IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA 12/2021

In the matters between:

E TRADEX (PTY) LTD T/A GLOBAL TRADE SOLUTION **Appellant**

(1st Respondent a quo)

and

AFZAL FINCH **First Respondent**

(Applicant a quo)

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Second Respondent**

COMMISSIONER PAT STONE N.O. **Third Respondent**

Heard: **1 September 2022**

Judgment: **27 September 2022**

Coram: **Sutherland JA, Coppin JA and Kathree-Setiloane AJA**

JUDGMENT

SUTHERLAND JA

Introduction

[1] The appeal is against two orders of the Labour Court. Both relate to jurisdictional controversies.

[2] The first order held that the Labour Court had jurisdiction to hear the review application because, contrary to a preliminary challenge by the appellant employer that the review application had been archived in terms of clause 11.2.7 of the Practice Manual of the Labour Court[1], which would have denied the court jurisdiction, the review application had not, as a fact, been archived, and upon that factual finding, the Labour Court had jurisdiction.

[3] The second order related to whether the Commission for Conciliation, Mediation and Arbitration (CCMA) had jurisdiction, under the Labour Relations Act[2] (LRA), to hear the case. The jurisdictional issue was about whether the respondent, Mr Afzal Finch was an employee. The factual controversy was whether or not Mr Finch had resigned from the employ of the employer. The arbitrator held that since he had resigned, there had been no dismissal and accordingly there was no jurisdiction to hear the case. Mr Finch sought a review and the Labour Court held, on review, that there had indeed been a dismissal and, accordingly, it had jurisdiction to hear the case. The Labour Court thereupon ordered that the case be remitted to the CCMA for a hearing about whether the dismissal was unfair.

[4] As a result of the view we take of the case, it is unnecessary to decide the review of the second order.

[1] Effective 1 April 2013.
[2] Act 66 of 1995, as amended.

The archiving issue

[5] The critical clauses in the Practice Manual provide:

Clause 11.2.7:

> 'A review application is by its nature an urgent application. An applicant in a review application is therefore required to ensure that all the necessary papers in the application are filed within twelve (12) months of the date of the launch of the application (excluding Heads of Arguments) and the registrar is informed in writing that the application is ready for allocation of 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 be archived or be removed from the archive.'

Clause 16.1:

> '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;
> - In the case of referrals in terms of Rule 6, when a period of six months has elapsed from the date of delivery of a statement of case without any steps taken by the referring party from the date on which the statement of claim was filed, or the date on which the last process was filed; and
> - When a party fails to comply with a direction issued by a Judge within the stipulated time limit.
>
> 16.2 A party to a dispute in which the file has been archived may submit an application, on affidavit, for the retrieval of the file, on notice to all other parties to the dispute. The provisions of Rule 7 will apply to an application brought in terms of this provision.

16.3 Where a file has been placed in archives, it shall have the same consequences as to further conduct by any respondent party as to the matter having been dismissed.'

[6] The few relevant facts are these:

6.1 The review application was launched on 16 January 2020.

6.2 The employer filed an answering affidavit on 27 November 2020.

6.3 Mr Finch did not file a replying affidavit within the 12-month period calculated from the launch of the review as provided in clause 11.2.7

6.4 On 16 January 2021, the 12-month period referred to in clause 11.2.7 expired.

6.5 On 4 May 2021, the registrar acted by setting the matter down to be heard on 2 July 2021.

6.6 On 27 May 2021, the six-month period referred to in clause 16.1; i.e., since the last activity occurred, expired.

6.7 On 1 June 2021, Mr Finch filed a replying affidavit.

6.8 The employer objected, alleging the case was archived in terms of the Practice Manual and contended that the Labour Court lacked jurisdiction to hear the case.

6.9 This provoked Mr Finch into filing an application on 10 June 2021. In that application:

6.9.1 He acknowledged he was late filing the replying affidavit and sought condonation. The Labour Court refused condonation and there is no cross-appeal against that ruling. Accordingly, the replying affidavit can be ignored. However, for the purposes of this controversy, the *fact* of attempting to file a replying affidavit, cannot be ignored.

