IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable

Case No: P50/15

In the matter between:

FATIMA MALIWA DLWATI **Applicant**

and

KING SABATA DALINDYEBO FET COLLEGE **Respondent**

Heard: 8 July 2021

Delivered: This judgment was handed down electronically by circulation to the Applicant and the Respondent's Legal Representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing- down is deemed to be 9h30 on 18 August 2021.

JUDGMENT

KROON, AJ

Introduction

[1] The Applicant brought a claim in terms of which she sought, *inter alia*, the payment of money from the Respondent. The application was opposed and both parties have filed heads of argument dealing with the merits of the claim. Owing to the subsequent death of the Applicant and for the reasons set out below, the merits of the claim were not canvassed by counsel when the matter was called. The parties however adopted contesting positions as to what should happen in the light of the demise of the Applicant.

[2] Mr Lambrechts, who was instructed by the legal representatives of the Applicant, requested, from the Bar, that the application be regarded as stayed until an Executor[1] was appointed so that instructions could be taken from the Executor of the Applicant's estate. It was his submission that the Court should borrow from rule 15 of the Uniform Rules of Court (the Uniform Rules) which, so he submitted, provides that if a party dies then the proceedings are stayed pending the appointment of an Executor. He further submitted that given that the operation of the stay was automatic, the matter could simply be removed from the roll. The request was in substance a request for the matter to be deferred until it could be established as to whether the Executor wished to persist with the claim.

[3] Mr Mhambi, who appeared on behalf of the Respondent, made the primary submission that the application should be dismissed with costs on the basis that the Applicant had passed away and that, notwithstanding an unreasonable delay, the Applicant had not yet been substituted with the Executor. He submitted, in the alternative, that if I was of the mind to postpone the matter then a costs order should be made in the Respondent's favour.

[4] In response to a question from the Bench aimed at ascertaining as to how it transpired that the question of the matter not proceeding was only being raised

[1] The masculine gender is used in this judgment for the sake of conciseness. References to the masculine gender include the feminine gender.

at the eleventh hour, Mr Lambrechts stated that his instructing attorney was informed by way of a telephone call in 2020 that the Applicant had passed away. Other than to record that the telephone call could only have occurred after 10 June 2020 (the date on which the matter was previously postponed by Lallie J), he was unable to shed further light on when his attorney was informed of the death of the Applicant.

[5] Mr Mhambi, in response, stated, also from the Bar, that the Respondent had no knowledge of the passing of the Applicant. It was, he said, only when the Registrar made telephonic enquiries from his instructing attorney on 6 July 2021 as to the further conduct of the matter given the passing of the Applicant that the Respondent's legal representatives became aware of this fact[2]. Mr Mhambi further explained, if I understood him correctly, that after his instructing attorney had been alerted to the passing of the Applicant by the Registrar, his attorney had ascertained or learned the date of the death of the Applicant to have been sometime in July 2020. Upon being apprised of this development, Mr Mhambi drew supplementary heads of argument dated 7 July 2021 addressing the legal issues arising from the death of the Applicant which were furnished to the Court.

The information before the Court

[6] The concern which I have is that the Court is in the dark as to the correct factual position. There is no evidence as to what steps, if any, have been taken to date by the Applicant's legal representatives with a view to engaging the Executor since the passing of the Applicant last year. Having regard to what was communicated to me by Mr Lambrechts, at least half a year, possibly substantially longer, has elapsed since this event came to the attention of the Applicant's legal representatives. In the result, and more importantly, no evidence has been placed before the Court as to whether an Executor has in fact been appointed and, if so, the identity of the Executor and the date of his appointment. This information would normally have been located in a substantive application for a postponement/stay as envisaged by rule 11 of the

[2] The enquiries were made pursuant to receipt of the letter referred to in paragraph 7 of the Judgment.

Rules for the Conduct of Proceedings in the Labour Court (the Labour Court Rules). There was however no such application and no explanation as to why one had not been brought (other than the contention by Mr Lambrechts, in effect, that on an unidentified date sometime last year the proceedings had been automatically stayed pending the appointment of an Executor).

[7] Instead what occurred is that on 29 June 2021, marginally more than a week before the hearing, the Applicant's attorney transmitted an email to the Registrar recording as follows:

> '**URGENT**
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> I refer to the above matter.
>
> Unfortunately the Applicant has passed away.
>
> I am thus not able to deal with the Application next week for want of instructions from an Executor.
>
> I will revert soonest as to the state of play.
>
> Thank you'

[8] The email appears to be premised on the assumption that the matter would not proceed as a matter of course. At the level of procedure, a letter does not amount to an application. It has no legal significance and the Court has no obligation to engage in correspondence with litigants. Froneman DJP (as he then was) was confronted with an analogous situation where an indulgence was sought on the strength of a written statement. The Learned Judge commented as follows:

> '[3] When the matter was called yesterday senior counsel who appeared for the employer handed up a statement headed "Aansoek om kondonasie" which was apparently signed by an official of the employer. The statement was not on oath, nor was there a notice of motion asking for

> condonation accompanying it. Counsel could not suggest any legal basis for us having any regard to this statement, nor am I aware of such a basis ...' [3]

[9] I also raised with Mr Lambrechts the circumstance that the email appeared to have been transmitted to the Registrar without the knowledge of the Respondent's legal representatives[4]. His response was that he was not in a position to dispute this.

