



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 484/15

In the matter between:

ELLIES ELECTRONICS (PTY) LTD

Applicant

And

**COMMISSION FOR CONCILIATION,
MEDIATION & ARBITRATION**

First Respondent

COMMISSIONER KHUMALO, B N.O.

Second Respondent

MEMMO G

Third Respondent

IN RE REVIEW APPLICATION

ELLIES (PTY) LTD

Applicant

And

**COMMISSION FOR CONCILIATION,
MEDIATION & ARBITRATION**

First Respondent

COMMISSIONER KHUMALO, B N.O.

Second Respondent

MEMMO G

Third Respondent

Heard: 27 February 2018

Delivered: 09 March 2018

Summary: Practice and procedure: Application for reinstatement of withdrawn application for review of arbitration award – Withdrawal being akin to absolution order allows for reinstitution and not reinstatement of proceedings – Reinstatement possible in respect of matters pending before court such as those removed from or struck off the roll - Application dismissed.

JUDGMENT

LEKALE, AJ

INTRODUCTION AND BACKGROUND

- [1] This is unopposed motion for reinstatement of a review application instituted and later withdrawn by the applicant's predecessor in business Ellies (Pty) Ltd ("the fourth respondent") which has since changed its name to Megatron (Pty) Ltd and is currently under supervision and business rescue. It is, further, an application for applicant's joinder as co-applicant in the review application as a consequential relief.
- [2] The application has its roots in the arbitration award issued on 05 March 2015 against the fourth respondent in favour of the third respondent by the second respondent in his capacity as the arbitrating commissioner with the first respondent.
- [3] The fourth respondent felt aggrieved by the award and launched an application in terms of section 145 of the Labour Relations Act ("the LRA") under the above case number for review of the same on the 01 April 2015. On 01 May 2015 and while the review application was pending before the court the applicant purchased the consumer/commercial division of the fourth respondent's business, in which the third respondent was employed,

as a going concern, thus, triggering the operation of the provisions of section 197(2) of the LRA with regard to automatic transfer of employment contracts of employees such as the third respondent.

- [4] The applicant, further, became bound *ex lege* by the arbitration award issued in favour of the third respondent insofar as there existed no agreement to the contrary.¹
- [5] On 12 June 2015 the fourth respondent changed its name to Megatron SA (Pty) Ltd (the fourth respondent in the review application) and on 12 August 2016 it got provisionally placed under supervision and business rescue in terms of section 131(1) of the Companies Act 71 of 2008 which order was confirmed on 19 August 2016. On 18 August 2016 the review application was set down for hearing on 22 March 2017 but before the hearing could take place the fourth respondent, represented by its appointed business rescue practitioner, withdrew the same on 14 March 2017.
- [6] Following such developments, the third respondent invoked the provisions of section 158(1)(c) of the LRA seeking to make the award an order of court and, further, sought to substitute the applicant's holding company for the fourth respondent. The applicant, thereafter, sought in vain to secure the third respondent's consent to reinstatement of the review application as well as its joinder as the second applicant in the review application. The correspondence directed to the third respondent's attorneys simply went unanswered.
- [7] The applicant now approaches this court for reinstatement of the withdrawn application for review and intervention in those review proceedings. The application serves unopposed before the court although all the respondents have been properly served. After hearing the matter on 27 February 2018, I reserved judgment as I needed to satisfy myself as to whether it is possible,

¹ See section 197(5)(b)(i) of the LRA and *High Rustenberg Estate (Pty) Ltd v NEHAWU obo Cornelius & Others* (2017) 38 ILJ 1758 (LAC).

in law and/or practice, to reinstate a withdrawn matter in the light of all the authorities relied upon by the applicant party.