6.9.2 Mr Finch also, simultaneously with the abortive condonation application, sought further, contingent, relief. In this respect, Mr Finch contended that the review application was not archived, pointing to the act of the registrar in setting it down as a critical fact. Second, in the alternative, if the court were to find that the case was indeed archived, he sought relief as contemplated in clauses 11.2.2 and 11.3 to revive the review application.

[7] Why did the registrar set the matter down? The standard procedure in clause 11.2.7 requires a *written* request. There is no written request in evidence. Ostensibly, the registrar was not invited to explain what triggered the decision to set the matter down, a missed opportunity to have possibly avoided the debate about these particular facts. Mr Finch alleged that he deliberately chose not to file a reply to the answering affidavit of the employer and only after the set down was communicated, he had second thoughts. This contention was met with a degree of cynicism. The result is that no factual explanation is offered as to why the registrar set the matter down. However, as a result of the view we take of the matter, this mystery need not be solved. The acts or omissions of the registrar are irrelevant to the decision which resolves the controversy about the archiving of the case.

[8] The Labour Court held that the fact that the matter had been set down by the registrar was the critical issue which was dispositive of the debate. This act of the registrar, so ran the reasoning, demonstrated that the case had not been archived but instead had been enrolled. Moreover, despite the 12-month period in clause 11.2.7 having expired, the act by the registrar of enrolment 'resuscitated' the case. In taking this view, the Judge said that the policy aims of the Practice Manual of orderly and expeditious litigation influenced the view taken of how to interpret the provisions of the Practice Manual.

[9] The notion of a case being 'archived' was invented by the drafters of the Practice Manual as a penalty for dilatoriness and to relieve the burden of carrying dormant cases indefinitely. The consequence of a case being archived is serious. Upon archiving, in terms of clause 11.2.7, a matter is "… *regarded as lapsed, unless good cause is shown why the application should not be*

archived or be removed from the archive" (own emphasis). To add to that provision, clause 16.3 states unequivocally that: "*Where a file has been placed in the archives, it shall have the same consequences as to further conduct by any respondent party as to the matter having been dismissed"* (own emphasis added). Moreover, clause 16.2 is equally unequivocal: "*A party to a dispute in which the file has been archived may submit an application on affidavit, for the retrieval of the file*…" There can be no plausible doubt that once the case is 'archived' it requires the intervention of the court to 'un-archive' it. There is no room to read into these provisions a role for the registrar to 'resuscitate' the case.

[10] The use of the term 'archived' is peculiar to the Labour Court Practice Manual. In the general civil courts, for example, the failure to prosecute an appeal timeously results in the appeal having lapsed.[3] The effect of that is that the case shall not be dealt with by a court unless an application to reinstate the appeal is made. It is, in our view, plain that the archiving of a Labour Court case was intended to have the identical effect; indeed, clause 16.3 goes even further, to equate the consequence of an archiving of a case to be understood to mean the application is 'dismissed', albeit that a procedure exists to reinstate the case on good cause shown.

[11] It must therefore follow that the archived case acquires a peculiar status which requires the delinquent party to justify why it should be reinstated and thereafter be entertained by a court in the wake of a lack of expeditious prosecution. The Labour Court *a quo*, treated the 'archiving' as an administrative act, not as a matter of status. The significance of this distinction between status and an administrative act is that the acquisition of a peculiar status means that upon a given event, the status automatically adheres to the case. That status has legal consequences which a mere administrative act by the registrar cannot undo.

[12] On these facts, on 16 January 2021, when the 12-month period since the launch of the application in terms of clause 11.2.7 had expired, automatically the case acquired the status of being archived; i.e., having lapsed or having

[3] Rule 49(6)(a) and (b) of the Uniform Rules of Court.

been dismissed. The belated attempt to file a replying affidavit is, *prima facie*, a tacit acknowledgement that not "*all the necessary papers in the application*" were filed in time. The absence of a document in which "*the registrar is informed in writing that the application is ready for allocation for hearing*" as required by clause 11.2.7 means that the condition that might have saved the case from the peril of archiving was equally absent.