[10] Thus the information given to me suggests that the Applicant's legal representatives allowed the Respondent's legal representatives to labour under the impression that the matter would be proceeding. One would have thought that, upon acquiring knowledge of the death of the Applicant, the legal representatives of the Applicant would have informed the legal representatives of the Respondent of this fact with a view to reaching agreement regarding the way forward and in particular on whether the matter should be held in abeyance pending the stance of the Executor being established. The parties could then have informed the Registrar accordingly who would in turn presumably have placed the setting down of the matter in abeyance pending the substitution of the Applicant with the Executor.

[11] That aside, in my view the legal representatives of the Applicant should have informed the legal representatives of the Respondent, at the latest, on receipt of the notice of set down on 25 May 2021, that the matter could not proceed owing to the passing of the Applicant. The respective legal representatives could then have discussed the further conduct of the matter and, absent an agreement thereon, a formal application could have been brought if the Applicant's legal representatives were so advised.

[12] There is a further email in the Court file which was transmitted by the Applicant's attorney to the Registrar on 5 July 2021 apparently in response to enquiries

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[3] *Classiclean (Pty) Ltd v CWIU and Others* [1999] 4 BLLR 291 (LAC) at para 3.
[4] The email shows that it was transmitted to staff in the office of the Registrar and copied to staff apparently employed by Applicant's firm of attorneys.

made by the Registrar regarding the further conduct of the matter in light of the passing of the Applicant. In that email, which also appears not to have been transmitted to the legal representatives of the Respondent, it is recorded, without elaboration, that "*... the Respondent is aware of Ms Maliwa's passing*"[5].

[13] Without wishing to dwell on this issue, the second email of 5 July 2021 serves only to underscore that no purpose can be served by legal practitioners addressing correspondence to the Registrar concerning the substantive merits of a matter. Such an irregular practice should be discouraged particularly where, as in this case, a state of affairs is contentious. If a legal practitioner is of the mind to place facts before the Court then, absent an agreement, this should be done under cover of affidavit and with the leave of the Court. If the parties wish to communicate with the Registrar regarding the further conduct of a matter, what is required is a practice note and preferably a joint practice note compiled after constructive engagement between the parties' respective legal representatives.

Is the application automatically stayed?

[14] Mr Lambrechts submitted that the proceedings fell to be regarded as stayed, as it were, *ipso jure*, pending the appointment of an Executor and that the application should simply be removed from the roll. In summary Mr Lambrechts submitted that because rule 22 of the Labour Court rules (which governs the substitution of parties in Labour Court proceedings) does not specifically provide for the situation where a party dies, guidance should be sought from rule 15 of the Uniform Rules which, so he submitted, provides that, in the event of the death of a party, proceedings are automatically stayed. He did not refer to any authority in support of the latter contention.

[15] My first difficulty with this submission is that the Court has no evidence before it regarding either the appointment or the non-appointment of an Executor notwithstanding, it would seem, the lapse of a year since the passing of the

[5] A contention which was echoed by Mr Lambrechts during argument but without amplification.

Applicant. If the stance of the Applicant's legal representatives was going to be to contend that the proceedings had been automatically stayed because of the non-appointment of an Executor, what was required, absent an agreement, was for facts to have been placed before the Court by way of affidavit to support such a submission. On the information furnished to the Court there is no evidence that the Applicant's legal representatives have communicated with anyone in connection with the deceased's estate this year i.e. for a period of more than six months. It follows that it cannot confidently be said that an Executor has not in fact been appointed. On this ground alone I would have refused the request for the matter simply to be removed from the roll.

[16] The second difficulty I have with this submission, assuming that it would be appropriate for this Court to seek guidance from rule 15 of the Uniform Rules, is that I have reservations as to whether the interpretation which is sought to be placed on the rule is indeed correct. I say this because the rule does not provide for the automatic stay of proceedings in the event of the death of a party. The relevant portions of the rule are as follows:

> **'15 Change of Parties**
>
> (1) No proceedings shall terminate solely by reason of the death, marriage or other change of status of any party thereto unless the cause of such proceedings is thereby extinguished.
>
> ...
>
> (3) Whenever a party to any proceedings dies or ceases to be capable of acting as such, his executor, curator, trustee or similar legal representative, may by notice to all other parties and to the registrar intimate that he desires in his capacity as such thereby to be substituted for such party, and unless the court otherwise orders, he shall thereafter for all purposes be deemed to have been so substituted....'

