THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 267/20

In the matter between:

ALEXANDER STANLEY MACASKILL **Applicant**

and

STATE INFORMATION TECHNOLOGY AGENCY (PTY) LTD (SITA) AND OTHERS **Respondents**

Heard: **03 August 2021 (*via* Zoom)**

Delivered: **11 August 2021 (This judgment was handed down electronically by emailing a copy to the parties. The 11th August 2021 is deemed to be the date of delivery of this judgment).**

Summary: Due to Covid-19 lockdown, this application was decided by hearing oral argument virtually and the parties agreed to this arrangement. Rule 11 application - where the review application is deemed withdrawn, the Labour Court lacks jurisdiction to hear it and dismiss it. Declaratory relief is not appropriate where the provisions of the Practice Manual are lucid and clear. Section 158 (1) (c) of the Labour Relations Act, 1995 is a discretionary relief. Where the interest of justice shall be jeopardised the discretion should not be exercised in favour of granting the order. Held: (1) The application to dismiss

the review application is dismissed. (2) The application to make the arbitration award an order of this Court is refused. (3) No order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] Indeed the issue whether a non-existent review application may be dismissed or not by the Labour Court has since become settled. What lingered in the balance was whether the Labour Court may entertain an application brought in terms of rule 11 of the Rules for the conduct of proceedings in the Labour Court (the rules) seeking to have a withdrawn review dismissed on the altar of reaching finality of a labour dispute. Two schools of thought existed over the issue. The one school suggested that despite a deemed withdrawal, this Court, on the strength of the judgment of the Labour Appeal Court in *Macsteel Trading Wadeville v Francois van der Merwe N.O and Others*[1], retains jurisdiction to still consider a dismissal of the review application on the basis of a delay in prosecution. The most recent judgment in this regard is that of *SG Bulk, A division of Supergroup Africa (Pty) Ltd v Khumalo and another in re Nkuna v NBCRFLI and others*[2]. The Court pertinently stated the following:

> "[11] …I do not understand *Macsteel* to be stating that in a lapsed review, the Labour Court still retains jurisdiction. Instead I understand the LAC to be saying once reinstated, a party may still have an opportunity to bring a rule 11 application to have the reinstated review application dismissed on the basis of undue delay. Until an order is issued reinstating a withdrawn or lapsed review, the Labour Court lacks jurisdiction to entertain a rule 11 application."

[1] (2019) 40 ILJ 798 (LAC).
[2] Unreported decision. Case no: JS393/19 & JR537/13. Delivered: 13 April 2021.

[2] On application of the *stare decisis* principle, unless submitted, which submission was not made before me, that the *SG Bulk* decision has been wrongly decided, this Court is obliged to follow *SG Bulk*. In this matter what Ms Beukes appearing for Alexander Stanley Macaskill (Macaskill) submitted was that under the prayer of further and alternative relief, this Court may issue a declarator that the review application is deemed withdrawn. To that end, she obtained fortification from the decision of this Court by my colleague Van Niekerk J in *Eskom Holdings SOC Ltd v Kgaile*[3]. In particular, Van Niekerk J reached the following conclusion:

> "[9] …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 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."

[3] The question to be tackled in this judgment is whether under those circumstances of a lapsed or withdrawn review application, a declarator is appropriate or not. This question shall be addressed in due course.

[4] That having been said, the application before me is a rule 11 application seeking a dismissal of a review application due to undue delay or dilatory prosecution thereof and a section 158 (1) (c) of the Labour Relations Act[4] (LRA) application seeking to make the impugned arbitration award an order of this Court. Both applications are opposed by the respondent, State Information Technology Agency (Pty) Ltd (SITA).

Background facts

[3] (JR 1440/17) [2021] ZALCJHB 8 (19 February 2021).
[4] No. 66 of 1995, as amended.

[5] Given the view I take at the end of this judgment, it is unnecessary to give a *plenus* rendition of the facts obtaining in this matter. It suffices to state that on 22 November 2019, Commissioner Ntsoane published an arbitration award, in terms of which he found that the dismissal of Macaskill was unfair and ordered SITA to pay compensation to Macaskill before 15 December 2019. Chagrined by the arbitration award, SITA launched a review application in terms of section 145 of the LRA on 10 February 2020[5].

[6] Having done so, on 28 February 2020, the Registrar of this Court advised SITA that the record of the proceedings sought to be reviewed was available. As required by the Practice Manual of the Labour Court[6] (the Practice Manual), SITA was to file the record of the proceedings sought to be reviewed within 60 days from 28 February 2020. The sixty days period envisaged in the Practice Manual expired on or about 28 April 2020. By that time, SITA failed, for reasons that shall not be canvassed in this judgment, to file the contemplated record. Owing to that failure clause 11.2.3 of the Practice Manual decrees that the review application launched on 10 February 2020 is deemed withdrawn by SITA.

