



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR 1343/10

In the matter between:

**NATIONAL UNION OF METALWORKERS OF
SOUTH AFRICA obo ANDREW MATABANE**

Applicant

and

**FABRICATED STEEL MANUFACTURING
(PTY) LTD**

First Respondent

CENTRE FOR DISPUTE RESOLUTION

Second Respondent

BONGANI KHUMALO

Third Respondent

Heard: 01 February 2017

Delivered: 07 February 2017

Summary: An opposed application to dismiss a review application due to lack of prosecution and an application to make an arbitration award an order of this Court. The binding effect of the Practice Manual of the Labour Court considered. The principles applicable to delay in prosecuting a review restated. Held: (1) The provisions of the Practice Manual of

the Labour Court are binding. (2) The review application is deemed to be withdrawn. (3) The application to dismiss the review application is dismissed due to lack of jurisdiction. (4) If the application to dismiss is not academic and the Court possesses jurisdiction, then the review application is bound to be dismissed for lack of prosecution. (5) The award is accordingly made an order of Court. (6) Each party to pay its own costs.

JUDGMENT

MOSHOANA, AJ

Introduction

- [1] This is an opposed application to dismiss a review application due to lack of prosecution and an application to make an arbitration award an order of this Court.

Background facts

- [2] Andrew Matabane (Mr Matabane), a member of the applicant, National Union of Metalworkers of South Africa (NUMSA), was employed by the first respondent as a fork lift driver. Following allegations of theft or attempted theft of copper, the applicant was charged, found guilty and dismissed on 17 June 2009. He unsuccessfully launched an appeal against his dismissal. Aggrieved by his dismissal, a dispute concerning the fairness of the dismissal was referred to the second respondent.
- [3] On 24 May 2010, an award reinstating Mr Matabane with back pay was published. The first respondent was aggrieved by the award. On 14 June 2010, it launched an application in terms of section 145 of the

Labour Relations Act in this Court.¹ On 15 June 2010, the applicant served and filed a notice of intention to oppose the review application. On 5 July 2010, the first respondent was informed that the records of the award sought to be reviewed were filed with the Registrar of this Court. After this step, it is apparent that the record was partly transcribed.² It is evident that from 5 July 2010, the first respondent did nothing to prosecute the review further. Almost three years later, the applicant launched the present application seeking to have the review dismissed and have the award made an order of court. The first respondent sought to oppose the application and effectively raised a barrage of technical points, which points, given the view I take at the end, I have no intention to entertain in this judgment.

Arguments

[4] In Court, counsel for the first respondent, Mr Campanella, attempted to raise a prescription argument. However, in the light of the recent Constitutional Court judgment in *Myathaza*³ he jettisoned that attempt. Although he raised other arguments ancillary to the prescription argument, I am of the view that such arguments are academic. For completeness sake, he argued that on the strength of the Labour Appeal

¹ 66 of 1995 (LRA) as amended. Section 145 is entitled "Review of arbitration awards" and provides in relevant part:

- "(1) Any party to a *dispute* who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award -
 - (a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or
 - (b) if the alleged defect involves an offence referred to in paragraph (a), within six weeks of the date that the applicant discovers such offence."

² In paras 9.2 to 9.4 of the opposing affidavit, Ms Cirone testified that the first respondent had every intention of finalising its review application *as soon as possible*. Further, that the record of the arbitration proceedings has been partly transcribed, and the first respondent's legal team are using their best endeavours to obtain a full copy of the record of the proceedings. That counsel has been requested to assist with the further pleadings and investigation into what is still required. This testimony was delivered on 3 April 2013.

³ *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* [2016] ZACC 49.