[17] Had it been the intention that the proceedings be automatically stayed I would have expected the rule to have indicated that intention. It would have been a simple matter for the drafters of the rule to have mirrored the provisions of the Magistrate's Court Rules. Rule 52(3) of those rules provides as follows:

> 'If a party dies or becomes incompetent to continue an action the action shall thereby be stayed until such time as an executor, trustee, guardian or other competent person has been appointed in his or her place or until such incompetence shall cease to exist.' (own emphasis)

[18] In Erasmus Superior Court Practice[6] the authors explain as follows:

> 'In proceedings in the magistrate's court an action is stayed if a party dies or becomes incompetent to continue until such time as an executor, trustee, guardian or other competent person has been appointed. In superior court practice the action is not stayed but, it is submitted, the court will not allow any further steps to be taken in the proceedings until an executor, curator, trustee or similar legal representatives has, in terms of the subrule, been substituted.' (own emphasis)

[19] In my view the commentary in Erasmus is to be endorsed because the language of the rule is clear[7]. This interpretation is also consistent with a Superior Court's power, in terms of the Constitution for the Republic of South Africa, 1996 to regulate its own process[8].

[20] In coming to the conclusion which I do, I am mindful that the commentaries are not harmonious and that there seems to be a dearth of authority on the point. In Civil Procedure in the Superior Courts the view is expressed, without reference to authority, that where a party dies an action is automatically stayed until the appointment of the Executor[9]. In Herbstein and Van Winsen[10] the same view is expressed and reliance is placed on *Standard Bank Financial Nominees (Pty) Ltd v Lurie and Others*[11]. That case did not however concern the situation where an Executor had yet to be appointed. Rather the issue concerned the

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[6] Second Edition, Vol. 2 at page D1-160
[7] Whilst I am of the view that the position put forward in *Erasmus* is correct, the reliance therein on *Estate Huisman and Others v Visse and Others* 1967 (1) SA 470 (T) is not apposite. In that matter Executors had already been appointed but an application to enforce a consent to judgment was refused because of a failure to follow the procedure in rule 15 to substitute the Executors in question.
[8] Section 173
[9] D Harms SC as published by LexisNexis South Africa at B15.1
[10] The Civil Practice of the High Courts of South Africa, Fifth Edition, Vol. 1 at page 339
[11] 1978 (3) SA 338 (W) at 346.

amendment of an incorrect citation of an existing Executor. *Standard Bank* accordingly does not support the view set out in Herbstein and Van Winsen. There is also the remark by Scott J made *en passant* in *Pentz v Gross and Others*[12] where the Learned Judge stated, without amplification and without reference to rule 15, that a "*consequence*" of any "*change in status*" is "*merely to stay the action*"[13]. This statement, which is obiter, was made in response to an analogy which counsel had sought to draw but which was not relevant to the exception which the Court was adjudicating. The remainder of the authorities which I could locate were consistent with the position that the notion of an automatic stay is something distinctive to the Magistrate's Court[14].

[21] In conclusion, and having given due consideration to the wording of rule 15, in my view the position as set out in Erasmus is to be preferred. It follows that in the event of the death of a party to proceedings in a Superior Court, the proverbial clock will not automatically stop. It will nonetheless be impermissible for the Court to allow a further step to be taken in the proceedings until the appointment of an Executor.

[22] Whilst the Court will naturally still possess the inherent jurisdiction to grant a stay of proceedings if it is demonstrated that an Executor is yet to be appointed (in most cases that would be the obvious order to make if there was an issue as to the status of the proceedings), nothing prevents the Court from granting a different order such as the postponement of the matter if the interests of justice so require.[15] Given the peculiar facts of this matter and in particular the undertaking by the Applicant's legal representatives to engage with the Executor or the prospective Executor, the appropriate order, in the event of the application not being dismissed, would be to postpone it. Mr Lambrechts, of his own accord, informed the Court that he had no objection if the Court "*set time*

[12] 1996 (2) SA 518 (CPD).
[13] Ibid at 526E
[14] See *Du Toit v Bornman and Another* 1992 (4) SA 257 (C) at 260E. See also: *Dykstra v Emmenis* 1952 (1) SA 661 (T).
[15] Cf. *Wie obo G v MEC for Health and Social Development of the Gauteng Provincial Government* (05715/2013) [2016] ZAGPJHC 113 (19 May 2016) and *G Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd* 2011 (5) SA 14 (WCC).

limits" within which his instructing attorney was required to report back as to the stance of the Executor.

Should the application be dismissed or postponed?

[23] In submitting that the application should be dismissed owing to the death of the Applicant, Mr Mhambi sought to persuade me to follow *Basil Read (Pty) Ltd v National Union of Mine Workers and Another; In Re: National Union of Mine Workers and Another v Commission for Conciliation, Mediation and Arbitration and Others*[16], a matter in which the Court had in turn placed reliance on *Transport and General Workers Union and* Others v Coin Security *Group (Pty) Ltd*[17].

[24] In *Basil Read* the facts obtaining were in one sense distinguishable in that there had already been a number of postponements after the death of the employee and it concerned the dismissal of a review application pursuant to the bringing of a substantive rule 11 application to dismiss the review application. The Court pointed out that some of the delays had been occasioned before the death of the Applicant[18]. The primary reason for dismissing the review application was thus the unreasonable delays which had accompanied its prosecution. In other words, the reason for dismissing the application was not based *per se* on the absence of the Executor.

[25] That all being said, having carefully analysed *Basil Read,* I am unable to agree with the reasoning contained therein as well as the conclusion which the Court ultimately reached.