[7] That notwithstanding, on 15 June 2020, Macaskill launched the present application. As indicated earlier the application is opposed by SITA.

Evaluation

[8] During oral submissions, Ms Thokoane appearing for SITA conceded, rightly so, that the provisions of clause 11.2.3 of the Practice Manual had taken effect. The effect thereof is that SITA is deemed to have withdrawn the review application. At the time of hearing this application there was no order let alone an application to reinstate the review application. Thus, the state of play at the time of hearing this application was that on or about 28 April 2020, SITA

[5] It was contended in argument that the application is defective since it was launched outside the prescribed six week period. The review application was not before me. This argument is suitable to be made in the review application.
[6] Effective April 2013.

withdrew the review application. On the latest authority there is nothing to dismiss since the review application was withdrawn by SITA. Ms Buekes faced with such authorities suggested that for the sake of finality, the Court must issue a declaratory relief so as to avoid Macaskill "*walking away empty handed*". However, despite a clear concession by SITA, I did not hear her abandoning the prayer that the review application must be dismissed. In that regard, I take a view that such an order must be refused due to lack of jurisdiction.

Is a declaratory relief appropriate?

[9] First and foremost, the power of the Labour Court to issue a declaratory order emanates from section 158 (a) (iv) of the LRA. To that end, the Labour Court possesses jurisdictional powers to issue a declarator. To my mind, the cardinal question is, when is it appropriate to issue a declaratory order? Sadly, my brother Van Niekerk J did not address this pertinent question in *Eskom*. What I observed is that my brother agreed with a submission of counsel that a declarator was an appropriate order in the circumstances where a review application is deemed withdrawn in terms of the Practice Manual. With considerable regret, I do not share the same sentiments. Like in this matter, Van Niekerk J was in *Eskom* faced with a rule 11 application seeking to have a withdrawn review application dismissed for want of diligent prosecution. It is not apparent from the order issued that the rule 11 application was refused on any basis[7]. It is also not apparent that the applicant's counsel in *Eskom* abandoned the quest to have the review application dismissed. All there is to be observed is that Van Niekerk J agreed with, I shall assume for the purposes of this judgment, a submission of counsel. It turns out that that submission became an order of the Court. Accordingly Van Niekerk J was persuaded by the submission, it would seem.

[7] On proper interpretation of the judgment as a whole, the application must have been refused. Amongst others Van Niekerk J stated that "*there is nothing to dismiss*". Such must mean that the rule 11 which was seeking to dismiss the review application was refused.

[10] In my view, where a declaratory relief is not sought in the notice of motion, such a relief cannot be issued on the strength of a submission by counsel. Rule 7 (2) of the Labour Court Rules obligates a party to state in the notice of application the relief sought. The appropriate route is to attempt obtaining a declarator under the rubric of "*further and alternative relief*". It could be that the full extent of counsel's submission in *Eskom* was that such an appropriate order was being pursued under the further and alternative relief rubric.

[11] Nevertheless, in this matter, the declarator was pursued under the head of further and alternative relief. Firstly, the law in that regard was clarified as follows. In *Geza v Minister of Home Affairs and Another*[8], the following was said:

> "Whatever the ambit of a prayer for further or alternative relief, such relief may only be granted if it is consistent with the case made out by the applicant in her founding affidavit and is consistent with the primary relief claimed. In *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd*, Coetzee J described the prayer for alternative relief as being 'redundant and mere verbiage' in modern practice adding that whatever a court 'can vividly be asked to order on papers as framed, can still be asked without its presence' and that it 'does not enlarge in any way "the terms of the express claim" as pointed out by Tindall JA'…[9]

[12] On the strength of the above authority, what will navigate a Court to an order is the case made out in the founding papers. Differently put, does the case made out in the founding affidavit justify a declaratory relief? I suppose that before the Court can scour the founding affidavit in search of admissible evidence for the justification, the question to be asked is when can a declaratory order be made? Corbett CJ in *Shoba v OC Temporary Police Camp, Wagendrift Dam*[10], laid the following principle with regard to declaratory reliefs:

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[8] [2010] ZAECGHC 15 (22 February 2010) at para 12

[9] See also: *Elefu v Lovedale Public Further Education and others* [2016] ZAECBHC 10 (11 October 2016) and *National Stadium South Africa (Pty) Ltd and others v First Rand Bank Ltd* 2011 (2) SA 157 (SCA)

[10] 1995 (4) SA 1 (A) at 14F-I.

