



NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

CASE NO. 803/2020

In the matter between:

VERONA VERONICA SPANNENBERG

Applicant

And

**THE MEMBER OF THE EXECUTIVE COUNCIL,
DEPARTMENT OF HEALTH,
EASTERN CAPE PROVINCE**

First Respondent

**THE HEAD OF THE DEPARTMENT,
DEPARTMENT OF HEALTH,
EASTERN CAPE PROVINCE**

Second Respondent

**JUDGEMENT IN RESPECT OF
APPLICATION FOR RESCISSION**

HARTLE J

[1] The first and second respondents (as cited in the application for judicial review) sought a rescission of an order of this court that was granted on 16 March 2021 (“the review order”) in the following terms:

- “1. The decision of the Department of Health, Eastern Cape Province pronouncing that the applicant experienced a break in her service as an employee of the Department of Health, Eastern Cape Province for the period 01 May 2011 to 31 July 2016 is reviewed and set aside.
2. The first respondent, Nomakhosazana Meth in her capacity as the Member Of The Executive Council of the Department of Health, Eastern Cape Province and Dr Sibongile Zungu in his capacity as the Head of Department, Department of Health, Eastern Cape Province are ordered to take such administrative steps as may be necessary, to submit an appropriate Z102 Form to the Government Employees Pension Fund recording the applicant’s uninterrupted tenure of service commencing February 1985 and terminating on 31 July 2016, within 60 days of service of this Order upon the respondent.
3. The 90 (Ninety) day period referred to in Section 5 (1) of the Promotion of Administrative Justice Act 3 of 2000 is extended in terms of Section 9 (1) of the aforesaid Act on the basis that the interests of justice so dictate.
4. The first and second respondents are ordered to pay the applicant’s costs jointly and severally, the one paying the other to be absolved.”

[2] It is abundantly plain that the respondents were absent when the review order was granted although there can be no question that they were properly served after the applicant had issued out the application for judicial review in terms of the provisions of the Promotion of Administrative Justice Act, No 3 of 2000. (“PAJA”).

[3] Indeed, the applicant put up proof in this respect that her application had been served on the office manager of the Superintendent General of the Department of Health (“the Department”), Mr. Viwe Tshangana, who it appears from the sheriff’s official returns of service accepted receipt of the initiating process on behalf of both respondents on 4 December 2020, one day after the issue of the application.

[4] Although evidently patently unknown to the respondents - well at least to the current incumbents of their offices, when the present application was launched, service of the initiating process was additionally effected on the State Attorney as is the peremptory requirement in terms of the provision of section 2 (2) of the State Liability Act, No. 20 of 1957, as amended. In this respect the papers were served upon a Mr. Stuurman on 12 December 2020 who according to the sheriff was ostensibly a responsible employee not less than 16 years of age and in control at the office of the State Attorney at the East London office.

[5] No notice to oppose was received by either respondent. The matter was consequently enrolled as an unopposed application for hearing on 16 March 2021.

[6] A comprehensive notice of set down advising when the matter would be heard and foreshadowing what relief would be asked for was also served by the sheriff on 10 February 2021.

[7] Once the review order was granted by this court, it too was served per sheriff on 23 March 2021 by handing it to a Ms. Zipho Mphelo who accepted service on behalf of both respondents.

[8] It is common cause that for more than a year after the grant of the review order the respondents failed to comply with its purported terms more especially as directed by prayer 2 thereof (giving credence to the claim that the current incumbents of their offices were unaware of it) and in consequence the applicant launched further proceedings under case number 291/2022 to compel compliance after having placed the Department on terms.¹

[9] It was only on 18 August 2022, some 17 months after the review order was granted, that the respondents applied in the present matter for an order “*(r)escinding the Order... that was issued on 16 March 2021 and replac(ing) it with an Order dismissing the application.*” (Sic)

[10] The application was supported by the founding affidavit of Ms. Rolene Wagner who is the Superintendent General of the Department and the responsible accounting officer. She explains that she was appointed to the position on 1 August 2021. The incumbent of the first respondent, Ms. Nomakhosazana Meth, although named in the review order, took up her appointment in the same month it was granted. She emphasises that the process in the review application was served before either of them “*took control of the Department.*”

[11] Initially one of the bases upon which the application for rescission - ostensibly pursuant to the provisions of “Rule 42 of the Uniform Rules of Court” was premised,

¹ I was advised by the parties that the determination of the contempt application has been suspended by agreement between them, pending the hearing of the present application.

is that the state attorney was not served with the review application which, so it was contended in the founding papers, was the reason for their absence from court when the order was “erroneously” granted.

[12] However, despite this claimed irregularity, at the heart of the matter is the respondents’ all-pervading complaint that the order sought to be rescinded is also a nullity, or invalid, or legally incompetent. The respondents aver in this respect that it would be unlawful for them to carry out its terms because the applicant’s salary was “frozen” for the period indicated in prayer 1 of the review order between 1 May 2011 and 31 July 2016. The applicant was therefore not entitled to the claim she made that the Department was obliged to record an uninterrupted tenure of service during this impugned period with the Government Employees Pension Fund.

