THE LABOUR COURT OF SOUTH AFRICA, POLOKWANE

Reportable

Case No: JR 2452/23

In the matter between:

NEHAWU OBO PHUTHI SELOBA **Applicant**

and

OFFICE OF THE PREMIER: LIMPOPO **First Respondent**

GENERAL PUBLIC SECTOR SERVICE BARGAINING COUNCIL **Second Respondent**

M S MAVHUNGU *N.O* **Third Respondent**

STATE SECURITY AGENCY (SSA) **Fourth Respondent**

Heard: **7 November 2024**

Delivered: **8 November 2024**

This judgment was handed down electronically by consent of the parties' legal representatives by circulation to them via email. The date for hand-down is deemed to be 8 November 2024.

JUDGMENT

PRINSLOO, J

LABOUR COURT

Introduction

[1] This matter has a litigious history and a brief background will put the current application in proper context.

[2] Mr Seloba was employed as a chief director in the office of the First Respondent (the Premier or Respondent) and after he was found guilty on various charges of misconduct, he was dismissed.

[3] Aggrieved by the outcome, the Applicant referred an unfair dismissal dispute to the Second Respondent (GPSSBC). The dispute was arbitrated and an arbitration award was issued under case number GPBC542/2020 on 17 March 2021 (the award). The Third Respondent (arbitrator) found that Mr Seloba's dismissal was procedurally and substantively fair and his case was dismissed.

[4] In May 2021, the Applicant filed an application for review of the said award in terms of the provisions of section 145(1) and (2) of the Labour Relations Act[1] (LRA). The relief sought was *inter alia* that the arbitration award be reviewed and set aside. The review application was filed under case number JR 885/21.

[5] It is common cause that the Applicant did not file the record in case number JR 885/21 within the prescribed period and that the provisions of the now repealed Practice Manual of the Labour Court[2] (Practice Manual) were triggered, and the consequences of clause 11.2.3 of the Practice Manual became applicable. The review application was deemed withdrawn.

[6] On 5 December 2023, the Applicant lodged a review application under case number JR 2452/23, seeking to review the arbitration award issued under case number GPBC542/2020. The second review application was pursued in terms of the provisions of section 145(2)(b) of the LRA. The Respondents are the same as in JR 885/21, except that the Applicant has cited the State Security Agency (SSA) as the fourth respondent.

[7] On 2 February 2024, the Respondent filed an application in terms of Rule 11 of the old Rules for the Labour Court[3], seeking an order to *inter alia* dismiss the

[1] Act 66 of 1995, as amended.
[2] Practice Manual of the Labour Court of South Africa effective 2 April 2013 and repealed with effect from 17 July 2024.
[3] GNN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court (repealed).

LABOUR COURT

review application filed under case number JR 2452/2023 and to declare the Applicant a vexatious litigant.

[8] The Rule 11 application was enrolled for hearing on 7 November 2024 and during argument, NEHAWU brought to the Court's attention that it no longer represented Mr Seloba as he terminated the union's mandate and Mr Seloba presented his own case.

The Rule 11 application

[9] The Respondent raised *lis alibi pendens* and *res iudicata* in the Rule 11 application.

[10] Mr Makua for the Respondent did not persist with the issue of *lis alibi pendens* in view of the Applicant's position in respect of case number JR 885/21, as evinced in the answering affidavit. The Applicant's position will be dealt with *infra.*

[11] The Respondent's case in respect of *res iudicata* is that the review application that was filed under case number JR 885/21 is deemed withdrawn/dismissed and is archived and as such, it acquired a peculiar status. The Applicant had to bring an application to reinstate the review application, which was deemed dismissed and the review application cannot be revived by filing another review application under a different case number, seeking to review the same award.

[12] First, I will deal with the relevant and applicable principles.

The applicable principles and provisions

[13] The purpose of the LRA is *inter alia* the effective resolution of labour disputes and the processes introduced by the LRA are intended to bring about the expeditious resolution of labour disputes. The detrimental implications of delays are obvious.[4]

[4] *Commercial Workers Union of SA v Tao Ying Metal Industries and others* [2008] ZACC 15; 2009 (2) SA 204 (CC), where the Constitutional Court held at para 63 that: "These disputes, by their very nature, require speedy resolution. Any delay in resolving a labour dispute could be detrimental not only to the workers who may be without a source of income pending the resolution of the dispute, but it may, in the long run, have a detrimental effect on an employer who may have to reinstate workers after a number of years".