> "An existing or concrete dispute between persons is not a prerequisite for the exercise by the Court of its jurisdiction under this subsection, though the absence of such may, depending on the circumstances cause the Court to refuse to exercise its jurisdiction in a particular case … But because it is not the function of the Court to act as an advisor, it is a requirement of the exercise of jurisdiction under this subsection that there should be interested parties upon whom the declaratory order would be binding …"

[13] In *Proxi Smart Services (Pty) Ltd v The Law Society of SA and others*[11], the High Court, correctly, in my view, held that a Court will not grant a declaratory order where the issue raised before it is hypothetical, abstract and academic, or where the legal position is clearly defined by statute. The Constitutional Court in *Competition Commission of South Africa v Hosken Consolidated Investments Ltd and Another*[12]confirmed that in considering whether or not to grant declaratory relief, two stage approach must be applied; *viz* (a) the court must be satisfied that the applicant for the relief has an interest in an existing, future or contingent right or obligation; and (b) the court may then exercise its discretion to either refuse or grant the order sought. The Constitutional Court went on to quote with approval *Oakbay Investments (Pty) Ltd v Director of the Financial Intelligence Centre*[13].

[14] Notably, the Court in *Oakbay* stated the following:

> "[63] The absence of a controversy in *casu,* regarding the relevant legal position cannot be ignored. In the circumstances of this case, the Court considers the absence of legal uncertainty to be a significant factor in determining the direction in which the Court ought to exercise its discretion. This factor carries other ramifications that have a bearing on the exercise of the Court's discretion. The Court does not provide legal advice to the parties. Courts therefore, consider it inappropriate for any party to come to Court for

[11] [2018] 3 All SA 567 (GP).

[12] (CCT296/17) [2019] ZACC 2 (01 February 2019)

[13] [2017] 4 All SA 150 (GP).

> the confirmation of a legal question which is common cause between the parties.
>
> [64] Lack of controversy on the legal question the Minister sought determined also brings into question the utility of the declaratory relief, its practical effect and the advantage the applicant will enjoy if the declaratory relief is granted.

[15] I firmly take a view that the legal position regarding what should happen to a review application when a party fails to file the record is clearly spelled out in clause 11.2.3 of the Practice Manual. That being the case, a declaratory relief is not required. As it was done in *Eskom*, the Labour Court, in my respectful view, necessarily recited, as it were, the provisions of clause 11.2.3. The High Court in the *Mahlangu and another v The Minister of Defence and Military Veterans and another* [14] matter dismissed a declaratory application in an instance where the legal position was clear and unambiguous in terms of the Act and the Regulations for the Reserve Force.

[16] Inasmuch as I accept that a declaratory relief is discretionary in nature, it was, in my respectful view, not necessary to make an order which reverberates what the legal position is in terms of the Practice Manual. It has long being held by the Labour Appeal Court that the Practice Manual has binding force[15]. More often than not parties in rule 11 applications state that they approach the Court in order to gain finality over a labour dispute. This to my mind suggest that parties know what the legal position is but in their view it is not sufficient to command finality. One wonders what finality? As it shall be demonstrated below, until the merits of the review application are determined no finality may be achieved. In my respectful view, finality is not achieved by an order declaring that a review application is deemed withdrawn. I do accept that one of the residual powers of the Labour Court emerge in section 158 (1) (j) of the LRA. In terms thereof, the Labour Court is empowered to deal with all matters necessary or incidental to performing its functions in terms of the LRA or any other law. In my view, even under these residual powers, it is not necessary to

[14] (54573/18) [2019] ZAGPPHC 418 (5 September 2019).
[15] *Samuels v Old Mutual Bank* [2017] 7 BLLR 681 (LAC).

make a declaratory order in such circumstances. The Labour Appeal Court in *Groom v Daimler Fleet Management (Pty)*[16] accepted that section 158 (1) (j) of the LRA commands itself to the common law principle of *causa continentia* which aims at effectiveness. Convenience is the driving force in the common law principle. There is no convenience achieved when a Court declares a known legal position.

Is the declaratory relief justified by the founding papers?

[17] In paragraphs 4.16 and 17 of the founding papers, Macaskill testified that the 60 days period ended on or about 28 May 2020 and as a result, the application for review can be deemed to be withdrawn in terms of clause 11.2.3 of the Labour Court's Practice Manual. It is clear from these allegations that Macaskill knew what the legal position is with regard to the lapse of the 60 days period. Technically, it may be said that these allegations justify a declarator. However, it is perspicuous that Macaskill knew what the legal position is. Thus, by making the order, the Court would simply confirm for him what the legal position is. Courts exists to deal with and resolve concrete legal disputes and not to give legal opinions. In confirming what the legal position is, this Court would, in my view, be dispensing with a legal opinion.

Would the declarator be binding on SITA?

[18] In my view, declaring that the application for review is deemed withdrawn only serves to remind the parties before Court, SITA in particular, of the known legal position as sufficiently spelled out in clause 11.2.3 of the Practice Manual. Such an order, in my respectful view, has no binding effect[17] on SITA. SITA would do nothing more but note that the provisions of the Practice Manual has been read back to it by the Court. This does not provide Macaskill with any practical effect nor does it bring finality to the dispute. Recently the Constitutional Court in

[16] (JA39/20) [2021] ZALAC 23 (4 August 2021).