Court (LAC) judgment in *Myathaza*,⁴ the interruption of prescription had lapsed because the applicant did not prosecute the present application diligently and timeously. For what it is worth and this point in time in passing, I state that the application was filed before the lapse of the three-year period of prescription. The pleadings in respect of the present application closed on 11 April 2013, when the applicant filed its replying affidavit. The fact that the Registrar only enrolled the application for the first time on 28 July 2016 has nothing to do with the applicant. The LAC dealt with the provisions of section 15(2) of the Prescription Act.⁵ In terms thereof, prescription if interrupted by any process, such will be deemed not interrupted if there is no successful prosecution or there is abandonment or setting aside of a judgment. The situation contemplated in section 15 (2) is not applicable to this matter before me.

- [5] Further, he submitted that a practice manual is a guideline and cannot take away the discretion of the Court to entertain a review which is deemed to be withdrawn. He persisted with an argument that the founding affidavit is defective in that the Commissioner of Oaths did not append a date on the affidavit. He submitted that the granting of an order in terms of section 158(1)(c) of the LRA⁶ will prejudice the first respondent's chances to seek reinstatement of the review application. On the other hand, Ms Mthiyane for the applicant argued that the review application ought to be dismissed due to lack of diligent prosecution.

⁴ *Myathaza v Johannesburg Metropolitan Bus Service, Mazibuko v Concor Plant, Cellucity v CWIU obo Peters* [2016] 37 ILJ (LAC) at para 77.

⁵ Act 68 of 1969. Section 15 is entitled "Judicial interruption of prescription" and subsection (2) thereof provides:

"(2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside."

⁶ Section 158(1)(c) states:

"(1) The Labour Court may—

...

(c) make any arbitration award or any settlement agreement an order of the Court."

Further, she argued that there are no impediments for the Court to make the award its order. On the issue of costs, both representatives did not press for an order for costs.

Evaluation

- [6] It is appropriate in my mind to address the issue of the Practice Manual⁷ first. The provisions relied on by the applicant reads thus:

“11.2.2 For the purposes of Rule 7A (6), 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 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...” (Emphasis added.)

- [7] In *casu*, the first respondent was advised by the Registrar that the records had been received on 6 July 2010. The 60-day period expired around September or October 2010. The effect of this is that the review application is deemed to be withdrawn. Put differently, as from September or October 2010 there is no review application pending before Court. The question that immediately crops is the binding effect of the Practice Manual. Such a question has received the attention of the LAC in *Samuels v Old Mutual Bank*⁸ where it held thus:

“The consolidated practice manual which came into operation on 2 April 2013 constitutes a series of directives issued by the Judge President over a period of time. Its purpose is, *inter alia*, to provide access to justice by all those whom the Labour Court serves; promote

⁷ Practice Manual of the Labour Court of South Africa. (Practice Manual)

⁸ [2017] ZALAC 10.

uniformity and/or consistency in practice and procedure and set guidelines on standard of conduct expected of those who practice and litigate in the Labour Court. Its objective is to improve the quality of the court's service to the public, and promote the statutory imperative of expeditious dispute resolution.

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.”⁹ (Emphasis added and footnotes omitted.)

- [8] Therefore, the LAC decisively held that the Practice Manual is binding. As the Labour Court, I retain a discretion only on application and or interpretation of the practice manual. The provisions of the Manual quoted *supra* are lucid and clear and require no different interpretation other than the literal meaning thereof. In the circumstances of this case, I cannot find any reason why I should not apply the provisions of the Manual. Mr Campanella did not proffer any reason why I should not. On the contrary, he submitted that the Practice Manual is not binding. To my mind this is a classical case where the provisions of the Practice Manual should be applied. For a period of almost three years, the first respondent did absolutely nothing to prosecute the review. Mr Campanella sought to shift the blame onto the applicant. He even submitted from the bar that a view was held that the award was abandoned based on rumours that Mr Matabane had passed on. Given the approach taken in the heads of argument – the award has prescribed, the first respondent sat back and hoped that the award would prescribe and become unenforceable in law.

⁹ Id at paras 14-5.