LABOUR COURT

[14] This Court has accepted that a review application is by its nature an urgent application and that it requires prosecution with diligence and urgency.[5] This is supported by the Practice Manual wherein an applicant, in a review application, is required to ensure that all the necessary papers in the application are filed within 12 months of the date of the launch of the application and where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown as to why it should not be archived.

[15] This Court and the Labour Appeal Court (LAC) have considered the status of the Practice Manual[6] and held that in essence, the manual promoted uniformity and consistency in practice and procedure and set guidelines on standards of conduct expected of those who practise and litigate in the Labour Court and it promotes the statutory imperative of expeditious dispute resolution.

[16] The amendments to section 145 of the LRA, which took effect on 1 January 2015, are specifically aimed at expediting the prosecution of review applications and *inter alia* require that an applicant on review must apply for a hearing date within six months of launching the review application. A review application requires urgent prosecution without undue delay.

Late filing of the record

[17] Rule 7A(6) of the Rules provided that the applicant in a review application must furnish the Registrar and each of the other parties with a copy of the record or portion of the record, as the case may be. The applicant must make available copies of such portions of the record as may be necessary for the purposes of the review.

[18] The service and filing of the record in a review application was provided for in clause 11.2 of the Practice Manual as follows:

> '11.2.1 Once the registrar has notified an applicant in terms of Rule 7A (5) that a record has been received and may be uplifted, the applicant must collect the record within seven days.

LABOUR COURT

[5] *Lehola v Nkadimeng N.O and others*, unreported judgment under case no: JR 1912/2012.
[6] *Ralo v Transnet Port Terminals and others* [2015] ZALCPE 69; [2015] 12 BLLR 1239 (LC) (*Ralo*); *Tadyn Trading CC t/a Tadyn Consulting Services v Steiner and others* [2016] ZALCJHB 42; (2014) 35 ILJ 1672 (LC)*; Samuels v Old Mutual Bank* [2017] ZALAC 1; [2017] 7 BLLR 681 (LAC) (*Samuels*).

11.2.2 For the purposes of Rule 7A (6), records must be filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received.

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. The application must be accompanied by proof of service on all other parties, and answering and replying affidavits may be filed within the time limits prescribed by Rule 7. The Judge President will then allocate the file to a judge for a ruling, to be made in chambers, on any extension of time that the respondent should be afforded to file the record.'

[19] Clauses 11.2.1 and 11.2.2 of the Practice Manual provided for the time frame within which the record should be filed and clause 11.2.3 sets out the steps to be followed and the consequences should an applicant fail to file the transcribed record within the prescribed period.

[20] In *Ralo v Transnet Port Terminals and others*[7] *(Ralo),* the Court accepted the legal definition of 'deemed' as set out in the Namibian authority of *Municipal Council of the Municipality of Windhoek v Marianna Esau*[8] where the Court held that the word 'deemed' is considered to have a conclusive effect.[9] This Court concluded by stating the following:

> '…The plain and unambiguous wording of the practice manual is to the effect that the applicant must be regarded as having withdrawn the review application.'

Clause 11.2.7 and clause 16 of the Practice Manual

[21] *In casu,* it is common cause that the Applicant did not file the record within the prescribed 60-day period, did not approach the Respondent to consent to an

[7] *Ralo supra.*
[8] 2010 (2) NR 414 (LC) (LCA 25/2009, 12 March 2010).
[9] *Ralo* at para 10.

LABOUR COURT

extension of time, nor was the Judge President of the Labour Court approached and it follows that the review application is deemed to be withdrawn.

[22] This is however not the end of the Applicant's difficulties.

[23] Clause 11.2.7 of the Practice Manual provided that:

> '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 to be archived or be removed from the archive.'

[24] The Applicant had filed the review application under case number JR 885/21 in May 2021 and had to ensure that all the necessary papers in the application were filed by May 2022. This did not happen and the Rule 7A(6) and (8) notices were never filed subsequent to the launching of the review application in May 2021.

[25] The relevant portions of clause 16 of the Practice Manual provided for the archiving of files as follows:

> '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;
>
> …
>
> 16.2 A party to a dispute in which the file has been archived may submit an application, on affidavit, for the retrieval of the file, on notice to all other parties to the dispute. The provisions of Rule 7 will apply to an application brought in terms of this provision.

LABOUR COURT

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.'

