IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JS 1036/18

In the matter between:

PHILLIP HENRY GROOM	**Applicant**
and	
DAILMER FLEET MANAGEMENT	
SA (PTY) LTD (IN LIQUIDATION)	**First Respondent**
JACOBUS RUST BARNARD *N.O*	**Second Respondent**
MERCEDES BENZ SA LTD	**Third Respondent**
MERCEDES BENZ FINANCIAL SERVICES	**Fourth Respondent**
MERCEDES BENZ SA FINANCIAL SERVICES	**Fifth Respondent**

Heard: **5 July 2024**

Delivered: **26 March 2025**

Summary: Application in terms of paragraph 16.2 of the Practice Manual read with Rule 11 of the Rules for the Conduct of Proceedings in the Labour Court

for the revival of a referral application, and the retrieval of the court file from the archives. Held: (1) Having regard to the litigation history in the matter, the fact that the matter has been through various courts in related proceed166/16 and the failure of the First and Second Respondents to oppose the main proceedings, and further having regard to the Third, Fourth, and Fifth Respondents' undertaking that the main proceedings under case number JS 1036/2018 be stayed pending the determination of the matter under case number JS 166/16, and having regard to the Applicant's explanation for the default, the Applicant has shown good cause. Held: (2) the application for the revival of the main application under case number JS 1036/1028 is granted, and the court file in the main application is retrieved from the archives. Held: (3) The First and Second Respondents' counter-application is dismissed. Held: (4) Costs are awarded against the First and Second Respondents, and also against the Third, Fourth and Fifth Respondents, jointly and severally, the one paying the other to be absolved.

JUDGMENT

RADEBE, AJ

Background and introduction

[1] This is an opposed application to revive a referral application which was brought by the Applicant in terms of Rule 6 of the Rules for the Conduct of Proceedings in the Labour Court (the Labour Court Rules), and to retrieve the application file from the archives in terms of paragraph 16.2 of the Practice Manual of the Labour Court of South Africa (the Practice Manual) read with Rule 11 of the Labour Court Rules.[1]

[1] This matter was brought under the old Labour Court Rules, and as such it is decided under these Rules, as the New Labour Court Rules were not yet in force. Rules of Court are delegated legislation, and as such, like legislation, they do not apply retrospectively. GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court, was repealed with effect from July 2024.

[2] The main application in this matter (the referral in terms of Rule 6) of the Labour Court Rules was launched in this Court on 7 December 2018. In this application, the Applicant's claim is primarily based on specific performance based on an alleged unlawful termination of his contract of employment and an alleged breach of his contract of employment by the First Respondent or Dailmer. Alternatively, he claims damages flowing from this alleged breach of contract occasioned by its termination.[2]

[3] The First and Second Respondents have in turn brought a counter-application in these proceedings, in which they seek the following relief:

3.1 That the Applicant's action under case number JS 1036/2018 is considered abandoned;

3.2 That the Applicant has failed to disclose a cause of action in the statement of claim under case number JS 1036/2018;

3.3 That the Applicant's claim under case number JS 1036/2018 be dismissed; and

3.4 That the Applicant be ordered to pay the costs of the First and Second Respondents.

[4] The First and Second Respondents have also brought an application to dismiss this revival application.

[5] This matter has a long history, spanning different courts, namely: the Labour Court,[3] the Labour Appeal Court,[4] and the High Court of South Africa, Gauteng Division, Pretoria.[5]

<u>The Labour Court proceedings under case number JS 166/16 briefly</u>

[2] Record pp 22 – 26 paras 4.1 – 4.13.
[3] See: Record pp 125 – 138.
[4] Record pp 391 – 411.
[5] It appears on the face of the court papers that this matter was decided in favour of Mr. Groom on 30 May 2022. However, the unreported judgment was not loaded onto the known search engines, such as Saflii.org.za, or LexisNexis. This judgment appears on: Record pp 413 – 419.