- [9] This in my view was an unfair tactical manoeuvre on the part of the first respondent. It is not surprising that section 22 of the Labour Relations Amendment Act¹⁰ sought to deal with such manoeuvres by enacting subsections (5)-(10) to section 145 of the LRA. Given the fact that I am of full intent to apply the Manual, the question to which I turn hereunder is: what then becomes of the application to dismiss the review application?
- [10] A review application that is deemed to be withdrawn does not exist. Put differently, there is nothing before the Court to be dismissed. This Court will have no jurisdiction to dismiss a non-existent review application. Such to my mind suggests that I must refuse to entertain the dismissal application due to lack of jurisdiction. In argument, Mr Campanella submitted that the first respondent should be left with an opportunity to approach the Judge President with an application for extension of time. Sadly, the first respondent did not seek consent within the 60-day period, nor did it launch the application for extension within the 60 days. I was perturbed to hear a submission by Mr Campanella that the review could have been argued without a record. If that was the case, I am unable to comprehend why the first respondent did not request the Registrar to enrol the review or filed a notice to stand by to enable the applicant to answer and continue to prosecute the review. Upon enquiry from the Court why such step was not taken, Mr Campanella informed the Court of the “*No record no review rule*” which is allegedly being implemented by this Court and/or the Registrar’s office. I am unaware of such a rule. On the contrary, I am aware of judgments of this Court that have held that if the grounds of review are not germane from the record but from the award itself, this Court can still entertain the application. Considering of course that an arbitration award in itself forms part of the record of the proceedings to be reviewed. Accordingly, I conclude that the review application is withdrawn, resultantly, the application to dismiss ought to be dismissed due to lack of jurisdiction. Assuming that I am wrong, I now consider the application to dismiss the review application.

¹⁰ 6 of 2014. The provisions introduced by this section came into effect in January 2015.

[11] As at 1 February 2017, a review which was launched on 14 June 2010, was not ripe for a hearing. Almost 7 years later, the first respondent did nothing to have the review prosecuted to finality. This is troubling and concerning gravely. It is not surprising that the legislature sought to enact section 145(5).¹¹ In terms of the Uniform Rules of Court, applying for a date is a step towards prosecuting an appeal, failing which, an appeal lapses.¹² In my mind, such provision must have influenced the manual provisions in respect of reviews in this Court. It can be inferred, albeit not expressly stated, that failure to apply for a date of review within the contemplation of subsection (5) leads to the lapsing of the review application. It is for that reason that the legislature behooves a party to seek condonation for such a failure. Nonetheless, the provisions of the subsection do not apply to the review application involved herein.

[12] As to the principles applicable to the delay issue, I resort to the LAC's judgment in *Colett v Commission for Conciliation, Mediation and Arbitration and Others*.¹³ In that matter, the LAC dealt with an appeal against an order of this Court to dismiss the review application due to delay in prosecuting the review application. Unlike in the matter before me, the applicant there applied for condonation for the late prosecution of the review. The LAC, at para 32, quoted with approval *Associated Institution Pension Fund and Others v Van Zyl and Others*.¹⁴ Therein the SCA held thus:

¹¹ This section provides:

“(5) Subject 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.”

¹² See rule 50(1) of the Uniform Rules of Court which provides:

“An appeal to the court against the decision of a magistrate in a civil matter shall be prosecuted within 60 days after the noting of such appeal, and unless so prosecuted it shall be deemed to have lapsed.”

¹³ [2014] 6 BLLR 523 (LAC); (2014) 35 ILJ 1948 (LAC). (*Colett v CCMA*). See also the recent judgment of the Constitutional Court in *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (CCT 228/14) [2015] ZACC 557 at paras 1, 34 and 35.

¹⁴ [2004] 4 All SA 133 (SCA) at para 48.

“The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case. . . The investigation into the reasonableness of the delay has nothing to do with the court’s discretion. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of that case, the delay was reasonable. Though this question does imply a value judgment it is not to be equated with the judicial discretion involved in the next question, if it arises, namely, whether the delay which has been found to be unreasonable should be condoned . . .” (Emphasis added.)

