IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J356/24

In the matter between:

BOPHELONG CONSTRUCTION (PTY) LTD **Applicant**

and

BARGAINING COUNCIL FOR THE CIVIL ENGINEERING INDUSTRY **First Respondent**

MASENYE, DIDA N.O. **Second Respondent**

LESIBA MOTHAPO **Third Respondent**

LAKI SAMUEL RADEBE **Fourth Respondent**

MPHO SIEBERT MALATJIE **Fifth Respondent**

THE SHERIFF OF THE HIGH COURT: KEMPTON PARK **Sixth Respondent**

Heard: **30 April 2024**

Delivered: **2 May 2024**

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date of hand-down is deemed to be 2 May 2024.

JUDGMENT

MAKHURA, J

Introduction

[1] On 15 October 2022, the second respondent (commissioner) issued an arbitration award in terms of which he ordered the applicant (company) to pay the fourth respondent (Radebe) and fifth respondent (Malatjie) R80 574.84 and R102 309.24 respectively. The commissioner also ordered the company to reinstate the third respondent (Mothapo) retrospectively from the date of his dismissal and to pay him backpay in the amount of R154 435.11.

[2] On 21 November 2022, the company applied to review and set aside the award in terms of section 145 of the Labour Relations Act[1] (LRA). Mothapo filed a notice of opposition of the review application on 30 November 2022.

[3] The company took no further steps to prosecute the review application. Mothapo proceeded to enforce the monetary award by way of execution process.

[4] This prompted the company to launch the current application, on an urgent basis. The company seeks an order to interdict and restrain the respondents from taking any further steps to enforce the award "*pending the determination of the application for a review of award to be launched by the applicant under case number JR2614/24 in the ordinary course*". In the alternative, the company seeks a rule *nisi* interdicting and restraining the Bargaining Council for the Civil Engineering Industry (BCCEI) from taking steps to enforce the award pending the determination of the application for a rescission of the judgment and staying the enforcement of the award pending the outcome of the rescission application "*to be launched*".

[1] Act 66 of 1995, as amended.

[5] The company's case is that it complied with section 145 of the LRA in that its review application was launched timeously and that it should not be punished for aspects that are not within its control. By this, the company refers to its failure to prosecute the review application by inter *alia* filing the record of proceedings.

[6] The application is opposed by Mothapo. He advances one primary ground of opposition – there is no review application pending before this Court because it has been deemed withdrawn and/or has lapsed. He relies on items 11.2.2, 11.2.3 and 11.2.7 of the Practice Manual of the Labour Court of South Africa[2] (Practice Manual).

<u>Deemed withdrawal</u>

[7] Item 11.2.2 of the Practice Manual provides that for the purposes of Rule 7A(6), the record of arbitration proceedings must be filed within 60 days of the applicant being advised of the availability of the record. The definition of a "day" excludes Saturday, Sunday and public holidays.[3] Item 11.2.3 provides as follows:

> '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.'

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[2] Effective April 2013.
[3] Item 3 of the Practice Manual.

[8] During the hearing, Mr Allis, appearing for the company, submitted that the company was notified that the record was available at the end of December 2022. The company contends that it was only placed in possession of the record from the BCCEI at the end of March 2023.

[9] On the papers before Court, the company was informed that the record was available before or at the end of December 2022. The company then alleges that between December 2022 and March 2023, it made several attendances to the BCCEI to obtain the record, which it eventually did during or about March 2023.[4] It then complains about the quoted costs of transcription – between R35 000.00 and R50 000.00 and that because of these high costs, it took the company a *"great deal of time to procure a transcriber"*. In his oral submissions, Mr Allis said that it took the company 4 to 5 months to obtain a reasonable quotation.

[10] The 5 months from the end of March 2023 would have expired at the end of August 2023. No reason is provided why the record was not filed at that stage or shortly thereafter. Instead, the company alleges that the record will be filed once it is transcribed.

[11] It is trite law that the Practice Manual is binding on the parties.[5] In *MJRM Transport Services CC v Commission for Conciliation, Mediation and Arbitration and others*,[6] Tlhotlhalemaje J held that:

> 'Clause 11.2.3 of the Practice Manual makes it clear that if the applicant fails to file the record of proceedings within the prescribed period of 60 days, the applicant will be deemed to have withdrawn the application,

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[4] The decision to approach the BCCEI and not this Court to uplift the record is not explained. The record of arbitration proceedings is filed with the Registrar of this Court and that is where it should be uplifted.

[5] *Macsteel Trading Wadeville v Van der Merwe N.O. and others* (2019) 40 ILJ 798 (LAC); [2018] ZALAC 50 at para 22; *Samuels v Old Mutual Bank* (2017) 38 ILJ 1790 (LAC); [2017] 7 BLLR 681 (LAC) at para 15.

[6] (2017) 38 ILJ 414 (LC); [2017] 1 BLLR 40 (LC).

unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been granted.'[7]

[12] The 60-day period as contemplated in items 11.2.2 and 11.2.3 of the Practice Manual commences from the date when the applicant is informed that the record is available for collection. In this case, the company was informed at the end of December 2022 that the record has been filed and/or is ready for collection. If the 60-day period commenced on Tuesday, 3 January 2023, the period would have expired on 28 March 2023. The company should have followed the provisions of the Practice Manual, which includes seeking consent from the respondent for an extension of the period or applying for an extension before the Judge President. It elected not to do so. There is no record of proceedings filed together with an application for condonation and there is no application to reinstate the review application.

