

SOUTH AFRICA / JUDGMENT

Sibanyoni v Trans-Africa Projects (Pty) Ltd (J385/16) [2018] ZALCJHB 130 (13 March 2018) [2018] ZALCJHB 130

COURT

Labour Court Johannesburg

BEFORE

GN Moshwana

CASE / FILE NUMBER

J385/16

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case

no: JS385/16

In

the matter between:

MAPULE
MUSHAISANO
SIBANYONI
Applicant
and
TRANS-AFRICA
PROJECTS (PTY) LTD
Respondent

Heard:

23 February 2018

Delivered:

13 March 2018

Summary:

A tale of two conflicting directives issued by Judges in Chambers. What then becomes the status of those directives? The history of the directives and the enforcement thereof considered. In applications of this nature prospects of success play a minimal or no role. As long as the explanation is adequate and acceptable, an applicant must be afforded her rights guaranteed in section 34 of the Constitution. Held (1) the application is re-enrolled. (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

- [1] This is an opposed application to re-enrol a condonation application which was struck of the roll due to non-appearance of the applicant. The applicant was ordered to make an application for re-enrolment[1]. Before then, the applicant had invoked the provisions of Rule 15 (1) read with the provisions of clause 14.4.2[2] of the Practice Manual of the Labour Court of South Africa[3]. The explanation under oath was presented to Acting Justice Snyman[4]. He then issued a directive (decision) wherein he refused to re-enrol the matter and archived it. For some unknown reasons, the file was placed before Madam Justice Nkutha-Nkontwana for another directive. She then directed (ordered) the applicant to make a formal application for re-enrolment in accordance with Rule 11[5]. The applicant obliged. The present application serves before me consequent upon the directive (order) by Madam Justice Nkutha-Nkontwana.

Background**facts**

- [2] The applicant joined the respondent as an independent contractor in 2005. On or about 1 June 2011, the applicant was permanently employed by the respondent in the position of Document Controller/Receptionist. During April 2015, the respondent commenced a retrenchment process. The applicant opted for a Voluntary Severance Package (VSP). Following that, a separation agreement was concluded. The applicant received a sum of money as part of the separation package. In May 2015, the applicant referred a dispute of alleged unfair dismissal based on operational requirements to the CCMA. A settlement agreement was concluded in terms of which, the applicant received further sums of money.

[3] On 26 October 2015, the applicant referred a dispute of alleged unfair discrimination. On 24 March 2016, the CCMA declined jurisdiction. On 25 July 2016, the applicant referred the dispute to this court in terms of Rule 6. At the same time an application for condonation for the late filing of the statement of case was launched. The referral and the application for condonation were opposed. The condonation

application was enrolled for hearing on 18 November 2016. On this day, owing to the applicant's non-appearance, Justice La Grange struck the matter off the roll and reserved costs. On 22 June 2017, the applicant requested that the matter be re-enrolled as she was not aware of the set down date, since her lawyers did not inform her[6].

[4] The file was forwarded to Acting Justice Snyman. After considering the request supported by an affidavit, he refused to re-enroll the matter and actually directed that it be archived. Almost two months later, Madam Justice Nkutha-Nkontwana, issued another directive to the effect that the applicant must invoke the provisions of Rule 11[7]. Consequent thereto, the applicant launched the present application, seeking to have the matter that was struck off the roll to be re-enrolled.

Evaluation

[5] Before I consider the application on its merits, I need to deal with a point in limine raised by the respondent[8]. The respondent sought an order dismissing the matter on the strength of this point. This point raises an interesting and somewhat a novel point. There are two contradictory directives. Before I consider the legal status of both directives, it is imperative to consider the meaning and content of each. Perhaps a little bit of history might assist.

The origin of practice directives in this court.