[26] The issue of archiving was considered by the LAC in *E Tradex (Pty) Ltd t/a Global Trade Solution v Finch and others*[10] *(Tradex)* where the LAC confirmed that:

'[9] The notion of a case being 'archived' was invented by the drafters of the Practice Manual as a penalty for dilatoriness and to relieve the burden of carrying dormant cases indefinitely. The consequence of a case being archived is serious. Upon archiving, in terms of clause 11.2.7, a matter is '*regarded as lapsed, unless good cause is shown why the application should not be archived or be removed from the archive*' (emphasis added). To add to that provision, clause 16.3 states unequivocally that: 'Where a file has been placed in the archives, it shall have the same consequences as to further conduct by any respondent party as to the matter having been dismissed*'* (emphasis added). Moreover, clause 16.2 is equally unequivocal: '*A party to a dispute in which the file has been archived may submit an application on affidavit, for the retrieval of the file'*. There can be no plausible doubt that once the case is 'archived' it requires the intervention of the court to 'un-archive' it. There is no room to read into these provisions a role for the registrar to 'resuscitate' the case.

[10] The use of the term 'archived' is peculiar to the Labour Court Practice Manual. In the general civil courts, for example, the failure to prosecute an appeal timeously results in the appeal having lapsed.[11] The effect of that is that the case shall not be dealt with by a court unless an application to reinstate the appeal is made. It is, in our view, plain that the archiving of a Labour Court case was intended to have the identical effect; indeed, clause 16.3 goes even further, to equate the consequence of an archiving of a case to be understood to mean the application is 'dismissed', albeit that a procedure exists to reinstate the case on good cause shown.

[11] It must therefore follow that the archived case acquires a peculiar status which requires the delinquent party to justify why it should be reinstated

[10] [2022] ZALAC 106; (2022) 43 ILJ 2727 (LAC) at paras 9 – 11.
[11] Rule 49(6)(a) and (b) of the Uniform Rules of Court.

LABOUR COURT

> and thereafter be entertained by a court in the wake of a lack of expeditious prosecution. The Labour Court *a quo*, treated the 'archiving' as an administrative act, not as a matter of status. The significance of this distinction between status and an administrative act is that the acquisition of a peculiar status means that upon a given event, the status automatically adheres to the case. That status has legal consequences which a mere administrative act by the registrar cannot undo.'

[27] *In casu,* a period of six months had elapsed without any steps being taken by the Applicant from the date of filing the application, thus the review application was also archived, and not only deemed withdrawn due to the late filing of the record. Clause 16.3 of the Practice Manual is clear that 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.

[28] The LAC confirmed that the consequence of an archiving of a case is to be understood to mean the application is 'dismissed'.

[29] If a review application is deemed withdrawn due to the failure to file the record timeously or as being archived and regarded as lapsed, with the same consequences as the matter having been dismissed, an applicant still has recourse. The LAC made it clear that the effect of lapsing or archiving of a matter is that the case shall not be dealt with by a court unless an application to reinstate or retrieve the file from the archive has been made.

[30] In the answering affidavit to the Respondent's Rule 11 application, the Applicant made it clear that he did not and does not intend to file an application for the reinstatement of the review application under case number JR 885/21 or for the retrieval of the file from the archives.

[31] The position adopted by the Applicant in respect of the review application filed under case number JR 885/21 is clear: he has no intention to revive the said application. The effect thereof is that the Applicant has accepted that the status of the review application is 'dismissed'.

LABOUR COURT

Res iudicata

[32] The principles applicable to the doctrine of *res iudicata* are settled. In *Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another*[12], it was explained:

> 'The expression *'res iudicata'* literally means that the matter has already been decided. The gist of the plea is that the matter or question raised by the other side had been finally adjudicated upon in proceedings between the parties and that it therefore cannot be raised again. According to Voet 42.1.1, the *exceptio* was available at common law if it were shown that the judgment in the earlier case was given in a dispute between the same parties, for the same relief on the same ground or on the same cause (*idem actor, idem res et eadem causa petendi*) (see eg *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) ([2001] 1 All SA 417) at 239F – H and the cases there cited).'

[33] The requirements for a successful plea of *res judicata* are as well established – they acquire the party raising the defence to show that a previous judgment on the merits by a competent court has been given in an action or application between the same parties, based on the same cause of action and in respect of the same subject matter. In *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd*[13], the Supreme Court of Appeal held that:

> 'The fundamental question in the appeal is whether the same issue is involved in the two actions: in other words, is the same thing demanded on the same ground, or, which comes to the same, is the same relief claimed on the same cause, or, to put it more succinctly, has the same issue now before the court been finally disposed of in the first action?'