[26] To summarise, the facts were that the Applicant had died and the Court had, per Francis J, ordered that the widow of the deceased be substituted for the Applicant after her appointment as the Executor[19]. Notwithstanding substantial

[16] (2014) 35 ILJ 2153 (LC)
[17] (2001) 22 ILJ 968 (LC)
[18] Para 30
[19] Para 8

delays no appointment of an Executor was made and the Court (per Baloyi AJ), it would seem having run out of patience, then dismissed the application on the basis of the unreasonable delays notwithstanding the non-appointment of the Executor.

[27] The nub of the judgment is to be found in the following paragraph:

> '[40] Due to death of the second Respondent on 15 July 2010 and failure to have an executrix appointed, the review application is undoubtedly stagnant. The situation did not subsequently change since 30 June 2011 when Francis J made an order calling for the Respondents to secure the appointment of an executrix to substitute the deceased Second Respondent. The only available remedy is as sought by the Applicant and that is to have the indefinite hanging review application dismissed.'

[28] Thus the Learned Judge found that even though no Executor had been appointed, the rule 11 application to dismiss the review application could nonetheless proceed. I am unable to align myself with this finding. As has been demonstrated above the authorities are clear that, whether or not a stay of proceedings is automatic, it is not permissible for a further step to be taken in proceedings until an Executor has been appointed. It cannot seriously be gainsaid that the bringing of an application to dismiss a review application would constitute a further step.

[29] The reasoning underpinning the position espoused in the prevailing authorities is not hard to fathom. It would be grossly unfair if an opposing party could take steps during the hiatus between the death of a party and the appointment of an Executor. During that period the deceased estate is defenceless. There is no Executor to protect it. A deceased estate is not a legal persona and consists of an aggregate of assets and obligations[20]. It acts through its Executor[21]. An

[20] *Commissioner for Inland Revenue v Emary NO* 1961 (2) SA 621 (A) at 624-625.
[21] *Gross and Others v Pentz* 1996 (4) SA 617 (SCA) 625 A – B. *"In my view, it should be accepted as a general rule of our law that the proper person to act in legal proceedings on behalf of a deceased estate is the executor thereof and that normally a beneficiary in the estate does not have locus standi to do so."*

injustice would thus occur if the heirs and beneficiaries of the deceased estate were to be prejudiced or penalised because of a delay in the appointment of an Executor. If there was a concern that finality in the litigation was being unduly delayed given an unreasonable delay in the appointment of an Executor, it would seem that the avenue to follow would be to obtain a *mandamus* against the Master compelling him to grant letters of executorship. The answer would surely not be for a judicial pronouncement to be made in the absence of an interested party i.e. the Executor. As Lord Atkin, on behalf of the Privy Council[22], observed:

> 'Finality is a good thing, but justice is better.'

[30] In the same breath, it needs to be appreciated that, on the death of a party, the premium placed on finality[23] and the expeditious resolution of employment disputes which is unique to labour litigation would wane, if not dissolve. The death of a party puts paid to any existing on-going relationship between the parties and erases the prospect of the restoration of an employment relationship which has been terminated. The claims which an Executor can persist with are limited. The reason for this is that the Executor of a deceased estate does not step into the shoes of the deceased. The Executor and the deceased are, in law, separate *personae*[24]. Any claim initially brought by an employee or an employer will, if persisted in by an Executor, in truth no longer constitute a labour dispute. Rather the dispute will become one as between the employer/employee and the deceased estate, as represented by the Executor, although it would remain adjudicable by the Labour Court.[25]

[31] *Basil Read* the Court, in adopting the approach which it did[26], relied on *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others*[27] in support of its finding that proceedings are not automatically stayed. The reliance on *Parekh* was however

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[22] *Ras Behari Lal and others v The King Emperor* [1933] All ER Rep 723 [PC] as endorsed in *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others* 2010 (1) SA 333 (SCA) at para 80.
[23] As emphasised in *Basil Read* at para 35.
[24] *SA General Electric Co (Pty) Ltd v Sharfman and Others N.N.O.* 1981 (1) SA 592 (W) at 597H-598A
[25] *Estate Late WG Jansen van Rensburg v Pedrino (Pty) Ltd* (2000) 21 ILJ 494 (LAC)
[26] Para 38.
[27] [1982] 3 All SA 697 (D)

misplaced. If anything, and as is pointed out in Civil Procedure in the Superior Courts[28], *Parekh* is authority only for the proposition that if a co-defendant dies then his liability is severable from the other co-defendants and the action may proceed against the living defendants. *Parekh* did not expressly deal with the issue as to whether proceedings were automatically stayed but it did accept, correctly so, that proceedings against the deceased defendant could not continue until an Executor had been appointed.

[32] As mentioned above, in *Basil Read* the Court also relied on *Coin Security* as authority in support of its conclusion that the application fell to be dismissed notwithstanding the non-appointment of an Executor. *Coin Security* is not authority for the proposition that, notwithstanding the non-appointment of an Executor, a claim may be dismissed. That matter did not concern a situation where an Executor had not been appointed. The facts were that a trial had run its course without authority having been obtained from the Executors of a few deceased employees. The Court found, in line with the prevailing authorities, that because the deceased employees were not properly before Court, their claims could not proceed[29]. The Court did not however dismiss the claims as was done in *Basil Read*.

