



THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable

Case No: PR283/17

In the matter between:

Airport Motor Retail Centre

Applicant

and

Catherine Willows, N.O.

First Respondent

Dispute Resolution Centre

Second Respondent

Siyathembisa Situngwa

Third Respondent

Zandise Mfazwe

Fourth Respondent

Heard: 13 June 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 26 June 2024.

Summary: Review application under section 145 of the LRA – A review application considered withdrawn, dismissed, lapsed or archived as per the Practice Manual is judged as finally dismissed – A Rule 11 application is not required or necessary to render a defunct review application conclusively dismissed.

JUDGMENT

THYS, AJ

- [1] Over seven years prior the applicant, Airport Motor Retail Centre (AMRC), initiated a review of an arbitration award that had been made in favour of the third and fourth respondents – two of its former employees, Siyathembisa Situngwa and Zandise Mfazwe.
- [2] It is common cause that this review application is now deemed or regarded to have been withdrawn, lapsed, archived and/or dismissed – in terms of the relevant provisions of the Practice Manual¹.
- [3] This is for the reason(s) that AMRC has failed to deliver the record within the required 60 days and/or a period of more than twelve months has expired without AMRC delivering all the necessary papers (of the launch of the application). Furthermore, AMRC did not comply with the requirement to notify the registrar in writing within a twelve-month period that its application was prepared for hearing allocation.

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

[4] In light of the current state of affairs, the employees' representative union, NUMSA, has filed a Rule 11 application to affirm the final dismissal of the review, which has already been deemed 'dismissed' – lapsed, withdrawn or archived.

[5] I am mindful that the LAC in *Macsteel Trading Wadeville v Van der Merwe N.O. & others*² (Macsteel) stated that:

[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application in its answering affidavit in the review application, but since that application had in effect lapsed and been archived, the Labour Court had no jurisdiction to determine the issue of the undue delay raised there.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

²(2019) 40 ILJ 798 (LAC); [2018] ZALAC 50.

the Labour Court to afford Macsteel an opportunity to bring a rule 11 application.’

[6] I am further cognizant that various judges, of this court, have interpreted *Macsteel* to mean that a Rule 11 application is required to render an inactive review finally dismissed. For example:³

6.1 In *Mthembu v Commission for Conciliation, Mediation & Arbitration & others*⁴ the court, per Mabaso AJ, found that it could consider and grant the employer’s application in terms of Rule 11, to dismiss the review application, even where the review application was deemed to have been withdrawn.

6.2 In *Matsha & others v Public Health & Social Development Sectoral Bargaining Council & others*⁵ Snyman AJ, held that:

“... the third respondent’s application in terms of Rule 11 [application] to dismiss the applicants’ review application is granted”.

6.3 In *Ramadie and Another v Department of Health: Mpumalanga and Others*⁶, Deane AJ, at paragraph 51 of his judgment, held that:

“Therefore and following the dicta of *Macsteel*, the correct approach would have been for the Applicants to request a postponement of the matter, and to bring a substantive Rule 11 application”.

6.4 In *Petro Chem Technical Service (Pty) Ltd v Motor Industry Bargaining Council Dispute Resolution Centre & others*⁷ Yeates, AJ held:

³These judgments or examples represent merely a limited sample of this view point and are not exhaustive.

⁴(2020) 41 ILJ 1168 (LC); [2019] ZALCJHB 353.

⁵(2019) 40 ILJ 2565 (LC); [2019] ZALCJHB 128.

⁶[2020] ZALCJHB 141.

⁷[2019] ZALCJHB 310; (2020) 41 ILJ 1216.

‘Following the dicta of Macsteel, wherein the facts are very similar to the present circumstances, the correct approach would have been for the applicant to request a postponement of the matter, and to bring a substantive rule 11 application.’

6.5 In *SAPS v Gerhard Coericius and others*⁸ the Rabkin-Naiker J held:

“... there is nothing that prevents the court from considering and dismissing a review application in the face of a rule 11 application, even in circumstances where the applicant was deemed withdrawn’.

6.6 This court has similarly adopted the above-mentioned position in: *Mchunu v Rainbow Farms (Pty) Ltd, In Re: Rainbow Farms (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁹ and *MJRM Transport Services CC v Commission for Conciliation, Mediation & Arbitration & others*¹⁰ and *November and others v Burma Plant Hire (Pty) Ltd*¹¹.