[13] Accordingly, the Labour Court approached the issue incorrectly by assuming that the archiving process was administrative in character rather than a matter of the status of the case. By doing so, it erred in its interpretation of the Practice Manual and the purpose of the 'archiving' status and the primacy of the role of the court, rather than any role of the registrar, in any potential reinstatement was defeated.

[14] The case law on the application of the Practice Manual has consistently applied its provisions strictly. The rationale is patent and rooted in the advent of the Practice Manual as a gloss on the Rules of the Labour Court. In a busy court inundated by cases, discipline on the part of practitioners is a critical virtue if good order and respectable turnaround times are to be achieved.

[15] In *Macsteel Trading Wadeville v Van der Merwe NO & others*[4], Kathree-Setiloane AJA examined the application of clause 11.2.7. In that case, no reinstatement application had been brought upon the archiving of the review application. The effect of the occurrence of the 'archiving event' was addressed:

> '[20] 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*:
>
> > "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."

[4] (2019) 40 ILJ 798 (LAC) at paras [20] – [26].

[21] Clause 11 of the Practice Manual of the Labour Court (Practice Manual) which was adopted to give effect to the requirement of expedition, as contemplated in the LRA and the rules, states in relation to review applications that:

> "11.2.2 For the purposes of Rule 7A(6), 4 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. ...
>
> 11.2.7 A review application is by its nature an urgent application. An applicant in a review application is therefore required to ensure that all the necessary papers in the application are filed within twelve (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 for allocation 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."

[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.

[23] The Practice Manual came into effect during April 2013;….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. The record in the review application had been filed approximately 20 months after the launch of the review application. And the review application was set down for hearing almost six years from its launch. This means that by the date of set down of the review application, it had been archived and regarded as lapsed.

[24] Macsteel had raised NUMSA's undue delay in prosecuting the review application in its answering affidavit in the review application, but since that application had in effect lapsed and been archived, the Labour Court had no jurisdiction to determine the issue of the undue delay raised there. In the circumstances, Macsteel 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 NUMSA's undue delay in prosecuting it. But a rule 11 application was not a prerequisite for the Labour Court, in this particular instance, to consider whether, on the grounds of undue delay, the review application should be dismissed or struck from the roll.

[25] As indicated, the review application was archived and regarded as lapsed as a result of NUMSA's failure to comply with the Practice Manual. There was also no substantive application for reinstatement of the review application, and no condonation sought for the undue delay in filing the record. As contended for by Macsteel, the Labour Court was, as a matter of law, obliged to strike the matter from the roll on the grounds of lack of jurisdiction, alternatively, give Macsteel 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 undue delay.

[26] Thus, having failed to strike the matter from the roll, it was impermissible for the Labour Court to decline to deal with the issue of the delay because Macsteel did not bring a rule 11 application. The correct approach was for the Labour Court to afford Macsteel an opportunity to bring a rule 11 application.'

[16] Accordingly, it was indeed necessary to seek the revival of the case by an application in terms of clause 16.2. Therefore, the first order of the Labour Court must be set aside.

The reinstatement application

[17] The Labour Court's conclusions that a reinstatement application was unnecessary should be understood to mean that the court must have considered the reinstatement application in order to reach that decision. As traversed above, that conclusion was in error. However, it is inescapable that the debate before the Labour Court on the archiving issue was occasioned by engaging with the reinstatement application in which Mr Finch advanced the proposition that archiving was an administrative function. Were it to be understood that the proper reading of the proceedings before the Labour Court is that the reinstatement application was not heard, the consequence would be that the matter would have had to be remitted to the Labour Court to consider. An interpretation of the proceedings before the Labour Court that would avoid that prospect, in the context of these circumstances, is manifestly preferable. In our view, whenever an interpretation that requires the application of a rule or of a standard practice to imply a compulsory genuflection to a ritual performance which adds no value to effective dispute resolution ought to be rejected where possible.[5] Accordingly, we are of the view that this court is competent to examine the merits of the reinstatement application which the Labour Court held to be unnecessary.

