



(1) Reportable: NO
(2) Of interest to other Judges: NO
(3) Revised

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR2545/22

In the matter between:

**NATIONAL UNION OF METALWORKERS OF SOUTH
AFRICA o.b.o. MEMBERS**

Applicant

and

ESSENTIAL SERVICES COMMITTEE

First Respondent

LUVUYO BONO N.O.

Second Respondent

MANGANESE METAL COMPANY (PTY) LTD

Third Respondent

Heard: 3 February 2026

Delivered: 9 February 2026

JUDGMENT

MAKHURA, J

Introduction

[1] The applicant brought these review proceedings against the ruling of the Essential Services Committee (ESC) issued on 30 September 2022. The ruling under review was issued pursuant to the applicant's request for the

ESC to cancel and/or vary the designation ruling issued on 30 December 2021, which designated certain services of the third respondent as essential.

The third respondent's application to archive the file

[2] On 20 March 2025, the third respondent applied for an order that the application is archived due to the applicant's *"failure to take any steps for a period of more than 6 months after the date of the last process filed in this matter and/or for its failure to comply timeously with the directive issued by this Honourable Court on 24 August 2023 to file its Heads of Argument within 15 days of receipt of the directive"*. Reliance was placed on clause 16.1 of the now repealed Practice Manual¹, alternatively the rule 69(2)(a) or (c) of the rules of this Court².

[3] Item 16.1 of the Practice Manual provided that:

'16.1 In spite of any other provision in this manual, the Registrar will archive a file in the following circumstances:

- in the case of an application in terms of Rule 7 or Rule 7A, when a period of six months has elapsed without any steps taken by the applicant from the date of filing the application, or the date of the last process filed;
- ...
- when a party fails to comply with a direction issued by a judge within the stipulated time limit.'

[4] Rule 69(2) of the current rules is the same as item 16.1 of the Practical Manual. The review application was launched on 21 November 2022. The provisions of the Practice Manual applied to the application until 16 July 2024.

[5] The third respondent argued that the applicant's heads of argument were filed after six months of no process.

¹ Practice Manual of the Labour Court of South Africa, 2 April 2013.

² Rules Regulating the Conduct of Proceedings of the Labour Court, GN4775a in GG 50608, 3 May 2024.

- [6] On 24 August 2023, the parties were directed by the registrar to file heads of argument. The applicant served its heads of arguments on the third respondent on 14 September 2023, which was within the 15-day period as directed. However, it only filed them in January 2025.
- [7] The third respondent contends that, for this non-compliance, the review application has been archived. It argues that the review application has been archived because the applicant's heads of argument were filed after six months of no process as contemplated in the first bullet point of item 16.1 of the Practice Manual and that the applicant had failed to comply with the direction issued by a judge, per the third bullet point of the item 16.1 and paragraph 3 of the directive to the parties to file heads of arguments dated 24 August 2023.
- [8] I am unable to agree with the third respondent that a failure to timeously file heads of arguments would lead to archiving of the application as contemplated in item 16.1 of the Practice Manual.
- [9] First, although paragraph 3 of the directive to file heads of arguments states that the Judge President directed the parties to file heads within a prescribed period, this is a standard administrative document issued to the parties by the registrar to file heads. In addition, even if it is accepted that this directive was issued by a "*judge*" as contemplated in item 16.1, the directive further informed the parties that non-compliance "*may lead to the ... matter not being considered for hearing*".
- [10] Secondly, the applicant had indexed and paginated the pleadings and filed a notice in terms of Rule 22B³, in terms of which it also requested the registrar to enrol the matter for hearing. This process was also aligned with clause 11.2.7 of the Practice Manual, which required the applicant to ensure all necessary papers (excluding heads of arguments) were filed within 12 months of applying for review and to notify the registrar that the matter was ready to

³ See the now repealed *Rules for the conduct of proceedings in the Labour Court*, GG 17495 of 14 October 1996.

be allocated a hearing date. Failure to do so would result in the review application being archived.

- [11] Thirdly, item 11.6.8 of the Practice Manual provides that failure to file heads of argument would not constitute a basis for the postponement of the hearing, and the presiding judge had the discretion to determine how to proceed with the matter. Item 11.6.5 also left it to the presiding judge to consider awarding a punitive costs order against a litigant who failed, neglected or refused to file heads timeously.
- [12] The primary focus of the Practice Manual was for pleadings to be filed within a specified period or for the file not to remain dormant for a period of six months before the pleadings were closed and the registrar is informed of such. Heads of arguments are not pleadings.
- [13] This application by the third respondent was a waste of the court's time and resources. It was unnecessary. At best, the third respondent could have argued that the court should disregard the applicant's heads of argument or that the court should award costs against the applicant for its non-compliance. Accordingly, the application for archiving is dismissed.