[6] Besides the Applicant's referral referred to in these proceedings under case number 1039/2018, and the current revival application under the same case number. The Applicant previously brought an in *limine* application under case number JS 166/16 in response to Mr Groom's referral of an unfair dismissal dispute for operational reasons before this Court.

[7] Mr Groom also brought a counter-application in convention seeking relief under section 359(2)(b) of the Companies Act, 61 of 1973 (the Companies Act).[6]

[8] Dailmer's points *in limine* objections were as follows:

8.1 That it was undisputed that Groom did not notify the Liquidator within four weeks of his appointment on 15 December 2017 of his (Groom's) intention to continue with his unfair retrenchment claim.

8.2 Groom had also not applied for an order in terms of section 359(2)(b) of the Companies Act that the proceedings should not be considered abandoned.

[9] Groom opposed the above-mentioned application, and also brought a counter-application under section 359(2)(b) of the Companies Act seeking to continue with his matter absent giving notice in terms of section 359(2)(a) of the Companies Act that he intended to continue with the case. Groom further sought condonation for the late filing of the application under section 359(2)(b) of the Companies Act.

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[6] Section 359 of the Companies Act provides as follows:

'**359. Legal proceedings suspended and attachments void.**

(1) When the Court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered in terms of section 200-

(a) all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator; and

(b) any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void.

[Sub-s. (1) amended by s. 24 of Act 83 of 1981.]

(2) (a) Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.

(b) If notice is not so given the proceedings shall be considered to be abandoned unless the Court otherwise directs.'

[10] The Liquidator opposed the counter-application, and for the first time raised a new jurisdictional point, to the effect that the Labour Court lacked jurisdiction to consider the application under section 359(2)(b) of the Companies Act because only the High Court has jurisdiction. Accordingly, Dailmer asked the Court to dismiss Mr Groom's referral for lack of compliance with section 359(2)(a) of the Companies Act, and because the Labour Court lacked jurisdiction.

[11] The Labour Court then referred to the decision in *Direct Channel Kwazulu-Natal (Pty) Ltd (in Liquidation) v Naidu and Others*[7] and held that despite the factual differences between the two cases, the common principle applicable to both was that compliance with section 359 of the Companies Act was peremptory and that the failure to file the required notice meant that the claim was deemed abandoned. The Labour Court went on to find that it lacked jurisdiction to entertain Mr Groom's counter-application because "the court" contemplated in that section only referred to the High Court.

[12] The Labour Court held that the referral of Groom's unfair dismissal claim under case number 166/16 is deemed abandoned by virtue of section 359 of the Companies Act and was accordingly dismissed.

[13] Mr Groom's application for an order that his unfair dismissal claim should be declared not abandoned was struck off the roll for lack of jurisdiction.

The Labour Appeal Court proceedings

[14] Mr Groom then appealed this Labour Court judgment and order to the Labour Appeal Court.

[15] The Labour Appeal Court held that:

> 'Once the court *a quo* was satisfied that it had jurisdiction in respect of the main claim, i.e. the unfair dismissal claim, and accordingly also in respect of

[7] (2015) 36 ILJ 2611 (LC); [2015] ZALCD 52 at paras 10 – 12.

the defence raised by the respondent (or liquidator) in terms of section 359(2)(a), it also had jurisdiction or the power to determine the conditional counter-application which was essentially interlinked and not merely ancillary to the issue raised by the defence, namely, whether the claim had been abandoned.'[8]

[16] The Court held further that… the appointment of a Liquidator can only legally take place after the registration of the special resolution with the Commission and the Master of the High Court, and after a meeting of creditors and members of the company had been called by the Master [section 364(a) of the 1973 Companies Act]. In the context of this case, it is not known whether a meeting of creditors had been called, or if members of the company at a duly convened general meeting dealt with those issues contemplated in section 349 of the Companies Act.[9]

[17] As things obtain, continued the Court, and in the absence of admissible evidence to the contrary, the legality of the Liquidator's appointment, and date of the commencement of the winding-up of Dailmer is not established, keeping in mind that inadmissible hearsay evidence has to be excluded, and that the establishment of those facts are important to the successful raising of the deeming provision in section 359(2)(a) of the Companies Act.[10]