[13] In the circumstances, the review application is deemed withdrawn and is not before this Court. The effect of this is that the review application ceased to exist as an application pending before this Court and this is not akin to a suspension or stay.[8]

<u>Archived file / lapsed application</u>

[14] The second basis the company's review application is no longer before this Court is items 11.2.7 and 16 of the Practice Manual. Item 11.2.7 states that review applications are by their nature, urgent. It provides further that a review applicant must ensure that all necessary papers (record and pleadings) are filed within 12 months of launching a review application and that the Registrar must be informed in writing that the application is ready to be allocated a hearing date. Failure to comply with this provision will result in the review application being archived and regarded as lapsed. Once the file is archived and the application is regarded as

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[7] *Ibid* para 15.

[8] See: *Overberg District Municipality (ODM) v IMATU obo Spangenberg and Others* [2020] ZALCCT 38 at para 24.

having lapsed, it can only be retrieved or reinstated upon application on good cause shown.

[15] Item 16 of the Practice Manual provides:

> '16.1. In spite of any other provision in this manual, the Registrar will archive a file in the following circumstances:
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> - 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;
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> …
>
> 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.' (Emphasis added)

[16] In *Seopa v Commission for Conciliation, Mediation and Arbitration and Others,*[9] this Court confirmed the circumstances under which a review application will be archived:

> 'Clause 16 of the Practice Manual is instructive as to the circumstances in terms of which applications will be archived. It provides that the Registrar will archive a file in circumstances, where a period of six months has lapsed without any further steps being taken by the applicant since the filing of the application or the date of the last process filed, in instances relating to applications in terms of rule 7 and 7A. Further, that where a file

[9] [2021] ZALCJHB 255; [2021] JOL 51287 (LC).

has been archived, it has the same consequence of the matter having been dismissed.'[10]

[17] The review application was launched on 21 November 2022. The 6 months expired on 21 May 2023 and the 12 months on 21 November 2023. The review application is therefore archived and regarded as lapsed. The consequence is that in the absence of an application for retrieval, the matter is regarded as having been dismissed. There is nothing that prevents the Sheriff from proceeding with the execution of the certified award.

Relief sought

[18] The notice of motion seeks the stay of the award pending the determination of a review application "*to be launched*" under case number JR2614/22 or a rescission application to be launched. The review application under the same case number was launched and has been withdrawn and/or has lapsed. The interdict pending the determination of a rescission application is not only bizarre but is also legally unsound. The award was not granted in default against the company nor was there any order granted against the company in default.

[19] Mr Allis submitted that as a Court of equity, this Court should exercise its discretion and issue an order that would allow the company to rectify its non-compliance with strict timelines. Regrettably, it is not the duty of this Court to advice the parties. There are rules and the Practice Manual which govern procedures to be followed in this Court.

[20] The company's application for an interdict pending a withdrawn or lapsed or dismissed review application is not competent. It follows that this urgent application stands to be dismissed.

Costs

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[10] *Ibid* at para 19.

[21] Despite seeking costs in its application, Mr Allis argued during the hearing that the company no longer persists with a cost order. This submission was made after it dawned on Mr Allis that this application was doomed. For reasons beyond any comprehension, the company argued further that it should not be punished for aspects that are not within its control. Ms Swanepoel, appearing for Mothapo, argued for a punitive cost order.

[22] At all material times, the company has been legally represented. It is 17.5 months since the review application was launched and no record has been filed. The company launched this urgent application with full knowledge that there is no *lis* pending before this Court because the review application is deemed withdrawn and/or has lapsed.

[23] The company chose to litigate at its own time. This Court will not and should not reward carelessness, complacency, ill-discipline and disregard of the rules regulating procedures which are aimed at achieving the purpose of the LRA to resolve labour disputes speedily and expeditiously.

[24] This application is devoid of merit. The dismissed employee, that is Mothapo, should not be saddled with the costs of opposing this misdirected application. Considering the above, there are valid reasons for this Court to deviate from the principle that costs do not follow the result.[11] I am persuaded that the dictates of law and fairness render a cost order entirely appropriate, *albeit* on a party and party scale.

[25] In the premises, the following order is made:

<u>Order</u>

1. The application is dismissed with costs, including the costs of counsel.

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[11] *Zungu v Premier of the Province of KwaZulu-Natal and others* (2018) 39 ILJ 523 (CC) at paras 24 – 26; [2018] 4 BLLR 323 (CC); *National Union of Mineworkers obo Masha and others v Samancor Ltd (Eastern Chromes Mine) and others* [2021] 9 BLLR 883 (CC); (2021) 42 ILJ 1881 (CC) at paras 28 – 33.

M. Makhura

Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant:	Mr. I.T. Allis of Allis Attorneys
For the Respondent:	Adv. A. Swanepoel
Instructed by:	De Wet Lyell Neland Maeyane Inc.