

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JS277/17

In the matter between:

JOHANNESBURG CITY PARKS AND ZOO

Applicant

and

SOUTH AFRICAN MUNICIPAL WORKERS UNION

First Respondent

**THE PEOPLE LISTED IN ANNEXURE “X” TO
THE NOTICE OF MOTION**

Second Respondent

Heard: 15 February 2024

Delivered: 02 May 2024

**Summary: Rule 11 application to dismiss – dismissal not competent as
main dispute archived in terms of the Practice Manual –
declaratory order issued regarding archiving.**

JUDGMENT

ITZKIN, AJ

Introduction

[1] Johannesburg City Parks and Zoo (City Parks) applies, in terms of Rule 11¹, for the dismissal of a referral in terms of Rule 6 based on a lack of diligent prosecution.

¹ Rules for the Conduct of Proceedings in the Labour Court as promulgated by GN 1665 in GG 17495 of 14 October 1996.

- [2] The referral was made several years ago. In the intervening period, there have been multiple extended stretches of inactivity; the longest being 16 months after the delivery by City Parks of its response to the statement of claim.
- [3] The Rule 11 application is opposed by SAMWU and its members. In opposing the application, they advance three main arguments:
- 3.1 First, they contend that City Parks ought to have invoked Rule 6 and not Rule 11. The argument runs along these lines: Referrals are governed by Rule 6. That rule contained a remedy which could be invoked where a pre-trial conference was not called for by SAMWU and its members - City Parks could have taken steps to have a pre-trial conference convened by a Judge.
- 3.2 Second, they contend that the trial relating to the main matter has been set down on 16 and 17 May 2024 and that as a result, the matter is on track to be heard at trial and ought not to be dismissed.
- 3.3 Third, they contend that the Rule 11 application has been archived by operation of the Practice Manual, as City Parks did not take any steps to prosecute the Rule 11 application for a period longer than six months.
- [4] It became evident from a consideration of the papers that there is an antecedent issue to be considered: owing to the period of inactivity in the main matter (i.e. the referral by SAMWU and its members), the six-month archiving period in paragraph 16 of the Practice Manual² would have elapsed (many times over) during the passage of the litigation. This, in turn, gave rise to the question regarding the impact of this on the Rule 11 application.

² Practice Manual of the Labour Court of South Africa, effective 2 April 2013.

[5] At the hearing of the matter, I raised the following questions with the parties' representatives:

5.1 Have the provisions in paragraphs 16.1 and 16.3 of the Practice Manual taken effect in relation to the main matter?

5.2 If the provisions in paragraphs 16.1 and 16.3 of the Practice Manual have taken effect in relation to the main matter, is an order dismissing the main matter competent in the Rule 11 application?

5.3 If such an order is not competent, what are the possible orders that the Court may issue?

[6] In addition to inviting the parties to address the Court regarding the above questions in oral argument (together with the merits of the Rule 11 application), I invited the parties to file brief written submissions addressing these questions if they so wished. Both parties took up this invitation, and I am grateful to the parties for their helpful submissions.

Analysis

[7] The starting point is the provisions of the Practice Manual.

[8] Paragraph 1.2 of the Practice Manual, which forms part of the introductory section outlining its purposes, provides as follows:

'The practice manual is not a substitute for the Rules of the Labour Court. It is concerned mainly with how the Rules of Court are applied in the daily functioning of the court. The manual tells representatives and litigants how things are done in this court, and what is expected of them. By their nature, the provisions of the manual call for flexibility in their application where this is required to promote their purpose.'

- [9] Paragraph 2.2 of the Practice Manual, which forms part of the section pertaining to its application, provides:

‘The manual seeks to obtain uniformity amongst judges in respect of practice rulings. It must be emphasised that no judge is bound by practice directives; this manual is not intended to limit judicial discretion. It should be noted though that the judges of the Labour Court strive for uniformity in the functioning of the courts and their practice-related rulings. The practice manual thus sets out what can be anticipated, in the normal course of events, on any issue covered by it.’

- [10] These extracts suggest that the provisions of the Practice Manual, although binding on litigants and designed to create uniformity, may be departed from by the Court where appropriate. This flexibility accords with section 173 of the Constitution which provides that the superior courts each have the inherent power to protect and regulate their own process, taking into account the interests of justice.³
- [11] Although the court is not bound to slavishly follow the Practice Manual, parties who litigate in it are bound by the Practice Manual. The flexibility in the application of the Practice Manual extends to judges applying its provisions; not to litigants. With reference to litigants, the Practice Manual does not operate as a guideline or a compilation of suggestions. The Labour Appeal Court (LAC) expressed the position as follows in *Samuels v Old Mutual Bank*:⁴

³ Although the section refers to the Constitutional Court, the Supreme Court of Appeal and the High Court, section 151(2) of the Labour Relations Act 66 of 1995, as amended (LRA) provides that “[t]he Labour Court is a superior court that has authority, inherent powers and standing, in relation to matters under 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”. See also *Mukaddam v Pioneer Foods (Pty) Ltd* [2013] ZACC 23; 2013 (5) SA 89 (CC) at para 32, where reference is made to each superior court being the master of its own processes.

