



REPUBLIC OF SOUTH AFRICA

**THE LABOUR COURT OF SOUTH AFRICA,  
IN JOHANNESBURG  
JUDGMENT**

**Reportable**

Case no: J2084/10

In the matter between:

PUBLIC SERVANTS ASSOCIATION OF  
SOUTH AFRICA obo N A SEHULARO &  
OTHERS

Applicant

and

NATIONAL DEPARTMENT OF WATER  
AFFAIRS

First Respondent

DIRECTOR-GENERAL, NATIONAL  
DEPARTMENT OF WATER AFFAIRS

Second Respondent

MINISTER OF WATER AFFAIRS &  
FORESTRY

Third Respondent

**Heard: 10 July 2012**

**Delivered: 11 July 2012**

**Summary:** (s 158(1)(c) application – pending application to review and application to dismiss review application – Rule 7A(8) not complied with after 21 months).

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## JUDGMENT

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### LAGRANGE, J

#### Background

- 1] This is an application to make an arbitration award, dated 22 January 2010 and issued under case number GPBC 250/2009 under the auspices of the General Public Bargaining Council, an order of court. It was launched on 17 November 2011. The award, which was varied on 28 March 2010, required the respondents to upgrade or alternatively promote the five individual applicants to level 11 salary levels with effect from various dates between 30 August 2007 and 2 September 2008.
- 2] On 8 September 2010, approximately five months late, the respondents filed a review application to set aside the award, under case number JR 2534/10. Some twenty-one months since then, the respondents have yet to comply with Rule 7A (8) of the Labour Court rules by filing a record and supplementary papers, if any.
- 3] On 27 March 2012, the applicants in this matter filed a counter-application to dismiss the review application. Mr Mtsweni, who appeared for the respondents, advised the court that he was instructed that they were opposing this application, but there was no evidence before the court of any notice of opposition, let alone an answering affidavit, having been filed in that matter. Mr Mtsweni also said he was instructed that the state attorney was attending at the transcribers' office at the time this application was being heard trying to determine what had happened to the transcription of the record.

**Merits**

- 4] At the start of proceedings, the respondents raised a preliminary objection to the s 158(1)(c) application being granted, on the basis that the review application to set the award aside was pending. Mr Mtsweni pointed out that if the award was made an order of court, the review application could not proceed and therefore the court should not entertain this application while the review application is pending.
- 5] Mr Van der Merwe, for the applicants also pointed out that nothing prevents a party bringing an application to make an award an order of court when a review application is pending. In this regard, it must be mentioned that in the much delayed review application the respondents are seeking an order suspending the award pending the outcome of the review application.
- 6] The crisp question which arises, is whether the court should grant the order sought in circumstances where a review application and an application to dismiss the application have been launched, where no further steps have been taken by the respondents to prosecute that review since it was launched over twenty-one months ago and where they have not even filed opposing papers in the dismissal application.
- 7] To compound matters, the respondents only filed their notice of opposition to the s158 (1) (c) application on 8 March 2011 and their opposing affidavit was only filed on 27 June 2011, whereas both these documents should have been filed by 1 December 2010. Accordingly, they have applied for condonation for their belated opposition in this matter.
- 8] In keeping with the tardiness of the respondents in finalising the review application, their delay in opposing this application is extensive. In the case of the notice of opposition it was filed over two months late and in the case of the answering affidavit it was nearly seven months late.
- 9] The explanation proffered for the delay may be summarised as follows:

9.1 When the application was received on 30 November 2010 it was not

put in the normal pigeon hole of the assistant state attorney, Mr T Letageng, for reasons he or anyone else, cannot explain.

9.2 He was very busy and in and out of the office between then and when he went on leave on 15 December 2010.

9.3 It only came to his attention on 23 February 2011 when it appeared with files scheduled for his attention that day. He says he immediately filed a notice of intention to oppose the matter, though in fact it took him more than a week to do this.

9.4 An unnamed legal officer of the respondent who had handled the matter had been transferred to the Department of Agriculture and it was difficult to get hold of anyone who could assist and make the arrangements for a consultation with the respondents' deponent to the founding affidavit in the review application, a director of the first respondent, Mr Holby. Counsel in the review application could not assist on short notice but she was issued with a brief to draft an opposing affidavit in late March 2011.