[5] See: *Adams v National Bargaining Council for the Road Freight and Logistics Industry and others* (2020) 41 ILJ 2051 (LAC).

[18] The reinstatement application, to put it mildly, is a model of perfunctory drafting. The relief claimed is a reinstatement of the review application, and in the prayers, an allusion is made to clauses 11.2.2 and 11.3 of the Practice Manual. These references are patent misnomers. A charitable view is that the drafter meant to invoke clause 16.2, which is cited above.

[19] The founding affidavit, as regards this issue, consists of three paragraphs. One criticises the employer for raising the issue and for delaying the finalisation of the matter; another denies the case has been archived, and the last paragraph merely states that the reinstatement relief is claimed in the alternative were a finding to be made that the case was indeed archived. The affidavit does allude, in the context of the issue of the late replying affidavit, that it was initially thought unnecessary to file a reply and that this initial thought explains the absence of a reply until after the afterthought occurred. Assuming this could also be pertinent to the archiving lapse, it nevertheless makes no substantive contribution.

[20] This affidavit does not meet the requirements for an application for reinstatement, which, as it was held by this court in *Samuels v Old Mutual Bank*[6], is in the nature of a condonation application. Tlaletsi DJP held thus:

> '[15] 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.
>
> [16] Clause 16.2 does not specifically state that in an application for the retrieval of the file, a party who brings that application must show good cause why the file must be retrieved from the archive. It however states in no uncertain terms that the provisions of rule 7 will apply in an application brought under the clause 16.2. Clause 11.2.7 applicable to

[6] (2017) 38 ILJ 1790 (LAC).

rule 7 and rule 7A applications requires that a party who applies for a file to be removed from the archive must show good cause why the file must be removed from the archive. Furthermore, an applicant who applies for a file that has been archived for failure to comply with an order by a judge to file a pretrial minute, to be removed from archives, has to show good cause why such a file should be removed from the archives. There is therefore no doubt that showing good cause is a requirement for a file to be removed or retrieved from the archives in terms of clause 16.2.

[17] In essence, an application for the retrieval of a file from the archives is a form of an application for condonation for failure to comply with the court rules, time frames and directives. Showing good cause demands that the application be bona fide; that the applicant provide a reasonable explanation which covers the entire period of the default; and show that he/she has reasonable prospects of success in the main application, and lastly, that it is in the interest of justice to grant the order. It has to be noted that it is not a requirement that the applicant must deal fully with the merits of the dispute to establish reasonable prospects of success. It is sufficient to set out facts which, if established, would result in his/her success. In the end, the decision to grant or refuse condonation is a discretion to be exercised by the court hearing the application which must be judiciously exercised.'

[21] Plainly, there is neither an explanation of the circumstances that allowed the archiving to occur nor, for that matter, a traverse of the prospects of success in the review. Mr Finch filed a replying affidavit to the employer's answer. That affidavit is also bare of substantive content.

[22] It must therefore follow that the reinstatement application cannot succeed.

Conclusions

[23] The decision of the Labour Court that it had jurisdiction to hear the review application was in error and must be set aside.

[24] Accordingly, the appeal must be upheld.

[25] In the circumstances of the case and the nature of the controversies which required to be decided, we deem it appropriate that there be no costs order made.

Order

1. The appeal is upheld.
2. The order is set aside.
3. There is no costs order.

_____

Sutherland JA

Coppin JA and Kathree-Setiloane AJA.

APPEARANCES:

For the Appellant:	L Frahm-Arp
	Instructed by Fasken
For the Respondent:	C Bosch
	Instructed by MacGregor Erasmus