IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: C263/19

In the matter between:

THE SOUTH AFRICAN POLICE SERVICES Applicant

and

GERHARD COERICIUS First Respondent

THE SAFETY AND SECURTITY SECTORAL

BARGAINING COUNCIL Second Respondent

JM MTHUKWANE N.O. Third Respondent

THUTHUZELA NDZOMBANE N.O. Fourth Respondent

Date heard: 12 May 2021

Delivered: By means of email 30 August 2021.

Summary: Rule 11 application to dismiss a review; Failure by applicant to apply for the resuscitation of an Award and Ruling deemed withdrawn in terms of Clause 11.2.3 of the Practice Manual or oppose the Rule 11 application; Macsteel Trading Wadeville v Van der Merwe NO & others (2019) 40 ILJ 798 (LAC) and Mthembu v Commission for Conciliation, Mediation & Arbitration & Others (2020) 41 ILJ 1168 (LC) followed.

JUDGMENT

RABKIN-NAICKER J

LABOUR COURT

[1] There are two applications in the pleadings before me. The applicant seeks to review and set aside a condonation ruling (dated 14 October 2016) and an arbitration award (dated 5 March 2019) under case number PSSS305-16/17. The application was launched on the 17 April 2019 and is opposed. The first respondent has brought an application in terms of Rule 11, dated the 13 May 2020, in which it seeks that the review application be dismissed for lack of prosecution, alternatively that:

"2.1 The Applicant is directed to comply with Rule 7A (8) of the Labour Court Rules by either delivering of notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit; or deliver a notice that the applicant stands by its notice of motion relating to the Review Application lodged under case number C263/19.

2.2 The affidavit or notice described at paragraph 2.1 herein above must be filed within 5 (five) days of this Honourable Court Order."

[3] The founding affidavit in the Rule 11 application points out that the transcribed record of the arbitration was filed on 19 September 2019, outside of the 60 day time period provided for in the Practice Manual of the Labour Court. The applicant did not seek consent for the extension of the time prescribed, nor did it apply for such extension. At the time of deposing to the Rule 11 affidavit, six months had passed and the applicant had failed to file its Rule 7A (8) Notice despite demand. A letter pertinently pointing out the failure to prosecute the review proceedings addressed to the State Attorney is attached to the application dated 18 March 2020. There is no opposing affidavit filed in respect of the application to dismiss the review.

[4] On the 19 August 2020, the applicant filed its supplementary founding affidavit in the review. The applicant avers that the record was filed in two parts. The transcript of the arbitration proceedings held on 28 March 2017 was filed at the Labour Court on 10 June 2019 and on 19 September 2019. The bundles of documents which the parties submitted in the course of the arbitrations proceedings were filed on the 19 June 2019. In the supplementary affidavit, it is averred that:

LABOUR COURT

"I am advised to seek condonation for the late delivery of the supplementary founding affidavit and I am informed that I should provide an explanation when seeking condonation."

[5] In the paragraphs dealing with its difficulties in obtaining a complete record of the proceedings which cover the period 14 May 2019 (when the applicant asked for the CD to be transcribed) to the 23 March 2020, when the applicant decided to proceed with the review, despite not having the complete transcript, no mention is made of attempts to comply with the Practice Manual of the Court, in particular Clauses 11.2.2 and 11.2.3 thereof. However, detail is provided as to the State Attorneys attempts to obtain the full record of the proceedings to be reviewed. The next period of delay from the 23 March 2020 until the 18 August 2020 is explained by various problems arising at the office of the State Attorney due to the Covid pandemic.

[6] In his answering affidavit, to the review application, dated the 25 September 2020, the first respondent raises a jurisdictional point in limine, that the applicant had failed to comply with the prescripts of the Practice Manual and their review application is therefore deemed to have been withdrawn in terms of Clause 11.2.3 thereof. The applicant was alerted that:

"35. This means that there is no review application before this Honourable Court currently. For the Applicant to revive its review application, it must apply for condonation for non-compliance of Rule 7A (6) read with Clause 11.2.2."

[7] In reply, it is stated on behalf of the applicant:

"35. Condonation for the late filing of the supplementary founding affidavit was promptly made at the earliest opportunity pursuant to the difficulties experienced by the applicant in securing a complete record of the proceedings sought to be set aside.