[17] See *Ex Parte Nel* 1963 (1) SA 754 (A) and *Mahlangu and another v The Minister of Defence and Military Veterans and another* (54573/18) [2019] ZAGPPHC 418 (5 September 2019).

Competition Commission v Beefcor (Pty) Ltd and another[18] found that a withdrawal or removal does not preclude reinstatement.

[19] In the face of such a declaratory order, SITA may still launch an application to reinstate the review application[19]. If the reinstatement application is refused, then the review application remains withdrawn. If it is granted, the declaratory order becomes academic, hypothetical and abstract[20].

Concluding remarks

[20] As I conclude, I take a view that a declaratory order in the terms of restating the provisions of clause 11.2.3 of the Practice Manual is not appropriate in instances where the provisions of the clause has taken effect. Where the legal position has taken effect a declaratory relief is not competent. One of the requirements of a declaratory order is that a parties must have existing, future or contingent right or obligation. Finality of a dispute is not an existing, contingent or future obligation or right of any party. Instead finality in disputes, particularly labour disputes serve the purpose of the LRA. The Labour Court and the parties must strive towards speedy resolution of labour disputes. Such does not imply that the rights or obligations of the one party are advanced over that of the other party to the dispute. Granting a declarator in those terms does not in any event, in my view, bring finality as envisaged by the applicants in rule 11 applications nor does it bring the applicant party any practical binding effect. For these reasons and those expatiated above, I choose not to follow the approach adopted in *Eskom*. Instead the approach I take is to refuse the rule 11 application for want of jurisdiction as it was not formally withdrawn by the applicant before me.

<u>The section 158 (1) (c) application.</u>

[18] (CCT175/20) [2021] ZACC 9 (13 May 2021).
[19] See: *Ralo v Transnet Port Terminals and others* [2015] 12 BLLR 1239 (LC).
[20] See: *Minister of Justice and Correctional Services v Mashiya and others* (J16/2014) [2017] ZALCJHB 140 (5 March 2015) where the Labour Court *per* Molahlehi J reinstated a deemed withdrawn review.

[21] As a departing node, the Labour Court retains a wide discretion to grant or not grant a section 158 (1) (c) application. Generally, where a review application is pending in this Court, the Labour Court is loath to exercise its discretion in favour of granting such an application. As I should, when faced with an application of this nature, I had regard to the contents of the impugned arbitration award. The dispute between Macaskill and SITA revolves around the dismissal or no dismissal of Macaskill. The test for jurisdictional reviews is that of the existence of objective facts and correctness as opposed to reasonableness of the decision. Having had a cursory look at the review papers this Court takes a *prima facie* view that SITA possesses reasonable prospects of success on review. Section 34 of the Constitution of the Republic of South Africa, 1996 guarantees SITA a right to be heard in Court. The Constitutional Court has already decreed that the right in section 34 is not available to frivolous and vexatious matters. Where a Court is faced with such matters, section 36 limitation may be applied. SITA's review application is not one such matters.

[22] Without necessarily seeking to aid, as it were, the potential reinstatement application, which ought to be determined on its own merits, if ever launched, I do note that the 60 days period expired at the time when the country was facing hard lockdowns due to the covid-19 pandemic. This point was harped on before me by Ms Thokoane. True, SITA may be criticised for not having taken advantage of the procedure outlined in clause 11.2.3 – seek a consent of Macaskill or approach the Judge President for an extension of the prescribed time period. That was doable even during hard lockdown period. Nonetheless, the interests of justice drives me to a conclusion that despite the fact that the review application is no longer pending in this Court at this juncture, it is inappropriate, in the circumstances of this matter, to grant a section 158 (1) (c) application. Thus, I refuse to exercise my discretion in favour of making the arbitration award an order of this Court. If the arbitration award is made an order, Macaskill shall in terms of section 163 of the LRA be entitled to execute the arbitration award to the prejudice of SITA before its legal dispute is determined by the application of law in a Court. Such does not augur well with the interests of justice. When considering the interests of justice, a judge must

strive to strike a balance between the interests of the competing parties. Macaskill will suffer no demonstrable prejudice if this application is refused. In due course, his rights will be afforded to him in *plenus*.

[23] In the results the following order is made:

Order

1. The application to dismiss is dismissed for want of jurisdiction.
2. The application in terms of section 158 (1) (c) of the LRA is refused.
3. There is no order as to costs.

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G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Ms S Beukes
Instructed by:	Serfontein Viljoen & Swart, Brooklyn Pretoria.
For the Respondents:	Ms N Thokoane
Instructed by:	Mampuele Attorneys Inc, Kempton Park.