[13] Ms. Wagner avers especially that the award of the Public Service Coordinating Bargaining Council (“the Bargaining Council”) that purportedly provided the underpinning for the applicant’s claimed entitlement to have approached this court for the judicial review of the Department’s supposed “decision” that the applicant “experienced a break in her service as an employee” (“the award”) cannot lawfully oblige the Department to do what the review order purports to because the award did not carry with it an order to pay her a salary in respect of this hiatus in her service.

[14] The respondents aver that not only does the award not order the payment of the applicant’s salary for this period, the Commissioner having pertinently not pronounced on the issue, but that the applicant also tried unsuccessfully before the Labour Court under case no P119/16 for the same relief, failed, and then moved on to this court “by way of forum shopping” to obtain the review order (the subject

matter of the present application) on the premise of alleged unfair administrative action.

[15] Without any prior declarator or order that the applicant was entitled to be paid during her extended absence from work on sick leave, so the respondents aver, any attempt in 2021 to claim a salary (or as the applicant's papers otherwise suggested an advantage in respect thereof impacting upon her pensionable interests) would further in any event have prescribed. They submit additionally that the applicant further failed to meet the requirement postulated by section 3 of the Institution of Legal Proceedings Against Certain Organs Of State Act, No 40 of 2002 ("ILPACOSA") obliging her to have given notice to the Department within six months "of the claim arising" before "instituting" the claim against it as an organ of state.

[16] They suggest that they will, if granted condonation and an opportunity to oppose the application for judicial review, likely successfully raise all of these defences against the applicant's "claim" implicated by the review challenge and offered that the Department would have done so but for the fact that the State Attorney was not served, leaving the Department unrepresented in court when the review order was granted. They argued against this premise that they were therefore not in wilful default for not opposing and attending court when the application was disposed of on a default basis.

[17] They further seek the condonation of this court for the late filing of the present application.

[18] It was tersely acknowledged by Ms. Wagner that negligence probably existed in the handling of the matter since there was no trace of the relevant documents in

either of the respondent's offices. Ms. Brenda Tongo from the State Attorney's office additionally confirmed unequivocally in an earlier affidavit that the State Attorney was *never* served with the process.

[19] The applicant opposed the application (as initially formulated) pointing out that there could be no suggestion that the order was "erroneously sought" or "erroneously granted" as envisaged in terms of the provisions of rule 42 (1) (a) of the Uniform Rules of Court. The respondents were properly served and afforded sufficient *dies* in terms of the court rules to challenge the review application, but by obvious implication chose not to do so. The applicant further pointed out the number of other ways in which the Department's attention would have been drawn to the proceedings, which notice had not exactly inspired it to question or challenge the fate of the application, or its consequences once the review order had been granted on a default basis, until the predicament posed by case number 291/2022 was staring them in the face.²

[20] Certain technical points were taken and legal arguments raised.³ The applicant however principally honed in on the evidently false allegation laid claim to by Ms. Wagner and Ms. Tongo that the application had *never* been served upon the State Attorney by producing the sheriff's return of service to disprove such fact.

² See paragraphs 6, 7 and 8 above.

³ The applicant complained, for example, that the promised supporting affidavit of Mr. V Tshangana was not attached, the respondents had restricted themselves to the ambit of Rule 42 rather than the common law remedy governing the rescission of judgments yet had "confusingly" sought to advance arguments on the merits of her original case whereas these had already been determined, they had prayed for substantive relief unheard of in a rescission application that the review application be dismissed outright, had demonstrated a lack of *bona fides* evident from the "reckless conduct" and "false testimony" of the deponents to the effect that the state attorney had never been served, had made a poor showing of explaining away their default and inordinate delays pointing to a reckless disregard for her rights and the sanctity of the review order, and had not identified which sub-rule of Rule 42 was in contention or how such sub-rule had in fact been breached entitling them to an order of rescission. She however firmly resisted the respondents' suggestion that they had been "absent" in the manner contended for by rule 42 (1) (a) which appeared, by implication, to be the rule relied upon by them in the earliest iteration of their application.

[21] One searches in vain however to find any reference by the applicant in her answering affidavit to the respondents' claim that the impugned review order was a nullity for the peculiar reasons advanced by Ms. Wagner and Ms. Tongo, the applicant merely asserting that the respondents had by their ill-conceived application and abuse of the court process sought disingenuously to defeat her "*bona fide efforts to enforce an order lawfully and validly granted.*" The applicant also failed to deal with the allegation that she had failed to achieve in 2016 in the Labour Court what she later purported to get around by the judicial review application in 2021.

[22] On 19 September 2022 the respondents filed a "Notice of Intention to Amend Documents in terms of Rule 28 of the Uniform Rules Of Court" in which they pray "*(t)hat the Respondents be granted leave to amend their Notice of Motion and admit the supplementary Affidavit that accompanies this Notice in support of the application for the rescission and setting aside of the... order issued on 16 March 2021*".

[23] Attached to this notice was a brief supplementary affidavit by Ms. Tongo⁴ which in essence confirms the respondents' intention to invoke the provisions of Rule 42 (1)(a), firstly, on the basis that the review order was erroneously sought or erroneously granted in their absence (although this time not relying on the supposed nonservice of the application on the state attorney) and, secondly, placing reliance on the common law for the rescission and setting aside of the review order. In the latter respect she repeated the averment that the order sought to be rescinded is a nullity, by reason of the fact that:

⁴ It was contended on behalf of the applicant at the hearing that this affidavit had not been served but it appears to have been sent by email to lee@hutto.co.za on 16 September 2022.

