Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: J1525/15

In the matter between:

MINISTER OF CORRECTIONAL SERVICES	**Applicant**
and	
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	**First Respondent**
MPE NGCOSANE (*N.O.*)	**Second Respondent**
M C MOTSAPI	**Third Respondent**

Heard: 5 September 2017
Delivered: 4 July 2018
Summary: (Review – Rule 11 – precautionary transfer)

JUDGMENT

LAGRANGE J

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Background

[1] This matter was heard on 5 September 2017. Subsequent to the hearing, the original file was stolen together with the other contents of my briefcase when my vehicle was broken into. Once it became evident that the file was missing, the parties reconstructed the file. The court is indebted to the parties for their assistance in this regard.

[2] The applicant, the Minister of Correctional Services, seeks to review and set aside an arbitration award by the second respondent ('the arbitrator') in favour of the first respondent, Deputy Director M C Motsapi ('Motsapi'). He found that Motsapi's precautionary transfer from his former position as Controller at Mangaung Correctional Centre to Grootvlei Management Area in November 2013, as an alternative to suspension, pending finalisation of an investigation was contrary to the Department of Correctional Services Disciplinary Procedure ('the DCS procedure') and an unfair labour practice. At the time of the arbitration award, 17 months after the transfer, Motsapi remained on suspension. The arbitrator awarded Motsapi three months' remuneration as compensation.

[3] The applicant applied to review the award and Motsapi has applied to dismiss the review and make the award an order of court.

Chronology of the review application and the rule 11 application

[4] The award was issued on 17 April 2015, but the review application was launched on or about 15 August 2015, approximately two and a half months' late. The review application included an application for the condonation of the late filing of the application.

[5] The Deputy Director Sanctions: Directorate Code Enforcement ('the director') at the applicant's head office recommended the institution of review proceedings on 5 May 2015. Counsel was briefed on the matter three weeks later on 26 May 2015, by which stage there were only a few days left to file the review application timeously. The applicant could only consult with counsel on 12 June 2015. At that consultation expressed the view that the award was not reviewable but he would furnish an opinion. By that stage, the six-week period for launching the application had

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expired a fortnight previously. The applicant did not communicate with the third respondent to request an indulgence for an extension of time.

[6] The opinion was furnished on 24 June 2015 confirming counsel's *prima facie* view on the merits. The director was not satisfied with the opinion and another council was briefed on 1 July 2015 but the counsel in question was on leave and only received the brief on 15 July 2015. Counsel requested the bundle of documents which appeared to have been used in the arbitration, which the applicant did not have in its possession. Nonetheless, on 4 August 2015, it was decided to proceed with drafting the review application in the absence of the documents so as not to prolong the delay. 11 days later the review was finally filed.

[7] Apart from this delay, there were further, lengthier delays in finalising the review application, as summarised below.

[8] By mid-2016, nothing further appeared to have been done to finalise the review. By this stage, in terms of paragraphs 11.2.2 and 11.2.3 of the Labour Court Practice Manual, the review application was already deemed to have been withdrawn in mid-October 2015. In the meantime, Motsapi took steps to enforce the award by having a writ of execution issued towards the end of May 2016. It appears that this belatedly galvanised the applicant to do something about the finalisation of the review because, on 2 June 2016, the bargaining council lodged the record of the proceedings with the registrar. On 30 June 2016, the applicant succeeded in obtaining a stay of the writ pending the finalisation of the review application, but no order of costs was made.

[9] For reasons which are unclear, the applicant claims that it was only able to locate the record at court sometime in September 2016 and the supplementary affidavit was only filed on 28 September 2016. No explanation was provided why it took so long to locate the record at the court, which had been lodged with the registrar by the bargaining council on 2 June 2016. Motsapi filed his replying affidavit on 13 October 2016.