[33] There was, in my view, a further hurdle facing the Court in *Basil Read*. The authorities, as set out above[30], are clear that even if an Executor has been appointed the deceased party must still be substituted before proceedings can continue. In *Dykstra v Emmenis*[31] default judgment was taken against the defendant after he had died but before his Executor had been substituted. The Court reasoned as follows:

> 'But the fact remains that judgment has been given against a dead person by default. Whenever it is known that a litigant has died the cases show that his

[28] B 15.1 footnote 1
[29] Para 166.
[30] Cf. *Estate Huisman and Standard Bank.* See also: *CEPPWAWU obo Gumede v Republican Press* [2006] 6 BLLR 537 (LC)
[31] 1952 (1) SA 661 (T)

executor is substituted. In Ohlsson's Cape Breweries Ltd v R. W. and A. L. Hamburg, 1908 T.S. 134, SOLOMON, J., at p. 140, said:

'But it must be taken to be well established under our law and practice that the executor alone is the legal representative of the deceased and that no action can be brought . . . claiming damages out of the assets of an estate without making the executor of the estate a party to the action.'

Under the Magistrate's Court Act, Rule 6 (3), an action is stayed by the death of a party. Voet, 5.1.32, states that by the Roman-Dutch Law if a party to an action dies during its pendency 'the heirs (now, the executor) must be cited by the other party to continue the action started with the deceased'. An exception is noted in 5.1.33, where all that remains to be done in the action is to note judgment.

On the authority of the passage in Voet, and having regard to the practice in other respects, it seems to me that I can only rule that the taking of default judgment against the dead defendant did not bind the estate, and the executrix must be given leave to defend the action.'[32]

[34] In my view, unless perhaps it is clear that the Executor has made an election not to persist with a claim brought by the deceased party,[33] I see no reason why the requirement of the substitution of an Executor for the deceased party should not also find application where there is an application to have the claim dismissed because the dismissal of the claim self-evidently has the potential to prejudice the deceased estate. In this context rule 15 (2) provides a streamlined procedure in terms of which any party, including an opposing party, may substitute the deceased party with the Executor. Under this heading, what further stands out in *Basil Read* is that Francis J had already made an order, the substance of which was that the Executor must be joined (as and when appointed).

[32] 663 A – F.
[33] Cf. *Ex-TRTC United Workers Front and Others v Premier, Eastern Cape Province* 2010 (2) SA 114 (ECB) at para 33. It would however always be prudent to substitute the deceased party with the Executor.

[35] Lastly, in my respectful view, all concerned in *Basil Read* failed to appreciate that, if indeed it was permissible for the application to proceed (I am of the view that it was not) and the application was going to be entertained on the merits, then the matter had for all intents become moot. The reason for this is evident from the circumstance that the relief which was being sought through the vehicle of the review application was an order of reinstatement, an order which would not, for obvious reasons, have been competent in the light of the death of the employee. The judgment records as follows:

> '[5] ... The relief sought in the notice of motion in support of the review application is, namely, an order reviewing and setting aside of the arbitration award, replacing it with an arbitration award finding that the dismissal is unfair and ordering the Applicant to reinstate the Second Respondent from any date not earlier than the date of dismissal.' (own emphasis)

[36] It needs only to be stated that a dead person is incapable of tendering his services and accordingly cannot be reinstated in terms of an arbitration award. The well-known nineteenth century author and self-appointed commentator on social conventions, Ward McAllister, is quoted as having said:

> 'A dinner invitation, once accepted, is a sacred obligation. If you die before the dinner takes place, your executor must attend.'

[37] The tongue in cheek wit of Mr McAllister aside, it suffices to record that an Executor can have no authority to tender services on behalf of a deceased employee and if no services are tendered as required, the fruit of a reinstatement award cannot be enjoyed. If an ex-employee, who is too ill to tender his services as required by an arbitration award, is not permitted to receive the benefits of that award[34], then all the more so an ex-employee who has died. This much has been authoritatively confirmed by the Constitutional Court in *National Union of Metalworkers of South Africa obo M Fohlisa and Others v Hendor Mining Supplies (a division of Marschalk Beleggings (Pty)*

[34] *MEC of the Department of Education, Eastern Cape v Gqebe* (2009) 30 ILJ 2388 (LAC) at para 15.

Ltd[35]. *Hendor* concerned ex-employees who had died both before and after the handing down of judgment entitling them to reinstatement. Only those employees who were alive at the time of judgment and had tendered their services on receipt of the judgment in terms of the original reinstatement order issued by the Labour Court, were entitled to any relief. In short, the capacity of a dismissed employee to tender his services pursuant to the issuing of a reinstatement order is a *sine qua non*. In consequence, in *Basil Read* the relief set out in the notice of motion in the review application, if granted, could have been of no value to the deceased estate. There was thus no need to consider the rule 11 application on its merits[36].