The review application

Material facts

- [14] On 24 March 2021, the third respondent filed a request for an essential services investigation in terms of which it sought to be designated as an essential service in terms of section 71 of the Labour Relations Act⁴ (LRA), alternatively be designated as a minimum service. Three interested parties were cited in this request, viz, the applicant, Solidarity and the Metal and Electrical Workers Union of South Africa (MEWUSA).
- [15] MEWUSA opposed the request or referral and filed its submissions on 17 May 2021. The applicant, on the other hand, sought an extension to file its opposing papers. The ESC granted the extension from 17 May 2021 to 28

⁴ Act 66 of 1995, as amended.

May 2021. On 26 May 2021, the applicant requested an inspection in *loco* to be conducted on 31 May 2021 and indicated that it would only file its opposing papers on 7 June 2021. The third respondent was not amenable to an inspection in *loco* to be conducted on 31 May 2021, but proposed 1 June 2021. The applicant did not attend the inspection in *loco* and instead proposed alternative dates of 22, 23 or 24 June 2021. The applicant was not amenable to the proposal and proposed a final date of 10 June 2021. The applicant informed the third respondent that it was not available on 10 June 2021. The applicant requested a further indulgence to file its opposing papers.

- [16] On 1 July 2021, the ESC refused the applicant's request for further extension. It also ruled that the inspection in *loco* would be conducted as part of the investigation if necessary. Accordingly, the ESC found that the third respondent's request for an essential service investigation had merit and should be investigated.
- [17] On 6 August 2021, a section 71 notice of investigation was gazetted containing dates for public hearings and the public was informed of their right to make oral and written representations. Public hearings were held over 7 days between 31 August and 12 October 2021. The applicant attended some of the meetings but made no representations nor requested an inspection in *loco*.
- [18] On 30 December 2021, the ESC issued a report in terms of which it designated the following services as essential:
- 'a. The refining of manganese ore through a continuous electrowinning process; and
 - b. The [t]reatment and management of contaminated water (leachate and run off) which is specifically related to the refining of manganese ore through a continuous electrowinning process at the affluent treatment plant.'
- [19] The parties were then directed to negotiate and conclude a minimum service agreement by no later than 30 March 2022. No minimum service agreement

was reached between the third respondent on the one hand and the applicant and MEWUSA on the other.

- [20] On 5 May 2022, the applicant applied in terms of section 71(9)⁵ of the LRA for variation and/or cancellation of the essential services designation, and variation and/or cancellation of the *“ratified ... minimum service agreement if any and/or ... minimum service determination if any”*. It is common cause that as of 5 May 2022, the applicant had not entered into an agreement with the third respondent and that the ESC had not determined the minimum services to be maintained during the strike or lockout.
- [21] On 25 July 2022, the ESC, in terms of section 72(2)⁶ of the LRA and considering the parties’ failure to conclude a minimum service agreement, issued a determination on the minimum services to be maintained in the event of a strike or lockout.
- [22] In its supporting affidavit for the variation and/or cancellation of the designation and/or minimum service agreement or minimum service determination, the applicant contended that it sought the above determination on the basis that the third respondent does not provide any essential service at all. The crux of the applicant’s case is that the ESC made the designation without considering its oral representations, which were made by its trade union official. However, the applicant does not state the date or dates on which its official made the representations which were allegedly ignored by the ESC. The applicant then submitted that:

‘...the ESC did not have the benefit of the Applicant’s representations contained hereunder when it made its determination in respect of the designation of 30 December 2021...

Only the representations of the [third respondent] were before the ESC.

⁵ Section 71(9) provides: “A panel appointed by the essential services committee may vary or cancel the designation of the whole or a part of a service as an essential service or any determination of a minimum service or ratification of a minimum services agreement, by following the provisions set out in subsections (1) to (8), read with the changes required by the context”.

⁶ Section 72(2) provides: “If the parties fail to conclude a collective agreement providing for the maintenance of minimum services or if a collective agreement is not ratified, a panel appointed by the essential services committee may determine the minimum services that are required to be maintained in an essential service”.

The representations that were made by the [third respondent]... were misleading.

