

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

CASE NO

D236/04
D292/04

Date of Hearing: 05/11/2004

Date of Judgment: 21/01/2005

In the matter between

ENFORCE GUARDING (PTY) LTD

APPLICANT

and

MINISTER OF LABOUR - RSA

1ST
RESPONDENT

**DIRECTOR-GENERAL OF DEPARTMENT
OF LABOUR**

2ND RESPONDENT

**NATIONAL SECURITY AND UNQUALIFIED
WORKERS UNION**

3RD RESPONDENT

**SA TRANSPORT AND ALLIED
WORKERS UNION**

4TH RESPONDENT

**SECURITY & ALLIED TRADE UNION
OF SOUTH AFRICA**

5TH RESPONDENT

NATIONAL SECURITY WORKERS UNION

6TH
RESPONDENT

**EMPLOYEES WHO ARE NOT MEMBERS
OF ANY OF THE AFORESAID 7TH & FURTHER
RESPONDENTS**

**JUDGMENT DELIVERED BY
THE HONOURABLE MR ACTING JUSTICE NGCAMU**

FOR APPLICANT:

MR G O VAN NIEKERK SC

FOR 1ST AND 2ND RESPONDENT:

MR M J D WALLIS SC

JUDGMENT

NGCAMU AJ

- [1] There are two applications before the Court. The first matter is under case No D236/04, which relates to the appeal and condonation. The second matter is under case No D292/04, being a review application. It has been agreed between the parties that case No D292/04 should only be considered if condonation is not granted in respect of case No D236/04.
- [2] The parties first argued case No D236/04 and thereafter asked the Court to consider D292/04 if the condonation is not granted. The parties thereafter addressed the Court in the review application. The first part of the judgment therefore relates to D236/04.
- [3] The applicant brought an application in which it sought an order:
- (a) staying the enforcement proceedings of the compliance order pending the appeal in terms of section 72 of the Basic Conditions of Employment Act; (The Act)
 - (b) extending the period for the submission of the appeal;
 - (c) upholding the appeal in terms of section 77 of the Act against the refusal of the objection against the compliance order by the second respondent.
- [4] A sectoral determination was made by the Minister of Labour to regulate the minimum ordinary hours of work, overtime, as well as payment for overtime. The applicant did not

make payment of overtime in terms of the sectoral determination. The applicant filed an application for the exemption to clause 5(9) of the sectoral determination No 3 applicable to the security industry. Clause 5(9) covers the payment of overtime. The application was launched in terms of section 50(7)(b) of the Basic Conditions of Employment Act of 1997.

- [5] The exemption sought was for the period 6 March 2001 to 15 November 2001. This is the period during which the applicant had paid overtime at a lower rate of 1,025 per hour instead of 1,5 per hour.
- [6] The second respondent refused to vary the sectoral determination.
- [7] The applicant launched a review application under case No D243/04. This application was heard on 3 November 2004 and judgment was reserved.
- [8] On 28 October 2002 a compliance order seeking to enforce payment for overtime was served on the applicant. The compliance order was issued in terms of section 69 of the Basic Conditions of Employment Act. This section provides:

"(i) A labour inspector who has reasonable grounds to believe that an employer has not complied with the provision of this Act may issue a compliance order."

- [9] The applicant filed an objection to the compliance order in

terms of section 71 of the Act. Section 71(1) provides:

"An employer may object to a compliance order by making representations in writing to the Director-General within 21 days of receipt of that order."

[10] Section 71(3) provides that:

"After considering any representations by the employer and any other relevant information, the Director-General -

(a) may confirm, modify or cancel an order or any part of the order; and

(b) specify the period within which the employer must comply with any part of the order that is confirmed or modified."

[11] The objection was refused by the second respondent.

Section 72 of the Basic Conditions of Employment Act provides:

"(1) An employer may appeal to the Labour Court against an order of the Director-General within 21 days of receipt of that order."

