IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JS393/19 & JR537/13

In the matter between:

SG BULK, A DIVISION OF SUPERGROUP AFRICA (PTY) LTD **Applicant**

and

SIMON THANDUYISE KHUMALO AND ANOTHER **Respondents**

In re:

WILSON S NKUNA **Applicant**

NBCRFLI AND OTHERS **Respondents**

Heard: **11 February 2021**

Delivered: **13 April 2021 (This judgment was handed down electronically by emailing a copy to the parties. The 13th April 2021 is deemed to be the date of delivery of this judgment).**

Summary: Application in terms of rule 11 seeking to dismiss a referral and a review application. Where a *lis* is archiveable by the registrar in terms of the

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provisions of the Practice Manual, until the provisions of the Practice Manual are invoked – request the registrar to archive a file – this Court must not exercise jurisdiction by dismissing the matter on the basis of failure to prosecute. Where a review application is deemed withdrawn, this Court lacks jurisdiction to dismiss the review application. Held: [1] The rule 11 applications are refused. Held: [2] There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] There are two applications before Court. The first matter came before this Court as a referral in terms of rule 6 of the Labour Court Rules. The applicant contends that the referring party has delayed prosecuting the referral and as such the referral must be dismissed on the basis of the delay. The second matter came as a review application. The application is deemed withdrawn within the contemplation of the provisions of the Practice Manual. That notwithstanding, the applicant seeks an order dismissing the application. These two matters were enrolled before my roll on 11 February 2021. Regard being had to the weight of authorities in this Court regarding deemed withdrawn reviews, the applicant sought and was given an indulgence to make submissions contrary to the authorities which held that the Court lacks jurisdiction over a withdrawn review. Huge reliance was placed on the judgment of *Macsteel Trading Wadeville v Francois van der Merwe N.O and others*[1] together with another Labour Court judgment which interpreted *Macsteel* in a manner that suggests that the Labour Court retains jurisdiction.[2] The applicants only made additional submissions on 16 March 2021.

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[1] [2019] 40 ILJ 798 (LAC)

[2] *Mthembu v CCMA* [2020] 41 ILJ 1168 (LC)

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Background Facts

[2] Given the crisp legal question to be addressed in this judgment, it is not necessary to detail the facts appertaining the two matters before me. Briefly the first matter is a referral by Mr Khumalos. On or about 20 May 2019, the Khumalos filed a statement of case alleging an unfair dismissal based on operational requirements. On or about 30 May 2019, the applicant, SG Bulk, filed a statement of response. In terms of the Rules of the Labour Court the next step was for the parties to hold a pre-trial conference. Such a step was not taken and a period of one year four months elapsed since the last step. Owing to that, the applicant launched an application seeking to dismiss the referral on the basis of undue delay.

[3] In the second matter, Mr Nkuna launched a review application on 19 March 2013. The review application was deemed withdrawn because for a period of two years, Nkuna failed to take appropriate steps to prosecute it. That notwithstanding, on 2 November 2020, the applicant, Imperial Distribution launched an application seeking to dismiss the review.

Evaluation

[4] The principle of unreasonable delay finds no application where the time period is regulated by a statute or the Prescription Act. With regard to the first matter, section 191 (11) of the LRA provides that a referral must be made within a 90 days' period. Once a dispute is so referred, thereafter it gets regulated by the rules and directives of the Labour Court. In terms of rule 4 (a) of the Labour Court Rules when a response is delivered, the parties to the proceedings (applicant and respondent) are obligated to hold a pre-trial conference within 10 days of the delivery of the response. It is common cause in this matter that the parties failed to hold or convene a pre-trial conference. Sub-rule (7) provides that if any party fails to attend a convened pre-trial conference a matter may be enrolled for hearing on the directions of a judge. In terms of sub-rule (5) a judge may direct the parties to hold a pre-trial conference. Instead of requesting the registrar to enroll the matter for pre-trial conference

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before a judge, the applicant brought a rule 11 application seeking a dismissal. That is inappropriate. Rule 11 is there to cater for situations not dealt with in the rules. The situation obtaining in this matter has been catered for in the rules.