[7] A wide range of judges contrary held that the Labour Court has no jurisdiction to entertain a Rule 11 application to dismiss a defunct review application. For example:¹²

7.1 In *SG Bulk, A Division of Supergroup South Africa (Pty) Ltd v Khumalo and Another*¹³, Judge Moshwana dismissed the Rule 11 application on the grounds that it was inappropriate by virtue of the fact that Rule 11 applications only strictly cater for matters which are not provided for by the Labour Court rules.

⁸(C263/19) [2021] ZALCCT 59 (30 August 2021).

⁹[2017] ZALCD 17.

¹⁰(2017) 38 ILJ 414 (LC); [2016] ZALCJHB 370.

¹¹(2020) 41 ILJ 1177 (LC).

¹²These judgments or examples represent a limited sample.

¹³[2021] ZALCJHB 416; [2021] JOL 50273 (LC).

7.2 In *Nkuna v NBCRFLI and others*¹⁴ Judge Moshwana similarly held that until an order is issued reinstating a withdrawn or lapsed review, the Labour Court lacks jurisdiction to entertain a rule 11 application.

7.3 In *SAPU obo Mnisi v SSSBC & Others*¹⁵, Judge Moshwana established that:

‘Once a case has been withdrawn, such a case is not justiciable in a court of law. The dismissal of a review that has been withdrawn no longer affects the interest of the parties. It has no practical effect to the parties, nor does it serve the interests of justice. 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. A review application that is set down for a hearing after having been deemed to be withdrawn ought to be struck off the roll rather than being dismissed.’

7.4 In *Eskom Holdings SOC Ltd v Kgaile*¹⁶, Van Niekerk J reached the conclusion that:

‘...The review application is thus deemed to have been withdrawn by the respondent. In the absence of an order reinstating the application, there is no review application that serves before the court. For the purpose of the Rule 11 application and the basis on which the dismissal of the review application is sought, there is nothing to dismiss. I agree with counsel for the applicant that in these circumstances, the appropriate order is a declarator to the effect that the review application is deemed to have been withdrawn.’

7.5 In *Ndlela v Department of Correctional Services: In Re: Department of Correctional Services v Ndlela and Others*¹⁷, Nkutha-Nkontwana J the

¹⁴[2021] ZALCJHB 416; [2021] JOL 50273 (LC).

¹⁵Case number: JR2579/2001 (Unreported and delivered on 19 August 2019).

¹⁶[2021] ZALCJHB 8 at para 9.

¹⁷[2022] ZALCJHB 133; [2022] JOL 54984 (LC).

Labour Court has no jurisdiction to entertain a Rule 11 application to dismiss a non-operational review application.

7.6 In *Department of Social Development Gauteng v WAR obo Ramaele and Others*¹⁸, Swartz AJ refused to hear a Rule 11 application and concluded that this court:

“... cannot determine a lapsed review application in the absence of a substantive reinstatement application and an order reinstating the review application. Likewise I cannot determine an application to dismiss a review application as the review application has lapsed and this court lacks jurisdiction”.

7.7 This view was also taken in: *Randburg Towers (Pty) Ltd v Masilo and others*¹⁹ and *Maloisane v Judge President of the Labour Court and other*²⁰.

[8] I side with the interpretation that the Labour Court has no jurisdiction to entertain a Rule 11 application to dismiss a redundant review application. I do so because I hold (and share) the sentiment that:

8.1 The LAC in *Macsteel* did not conclusively (or with binding authority) hold that an applicant may launch a Rule 11 application to have the review application finally dismissed, even though the review application had already been archived.

8.2 *Macsteel* never intended to mean that an applicant (as a matter of law) is entitled to file a Rule 11 application, regardless of the status of the review itself.

¹⁸ [2023] ZALCJHB 118.

¹⁹ [2021] ZALCJHB 10.

²⁰ (J2024-19 [2022] ZALCJHB 219 (11 August 2022)).