9.5 It was difficult to make an arrangement with Holby to look at counsel's draft, which was apparently available from mid-April, and to make comments on it. No explanation was made why Holby could not simply have been sent the draft and asked to return it with his comments. The state attorney also said he had other pressing, but unspecified matters, to attend to.

10] The explanation for the delay is sketched in the broadest terms, lacking any of the detail that should be contained in such an explanation. Although Mr Holby deposed to the opposing affidavit on 23 June 2011, he did not even allude to the delay nor did he depose to a confirmatory affidavit on the contents of the state attorney's affidavit in support of the condonation application, which the state attorney completed the next day.

11] One striking feature about this vague and casual attempt to justify the delay is that, it took two and a half month's for it to be settled, after the draft affidavit had supposedly being prepared by mid-April 2011. The court

is expected to simply accept that the state attorney and Holby, a senior official, were unable to communicate effectively with each other on the issue for the whole of this period and is left to imagine what might have made their communications so difficult.

- 12] In the circumstances, it appears that the first portion of the delay must be attributed to the inefficiencies of the state attorney's office in monitoring court process served on it and the bulk of the rest of the delay must be attributed to a failure between the state attorney and the client to communicate effectively on finalising an overdue response in a matter that should have occupied their urgent attention. The level of detail in this explanation is more akin to what one might expect in pleadings, and does not meet the standard of detail required in an affidavit which must provide evidence of what transpired.
- 13] In the circumstances, I cannot accept the explanation for the bulk of the four month delay in filing a response from the time the state attorney alleges he became aware of the application on 23 February 2011. He must have been aware a response was overdue by then. Yet no attempt was made to contact the applicants to ask them for an indulgence in filing opposing papers, or at least that they would not oppose a condonation application if the opposing papers were filed by a certain date. Further, the explanation why it took over six weeks to finalise a draft answering affidavit is simply inadequate. It is not sufficient simply to say that counsel could not attend to it on short notice. Just because the respondent's counsel of first choice was not available does not mean no other counsel could have been briefed. Given that the initial review papers were available it should not to have been that difficult for another counsel to draft an answering affidavit.
- 14] The dilatoriness of the respondent's handling of the matter also takes place against the backdrop of its manifest failure to finalise its prosecution of the review application within a reasonable time. Without attempting to demonstrate that it had in fact done anything in that matter since the founding papers in that matter were filed, it raised that very application as a justification for the s 158(1) (c) application not being entertained at this

stage. On the papers as they stand the review application appears to be pending only in the formal sense that it has not been finalised, and not that it is a matter that is being constantly worked on by the applicant.

- 15] At the very least, since the respondents wish to rely on that pending application as the reason for not considering this one, it is reasonable to expect that it would have anticipated that they ought to have tried to demonstrate to this court that it was not sitting on its hands, but that it was diligently pursuing the matter. Even if the late filing of the opposing affidavit was condoned, it does not contain a scintilla of evidence of any action on its part to finalise the review.
- 16] It should have been readily apparent to it that the delay in finalising the review application would be pertinent to any consideration of whether that application justified staying this one. At the very least, given that approximately a year and a half has passed since it was aware of the s 158(1)(c ) application, some evidence of the steps it had taken to comply with rule 7A(8) ought to have been placed before the court if it wanted its opposition to this application on account of the pending review application to be taken seriously.
- 17] In ***Ntshangane v Speciality Metals CC* [1998] 3 BLLR 305 (LC)**, which was also concerned an application to make an award an order of court when a review application was pending, Mlambo, J (as he then was) noted that the respondent's argument in that case was similar to a stay application:

*"He [the respondent's representative] argued that this application should be stayed pending the finalisation of the review. To succeed in stay proceedings the applicant must satisfy the Court that there are good prospects of success in the pending matter, that the balance of convenience is in his favour and that it would be fair to stay the present proceedings."*

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See *Kerbel v Kerbel* 1987 (1) SA 562 (W); and *Osman v Hector* 1933 CPD 507.