[5] Further, the Practice Manual provides that if six months lapses without any step taken the Registrar is empowered to archive a file. Once archived a matter is as good as being dismissed. In order to achieve a dismissal of a referral, the respondent party must request the Registrar to archive the file and not approach this Court to seek a dismissal.

[6] For all the above reasons, the rule 11 application brought under case number JS393-19 stands to be dismissed.

Deemed withdrawn review application.

[7] It is by now settled law in this Court that where a review application is deemed withdrawn, there is no longer a live matter to be entertained[3]. The applicants placed premium on the following *dictum* in *Macsteel*:

> "Thus having failed to strike the matter from the roll, it was impermissible for the Labour Court to decline to deal with the issue of the delay <u>because the correct approach was for the Labour Court to afford Macsteel an opportunity to bring a rule 11 application.</u>

[8] This part of the dictum was interpreted by my brother Tlhotlhalemaje J in *Mthembu* to mean the following:

[3] See *Overberg District Municipality v IMATU obo Spangenberg and others* case number C157-18 (08 June 2020) followed recently in *Vesela Risk Services (Pty) Ltd v CCMA and others* case number JR648-18 [2021] ZALCJHB 37 (28 January 2021).

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> "…the court is, as a matter of law, obliged to strike the matter from the roll on the grounds of lack of jurisdiction or alternatively, to give the party affected by the undue delay an opportunity to file a separate rule 11 application demonstrating why the matter should be dismissed or struck off the roll on the basis of that delay."

[9] With considerable regret I am unable to agree with the alternative suggested by Tlhotlhalemaje J. In my view once an application is withdrawn same cannot be entertained in Court. The views expressed in *SAPU obo Mnisi v SSSBC*[4] were accepted in *Overberg*. On application of the *stare decisis* principle the latest authorities weigh in favour of the views expressed in *Mnisi*.[5]

[10] I fully agree with Van Niekerk J in *Randburg Towers (Pty) Ltd v Masilo and others*[6] when he aptly concluded thus:

> "[5] …I do not understand the decision of the Labour Appeal Court in *Macsteel*… to entitle an applicant to file a Rule 11 application regardless of the state of the review application itself. That decision concerned a review application which in terms of the practice manual had been archived and regarded as lapsed. The reference to the opportunity to file a separate Rule 11 application made in paragraph 28 of the judgment must necessarily be understood in that context.

[11] Might I also add; I consider the dictum regarding an opportunity to be *obiter dictum*. In the main, the LAC concluded that the Labour Court determined a review application when it had no jurisdiction to do so. The LAC emphasized that determining a lapsed application in the absence of a substantive reinstatement application and an order reinstating the review application. To

[4] Case number JR2597/2001 (19 August 2019)

[5] See *Eskom Holdings SOC Ltd v Kgaile* [2021] JOL 49826 (LC).

[6] Case JR1758/2016 dated 19 February 2021.

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my mind there is no significant difference between a lapsed review and a deemed withdrawn review. Both are as good as being struck off. Clause 11.2.7 states that the application will be archived and be regarded as lapsed. Clause 16.3 provides that the consequences of an archived file is that of the matter having been dismissed. In my view the wording of the clause is unfortunate, it must appropriately read "struck off" as opposed to dismissed. A Court is not entitled to dismiss a matter if the merits thereof has not been considered. Nonetheless, I do not understand *Macsteel* to be stating that in a lapsed review, the Labour Court still retains jurisdiction. Instead I understand the LAC to be saying once reinstated, a party may still have an opportunity to bring a rule 11 application to have the reinstated review application dismissed on the basis of undue delay. Until an order is issued reinstating a withdrawn or lapsed review, the Labour Court lacks jurisdiction to entertain a rule 11 application.

[12] For all the above reasons, the rule 11 application in the second matter is bound to be dismissed due to lack of jurisdiction.

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

Order

1. The applications are dismissed.

2. There is no costs order.

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GN Moshoana

Judge of the Labour Court of South Africa

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Appearances:

For the Applicants: Ms M Chenia of CDH Inc, Sandton.

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