IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 1643/17

In the matter between

NICHOLAS MTHEMBU **Applicant**

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **First Respondent**

LUNGILE MTIYA *N. O* **Second Respondent**

SOUTH DEEP GOLD MINE – a division of

GOLDFIELDS LTD **Third Respondent**

Heard: **26 November 2019**

Delivered: **13 December 2019**

JUDGMENT

TLHOTLHALEMAJE, J

[1] For the sake of convenience in this Rule 11 application, the parties will be referred to as cited in the review application launched on 13 February 2018. The third respondent (South Deep) seeks to have the review application launched by the applicant dismissed on account of lack of timeous prosecution.

[2] The applicant had sought to review and set aside the arbitration award under case number GAJB9513-16 issued by the second respondent (the Commissioner) acting under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA). The arbitration award was issued pursuant to the applicant having referred an alleged unfair dismissal dispute to the

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CCMA. The Commissioner had concluded that the dismissal of the applicant by South Deep was fair.

[3] The undisputed facts and circumstances of this case are summarised as follows;

3.1 The arbitration award in terms of which the applicant's claim of an alleged unfair dismissal was issued on or about 7 September 2016.

3.2 The review application was launched on 13 February 2018, some 16 months outside of the statutory time periods, and not a mere seven months as alleged by the applicant in his application for condonation.

3.3 Upon receipt of the applicant's review application, South Deep had on 28 February 2018, filed its notice of intention to oppose.

3.4 No further steps were taken by the applicant in prosecuting the review application since the notice of intention to oppose was filed. There was no compliance with the provisions of rule 7A(3) of the Rules of this Court by the first and second respondent.

3.5 It was against the above background that South Deep launched the current Rule 11 application on 7 August 2019. Despite the application having been properly served, it remained unopposed as at the time of its hearing.

[4] At the hearing of these proceedings, Ms Mostert on behalf of the applicant had sought a postponement in order for an answering affidavit to the Rule 11 application to be filed. The request for a postponement was refused for a variety of reasons. Chief amongst these was that the deponent to the founding affidavit to the Rule 11 application, Mr B.S Nhlapho, and South Deep's the attorney of record, had in April 2019 contacted the applicant and was advised that he was still consulting with his legal representatives in respect of the review application. The applicant had further undertaken to revert to Mr Nhlapho but had failed to do.

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[5] On 13 June 2019, Mr Nhlapho had again contacted the applicant and was advised that his legal representatives were *busy* with the review application. The applicant was also at the time, forewarned that the Rule 11 application would be launched to seek a dismissal of the review application.

[6] On 14 June 2019, the applicant had contacted Mr Nhlapho and indicated his intention to proceed with the review application and undertook to contact Mr Nhlapho on 21 June 2019. Again, nothing came out of the undertakings made by the applicant.

[7] In my view, the applicant as evident from his interactions with Mr Nhlapho was aware with the problems with his review application, and the Rule 11 application. A postponement to further grant the applicant an opportunity to either take any further steps in respect of the review application or to file an answer to the Rule 11 application would not have served any purpose.

[8] It being common cause that no further steps were taken in order to prosecute the review application since 13 February 2018 (that is exactly some one year and nine months since it was launched), the issue is whether it would be competent for the Court to dismiss the review application on account of lack of timeous prosecution.

[9] The review application in its current state is obviously is not in compliance with the Rules of this Court or the provisions of this Court's Practice Manual. Clause 11.2.3 of the Practice Manual 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 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. The application must be accompanied by proof of service on all other parties, and answering and replying affidavits may be filed within the time limits prescribed by Rule 7. The Judge President will then allocate the file to a judge for a ruling, to be made in chambers, on any extension of time that the respondent should be afforded to file the record '

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[10] The above provisions received attention in *Macsteel Trading Wadeville v Francois van der Merwe N.O and Others*[1], and flowing from that decision, it can be accepted that;

10.1 These provisions are binding on this Court and the parties[2];

10.2 Where the time limits are 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 archives;

10.3 Where undue delay in prosecuting the review application is raised in the answering affidavit in the review application, and since that application had in effect lapsed and been archived, this Court would lack jurisdiction to determine the issue of the undue delay raised there. In these circumstances, a party complaining of undue delay would

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[1] (2019) 40 ILJ 798 (LAC)

[2] At para 22 – 23 where the Labour Appeal Court held;

> "[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.
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> [23] … 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..."