⁴ [2017] ZALAC 10; [2017] 7 BLLR 681 (LAC) at para 15.

‘The practice manual is not intended to change or amend the existing Rules of the Labour Court but to enforce and give effect to the Rules, the Labour Relations Act as well as various decisions of the courts on the matters addressed in the practice manual and the Rules. Its provisions therefore, are binding. The Labour Court’s discretion in interpreting and applying the provisions of the practice manual remains intact, depending on the facts and circumstances of a particular matter before the court.’

- [12] The Practice Manual contains several provisions which impose consequences on litigants for steps which are not taken timeously.
- [13] Paragraph 10.4.4 provides, in relation to pre-trial conferences, that a judge may issue an order in respect of filing of a pre-trial minute, and a failure to comply with such an order may result in the file being archived, to be retrieved only on application.
- [14] Paragraph 11.2.3, which pertains to review records, provides that if the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application (unless consent to an extension has been sought from the respondent, or if consent is refused, an application has been made to the Judge President in chambers for an extension of time).
- [15] Paragraph 11.2.7 provides, in relation to review applications, that where all of the papers are not filed and the registrar is not informed in writing that the application is ready for allocation for hearing within 12 months of launching the application, 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.⁵

⁵ In 2014, the LRA was amended to include, as section 145(5), a provision to the effect that *“[s]ubject to the rules of the Labour Court, a party who brings an application under subsection (1) must apply for a date for the matter to be heard within six months of delivery of the application, and the Labour Court may, on good cause shown, condone a late application for a date for the matter to be heard.”*

[16] Paragraph 16 – which is directly relevant to this case given that the main matter involves a Rule 6 referral - is headed “Archiving of Files”. It provides:

‘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;
- in the case of referrals in terms of Rule 6, when a period of six months has elapsed from the date of delivery of a statement of case without any steps taken by the referring party from the date on which the statement of claim was filed, or the date on which the last process was filed; and
- when a party fails to comply with a direction issued by a judge within the stipulated time limit.

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.’

- [17] How have the courts interpreted and applied the provisions relating to archiving in the context of Rule 11 applications to dismiss?
- [18] There has been a divergent array of approaches over the years. Given that the LAC has delivered judgments which bind this court, dealing with the implications of the archiving and dismissal provisions of the Practice Manual, those judgments (and judgments of this court referring to and applying those judgments) are the focal point.
- [19] *Macsteel Trading Wadeville v van der Merwe N.O and Others*⁶ involved an appeal against a judgment of this court in a review application. In an answering affidavit, the respondent in the review application raised the review applicant's dilatory conduct. It did not deliver a separate Rule 11 application. The LAC held as follows:

[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 not be archived or be removed from 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.

⁶ [2018] ZALAC 50; (2019) 40 ILJ 798 (LAC).

[24] Macsteel had raised NUMSA's undue delay in prosecuting the review application in its answering affidavit in the review application, but since that application had in effect lapsed and been archived, the Labour Court had no jurisdiction to determine the issue of the undue delay raised there. In the circumstances, Macsteel 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 NUMSA's undue delay in prosecuting it. But a rule 11 application was not a prerequisite for the Labour Court, in this particular instance, to consider whether, on the grounds of undue delay, the review application should be dismissed or struck from the roll.

[25] As indicated, the review application was archived and regarded as lapsed as a result of NUMSA's failure to comply with the Practice Manual. There was also no substantive application for reinstatement of the review application, and no condonation sought for the undue delay in filing the record. As contended for by Macsteel, the Labour Court was, as a matter of law, obliged to strike the matter from the roll on the grounds of lack of jurisdiction, alternatively, give Macsteel an opportunity to file a separate rule 11 application demonstrating why the matter should be dismissed or struck from the roll on the basis of undue delay.

[26] 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 because Macsteel did not bring a rule 11 application. The correct approach was for the Labour Court to afford Macsteel an opportunity to bring a rule 11 application.'

- [20] The LAC thus appears to have accepted that a Rule 11 application would be competent where the archiving provisions of the Practice Manual have taken effect – albeit that it did not definitively determine the relief to be granted in such an application; making reference to the possibility of seeking dismissal or for the matter to be struck off the roll.
- [21] Subsequently, in *Randburg Towers v Masilo; In re Masilo v CCMA and Others*⁷ (*Randburg Towers*) this court (per Van Niekerk J, as he then was) held as follows in the context of a Rule 11 application for an order dismissing a review application, where paragraph 11.2.3 of the Practice Manual had taken effect:⁸

‘To the extent that the applicant submits that the court is empowered to entertain an application to dismiss, that may be so in respect of review applications where an applicant has failed, generally speaking, to prosecute the application with due diligence or where one or more factors, other than one that has the consequence of a deemed withdrawal of the review application, is at play. I do not understand the decision of the Labour Appeal Court in *Macsteel Trading Wadeville v François van der Merwe & others* (2019) 40 ILJ 798 (LAC) 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. In the present instance, the applicant in the review application is deemed to have withdrawn the application. It is not an application that has lapsed, or which has been archived. Simply put, there is no longer a review application that serves before the court. In those

⁷ (JR 1758/2016) [2021] ZALCJHB 10 (19 February 2021) at para 5.

