THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Not of interest to other judges

Case No: JR 543/2018

In the matter between:

JB MARKS LOCAL MUNICIPALITY **Applicant**

and

SALGBC **First Respondent**

MARLEZE BLIGNAUT SWANEPOEL **Second Respondent**

CH STOLZ **Third Respondent**

Heard: **24 August 2021**

Delivered: **This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 25 August 2021.**

Summary: Review application

Whether the application is dismissed in terms of the Practice Manual clause 16.1 and 16.3 as it was not prosecuted within six months

Whether the application is deemed to have been withdrawn as the record was not delivered within 60 days

LABOUR COURT

JUDGMENT

COETZEE AJ

[1] I raised with the parties the view that the Court has no jurisdiction as the record may not have been delivered within 60 days.

[2] The applicant approaches this Court to review and set aside an arbitration award issued on 10 February 2018. The second respondent reinstated the third respondent with retrospective effect and payment.

[3] The third respondent submits that the review application has been dismissed by virtue of clause 16 of the Practice Manual as for more than 6 months the applicant did not pursue its review application.

[4] The applicant issued the review application on 27 March 2018.

[5] According to the third respondent, the applicant took a further step only when it served its supplementary affidavit on the third respondent on 19 November 2018, more than 6 months later.

[6] The third respondent submits that the review application is archived in terms of clause 16.1 of the Practice Manual as the applicant failed for more than 6 months to pursue the application. In terms of clause 16.3 the effect is the same as having dismissed the matter. The third respondent raised this in its answering affidavit.

[7] The applicant in its replying affidavit contended that the third respondent first had to apply for the matter to be archived, whereupon the Registrar had to archive the review application. Until such time, the review remains alive.

[8] The applicant served the transcribed record on 5 September 2019, well outside the 60-day period.

[9] The third respondent submitted that serving the record on 6 September 2019 it constituted the filing of a process.

LABOUR COURT

Analysis

[10] The filing notice of the supplementary affidavit bears a date stamp of the Registrar of 2 November 2018 which is also the date of the fax transmission when the supplementary affidavit was faxed to the third respondent's fax number.

[11] This means that for the period 27 March 2018 to 2 November 2018 the applicant did not pursue the review application. That is for a period of 7 months and one week.

[12] Clauses 16.1 -16.3 of the Practice Manual provides as follows:

> "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;
>
> …
>
> 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.
>
> 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.

[13] The Labour Court in *Ralo v Transnet Port Terminals and Others*[1] considered the status of the Practice Manual and concluded as follows:

> [8] The status of the practice manual was discussed by this court in *Tadyn Trading CC t/a Tadyn Trading Consulting Services v Steiner and others* (2014) 35 ILJ 1672 (LC) [also reported at [2014] 5 BLLR 516 (LC) – Ed]. The court said the following, at paragraph 11 of the judgment:

[1] [2015] 12 BLLR 1239 (LC)

LABOUR COURT

> "The correct approach, in my view, as to the force and effect of practice directives similar to the one in issue is the one adopted in *In re Several Matters on the Urgent Roll* in which the court had to consider the force and effect of the provisions of the practice manual chapter 9.24 of the South Gauteng High Court regarding the failure by the applicant to set out the explicit circumstances which rendered the matter urgent. The court held that in law the Judge President was entitled to issue practice directives relating to the procedure of setting down matters on the roll."

[9] I agree. The practice manual contains a series of directives, which the Judge President is entitled to issue. In essence, the manual sets out what is expected of practitioners so as to meet the imperatives of respect for the court as an institution, and the expeditious resolution of labour disputes (see paragraph 1.3). While the manual acknowledges the need for flexibility in its application (see paragraph 1.2) its provisions are not cast in the form of a guideline, to be adhered to or ignored by parties at their convenience."

[14] It is clear that the Practice Manual is binding.

[15] It is common cause that the applicant has not filed an application to condone non-compliance or to retrieve the review application from the archive.

[16] The third respondent relies upon *SA Municipal Workers Union on behalf of Mlalandle v SA Local Government Bargaining Council & others*[2] for the proposition that if the applicant has failed for six months to prosecute the review, that there is no *lis* left between the parties:

> [9] The third respondent's contention was that there was no longer a *lis* before the Court because the review application was deemed to have been withdrawn. To this end, the applicant was obliged to have brought an application for the reinstatement of the review application, alternatively, an application for condonation.
>
> [10] I agree with the submissions made on behalf of the third respondent, and this approach is in line with the authorities as referred to elsewhere in this judgment. Accordingly, by virtue of the fact that there was non-compliance with the 60-day period contemplated in clause 11.2.2 of the Practice Manual, the review application as filed by the applicant is deemed to have been withdrawn.

[2] (2017)38 ILJ 477 (LC)

LABOUR COURT

[11] In the absence of an application to reinstate the review application, or further in the absence of an application for condonation as inferred from the provisions for such non-compliance, the Court cannot exercise its discretion in a vacuum. To therefore request the Court to exercise its discretion, and to ignore the fact that no formal request or application have been made is indeed a big ask, which the Court cannot accede to. To do so would make a mockery of practices in this court which are meant to ensure its smooth and efficient running. It is not for this court to willy-nilly grant extensions or indulgences where no formal applications have been made in that regard."

