



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA74/2018

In the matter between:

ELLIES ELECTRONICS (PTY) LTD

Appellant

and

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

First Respondent

COMMISSIONER B KHUMALO N.O.

Second Respondent

G MEMMO

Third Respondent

MEGATRON SA (PTY) LTD

Fourth Respondent

Heard: 28 May 2020

Delivered: 24 June 2020

Coram: Phatshoane ADJP, Davis JA and Savage AJA

JUDGMENT

SAVAGE AJA

- [1] This appeal concerns the refusal of the Labour Court (Lekale AJ) on 9 March 2018 to reinstate a review application instituted on 15 April 2015 by Ellies (Pty) Ltd ('Ellies'), a business owned by Ellies Holdings Ltd, but withdrawn by its business rescue practitioner on 14 March 2017. The Court also refused to join the appellant, Ellies Electronics (Pty) Ltd, a wholly owned subsidiary of Ellies Electronics Holding (Pty) Ltd, which in turn is owned by Ellies Holdings Ltd, as co-applicant to such review application.
- [2] The third respondent, Mr Gianluca Memmo ('Mr Memmo') resigned on 19 September 2015 from Ellies. At the date of his resignation he was employed as Executive Commercial Manager in the consumer/commercial division ('the division') of Ellies. Mr Memmo referred a constructive dismissal dispute to the Commission for Conciliation Mediation and Arbitration ('CCMA'). On 5 March 2015, his dismissal was found unfair and he was awarded R1 million compensation by the CCMA. Shortly thereafter Ellies, represented by Webber Wentzel attorneys, applied to the Labour Court for the review of the arbitration award.
- [3] On 1 May 2015, following the appellant's purchase of the division from Ellies, it was transferred as a going concern to the appellant. On 12 June 2015, Ellies changed its name to Megatron SA (Pty) Ltd. Despite the transfer of the division by Ellies to the appellant, Webber Wentzel, apparently acting on behalf of Ellies, filed a supplementary affidavit in the review application on 3 September 2015 and the replying affidavit on 15 October 2015. Heads of argument were filed in early 2016.
- [4] In August 2016, Megatron SA was placed in business rescue. On 14 March 2017, on the instruction of the appointed business rescue practitioner, Webber Wentzel withdrew the review application launched by Ellies.
- [5] On 22 September 2017, the employee sought to enforce the arbitration award in terms of section 158(1)(c) of the Labour Relations Act 66 of 1995 ('the LRA') and substitute the appellant as his employer. In response, on 3 November 2017, the appellant, represented by Webber Wentzel, launched an application seeking the

reinstatement of the review application and an order joining it as second applicant to the review application. The employee did not oppose the application.

Judgment of the Labour Court

[6] The Labour Court refused the appellant's application on the basis that:

'[17] In my considered opinion, it is not possible to reinstate withdrawn proceedings regard being had, inter-alia, to the need for finality in legal disputes and expeditious resolution of labour disputes in particular. The need to comply with the prescribed timeframes such as the six-week period limited by section 145 (1) of the LRA for launching review proceedings also militate strongly, in my view, against reinstatement of withdrawn review proceedings as opposed to reinstitution of the same in the form of reapplication.

[18] Reinstatement is, in my view, limited to matters removed from or struck off the court roll in so far as such matters are pending before the court and only have to be reinstated on the roll for purposes of being heard and finalised....

[20] In my judgement the option available to the applicant in the circumstances is reinstitution of review proceedings in the same way as the applicant in *Ncaphayi*¹ and *Samwu*² matters...sought and were, in fact, allowed to refer withdrawn disputes to the CCMA afresh as opposed to reinstating them.

[21] Reinstatement is, thus, in law and equity not available to the applicant as a relief in the circumstances of the present matter.'

[7] Given that no review application was before the Court, the joinder application was refused and with the matter unopposed, no order of costs was made.

¹ *Ncaphayi v Commission for Conciliation, Mediation and Arbitration & others* ('*Ncaphayi*') (2011) 32 ILJ 402 (LC) at paras 27 and 28.

² *SA Municipal Workers Union & others v Commission for Conciliation Mediation and Arbitration & another* (2014) 35 ILJ 2011 (LC).

Grounds of appeal

- [8] On appeal the appellant takes issue with the judgment and order of the Labour Court on the basis that the Court has the power in particular circumstances to reinstate withdrawn proceedings, including a review application. The appellant submits that it has a direct and substantial interest in the outcome of the arbitration award and the review application by virtue of the transfer of the business to it and that it is therefore entitled to persist with the review and be joined as an applicant to such application.
- [9] The employee opposes the appeal. He accepts that the Labour Court has the inherent power to determine its own proceedings and is entitled to reinstate an application previously withdrawn provided this is not an abuse of its process. However, on the facts of this matter that the reinstatement application was not brought within a reasonable period of time and the delay was unexplained. Consequently, it was contended that the application fell to be struck out, with the appellant entitled to launch its own review application together with an application for condonation.

Evaluation

- [10] The Constitutional Court, Supreme Court of Appeal and High Courts in terms of s 173 of the Constitution of the Republic of South Africa, 1996 have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.³ Section 151(2) of the LRA reads as follows: –

‘The Labour Court is a superior court that has authority, inherent powers and standing, in relation to matters within its jurisdiction, equal to that which a court of a provincial division of the Supreme Court has in relation to the matters under its jurisdiction’.