“It would have been unlawful for the Respondents to pay the Applicant’s pension contributions for the period May 2011 to July 2016 while her salary was frozen for that period.”

[24] The applicant immediately took issue with the purported notice of intention to amend by filing a notice in terms of Rule 30 complaining that the notice constituted an irregular step but it is common cause that she did not follow through with the threatened application to set aside the irregular proceedings.⁵

[25] This was followed up by the delivery of the respondents’ amended notice of motion on 17 October 2022 and further supplementary affidavits that purported to set matters straight.⁶

[26] Ms. Wagner in her supplementary affidavit did not withdraw her prior averment that the sheriff had not been served. She however now positively asserted that it was only on 27 May 2022 when the State attorney was served with the papers comprising the contempt proceedings (in case no 291/2022) that her office had been alerted to the existence of the earlier review application. She repeated her assertion of the absence of any wilful default at least on her part for the delay in filing the rescission application but now attributed apparent negligence in the proper handling of the matter to the officials of both the respondents’ offices as well as that of the State Attorney.

⁵ When the matter was argued before me counsel for the applicant conceded that the objection had not formally been acted upon.

⁶ Evidently the respondents purported to deal with some of the complaints raised by the applicant in her answering affidavit by supplementation or correction, apart from obliquely dealing with the issue of the purported nonservice on the State Attorney.

[27] In further amplification of the contention that the review order was invalid, she pointed out that the Bargaining Council's 2014 award had been fully complied with which in fact resulted in the Department approving the applicant's ill-health retirement on 31 July 2016. She further alluded to the relevant documentation exchanged between the applicant and the Government Employees Pension Fund pursuant thereto as proof that the applicant was paid the pension monies "to which she is entitled."

[28] Ms. Mphelo an employee in the office of the second respondent confirmed that she had no recollection of receiving the process, neither could she trace any of the documents served at the Department's offices. She claimed that it was unknown what must have happened.

[29] She also clarified that Mr. Viwe Tshangana was no longer in the employ of the Department.

[30] Ms. Tongo too filed a further supplementary affidavit in which she could offer no explanation for why the process (which she appears to presently accept was in fact served on Mr. Stuurman) went astray but emphasised that this had in fact resulted in the non-representation of the respondents in court on 16 March 2021 when the review order was granted. She further explained that it was the receipt of the contempt application that had finally galvanised their office into action, and that there had been a further delay in the procurement of counsel and research into the matter before they came on board to oppose the contempt application and bring the present application.

[31] She reiterated that the application for condonation was made *bona fide* and that good cause exists in granting the rescission order essentially on the basis that

the applicant's claim in the application for judicial review has "no legal basis" because of the underlying premise that she is not entitled to any salary in respect of the period under contention in prayer 1 of the review order.

[32] Despite the applicant's purported objection to the amended notice of motion,⁷ she delivered a supplementary answering affidavit in which she made capital of the "patently false allegation" previously made by both Ms. Wagner and Ms. Tongo that the State Attorney had not been served as a deliberate premise for the rescission application which had now been abandoned without any real explanation or account given to the court as to why.

[33] Conspicuous by its absence however the applicant again omitted to deal with the respondents' suggestion that the impugned order as it was framed was not legally competent, except to assert the following:

"As for the attempt to challenge the merits of my case which culminated in the granting of the court order, on the basis that my salary "was frozen between 1 May 2011 and July 2016" this would in any event not have constituted a defence because it was the respondents own administrative action freezing my salary. The Respondents cannot rely upon their own prior unlawful administrative action as a defence."⁸

[34] In order to understand the respondent's argument that the impugned order was incompetently granted it is necessary briefly to canvas the circumstances under

⁷ Rule 30 (2) (a) behooves a litigant raising an objection in terms of this rule not to take any further step in the proceedings with knowledge of the irregularity, which action by necessary implication renders the complaint academic and overtaken as it were by the next formal step taken in the proceedings effectually advancing the matter.

⁸ This passage appears to confirm that it is the act of not having paid the applicant's salary (because she was on unapproved paid sick leave) that was the real gravamen of the matter. Reading between the lines this is indeed the underlying obligation that the applicant had hoped to enforce or bring to the fore by the judicial review proceedings.

which the Public Service Coordinating Bargaining Council's 2014 award came to be issued.⁹

[35] The applicant was employed by the Department since February 1984 as a staff nurse.

[36] During 2005 she started to suffer from a major depressive disorder for which she received treatment by *inter alia* psychiatrists and a psychologist. She last worked in June 2006. Her salary was stopped during May 2011.

[37] She applied for ill-health retirement on three occasions in 2007, 2008 and 2010 but the Department evidently failed to process any of these requests.

[38] In the meantime, she successfully challenged the Department's failure in the Bargaining Council to consider her application for temporary incapacity leave for the period 1 September 2006 to 30 July 2012 as a contravention of clause 7.5.1 (b) of the Public Service Coordinating Bargaining Council Resolution 7 of 2000 (as amended).

