IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

LABOUR COURT

Not reportable

Case no: **C169/2021**

In the matter between:

ASHLEY PEDRO Applicant

And

DEPARTMENT OF CORRECTIONAL SERVICES First Respondent

GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL Second Respondent

J BUITENDAG N.O Third Respondent

Date of Hearing: 26 June 2024

Date of Judgment: 18 December 2024

JUDGMENT

CASSELLS AJ

Introduction

[1] The Applicant seeks an order on an unopposed basis for various relief, summarised as follows:

1. Condonation for the late filing of his application and non-compliance with the rules of the Labour Court;

2. The Second Respondent be ordered to enrol the Applicant's unfair labour dispute for arbitration *de novo* before a commissioner other than the Third Respondent within 10 (ten) days from the date of this order;

3. *Alternatively*, the Second Respondent be ordered to render its ruling regarding the necessity of condonation as per the directive issued by the Third Respondent under the auspices of Second Respondent dated 21 August 2023 within 5 (five) days of this order;

4. That, in case the Second Respondent persistently fails to adhere to its obligations and the Labour Court orders, the Applicant be granted leave to approach the court on an urgent basis, with supplementary papers if required, for an order declaring the current secretary of the Second Respondent in wilful contempt, liable to imprisonment or a fine of R1 000 000.00 (one million rand);

5. The Second Respondent be ordered to pay the costs of the Applicant's application on a scale as between attorney and own client, including the costs of counsel.

[2] The Applicant's attorneys of record have filed a service affidavit confirming

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service of the Applicant's application in terms of Rule 11 of this Court's Rules on the First Respondent, the Second Respondent and the Third Respondent. The service affidavit confirms service on the Respondents, although the deponent to the service affidavit records that she was unable to obtain telephonic confirmation of service of the application on the First Respondent. As the Rule 11 application is an interlocutory application brought under the same case number as previous proceedings between the parties, the manner of service on the Respondents is accepted as substantial compliance with the provisions of Rule 4 relating to service in terms of the Rules of this Court applicable at the time of the hearing of this application.

Background

[3] The background to the Applicant's application is that the Third Respondent, under the auspices of the Second Respondent, issued a joinder ruling dated 21 August 2023 under case number GPBC419/2023 (hereafter referred to as "the Ruling") in terms whereof a third party was joined as a party to an arbitration dispute that had been scheduled to be heard before the Third Respondent on 18 August 2023. In addition to the joinder of the third party, the Ruling also contained a directive relating to the service of relevant documents on the third party. More importantly, for purposes of the present application, the Ruling also recorded a concern in respect of the possibility that a condonation application was required in the proceedings before the Second Respondent. The Ruling records as follows:

"*9. A further preliminary issue of condonation was identified. In this regard, the parties agreed to make written submissions, for and against issue of condonation. The following timeline was agreed upon.*

10. The Applicant must serve and file written submissions by no later than Monday, 18 September 2023.

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11. The Respondent (both the First and Second Respondent) must serve and file written submissions on or before Monday, 09 October 2023.

12. The Applicant may to the extent necessary, serve and file a final replication, which must be done on or before Monday, 16 October 2023."

[4] Although the paragraphs recorded above clearly constitute a ruling directing the parties in respect of the further conduct of the proceedings, these paragraphs are not recorded at the conclusion of the Ruling but are rather contained in the body of the Ruling under the header "Discussion". Notwithstanding the unusual structure of the Ruling, its substantive content is unambiguous.

[5] The annexures to the affidavit filed in support of the Rule 11 application indicate that although the First Respondent did not file papers in respect of the issue of condonation (annexure CH5), it did make written submissions in terms of the Third Respondent's directive (annexure CH 6). The annexures referred to also indicate that by 23 November 2023 the relevant documents had been submitted to the Second Respondent for a ruling to be issued on the issue of condonation.

