



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA67/2016

In the matter between:

MACSTEEL TRADING WADEVILLE

Appellant

And

FRANCOIS VAN DER MERWE N.O.

First Respondent

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL

Second Respondent

NUMSA obo LEMSON CHILOANE

Third Respondent

Heard: 27 September 2018

Delivered: 12 December 2018

Summary: Review of arbitration award – employer raising union undue delay in prosecuting the review application in its answering affidavit in the review application – Labour Court refusing to consider the undue delay because the employer had not filed a rule 11 application – court finding that by the time review was heard, the application had in effect lapsed and been archived in terms of Practice Manual of the Labour Court- as such the Labour Court had no jurisdiction and should have struck the matter from the roll or give the employer 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. Appeal upheld with costs and Labour Court’s judgment set aside.

Coram: Phatshoane ADJP, Sutherland JA and Kathree-Setiloane AJA

JUDGMENT

KATHREE-SETILOANE AJA

- [1] The appellant, Macsteel Trading Wadeville (“*Macsteel*”) appeals against the judgment and order of the Labour Order (Coetzee AJ) which reviewed and set aside the arbitration award of the third respondent (“*Arbitrator*”), made under the auspices of the second respondent, the Metal and Engineering Industries

Bargaining Council ("Bargaining Council"). The third respondent is the National Union of Metalworkers South Africa (NUMSA) acting on behalf of Mr Lemson Chiloane ("Mr Chiloane") who was dismissed by Macsteel for purportedly planning and orchestrating an unprotected work stoppage. Only NUMSA on behalf of Mr Chiloane opposes the appeal.

[2] Macsteel employed Mr Chiloane as a warehouse administrator. He was also a NUMSA shop-steward. On 11 June 2009, following a disciplinary hearing, Mr Chiloane was dismissed after being found guilty of the following incidents of misconduct:

- (a) Intimidation or incitement to violence or illegal action, in that on 22 May 2009, he facilitated and led a group of employees to the offices of Macsteel and, once there, made various threats.
- (b) Acting in bad faith towards Macsteel and deliberately acting in a manner designed to harm the company.

[3] On 6 May 2009, Mr Chiloane faxed a letter to one "Albert" of the NUMSA Group Shop-Stewards Council, announcing an intention to "deal with the current challenges facing us, e.g., unfair labour practice in the group and the effects of short-term." The letter evinced an intention to mobilise Macsteel's workers for protest action and indicated that a demonstration would happen "very soon." On 22 May 2009, some two weeks after Mr Chiloane sent the fax, an unprotected work stoppage occurred at Macsteel's premises after several employees demanded their pay slips and threatened to, amongst other things, go on strike if the payslips were incorrect. The payslips were handed to the employees just after 8 am on 22 September 2009.

- [4] On discovering that “short time” deductions were made from their pay, Mr Chiloane and several of his fellow employees confronted Ms G. Nelson, the Human Resources Supervisor, about the deductions. They asked her to leave her office with them. When she showed a reluctance to do so, other employees surrounded her. This made her feel unsafe.
- [5] Ms Nelson immediately reported the incident to Mr T. Blahnek, the managing director. He approached Mr Chiloane and suggested that the employees assemble in the training centre. Upon doing so, the employees began chanting, stopping only on instruction from Mr Chiloane. The employees had no permission to leave their workstations. Nor did they have permission to go to Ms Nelson’s office.
- [6] Mr Chiloane admitted writing the letter of 6 May 2009 but explained that it was merely the minutes of a NUMSA meeting which he took down on 18 April 2009.
- [7] Following a disciplinary hearing, Mr Chiloane was found guilty of misconduct and dismissed from Macsteel’s employ.

In the Arbitration

- [8] Following his dismissal, Mr Chiloane referred a complaint to the Bargaining Council. The parties concluded a pre-arbitration minute in which it was envisaged that several witnesses would be called to testify for each of them, including an expert witness. However, at the commencement of the arbitration proceedings, their legal representatives agreed that the dispute would be decided on the record of evidence led at the disciplinary inquiry, and the argument presented by the parties, subject to the Arbitrator’s right to call for further information in the case of uncertainty. In other words, the parties

agreed that no evidence would be led at the arbitration hearing. The Arbitrator endorsed the agreement by issuing a directive recording it.

