit. The third respondent chose not to file a replying affidavit or seek indulgence for the late filing of the record.
- [6] On 13 March 2017, the applicant's attorneys of record wrote a letter to the third respondent's attorneys of record informing them that numerous unsuccessful attempts had been made to contact their offices and that, should they fail to respond by close of business on 20 March 2017, it would be assumed that the third respondent no longer wishes to pursue the matter and an application to dismiss the review application in terms of Rule 11 of the Rules would be launched.
- [7] On 3 April 2017, the applicant's attorneys of record delivered this application to dismiss the review application. Instead of opposing this application, on 14 May 2018, the third respondent filed an application for condonation for the later filing of the record. That application is vigorously opposed by the applicant.

Legal principles and application

- [8] Recently, in *Overberg District Municipality v IMATU obo Spangenberg and Others*,^[1] this Court, per Lagrange, J, gave a detailed exposition on the effect of the deeming provisions in clauses 11.2.3, 11.2.7 and 16.3 of the Practice Manual of Labour Court^[2] (Practice Manual) which provides as follows:

'11.2.3 If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given. If consent is refused, the applicant may, on notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time.

...

11.2.7 A review application is by its nature an urgent application. An applicant in a review application is therefore required to ensure that all the necessary papers in the application are filed within twelve (12) months of the date of the launch of the application (excluding Heads of Argument) and the registrar is informed in writing that the application is ready for allocation for hearing. Where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown why the application should not be archived or be

removed from the archive.

16.3 Where a file has been placed in archives, it shall have the same consequences as to further conduct by any respondent party as to the matter having been dismissed. (Emphasis added)

[9] The court concluded that:

‘[23] Whether the practice manual has reduced protracted ancillary litigation relating to reviews which have not been prosecuted expeditiously is debatable. However, it has clarified those time periods, which are not contained in the court rules, within which certain steps in the prosecution of the review must be taken. Not only does the manual prescribe the acceptable time periods for performing such steps but attaches adverse consequences to non-compliance therewith by means of deeming provisions in clauses 11.2.3, 11.2.7 and 16.3. in terms of which a review application is deemed withdrawn, lapsed or dismissed. Those deeming provisions curtail the dilatory prosecution of a review and ought to make it unnecessary for a respondent party to launch an application to dismiss the review.

[24] The effect of a review application which is deemed to have been withdrawn, lapsed or dismissed in terms of the provisions of clauses 11.2.3, 11.2.7 and 16.3 of the manual respectively is that to all intents and purposes it ceases to exist as a pending application and this is not akin to a mere suspension or stay. Nothing in the jurisprudence suggests that the legal consequences of the three different terms used to deem a review application inactive are any different from each other. If and when a review applicant succeeds in bringing an application to reinstate it or to retrieve it from its archival state, its status as a pending application will be restored.’

[10] In the present case, the third respondent only filed an application for condonation of the late filing of the transcribed record way after the matter had been deemed withdrawn or archived in terms of the Practice Manual. However, there is no application for the reinstatement of the review application despite the third respondent’s concession that the review application is deemed

to have been withdrawn, alternatively or archived for the dilatory prosecution. This approach was found to be irregular in *Sol Plaatjie Local Municipality v South African Local Government Bargaining Council and Others*,^[3] where Prinsloo, J, found that without an application reinstating the review application, there is no application to entertain, including a condonation application for the late filing of the record. I align myself with the pronouncement by Prinsloo, J in *Sol Plaatjie*^[4]. As stated in *Overberg District Municipality*,^[5] the effect of the deeming provisions in terms of clauses 11.2.3, 11.2.7 and 16.3 of the Practice Manual is that there is no live matter between the parties that the Court can entertain, including condonation or a Rule 11 application itself.^[6]

[11] For completeness sake, even if the condonation application is masqueraded as an application to reinstate the review application, the third respondent has another difficulty to contend with. Despite the fact that the delay in filing the record and prosecuting the review

application is excessive, more than a year late, and that the explanation is entirely unsatisfactory, the whole review application has been rendered moot by the lapse of the final written warning that is impugned. It is trite that a case is moot if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.[7] In essence, a moot matter is not justiciable.[8] I accordingly concur with the applicant's submission that the relief sought in this application is now impeccably academic.[9] On this point alone, the application to reinstate the review application must fail.

Conclusion

[12] It follows that the review application remains withdrawn or archived and effectively defunct. By the same token, the Rule 11 application is consequently moot and stands to be struck off the record.

Costs

[13] It is trite that costs do not follow the result in this Court and the circumstances of this case dictate that the parties should pay their own costs.

[14] In the premises, I make the following order:

Order

1. The applicant's Rule 11 application is struck off the roll.
2. The third respondent's application to reinstate the review application is dismissed.
3. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

[1] C157/18 (08 June 2020) yet to be reported, at paras 16 – 35.

[2] Effective April 2013.

[3] (PR192/15)

[2017] ZALCPE 11 (13 June 2017)

[4] Ibid.

[5] Supra n 1 at para 24.

[6] See: *Macsteel Trading Wadeville v Van der Merwe NO & others* (2019) 40 ILJ 7 98 (LAC) at para 22.

- [6] See: *Macsteel Trading Wadeville v Van der Merwe NO & others* (2019) 40 ILJ 7 98 (LAC) at para 22.
- [7] See: *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000
- (1) BCLR 39 (CC); *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001
- (9) BCLR 883 (CC); *South African Transport and Allied Workers Union v ADT Security (Pty) Ltd* [2011] 9 BLLR 869 (LAC); (2011) 32 ILJ 2112 (LAC) at paras 4 - 5. [7] *National Employers Association of South Africa (NEASA) v Metal and Engineering Industries Bargaining Council (MEIBC) and Others* [2015] ZALAC 11; (2015) 36 ILJ 2032 (LAC) at paras 6-7.
- [7] See: *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000
- (1) BCLR 39 (CC); *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001
- (9) BCLR 883 (CC); *South African Transport and Allied Workers Union v ADT Security (Pty) Ltd* [2011] 9 BLLR 869 (LAC); (2011) 32 ILJ 2112 (LAC) at paras 4 - 5.
- [7] *National Employers Association of South Africa (NEASA) v Metal and Engineering Industries Bargaining Council (MEIBC) and Others* [2015] ZALAC 11; (2015) 36 ILJ 2032 (LAC) at paras 6-7.
- [8] Ibid.
- [9] *National Employers Association of South Africa (NEASA) v Metal and Engineering Industries Bargaining Council (MEIBC) and Others* [2015] ZALAC 11; (2015) 36 ILJ 2032 (LAC) at paras 6-7.

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