



**REPUBLIC OF SOUTH AFRICA**

Not reportable

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

**JUDGMENT**

Case no: JR 2774/2012

In the matter between:

**NATIONAL PROSECUTING AUTHORITY**

**APPLICANT**

and

**SILAS RAMUSHOWANA N.O.**

**FIRST RESPONDENT**

**GPSSBC**

**SECOND RESPONDENT**

**DANIEL WILLEM PETRUS NEL**

**THIRD RESPONDENT**

**Heard: 31 July 2015**

**Order made: 3 August 2015**

**Reasons furnished: 5 August 2015**

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## JUDGMENT

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### VAN NIEKERK J

- [1] This is an application to rescind an order granted by this court on 12 May 2015, when the court dismissed with costs an application filed by the applicant to review and set aside an arbitration award issued by the first respondent. The applicant also seeks an order in terms of which the enforcement of the award be stayed pending the outcome of the review application.
- [2] The third respondent (the employee) was employed with effect from 1 January 2008 in terms of a fixed term contract that was to terminate on 31 December 2009. The contract was extended to 31 December 2011. When the employee's contract was not further renewed, he referred a dispute to the second respondent, the bargaining council, contending that he had been unfairly dismissed. The dispute was ultimately referred to arbitration before the first respondent. On 26 September 2012, the first respondent issue an award in the employee's favour.
- [3] On 7 November 2012, the applicant field an application to review and set aside the award. In compliance with the Rules, the first and second respondents were called on to dispatch to the registrar the record of the proceedings under review. On 4 March 2013, the employee's attorney enquired when the record would be filed. The applicant responded by stating that it was waiting for the record to be filed.
- [4] On 27 September 2013, presumably after making its own enquiries, the employee's attorney sent a letter to the applicant recording that the record had been filed on 19 December 2012. On 28 October 2013 the applicant's attorney

requested the bargaining council to provide it with the compact disc containing the record of the proceedings. When the disc was sent to the transcribers, it was found that the disc was blank. On 31 October 2013, the applicant's attorney advised the employee's attorney that a proper record was being sought.

- [5] On 2 December 2013, the employee's attorney enquired from the applicant's attorney whether it had received a disc containing the proper record and indicated that an application would be brought to have the review application dismissed. On 3 December 2013, the applicant's attorney relied by proposing that they meet in order to reconstruct the record. On the same date, a Mr. Phamba, who had been dealing with the matter, wrote to the bargaining council requesting a proper record of the proceedings. The record was finally sent to Phamba on 14 March 2014 and sent for transcription.
- [6] Phamba left the applicant's attorney's employ in April 2014. He failed to effect a proper hand over and refused to co-operate in any hand over of matters with which he was dealing. There was no further correspondence between the parties' attorneys between April 2014 and March 2015.
- [7] On 26 March 2015, the application to dismiss was filed on the applicant. That application was not opposed, nor was any answering affidavit filed. A Ms. Sahib of the applicant's attorney consulted senior counsel. On 10 April 2015 counsel advised Sahib that the record with which he had been briefed was incomplete and requested Sahib to arrange a consultation with Phamba.
- [8] The application to dismiss was set down for hearing on 12 May 2015. The applicant says that it did not receive notice of the hearing. On 12 May 2015, the order sought to be rescinded was granted.
- [9] On 8 June 2015, Sahib advised counsel that Phamba was no longer employed by the applicant's attorney and that his emails could not be accessed. On 9 June 2015, oblivious to the order granted on 12 May, Sahib wrote to the bargaining counsel noting the incomplete record and proposing a reconstruction of the record.

[10] On 18 June 2015, the employee's attorney advised the applicant's attorneys of the existence of the order and claimed payment of the compensation awarded to the employee in terms of the award. Counsel was obliged to withdraw his appointment when he was appointed as an acting judge. On 25 June 2015 the applicant's present counsel was briefed with instructions to prepare the present application.

[11] The applicable legal principles regulating the rescission of an order granted in the absence of a party are based on a threshold of good cause shown. Specifically, this requires the applicant to furnish a reasonable explanation for its absence on 12 May 2015 when the order sought to be rescinded was granted, the application must be *bona fide*

and the applicant must show on a *prima facie* basis that it has a *bona fide* case to present in respect of that application.

[12] The applicant's failure to appear on 12 May 2015 must necessarily be seen in context. It is a context where despite the provisions of the Practice Manual to the effect that a review application is not unlike an urgent application and that the failure by a party to file the record within 60 days has the consequence of the deemed withdrawal of the application, the filing of the record is now two years and seven months overdue. In the Rule 11 application, the applicant's answering affidavit is now three months overdue.

