

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

15/6/17



CASE NO.: 96764/2015

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<p>15/06/2017</p> <p><i>[Signature]</i></p>	

In the matter between:

ADV G D LUBBE, N.O.

APPLICANT

and

THE COMPENSATION COMMISSIONER

FIRST RESPONDENT

THE DIRECTOR-GENERAL FOR THE
DEPARTMENT OF LABOUR

SECOND RESPONDENT

THE MINISTER OF LABOUR

THIRD RESPONDENT

TRANSNET

FOURTH RESPONDENT

JUDGMENT

VAN DER WESTHUIZEN, A J

- [1] This matter has some unfortunate history. The employee sustained severe injuries whilst on duty some 40 years ago and his claim against the Compensation Commissioner has not progressed much during that period.
- [2] One of the applications now before court relates to the employee's application for increased compensation. The application for increased compensation was submitted to the Compensation Commissioner on 19 September 2014. Receipt of the application for increased compensation was acknowledged on 4 November 2014. In the said letter it was confirmed that the matter was receiving due attention.
- [3] During December 2015, the appointed *curator ad litem* for the employee, instituted proceedings for the review of the Compensation Commissioner's failure to take a decision on the employee's application for increased compensation.
- [4] That application is opposed. However, the first respondent in that application failed to file its answering affidavit timeously. On 17 March 2016, the first respondent was granted leave to file its answering affidavit within fifteen days from the granting of the order. It is common cause that the fifteen days expired on 12 April 2016. The first respondent only served and filed its answering affidavit on 19 April 2016. That necessitated the present application for an order condoning the late filing of that answering affidavit. The application for condoning the late filing of the answering affidavit is opposed.
- [5] The premise upon which the present application is brought, can be termed no better than a comedy of errors. It harbours on ineptness on the part of the first applicant in this application.
- [6] For ease of reference I shall refer to the parties as cited in the main application.

- [7] The following is to be gleaned from the founding affidavit of the first respondent in the application for condoning the late filing of the answering affidavit.
- (a) The first respondent failed to file its answering affidavit by the close of business on 12 April 2016;
 - (b) On 13 April 2016, a "soft copy" of the answering affidavit was supplied to the applicant. That affidavit was unsigned and not commissioned;
 - (c) It was stated in an e-mail accompanying the "soft copy" of the proposed answering affidavit that the duly signed and commissioned answering affidavit will be served shortly. That was only done on 19 April 2016;
 - (d) The applicant addressed a letter to the first respondent's attorneys indicating that due to the non-compliance with the court order of 17 March 2016, the first respondent was obliged to file an application for condoning the late filing of the answering affidavit.
- [8] The reasons advanced for the non-compliance of the order of 17 March 2016 are the following.
- (a) A diligent search was undertaken in the first respondent's office to gather the required information. This search was completed and a consultation was held on 6 April 2016 for the purpose of preparing an answering affidavit. Details of at what time on 6 April 2016 the consultation was held and with whom are not supplied;
 - (b) By 8 April 2016 the affidavit was not yet finalised. On that date, the deponent to the founding affidavit in this matter was

instructed by her superiors to participate in a disciplinary hearing in Cape Town on 11 April 2016 in the stead of a colleague. No details were supplied why the particular colleague was no longer in a position to attend at the disciplinary hearing, or why the specific deponent was to replace her colleague and not any other colleague in the Pretoria office or for that matter in the Cape Town office;

- (c) On the deponent's version, she was only to depart for Cape Town on Sunday, 10 April 2016. No explanation is provided whether the person drafting the affidavit was advised of the situation. It appears that the deponent merely left for Cape Town without advising anyone of her non-availability to attend to the matter any longer;
- (d) It is stated in the founding affidavit in this application that the first respondent's attorney of record sent the required answering affidavit to the deponent's work e-mail address on 11 April 2016. In support of that statement a copy of the said e-mail is attached to the founding affidavit. I shall deal with that e-mail later;
- (e) The deponent states that she was not in her office in Pretoria on 11 April 2016 and accordingly could not attend thereto. During the lunch adjournment of the disciplinary hearing on 11 April 2016, the deponent happened to switch her cell phone on and noticed that the first respondent's attorney had attempted to contact her telephonically. On calling the attorney back, presumably on 11 April 2016, the deponent learnt about the settled answering affidavit and the required commissioning thereof;
- (f) The deponent indicated to the first respondent's attorney that she is no longer in a position to retrieve the settled affidavit and to have it commissioned before 12 April 2016, as she was in

Cape Town. The attorney was advised that another deponent would have to be found. In that regard, it appears that the deponent suggested her immediate superior, the Director of Legal Services;

- (g) The deponent further states that her immediate superior was only in a position to familiarise himself of the facts on 12 April 2016. It is not explained why that could not have been done, or at least commenced, on 11 April 2016. Neither is it explained why a further consultation was to be held and why the affidavit required to be re-settled. One would not have expected any change in the facts;
 - (f) It appears that the required affidavit was only re-settled on the morning of 13 April 2016 whereafter a "soft copy" was made available to the applicant. As recorded above, the signed and commissioned answering affidavit was only served and filed on 19 April 2016. No explanation is forthcoming why it was only filed on 19 April 2016, a week later;
 - (g) It is submitted by the deponent to the founding affidavit in this application that the first respondent, and not the applicant, would suffer prejudice should this application be unsuccessful. In that regard it is submitted that an unsigned and non- commissioned copy of the answering affidavit had been supplied but one day late. The filing on 19 April 2016 was only a mere formality. The logic thereof defies reason.
- [9] There is also no confirmatory affidavit from the person who eventually deposed to the answering affidavit in which the glaring aforementioned omissions could have been supplied.
- [10] Two e-mails are relied upon to substantiate the allegations relating to the circumstances of 11 April 2016. The first e-mail relied upon is an e-

mail from one Mantlheng Mphahlele to Constance Buso. The latter is the attorney at the State Attorney dealing with the matter. That e-mail was sent on 11 April 2016 at 5:08 PM. A copy of the settled affidavit was attached to that e-mail.