[18] The Court held further that there was no basis for the Labour Court to exercise its discretion to admit the Liquidator's (Mr. Barnard's) hearsay evidence. As a result, key facts that needed to be proved by Dailmer or the Liquidator, had not been proved, for the invocation of section 359(2)(a) of the Companies Act, and this should have resulted in the dismissal of the Rule 11 application.[11]

[19] Secondly, continued the Court, it appears on the fact of the Respondent's application, that the Liquidator did not promptly insist on Groom complying with section 359(2)(a) of the Companies Act. Instead, he displayed an intention not to

[8] *Groom v Daimler Fleet Management (Pty) Ltd (Groom)* (2021) 42 ILJ 2179 (LAC); [2021] 11 BLLR 1079 (LAC) at para 66.
[9] *Supra* note at paras 72 – 73.
[10] *Groom* at para 74.
[11] Ibid at para 76.

invoke the section, but allowed the claim to be pursued further, and only sought to invoke this section later when the claim was no longer subject to a suspension.[12]

[20] The Court held further crucially that:

> 'It was not open to the liquidator, having waived compliance, to then insist on compliance at his own whim. He could not approbate and reprobate. Thus, even in that regard the respondent (or the liquidator) had failed to make out a case that the appellant's unfair dismissal claim before the court a quo was deemed to be abandoned as contemplated in section 359(2)(a) of the old Companies Act.'[13]

[21] The appeal accordingly succeeded. The Court went further and held that the court *a quo* should not have to strike off the roll Mr Groom's counter-application as held above, it should not have decided it, since it could not find on the papers that the Respondent, and in particular, the Liquidator had made out a case for invocation of section 359(2)(a) of the Companies Act.[14]

[22] The Court accordingly set aside the order of the Labour Court and substituted it with an order to the effect that "*The Rule 11 application for an order declaring that the respondent's unfair dismissal claim under case number JS 166/16 is deemed abandoned, and related relief, is dismissed with costs"*.

<u>The High Court of South Africa (Gauteng Division, Pretoria) judgment</u>

[23] Mr Groom brought an application before the High Court, seeking condonation for his failure to comply with section 359(2)(a) of the Companies Act. The issue before the Court was whether the Applicant (Mr Groom) has shown good cause why the proceedings under case number: JS1036/18 in the Labour Court should not be deemed abandoned by virtue of section 359(2)(a) of the Companies Act.

[24] The Court held that Mr Groom clearly provided the reasons in his founding

[12] *Groom* at para 77.
[13] *Supra* note at para 78.
[14] *Groom* at para 79.

affidavit and replying affidavit why he failed to comply with section 359 of the Companies Act.

[25] The Court held further that it was not disputed that the First and Second Respondents knew during February/March 2017 that Mr Groom had a pending claim that he intended to pursue.

[26] The Court held further that the Second Respondent (Liquidator) failed to comply with the provisions of section 357 of the Companies Act by not giving notice of his appointment in the Government Gazette and only giving this notice almost five months later. By that time, interested parties could not comply with the provisions of section 359 of the Companies Act, even if they wanted to.

[27] The Court held further that comparing the degree of lateness, the explanation proffered by the Applicant and the importance of the case, the Applicant did not wilfully neglect to give the required notice on time.

[28] The Court, therefore, held that the Applicant's failure to give the Second Respondent notice in terms of section 359(2)(a) of the Companies Act, of his intention to pursue proceedings in the Labour Court under case number JS 1036/18 against the First Respondent is condoned, and as a result, the proceedings are not abandoned in terms of section 359(2)(b) of the Companies Act.

[29] I now turn to set out the factual matrix, for the sake of completeness, and as a prelude to the applications before me.

The factual matrix

[30] Mr Groom was employed by Dailmer on 29 June 1981. On 8 December 2015, following negotiations, Dailmer terminated his employment, allegedly due to operational requirements.