[38] This is not to say, as per *Estate Late W G Jansen van Rensburg v Pedrino (Pty) Ltd*[37], that an Executor is not permitted to institute a claim on behalf of a deceased estate for wages up until the date of the death of the employee[38]. An Executor is entitled to enforce contractual rights as contained in an employment agreement[39].

[35][2017] 6 BLLR 539 (CC) ; 2017 (7) BCLR 851 (CC); (2017) 38 ILJ 1560 (CC) at paras 1, 22, 32, 35, 55, 67 and 79. Although the Court was split in respect of its reasoning, it was unanimous on the point that an ex-employee who dies before judgment reinstating him will not have a claim in terms of that judgment.

[36] Had the Court waited for the appointment of an Executor then he could conceivably have amended the notice of motion to claim compensation (*Cf. CEPPWAWU obo Gumede v Republican Press* [2006] 6 BLLR 537 (LC)). I note further that the Court, notwithstanding the fact that it considered the merits of the application, appeared, in addition, to find that it was "*academic*" but on other unrelated grounds, namely because the trade union, which was also a party, would not have been capable of enforcing the envisaged review application judgment (para 37) as well as the circumstance that an Executor has no locus standi if he has not received "*letters of administration*" (para 41), the latter finding being not easily reconcilable with the finding that no Executor had been appointed.

[37] Para 9.

[38] *Estate Late WG Jansen van Rensburg* at para 7. This judgment was given in terms of the erstwhile Labour Relations Act of 1956 which provided for "*prospective reinstatement*" in terms of section 43 thereof, something not envisaged by the Labour Relations Act No. 66 of 1995 (see *Hendor* at paras 95 and 96). It made mention of the concept of "*partial reinstatement*" being an avenue open to Executors to pursue (see para 11 contra para 27 where the claim is described as one for compensation) although it made it clear that reinstatement was not an option for a deceased employee (para 27). Insofar as *Estate Late WG Jansen van Rensburg* is inconsistent with *Gqebe* and *Hendor*, it has been implicitly overruled. In this regard it may be noted that the requirement to pay retrospective remuneration is inextricably bound with the act of reinstatement (*Hendor* at para 18). That in turn is the reason why it is not competent for a writ to be issued for back pay (*Hendor* at para 103).

[39] *Estate Late WG Jansen van Rensburg* at para 7.

Should the application be postponed?

[39] In light of what I have said above, a postponement of the application is all but inevitable. For the reasons already set out, I do not think that the granting of a stay would be appropriate at this stage. Nothing would of course prevent the Court hearing the matter from issuing an order staying the proceedings if it is established that an Executor has in fact not been appointed.

[40] Given the facts necessitating the postponement, I do however wish to stress that a postponement is not there for the asking and that the onus is on the party seeking such an indulgence to demonstrate good cause and that there are grounds justifying the granting of a postponement. In the ordinary course what was in substance a request for a postponement by the Applicant's legal representatives would have been refused outright because, as mentioned above, there is in truth no postponement application and no explanation as to why the problem necessitating the postponement was not dealt with at an earlier stage[40].

[41] The Court however always retains a discretion to grant a postponement if a failure to do so would result in an injustice[41]. In determining whether an injustice would occur one of the factors to be taken into account would be the consequences of a failure to grant a postponement[42]. What weighs heavily with me in this matter, leaving aside my reservations as to whether it would be competent to entertain a request to dismiss the claim, is that if the matter is not postponed an injustice may occur because an Executor may not have yet been appointed or, if he has, he may be oblivious to the claim and will then not have been afforded an opportunity to decide as to whether it would be in the interests of the estate of the late Applicant to pursue the pending claim. I am thus of the view that justice would not be served in extinguishing the claim at this stage and for reasons pertaining solely to the apparent laxity displayed by the legal representatives of the Applicant.

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[40] *Classiclean* at para 3.
[41] *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmSC) at 315H.
[42] *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC) at para 11.

[42] Thus, notwithstanding the failure to timeously apply for a postponement and the irregular procedure adopted in requesting same, I am inclined to grant the postponement particularly in circumstances where there is no demonstrable prejudice to the Respondent given the nature of the claim (it is a claim sounding in money) and in the light of the order which I intend to make.

[43] Given the undertaking by the Applicant's legal representatives to obtain instructions from the Executor, I will postpone the application to a particular date bearing in mind that sufficient opportunity should be afforded to the Applicant's legal representatives to engage with the Executor and to take proper instructions and, if so advised, to follow the requisite procedure so as to ensure that the matter is ripe for hearing when it comes before the Court again. I would venture to suggest that the simplified procedure contained in rule 15 (3) of the Uniform Rules should be endorsed by this Court (given how it values efficiency) in terms of the powers accorded it by rule 11(3) of the Labour Court Rules. This would alleviate the obligation on a party to bring a formal application for joinder in terms of rule 22 of the Labour Court Rules.