[6] Some years back a form titled "Judge's directions in terms of Rule 6 (5)" was designed. This form allowed a judge sitting in chambers to direct whether the matter should be enrolled on the unopposed motion court, opposed motion court, for default judgment, for trial, for diary, for pre-trial and other directions. The Rules of the Labour Court are tantamount to subordinate legislation and are binding on the Labour Court. The relevant rule provides thus:

Judge's directions

- (5) When the minute of a pre-trial conference is delivered or the time limit for its delivery lapses, whichever occurs first, the registrar must send the file to a judge of the court for directions in terms of this subrule. The judge who receives the file from the registrar may-
 - (a) direct the registrar to enroll the matter for a hearing if the judge is satisfied that the matter is ripe for hearing; or
 - (b) direct that an informal conference be held before a judge in chambers to deal with any pre-trial matters; or

(c) direct the parties to convene a further formal pre-trial conference at a date, time and place fixed by the registrar, at which a judge must preside, to deal with any pre-trial matters.

[7] It is clear that this subrule is meant to apply to referrals in terms of Rule 6. There are no similar provisions in Rule 7, which deals with applications. It must then immediately follow that both directives are not authorised by the subordinate legislation. Unless of course if the directives can be accommodated under Rule 11 (3). The rules define the court to mean the Labour Court established by section 151 of the Act and includes any judge of the court. On the face of it, it seems to me that a judge may adopt any procedure that he or she deems appropriate in the circumstances. This simply entails that if the rules do not provide for a situation that arises, then a judge may fashion out any procedure he or she deems appropriate. The further question to be considered is where and

when? The subrule refers to in proceedings or contemplated proceedings.

[8] The dictionary meaning of the word proceedings mean a lawsuit; all or some part of a cause heard and determined by a court or any legal step or action taken at the direction of a court or any measures necessary to prosecute or defend an action. In the context of the Rules proceedings must mean a referral in terms of rule 6 and applications or motion proceedings in terms of Rule 7. Rule 3 (1) provides that any party initiating proceedings must do certain things. This to my mind must be what is termed contemplated

proceedings. When a party applies for a case number, he or she contemplates referral proceedings or motion proceedings. A statement

of claim is known as a document initiating proceedings[9]. Rule 7 makes no reference to proceedings being initiated by a document like in Rule 6 but simply provides that an application must be brought.

[9] It seems to me that the word proceedings ought to be given a narrow meaning. It relates only to referrals and not applications. I say so because in the rules, the only time there is reference to a document initiating proceedings, is when a statement of case is being referred to. In my view, a judge is authorised to issue directions on any matter involving a referral and not applications. Even in a striking off the roll situation, a judge is authorised to decide and order and not direct[10]. That being my view, I conclude that the two “directives”[11] are not authorised by the subordinate legislation. The directives involved in this matter do not equate directives that may be issued by a Judge President or a head of a court.

[10] Normally, such directives come in a form a rule or practice direction. In relation to those the court has stated the position as follows. In *Tadyn Trading cc t/a Tadyn Consulting Services v Steiner and others*[12] states that:

“in law the Judge President was entitled to issue practice directives relating to the procedure of setting down matters on the roll.”

[11] The court in *ABSA Bank Limited v Lekuku Daniel*[13] stated that

“the High Court in issuing Practice Directive is clearly entitled to regulate its own intimate process and does so not only based on the existing common law but is also entitled to do so by virtue of s173 of the Constitution... This court based on constitutional

principles and the inherent common law right principles referred to above clearly entitles the Judge President and the Deputy Judge

President to issue practice directives where appropriate.”[14]

Therefore, I am of a view that until authorized by the Rules, the practice of issuing chambers directives in respect of applications need to be reconsidered as it is not authorized by the Rules. This of course is different from what the High Court said in relation to practice directives. The court in *In re: Several matters on the urgent court roll*[15] stated that:

[13] I am consequently of the view that the word ‘action’ in s 43 of the Supreme Court Act should be read to include all proceedings in the High Court. This would entitle the Judge President to issue practice directives relating to the setting down of matters both in actions and in the applications.[16]

The effect of the Practice Manual on directives.