[31] Unhappy at this, Mr Groom referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA). When

conciliation failed, he instituted a claim for unfair dismissal in the Labour Court. He filed a statement of claim on 1 April 2016, and the Dailmer delivered its response to the claim on 21 April 2016.

[32] In his statement of claim, Mr Groom alleges, amongst others, that his dismissal by Dailmer was both procedurally and substantively unfair; that it was not for operational reasons at all, and had resulted, *inter alia*, in a reduction of his lump sum pension fund entitlement in the amount of about R 2 million, as well as in the forfeiture of his entire severance package, allegedly because he refused alternative employment. It goes without saying, that the Dailmer disputed all these allegations and sought a dismissal of the claim.

[33] It was suspected that prior to November 2016 that Dailmer was considering liquidation. A notice addressed to its customers was posted on its website to the effect that it would be ceasing its business activities by 1 November 2016.

[34] Mr Groom's erstwhile Attorneys at the time, then wrote to Dailmer seeking clarification and confirmation whether it was true that Dailmer was considering liquidation. At this time, Mr Groom even filed an urgent application seeking an allocation of a trial date. On 4 November 2016, Dailmer responded to Mr Groom and said it was not obliged to divulge such information, and that Mr Groom would be afforded an opportunity to exercise his rights when Dailmer was liquidated.

[35] In December 2016, and unbeknown to Mr Groom, Dailmer passed a special resolution for its voluntary liquidation. His Attorneys then addressed further emails to Dailmer in December 2016, and in January 2017, enquiring whether Dailmer was entering liquidation.

[36] The Liquidator, Mr Barnard was allegedly appointed on 21 February 2017. Unaware of this, Mr Groom continued on his own to enquire with Dailmer whether it was entering liquidation, including conducting his own searches on the Government Gazette and on Dailmer's website.

[37] The notice of the First Respondent's liquidation and Mr Barnard's appointment as the Liquidator was only published in the Government Gazette on 10 July 2017, and it is only then that Mr Groom acquired knowledge of those facts.

[38] Mr Groom then appointed new attorneys to represent him, and they quickly contacted the First Respondent on 12 July 2017 to enquire about the liquidation, and about Mr Barnard's appointment. During this time, further written correspondence was exchanged between the parties.

[39] On 25 August 2017, approximately six months after the Liquidator's appointment, Mr Groom through his attorneys, gave the Liquidator a notice contemplated in section 359(2)(a) of the Companies Act to the effect that he would be continuing with the unfair dismissal claim that he had instituted in the Labour Court before the First Respondent's voluntary liquidation.

[40] On 6 October 2017 attorneys representing the Liquidator informed Mr Groom's Attorneys that section 359(2)(a) of the Companies Act was not applicable. On 12 October 2017, Mr Groom requested that the matter (i.e. his unfair dismissal claim), which was set down to proceed to trial in the Labour Court on 23 October 2017, be removed from the trial roll and, instead, be set down for 27 October 2017.

[41] The matter was however, set down for trial before the Labour Court for 4 March 2019, and this was communicated in writing to Dailmer's Attorneys.

[42] It was only on 5 July 2018, that the First Respondent's attorneys informed Mr Groom's attorneys by letter, *inter alia*, that he had failed to comply with section 359(2)(a), and in particular, had failed to give the Liquidator the notice contemplated in that section and that the appellant's claim was "deemed abandoned" as contemplated in that section.

[43] Mr Groom replied through various correspondence to this, even pointing out that this Dailmer's position represented a sharp about turn from previous correspondence wherein he was advised that the section did not apply. Dailmer never responded to this correspondence.

[44] In December 2018, Mr Groom through his Attorneys proceeded to launch action proceedings against Dailmer, the Liquidator and others, for breach of his employment contract, but did not proceed with these legal proceedings.

[45] Then on 28 February 2019, the Friday shortly before the hearing of the unfair dismissal claim, the First Respondent for the first time, and in its practice note, raised a point *in limine* to the effect that the claim was deemed to be abandoned as contemplated in section 359(2)(a).