- [13] Conspicuously absent in this matter are the facts to be investigated to determine whether the delay is reasonable or unreasonable. It is common cause that the prosecution of the review has been delayed. In fact, Mr Campanella conceded that the delay was deliberate since, in the first respondent’s view, the award was either abandoned or had become unenforceable in law. Mr Campanella implored me to exercise discretion in the interest of justice not to dismiss the review. As correctly and decisively held by the SCA, the investigation of the facts has nothing to do with the court’s discretion. I fully agree with the submission by the applicant that the principles enshrined in *Mkhize v Tankers Services (Pty) Ltd*¹⁵ finds application. Surprisingly, in responding to the application to dismiss, the first respondent made no effort, in fact took a cavalier approach, to explain to the Court why the prosecution of the review is being delayed. Laughably, the deponent testified that the facts pleaded by her indicate a clear lack of interest in the pending review proceedings by the applicant’s member. Largely, the deponent devoted her time by being critical of the applicant. There is no iota of evidence seeking to explain the apparent excessive delay.

¹⁵ [1993] 14 ILJ 688 (LAC) at page 692. Here, the Court, in holding that the maxim *vigilantibus non dormientibus iura subveniunt* also applied in labour relations matters, remarked as follows:

“...an applicant must bring his application within a reasonable time. The legal maxim is *vigilantibus non dormientibus iura subveniunt* which in effect means that the law comes to the aid of those who are vigilant and those who look after their own interest and does not do so in case of the indolent.”

[14] The LAC in *Colett v CCMA*¹⁶ concluded that when assessing the reasonableness or unreasonableness of a delay sight must not be lost of the fact that labour disputes must be resolved without delay.¹⁷ Mr Campanella implored me to have regard to the prospects of success in the review application. In its opposing affidavit, the first respondent is completely mum about its prospect of success. Mr Campanella referred me to a 'detailed' founding affidavit in support of the review application. In that supposedly detailed affidavit, the deponent deals with the grounds of review in two paragraphs.¹⁸ The grounds can be summarised as follows: (a) failure to apply mind to the evidence as required by the law of evidence; and (b) rejection of circumstantial evidence of Viljoen, requiring possession of the stolen goods and rejection of the polygraph results. A brief glance at the award suggests to me that the award was well reasoned and supported by the applicable legal principles. In any event the review application is not before me. In *Colett v CCMA* the LAC went further to hold thus:

"There are overwhelming precedents in this Court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success."¹⁹ (Footnote omitted)

[15] In this matter, the first respondent clearly ignored the Rules and Directives of this Court. I accordingly have no reason to even consider the prospects of success in the review application.²⁰ Therefore I would, without hesitation, dismiss the review application due to lack of diligent prosecution. I now turn to the section 158(1)(c) application.

¹⁶ *Colett v CCMA* above n 13.

¹⁷ *Id* at para 34.

¹⁸ Paras 18 and 19, pages 31-2 of the pagination.

¹⁹ *Colett v CCMA* above n 13 at para 38.

²⁰ *Id* at para 39.

- [16] This Court retains discretion in applications of this nature. I do not agree with Mr Campanella that this Court is impeded to exercise its discretion. It has long been held by this Court that a filing of a review does not suspend the operation of an award. This position found its way into the LRA in 2015.²¹ Regard being had to the views expressed by me above, I do not find any persuasion not to grant the section 158(1)(c) application.

Order

- [17] In the results, I make the following order:
1. The application to dismiss the review application is dismissed for want of jurisdiction.
 2. The Arbitration Award issued by the third respondent dated 24 May 2010 under case number MEGA 25789 is hereby made an order of this Court.
 3. Each party to pay its own costs.

G.N Moshwana
Acting Judge of the Labour Court of South Africa

²¹ See section 145(7) of the LRA which provides that—

“The institution of review proceedings does not suspend the operation of an arbitration award, unless the applicant furnishes security to the satisfaction of the Court in accordance with subsection (8).”

Appearances

For the Applicant: S Mthiyane

Instructed by: NUMSA

For the First Respondent: G Campanella,

Instructed by: Luita Cirone Attorneys, Johannesburg.

LABOUR COURT