ISSUE FOR DETERMINATION

- [8] I am enjoined by the facts and circumstances in the instant matter to determine firstly whether or not the withdrawn review application can, in law and/or practice, be reinstated with the applicant party contending in the positive and pointing out that a withdrawal has the same effect as an order of absolution from the instance.
- [9] A positive answer to the preceding question raises the question whether or not the applicant can, in law, intervene in the review proceedings regard being had to the provisions of section 197 of the LRA applicable to it.

CONTENTIONS FOR AND ON BEHALF OF THE APPLICANT

- [10] [10] Mr Hollander for the applicant submits, *inter alia*, to the effect that according to case law the withdrawal of the matter does not deal with the merits of such a matter and has the effect of an order of absolution from the instance. In his view a withdrawn application can be reinstated in the same manner as a labour dispute withdrawn before the Commission for Conciliation, Mediation and Arbitration ("the CCMA").
- [11] In Mr Hollander's view the applicant has direct and substantial interest in the review application in light of the provisions of section 197 of the LRA and should, as such, be allowed to intervene as a co-applicant in the matter.

APPLICABLE LEGAL POSITION

- [12] The withdrawal of a matter is akin to an order of absolution from the instance and, as such, does not bar a party from reinstituting the proceedings with the consequence that the *exceptio rei judicatae* is not available as a defence in the same way in which withdrawn criminal charges can, in terms of our criminal justice system, be reinstituted against

the accused person without a plea of *autrefois acquit* or *autrefois convict* being available to the latter.²

- [13] The test for joinder in our law is that a party sought to be joined in the proceedings must have a direct and substantial interest in the matter in the sense of **“an interest in the right which is the subject matter of the litigation and not merely a financial interest”**.³

APPLICATION OF THE LEGAL POSITION TO THE FACTS AND FINDINGS

- [14] The applicant, in effect, seeks to withdraw the withdrawal insofar as it prays for the reinstatement of the withdrawn review application.
- [15] In my view reinstatement in the context of the instant matter means restoration of the review application to the position it occupied on the books of the Registrar, retaining its case number as if it was always pending before the court. In this regard it is worth noting that the present application is brought under the same case number as the review application as if the latter is still pending before the court.
- [16] The applicant, thus, seeks to revive the review application as opposed to reinstituting the proceedings in the same way as the plaintiff would pursue the absolved defendant by reinstituting the proceedings consequent to an order of absolution from the instance.
- [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 prescribed time frames such as the six-week period limited by section 145(1) of the LRA for launching review proceedings also militates strongly, in my view, against reinstatement of withdrawn review

² See *Ncaphai v CCMA & Others* [2011] 32 ILJ 402 (LC) at paragraph 27; *SAMWU v CCMA & Another* [2014] 35 ILJ 2011 (LC) and section 6(a) of Criminal Procedure Act, 51 of 1977.

³ See *State Information Technology Agency (Pty) Ltd v Swanevelder & Others* [2009] 30 ILJ 2786 (LC).

proceedings as opposed to reinstitution of the same in the form of re-application.

- [18] Reinstatement is, in my view, limited to matters removed from or struck off the court roll insofar as such matters are pending before the court and only have to be reinstated on the roll for purposes of being heard and finalised.
- [19] In the instant matter the review application was withdrawn on 14 March 2017 while the present application was delivered more than seven months later on 03 November 2017. The reinstatement desired *in casu* is foreign to our law and equity. It is, further, neither recognised nor regulated, as a relief, by our practice rules. Even if such a relief were sanctioned by the common law, it would be necessary, in the circumstances of the instant matter, for the applicant to apply for condonation regard being had to the fact that at common law applications are supposed to be brought within a reasonable time
- [20] In my judgment the option available to the applicant in the circumstances is reinstitution of review proceedings in the same way as the applicants in the *Ncaphayi* and *SAMWU* matters (*supra*) 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 instant matter.
- [22] Joinder or intervention is also not possible at this stage because there is simply no review application before the court.

Order

- [23] The application is dismissed.

LJ Lekale
Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr L Hollander

Instructed by: Webber Wentzel

For the Respondent: No appearance

LABOUR COURT