Costs

[44] This leaves only the question of costs. Mr Mhambi initially submitted that the application should be dismissed with costs. When I enquired from him as to whether it would be competent for the Court to grant a costs order against a non-existent Applicant and without the Executor, if indeed one had been appointed, having been substituted for the Applicant, he submitted that, given the manner in which the Applicant's legal representatives had conducted the litigation, they should be liable for costs of the application *de bonis propriis*. In this context Mr Mhambi stressed that the Respondent was aggrieved because unnecessary expense had been incurred in engaging Counsel to argue the merits of the matter, the Applicant's legal representatives not having taken the trouble, so he contended, to inform the Respondent's legal representatives of the passing of the Applicant.

[45] Insofar as Mr Mhambi sought to persuade the Court that the Applicant's legal representatives should be liable for the costs of the bringing of the application, there can be no basis for making such an order. There is nothing to indicate to me that the Applicant's legal representatives were not duly fulfilling their mandate and acting on instructions when they brought the application. In any event, I have already decided not to dismiss the application and the question of costs accompanying the bringing of the application will be pronounced upon in due course.

[46] On the information furnished to me, there is however scope for the Respondent to contend that the Applicant's legal representatives should be liable for the wasted costs of 8 July 2021 for the reasons set out above and in particular because, on the face of it, if the Applicant's legal representatives had acted diligently in taking instructions pursuant to the death of the Applicant or, in my view more importantly, had the Applicant's legal representatives timeously informed the legal representatives of the Respondent of the death of the Applicant, the wasted costs occasioned by the postponement may have been avoided. In this context, in my view it would not be sufficient for the Applicant's legal representatives to contend that some or other employee of the Respondent was aware of the death of the Applicant. The Respondent has appointed legal representatives to conduct the litigation on its behalf and the Respondent is entitled to assume that the Applicant's legal representatives will communicate with its duly appointed legal representatives when it comes to the conduct of the litigation.

[47] It was emphasized in *Mashishi v Mdladla and Others*[43] that the ethical duties resting on legal practitioners are not confined to the imperative that they conduct themselves with scrupulous honesty and integrity, but extend to and govern the manner in which litigation is conducted by them[44]. It has always been so, given his paramount duty to the Court, that an officer of the Court is not the mere

[43] (2018) 39 ILJ 1607 (LC).
[44] Paras 14 to 16.

hireling or mouthpiece of his client[45]. He is more than an agent or a proxy. His special role in upholding the values of the Constitution is "*without parallel*"[46]. He owes an allegiance to a higher cause i.e. the fair and efficient administration of justice[47] and with this in mind he has a heavy responsibility *vis-a-vis* the Court to autonomously exercise his own judgment when pursuing a claim on behalf of his client.

[48] In *Mzayiya v Road Accident Fund*[48] the following observation by Chief Justice Mason of the High Court of Australia was quoted with approval:

> '12 ... it is that a barrister's duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. [In so doing] ... counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily...' (own emphasis)

[49] The sentiments expressed above apply with equal, if not more, force to legal practitioners who ply their trade in a forum such as the Labour Court. It would follow that, generally, where legal practitioners are themselves culpable for eleventh hour postponements[49] they would be acting inconsistently with their duty to properly manage the case they are prosecuting and, in the words of Chief Justice Mason, acting inconsistently with their duty to ensure its "*speedy and efficient*" adjudication.

[50] I am mindful of the position in which the legal representatives of the Applicant find themselves given the death of the Applicant. They have no mandate (it

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[45] See the remarks of De Villiers JP in *Cape Law Society v Vorster* 1949 (3) SA 421 (C) at 425 as referred to with approval in *Toto v Special Investigating Unit and Others* 2001 (1) SA 673 (E) at 683.
[46] *General Council of the Bar of South Africa v Geach and Others, Pillay and Others v Pretoria Society of Advocates and Another, Bezuidenhout v Pretoria Society of Advocates* 2013 (2) SA 52 (SCA) at para 87
[47] In *General Council of the Bar* the duty was described as that of ensuring the "*... system of justice is both efficient and effective*" (at para 87).
[48] [2021] 1 All SA 517 (ECL)
[49] *Cf. Shilubana and Others v Nwamitwa* at para 23.

having automatically terminated on the death of the Applicant) and are endeavouring to secure a fresh mandate from the Executor. However, whilst they remain on record and the claim is extant (it being uncontroversial that the death of a party does not automatically terminate legal proceedings), they are obliged to comply with the rules of this Court and to adhere to the standards it requires of legal practitioners.

[51] The question of a *de bonis propriis* costs order was mooted for the first time at the hearing and understandably so given how events unfolded. Section 34 of the Constitution provides, in substance, that no person should be condemned without a hearing[50]. The legal representatives of the Applicant have not been given a fair opportunity to be heard on whether they should be personally liable for any costs[51]. They are entitled to one.