[39] On 8 April 2013 an award was issued in her favour against the Department under case number PSCB 340-12/13 ordering it within 90 days to reconsider and properly conduct an assessment of her temporary incapacity leave applications for this period as prescribed in terms of paragraph 7.3.5 of the Department's Policy Incapacity Leave Ill-health Retirement ("PILIR").

⁹ I refer in this regard to the history set out by the Commissioner of the Bargaining Council in the award, which background does not appear to be contentious as between the parties in the present application.

[40] This would according to the Commissioner have required the health risk manager to conduct a secondary assessment to investigate, verify or expand upon information received, and to have provided further independent and impartial opinions on the nature and extent of the applicant's condition so as to have ascertained more precisely the functional implications of the conditions of her work performance.

[41] As a consequence of the department's non-compliance with that *mandamus*, the applicant approached the Labour Court on 13 March 2014 to make that award an order of court.

[42] Still the Department failed to comply with the Bargaining Council's order in that the health risk manager did not conduct the secondary assessment to move the processes along as it ought to have. The Commissioner added that the Department had also failed to reconsider or properly conduct an assessment of the applicant's temporary incapacity leave applications as prescribed by paragraph 7.3.5 of PILIR.¹⁰

[43] The Department on 20 March 2014 issued the applicant with an instruction that she should return to work by 31 March 2014 failing which she would be charged with misconduct or her services would be terminated with effect from 27 April 2006. The applicant co-incidentally learnt from Mrs. Hugo, the head of Human Resources, that her application for temporary incapacity leave had in fact been declined and she advised her of the Labour Court order that had required the Department to reconsider her application for temporary incapacity leave.

[44] Despite drawing attention to the order of the Labour Court that required the Department to reconsider her application for temporary incapacity leave, the

¹⁰ This paragraph deals with the assessment process by a Health Risk Manager.

Department yet forwarded a second “uncommunicated absence” letter to the applicant calling on her once again to report for duty or face the consequences.

[45] Despite interventions by her attorney, uncertainty continued to prevail until a further dispute was lodged with the Bargaining Council to compel the Department to deal with the applicant’s application for ill-health retirement on a final basis. In the meantime, she continued to reserve her position that her temporary absence was attributable to her ill-health.

[46] She continued to provide medical certificates booking her off, and also lodged a grievance in respect of the temporary incapacity leave application declined for the period 1 July 2013 to 20 September 2013. She further continued to apply for temporary incapacity leave and on 18 July 2014 the Department at least acknowledged receipt of her temporary incapacity leave applications received by them on 10 June 2014. The letter furthermore advised the applicant that the head of Department in terms of the authority vested in him/her in terms of the Determination on Leave of Absence in the Public Service conditionally approved temporary incapacity leave for the period 17 June 2014 to 1 August 2014, but this was subject to the outcome of an investigation into the nature and extent of the illness/injury described in her temporary incapacity leave application.

[47] The applicant’s cause of action before the Bargaining Council under the last referral to the Bargaining Council on 8 December 2014 under case number PSCB 198-14/15 was said to relate to “the interpretation and implementation of clause 7.5.2 (c) of PSCBC resolution 7 of 2000 in refusing the applicant’s *application for ill-health retirement*”.¹¹

¹¹ This sub-paragraph deals specifically with applications for ill-health benefits in terms of the Pension Law of 1996 entailing ill-health retirement.

[48] After hearing evidence and interpreting the relevant paragraph to mean that the Department did not have a discretion whether to grant or refuse permanent incapacity leave and ill-health retirement,¹² the Bargaining Council concluded that the applicant would not be able to perform any type of duties at her level or rank. It found that the Department had failed to comply with the relevant provisions of the PSCBC resolution 7 of 2000 in declining her application for ill-health retirement and declared that she was entitled to proceed with an application for ill-health retirement in terms of the Pension Law of 1996. The Department was further directed within 30 days to initiate the process of ill-health retirement/ill-health benefits in terms of the Pension Law.

[49] Prefatory to the award the Commissioner noted the following important qualification:

“The Applicant seeks an order directing the Respondent to approve her application for ill health retirement and pay her salary with effect from date her salary was stopped (May 2011) until such time as her application for ill-health retirement is finalised. *It is unfortunate that the claim for salary based on permanent incapacity leave did not form part of the applicant’s referral and therefore this issue was never conciliated.*¹³ Therefore, I lacked jurisdiction to entertain the Applicant’s claim for permanent incapacity leave as

¹² The word “shall” in paragraph 7.5.2 was construed to be peremptory.

¹³ In this respect the Commissioner referred to the provisions of section 136 (1)(a) and section 24 (4) and (5) of the Labour Relations Act, No. 66 of 1995.

regulated in terms of paragraph 7.5.2 (a) and (b) of the PSCBC Resolution 7 of 2000 as amended.”¹⁴ (Emphasis added)

[50] The relevant paragraph dealing with disability leave provides as follows:

“7.5 Disability management leave:

7.5.1 Temporary disability leave:

- (a) An employee whose normal sick leave credits in a cycle have been exhausted and who, according to the relevant practitioner, requires to be absent from work due to disability which is not permanent, may be granted sick leave on full pay provided that:
 - (i) her or his supervisor is informed that the employee is ill; and
 - (ii) a relevant registered medical and/or dental practitioner has duly certified in advance as temporary disability except where conditions do not allow.
- (b) The employer shall, during 30 days, investigate the extent of inability to perform normal office official duties, the degree of inability and the cause thereof. Investigations shall be in accordance with item 10 (1) of Schedule 8 in the Labour Relations Act of 1995.
- (c) The employee shall specify the level of approval in respect of applications of for disability leave.