- [13] What the applicant appears to have overlooked, both in the founding and replying affidavits and in argument, is that the applicant (the NPA) is not the state attorney, and the state attorney is not the NPA. The state attorney acts for and on behalf of the applicant, and owes the applicant the same duty of care as any attorney acting for a client in the private sector. Equally, the NPA as a client of the state attorney cannot escape the result of the latter's negligence or the insufficiency of the explanation tendered by the state attorney. In the present matter, the deafening silence of the applicant or any of its officials in relation to the conduct of the review and the application in terms of Rule 11 and in particular, their failure to provide any evidence as to what steps, if any, were taken to ensure that the applications were prosecuted with due diligence, suggests a degree of disinterest so as to amount to wilful default.
- [14] It is apparent from the court file that the third respondent's request for a court date in the Rule 11 application and the request that the matter be allocated a date on the unopposed motion roll was successfully telefaxed to fax number 011 337 7180 on 26 April at 8.25 am. That fax was marked for the attention of a Mr. Fumanekile, with a reference number corresponding to the number used by the applicant in the present application. The applicant does not deny having received this notice (which served as adequate prior warning that the third respondent was proceeding to enroll the Rule 11 application), nor is there any explanation as to who Mr. Fumanekile might be or what role he played in the present saga after Phamba's departure. The applicant does not dispute that the notice of set down of the Rule 11 application was sent and received by the office of the applicant's attorney. What it disputes is that the notice was received by the attorney dealing with this particular matter. Both telefax numbers to which the notice of set down was addressed (0866756737 and 011 3377180) indicate a successful transmission. The supplementary affidavits filed by the parties suggest no more than that the fax number used to transmit the notice of set down was not one that the registrar was requested some years ago to use. It may be that the notice of set down was not sent to the designated fax number, but that does not detract from the fact that both the applications to have the Rule 11 application set down

for hearing and the notice of set down itself were successfully transmitted, with correct reference numbers, to the applicant's attorney. There is no cogent explanation for the failure by the applicant's attorney to respond to these notices.

[15] For the above reasons, in my view, the applicant is in wilful default of appearance on 12 May 2015 when the review application was dismissed.

[16] The conclusion to which I have come disposes of the present application. However, even if I was wrong in coming to the conclusion that I have in regard to the adequacy of the explanation proffered by the application is concerned, the application in any event stands to be dismissed on account of the failure by the applicant to establish, even on a *prima facie* basis, that it has a *bona fide* defence to the proceedings in respect of which rescission is sought. The deponent to the founding affidavit, for reasons that are not apparent, makes out the applicant's case in respect of the merits of the review application. He refers in some detail to the findings made by the arbitrator, and sets out the grounds on which the review of the award is sought. The deponent to the founding affidavit fails to address in any respect the case that the applicant has to present in respect of the merits of the Rule 11 application. In that sense, the applicant has failed to recognize that its defence to the Rule 11 and the review application respectively are separate issues and must necessarily be dealt with as such (see *Powertech Transformers (Pty) Ltd v MEIBC* (JR 1250/09) at paragraph [41]).

[17] To the extent that the founding affidavit can be generously read to include a defence to the Rule 11 application, it is clear that the applicant and the applicant's attorney have failed to prosecute the review application with due diligence and that the explanation for the failure to file the record of the proceedings under review and a Rule 7A (8) notice despite an effluxion of some 16 months (as at the date of the filing of the application to dismiss). The conduct of the applicant and its attorney was nothing less than dilatory in nature and represented a failure to promote the statutory purpose of expeditious dispute resolution.

[18] For the above reasons, the application stands to be dismissed. In so far as costs are concerned, in my view, the requirements of the law and fairness dictate that the third respondent should not be deprived of the costs of having to defend these proceedings, such costs to include the costs of the proceedings on 9 July 2015, and those on 29 July 2015, when the application was stood down to 31 July 2015.

I make the following order:

1. The application is dismissed.
2. The applicant is to pay the costs of the application, such costs to include the costs of the proceedings on 9 July 2015 and those on 29 July 2015, when the application was stood down to 31 July 2015.

ANDRÉ VAN NIEKERK  
JUDGE OF THE LABOUR COURT

#### REPRESENTATION

For the applicant: Adv. IS Ngwetjana, instructed by the State Attorney

For the third respondent: Mr. R Menses, Garlicke Bousfield Inc.