[12] As pointed out above, the practice of issuing directives in chambers existed long before the coming into operation of the Practice Manual. There are decisions of this court to the effect that the Practice Manual is binding in effect. The LAC in *Samuels v Old Mutual Bank*[17] held thus:

“The consolidated practice manual which came into operation on 2 April 2013 constitutes a series of directives issued by

the Judge President over a period of time. Its purpose is, inter alia, to provide access to justice by all those whom the Labour Court serves; promote uniformity and/or consistency in practice and procedure and set guidelines on standard of conduct expected of those who practice and litigate in the Labour Court. Its objective is to improve the quality of the court’s service to the public, and promote the statutory imperative of expeditious dispute resolution.

The practice manual is not intended to change or amend the existing Rules of the Labour Court but to enforce and give effect to the Rules, the Labour Relations Act as well as various decisions of the courts on the matters addressed in the practice manual and the Rules. Its provisions therefore are binding. The Labour Court’s discretion in interpreting and applying the provisions of the practice manual remains intact, depending on the facts and circumstances of a particular matter before the

court.”[18] (Emphasis added and footnotes omitted.)

[13] The Practice Manual is not a replacement of the Rules. The Rules do make provision for the striking off of matters from the roll.[19] However according to clause 14.4.2 of the Practice Manual, provision is made only for re-enrolment by giving an explanation under oath. The clause does not provide that the re-enrolment can be done or refused by a Judge. Therefore, this clause must be read in tandem with the provisions of rule 15. There a judge is authorised to decide based on the affidavit or affirmation and not to issue a directive as it were. The other provision for enrolment in terms of the Rules occur in subrule 6 (8)[20].

[14] Rule 7 (6)

(a) provides that the registrar must allocate a date for the hearing of the application once the replying affidavit is delivered, or once the time limit for delivering a replying affidavit has lapsed, whichever occurs first. The power to re-enroll matters that are struck off the roll lies with a single judge in chambers. That single judge issues a decision and not a directive. Therefore, if the decision is valid in law, which I doubt though, the principle of *functus officio* must apply. Therefore, only if Snyman AJ's decision to refuse enrollment is valid in law, to my mind, the only remedy available to the applicant is one of rescission, because, ordinarily decisions made in chambers are made in the absence of a party[21].

[15] I, accordingly also agree with the respondent that the order of Nkutha-Nkontwana J, ordering the present application, is lacking in legal consequences. In terms of the enabling rule, an order that an application for re-enrolment must be made instead of a decision to refuse to re-enroll has to be made by the judge before whom the affidavit or affirmation is placed. In other words, Snyman AJ was authorised at the time to order the launching of the present application before me. He did not do so. However, my reading of rule 15, suggests that the only decision that Snyman AJ was authorised to make is the re-enrollment and not the refusal thereof. He ought to have issued an order to have the application for re-enrolment to be made[22] and be decided in an open court.[23] If for any reason, Snyman AJ understood the provisions of clause 14.4.2 to empower him to refuse enrollment, then I must say the

following. A superior court has overriding jurisdiction to prevent abuse of process, it has inherent power to make any orders furthering

the administration of justice only when a statute or rule of court is silent about the situation.[24] In *Western Bank Limited v Packery*[25], it was held that Rules of Court are delegated legislation, they have statutory force and are binding on the court.

[16] Instead of invoking the provisions of the rule by ordering the present applications, Snyman AJ invoked clause 16[26]. To my mind invocation of the clause was unwarranted. The circumstances contemplated in the clause were not present. To my mind

the decision of Snyman AJ to refuse to enroll this matter is inconsistent with the enabling rule and also the Constitution. Since

to my mind it is not in line with the enabling rule, it is not binding on me. It was made without the necessary powers and is brutum fulmen. Might I add, issuing a directive is not an administrative action in this context. Perhaps it is in the context of the Judge President

issuing a practice directive as empowered. Therefore the principle in Oudekraal[27] does not find application. The order of Nkutha-Nkontwana J is also not in line with the enabling rule. There is no evidence before me that after Snyman AJ's decision, was there a further affidavit placed before her to enable her to invoke the provisions of Rule 15(3).