¹⁴ As will be seen from the excerpt in paragraph [50] above, these provisions deal with the salary to which the applicant might still have been entitled (over and above the maximum of 30 working days paid leave) covering the period from the moment when her degree of disability was certified as permanent and continuing up until the date when her application for ill-health retirement was expected to be finalised. This must be what the Commissioner had in mind when referring to it as *“salary based on permanent incapacity leave”*. It is not difficult to appreciate that that her notional entitlement to a salary for this period would not have been conciliated as yet between the parties because the future was still uncertain. Although only paragraph 7.5.2 is referenced by the Commissioner, by obvious implication the provisions of paragraph 7.5.1 relating to temporary capacity leave would also have been applicable concerning the period from the date when the applicant’s salary had stopped, presumably up until the date of certification envisaged by paragraph 7.5.2 (a). Although it does not appear clear to me, I believe it is safe to assume though from the terms of the award granted that *no salary was ordered thereby to be paid*. It is further not clear from a reading of Resolution 7 of 2000 whether, once the certification envisaged by paragraph 7.5.2 (a) is granted, it can by implication vindicate the applicant’s preceding absence from work (during the temporary incapacity period) as a result of the same ill-health culminating in her final ill-health retirement. The mischief which the Commissioner seemed intent on avoiding however is making any pronouncement in favour of the applicant with regard to a legal entitlement to a salary during the impugned period absent a necessary prior conciliation between the parties.

7.5.2 Permanent disability leave:

- (a) Employees whose degree of disability has been certified as permanent shall, with approval of the employee, be granted a maximum of 30 working days paid sick leave, or such additional number of days required by the employer to finalize the process set out in (b) and (c) below.
- (b) The employee shall, within 30 working days, ascertain the feasibility of:
 - (i) one alternative employment; or
 - (ii) adapting duties or work circumstances to accommodate the disability.
- (c) If both the employer and the employee are convinced that the employee will never be able to perform any type of duties at her or his level or rank, the employee shall proceed with application for ill health benefits in terms of the pension law of 1996.”

[51] It is common cause that the Department ultimately processed the applicant’s application for ill-health retirement, although she alleges that she was first obliged to approach the Labour Court to have the award made an order of court and when it still failed to comply with the Labour Court’s order was obliged to seek the intervention of this court to enforce its provisions.

[52] The applicant failed to state in the review application what further steps she took if any to deal with the issue of her entitlement to incapacity leave (whether temporary or permanent) in the period between her last day of working due to ill-health and her ill-health retirement. It appears from the provisions of paragraph 7.5 of Resolution 7 of 2000 however that paid sick leave due to disability under either category cannot arise automatically but must be applied for, failing which the employee will be deemed to have been on unpaid leave for the period he/she was

absent from work due to incapacity up until the date that ill-health retirement is approved.

[53] There is therefore merit in the respondents' submission that this is the default position that applies (the respondents referred to the situation as the applicant's salary having been "frozen" in respect of this period), and because the Department will not have paid over contributions to the Pension Fund in the relevant interlude, no fiction in the prescribed form Z102 to the effect that there was an "*uninterrupted tenure of services*" can change that reality unless the issue of her underlying entitlement to any paid incapacity leave during this hiatus has first been legally pronounced upon.

[54] The gravamen of the applicant's complaint of unfair administrative action in the year 2020 when the review application was launched, was described in the following terms:

"In this application I request this Honourable Court's assistance in addressing certain unfair administrative action on the part of the Department in dealing with my pensionable service as an employee of the Department. Essentially in forwarding the relevant documents to the Government Employees Pension Fund upon my retirement on grounds of ill-health on 31 July 2016, the Department submitted the relevant form Z102, which for official purposes and especially for purposes of calculation of my pension benefits, records incorrectly that I had allegedly experienced a break in service for the period 1 May 2011 to 31 July 2016."

[55] The applicant appears to have assumed that the approval by the Department of her retirement automatically dispensed with the need to finalise the separate issue of her entitlement to incapacity leave during the relevant period:

“Although the last-mentioned period had coincided with my ill health and had thus prevented me from discharging my duties, *my ill health retirement in fact vindicated my absence*. This was made clear by the Public Service Coordinating Bargaining Council, whose Commissioner issued an arbitration award on 8 December 2014.”¹⁵

[56] The applicant went on to state in the review application that:

“Although the Department ultimately recognized my ill-health retirement, its officials made no attempt to correct the record which had been furnished to the Government Employees Pension Fund which resulted in denying me a substantial portion of my pension benefits. The Department has persisted in this failure.”