36. I am advised that a review application is deemed to have been withdrawn if the applicant fails to file the record within 60 day of the date on which the applicant is advised by the registrar that the record has been received. I am also

LABOUR COURT

advised that the dismissal of a review application on account of the delays in filing a complete record is an option which the Court will not take lightly.

37. I submit that an application for condonation, comprising a reasonable and acceptable explanation for the delays in this review application is before the Court."

[8] In addition, in its replying papers before me, the applicant submits that:

"Rule 7A(6) of the Labour Court Rules read together with Clause 11.2.2. requires an applicant to deliver the record with 60 days of the date on which the applicant is advised by the registrar that the record has been received.

It follows that if the complete record is not made available to the applicant, the applicant cannot deliver the record within the 60 day period or otherwise. I submit that the applicant cannot be criticized for the delays in filing the record." (emphasis mine)

[9] It was only on the 10 of May 2021, two days before the set down of this matter, that the applicant filed a Notice of Motion in respect of: "*condonation for the late filing of the Rule 7A Record and the Supplementary Affidavit dated 18 August 2020 and reinstatement of the review application, if necessary, in the event that the Court find that the file was archived.*" The challenge to the applicant, made in the answering papers was however that the review application is: "deemed to have been withdrawn" in terms of clause 11.2.3. This is not the same as a file being archived which is dealt with in clause 11.2.7 of the Practice Manual, when an applicant fails to file all of its papers within 12 months of the launch of the application, and to inform the Registrar that the matter is ready for allocation for hearing. As a matter of fact however, the application had also lapsed and was archived.

[10] In a supplementary note filed at the same time as the said Notice of Motion, it becomes apparent as to why the applicant does not ask the Court to reinstate the review on the grounds that it is deemed dismissed. It is submitted on behalf of the applicant that the record was delivered to the Registrar within the 60-day period, *albeit that it was incomplete*, and on that basis the review application

LABOUR COURT

cannot be deemed to be dismissed and that Clause 11.2.3 is therefore not applicable. This argument is also contained in the Heads of Argument filed by the applicant.

[11] It is necessary to set out both relevant clauses of the Practice Manual as follows:

"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."

[12] The applicant is essentially arguing that it does not fall foul of clause 11.2.3 on the basis that it filed a part of the record within 60 days of launching the review. This simply cannot be correct. Clause 11.2.3 of the Practice Manual provides that an applicant is to request an extension of time to obtain the full record from a respondent, or approach the Judge President with an application for extension, if consent is not forthcoming, if it fails to file the record within the prescribed 90 day period. The notion that an applicant can file a record in 'dribs and drabs' and that the *dies* of 60 days only starts running when it is of the opinion that the record is adequate, militates against the principle that a review is by its very nature urgent. This principle of urgency is set out in Clause 11.2.7 of the Practice Manual[1] and has been repeated in numerous judgments of this Court. Any

[1] 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

LABOUR COURT

interpretation of the Practice Manual that accords the word 'record' in clause 11.2.3, the meaning 'a part of the record', as submitted by the applicant is absurd on a plain reading of the Clause, and in addition would be contrary to its purpose.

[13] As the Labour Appeal Court has stated[2]:

"[22] The underlying objective of the Practice Manual is the promotion of the statutory imperative of expeditious dispute resolution. It enforces and gives effect to the Rules of the Labour Court and the provisions of the LRA. It is binding on the parties and the Labour Court. The Labour Court does, however, have a residual discretion to apply and interpret the provisions of the Practice Manual, depending on the facts and circumstances of a particular case before the court."

[14] Ultimately, it is submitted by the applicant, that the first respondent is putting form before substance and that a proper case has been made out in the supplementary founding affidavit for condonation for the non-compliance with "the prescripts of this Court". As stated above, the supplementary affidavit contains averments supporting condonation to be granted for the its' late filing, and in that respect provides detailed information as to the efforts of the state attorney to obtain the record of the ruling and arbitration sought to be reviewed.

[15] The Court was not favoured with a condonation application apart from the averments contained in the supplementary affidavit. There was also no opposition filed to the Rule 11 application. As I have recorded, a last minute Notice of Motion was filed, asking the Court to reinstate the Award 'if necessary' in the event the Court regarded the review application to be archived. The applicant stuck to its guns (as it had to, given its averments in reply), that the review could not be deemed dismissed, as the applicant had not been able to obtain the full record within the 60 day period.