[17] Having said all that, I do not believe that in the interest of justice, I can refuse to hear the present application because it was not properly ordered. In *Greenberg v Khumalo* and another, *Greenberg v Du Preez* and another[28], the High Court was faced with almost a similar situation. In dealing with the matter, Acting Justice Potgieter refused to apply a directive that required an affidavit before a matter that was struck off the roll is re-enrolled. [29]The court found that in terms of Uniform Rules enrolment is the function of a registrar and anything contained in a practice directive cannot serve as a bar to enrolment of a matter. Section 34 of the Constitution entitles the applicant to be before me and have her dispute resolved by a court of law. I am seized with an application, clearly authorised by rule 15(3) to be the appropriate path for a party whose matter has been struck off the roll. Also, section 1 of the Labour Relations Act, enjoins speedy resolution of labour disputes. I shall now turn to the merits of the application.

Should this matter be re-enrolled?

[18] This application is not akin to an application to reinstate a lapsed appeal and or review. The principles applicable to condonation are not applicable in this matter. The applicant must simply provide an adequate and acceptable explanation. In *Khunou and others v M Fihrrer & Son (Pty) Ltd and others*[30], the court had the following to say.

The proper function of a Court is to try disputes between litigants who have real grievances and to see to it that justice is done. The rules of civil procedures exist in order to enable courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rules of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues which I have mentioned are clarified and tried in a just manner.

[19] To my mind the above sums up the duty of a court in applications of this nature. Although this was said in 1982, it resonates well with the constitutional imperatives set out in section 34 of the Constitution.

Is the applicant's explanation adequate and acceptable?

- [20] I must state upfront that although I have said the order of Nkutha-Nkontwana J is not in line with the rules, it was nonetheless communicated to the applicant by the registrar on 28 August 2017. In other words, by that time the applicant knew that she ought to seek an indulgence from this court. Like an applicant for condonation, such an applicant must act as soon as knowledge is gained that condonation is required. The application before me was only launched on 20 September 2017, with no explanation why it was not brought soon after the 28th of August 2017. To my mind she cannot be non-suited because of this.
- [21] The explanation of the applicant is simply that she was unaware of the date since her attorneys of record withdrew and the notice of set down was sent to them and not her. The applicant's attorneys withdrew on 30 August 2016. The registrar sent a notice of set down to the parties on or about 25 October 2016. Indeed, according to the records, the set down was sent to the erstwhile attorneys and not to the applicant. The respondent seems to have sent an email to the applicant on 17 November 2016 at about 9:28 AM advising her of the set down the following day. There is no evidence that the applicant indeed received this email. Nonetheless, the duty to send notices of set down is that of a registrar and not the other party[31]. I am therefore satisfied that the applicant did not receive notification. Such is a reasonable and an acceptable explanation.

Does the applicant possess reasonable prospects of success nonetheless?

- [22] The reasonable prospects of success required for the purpose of this application could be whether the late filing of the statement of case is condonable. In the condonation application, the reasonable prospects of success-that the applicant was subjected to an automatically unfair dismissal-will be a factor. If she does not possess prospects condonation shall be refused. If she does not possess prospects there it would be a futile exercise to grant this application, so it was submitted.
- [23] However, in my view, at this stage I am not hearing the condonation application. I can neither refuse nor grant it. Therefore, prospects of success play a minimal role if any at this stage. What is important is the explanation for the default. I say so because if Snyman AJ had allowed the matter to be back on the roll, a decision in keeping with section 34 of the Constitution in my mind, the applicant would still have to persuade the judge hearing the condonation application that she possess prospects of success.

Rule 15(1) requires an explanation for the failure to attend court. Parties do not attend court only for matters that are meritorious.