[6] The Rule 11 application records that over the following two months, the Applicant's legal representatives submitted emails to the Second Respondent at regular intervals seeking a ruling on the condonation issue and on 29 January 2024, the Second Respondent submitted an email to the Applicant's attorneys recording that "*your enquiry is receiving attention and we will urgently update you regarding the status of this matter. We apologise for this inconvenience*". Notwithstanding this undertaking by the Second Respondent, the founding affidavit records that the Second Respondent did not communicate further with the Applicant's attorneys and the Second Respondent's lack of action prompted the Applicant to launch the Rule 11 application.

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Assessment

[7] This Court is empowered in terms of section 158 (1) (a) (iii) of the Labour Relations Act, 1995 as amended ("the LRA") to make an order directing the performance of any particular act that will remedy a wrong and give effect to the primary objects of the LRA. The relief that the Applicant seeks in these proceedings is contemplated by this provision in that the unopposed application clearly indicates that the Applicant's rights are being frustrated by the failure of the Second Respondent to address the outstanding issue relating to the necessity or otherwise of an application for condonation in respect of the Applicant's referral of his unfair labour practice dispute to the Second Respondent for determination.

[8] In respect of the relief that the Applicant seeks in these proceedings as set out in the Notice of Motion, the proposed order sought does require significant adaptation:

1. Prayer 1 in the Notice of Motion is not applicable to these proceedings and its inclusion in the Notice of Motion is clearly erroneous;

2. The relief sought in respect of prayer 2 is not competent as the issue whether condonation is required in respect of the Applicant's referral and the outcome of an application for condonation, if any, must first be determined before the Second Respondent may enrol the unfair labour practice dispute for arbitration;

3. The five day time period proposed in the alternative relief sought in terms of prayer 3 of the Notice of Motion for the Second Respondent to render its ruling regarding the necessity of condonation, as per Commissioner R Slamang's directive dated 21 August 2023, is both unreasonable and impractical;

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4. The Court cannot contemplate prayer 4 at this stage in the proceedings;

5. The scale of legal costs that the Applicant seeks against the Second Respondent has not been substantiated and the Applicant was also not represented by counsel.

[9] Notwithstanding the concerns raised regarding the nature of the costs order sought, the pleadings indicate that, on the facts presented, the Second Respondent has failed to render the dispute resolution services that it is accredited to perform in terms of the LRA to the Applicant in this matter, even to the extent of disregarding its own undertaking to urgently address the matter. This conduct is wholly unacceptable, and the Second Respondent has failed to utilize the opportunity in these proceedings to explain its conduct or to take steps to rectify its failings.

[10] The Second Respondent's abject failure to perform its functions, as required and undertaken, materially undermines the purpose of section 1 (d) (iv) of the LRA to promote the effective resolution of labour disputes and, in the circumstances, its conduct justifies the imposition of a costs order against it in accordance with the principles of equity and the application of the legal principles set out in section 162 of the LRA and *Booi v Amathole District Municipality & others*[1] where the Constitutional Court stated that, although costs do not ordinarily follow the cause in labour disputes, the principle may be departed from where fairness demands it and there is a basis for such an order.[2]

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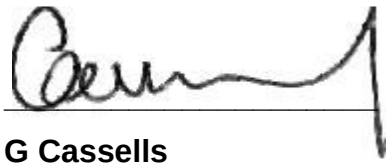
[1] (2022) 43 ILJ 91 (CC) at para [60]
[2] See also: Union for Police Security & Corrections Organisation v SA Custodial Management (Pty) Ltd & others (2021) 42 ILJ 2371 (CC) at paras [33] to [35]

[8] The following order is made:

Order:

1. The Second Respondent is ordered to render a ruling regarding the necessity of condonation as per Commissioner R Slamang's directive dated 21 August 2023 by no later than 31 January 2025.

2. The Second Respondent is ordered to pay the costs of this application.



G Cassells

Acting Judge of the Labour Court of South Africa

For the Applicant: C Hendricks
Instructed by: Marais Muller Hendricks Inc.

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