⁸ See also *SG Bulk, A Division of Supergroup Africa (Pty) Ltd v Khumalo and Another* (J63/20) [2021] ZALCJHB 416 (13 May 2021), wherein the Court (per Moshwana J) followed a similar approach.

circumstances, in my view, the applicant in the present application is entitled to a declaratory order that gives effect to the consequences visited by clause 11.2.3 on an applicant that fails to comply with the time limits within which to file a record of proceedings sought to be reviewed.'

[22] The court consequently made the following order:

'It is decreed that in terms of clause 11.2 of the Practice Manual, the review application filed by the respondent is deemed to have been withdrawn.'

[23] This court thus found that where a review application is deemed to have been withdrawn in terms of the Practice Manual (and has not merely been archived), a Rule 11 application is not competent, but a declaratory order regarding the status of the matter may be appropriate.

[24] There has been a series of subsequent judgments of this court adopting a range of approaches relating to archiving. An in-depth analysis thereof is unnecessary because the LAC has since delivered the judgment in *E Tradex (PTY) Ltd t/a Global Trade Solution v Finch and Others*,⁹ which espoused the following principles:

24.1 The Registrar's act of setting a matter down after the archiving provisions in the Practice Manual have been triggered, has no legal significance and does not serve to 'resuscitate' the matter. Once the case is 'archived' it requires the intervention of the court to 'un-archive' it.¹⁰

24.2 An archived case acquires a peculiar status which requires the delinquent party to justify why it should be reinstated and thereafter be entertained by a court in the wake of a lack of

⁹ [2022] ZALAC 106; (2022) 43 ILJ 2727 (LAC).

¹⁰ *Ibid* at para 9.

expeditious prosecution. Archiving is not an administrative act; it is a matter of status. Upon a given event (i.e. the triggering of the archiving provisions), the case automatically acquires the status provided for in the Practice Manual.¹¹

- [25] This approach was later followed by this court in *Nhlapo v Sambo N.O. and Others*¹² (per Prinsloo J), also in the review context, wherein with reference to the LAC's *dicta* above, it was held that “[t]he LAC made it clear that the effect of lapsing or archiving of a matter is that the case shall not be dealt with by a court unless an application to reinstate or to retrieve the file from the archive has been made”.¹³
- [26] In these circumstances, this court is bound by the LAC's judgment in *E Tradex (PTY) Ltd t/a Global Trade Solution v Finch and Others* (which were followed by this court *Nhlapo v Sambo N.O. and Others*).
- [27] The referral by SAMWU and its members has accordingly been archived, which has the same consequences as the dismissal of the matter. That position will remain in effect until and unless an application for retrieval is brought and granted.
- [28] It follows that the merits of the application to dismiss cannot be entertained – which also obviates the need to determine the three bases of opposition raised by SAMWU and its members.
- [29] That is, however, not the end of the matter.
- [30] The trial in the matter is set down on 16 and 17 May 2024. Given the impact of the archiving of the matter (which, in terms of paragraph 16.3 of the Practice Manual, has “the same consequences as to further

¹¹ *Ibid* at para 11.

¹² (JR1451/2018) [2023] ZALCJHB 169 (18 May 2023).

¹³ *Ibid* at para 29. In *Dzuni Properties (Pty) t/a Wimpy Songozwi v SACCAWU obo Maimela and Others* (JR 591-18) [2023] ZALCJHB 115 (26 April 2023), the Labour Court (per Leppan AJ) adopted a more flexible construction, finding that an application dismiss is competent even where the archiving provisions of the Practice Manual have taken effect.

conduct by any respondent party as to the matter having been dismissed”), the matter has acquired a status which precludes it from proceeding to trial.

[31] It is therefore appropriate to make an appropriate declaratory order as was done by this court (per Van Niekerk J, as he then was) in *Randburg Towers*.¹⁴

[32] Lastly, with reference to costs, City Parks did not seek costs owing to the parties’ ongoing relationship. SAMWU and its members’ representative did not press for any order of costs. Considerations of law and fairness weigh against a costs order being made.

[33] In the result, the following order is made:

Order

1. It is declared that in terms of paragraph 16 of the Practice Manual, the referral by SAMWU and its members is archived, which has the same consequence as the matter having been dismissed.
2. There is no order as to costs.

R Itzkin

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Charles Beckenstrater of Moodie & Robertson
For the Respondent:	B Lukhele of Phakedi Attorneys Inc.

¹⁴ Such an order would accord with the court’s power to make such orders under section 158(1)(a)(iv) of the LRA.