[17] The decision in *SA Municipal Workers Union on behalf of Mlalandle* relates to clause 11.2 of the Practice Manual where the applicant failed to file the record within 60 days and the review was deemed to have been withdrawn.

The Labour Court in *Ralo* further held as follows:

[10] To the extent that the applicant contends that the meaning of the word “deemed” is such that the dispute between the parties remains unresolved and that the application has not been withdrawn, the meaning of “deemed” in a context similar to the present has been the subject of an instructive judgment by the Labour Court of Namibia. While *Municipal Council of the Municipality of Windhoek v Marianna Esau* (LCA 25/2009, 12 March 2010) concerned the lapsing of appeals, the wording of the rule under consideration in that instance is not dissimilar. Rule 17(25) of the Rules of the Labour Court of Namibia provide that an “*appeal to which this Rule applies must be prosecuted within 90 days after the noting of such appeal, and unless so prosecuted it is deemed to have lapsed*”. The word “deemed” in this instance was clearly considered to have conclusive effect – in the absence of the prosecution of the appeal within the prescribed period the appeal was held to have lapsed. (See also *Pereira v Group Five* (*Pty*) *Ltd and others* [1996] All SA 686 (SE), at 698, where the court referred with approval to *Steel v Shanta Construction* (*Pty*) *Ltd and others* 1973 (2) SA 537 (T) [also reported at [1973] 3 All SA 42 (T) – Ed], in which Coetzee J stated that the word “deemed” means “considered” or “regarded” and is used to denote that “something is a fact regardless of the objective truth of the matter”.) 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.

LABOUR COURT

[18] There can be no doubt that there is no case before the Court when a party failed to comply with clause 11.2 and 11.3 of the Practice Manual. There are no preceding formalities. The Court does not have jurisdiction to hear the matter.

[19] The applicant in the replying affidavit, but not dealt with in the heads of argument, stated that the position is different when a party relies upon clause 16 of the Practice Manual. The applicant said the following:

> "The available avenue for the third respondent would have been for the third respondent to apply for the archiving of the matter."

[20] The third respondent relies also upon *Macsteel Trading Wadeville v Van der Merwe NO and Others*[3] where the Labour Appeal Court considered the effect of non-compliance with both clause 11.2 and 11.2.7.

[21] Clause 11.2.7 provides as follows:

> "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 Arguments) 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. (own emphasis).

[22] In *Macsteel* the LAC held as follows[4]:

> [23] The Practice Manual came into effect during April 2013; midway through the review application. It, therefore, applies to it. Clause 11.2.7 imposes an obligation on the applicant to ensure that all the necessary papers in the application are filed within 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 to be set down 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 Samuels v Old Mutual Bank [2017] ZALAC 10 (25 January 2017) at paras 14 and 15. 11 not be archived or be removed from

[3] (2019) 40 ILJ (LAC)
[4] Para 23

LABOUR COURT

the archive. The record in the review application had been filed approximately 20 months after the launch of the review application. And the review application was set down for hearing almost six years from its launch. This means that by the date of set down of the review application, it had been archived and regarded as lapsed".

[23] The Court in *Macsteel* regarded the review application as being deemed withdrawn by virtue of non-compliance with clause 11.2 of the Practice Manual. But it also seemed to have considered the long delay of six years in pursuing the review. It emphasised that there was no need for Macsteel to have brought an application to archive or dismiss the review. By reason of the late filing of the record and the long delay (exceeding 12 months) the review application " …had been archived and regarded as lapsed."

[24] The obligation is placed upon the Registrar to archive a file both where the 6-month provision or the 12-month provision has not been complied with.

[25] I can find no indication in the Practice Manual that the Third Respondent must first have applied for the archiving of the matter. While it may be convenient for the Registrar to be informed that there was non-compliance, it is not a prerequisite for archiving a file in those two instances.

[26] The purpose of the Practice Manual was stated in *Macsteel*[5] as follows:

"[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.[6]"

[27] In order to give effect to the purpose of expeditious dispute resolution there is no need to bring an application (that complies with rule 7) for the archiving of a file.

[5] Para 22
[6] 5 Samuels v Old Mutual Bank [2017] ZALAC 10 (25 January 2017) at paras 14 and 15

LABOUR COURT

[28] The applicant's submission that delivery of the record constitutes the filing of a process is not clear. Instead, the filing of the record within 6 months constitutes the taking of a step. In terms of clause 16.3 the matter had not been dismissed as the applicant took a step by delivering the record.

[29] In terms of clause 11.2.2 of the Practice Manual the matter, however, is deemed to have been withdrawn as the record was not delivered within 60 days.

Costs

[30] Having regard to the relevant considerations I find no reason to make a cost order.

Order

[31] I make the following order:

1. The review application is struck from the roll as it is deemed withdrawn in terms of clause 11.2.2.

2. There is no order as to costs

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F. Coetzee

Acting Judge of the Labour Court of South Africa

LABOUR COURT

Appearances

For the applicant:	Adv Tefo Moneri
Instructed by:	Shuping Attorneys
For the Third Respondent:	Shagan Windvogel of IMATU

LABOUR COURT