[34] This Court had also considered the issue of *res iudicata* and held that it is against public policy that a litigant should be able to keep demanding the same relief from the same adversary on the same grounds. The rule is expressed by saying that a valid defence of *res iudicata* may be raised where the same thing had, on the same grounds, earlier been demanded from the same party.[14]

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[12] [2012] ZASCA 28; 2014 (5) SA 297 (SCA) at para 10.
[13] [2000] ZASCA 70; 2001 (2) SA 232 (SCA) at para 3.
[14] See: *Dumisani and another v Mintroad Sawmills (Pty) Ltd* [1999] ZALAC 27; (2000) 21 ILJ 125 (LAC).

LABOUR COURT

[35] In *African Farms and Townships Ltd v Cape Town Municipality*[15], Steyn CJ held that:

> 'Where a court has come to a decision on the merits of a question in issue, that question, at any rate as a *causa petendi* of the same thing between the same parties, cannot be resuscitated in subsequent proceedings.'

[36] In other words, what the Court is required to do is to compare the relevant facts upon which reliance is placed for the contention that the cause of action is the same in both proceedings.

Analysis

[37] The Respondent's case is that the Applicant, under case number JR 2452/23 seeks the same relief, based on the same cause of action as what was sought in case number JR 885/21.

[38] The Applicant disputed that the doctrine of *res iudicata* finds application for the following reasons: the review application filed under case number JR 885/21 was launched in terms of the provisions of section 145(2)(a) and the review application filed case number JR 2452/23 was launched in terms of the provisions of section 145(2)(b) of the LRA. The parties are not the same as the SSA had been added as a party with a direct and substantial interest, which may be affected by the judgment under case JR 2452/23. The Applicant submitted that, notwithstanding the fact that both review applications seek the review and setting aside of the arbitration award issued under case number GPBC542/2020, the facts relied upon are different, the grounds for review are different and the parties are different.

[39] The Constitutional Court has held in *Mkhize N O v Premier of the Provinces of KwaZulu-Natal and others*[16] that "*the doctrine of res iudicata will apply only 'where a cause of action has been litigated to finality between the same parties on a previous occasion'*". That is the gist of the issue before me – has the cause of action been litigated to finality?

[15] 1963 (2) SA 555 (A) at 562D.
[16] [2018] ZACC 50; 2019 (3) BCLR 360 (CC) at para 38.

LABOUR COURT

[40] The question is what is the Applicant's cause of action? It is evident from both review applications that the subject of the review application is the award that was issued on 17 March 2021 under case number GPBC542/2020 and that the relief sought is for the said award to be reviewed and set aside in terms of section 145(2) of the LRA.

[41] The Applicant's case is that it is not the same cause of action because the facts relied upon and the grounds for review are different. This is not correct.

[42] Section 145 of the LRA provides for the review of arbitration awards and in terms of section 145, any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the CCMA or bargaining council, may approach the Labour Court for an order setting aside an arbitration award, within the prescribed time period. Section 145(2)(a) and (b) sets out what a 'defect' means. In short: section 145 provides for the review of arbitration awards or proceedings where a defect, as described in section 145(2) is alleged.

[43] The 'defect' which triggers an application for review in terms of section 145 of the LRA, is to be identified by the applicant in the review application and it could include any or all of the defects set out in section 145(2). Section 145 permits a party to apply to the Labour Court for adjudication of its review application when a defect is alleged. The LRA does not differentiate between the defects as grounds for review for purposes of a referral for adjudication, nor does it provide separate dispensations for that.

[44] The cause of action in a review application remains an arbitration award or proceeding where a defect, as defined in section 145(2), is alleged. The specific nature of the defect will determine the grounds for review, the defects do not constitute causes of action for which separate applications must be filed – they constitute different grounds for review.

[45] The Rules provided for the filing of a supplementary affidavit in the event that an applicant wants to supplement and/or amend the factual and legal grounds upon which he or she relies in the application for review – it is not permitted to file an entirely new application for review to include an additional ground for review based on a different defect, as provided for in section 145(2). The

LABOUR COURT

Applicant had to raise all his grounds for review in respect of the same arbitration award once and in the same application.

[46] *In casu,* the cause of action in respect of both review applications is the same, the relief sought is the same and the fact that the grounds for review are different or that the facts relied upon in support of the grounds for review differ, is of no moment – the cause of action and the relief sought remained the same. A new or different ground for review in respect of the same arbitration award does not constitute a fresh cause of action.