If the ESC had been privy to the truth about the negligible degree of danger posed (to life and environment) by the interruption... of the refining process and true number of employees who had participated in previous strikes with no danger to life or environment, it would not have issued an essential services designation.'

- [23] The applicant then proceeded to set what in its view are true facts. No grounds were advanced for the variation or cancellation of the minimum service determination, as that determination was issued after the application. The applicant did not seek to supplement its papers to address the minimum service determination. The application was opposed by the third respondent.
- [24] On 30 September 2022, the ESC issued a ruling on the applicant's request for variation and/or cancellation of the designation. The ESC ruled that the applicant's request did not meet the required standard of reasonableness for the ESC to investigate or reinvestigate, that the applicant had an opportunity to oppose the third respondent's application, but elected not to exercise its right. In addition, the ESC refused to rescind its designation on the basis that the applicant was notified of the public hearings and despite its attendance at these hearings, failed to make any representations.
- [25] It is this ruling that the applicant now seeks to review and set aside. To clarify, the applicant does not challenge the designation ruling issued on 30 December 2021, nor does it challenge the minimum service determination issued on 25 July 2022. It only seeks to review the ruling in terms of which the ESC refused to conduct the investigation.
- [26] In opposition of this application, the third respondent raised four points in *limine*, which I address first.

The third respondent's points in limine

- [27] The third respondent argued that the applicant filed an incomplete record and that the missing portion of the record is material to the determination of the

review application. The record referred to by the third respondent relates to the proceedings leading to the designation ruling of 30 December 2021. The applicant filed a notice in terms of rule 7A(8) and has indicated that it was satisfied with the record. The applicant made the election to proceed with the review on the record it had filed. It therefore complied with the rules of the Court. The issue, of course, is whether the grounds of review are supported by the material or record filed by the applicant. Where the applicant failed to file the portion of the record which is material to one or more grounds raised in its review application, such ground/s would be dismissed because of a lack of substantiating evidence on the record before the Court. It is therefore inappropriate to dismiss the review application solely because part of the record is missing or has not been filed, particularly where the applicant argues that the record before the Court is sufficient.

[28] The second point is that the referral or request for variation or cancellation dated 5 May 2022 is moot or premature. This point was based on section 72(4)(b) of the LRA. Section 72(4) provides that:

‘(4) A minimum service determination –

- (a) is valid until varied or revoked by the essential services committee; and
- (b) may not be varied or revoked for a period of 12 months after it has been made.’

[29] The point is not relevant or applicable in the present application because the review application before this Court is, as I already stated, not against the minimum service determination. Further, the applicant does not seek to review and set aside the designation made on 30 December 2021, which would have raised the question about the validity of the minimum service determination. The review application is not moot because the ESC could have decided to reinvestigate the matter if it was satisfied that the request was reasonable and depending on the outcome of that reinvestigation, vary the minimum service determination. This point takes the matter no further and falls to be dismissed.

- [30] The third point is that the review application is an abuse of the court process because for this review application to have any practical effect, the minimum service determination would have to be varied or revoked. How this could be raised as a point in *limine* is beyond comprehension. For the Court to find that the application constitutes an abuse of its process, it must first determine the merits of the application. This so-called point in *limine* is dismissed.
- [31] The fourth point in *limine*, raised as an alternative point to the mootness point above, is that the applicant's request to the ESC was premature because section 72(4)(b) of the LRA provides that "*a minimum service determination may not be varied or revoked for a period of twelve (12) months from the date after it has been made*". The applicant did not request the variation or cancellation of the minimum service determination. For this reason alone, the point in *limine* falls to be dismissed.

Merits of the review application

- [32] The applicant advanced two grounds of review. First, it contends that the dispute that it referred to the ESC remained unresolved, second, that the ESC ignored relevant factors in its decision to refuse to "*re-open*" the investigation.
- [33] The review test applicable to review of the ESC rulings or determinations was discussed by this Court, per Tlhlalema J, in *National Union of Mineworkers v Essential Services Committee and Others*⁷ in a matter where the Court was asked to review a minimum service determination issued in terms of section 72(2) of the LRA. The Court considered the debate whether the determinations or rulings are reviewable under the Promotion of Administrative Justice Act⁸ (PAJA) and/or section 145 and 158(1)(g) of the LRA. The Court, having considered various judgments⁹, found that the applicable test is that of reasonableness as set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and others*¹⁰ (*Sidumo*). It concluded that:

⁷ [2019] ZALCJHB 82.

⁸ Act 3 of 2000.