Even unmeritorious matters are heard in court. As I said, to my mind, even if I doubt that the applicant possesses reasonable prospects of success on the condonation application, I certainly cannot deny her access to court. She must have an opportunity to ventilate her application for condonation in an open court. Accordingly, I am not to discuss the prospects of success at this stage, the applicant is still burdened to show prospects at the hearing of the condonation application. To expect her to do so at this stage would be to overburden her unnecessarily.

[24] In summary, both the directives are non-compliant with the enabling Rule. In the interest of justice, I heard the application. The explanation by the applicant is adequate, reasonable and acceptable. Prospects of success play a minimal role at this stage. Accordingly, the application ought to be granted with no order as to costs.

[25] In the results, I make the following order:

Order

1. The application for condonation is hereby re-enrolled.
2. No order as to costs.

GN Moshwana

Judge of the Labour Court of South Africa

Appearances

For the Applicant: In Person

For the Respondents: Advocate F Venter

Instructed by:

Cowan-Harper Attorneys, Sandton.

[1] The Nkutha-Nkontwana J directive.

[2] 14.4.2 A matter struck from the roll will only be re-enrolled if a proper explanation for non-appearance is given. The explanation must be on oath.

[3] The Manual came into effect from 2 April 2013

[4] As decreed by Rule 15 (2).

[5] 11 Interlocutory applications and procedure not specifically provided for in other rules (1) The following applications must be brought on notice, supported by affidavit: (a) Interlocutory applications; (b) other applications incidental to, or pending, proceedings referred to in these rules that are not specifically provided for in these rules; and (c) any other applications for directions that may be sought from the court. (2) The requirement in sub rule (1) that affidavits must be filed does not apply to applications that deal with procedural aspects. (3) If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems appropriate in the circumstances. (4) In the exercise of its powers and in the performance of its function, or in any incidental matter, the court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act.

[5] 11 Interlocutory applications and procedure not specifically provided for in other rules

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- (a) Interlocutory applications;
 - (b) other applications incidental to, or pending, proceedings referred to in these rules that are not specifically provided for in these rules; and
 - (c) any other applications for directions that may be sought from the court.
- (2) The requirement in sub rule (1) that affidavits must be filed does not apply to applications that deal with procedural aspects.
- (3) If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems appropriate in the circumstances.
- (4) In the exercise of its powers and in the performance of its function, or in any incidental matter, the court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act.
- [6] A procedure contemplated in Rule 15 read with clause 14.4 of the Practice Manual.
- [7] It is not altogether clear why the file was placed before the Madam Justice. As per the directive of Snyman AJ, the file was archived. In terms of clause 16.2 of the Practice Manual, a party to a dispute in which the file has been archived may submit an application, on affidavit, for retrieval of the file, on notice to all the parties to the dispute. The provisions of Rule 7 will apply to an application brought in terms of this provision. There is no indication that such an application was launched or not. It seems to me that what was placed before Madam Justice for the purposes of the directive was the explanatory affidavit made on 22 June 2016. This is pure speculation from my side.
- [8] The point being that the application is moot as per the directive of Snyman AJ and that the directive of Nkutha-Nkontwana J is of no legal effect as the matter has already been decided upon by Snyman AJ.
- [9] Rule 6 (1) (a)
- [10] 15 Matters struck off the roll
- (1) If a matter is struck off the roll because a party who initiated the proceedings was not present, the matter may not be re-enrolled without that party having provided the court with a satisfactory explanation, under oath or affirmation, for the failure to attend court.
 - (2) The affidavit or affirmation must be delivered and the registrar must place it before a judge in chambers, to decide whether the matter may be re-enrolled.
 - (3) The judge before whom the affidavit or affirmation is placed may order that an application for re-enrolment be made. In that event, the application must comply with rule 11.
-

[10] 15 Matters struck off the roll

- (1) If a matter is struck off the roll because a party who initiated the proceedings was not present, the matter may not be re-enrolled without that party having provided the court with a satisfactory explanation, under oath or affirmation, for the failure to attend court.
- (2) The affidavit or affirmation must be delivered and the registrar must place it before a judge in chambers, to decide whether the matter may be re-enrolled.
- (3) The judge before whom the affidavit or affirmation is placed may order that an application for re-enrolment be made. In that event, the application must comply with rule 11.

