



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JR1758/13

In the matter between:

ROBOR TUBE (PTY) LTD

Applicant

and

MEIBC

First Respondent

J MATHEBULA N.O

Second Respondent

KEHLA F MOTLOUNG

Third Respondent

Application heard: 20 June 2018

Judgment delivered: 21 June 2018

JUDGMENT

VAN NIEKERK J

- [1] This is an application to reinstate an application to review and set aside an arbitration award issued by the second respondent.
- [2] The factual background can be summarised as follows. The third respondent was employed by the applicant in July 1987. He was dismissed on 30 December 2013 after a disciplinary hearing into charges of gross misconduct. The third respondent disputed the fairness of his dismissal and the matter was ultimately referred to arbitration. On 17 June 2013, the second respondent, appointed as an arbitrator by the first respondent, issued an award in terms of which he concluded that the third respondent's dismissal was procedurally fair but substantively unfair and reinstated the third respondent into the applicant's employ, on the basis that he report for duty on 25 June 2013. The arbitration award was served on the applicant and the third respondent on 9 July 2013. The applicant filed an application to review and set aside the award. That application was enrolled for hearing on 27 July 2016. The applicant contended that in terms of the law that prevailed at the time, the arbitration award had prescribed on 8 July 2016. At the time that the review application was to be argued, the third respondent had not taken any steps to enforce the award. On the date of the hearing, the applicant withdrew the review application. The transcript of the proceedings discloses that the applicant's attorney sought to have the court make a note on the file that the application had been withdrawn because the award had become prescribed. The court declined that invitation, recording that if the applicant sought to withdraw the application, the court was obliged simply to accept that there was no longer an application that served before the court and that no decision or judgment was necessary on whether the award had prescribed. The transcript reads: "The application is withdrawn". On 12 August 2016, the third respondent filed an application in terms of s 158(1) (c) seeking to have the arbitration award made an order of court. That application was filed under case number J 1773/16, and remains pending.
- [3] In the notice of motion, the applicant seeks an order declaring the withdrawal of the review application to be invalid, and secondly, an order reinstating the review

application alternatively reviewing and setting aside the award issued by the second respondent . Mr Kirstein, who appeared for the applicant, pursued only prayer two of the notice of motion, i.e. that the review application be reinstated.

- [4] The applicant relies *Ncaphayi v Commisison for Conciliation, Mediation and Arbitration & others* (2011) 32 ILJ 402 (LC), a matter where a referral to the CCMA had been withdrawn, and a fresh referral made. Lagrange J said the following (footnotes omitted):

[27] The second reason relates to the effect of a withdrawal of a referral to conciliation. The LRA does not deal with the withdrawal of matters referred to the CCM a and neither do the rules of the CCM a will stop rule 13 of the Labour Court rules merely deals with the procedure to be followed if a party wishes to withdraw proceedings. It is instructive to note how the High Court has considered the effect of a withdrawal of the matter. It is been held that there was taller the matter by a party is akin to an order of absolution from the instance. Ordinarily, an order of absolution from the instance does not prevent a party from reinstituted proceedings and the defendant absolved in the first proceedings will not be able to raise the exception rei judicatae if sued again on the same course of action.

[28] If the withdrawal of a matter in the High Court at a stage when it is ripe for hearing does not necessarily prevent the institution of fresh proceedings, it would be anomalous if the withdrawal of a matter at the conciliation stage of dispute resolution under the LRA – when no decision on the merits of the dispute is even possible – precluded a party from making a fresh referral. Obviously, if the withdrawal under consideration as part and parcel of the final settlement of the dispute the situation would be quite different. However, in this case, the withdrawal was at the applicant's own instance and not an intrinsic part of a settlement agreement...

- [5] In *SAMWU obo Others v Zenzeleni Cleaning and Transport Services* (unreported, JR 852/13, 23 February 2015) Molohlehi J followed the same principle, agreeing that the withdrawal of the dispute and labour matters is similar to an order of absolution from the instance in civil procedure. Molahlehi J referred

to *Kgobokoe v Commission for Conciliation Mediation and Arbitration & others* (2012) 33 ILJ 235 (LC), where the court held that a party was entitled to withdraw a notice of withdrawal. In that judgment, the court disagreed with the application of the doctrine of election applied in *Public Servants Association of SA obo Strydom v SARS* [2007] JOL 20040 (LC), where Moshoana AJ (as he then was) held that having referred a dispute to this court for adjudication and then advising the respondent that the matter was 'not being proceeded with' the applicant was bound by that election and not entitled effectively to seek leave to withdraw the withdrawal of the action. In *SAMWU & others v Commission for Conciliation Mediation and Arbitration* (2014) 35 ILJ 2011 (LC), Steenkamp J approved of the approach in *Ncaphayi* and held that the withdrawal of a referral to the CCMA did not preclude a party from making a fresh referral, nor did it deprive the CCMA of jurisdiction to entertain the second referral. In so far as the application of the doctrine of election was concerned, the court held that this was a matter for the arbitrator considering the second referral to decide.