[46] Mr Groom's Attorneys objected to this and even went as far as intimating that they would argue that the unfair dismissal claim had not been abandoned.

[47] Then on the day of the trial, on 4 March 2019, when the First Respondent raised the issue of the abandonment of the unfair dismissal claim, it was directed to deliver a Rule 11 application to deal with this issue.

[48] I now turn to deal with the current applications before me.

Survey of the applicable legal principles

[49] The Practice Manual of the Labour Court of South Africa provides in clause 16 for the archiving of files as follows:

> '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.'

[50] The Court in *Edcon (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others; In re: Thulare and others v Edcon (Pty) Ltd*[15] *(Edcon)* held that the Practice Manual is enforceable and competent and not a mere guideline. In this regard, the court had this to say:

'This has been confirmed by Molahlehi J in Tadyn Trading CC t/a Tadyn Consulting Services v Steiner and Others from which it is clear that all practice directives are competent and should be adhered to and are not merely guidelines. I respectfully agree with this interpretation, which is fortified by the peremptory language used in clause 16 of the Practice Manual with regard to the legal effect of a court file having been archived. In my view it seems clear that the deemed archiving of a review court file is to consign the unfortunate file to a form of limbo without ever being formally dismissed and from which the file may never emerge unless a properly motivated revival application demonstrating "good cause" enters to rescue it from a shadowy netherworld akin to the Asphodel Meadows of Greek Mythology.'[16] (own emphasis).

[51] Clause 16.3 of the Practice Manual is noticeably clear, that the legal consequences of a file being placed in the archives or a file which is deemed to have been archived is the same as if the matter had been dismissed.[17]

[15] (2016) 37 ILJ 434 (LC); [2015] ZALCJHB 392.
[16] Ibid at para 24.
[17] *Supra* note at para 22.

[52] The Court in *Macsteel Trading Wadeville v Van der Merwe NO and others* (*Macsteel*)[18] held that:

> '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.'[19]

[53] *Macsteel* also emphasised the objectives of the LRA, which is to promote the effective and expeditious resolution of labour disputes, and the legal consequences of the delay in prosecuting labour disputes in the context of review application, which in my view are also analogous to referral in terms of Rule 6. One of these consequences depending on the facts of each matter, is the dismissal of the review application, or its lapsing or the archival of the file in terms of the Practice Manual.[20]

[54] An applicant in an application for the revival of a matter and the retrieval of the file from the archives is required to show good cause, in order to succeed in such an application.[21]

[55] The Labour Appeal Court in *Superb Meat Supplies CC v Maritz*[22] held that the test applicable to determining whether an application to revive a matter or retrieve a file that has been deemed archived in terms of clause 16 of the Practice Manual, should be granted and whether good cause has been shown is the same as that applicable to rescission applications. These principles are as follows:

55.1 The Applicant must give a reasonable explanation of its default;

55.2 The application must be *bona fide*; and

55.3 The Applicant must demonstrate that it has a *bona fide* defence to the

[18] (2019) 40 ILJ 798 (LAC); [2018] ZALAC 50.
[19] *Macsteel* at para 22.
[20] *Macsteel* at paras 20 – 25.
[21] *Edcon* at paras 24 - 25.
[22] (2004) 25 ILJ 96 (LAC) at paras 19 – 23.

respondent's claim (and must set out sufficient facts which, if established at trial, would constitute a good defence.

[56] In determining whether good cause has been demonstrated, a court enjoys a wide and flexible discretion. This discretion must be exercised after a proper consideration of all the relevant circumstances of the case before the court. Where the default is occasioned by wilful or gross negligence, the court may well decline to exercise its discretion in favour of granting the application for the revival of the matter or for the retrieval of the file from the archives. However, the absence of wilfulness or gross negligence in relation to the default is not an absolute prior requirement for the granting of such relief.[23]

Analysis and evaluation

[57] This matter has been through many courts as alluded to above. In fact, an application under section 359(2)(b) of the Companies Act seeking condonation for non-compliance with section 359(2)(a) of the Companies Act was granted by the High Court of South Africa, Gauteng Division, Pretoria. None of the Respondents suggested that this revival application is not *bona fide*. I also cannot find otherwise, particularly if one has regard to the long history of this matter and the legal skirmishes in this matter. This then dispenses with the second requirement applicable to whether one should grant a rescission application, which is also applicable to whether a court should grant or refuse a revival application or an application to retrieve the file from the archives.