- [9] The Arbitrator determined the matter on the record of evidence led at the disciplinary inquiry. He made certain credibility findings and findings on the probabilities. On 4 May 2010, he issued an award in which he found the dismissal of Mr Chiloane to have been both procedurally and substantively fair.

In the Labour Court

- [10] Aggrieved by the award, Mr Chiloane instructed NUMSA to institute review proceedings, on his behalf, which it duly did on 22 June 2010. On 19 July 2010, NUMSA advised Macsteel's attorneys of record that it had uplifted the record and was in the process of having it transcribed. The transcription of the record was only completed in May 2011, some 10 months after NUMSA had uplifted it. NUMSA filed an incomplete copy of the record 17 months later in December 2012, not explaining its incompleteness or the delay in filing it. In January 2013, NUMSA filed the full record. This was approximately 19 months after the record had been transcribed. Again, NUMSA did not explain the delay.

- [11] In its answering affidavit, Macsteel raised the issue of NUMSA's undue delay in filing the record and requested the Labour Court to dismiss the review application. In reply, NUMSA failed to provide any explanation or seek condonation for the delay. It simply denied prosecuting the review with "a high degree of negligence."

[12] The review application was heard on 24 February 2016, almost six years after it was instituted. NUMSA did not explain the delay in setting the matter down for hearing.

[13] Macsteel sought to persuade the Labour Court to dismiss the review application because of the dilatory manner in which NUMSA had prosecuted it, and its total failure to explain the delays. The Labour Court refused to consider the issue on the basis that Macsteel had not brought an application in terms of rule 11 of the Labour Court Rules ("the Rules")¹. Significantly, in this regard, it held as follows:

'[47] The issue of an undue delay has been raised by the respondent. There is, however, no application in this regard and it has been argued that as far as costs are concerned, that should be taken into account, especially as it was foreshadowed in the answering affidavit. I am, however, not basing a costs order on this factor.'

The Labour Court accordingly exercised his discretion against making a costs order.

[14] As indicated, the Arbitrator did not hear *viva voce* evidence in the arbitration but determined the dispute on the record of evidence led at the disciplinary

¹ Rule 11 of the Labour Court Rules provide:

"(1) The following applications must be brought on notice, supported by affidavit:

- (a) Interlocutory applications;
- (b) Other applications incidental to, or pending, proceedings referred to in these rules that are not specifically provided for in the rules; and
- (c) Any other application for directions that may be sought from the court.

(2) The requirement in sub-rule (1) that the affidavit must be filed does not apply to applications that deal only with procedural aspects.

(3) If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems appropriate in the circumstances.

(4) In the exercise of its powers and in the performance of its functions, or in any incidental matter, the court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act.

inquiry. On review, the Labour Court found this approach to amount to a reviewable irregularity reasoning thus:

[42] Is this then an award that a reasonable commissioner could have made or not made? The commissioner made findings of fact on the probabilities and on the credibility of witnesses where the facts do not justify those conclusions. He was in no position in the absence of oral evidence to make credibility findings. This, in my view, is an irregularity, i.e., misconduct on the part of the commissioner.

[43] The award, therefore, is based upon an incorrect interpretation of the facts and the exclusion of facts because of credibility findings.'

[15] Notably, the Labour Court reviewed and set aside the arbitration award, and substituted it with an order reinstating Mr Chiloane retrospectively to 11 June 2009, on terms and conditions no less favourable than those that applied to him just before his dismissal. The Labour Court substituted the arbitration award on an evaluation of the probabilities based only on the record of evidence led in the disciplinary inquiry. In so doing, the Labour Court questioned whether it was reasonable for the Arbitrator to decide that the dismissal was fair and concluded as follows:

[44] In my view, no reasonable commissioner could have concluded that the employee was guilty of the misconduct as charged. He simply was executing his shop-steward functions. There was no justifiable basis to conclude that the employee had to be dismissed.

[45] The award stands to be reviewed. This matter is six years old. The record, in my view, is sufficient to substitute the award with the court's finding.'