[11] However, although they are labelled directives, in truth they are decisions of the judges.

[12]

[2014] 5 BLLR 516 (LC)

[13] Absa Bank Limited v Lekuku (32700/2013) [2014] ZAGPJHC 244

[14] Paragraph 22 and 23

[15]

[2012] JOL 29563 (GSJ)

[16] See paragraph 12 – referenced Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC)

[17]

[2017] ZALAC 10.

[18] Id at paras 14-5.

[19] Ibid fn 6

[20]

- (8) (a) 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 hearing. (b) When the registrar receives a direction in terms of paragraph (a), the registrar must enrol the matter and notify the parties of the time, date and place that has been allocated for a hearing.

[20]

- (8) (a) 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 hearing.
- (b) When the registrar receives a direction in terms of paragraph (a), the registrar must enrol the matter and notify the parties of the time, date and place that has been allocated for a hearing.

[21] 165 Variation and rescission of orders of Labour Court The Labour Court, acting of its own accord or on the application of any affected party may vary or rescind a decision, judgment or order (a) erroneously sought or erroneously granted in the absence of any party affected by that judgment or order.

[21] 165 Variation and rescission of orders of Labour Court

The Labour Court, acting of its own accord or on the application of any affected party may vary or rescind a decision, judgment or order

(a) erroneously sought or erroneously granted in the absence of any party affected by that judgment or order.

[22] Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court or, where appropriate another independent and impartial tribunal or forum.

[23] Section 160 (1) of the Act requires proceedings to be carried out in an open court.

[24] See ABSA Bank Ltd v De Villiers and another [2010] 2 All SA 99 (SCA).

[25] 1977 (3) SA 137 (T)

[26] 16 ARCHIVING FILES 16.1 In spite of any other provision in this manual, the Registrar will archive a file in the following circumstances: · In the case of an application in terms of Rule 7 or Rule 7A, when a period of six months has elapsed without any steps taken by the applicant from the date of filing the application, or the date of the last process filed.

[26] 16 ARCHIVING FILES

16.1 In spite of any other provision in this manual, the Registrar will archive a file in the following circumstances:

· In the case of an application in terms of Rule 7 or Rule 7A, when a period of six months has elapsed without any steps taken by the applicant from the date of filing the application, or the date of the last process filed.

[27] Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA). See also Merafong City Local Municipality v Anglogold Ashanti 2016 ZACC 35

[28]

[2012] ZAGPJHC 91 (11 May 2012)

[29] 9.22 STRIKING FROM THE ROLL 4 If a matter has been struck from the roll, counsel in the course of the week in which the matter was struck from the roll, may seek that the matter be re-enrolled. The matter will only be re-enrolled if a proper explanation for non-appearance is given. In appropriate circumstances, the explanation must be on oath. 5 if a matter has been struck from the roll it may only be re-enrolled for a subsequent week if simultaneous with the filing of J118, an affidavit explaining the previous non-appearance is filed.

[29] 9.22 STRIKING FROM THE ROLL

4 If a matter has been struck from the roll, counsel in the course of the week in which the matter was struck from the roll, may seek that the matter be re-enrolled. The matter will only be re-enrolled if a proper explanation for non-appearance is given. In appropriate circumstances, the explanation must be on oath.

5 if a matter has been struck from the roll it may only be re-enrolled for a subsequent week if simultaneous with the filing of J118, an affidavit explaining the previous non-appearance is filed.

[30] 1982 (3) SA 353 (W)

[31] Rule 14 (2)

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