[10] In February 2017, Motsapi asked for an update on progress in the application from the applicant and warned that an application would be brought to have the review application dismissed, *inter alia* for lack of

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prosecution. Motsapi was then advised by State attorney that the matter would be set down within a month and she would revert by mid-April. No further response was received from the State attorney and no further steps were taken by the applicant to enrol the matter. The applicant also never applied for condonation for its non-compliance with the provisions of the practice manual or to reinstate the review application, which was deemed to be withdrawn.

[11] Motsapi then launched his application to dismiss the review application on 12 July 2017.

[12] The applicant only opposed the dismissal application on 4 September 2017. The applicant claims that prior to obtaining knowledge of the dismissal application, it was satisfied since September 2016 that the matter was proceeding and that everything necessary was being done to prosecute the matter. The applicant also took comfort in the knowledge that the Labour Court roll is inundated and that it normally took a substantial period of time to set down review applications. It appears that the applicant was so confident that all was well that there was no evidence of a single communication between the applicant and the state attorney between the filing of the supplementary affidavit the end of September 2016 and the filing of the dismissal application in July 2017, a period of some nine months.

[13] The further delay in responding to the rule 11 application is explained by the personal incapacity of the state attorney who had been handling the matter, which necessitated the appointment of another attorney in the state attorney's office to take over the case.

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The substantive merits

The arbitration award

[14] As mentioned above, Motsapi was transferred to another post in the department, as an alternative to suspension, pending finalisation of an investigation. However, when the matter was arbitrated, he remained in the transferred post 17 months later.

[15] It is not necessary to traverse the arbitration award in detail save to mention the following important aspects of the arbitrator's findings:

15.1 The applicant was entitled to place Motsapi in an alternative position in terms of clause 7.2 of the DCS disciplinary code and Resolution 1 of 2006 but such a precautionary transfer was limited to a maximum of three months, whereas Motsapi had been in the position for more than a year.

15.2 The purpose of such a transfer was to make sure, amongst other things,that an employee does not interfere with the investigation underway.

15.3 Clause 7.2.3 of the disciplinary code provides that an employer must hold a disciplinary enquiry "within 60 calendar days if an employee is suspended or transferred as a precautionary measure" and if disciplinary proceedings have not been instituted within that time the suspended employee may return to work.

15.4 No basis was provided by the applicant for extending the period of the precautionary transfer beyond three months.

[16] The arbitrator decided that the failure to transfer Motsapi back to his position was an unfair labour practice and awarded him three months' salary as compensation.

Grounds of review

[17] The applicant raised three grounds of review. Firstly, the arbitrator failed to distinguish between an employee placed on a precautionary suspension and an employee who is transferred as a precautionary measure, even though the disciplinary code draws such a distinction. Secondly, the applicant complains that the arbitrator irregularly decided the matter without hearing evidence and instead relied on the written submissions of the parties and the documentation. Thirdly, the award of compensation of three months remuneration amounting to R 164 020, 50 was made without any evidence of any humiliation or damages being suffered by Motsapi.

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Evaluation of the condonation application

The explanation for the delay

[18] The period of the delay is nearly double the period that it should have taken the applicant to file the review application. As such, it is an extensive delay.

[19] I am not satisfied that the delay of two and a half months' in launching the review is fully explained. Even allowing for the fact that it took three weeks before a decision was made whether to institute review proceedings, counsel was briefed without apparently ascertaining beforehand if that counsel would be able to draft the application timeously. Also, once the deadline for filing the application had expired, at no stage during the ensuing period of delay did the applicant make any attempt to approach Motsapi to explain that it was taking steps to institute the review application and ask for an indulgence. The applicant should have at least advised that it was seeking an opinion of counsel before deciding whether or not to proceed. Having obtained the opinion, but being dissatisfied with it, the applicant then briefed another counsel. Before briefing counsel, it should have ascertained from him that he could not even start looking at the matter for another fortnight. It still took another month to file the application on the same information which had been available to the applicant since the beginning.