[58] It was argued that the Applicant did not take any further steps in the main proceedings (referral in terms of Rule 6 of the Labour Court Rules), for a period of some 16 (sixteen) months. This it is argued, is what then led to the archiving of the file in the main proceedings under case number JS 1036/2018.

[59] The Applicant's explanation given for the failure to take steps in the main proceedings (the referral) is that firstly, the related matters were being ventilated in

[23] *Supra* note at para 27.

various courts as mentioned above. Secondly, the main proceedings deals with a contractual claim brought against the First to Fifth Respondents, and at the time, Mr Groom also had a pending unfair dismissal dispute before the Labour Court under case number: JS 166/16.

[60] Secondly, the First and Second Respondents never delivered their notice of opposition to Mr Groom's referral under case number JS 1036/2018.

[61] Thirdly, the Third, Fourth and Fifth Respondents delivered their notice to oppose the referral, and their statement of defence on 18 December 2018. In their statement of defence, the Third, Fourth and Fifth Respondents prayed for the Applicant's case under case number JS 1036/2018 to be stayed pending the determination of the Labour Court case under case number JS/166/16.[24]

[62] I agree with the Applicant, that he has provided a reasonable explanation for the default. This is particularly so because of the history of the litigation in the matter. It is plain from the record that the Applicant and his legal representative, did not adopt a supine attitude to his referral under case number JS 1036/2018.

[63] It is also undisputed that the Third, Fourth, and Fifth Respondents agreed to the stay of the main proceedings under case number JS 1036/2018 in their statement of defence, pending the Labour Court case under JS166/16. When this statement of defence was filed with this prayer for the stay of the proceedings in the main proceedings, it was met with deafening silence from the First and Second Respondents. It can then only be deduced that they had no qualms with the stay of the main proceedings pending the Labour Court case under case number JS 166/16.

[64] What is more, the First and Second Respondents admit in their answering affidavit that the Third, Fourth and Fifth Respondents prayed in their statement of defence under the main proceedings (case number JS1036/2018) agreed that these

[24] Record pp 81 and 85.

proceedings be stayed pending the determination of the matter under case number JS166/16.[25]

[65] The Labour Court matter under case number JS 166/16 before the Labour Court was finally decided on 30 January 2020, whereafter an application for leave to appeal was filed, and the judgment in the leave to appeal rendered on 7 July 2020. Thereafter, the matter served before the Labour Appeal Court, which rendered its judgment on 4 August 2020. This is further evidence that the Applicant did not adopt a supine attitude to matter in the main proceedings.

[66] I now turn to deal with the Applicant's prospects of success in the main proceedings. It is difficult to adjudicate Mr Groom's reasonable prospects of success, in light of his failure to address the same in his revival application, and again in replying affidavit on these proceedings. It was only in the Applicant's opposing affidavit, opposing the First and Second Respondent's counter-application, and the Third, Fourth and Fifth Respondents' affidavit in support of the counter-application, that the reasonable prospects of success in the main proceedings are addressed by the Applicant.[26]

[67] It is a trite principle in motion proceedings, that an applicant stands or falls by their founding papers and cannot make out their case in the replying affidavit, except in exceptional circumstances.[27]

[68] The First and Second Respondents have failed to oppose the main proceedings under case number JS 1036/2018. They cannot then be heard to enter the fray in these proceedings, being interlocutory proceedings and seek to oppose them and even bring a counter-application, when they have failed to enter the main proceedings by filing their notices to oppose the main proceedings, and any other court papers in that direction. Their opposition and counter-application in these proceedings is therefore not properly before this Court.