[57] Even recognizing that there may well be merit in the applicant’s contention that the Department (by obvious implication) conceded that she must have suffered from the same disability in the interim that persuaded it to accept ultimately that she should be discharged on the basis of her ill-health, it appears that the applicant did not take any formal steps to close the gap as it were. In the result it may have been stretching it somewhat to suggest that the Commissioner’s award made the nexus between the approval of her retirement and her entitlement to incapacity leave in the preceding period “clear”.

[58] It is not evident what exact steps were taken on behalf of the applicant between the date of the issue of the Bargaining Council’s award and the ultimate approval of

¹⁵ This is evidently the same award under discussion above.

her application for ill-health retirement, or thereafter before she once again approached this court for judicial review.

[59] In this respect Ms. Wagner averred that the applicant had filed a further application in the Labour Court on 19 May 2016 pursuant to the Commissioner's award of 2014 "for the same relief" in that forum. According to her this application was dismissed per order granted on 29 July 2016 under case number P119/16. A perusal of the relevant order put up by her as an annexure to her supplementary affidavit involving the same parties as in the review application suggests that a chamber book application was made culminating in an order that "the application is incompetent and consequently dismissed".¹⁶

[60] The applicant chose not to deal with these allegations in reply or to disclose the nature of that application leaving it open to be inferred that possibly she took no steps consequent to the 2014 award to again conciliate the issue recognized by the Commissioner to still be extant and requiring adjudication (that is assuming that she could still have sought her redress in the Bargaining Council after her discharge from service), or in any other court for that matter.

[61] As an aside though, the whole unfortunate saga of the applicant seeking to be compensated for incapacity leave over a period straddling more than a decade is replete with serial disregard by the Department of its lawful obligations in terms of the applicable Resolution and PILIR, awards of the Bargaining Council, and orders of the Labour Court. The audacious reservation of the respondents of their right to plead prescription (in the event that rescission is granted) against this troubled history is indeed quite astounding especially since the Department has, so it appears,

¹⁶ It appears to me to be inconceivable that the applicant would have sought any substantive relief via a chamber book application.

avoided dealing with its lawful obligation to have considered the applicant's entitlement to any incapacity leave whatsoever before it got around to making its much anticipated decision at least (two years after the Bargaining Council's injunction to get on with it) to approve of her application for ill-health retirement. The unlawfulness of the Department in not meeting its legal obligations in this respect has consistently been decried by the applicant. On the other hand, the Department has not even brought itself to the bargaining table,¹⁷ let alone acknowledged or disavowed that it has fallen short of its obligation to have applied fair and just administrative action in bringing the issue of the applicant's entitlement to incapacity leave to a close, rendering it necessary for her to have resorted to this court to review and set aside its unlawful action. As indicated above, however, it is unfortunate that the manner in which the relief was cast in the review application put the cart before the horse so to speak.

[62] The Department would do well to remind itself of the warning of the constitutional court in *Njongi v The MEC for Welfare, Eastern Cape*¹⁸ that decisions by the State whether or not to invoke prescription (in instances where Constitutional rights are sought to be engaged) must be informed by the values of our Constitution.¹⁹

[63] Rule 42 (1)(a) affords this court a discretion, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, to vary or rescind an order "erroneously sought or erroneously granted in the absence of the party affected thereby" which order is otherwise regarded as final in effect.

¹⁷ It appears that it failed to attend any conciliation or arbitration in the Bargaining Council, neither did it oppose any of the applications issued out of the Labour Court.

¹⁸ 2008 (4) SA 237 (CC) at [79].

¹⁹ In this instance the right of the applicant to assert fair and just administrative action pertains.

[64] One of the bases upon which an order might also be erroneously granted is if it was not legally competent for the court to have made such an order.²⁰

[65] I have already expressed some thoughts above why the review order as framed (particularly in prayer 2 thereof) is invalid or meaningless in relation to the Fund's involvement on the basis ordered in the absence of any prior legal pronouncement in favour of the applicant that the Department's failure to have properly considered her application(s) for incapacity leave falls to be reviewed and set aside. It is only once such an order has been made that her purported claim to have been paid a salary during the impugned period (or incapacity leave) as a result can be enforced as an inevitable remedy flowing from the claimed unlawful administrative action. There can certainly be no legal obligation on the Pension Fund in my view to pay pension benefits to the applicant on the basis of a fiction by the Department noting that there was no break in her service during the impugned period. A mere assertion to such affect cannot order the payment of her salary/incapacity leave, and the absence of payment in turn will not put contributions there that do not exist. The Pension Fund is further bound to do what the Pension Law and its Rules narrowly prescribe.

[66] The obvious obstacle standing in the way is the Department's stance that the applicant's salary for this period is and remains "frozen" whereas it has certainly

²⁰Master of the High Court Northern Gauteng High Court, Pretoria v Motala 2012 (3) SA 325 (SCA) paras 11-13, City of Johannesburg v Changing Tides 74 (Pty) Ltd & Others 2012 (6) SA 294 (SCA); Moriatis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others 2017 (5) SA 508 SCA at footnote 4; Minister of Rural Development and Land Reform v Normandien Farms (Pty) Ltd and Others, Mathyibane and Others v Normandien Farms (Pty) Ltd and Others 2019 (1) SA 154 (SCA) at par 53; Travelex Limiter v Maloney [2015] ZASCA 128; and MEC for the Department of Public Works & Others v Ikamva Architects and Others 2022 (6) SA 275 (ECB) at [21].

taken no steps in the direction of deciding if it should be “unfrozen” to use its own expression.²¹

[67] That having been said, I am satisfied that the review order as it was framed and granted by this court was a nonstarter. It is incapable of being enforced and was therefore granted erroneously as envisaged in Rule 42 (1) (a).