Issues for determination

- [16] The issues that arise for determination in the appeal are whether the Labour Court erred in:
- (a) Failing to consider NUMSA's undue delay in prosecuting the review application because Macsteel did not bring an application in terms of rule 11 of the Rules;
 - (b) Reviewing, setting aside and substituting the Arbitrator's award on the record of evidence led in the disciplinary inquiry, rather than remitting it to the Bargaining Council for a new hearing.

Undue delay in prosecuting the review application

- [17] Macsteel contends that the Labour Court erred in declining to consider the issue of NUMSA's delay in prosecuting the review application when it had specifically pleaded the issue in its answering affidavit.
- [18] Neither the Rules nor the Labour Relations Act 66 of 1995 (LRA/Act) makes provision for the dismissal of a review application on the grounds of undue delay in prosecuting the application. However, rule 11(3) provides that if a situation for which the Rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems appropriate in the circumstances. The Labour Court declined to deal with the issue raised by Macsteel because it did not bring a rule 11 application.

- [19] Rule 11(4) provides that in the exercise of its powers and the performance of its functions, or any incidental matter, a reviewing court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act. This provision gives the Labour Court a wide discretion to take any course of action to achieve the objects of the Act.
- [20] A primary object of the Act is to promote the effective resolution of labour disputes, integral to which is the speedy resolution of disputes. As stated by the Constitutional Court in *Toyota*:²

‘Any delay in the resolution of labour disputes undermines the primary object of the LRA. It is detrimental not only to the workers who may be without a source of income pending the resolution of the dispute but ultimately, also to the employer who may have to reinstate workers after many years.’³

- [21] Clause 11 of the Practice Manual of the Labour Court (“Practice Manual”) which was adopted to give effect to the requirement of expedition, as contemplated in the LRA and the Rules, states in relation to review applications that:

‘11.2.2 For the purposes of Rule 7A(6),⁴ records must be filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received.

11.2.3 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

² *Toyota SA Motors (Pty) Ltd v Commissioner for Conciliation, Mediation and Arbitration and Others* [2016] 3 BLLR 217 (CC).

³ At para 1.

⁴ Rule 7 regulates review applications. Sub-rule 7A(6) provides:

‘The applicant must furnish the registrar and each of the other parties with a copy of the record or portions of the record, as the case may be, and a copy of the reasons filed by the person or body’

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.

...

11.2.7 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 Argument) 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 be archived or be removed from the archive.'

[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.⁵

[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

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

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.

[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.⁶

- [27] The Labour Court did not adopt this approach. It instead declined to deal with the issue of the undue delay and proceeded to determine the merits of the review application, which had already lapsed for non-compliance with clause 11.2.7 of the Practice Manual. The Labour Court determined the “lapsed application” in the absence of a substantive reinstatement application and an order reinstating the review application. Put simply; the Labour Court determined the review application when it had no jurisdiction to do. This constitutes a basis for interference on appeal. The appeal must accordingly be upheld, and the order of the Labour Court set aside and replaced with an order striking the matter from the roll.

Costs

- [28] The review application fell to be struck from the roll in the Labour Court as NUMSA did not, in compliance with Rule 11.2.7 of the Practice Manual, file a substantive application for reinstatement of the review application in the Labour Court. In the circumstances, I consider it fair and just that NUMSA pays the costs of appeal.

Order

- [29] In the result I order that:

⁶ This application could have been brought simply on notice of motion at the hearing in the Labour Court, as rule 11(3) of the Rules provide that the requirement in sub-rule (1) that the affidavit must be filed does not apply to applications that deal only with procedural aspects.

1. The appeal succeeds with costs.
2. The order of the Labour Court is reviewed and set aside and replaced with the following order:

“The application is struck from the roll.”

F Kathree-Setiloane AJA

R Sutherland JA and M Phatshoane Acting DJP concur.

APPEARANCES:

FOR THE APPELLANT:

Ms Elisa Tolmay

Instructed by Webber Wentzel

FOR THE THIRD RESPONDENT:

Mr Chris Orr

Instructed by David Cartwright Attorneys