[12] The applicant did not take the decision on appeal. The second respondent lodged an application to enforce the compliance order under case No D214/04 in terms of section 73 of the Basic Conditions of Employment Act. The applicant thereafter lodged an appeal to this Court. This appeal was lodged outside the period of 21 days prescribed in section 72(1). An application for condonation

was accordingly made by the applicant. The first and second respondents opposed this application.

The condonation application

[13] Section 72 prescribes that the appeal should be lodged with the Labour Court within 21 days. The applicant received the notification refusing the objection on 17 March 2004. The notification was delivered by Mr Harris Reddy of the Department of Labour. The 21-day period expired on 7 April 2004. The application for the appeal was filed with the registrar outside the period of 21 days. It was launched on 29 April 2004.

[14] Section 72(3) grants the Court the power to condone the late filing of the appeal on good cause shown. The applicant's explanation for the delay in the filing of the appeal is that when the human resources manager, Mr Hardie, received the notification of the refusal of the objection, he did not realise that it was such a notification. The deponent to the applicant's affidavit, Mr Hardie, further stated that he was misled into believing that the compliance order was being reissued because the document served was headed "Compliance order in terms of section 69 read with section 71(3) of the Basic Conditions of Employment Act". He further stated that he only realised on 22 April 2004 what the document was. This is the date on which the notice to enforce compliance order was served. It was submitted that had Hardie read the document he would have realised that the objection had been refused. When the notice was given to Mr Hardie, he signed for it.

[15] What is in dispute is whether Mr Reddy informed Mr Hardie

that he was reissuing the compliance order, as alleged by Mr Hardie. As a result of the heading of the document, Mr Hardie (as the argument continues) was misled.

[16] In the replying affidavit, page 243, paragraph 6.2, Mr Hardie testified that he did not read the document and that Mr Reddy did not explain the contents thereof. He further stated that he did not consider it necessary to read the document as he assumed it was the same compliance order which had been reissued.

[17] I have some difficulties with the applicant's version, as will appear below. In paragraph 20, page 12, line 7, of the documents Mr Hardie stated:

"I had not seen the original compliance order
and assumed it was the same document."

The difficulty here is that Mr Hardie has not explained how he assumed the document served on him was the compliance order when he had not seen the original. As Mr Hardie had not seen the compliance order, one would have expected him to read the document if he did not do so.

[18] Another difficulty with the applicant's version is that even if Mr Reddy did not explain the contents to Mr Hardie, Mr Hardie was aware that the variation application had been refused. At page 12, paragraph 20, of his founding affidavit, Mr Hardie stated:

"On 16 March 2004 I was informed that the
second respondent had refused the applicant's
variation application. On the following day
Mr Harris Reddy, an inspector from the

Department of Labour, who has throughout dealt with this dispute, attended the applicant's premises and informed me that he was reissuing the compliance order."

[19] The applicant knew by 16 March 2004 that the variation had been refused, even before the arrival of Mr Reddy. Section 71(6) provides that if the Director-General confirms or modifies the order or any part of the order, the employer must comply with that order within the time specified in that order. Mr Hardie has not explained how he got to know on 16 March 2004 that the variation had been refused. However, the applicant did not comply with the order, even though Mr Hardie had been informed on 16 March that the application had been refused.

[20] The service of the documents on 17 March 2004 merely confirmed what Mr Hardie already knew. This, in my view, explains why he did not read it. The applicant waited for the second respondent's next move. The applicant only took steps when the application to enforce the compliance order was served.

[21] I reject the submission that Mr Hardie was misled by Mr Reddy for the reason that he had been informed on 16 March of the results of the application. It was for Mr Hardie to read the document served on him as human resources manager. Another problem with the explanation is that Mr Hardie did not consider it necessary to send the document to the attorneys acting for the applicant and the attorneys simply accepted that the document served was a compliance order. If Mr Hardie did not read the document, as he has alleged, he neglected his duties as a human resources manager. The fact that Mr Reddy did not explain the document when it was served cannot be accepted for the reason that it is not the applicant's case that he did not understand the document. The document was properly served. There is no suggestion that it was in a language that Mr Hardie did not understand.