[68] Further, as opprobrious as it is that the respondents come to this court at the last moment when they are called to personally account for their contempt of a court order and have their backs against the wall as it were, they were undeniably not “present” and represented by the State Attorney when the matter was called on 16 March 2021. I daresay that even a legal argument advanced on behalf of the respondents raised from the bar on 16 March 2021 that the order sought was invalid or meaningless or otherwise legal untenable might have scuppered the grant of the review order.

[69] Section 2 of the State Liability Act provides in no uncertain terms what the expectation is of both the executive authority of a department of state sued in an action or other proceedings and the State Attorney as follows:

“2. Proceedings to be taken against executive authority of department concerned. —

(1) In any action or other proceedings instituted against a department, the executive authority of the department concerned must be cited as nominal defendant or respondent.

(2) The plaintiff or applicant, as the case may be, or his or her legal representative must—

²¹ The Department appears to concede by the use of the expression that it is a temporary not a permanent obstacle, but for the fact that it now claims, quite unconscionably so in my view, that the applicant’s claim for her salary has prescribed.

- (a) after any court process instituting proceedings and in which the executive authority of a department is cited as nominal defendant or respondent has been issued, serve a copy of that process on the head of the department concerned at the head office of the department; and
- (b) within five days after the service of the process contemplated in paragraph (a), serve a copy of that process on the office of the State Attorney operating within the area of jurisdiction of the court from which the process was issued.
- (3) Upon receipt of the process contemplated in subsection (2), the State Attorney must—
 - (a) without undue delay, send a written request to the head of the department concerned to provide the State Attorney with written instructions regarding the proceedings; and
 - (b) within 10 days of receipt of the process, provide the head of department with legal advice on the merits of the matter.”

[70] The relationship between the Head of the Department and the State Attorney in such a situation is a critical one with mutual obligations. He or she must provide the State Attorney with written instructions regarding *any* proceedings (not just that which the Head of the Department *chooses* to be of interest to him or her to involve themselves in), and the State Attorney, in turn, must provide him/her with legal advice on the merits of the matter.

[71] All of this must be done within a short space of both having been served with the process with a view to taking a firm legal position in the matter.²²

[72] It is no surprise that the recent amendment to this section introduced by the Judicial Matters Amendment Act, No. 8 of 2017 implicating the State Attorney in a co-responsible litigation role was aimed at reducing the high rate of default judgments against government departments. Indeed, the stated object of the Judicial Matters Amendment Act Bill, 2016, as described in the Memorandum with regard

²² See section 2 (3) of the SLA.

to clause 3 thereof which founded the basis for the substitution of section 2 of the State Liability Act dealing with proceedings against the State, provides as follows:

“2.3 Clause 3 substitutes section 2 of the State Liability Act, 1957(Act No. 20 of 1957), dealing with proceedings against the State.

2.3.1 The Rules Board for Courts of Law has suggested that section 2(1) be amended by removing the words “by virtue of the provisions of section 1”. The Rules Board argues that the deletion of this wording will address the restrictive application of the Act to proceedings arising out of contract or delict and will make it applicable to all proceedings, for instance joinder and review applications.

2.3.2 Various default judgments are obtained against Government departments due to the fact that departments fail to oppose litigation against them. In most instances this happens because court process is served on persons who fail to bring this to the attention of the persons who are supposed to deal with litigation against the State. In order to address this state of affairs, the State Attorneys proposed amendments to section 2(2) of the State Liability Act, 1957, in order to make provision for a dual service of court process. Section 2(2) is amended in order to provide that—

- (a) court process should be served on the head of the department concerned; and
- (b) a copy of the process should, within 5 days after the service of process contemplated in paragraph (a), also be served on the State Attorney operating within the area of jurisdiction of the court from which the process was issued.

This amendment aims to ensure that both the department and the State Attorney have knowledge of any pending litigation against the department concerned. The period of 5 days is consistent with the current procedural approach of multiples of five.”²³

[73] Further, although not so stated in the Memorandum, the careful and timeous consideration by both the second respondent and the State Attorney of the legal merit of any proceedings instituted against the Department will in my view conduce to a very necessary saving of costs of litigation. This court has bemoaned the waste of its resources and the deleterious effect of the costs of litigation on the public pursue

²³ See Judicial Matters Amendment Bill [B14 B – 2016] and related parliamentary briefings in respect thereof.

in so many matters, it hardly seems necessary for me to stress to responsible heads of department or the State Attorney that they should be mindful of their statutory and constitutional obligations in this respect.

[74] Although the amendment to the State Liability Act is a recent one, the Joint Rules of Practice of this Division have for a long while now similarly recognized the need for the State Attorney to be apprised of the set down of an application against the State in which orders are sought to be obtained on a default basis.

[75] Paragraph 23 (m) of the practice rules provides as follows:

“In all cases in which judgment by default is sought against the State (which will include applications where the State has failed to timeously file either a notice of opposition or its opposing papers) a notice of set down is to be served on the State attorney at least five days prior to the hearing.”