[47] The Applicant's argument that the parties are not the same because the SSA is cited as the fourth respondent in the second review application is without merit. It is trite that in a review application, the parties cited as respondents are the CCMA or bargaining council, the arbitrator who had issued the award which is the subject of the review application and the employer or employee in whose favour the award was issued.

[48] *In casu,* the Applicant cited the SSA and submitted that the SSA had been added as a party with a direct and substantial interest, which may be affected by the judgment under case JR 2452/23.

[49] In my view, there is no merit in the Applicant's submission – to the contrary, it displays a lack of understanding of the applicable principles. It is trite that for parties to be joined to particular proceedings, they must have a direct and substantial legal interest in the matter such as to make them necessary parties to the proceedings. Only parties that would be directly affected by the court's order or where the order cannot be sustained or carried into effect without prejudicing such a party are necessary parties to the proceedings.

[50] In JR 2452/23, the Applicant seeks the review and setting aside of the award and no relief is sought against the SSA. No case is made out that the SSA would be affected by the review and setting aside of an arbitration award as the SSA was not a party to the unfair dismissal dispute, or that the review of the award cannot be carried into effect without prejudicing the SSA, nor that it is a necessary party to the proceedings. Not every entity or person that is mentioned during arbitration proceedings is a necessary party in subsequent review proceedings. The SSA is not a necessary party to the review application and

LABOUR COURT

should not have been cited. Ultimately the parties in both review applications, are the same parties.

[51] The Applicant accepted the consequences of the non-compliance with the provisions of the Practice Manual due to his failure to prosecute the review application filed under case number JR 885/21 in accordance with the prescribed timeframes. As already alluded to, the LAC confirmed that the consequence of an archiving of a case is to be understood to mean the application is 'dismissed'.

[52] The Applicant made it clear that he has no intention to bring an application to revive the said review application or to remove it from the archives and therefore the review application filed under case number JR 885/21 remains dismissed. The Applicant cannot come back to Court on the same dispute because he now seeks to raise a different ground for review and institute fresh proceedings for the same relief as before on the same cause of action. The reality is that the review application is dismissed and remains dismissed.

[53] It is trite that any litigant who brings an application to Court should place before the Court all the relevant and material evidence in support of his or her case on the first occasion. A litigant cannot institute multiple applications, one after the other. The application of the doctrine of *res iudicata,* by its nature, brings an end to legal proceedings as well as to a party's right to approach a court.

[54] In launching the second review application under case number JR 2452/23, the Applicant seeks to salvage its wrecked ship, which they can clearly not do. Put differently, the Applicant seeks a second bite at the cherry to which it is not entitled. The Applicant does not have the right to approach the Court a second time to review the same arbitration award.

[55] The special plea of *res iudicata* is upheld.

[56] The Applicant seeks an order to declare the Applicant a vexatious litigant in terms of the Vexatious Proceedings Act[17] as the Applicant is in the habit of instituting frivolous and vexatious applications against the Respondent, which

[17] Act 3 of 1956.

LABOUR COURT

result in the Respondent incurring unnecessary legal costs in opposing meritless applications which are all eventually dismissed or abandoned.

[57] It is evident from the papers that this matter has a litigious history. However, I am not convinced that a case has been made out to declare the Applicant a vexatious litigant. In any event, NEHAWU is no longer representing Mr Seloba and by upholding the special plea of *res iudicata,* it brings an end to the legal proceedings as well as to the Applicant's right to approach this Court in respect of any of the review applications.

Costs

[58] The last issue to be decided is the issue of costs. This Court has a wide discretion in respect of costs, considering the requirements of law and fairness.

[59] In *Zungu v Premier of the Province of KwaZulu-Natal and Others*[18], the Constitutional Court confirmed the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.

[60] Mr Makua for the Respondent did not press for a cost order. Mr Seloba is no longer represented by the trade union and he indicated that a cost order would destroy him.

[61] Although this is a case where a cost order would be appropriate, the interest of justice militates against it.

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

LABOUR COURT

[18] [2018] ZACC 1; (2018) 39 ILJ 523 (CC) at para 24.

Order

1. The special plea of *res iudicata* is upheld;

2. The review application filed under case number JR 885/21 is declared to be withdrawn and is regarded as dismissed;

3. The review application filed under case number JR 2452/23 is struck off the roll;

4. There is no order as to costs.

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Connie Prinsloo
Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicant:	Mr Seloba in person
For the First Respondent:	Advocate L A Makua
Instructed by:	State Attorney, Johannesburg

LABOUR COURT