See also *Samuels v Old Mutual Bank* [2017] ZALAC 10 (25 January 2017) at para 14 – 15, where it was held,

> "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 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.
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> 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.""

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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 the other party's undue delay in prosecuting it.

10.4 Once the review application was archived and regarded as lapsed as a result of a party's failure to comply with the Practice Manual, and there was also no substantive application for reinstatement of the review application, and no condonation was sought for the undue delay in filing the record, the Court is as a matter of law, obliged to strike the matter from the roll on the grounds of lack of jurisdiction or alternatively, to give the party affected by the undue delay, 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 that delay.

[11] In *SAPU obo Mnisi v SSSBC & Others*[3], this Court's approach (per Moshoana J), which relied on *Macsteel* was that;

11.1 Once a case has been withdrawn, such a case is not justiciable in a court of law.

11.2 The dismissal of a review that has been withdrawn no longer affect the interest of the parties. It has no practical effect to the parties nor does it serve the interests of justice;

11.3 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.

11.4 A review application that is set down for a hearing after having been deemed withdrawn ought to be struck off the roll rather than being dismissed.

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[3] Case no: JR2597/201(Unreported and delivered on 19 August 2019)

[12] One cannot quarrel with the above approach to the extent that it re-states the legal position as supported by *Macsteel*. Several practical difficulties however needs to be highlighted insofar as applying the provisions of the Practice Manual are concerned. The obvious difficulty is that these provisions continue to be flouted despite being in place since April 2013 when they became effective. Certain parties continue to fail to comply with the provisions of Rule 7A or those of the Practice Manual, and there are no consistent mechanisms in place to either enforce the deeming provisions in the sense that this Court or the Office of the Registrar effectively and physically archive files as a consequence of non-compliance.

[13] In some instances, review applications are launched without any further steps being taken as in this case, and the applicants in those matters only wake up from their slumber when confronted with Rule 11 applications. Invariably, matters in which there was non-compliance with the time frames, or deemed withdrawn, or where there was no application for reinstatement or even an application for condonation for non-compliance with the time frames find themselves on the court's rolls. In other instances, the other party would have raised the issue of non-compliance in the answering affidavit, which nonetheless would have failed to jolt the reviewing party into taking corrective action. In other instances, the opposing party would raise the issue of non-compliance .

[14] In *SAPU obo Mnisi v SSSBC & Others*, Moshoana J suggested a practical solution to the above administrative conundrum which impacts on the adjudication of these matters by stating that;

> "I fail to understand the practical effect of dismissing a withdrawn review. The approach taken by Van Niekerk J in Ralo, was to struck such a review off the roll when it was enrolled despite having been deemed withdrawn. Such to me is a proper approach and it commands to certainty. In my view, the Registrar must refuse to enroll deemed withdrawn until reinstated by a court. A system may have to designed by the Registrar to identify such matters. This would do the already congested roll a lot good. As a corollary to that, the Registrar must refuse to enroll Rule 11 applications seeking to dismiss reviews that are deemed withdrawn"

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[15] Inasmuch as I agree with the above proposition, the only difficulty however is with the suggestion that the Registrar should not enrol Rule 11 applications were matters have been deemed withdrawn as a matter of practice. The provisions of Rule 11 cannot be rendered redundant by those of the Practice Manual in <u>all</u> instances.

[16] In *Macsteel*, the LAC confirmed that this Court would lack jurisdiction in instances where a matter is deemed withdrawn and where the opposing party only raised the issue of non-compliance with the time frames in the answering affidavit. In these circumstances, a party complaining of undue delay 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 the other party's undue delay in prosecuting it. I do not however understand the principle to imply that a party can only bring a Rule 11 application once it has been placed in a position to file an answering affidavit and raised the issue of non-compliance.

[17] It often happens in this Court as the facts of this case demonstrates, that reviewing parties file the applications and do absolutely nothing thereafter. In my view, it would defeat the whole concept of expeditious resolution of disputes if opposing parties were to be required to wait endlessly for the reviewing party to file everything required in terms of the Rules, and to only thereafter complain about the non-compliance in the answering affidavit. Once a matter is deemed withdrawn, and the reviewing party does nothing by way of an application to reinstate or to seek condonation for non-compliance with the time frames for the matter to be resurrected, it cannot be expected of the opposing party to wait endlessly. The only way of putting an end to the matter would be by way of a Rule 11 application. To hold otherwise would effectively place opposing parties in review applications at the mercy and whim of the reviewing parties.

