IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 1797/17 In the matter between:

BHEKUYISE MJOLI & OTHERS **Applicant**

and

PETER PAPERS (PTY) LTD **First Respondent**

COMMISSIONER DANIEL DU PLESSIS *NO*. **Second Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION
Third Respondent

Enrolled: 17 June 2020, supplementary heads filed on 26 June 2020.

Delivered: This judgment is handed down electronically by circulation to the parties' legal representatives by email, and release to this Court's library and SAFLII. The date and time for hand-down is deemed to be 10:00 on 25 September 2020.

JUDGMENT

Mabaso, AJ

Introduction and brief background

[1] The parties in the review application are as follows: the Applicants are Bhekuyise Mjoli & Others (the applicants); the First Respondent is Peter Papers (Pty) Ltd; the Second Respondent is Commissioner Daniel Du Plessis (the Arbitrator); the Third Respondent is the Commission for Conciliation, Mediation and Arbitration (the CCMA). Both latter Respondents did not deliver opposing papers.

[2] This matter was set down for the review application, however, at the commencement thereof the First Respondent's Counsel advised this Court that she has been instructed to ask this Court to entertain the application for dismissal of the review(The Rule 11 Application).[1] Subsequently, it was agreed that since the Rule 11 application was ripe for hearing, then it may be dealt with. The Third Respondent's main point in this application had been that the review application is deemed withdrawn; in terms of the provisions of clause 11.2.2[2] read with clause 11.2.3[3] of the Practice Manual.

[3] In response thereto, the Applicants' Counsel argued that, under the circumstances, this Court has no jurisdiction because it cannot dismiss a review application that has been withdrawn. As this was a belated jurisdictional point, parties were allowed to file respective written submissions, which they did by 26 June 2020.

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[1] Parties previously had agreed that they were not going to deal with this application.

[2] For the purposes of Rule 7A (6), 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.

[3] If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent‟s consent for an extension of time and consent has been given.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. 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.

[4] The Applicants relied on *Savuka Mine (AngloGold Ashanti) v Mazozo and others*[4] wherein the learned Moshoana J held that this Court lacks jurisdiction to dismiss a deemed withdrawn review application. Whereas, the Third Respondent mainly leaned on *Mantsha and Others v Public Health and Social Development Sectoral Bargaining Council and Others*[5] where this Court, per learned Synman AJ, held that a review which is deemed withdrawn may be dismissed in terms of Rule 11. The Third Respondent's argument is that the *Savuka* judgment is incorrect; because it is against the LAC's *MacSteel Trading Wadeville v Van der Merwe NO & Others*.[6]

[5] Both parties are in agreement that the review application is deemed withdrawn.

Principle and application thereof

[6] In essence, the Third Respondent contends explicitly that this Court in *Savuka* misunderstood *Macsteel*'s judgement.

[7] In *Macsteel*, the LAC had to decide *inter alia* whether or not the Court *a quo* was correct in refusing to dismiss the then delayed action, the prosecution of the review , because the applicant therein had not brought an application in terms of Rule 11 of this Court's Rules.[7] It has to be mentioned that in *Macsteel*, before the Court *a quo*, the issue was not about deemed withdrawal. Therefore, my view is that reading *Macsteel* one has to take into account that the LAC was dealing with what had been raised before the Court *a quo;* therefore, the findings of the LAC have to be understood from that angle.

[8] The Third Respondent contends that in *Savuka*, this Court did not follow what the LAC said where it was held that,

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[4] [2019] JOL 41783 (LC) ("Savuka")
[5] (2019) 40 ILJ 2565 (LC) ("Mantsha")
[6] (2019) 40 ILJ 798 (LAC) ("MacSteel")
[7] Paras 13, 16(a), 18

"[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..."

"[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."[8]

[9] The Third Respondent in support of its argument asked this Court to take into account what Snyman AJ said in paragraphs 24 to 26; and paragraphs 15 to 21 of *Mthembu*'s judgment.[9]

[8] The underlining and bolding are emphasis from the Third Respondent's submissions.

[9] Mthembu v CCMA & others (2020) 41 ILJ 1168 (LC)

[10] The Third Respondent further argues that this Court has to entertain its Rule 11 application because, according to it, there is a difference between an "*application that is deemed withdrawn*" than the one that is "*in fact withdrawn*". It further argues that the latter cannot be revived by way of "an application", but a fresh review application would have to be launched and supports this argument by citing what the Learned Gush J said in *Mchunu v Rainbow Farms (Pty) Ltd v CCMA and Others,*[10] where held *"a deeming provision is a legal fiction. It presupposes that an applicant may endeavour to have the matter revived as in the circumstances of* ***a deemed withdrawal the review has not actually been withdrawn****."*[11]

[11] Firstly, I must indicate that I do not think that the latter argument by the Third Respondent is correct. Considering what the Learned Van Niekerk J said in *Robor Tube Ltd v MEIBC and Others*[11] where he held that,

> *"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 reenrolled and argued."*

Recently, the LAC in *Ellies Electronics (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* [2020] JOL 47535 (LAC) at para 12, underpinned this *Robor*'s judgment. This approach supports the underlying objective of expeditious resolution of matters before this Court. For example, if a new review application has to be instituted, there will possibly be a condonation aspect and the same cause for the delay which resulted to the

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[10] ("Mchunu") [11]
Own emphasis.
[11] (2018) 39 ILJ 2332 (LC) ("Robor")

records not be filed on time will be included, and consequently, this Court will be required to look at the deemed withdrawn and archived review.