[22] In the circumstances the explanation cannot be accepted as it is not reasonable. The applicant has failed to satisfy the first requirement of an explanation that is reasonable and acceptable. I find that it is not necessary to look at the prospects of success. (See *Mziya v Putco Ltd* (1999) 2 BLLR 163 (LAC) at page 107, paragraph 11.)

[23] I should mention that before the amendment section 70 of the Basic Conditions of Employment Act limited the ability of the labour inspector to issue a compliance order. The amendment was meant to remove the limitation. The result is that, even if the amount has

been owing for more than 12 months, the compliance order can be issued. The provisions of section 70 before the amendment did not make the claim to prescribe. It only meant that other means of claiming the amount owing had to be followed.

[24] The applicant does not have any vested right in refusing to pay the amount owing. There is no merit in the argument that the amount owing cannot be enforced by means of a compliance order. There is no right of the applicant that has been taken away. Furthermore, the applicant did not at any time suggest that the compliance order was vague. That has only been raised in these papers. I would have expected this to have been raised with Mr Reddy or the second respondent. This was never done by the applicant. The compliance order also complies with the requirements of section 69(2) of the Basic Conditions of Employment Act as it sets out what the Section requires. There is no question of it being vague.

[25] In the light of the fact that there are no prospects of success on appeal, the application for condonation is dismissed with costs, such costs to include the costs of two counsel.

[26] I have indicated that I was asked to consider the application for the review under case number D292/04 in the event of the application for condonation not succeeding. I now deal with the application for the review of the decision of the

second respondent. What follows below therefore is my decision with regard to the review application under case No D292/04.

The review application

[27] The respondents have raised a point *in limine* and submitted that the application for a review has been brought in contravention of section 7(2)(a) of the Promotion of Administrative Justice Act No 3 of 2000. The basis for this point is that the review was brought when the internal process had not been exhausted. This section provides that:

"7(2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted."

Section 7(c) provides that:

"A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interests of justice."

[28] The remedy provided by the Basic Conditions of

Employment Act in circumstances where the exemption or variation has been refused is an appeal. (Section 72(1) of the BCEA)

[29] Mr *van Niekerk*, for the applicant, submitted that section 7(2)(a) is not a bar to a review and submitted that the application for review was brought when there was an attack on an application for condonation.

[30] I reject the submission made on behalf of the applicant for the reasons that follow. The applicant's submission is that as a result of the attack on condonation it was necessary to apply for a review. The fact is that the review application has been brought while the appeal is pending, there being no decision on the appeal. The fact that there was an attack on condonation does not mean that the applicant had exhausted the internal processes. The internal processes are only exhausted once there is a decision on the appeal.

[31] I do not accept the submission that section 7(2)(a) is not a bar to a review. If the statute provides for an appeal as an internal remedy, a review cannot be brought simultaneously with the appeal, as the applicant has done in the present matter. The applicant has not applied for an exemption in terms of section 7(c) on the basis that the internal remedies have been exhausted as a result of the application for the appeal.

[32] For the applicant to succeed on the exemption a

substantive application setting out the exceptional circumstances should have been made. In my view, as the statute provides for the appeal the applicant cannot review what is subject to the appeal. As I have refused the condonation application the remedy available to the applicant is an appeal to the Labour Appeal Court.

[33] I agree with Mr *Wallis*, for the first and second respondent, that the point *in limine* should succeed.

[34] In the circumstances, the point *in limine* is upheld. The application for a review is dismissed. The applicant is ordered to pay the first and second respondents' costs, such costs to include the costs of two counsel.

[35] In conclusion therefore the following order is made in respect of matter:

(a) The application for condonation is dismissed.

(b) The application for the review is dismissed.

(c) The applicant is ordered pay the 1st and 2nd

Respondent's costs. Such costs to include costs of two counsel.

Ngcamu AJ