[76] Section 3 (1) of the State Attorneys Act, No. 56 of 1957, further behoves the office of the State Attorney to carry out its mandated statutory function which entails “*the performance in any court or in any part of the Republic of such work on behalf of the Government of the Republic as is by law, practice or custom performed by attorneys, notaries and conveyancers*”. Subsection (2) also provides that “there may also be performed at the offices of State Attorney *like functions for or on behalf of the administration of any province*, subject to such terms and conditions as may be arranged between the Minister of Justice and Constitutional Development and the administration concerned”.

[77] The prejudice to the Department by the failure of the Office of the State Attorney to have advised it in respect of the merits of the application for judicial review are patently obvious.

[78] But even though the State Attorney became legally responsible to advise the second respondent by the amendment to section 2 of the State Liability Act, the Department apparently could not have been bothered before this juncture to apply its mind to the legal merits of the applicant's claim for temporary incapacity leave going right back to her pursuit before the Bargaining Council of at least two matters for conciliation/arbitration which were disposed of in its absence.

[79] Had the Department properly considered the applicant's claim that she was entitled with reference to the relevant provisions of the PILIR and Resolution 7 of 2000 to have had her applications for incapacity leave properly considered, this whole unfortunate saga could have been avoided, costs would have been limited, the resources of the court would not have been wasted and, most significantly, the applicant would not have had to endure the indignity by the treatment suffered at the hands of the Department that she has had to put up with.

[80] Whilst this court is obliged to recognize the entitlement of the Department to be properly and efficiently represented in proceedings against it and to have meaningful access to court in the process, there comes a time when officials belatedly seeking to enforce their constitutional obligations in the professed interest of the public pursue or other noble institutional integrity objectives will be shown the door. In this instance however I will address the ostensibly blatant disregard for the court and the applicant's rights to finality in her litigation by an appropriate punitive costs order.

[81] To return to the requirements that the respondents are obliged to establish, I find that Ms. Wagner has explained why it is necessary as an accounting officer to question the review order and as best she can, albeit rather curtly, why the Department missed the boat in the first place. I further accept that she brought the present application within a reasonable time of establishing the fact of the error or erroneous state of affairs contemplated by rule 42 (1)(a) causing the conundrum facing the Department by prayer 2 of the review order.²⁴

[82] She would do well however to reflect upon her ostensible flippancy in failing to have given anything more than a perfunctory account to this court for having abandoned the initial premise of this application that the State Attorney had not been served with the process. Whilst she was clearly mistaken in this respect and relied on poor advice given to her, the unfortunate impression created by her officiousness is that she has little respect for this court or for the interests or dignity of the applicant at the receiving end of the Department's and the State Attorney's collective mishandling of the matter.

[83] Finally, where an applicant for rescission such as in this case relies solely on the respondents' claim ultimately that the order is a nullity, there is no requirement under Rule 42 (1)(a) that the showing of "sufficient cause" by such an application is a necessary requirement.²⁵

²⁴ Even applications in terms of Rule 42 (1) (a) must be brought within a reasonable time of establishing the fact of the error or erroneous state of affairs contemplated by the sub-rule and that the delay ought to be fully explained in all the circumstances. See in this regard *Minister of Home Affairs & 2 others v Zuma* (3014/2017) [2002] ZAECHMHC 33 (13 August 2020 at [8]).

²⁵ This has been authoritatively decided in *Lodhi 2 Property Investments CC and Another and Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) at para [27] where the court held that "(t)he existence or non-existence of a defence on the merits is an irrelevant consideration" under the sub-rule. See also *National Pride Trading* 452 Media 24 2010 (6) SA 587 at para [55] and unreported judgment of the SCA in *Rossiter v Nedbank Limited* dated 1 December 2015, case no 96/2014, at [16].

[84] In *National Pride Trading 452 v Media 24*²⁶ the court explained why it believed that it was also a consideration of policy why it is not a requirement that an applicant raising a procedural irregularity under Rule 42 (1)(a) has to show a *bona fide* defence under the sub-rule, as follows:

“[56] There is, I believe, also a consideration of policy why it is not a requirement that an applicant has to show a *bona fide* defence under Rule 42 (1) (a), and that is this: Any order or judgment made against a party in his absence due to an error not attributable to him, is such a profound intervention in his right to a fair trial and right to be heard, that, for this reason alone, the judgment or order should be set aside without further ado.

[85] In conclusion, I am satisfied that the respondents have established the necessary requirements for the relief that they seek.

[86] In the result I issue the following order:

1. The late issue of the application for rescission is condoned.
2. The order of this court dated 16 March 2021 is rescinded.
3. The respondents are to pay the applicant’s costs of opposing the application on the scale of attorney and client.

²⁶ *Supra*, at paras [56] – [59].

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING : 23 March 2023

DATE OF JUDGMENT : 25 May 2023

Appearances:

For the applicant: Mr. Maseti instructed by Nolands Law c/o Hutton & Cook, King William's Town (ref. Mr G C Webb).

For the respondents: Mr. A Nyondo instructed by the State Attorney, East London (ref. Ms. B Tongo).