[18] It is therefore my view that given the wide discretion that this Court enjoys when interpreting and applying the provisions of the Practice Manual as acknowledged in both *Macsteel* and *Samuels*, there is nothing that prevents the Court from considering and dismissing a review application in the face of a

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Rule 11 application, even in circumstances where that application was deemed withdrawn. Obviously that decision will be determined by the facts and circumstances of a particular matter before the court.

[19] The above view is held in the light of the emphasis placed by the LAC in *Macsteel* that 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[4], and furthermore, there is an appreciation that the underlying objective of the Practice Manual is the promotion of the statutory imperative of expeditious dispute resolution, and to enforce and give effect to the rules of the Labour Court and the provisions of the LRA[5].

[20] Effectively, the Rules of this Court work in tandem with the provisions of the Practice Manual, and it is my view that it could not therefore have been envisaged when the Practice Manual was put in place, that its provisions would override those of the Rules of this Court or render them impotent. The Rules are subordinate legislation in any event, and still enjoys primacy in review matters, especially where they would give effect to the primary objectives of the LRA.

[21] The Court cannot be sympathetic to litigants who sit on their rights to pursue matters before it. Furthermore, this Court and the Office of the Registrar, cannot be burdened with dormant matters that clog up the Court's roll unnecessarily. The whole system of administration of justice will collapse if litigation is willy-nilly initiated, without any further steps being taken to bring it to finality.

[22] The facts and circumstances of this case fortifies my conclusions as above. The applicant in this case has not sought a reinstatement of the review application. In fact, the review application since it was launched in

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[4] At para 19
[5] At para 22

February 2018, has not moved an inch towards prosecution. It is worth repeating that it is some one year and nine months since the review application was filed. Effectively, the review application is dormant, and is nowhere near being ripe for a hearing. It did not require some action on the part of South Deep or the Office of the Registrar to resurrect that matter. That responsibility remained with the applicant in ensuring that his matter was alive at all material times, which meant that he was supposed to have done what the provisions of the Rules and the Practice Manual of this Court required him to do.

[23] In *Macsteel*, emphasis was placed on the underlying objective of the Practice Manual, which is the promotion of the statutory imperative of expeditious dispute resolution[6]. The Labour Appeal Court had further held that;

> "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:*
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> > '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.'"[7]

[24] In circumstances such as in this case, where the applicant was notified of the intention to oppose the review application, and further where no steps were taken either to prosecute the review application, or to reinstate the review after it was deemed withdrawn, or worst still, where the applicant was aware of the Rule 11 application and took no steps in either opposing that application or taking any steps that indicated any intention that there is still an interest in pursuing the review application, it cannot for all intents and purposes, be concluded that any such conduct on the part of the applicant contributes in any meaningful way towards the expeditious resolution of disputes. In my view, such conduct is the antithesis of the very objectives of

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[6] At para 21
[7] At para 20

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the LRA. It constitutes an abuse of the Court's process and cannot for whatever reason be countenanced.

[25] The facts of this case as already outlined elsewhere in this judgment are clearly materially distinguishable from those in *Macsteel*, *Ralo*[8] and *SAPU obo Mnisi v SSSBC & Others.* Inasmuch as the applicant is entitled to have his case finally determined by this Court, this Court cannot come to his assistance if he practically did nothing to pursue his matter. The fact that his review application was deemed withdrawn, does not imply that South Deep is precluded from taking steps to bring it to finality. South Deep is entitled to continue with its affairs, without having to wonder when the applicant will ever take any steps in prosecuting the review application and bringing the matter to finality. The applicant's review application has been plagued by delays from the moment it was launched. It was launched some 16 months outside of the statutory time periods, and no efforts whatsoever have been made to prosecute it to finality. In these circumstances, the interests of expeditious resolution of disputes in line with the primary objectives of the LRA dictate that the Rule 11 application be granted.

[26] I have had regard to the requirements of law and fairness, and I am of the view that a costs order given the circumstances of this case and the conclusions reached above dictate that no such costs order be made. In the premises, the following order is made;

<u>Order:</u>

1. The application to review and set aside the arbitration award issued by the second respondent under case number GAJB9513-16 is dismissed on the grounds of lack of timeous prosecution.

2. There is no order as to costs.

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E. Tlhotlhalemaje

[8] *Ralo v Transnet Port Terminals and others* [2015] 12 BLLR 1239 (LC*)*

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Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: B Mostert of Bianca Mostert Attorneys

For the First Respondent: B Nhlapho of Cliffe Dekker Hofmeyr Incorporated

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