Prospects of success

[20] In relation to the failure of the parties to lead evidence, as such, it is common cause between the parties that they had agreed to submit heads of argument and that a bundle of documents relevant to the issues had been handed in by consent. The applicant also accepted that Motsapi had been on a precautionary transfer for approximately one year pending an investigation into his alleged misconduct, but averred that the investigation was not yet finalised at the time of the arbitration, which Motsapi apparently disputes. The applicant contends that there were disputes of fact and denies that it was competent of the parties to agree to deal with the matter by way of submissions.

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[21] Apart from the fact that Motsapi had claimed that he suffered financial loss and that the parties do not appear to be in agreement about the conclusion of the investigation, it is difficult to understand what material disputed facts the applicant could have been referring to. It is also noteworthy, that the main reason why the applicant felt compelled to persist with the application concerned its first ground of review relating to the interpretation of the disciplinary code. It was the applicant's dissatisfaction with counsel's opinion on this aspect of the merits of the case which prompted it to pursue the matter further. Nonetheless, there is some merit in the point that it is unclear on what basis the arbitrator determined that three months' compensation was appropriate, apart from general principles. In this regard, it also appears that a factor which played a role in the arbitrator's thinking was that the investigation on which the transfer was predicated might in fact have been complete, whereas this was clearly a matter in dispute and should have either been clarified in evidence or being clarified in a stated case. I am mindful of the fact that both the Labour Court and the Labour Appeal Court have taken a dim view of parties who submit a case to arbitration and then argue the merits based simply on a bundle of documents, the status of which is uncertain. See in this regard ***SA Social Security Agency v National Education Health & Allied Workers Union on behalf of Punzi & Others*** **(2015) 36 ILJ 2345 (LC)**, ***Department of Home Affairs v General Public Service Sectoral Bargaining Council & others*** **(2018) 39 ILJ 248 (LC)**, and ***Arends & others v SA Local Government Bargaining Council & others*** **(2015) 36 ILJ 1200 (LAC)**.

[22] In relation to the main ground of review, the principal complaint of the applicant is that, it interprets the provisions of the code dealing with precautionary transfers and precautionary suspensions differently to the arbitrator and it contends that the arbitrator was unreasonable in regarding the two precautionary measures as having identical consequences in terms of the code. The relevant provisions of the code read:

> "7.2.1 The employer may suspend an employee on full pay or transfer the employee if

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7.2.1.1 The employee is alleged to have committed a serious offence; and

7.2.1.2 The employer believes that the presence of an employee at the workplace may jeopardise any investigation into the alleged misconduct or endanger the well-being or safety of any person or state property.

7.2.2 A suspension of this kind is a precautionary measure that does not constitute a judgement. An employee shall not be suspended without salary or normal benefits. Benefits shall not include overtime pay or danger and/or special danger allowances and.

7.2.3 If an employee is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within 60 calendar days, depending on the complexity of the matter and the length of the investigation. If after the 60 days of suspension the disciplinary hearing has not been instituted the suspended employee may return to work. Depending on the seriousness of the alleged misconduct, the employer may extend the suspension with a further 30 days. If after such period the disciplinary hearing has not been instituted the employee must return to work. If the disciplinary hearing has been instituted the employer shall determine when the employee can return to work.

(emphasis added)

[23] In essence, the applicant contends, in reliance on the emphasised portions above, that clause 7.2.3 of the code only provided that an employee who has been suspended may return to work. By implication, this would mean that an employee placed on a precautionary transfer for the same reason that they might have been suspended could be transferred on an indefinite basis even if the disciplinary hearing was not convened within the three month period applicable to suspended employees. The arbitrator clearly did not consider that such a distinction in treatment was intended by the section and was of the view that Motsapi, as an employee on precautionary transfer for more than three months, was also entitled to return to his former position. The arbitrator's interpretation is not an entirely unreasonable one, given the purpose of the precautionary measure and the intention of the section that the disciplinary

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hearing should not be unduly delayed. That is not to say that another interpretation might not be possible, but it is sufficient that his interpretation was not one that no reasonable arbitrator could have arrived at.