⁹ Fn 4, at paras 37 – 50.

¹⁰ [2007] ZACC 22; (2007) 28 ILJ 2405 (CC).

‘... it should be accepted as argued on behalf of Eskom, that the administrative justice provision of the Constitution suffuses the grounds of review under section 145 and 158(1)(g) of the LRA, which in turn are suffused by the constitutional standard of reasonableness. The parties in this case having failed to agree on which positions within Eskom’s Human Resources Department ought to fall under minimum services, the dispute then had to be subjected to compulsory arbitration, which resulted in the impugned award.

The fact that the findings of the ESC are framed as a ‘Determination’ does not give it a different colour or texture for the purposes of a review under PAJA. The fact that the provisions of section 158(3) of the LRA omitted to refer to such determinations as arbitration awards does not make them less of awards. They remain awards which would ordinarily be subject to the review test under the confines of section 145 and 158 of the LRA.’

- [34] Accordingly, the *Sidumo* test applies, unless the ESC issued a jurisdictional ruling. Now, turning to the first ground of review. The applicant contends that the ESC failed to deal with the following issues, namely, whether the electrowinning process is continuous, whether the third respondent’s misrepresentations were misleading insofar as they related to the dangers emanating from an interruption of the refining process and the number of employees who participated in the strike, the previous overflows which indicated the lack of danger and the previous strike actions where all employees, except management, participated and there was no danger to life.
- [35] The first ground is interwoven with the second because the applicant contends under the second ground that the ESC ignored relevant factors. These factors allegedly ignored by the ESC are that, because the ESC made its decision based on the third respondent’s representations, it would not have known if the representations were misleading or not. This, of course, contradicts the applicant’s pleaded case elsewhere that the union official made oral representations. The applicant again contends that the ESC ignored the alleged outsourcing aspects of the electrowinning process and the impact of the previous strikes.

- [36] Insofar as the applicant contends that the ESC ignored its oral representations made by its official, this allegation is not supported by any facts. The applicant failed to plead the date when the representations were made. It also failed to provide the record in the form of a transcript of the hearing when such representations were made. On the record before this Court, the applicant failed to make representations during the public hearings. The applicant's submission, therefore falls to be rejected as unsubstantiated.
- [37] The applicant's request for variation and/or cancellation before the ESC must be seen for what it truly was. Its request was not for variation as it had not pleaded how the designation should be varied. It was an attempt to nullify the due process of the ESC, which was carried out in accordance with section 71(1) -(8) of the LRA. The applicant was aware of the public hearing dates, which were duly gazetted and it had attended most of these hearings. It elected, for its own reasons, to make no input in that duly constituted process. When the ESC issued a designation, it now cries foul and seeks to rescind or cancel the designation and re-open or restart the process so that it can, this time around, make its representations.
- [38] The ESC correctly rejected the request as unreasonable or failing to meet the standard of reasonableness to investigate or re-investigate. It further correctly recorded that the applicant had ample opportunity to participate in the process, which commenced in August 2021 until November 2021, before it issued its designation on 30 December 2021. In other words, the applicant failed to show good cause for its designation to be rescinded, and for the third respondent's request to be heard *de novo*. The review application rehashed some of the submissions before the ESC and sought to provide the representations that should have been made to the ESC during the period August 2021 to November 2021.
- [39] In the applicant's request before the ESC and the current review application, the applicant made no attempt whatsoever to provide reasons why it elected not to or failed to make representations during the public hearings. The applicant did not provide any exceptional circumstances or new facts that came to light after the designation which were not within its knowledge or

contemplation before and during the public hearings. The request to vary or cancel the designation in terms of section 71(9) should not be based on the party's election not to participate in the earlier investigation process, which this application is about. I agree with the third respondent that the applicant's request and the current application are an abuse of the variation and/or cancellation and the review processes. For the above reasons, the review application falls to be dismissed.

Costs

[40] The third respondent sought costs against the applicant on a punitive scale. Whilst I agree that the review application is an abuse of the court process, there is no justification for a costs order in this case because the third respondent had also raised unnecessary technical points which have all been dismissed. It also brought a misguided application to archive the review application. Accordingly, there should be no costs order in the two applications before this Court.

[41] In the result, the following order is made:

Order

1. The third respondent's application to archive the file is dismissed.
2. The review application is dismissed.
3. There is no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr S Mogare (NUMSA)

For the Third Respondent: Ms JD Withaar

Instructed by: Gottschalk Attorneys

LABOUR COURT