REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Case no: P136/2014

Reportable

In the matter between:

MELIKAYA LULUMILE RALO

APPLICANT

and

TRANSNET PORT TERMINALS

1ST RESPONDENT

TRANSNET BARGAINING COUNCIL

2ND RESPONDENT

LEANNE SCHEEPERS AH SHENE *N.O.*

3RD RESPONDENT

Heard: **15 June 2015**

Delivered: **17 June 2015**

REASONS FOR JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application to review and set aside an arbitration award issued by the third respondent, who upheld the applicant's dismissal by the first respondent. Tw preliminary points raised by the first respondent were argued separately on

15 June 2015. These relate to the applicant's failure to comply with the provisions of the practice manual, and the application to condone the late filing of the review application.

[2] After hearing argument, I ordered that the review application be struck from the roll, with no order as to costs. These are my reasons for that order.

[3] After the application for review was filed, the applicant was notified by the registrar on 21 July 2014, in a letter dated 16 July 2014, that the record of the proceedings under review was available.

[4] The consolidated practice manual, which came into effect on 2 April 2013, provides in relation to review applications that for the purposes of Rule 7A (6), records must be filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received (see clause 11.2.2). Clause

11.2.3 reads:

> If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent's consent for the extension of time and consent has been given. If consent has been refused, the applicant may, on notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time…

[5] The applicant filed part of the record on 19 November 2014. The balance of the record appears to have been filed during December 2014. It is common cause that the record was

filed outside of the 60-day period established by the practice manual and that no extension of that period was either sought or granted.

[6] The first respondent contends that in these circumstances, there is no longer a *lis* between the parties because in terms of paragraph 11.2.3 of the practice manual, the applicant is deemed to have withdrawn the application.

[7] The applicant has not filed any application in which he seeks condonation for the late filing of the record. He contends that the practice manual is neither binding nor irrevocable; it serves only as a guideline. The applicant submits that he has not withdrawn the application, that the dispute between the parties remains unresolved. He also avers that a delay of less than a month is not substantial, that the reason for the delay was his financial constraints, and that the first respondent has not demonstrated any prejudice that it has suffered on account of the late filing of the record.

[8] The status of the practice manual was discussed by this court in *Tadyn Trading CC t/a Tadyn Trading Consulting Services v Steiner & others* (2014) 35 *ILJ* 1672 (LC). The court said the following, at paragraph 11 of the judgment:

> The correct approach, in my view, as to the force and effect of practice directives similar to the one in issue is the one adopted in *In re Several Matters on the Urgent Roll* in which the court had to consider the force and effect of the provisions of the practice manual chapter 9.24 of the South Gauteng High Court regarding the failure by the applicant to set out the explicit circumstances which rendered the matter urgent. The court held that in law the Judge President was entitled to issue practice directives relating to the procedure of setting down matters on the roll.

[9] I agree. The practice manual contains a series of directives, which the Judge President is entitled to issue. In essence, the manual sets out what is expected of practitioners so as

to meet the imperatives of respect for the court as an institution, and the expeditious resolution of labour disputes (see paragraph 1.3). While the manual acknowledges the need for flexibility in its application (see paragraph 1.2) its provisions are not cast in the form of a guideline, to be adhered to or ignored by parties at their convenience.

[10] To the extent that the applicant contends that the meaning of the word 'deemed' is such that the dispute between the parties remains unresolved and that the application has not been withdrawn, the meaning of 'deemed' in a context similar to the present has been the subject of an instructive judgment by the Labour Court of Namibia. While *Municipal Council of the Municipality of Windhoek v Marianna Esau* (LCA 25/2009, 12 March 2010) concerned the lapsing of appeals, the wording of the Rule under consideration in that instance is not dissimilar. Rule 17(25) of the Rules of the Labour Court of Namibia provide that an '*appeal to which this Rule applies must be prosecuted within 90 days after the noting of such appeal, and unless so prosecuted it is deemed to have lapsed*.' The word 'deemed' in this instance was clearly considered to have conclusive effect – in the absence of the prosecution of the appeal within the prescribed period the appeal was held to have lapsed. (See also *Pereira v Group Five (Pty) Ltd and others* [1996] All SA 686, at 698, where the court referred with approval to *Steel v Shanta Construction (Pty) Ltd* 1973 (2) SA 537 (T), in which Coetzee J stated that the word 'deemed' means 'considered' or 'regarded' and is used to denote that 'something is a fact regardless of the objective truth of the matter'.) The plain and unambiguous wording of the practice manual is to the effect that the applicant must be regarded as having withdrawn the review application.

[11] To the extent that the applicant contends that he will suffer prejudice on account of any application of paragraph 11.2.3 of the practice manual and that he will be deprived of his right to access to court and to have his application fully ventilated, this is simply not so. The proper

order, it seems to me, in circumstances such as the present, is to strike the review application from the roll. There is no bar, either in the Rules of this court or the practice manual to the applicant filing an application in which he seeks to have the review application reinstated, together with an application in which condonation for the late filing of the record is sought.

[12] Mr. Kroon, who appeared for the first respondent, charitably did not press for an order for costs against the applicant on the basis that the failure to comply with the practice manual and to prosecute the review with due diligence was that of the applicant's attorneys and not the applicant himself.

[13] For the above reasons, the review application was struck from the roll. It was not necessary in the circumstances to consider the applicant's application to amend the notice of motion (in which he effectively sought a postponement of the proceedings), the application to condone the late filing of the review application or the first respondent's point in *limine* to the effect that the review application stands to be dismissed in the absence of the full transcribed record.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv. Mey, instructed by Michael Randall Attorneys

For the first respondent: Adv. P Kroon, instructed by Mc Williams Elliott Inc.