[24] The only remaining aspect pertaining to the prospects of success is whether it is possible for the arbitrator to have awarded three months' remuneration as compensation in the absence of evidence of humiliation or financial loss on the part of Motsapi. I have already mentioned above that the determination of this issue without understanding the evidentiary basis on which it was made is problematic.

[25] In the light of the above, notwithstanding the poor explanation for the initial delay in launching the review application, I am inclined to grant condonation for the late filing of the application, mainly on the basis that there are some factual issues bearing on the award where the evidentiary basis therefor is unclear or where there is an issue in dispute, in the absence of a stated case along the lines described in the judgements mentioned above.

<u>The failure to comply with subsequent time periods for finalising the review.</u>

[26] The more problematic part of the applicant's explanation for its dilatoriness in prosecuting the review application is what happened after supplementary affidavit was filed.

[27] At that stage, the applicant itself was aware that counsel did not have a full record of the arbitration and that this was still outstanding when the founding affidavit was filed. There is no evidence that it made any effort to enquire if that shortcoming had been rectified in the whole period from the end of September until the writ of execution was served in late May 2016, several months later. It was aware that even after the successful application to stay the writ on 30 June 2016, that it took four months since the record had been lodged by the bargaining council at the beginning of June to locate the record and to file the supplementary affidavit.

[28] Despite a significant history of delay in the prosecution of the review, in which the pleadings had only been finalised a year after the review was

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filed, the applicant itself was content to leave the matter to the State attorney. The applicant claims then to have been surprised to learn of the dismissal application on 7 August 2017. Even though it should have been more diligent, it does seem it was not kept in the loop by the state attorney who was handling the matter at the time. Having learnt belatedly of the dismissal application, the applicant was then hampered by the incapacity of the state attorney who was handling the matter, which necessitated fairly delicate manoeuvring to transfer the matter to another attorney in the same office. This delayed the filing of the opposing affidavit. The applicant did tender the wasted costs of the Rule 11 application, effectively acknowledging that had the state attorney's office handled the matter acted as they should have, the Rule 11 application would have been unnecessary.

[29] Were it not for the circumstances of the personal incapacitation of the state attorney in question which appeared to explain the non-responsiveness of that office to the correspondence threatening to bring the Rule 11 application, I would be less sympathetic to the further delays in this matter. However, the circumstances are somewhat unusual and the applicant acknowledges its shortcomings in this regard.

[30] All things considered, I accept that the subsequent delay in enrolling the matter after pleadings had closed was not necessarily a delay which the applicant would have entirely anticipated and there is no reason to believe it was aware of the correspondence from Motsapi's attorneys in February 2017. I am also mindful of the fact that Motsapi could also have requested the registrar to enrol the matter when it appeared that the applicant was not going to do so. It also could have acted earlier when the record was not forthcoming in requiring the applicant to file the record or apply for an extension of time under clause 11.2.3 of the practice manual.

[31] In light of the above, I believe that the review application should not be dismissed. Nonetheless, and despite the tender of costs for the Rule 11 application itself, as a mark of the court's disapproval of the applicant's dilatory prosecution of the review and particularly its casual disregard for the provisions of the time periods in the practice manual - as if they did not

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exist – the applicant should also pay the costs of Motsapi's opposition to the condonation application, and all costs should be on an attorney own client scale.

Order

[32] The late referral of the review application is condoned.

[33] The Rule 11 application of the third respondent is dismissed.

[34] The arbitration award of the second respondent dated 17 April 2015 issued under case number GPBC 1914/14 is reviewed and set aside and the matter is remitted back to the first respondent to convene a fresh arbitration hearing within 30 days of receipt of this judgement.

[35] The applicant must pay the costs of the third respondent in the rule 11 application and the condonation application on an attorney own client scale.

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Lagrange J

Judge of the Labour Court of South Africa

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APPEARANCES

APPLICANT:	Mr. T. Mokwayi for Phatshoane Henney Attorneys
RESPONDENT:	Adv. P.C. Pio instructed by State Attorneys Pretoria

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