- [6] The third respondent's representative referred me to the recent decision by Lekale AJ in *Ellies Electronics (Pty) Ltd v CCMA & others* (JR 484/15, 9 March 2018). In that matter, the applicant sought to reinstate a review application that had been withdrawn by a business rescue practitioner appointed after the filing of the application. The applicant's successor sought leave to reinstate the review application. Lekale AJ refused the applicant leave to reinstate the withdrawn application, on the following basis:

[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 the prescribed timeframes such as the six week period limited by section 145 (1) of the LRA for launching review proceedings also militate strongly, in my view, against reinstatement of withdrawn review proceedings as opposed to reinstitution of the same in the form of reapplication.

[18] Reinstatement is, in my view, limited to matters removed from or struck off the court roll in so far as such matters are pending before the court and only have to be reinstated on the role for purposes of being heard and finalised....

[20] In my judgement the option available to the applicant in the circumstances is reinstitution of review proceedings in the same way as the applicant in *Ncaphyi* 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 present matter.

[7] In my view, there ought to be no reason, in principle, why an application that has been withdrawn ought not to be capable of reinstatement. First, the Labour Court is established a court of law and equity, with the inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a division of the High Court has under its jurisdiction. The court therefore has the inherent jurisdiction to regulate its own proceedings and control its own process (see *Windybrow Theatre v Maphela* (2016) 37 ILJ 2641 (LAC) at paragraph 15.) Section 158 (1) confers specific powers on the court, including the power to deal with all matters necessary or incidental to performing its functions in terms of the LRA or any other law (see s 158(1)(j)). (See also *Johannesburg Metropolitan Municipality & others v Independent Municipal and Allied Trade Union & others* (2017) 38 ILJ 2695.) Secondly, there is the compelling analogy with referrals to the CCMA that are withdrawn, and the right of a party to make a fresh referral. The prevailing authority is clearly to the effect that the withdrawal of a matter is not a bar to the reinstitution of proceedings. There are obvious process-related differences between the withdrawal of a referral to conciliation and the withdrawal of an application enrolled for hearing on this court's motion roll, but it seems to me that an applicant ought to be able to have the dispute heard and determined by way of a re-referral or re-enrollment, unless there is some imperative that militates against that, for example, a claim has been withdrawn in terms of a settlement agreement and thus extinguished.

- [8] I fail to appreciate why the reinstatement of applications that have been withdrawn should be limited to those that have been removed or struck from the roll, or that any withdrawn application must necessarily recommence with the delivery of a fresh notice of motion and founding affidavit. To impose the latter requirement would simply further delay the determination of the review application. The imperative of expeditious dispute resolution dictates that the application be re-enrolled and argued.
- [9] Principle aside, the particular circumstances of this case also warrant the reinstatement of the review application. Until the judgment by the Constitutional Court in *Myathaza v Johannesburg Metropolitan Bus Services* on 15 December 2016, and on the basis of the LAC's judgment in the same matter, it was assumed by most practitioners (including the applicant's attorney) that an arbitration award is a debt that prescribes after the expiry of three years. It is not disputed that the only reason for the withdrawal of the review application was the applicant's contention that the application had become academic because the award had prescribed. It is also not disputed that had the applicant been aware on 27 July 2016 that the law was that the Prescription Act did not apply to the award under review, it would not have withdrawn the review application.
- [11] For the above reasons, in my view, the applicant ought to be afforded leave to re-enroll the review application. Mr Kirstein charitably did not pursue the issue of costs and I intend therefore to make no order as to costs.

I make the following order:

1. The applicant is granted leave to reinstate the application for review.
2. The registrar is directed to enroll the review application for hearing on the opposed motion roll, together with the application in terms of s 158 (1) (c) filed by the third respondent under case number J 1773/16.
3. There is no order as to costs.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Adv. P Kirstein, instructed by Geldenhuys Attorneys

For the respondent: Union official