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*Indeed it is so that the mere fact of a pending review is not a bar to this Court making an award an order of Court. It is for whoever relies on the pending review argument to instil a well-grounded conviction in the mind of the Court that the prospects of success of the review are reasonably good.*

*See Dickinson v South African General Electric Co (Pty) Ltd 1973 (2) SA 620 (A) at 630F–H.”<sup>1</sup>*

- 18] In a later judgment, which endorsed the approach of the court in *Ntshangase*, Murphy J stated:

*“[24] ... The power to make an award an order of court under [section 158\(1\)\(c\)](#) of the LRA (or concomitantly to stay enforcement of an award under [section 145\(3\)](#) is a discretionary power to be exercised judicially, and in general should be applied in favour of lending enforceability to an award in the interests of bringing finality to labour disputes. The prospects of success are therefore only one consideration. Equally important are the balance of convenience and the requirements of fairness.*

*[25] In Khoza v Sasol Ltd [\[2002\] 9 BLLR 868](#) (LC) Ntsebeza AJ for instance gave particular consideration to the prejudice likely to be suffered by each of the parties if the award were made an order. In Professional Security Enforcement v Namusi [\[1999\] 6 BLLR 610](#) (LC) Grogan AJ held that where a party had not protected its interests for six months and only sought to oppose it on hearing that the other party was pursuing its application to have the award made an order of court (much like the respondent in this case), the conduct was so tardy that it did not*

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<sup>1</sup> At 304-5,[13]-[14]

*warrant further frustrating the other party's bona fide attempts to have the award made an order of court. As he put it:*

*"The object of expeditiously resolving labour disputes would certainly be compromised were employers to be permitted with impunity to ignore awards indefinitely without taking action under [section 144](#) or [145](#), and then block the employee when he ultimately seeks to have the award enforced under [section 158\(1\)\(c\)](#)."*

*In other words, the discretion of the court under [section 158\(1\)\(c\)](#) when faced with a pending review application, which has not been conscientiously prosecuted, must be exercised taking account of the prospects of success, the balance of convenience, the parties, conduct in litigation, the policy of the Act, the interests of the administration of justice and the general tenets of fairness."*<sup>2</sup>

- 19] In the light of the weakness of the respondents' condonation application, I am strongly inclined to refuse it and decide this application on an unopposed basis. If I did so and found, after considering the factors mentioned in the judgments above, that the award should be made an order of court then, that would prevent the consideration of its review application as Mr Mtswene rightly points out.<sup>3</sup> His instructions were in effect that the transcribers should have already been busy with preparing a transcription of the arbitration hearing. If so, the respondent should have no difficulty in finalising the filing of a record and any supplementary submissions in terms of Rule 7A (8) within a few weeks of yesterday's hearing. A full assessment of the merits of the review application, the application to dismiss it and this application could then be made on the best available information. The set down of the matter can be expedited. Given the long period of delay to date, a further relatively short delay would not be unduly prejudicial to the applicants.

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<sup>2</sup> **NEHAWU obo Vermeulen v Director General: Department of Labour** [2005] 8 BLLR 840 (C) at 840.

<sup>3</sup> See **Blue Marine (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others** (2003) 24 ILJ 1528 (LC) at 1532,[15]-[16] and **Dartprops (Pty) Ltd v CCMA & others** [1999] 2 BLLR 137 (LC) at 137,[8] - [10]



- 20] Mr Mtswene himself suggested as an alternative to determining this application now, a consolidation of this matter and the applications in the review matter and an expedited timetable for the respondents to finalise their review could be ordered. In the exercise of my discretion, I think this would be more desirable to deal with this application along those lines, provided the matter is handled expeditiously.
- 21] Nevertheless, there is no reason why the applicant should bear the wasted costs of yesterday's appearance given the respondents' conduct of the matter.

### **Order**

- 22] In the circumstances, the following order is made:

- 22.1 The application to make the arbitration award dated 22 January 2010 issued under case number GPBC 250/2009 an order of court is postponed to the hearing of the consolidated matter referred to below.
- 22.2 This application is consolidated with the review application and the counter application to dismiss the review application filed under case number JR 2534/10.
- 22.3 The respondents in this matter are ordered to comply with Rule 7A (8) of this court's rules by no later than 9 August 2012.
- 22.4 In the event that the respondents wish to oppose the application to dismiss the review application they must file any notice of opposition and answering affidavit together with a condonation application for the late filing thereof within 10 days of this order.
- 22.5 The registrar is directed to enrol the consolidated application as soon as possible after 16 August 2012, irrespective of whether the respondents have complied with the steps above.
- 22.6 The respondents must pay the wasted costs of the applicants' appearance and representation on 10 July 2012.



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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:

F Van der Merwe instructed by Bouwers Inc

FIRST RESPONDENT:

D V Mtswene instructed by the State Attorney