[16] The Practice Manual containing Clause 11.2.3 has been in force since 2013. It is binding on the parties, and confirmed as such by the LAC for at least the past

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.

[2] Macsteel Trading Wadeville v Van der Merwe NO & others (2019) 40 ILJ 798 (LAC)

LABOUR COURT

four years[3]. It is surely not too formalistic to expect the State Attorney to comply with its prescripts when it is unable to file a record within 60 days. Individual litigants are expected to do so. As the Constitutional Court has stated and repeated:

'(T)here is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.' [4]

[17] The first respondent did not sit on his hands waiting for the applicant to file its supplementary affidavit. A Rule 11 application was filed and ample opportunity was provided for the applicant to apply for the reinstatement of the review. In **Mthembu v Commission for Conciliation, Mediation & Arbitration & others[5]**) Tlhotlhalemaje J stated:

"[16] In *Macsteel*, the LAC confirmed that this court would lack jurisdiction in instances where a matter is deemed withdrawn and where the opposing party only raised the issue of non-compliance with the time frames in the answering affidavit. In these circumstances, a party complaining of undue delay would have been required to bring a separate rule 11 application for the review application to be dismissed or struck from the roll on the grounds of the other party's undue delay in prosecuting it. I do not however understand the principle to imply that a party can only bring a rule 11 application once it has been placed in a position to file an answering affidavit and raised the issue of non-compliance.

[17] It often happens in this court as the facts of this case demonstrate, that reviewing parties file the applications and do absolutely nothing thereafter. In my view, it would defeat the whole concept of expeditious resolution of disputes if opposing parties were to be required to wait endlessly for the reviewing party to file everything required in terms of the rules, and to only thereafter complain

[3] Samuels v Old Mutual Bank (2017) 38 ILJ 1790 (LAC)
[4] MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute 2014 (3) SA 481 (CC) at paragraph 82
[5] (2020) 41 ILJ 1168 (LC

LABOUR COURT

about the non-compliance in the answering affidavit. Once a matter is deemed withdrawn, and the reviewing party does nothing by way of an application to reinstate or to seek condonation for non-compliance with the time frames for the matter to be resurrected, it cannot be expected of the opposing party to wait endlessly. The only way of putting an end to the matter would be by way of a rule 11 application. To hold otherwise would effectively place opposing parties in review applications at the mercy and whim of the reviewing parties.

[18] It is therefore my view that given the wide discretion that this court enjoys when interpreting and applying the provisions of the Practice Manual as acknowledged in both Macsteel and Samuels, there is nothing that prevents the court from considering and dismissing a review application in the face of a rule 11 application, even in circumstances where that application was deemed withdrawn. Obviously that decision will be determined by the facts and circumstances of the particular matter before the court.

[19] The above view is held in the light of the emphasis placed by the LAC in Macsteel that rule 11(4) provides that in the exercise of its powers and the performance of its functions, or any incidental matter, a reviewing court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act. This provision gives the Labour Court a wide discretion to take any course of action to achieve the objects of the Act, and furthermore, there is an appreciation that the underlying objective of the Practice Manual is the promotion of the statutory imperative of expeditious dispute resolution, and to enforce and give effect to the Rules of the Labour Court and the provisions of the LRA."

[18] *In casu*, the Rule 11 application was not opposed and no application was made to reinstate the review given that it was deemed withdrawn in terms of Clause 11.2.3. The applicant was given every opportunity to comply with the Rules and Practice Manual of the Court but did not. Rather it sought to give an interpretation to Clause 11.2.3 of the Practice Manual at odds with the statutory imperative of expeditious dispute resolution. I am persuaded that that the first respondent's unopposed Rule 11 should succeed and find that this Court does not have

LABOUR COURT

jurisdiction to review the award and ruling in question. The Award of 12 months back-pay and reinstatement therefore stands.

[19] Given that the individual first respondent has had to incur legal costs in order to reach finality in this matter, despite his best efforts to get the applicant to diligently prosecute the matter, I am of the view that costs should follow the result. I make the following order:

Order

1. The review application of the Ruling and Award under case number PSSS305-16/17 is dismissed with costs.

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H.Rabkin-Naicker

Judge of the Labour Court

Appearances

Applicant: T. Golden S.C. with Ria Matsala instructed by the State Attorney

First Respondent: Majang Inc Attorneys

LABOUR COURT