[12] Moshoana J, in *Savuka*, considered all the paragraphs that the Third Respondent relies on, in paragraph 8 above. His analysis of these paragraphs comes from an angle of what was totally before the LAC. He concludes thus, *"What the LAC said in paragraph 24 of the judgment must be understood against the background that [Court a quo] entertained a lapsed review, when the appropriate order was to struck it off the roll."* He continued by saying in paragraph 24 thus, *"…was said obiter and in the circumstances of a live review as the Labour Court entertained it as if it was alive still."* The Third Respondent does not attack this analysis by that Court in *Savuka*. In my view, the approach by Moshoana J is consistent with the whole judgment of *MacSteel*, as such I share the same view. Considering, further, that *obiter* is not binding as its status is not the same as *dictum*.

[13] Moshoana J further, regarding paragraphs 25 and 26 of the *Macsteel*, held that,

> *"[23] Therefore, Macsteel is not authority for the proposition that in instances of a lapsed and or deemed withdrawn reviews, a rule 11, as a separate and distinct application, is appropriate. In fact, the LAC found that the Labour Court does not have jurisdiction to determine a lapsed review. Rule 11 applications are aimed at dismissing a review that is prosecuted in a dilatory manner. Simply put, is an added string on the bow to dismiss a review application.* ***How then would the Labour Court have jurisdiction to still dismiss a lapsed and/or deemed withdrawn review?*** *In my view, similarly, the Labour Court lacks jurisdiction over such a review. The review does not exist. For the same reasons, as are in a lapsed review, the Labour Court is not empowered to dismiss a withdrawn review."*[12]

[12] Own underlining.

[14] The Third Respondent argued that this finding is wrong and is inconsistent with *Macsteel,* in support of its argument says this Court has to follow *inter alia* the *Mthembu*'s judgment, where it was held that an opposing party in a deemed withdrawn review cannot be expected to wait endlessly but has to put an end to the matter by bringing an application for dismissal. I cannot entirely agree with this proposition, taking into account that once a matter is deemed withdrawn there is no live issue to be entertained and by bringing an application to dismiss a review that is "regarded as withdrawn",[13] further defeats the expeditious dispute resolutions before this Court. The only time whereby the opposing party will be expected to act is when a revival application is dealt with.

[15] As none of the judgments, relied on herein by the Third Respondent, has challenged *Savuka*'s conclusions as highlighted above, and I do not think that Moshoana J misunderstood *Macsteel* and that *Savuka* should not be followed, as argued by the Third Respondent.

[16] The LAC in *Algoa Bus,* says there, for an appeal to re-exist there must have been a substantive application for reinstatement.[14] In this Court, for a deemed withdrawn review application to be removed from archived there must be good cause shown. In the circumstances, the arbitration award was issued in favour of the Third Respondent and no good cause has been shown why the deemed review application should be removed from the archive in order to be "reinstated", then dismissed. I, therefore, conclude that this Court cannot dismiss a review that does not exist.

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[13] The LAC, in *Transport and Allied Workers Union of South Africa v Algoa Bus Company (Pty) Ltd [2019] 3 BLLR 262 (LAC*) ("Algoa Bus"), discussing a status of an appeal wherein an applicant had failed to comply with the rules of that Court by delivering the records held thus:

> Rule 5(8) of the Rules of the Labour Appeal Court provides that the record must be delivered within 60 days of the date of the order granting leave to appeal. Rule 5(17) provides that if an appellant fails to lodge the record within the prescribed period the appellant shall be deemed to have withdrawn the appeal unless the respondent or the Judge President, on proper application, has consented to an extension. TAWUSA did not seek an extension from ABC nor did it make application to the Judge President. The appeal was, therefore, regarded as withdrawn, and could only be reinstated by order of the Labour Appeal Court in terms of a substantive application for reinstatement.

[14] Ibid.

[17] I, therefore, make the following order,

1. The Rule 11 application is struck off the roll.
2. The Review application is struck off the roll.
3. No order as to costs.

S Mabaso

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr Ludwig-Frahm-Arp

Instructed by: Fasken Attorneys

For the First Respondent: Adv S Collet

Instructed by: Shapiro Aarons Inc