- 8.3 *Macsteel* simply contemplates that once reinstated a party may still have an opportunity to bring a Rule 11 application to have the reinstated review application dismissed. Until an order is issued reinstating a withdrawn or lapsed review, the Labour Court lacks jurisdiction to entertain the Rule 11 application.
- 8.4 Without a reinstatement order, no review is pending before the court. Consequently, there is nothing to be dismissed under Rule 11 – i.e. which applies to the dismissal of “archived” reviews.
- 8.5 Rule 11 applications are unsuitable for reviews deemed lapsed, withdrawn, or dismissed, as they are specifically designed for situations not covered by the Labour Court rules.
- 8.6 A review perceived as withdrawn ceases to exist and bears no consequence for the parties concerned.
- 8.7 Reviews set for hearing after being considered withdrawn should be removed from the court roll rather than dismissed.
- 8.8 Without an order for reinstatement, a review considered withdrawn is non-existent and is not properly before the court.
- 8.9 The Labour Court lacks authority to address a Rule 11 application for dismissing an in operative review application.
- 8.10 A Rule 11 application cannot resolve a lapsed review without a formal application and order for reinstatement of that review.

[9] My resolve is strengthened by the fact that the LAC subsequent to the Macsteel matter in *E Tradex (Pty) Ltd t/a Global Trade Solution v Finch and others*²¹ stated that:

[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. 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.’

[10] These words (stated in the *E Tradex (Pty) Ltd* matter according to my contemplation) mean until an order is issued reinstating, a withdrawn, dismissed, lapsed or archived review the Labour Court lacks jurisdiction to entertain the Rule 11 application.

[11] Another reason, for coming to my aforementioned conclusions, is because of the impending changes to the rules, of this court, which are set to take effect on 17 July 2024. According to Rule 37(18), for instance, a case that has been classified as deemed withdrawn cannot be revived without a Court Order. Interestingly, Rule 69(1) provides for the destruction of a file that has remained inactive for a period of three years. Regarding archiving, the rule (69(2)) is now mandatory; the Registrar is obliged to archive files – in certain circumstances.

[12] These changes (to the rules), according to me, are not merely administrative or procedural adjustments; they underscore the long-standing position or

²¹ [2022] JOL 57621 (LAC) at para 10.

understanding, of the Labour Court, that a deemed withdrawn/lapsed or dismissed or archived review is effectively “dead” - until it is “revived” by a court order.

- [13] This fundamental shift lend support to the notion that a defunct review cannot be destroyed by a Rule 11 application and/or by elevating the practice manual’s provisions on deemed withdrawn, lapsed, and/or archived reviews to “rule status” signifies an intention for these withdrawals/dismissals to carry absolute finality going forward.
- [14] In the absence of a court order reviving the award, the affected party is at liberty to enforce the award as it stands and such an endeavour is a legitimate pathway to seek redress and ensures that the award is not left in a state of limbo.
- [15] Once a matter is deemed withdrawn the application loses its existence and the court therefore has no jurisdiction to dismiss the matter.
- [16] In all the circumstances I have no hesitancy but to reject the union’s Rule 11 bid.
- [17] The proceedings related to the application for revival were however interrupted due to an agreement between the parties to postpone it.
- [18] I opted not to obstruct this agreement, on condition that the matter progresses toward a timely resolution. The prolonged duration has become a concern, and achieving finality is essential.
- [19] Consequently, by mutual consent and with a view to conclusively resolving this matter, the parties have agreed to be bound by an order that will delineate the path forward.
- [20] In consideration of the foregoing and the specific circumstances of this case, I anticipate the following way forward and hereby issue the following order:

Order

1. The Rule 11 application is struck off the roll.
2. The applicant is ordered to deliver the record, under review, by no later than 16 July 2024.
3. The applicant is further ordered to deliver supplementary notice or affidavit by no later than 31 July 2024.
4. The respondents may deliver their answering affidavits, if they so wish, by no later than 15 August 2024.
5. The applicant may deliver a replying affidavit if it so wishes by no later than 23 August 2024.
6. The registrar is directed to enroll the matter for adjudication on 9 October 2024²².
7. The decision regarding costs is deferred.



Mark Thys

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Ms. B Olowookorun of Bukky Olowookorun Attorneys Inc.

For the Respondent: Mr. A Motane of NUMSA

²² This date was established in advance and has also been formally endorsed by the registrar.