- [11] Clearly on the face of that e-mail, it could not have been sent to the intended deponent for consideration and commissioning on the morning of 11 April 2016. The statements on oath to that affect cannot be correct.
- [12] Furthermore, when considering the second e-mail relied upon, it clarifies and supports the fact that the e-mail could not have been sent to the initial deponent on 11 April 2016. The second e-mail clearly, on the face of it, records that a copy of the draft affidavit was only sent to the intended deponent on 12 April 2016 at 10:05. The intended deponent was requested to return it duly signed and commissioned to the first respondent's attorney of record for service and filing. Similarly, the statements on oath, that all happened on 11 April 2016, cannot be true.
- [13] Furthermore and in view of the foregoing, the statements relating to the substitute deponent appear equally questionable. Particularly where a confirmatory affidavit is absent.
- [14] For good reason a duly signed and commissioned affidavit is to be served and filed. Although a half-baked, unsigned and non-commissioned copy may have some curtesy element, it by no means constitutes substantial compliance with the terms of a court order in that regard.
- [15] The *bona defence* that is claimed is an apparent reliance on prescription. There is no merit in that regard. In terms of a court order dated 2011, the first respondent has been ordered to pay 100% of the plaintiff's claim. All that remains is a determination of the quantum

thereof. The issue of the first respondent's liability has been decided. The issue relating to quantum can therefor not be the subject of prescription. In terms of the Prescription Act a court order only lapses after a period of 30 years if not complied with.

- [16] It is trite that a party seeking an order condoning its omission to adhere to a prescribed time period, whether in terms of the rule or a court order, is required to show good cause.¹ Such good cause has been held to include, and not limited to, an explanation of the delay, that the application is *bona fide*, and that the applicant has a *bona fide* defence in order to assess his conduct.²
- [17] In my view the application seeking the condoning of the late filing of the answering affidavit is far inadequate in explaining the lateness and the alleged defence, for what follows.
- [18] Applying the aforesaid principles to the present application, the following presents.
- (a) The delay is not explained. The facts and supporting documents do not measure up. The contrary appears, namely a version is presented to court that is highly questionable, if not downright untrue;
 - (b) The application can hardly be said to be *bona fide* in the absence of an explanation for the delay;
 - (c) No defence has been raised, other than that of prescription. Consequently, the first respondent has not submitted a *bona fide* defence.

¹ *Du Plooy v Anwes Motors (Edms) Bpk* 1984(4) SA 212 (O)

² *Silber v Ozen Wholesalers (Pty) Ltd* 1954(2) SA 345 (A)

- [19] It follows that the late filing of the answering affidavit cannot be condoned. The application for an order condoning the late filing of the answering affidavit stands to be refused.
- [20] There is a second application before court, the main application. In that application, counsel for the applicant limits the relief sought in the main application to an order in terms whereof the respondents are ordered to pay the increased compensation in respect of the employee's injuries suffered whilst on duty and that the respondents are ordered to pay the costs jointly and severally, the one paying the other to be absolved.
- [21] In the absence of an opposing and/or answering affidavit in the application for increased compensation, the allegations on the part of the applicant stand uncontested. I am satisfied that the applicant has made a case for increased compensation.
- [22] There remains the issue of the scale of costs to be paid by the respondents in respect of the main application for increased compensation. The matter has dragged on for close on 40 years. The first respondent has not advanced any reason why the matter has dragged on for an extensive period. Various steps were taken on the employee's behalf to finalise the matter. In the application for an order condoning the late filing of the required answering affidavit, it is clear that the respondents do not have any intention to have the matter finalised in the near future. I have dealt with that aspect above. In my view, it follows that the respondents are to be mulct with a punitive cost order.
- [23] It follows that in the absence of a defence, the main application is to succeed in respect of the limited relief.

I grant the following order.

- (a) The application for an order condoning the late filing of the answering affidavit in the main application is refused;
- (b) The first, second, and third respondents are ordered jointly and severally to pay the costs of the application for condoning the late filing of the answering affidavit in the main application;
- (c) The first, second and third respondents are hereby ordered to pay the increased compensation as a result of the injuries suffered by the employee Phillipus Johannes Rudolf Heymans van Sittert, whilst on duty, the one paying the other to be absolved;
- (d) The first, second, and third respondents are ordered jointly and severally to pay the costs of the main application, for increased compensation, on the scale as between attorney and client.


C J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT

On behalf of Applicant: BP Geach SC
Instructed by: Nell, Kotzé & Van Dyk Attorneys

On behalf of Respondent: S S Maakane SC
M H Mphahlele
Instructed by: The State Attorney