- [11] Section 158 (1) confers specific powers on the Labour Court, including in s 158(1)(j) the power to ‘...deal with all matters necessary or incidental to

³ *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC) at para 42; *Windybrow Theatre v Maphela & others* [2016] ZALAC 27; (2016) 37 (ILJ) 2641 (LAC) at paras 14-16.

performing its functions in terms of [the LRA] or any other law'. Matters necessary or incidental to performance of its functions include matters related to the enrolment and removal of matters from the roll, in respect of which the Labour Court has an inherent power to control its own process. This means that the Labour Court has the power to reinstate a matter withdrawn from its roll or to refuse to do so.

- [12] The withdrawal of a matter at the instance of a party is a unilateral act which results in the matter being removed from the roll in the same manner as if absolution from the instance had been granted.⁴ The fact that a matter has been withdrawn does not in principle bar either the reinstitution of proceedings⁵ or the institution of fresh proceedings (in which case the absolved defendant may not raise the defence of *res judicata* if sued again on the same cause of action).⁶ In finding differently, the Labour Court erred. Faced with an application to have the matter reinstated, it was for a court to determine whether or not to grant such application having regard to the relevant facts and issues of prejudice,⁷ while recognising that employment disputes by their nature are urgent and require speedy resolution.⁸
- [13] The review application was instituted on behalf of Ellies by its attorneys, Webber Wentzel. After the transfer of the commercial division to the appellant, the same attorneys filed the supplementary affidavit, the replying affidavit and heads of argument in the review application. Apparently on the instruction of the business rescue practitioner, Webber Wentzel then withdrew the review application on 14 March 2017. And, almost two years after the transfer of the

⁴ *Kaplan v Dunell Ebdon and Co* 1924 EDL 91 at 93. This decision was cited with approval in *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape, and others* 2005 (6) SA 123 (E) at 127I-128C.

⁵ See *Robor Tube (Pty) Ltd v Metal Engineering Industries Bargaining Council & others* [2018] ZALCJHB 229; (2018) 39 ILJ 2332 (LC) at paras 7 and 8; *Ncaphayi v Commission for Conciliation, Mediation and Arbitration & others* (Op cit).

⁶ At para 27.

⁷ *Samwu* at para 16; *Kgobokoe v Commission for Conciliation Mediation and Arbitration & others* (2012) 33 ILJ 235 (LC); *Roupell v Metal Art (Pty) Ltd* 1972 (4) SA 300 (W).

⁸ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus* [2016] ZACC 49; 2018 (1) SA 38 (CC); 2017 (4) BCLR 473 (CC) at para 33; *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) at para 44.

commercial division to the appellant, Webber Wentzel acted for the appellant in its application to reinstate the review and be joined as a co-applicant.

[14] Mr Wayne Samson, the Chief Executive Officer of Ellies Holdings Ltd and a director of the appellant, confirmed in the founding affidavit in the application to reinstate the review that the appellant became bound by the arbitration award in terms of s 197(5)(b) of the LRA following the transfer of the division to it. He did not explain on whose instructions pleadings and heads of argument were filed in the review application. He was silent on why the appellant for more than two years did not seek to be joined as a co-applicant in the review application. He failed to state when the appellant became aware of the withdrawal of the review or the reasons for the delay in seeking the reinstatement of the review.

[15] What is clear from the facts is that the division was transferred between related entities owned by one holding company. The appellant knew itself to be bound by the arbitration award as a result of the sale. Yet despite this, it took no steps to be joined as an applicant to the review application. And, although the appellant knew itself to be bound by the award, it is noteworthy that it was silent as to whether Webber Wentzel acted on its behalf in filing pleadings and heads of argument in the review application and if not, why Ellies would have instructed that such steps when it was the appellant that was bound by the award. The appellant also fails to explain how it was that the review application was withdrawn by Webber Wentzel, apparently acting on the instruction of the business rescue practitioner; and why it remained silent and took no action when this occurred. In adopting the stance that it did without explanation, yet with the express knowledge that it was liable for payment of the quantum awarded, the only reasonable conclusion to be drawn is that the appellant opportunistically sought to benefit from the withdrawal of the review application, assuming the award would be incapable of enforcement against it. And, it was only after Mr Memmo sought to enforce the award that the appellant was spurred into action, launching the reinstatement application without a full disclosure of the relevant facts and with no reasons put up to explain either the delay in doing so.

- [16] The result was that the reasons advanced by the appellant for the reinstatement of the review application were neither clear nor compelling. Instead, what the facts show is a deliberate attempt on the part of the appellant to avoid the consequences of an award by which it knew itself bound. This conduct is not only opportunistic and prejudicial, but it flies in the face of the legislative scheme which aims to ensure that employment matters are treated as urgent and are speedily resolved. The prejudice to be suffered by Mr Memmo were the application to have been granted outweighed any prejudice which may be suffered by the appellant in this matter.
- [17] For these reasons, the appeal cannot succeed and there is no reason, having regard to considerations of law and equity, that costs should not follow the result.

Order

- [18] The following order is therefore made:

1. The appeal is dismissed with costs.



Savage AJA

Phatshoane ADJP and Davis JA agree.

APPEARANCES:

FOR THE APPELLANT:

L Hollander

Shepstone & Wylie Attorneys

FOR THE THIRD RESPONDENT:

J Crouse

Instructed by Reynders Attorneys

LABOUR APPEAL COURT