
SOUTH AFRICA / JUDGMENT

Van Rooi v Swellendam Municipality and Others (C812/2018) [2021] ZALCCT 82 (30 October 2021)

[2021] ZALCCT 82

COURT

Labour Court Cape Town

BEFORE

Rabkin-Naicker

CASE / FILE NUMBER

C812/2018

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REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

C812/2018

In the matter between:

RAYNO CHRISTOPHER VAN ROOI Applicant

and

SWELLENDAM MUNICIPALITY First

Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL Second

Respondent

I DE VLIAGER-SEYNAEVE Third

Respondent

Date heard: 10 June 2021 by means of virtual hearing; additional submissions received 25 June 2021

Delivered: 30 October 2021 by email and deemed received on 3 November 2021 at 10.00hr

RABKIN-NAICKER J

- [1] This matter was set down as an opposed application to retrieve a review application under the above case number.
- [2] The applicant signed all the papers in respect of the said application but sadly died on the 19 January 2021. On the 3 June 2021, four court days before the hearing, Liesel Scholtz Attorneys withdrew as attorney of record on behalf of the applicant, annexing a copy of the applicant's death certificate and letters of Executorship dated stamped the 8 April 2021.
- [3] The correspondence between the attorneys reflects that BCHC, for the first respondent, had been attempting to find out whether the retrieval application would proceed or not since the 3 March 2021 in order to avoid the costs involved.
- [4] At the hearing of the matter, first respondent's attorneys and a member of the Cape Bar representing the applicant's erstwhile attorney, were before me. After hearing a range of submissions from them, including that I dismiss the retrieval application and award costs *de bonis propriis* against applicant's erstwhile attorney, I asked that brief submissions be prepared for me, to be filed by 25 June 2021, on the following questions:
 - 4.1 Whether the Court can decide the merits of the retrieval application without an application for the substitution of the deceased applicant before it.
 - 4.2 Whether as matter of law, an attorney can be liable for costs *de bonis propriis* after the death of its client?
- [5] I am in agreement with Mr Felix for the applicant's erstwhile attorney, that without the substitution of the executor of the estate of the applicant, the retrieval application cannot proceed because there is no one with standing before the Court. Ms Vlok for the first respondent agreed in her written submissions that the retrieval application was not properly before Court. She argued however that the Court has a discretion to dismiss the application rather than leave the matter 'hang indefinitely'. Reliance was placed on the matter of *Basil Read (Pty) Ltd v National Union of Mineworkers & another: In re National Union of Mineworkers & another v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 2153 (LC).
- [6] In that matter, the Court per Baloyi AJ was dealing with a Rule 11 application to dismiss a review. The employee party, applicant in the review had died and no application for substitution had been made. The Court found that given the excessive delays in prosecuting the review application, which was not properly before Court, he was not prepared to dismiss the Rule 11 or postpone proceedings pending substitution of the employee by his wife. On the basis of the lengthy delays in the review, he dismissed the review application. He stated as follows:

“[39] Since 30 June 2011, the respondents have not secured the appointment of an executrix of the deceased employee's estate. In this regard, given the absence of any authority from the executrix, it follows that the review application as it is now is not properly before court. I am therefore not prepared to dismiss the rule 11 application and to postpone the case sine die pending substitution of second respondent's wife as contended on behalf of the respondents. I am also not prepared to order that parties should present their argument on the review in which the first respondent has no authority from an executrix of the deceased employee's estate. I am thus constrained to echo what was held in the TGWU & others v Coin Security Group (Pty) Ltd 15 per Basson J at para 166 as follows:

'In regard to applicants 30 and 88 (in annexure A to the applicants' statement of case) the respondent contended that, as they are deceased and no authority was obtained from the executors of their estates to persist with the referral on their behalf, they were not properly before court as parties in this matter. See inter alia, Du Toit v Bornman & another 1992 (4) SA 257 (C) at 261F-G, Nyati v Minister of Bantu Administration & others 1978 (3) SA 224 (E) at 226F-227B; and Pentz v Gross & others 1996 (2) SA 518 (C) at 523A-E. I agree with this contention and this was also conceded in argument by the applicants' legal representative.'

- [40] Due to the death of the second respondent on 15 July 2010 and the failure to have an executrix appointed, the review application is undoubtedly stagnant. The situation did not subsequently change since 30 June 2011 when Francis J made an order calling for the respondents to secure the appointment of an executrix to substitute the deceased second respondent. The only available remedy is as sought by the applicant and that is to have the indefinite hanging review application dismissed.”
- [7] There is no Rule 11 application to dismiss before me. The Basil Read matter is thus distinguishable. In Basil Read the Court had in law, an unopposed dismissal application brought by the employer before it, the trade union representatives of the deceased employee having no standing to oppose it. In casu the deceased employee was dominus litus, no executor has been appointed and there is simply no retrieval application in law before me to dismiss. The legal position is that the review application remains deemed withdrawn.
- [8] In as far as the second issue regarding costs is concerned, Mr Felix submitted that applicant's attorney's mandate ceased upon the death of her client; that numerous efforts were made by her to obtain a mandate from the executor to no avail and as a matter of law and fact, applicant's erstwhile attorneys cannot be held liable for costs incurred prior to the death of her client. His submissions in this respect were cursory. I am of the view, that given the retrieval application is not before Court, it follows that I cannot make any costs orders in relation thereto.
- [9] However, given that the erstwhile attorney of record appeared in her own right in the proceedings before me, represented by Counsel, I am able to make a costs order in respect of those incurred by the first respondent in respect of appearing on the 10 June 2021. The hearing only took place after numerous attempts by the first respondent to ask applicant's erstwhile attorney to remove the matter from the roll, without success. A notice to remove

the matter was actually emailed to the registrar of the Labour Court by that attorney on the day of the hearing, (although she had purportedly withdrawn on the 3 June 2021), after the matter was already in process. I had sight of this on the 11 June 2021.

- [9] I am therefore of the view that it is proper that the costs of 10 June 2021 and those associated with the submissions filed on my direction, be paid by Liesel Scholtz Attorneys. These are not costs de bonis propriis but are costs in her own right in that she was represented by Counsel on that day and subsequent to it. I therefore make the following order:

Order

1. The review application under the above case number has lapsed.
2. The retrieval application is struck off the roll and may be duly brought before court on good cause shown.
3. Costs of June 10 2021 and further submissions ordered by this Court on that date are to be paid by Liesel Scholtz Attorneys.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances

JK Felix instructed by the late applicant's erstwhile attorneys

BCHC for the first respondent

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Prepared on 11 October 2026 · Esheria