[52] Having due regard to the provisions of the Labour Relations Act[52], Murphy AJA elucidated the position as follows:

> '[10] ... Personal costs orders and awards of costs de bonis propriis are useful means of disciplining officials and attorneys who act in this fashion. However, section 162(1) of the LRA provides that the Labour Court may only make an order for the payment of costs, according to the requirements of the law and fairness. An order for personal costs against a person acting in a representative capacity (be it as an attorney or as an official) is inherently punitive. It is extraordinary in nature and should not be awarded without following the precepts of fairness. While the municipal manager was a party to the proceedings, the attorneys were not. Therefore, in the absence of any prayer for a personal costs order or one de *bonis propriis*, as in this case, it was incumbent on the court when considering such orders to have acted fairly by first inviting

[50] *De Beer NO v North-Central Local Council and South-Central Local Council and Others* 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109 at para 11 and *Stopforth Swanepoel and Brewis Incorporated v Royal Anthem Investments 129 (Pty) Ltd* 2015 (2) SA 539 (CC) at paras 24 to 26.
[51] The position would of have been different if the prospect of a *de bonis propriis* cost order had been raised on the pleadings and there had been an opportunity to respond thereto. See *Hlumisa Technology (Pty) Ltd and Another v Voigt N.O and Others* (111/2018) [2020] ZAECGHC 133 (1 December 2020) at para 22.
[52] No 66 of 1995, as amended.

> the second appellant and the attorneys to make representatives as to why such an order should not be made. There is no evidence that the Labour Court did that in this case. The second appellant and the attorneys have been denied natural justice in accordance with the principle of *audi alteram partem*, with the result that the costs order cannot stand.'[53]

[53] It may be that the legal representatives of the Applicant are able to furnish an explanation which places a different complexion on the matter. That will be a decision for another day. As to the procedure to be followed, given the peculiar facts of the matter it is expedient for a *rule nisi* to be issued to ensure compliance with the principles of natural justice, a practice endorsed by the Constitutional Court[54]. In this context I associate myself with the following synopsis by Goosen J in *Silinga and others v Nelson Mandela Bay Metropolitan Municipality*[55]:

> '[11] An order that a legal practitioner (or for that matter a representative litigant) should pay the costs personally carries with it obviously serious consequences that necessarily impinge upon the rights and interest of that representative. It is for this reason that, in dealing with such costs orders, a practice has been developed by the courts to afford the affected party notice of the intention to impose such order and an opportunity to make representations or submissions prior to such order being made. This practice usually involves the issuing of a rule nisi calling upon the affected person to show cause why such order is not made and is based upon constitutionally protected fundamental rights to a fair hearing (see MEC for Health, Gauteng v Lushaba 2017 (1) SA 106 (CC) at par [18] – [21]; cf also Tasima (Pty) Ltd v Department of Transport and Others 2013 (4) SA 134 (GNP); Black sash Trust and others v Minister of Social Development 2017 (9) BCLR 1089 (CC)).'

[54] In the circumstances, the following order is made:

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[53] *Kopanong Local Municipality and Another v Mantshiyane* (2020) 41 ILJ 1907 (LAC).
[54] *South African Liquor Traders Association and Others v Chairperson Gauteng Liquor Board and Others* 2009 (1) SA 565 (CC) at para 20.
[55] [2019] JOL 44352 (ECG).

Order:

1. The application is postponed to 28 October 2021.

2. The costs of the hearing of 8 July 2021 are reserved.

3. A *rule nisi* is issued calling upon the Applicant's attorneys to show cause under oath at 09h30 on 28 October 2021 as to why an order of costs *de bonis propriis* should not be made against them in respect of the wasted costs occasioned by the postponement of the application on 8 July 2021 including the costs of the supplementary heads of argument dated 7 July 2021 submitted on behalf of the Respondent.

4. The Applicant's attorney is directed to file his affidavit by 27 August 2021.

5. The affidavit referred to in paragraph 4 is required to provide a full explanation having due regard to the concerns raised in this judgment and to:

    5.1. Disclose the date upon which the Applicant's legal representatives became aware of the death of the Applicant and the circumstances pertaining thereto.

    5.2. Set out with sufficient particularity the steps taken, if any, to obtain instructions from the Executor of the estate of the late Applicant prior to 8 July 2021.

    5.3. Disclose as to whether the legal representatives of the Respondent were informed of the death of the Applicant and, if so, when and in what manner.

    5.4. Contain as annexures all correspondence transmitted to the Registrar regarding the death of the Applicant and to disclose whether such correspondence was transmitted to the legal

representatives of the Respondents and, if not, the reasons for such omission.

5.5. Include as an annexure the death certificate of the Applicant and, if an Executor has been appointed, disclose his identity and the date of his appointment and, if the Executor intends to persist with the claim, annex his letters of executorship as granted by the Master.

6. The Respondent is given leave to file an affidavit in answer to the affidavit delivered by the Applicant's attorney, if so advised, by no later than 10 September 2021.

7. The Applicant's attorney is given leave to file a replying affidavit to the above answering affidavit, if so advised, by no later than 17 September 2021.

8. The parties are given leave to file supplementary heads of argument on the question of the wasted costs of 8 July 2021 and, if so advised, the Respondent is to file such heads of argument 10 (TEN) Court days before the return date and the Applicant 5 (FIVE) Court days before the return date.

P. N. Kroon

Acting Judge of the Labour Court of South Africa

Appearances:

For Applicant	:	Adv Lambrechts
Instructed by	:	Brown Braude & Vlok
For Respondent	:	Adv Mhambi
Instructed by	:	Mbulelo Qotoyi Attorneys