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[25] Record p 114 para 12.
[26] Record pp 277 – 297, at pp 290 – 292 paras 51 – 55.
[27] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 645H to 636H, applied in *Harmony Gold Mining Co Ltd (Target Mine) v National union of Mine Workers and others* (2012) 33 ILJ 2609 (LC); [2012] ZALCJHB 32 at paras 22 – 26; *Betlane v Shelly Court CC* 2011 (1) SA 388 (CC); [2010] ZACC 23 at paras 29 – 30.

[69] What is more, the Applicant intends to amend its statement of claim, and any defects in the statement of claim, as far as the prospects of success are concerned may well be cured by the application to amend the statement of claim, and the amended statement of claim, assuming that the application is granted.

The First and Second Respondents' counter-application

[70] If I am mistaken that the First and Second Respondents' counter-application is not properly before me. I then proceed to deal with it.

[71] The first prayer of the relief sought in the counter-application, which seeks an order to the effect *"that the applicant's action under case No JS 1036/2018 is considered abandoned in terms of section 359 of the Companies Act, 61 of 1973"* has been decided by the Labour Appeal Court,[28] whose judgment is binding on this Court under the well-known principle of *stare decisis*.

[72] The remainder of the relief sought by the First and Second Respondents traverses and is inextricably part of the merits in the main proceedings under case number JS 1036/2018. It would therefore, in my view be inappropriate and amount to judicial overreach for this Court to decide these other prayers when this Court is not presiding in the main proceedings.

[73] In the exercise of my discretion then and based on the foregoing, the Applicant's application to revive the Applicant's referral in this Court under case number JS 1036/2018 must succeed.

Costs

[74] It is now trite that the general rule is that costs in this Court do not follow the result, unlike the opposite position in the High Courts of South Africa.[29] Section 162

[28] *Groom* at paras 77 – 79.
[29] *Zungu v Premier of the Province of KwaZulu-Natal and others* 2018 (6) BCLR 686 (CC); (2018) 39 ILJ 523 (CC).

of the Labour Relations Act[30] provides for the circumstances under which costs may be awarded in this court.

[75] I have, however, decided, to exercise my discretion in this matter, having regard to the history of the matter, and the conduct of the parties, to award costs against the First and Second Respondents, and against the Third, Fourth and Fifth Respondents, jointly and severally, the one paying the other to be absolved. This is because:

75.1 The First and Second Respondents decided to oppose these interlocutory proceedings, despite failing to oppose the main proceedings (the referral in terms of Rule 6), which is improper.

75.2 They have also filed a counter-application, without entering the main proceedings, which is also improper and not properly before this Court.

75.3 The First and Second Respondents also brought a counter-application seeking relief over a matter that has already been decided by the Labour Appeal Court, and the High Court in related proceedings.

75.4 The First and Second Respondents also sought relief in their counter-application over matters that are part of the merits in the main proceedings.

75.5 The Third, Fourth and Fifth Respondents litigated in bad faith and were disingenuous in grabbing the coattails of the First and Second Respondents in these proceedings by supporting the counter-application, and essentially opposing the revival application, despite having prayed in their statement of response of defence filed in these proceedings under case number JS 1036/2018 be stayed pending the determination of the matter under case number JS 166/16.

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

Order

[30] Act 66 of 1995, as amended.

1. The application under case number JS 1036/2018 is revived.

2. The Court file under case number JS 1036/2018 is retrieved from the archives in terms of paragraph 16.2 of the Practice Manual.

3. The First and Second Respondents' counter-application is dismissed.

4. The First and Second Respondents, and the Third, Fourth and Fifth Respondents are ordered to pay costs of this application, jointly and severally, the one paying the other, to be absolved.

S. B. Radebe

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. Sarah Saunders

Instructed by: Du Toit Attorneys and Labour Law Practitioners

For the First and Second Respondents: Adv. P. Kirstein

Instructed by: Adams and Adams Attorneys

For the Third, Fourth and Fifth Respondents: Mr C. Kirchmann (Attorney)

Instructed by: Kirchmann's Inc. Attorneys