

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

**CASE NO. J1353/99
J3586/98**

In the matter between:

PAUL MASEKO AND ANOTHER

Applicants

and

M-TEL (PTY) LTD

Respondent

JUDGMENT

MARCUS A J:

[1] In this matter the two applicants originally sought an order in terms of section 158(1)(c) of the Labour Relations Act 66 of 1995 ("the Act") in the following terms:

- "1. That the arbitration award dated 20 September 1998 and issued by Commissioner Edwin Maepe of the Commission for Conciliation, Mediation and Arbitration ("CCMA") attached hereto marked Annexure A, be made an order of court in terms of section 158(1)(c) of the Act;*
- 2. that the costs of this application be paid by the respondent; and*
- 3. further and/or alternative relief."*

For reasons which will become apparent this relief has become academic.

[2] The first applicant states in his affidavit that the respondent has failed or refused to comply with the terms of the arbitration award. Instead the respondent has instituted review proceedings in order to have the arbitration award set aside.

[3] The applicants are represented by the Wits Law Clinic who served a notice of intention to oppose the application for review and thereafter answering affidavits, the latter being served on the respondent on 2 December 1998. The first applicant then describes the steps taken to have the review set down for hearing. It is appropriate that I set out precisely what is said in the relevant paragraphs of the founding affidavit:

"7. *Unfortunately the respondent did not indicate a case number in its review application and my attorneys of record filed a notice of intention to oppose and answering affidavits at the Labour Court on 8 December 1998 after being informed by the CCMA of the Labour Court case number.*

8. *On 18 January 1999 the Wits Law Clinic sent a fax to the Registrar of the Labour Court requesting him to set the matter down on the opposed roll. A copy of this fax is attached hereto marked Annexure W1.*

9. *On 4 February 1999 the Wits Law Clinic once again wrote to the Registrar of the Labour Court enquiring when the matter would be set down on the opposed roll. A copy of this letter is attached marked Annexure W2.*

10. *The second applicant and myself then approached the Registrar of the Labour Court personally to enquire why the review application was not being set down. We were informed by the Registrar that the matter could not be set down as the only party who could set it down was the applicant in those proceedings, namely the respondent in these proceedings. We then immediately telephoned the Wits Law Clinic and informed them that the Registrar had indicated that it was left to the respondent M-Tel (Pty) Ltd to set the matter down.*

11. *The Wits Law Clinic then advised the second applicant and myself that the law allowed a respondent to set a matter down for hearing on the opposed roll if the applicant failed to do so.*

12. *The second applicant and myself once again approached the Registrar of the Labour Court indicating to him that we had been advised by our legal representatives that we as the respondents in the review application could request that the matter be set down for hearing on the opposed roll if the*

applicant failed to do so.

13. *We were then informed by the Registrar that our attorneys of record should seek direction from a Judge of the Labour Court.*

14. *The second applicant and myself informed the Wits Law Clinic of this fact.*

15. *The Wits Law Clinic then wrote to the Judge President of the Labour Court on 26 February 1999 informing him of the situation and requesting him to inform them of the appropriate steps to be taken in order for the matter to be set down (a copy of this letter is attached hereto marked Annexure W3).*

16. *On 16 March 1999 the Wits Law Clinic again wrote to the Judge President of the Labour Court requesting him to inform us of the appropriate steps that need to be taken in order for the matter to be heard in the Labour Court (a copy of this letter is attached hereto marked Annexure W4).*

17. *On 26 March 1999 the Wits Law Clinic once again wrote to the Judge President of the Labour Court requesting him to inform us of the appropriate steps that need to be taken in order for the matter to be heard in the Labour Court (a copy of this letter is attached hereto marked Annexure W5).*

18. *On 12 April 1999 Mr Alli of the Wits Law Clinic telephoned the Labour Court requesting to speak to the Judge President's office. A person called Dudu informed him that she is the assistant to the Judge President and that it was quite possible that the Judge President did not receive the correspondence from the Wits Law Clinic.*

19. *On the same day, 12 April 1999, the Wits Law Clinic faxed through to the Judge President's office the three letters which are marked W2, W3 and W4.*

20. *I have been informed by the Wits Law Clinic that to date they have not received a reply to any of the letters referred to herein as W1, W2, W3, W4 and W5.*

21. *The respondent has to date also failed to set the matter down for hearing on the opposed roll."*

[4] I should interpose at this stage to state that it now appears that the review application has indeed been set down for hearing on 29 July 1999. In order to make the founding affidavit comprehensible, it is also appropriate that I refer to and quote from the letters which were annexed to the founding affidavit.

[5] Annexure W1 is a letter written to the Labour Court and marked for the attention of the Registrar. It states:

"We refer to the above matter and request that the matter be set down on the opposed roll.

We thank you in anticipation."

Annexure W2 is also addressed to the labour Court and marked for the attention of the Registrar. It states the following:

"We refer to the above matter and to our fax to you dated 18 January 1999 and confirm that we have not received any response thereto. We therefore wish to enquire when the matter will be set down on the opposed roll.

We thank you in anticipation."

Annexure W3 is the letter dated 28 February 1999 and is addressed to the Judge President of the Labour Court. This letter states:

"We refer to the above matter and to our client's conversation with the Registrar, Mr Phophi who advised our client that they needed to obtain instructions from a Judge of the Labour Court regarding the appropriate steps that needed to be followed in their case. Our clients' obtained an arbitration award wherein the CCMA held that they should be reinstated and that compensation should be paid to both clients. M-Tel subsequently launched review proceedings. We accordingly served and filed our client's notice of intention to oppose as well as their answering affidavit on 2 December 1998. The originals were filed in court on 8 December 1998. We wrote to the Registrar on 18 January 1999 requesting that the matter be set down on the opposed roll. On 4 February 1999

we once again wrote to the Registrar requesting that the matter be set down on the opposed roll. Despite all our efforts we have not received any response from the Labour Court. Our clients have been informed that the applicant, M-Tel, has not made any efforts to have the matter set down. We note further that almost two months have elapsed since the close of pleadings. Kindly inform us of the appropriate steps at your earliest convenience."

Annexure W4, which is dated 16 March 1999, is addressed to the Judge President and it states the following:

"We refer to the above matter and to our letter to you dated 26 February 1999, a copy of which is enclosed for your convenience. Kindly inform us of the appropriate steps that our clients need to take in order for the matter to be heard in the Labour Court.

We await to hear from your in this regard."

Annexure W5, which is dated 26 March 1999, and is addressed to the Judge President, states the following:

"We refer to the above matter and to our letters to you dated 26 February 1999 and 16 March 1999 and note that we have not had a response thereto. Kindly inform us of the appropriate steps that our clients need to take in order for their matter to be held in the Labour Court.

Kindly grant this matter your urgent attention."

Also on 12 April 1999 there is a fax marked for the attention of Dudu in the Judge President's office and the message on the fax cover sheet states:

"Herewith the correspondence to which we have not received a reply from the Judge President's office. Kindly attend to bring them to the Judge's attention.

We thank you in anticipation."

[6] This affidavit discloses an extraordinary state of affairs which cries out for an explanation. I do not know if there is an explanation and do not wish to be understood as suggesting that there is none. Nevertheless, the Registrar's stance in refusing to set down the review application is, in my view, misconceived. This is a matter which at the very least is regulated by Rule 7 of the Rules of the

Labour Court which stipulates the time periods for the filing of answering and replying affidavits.

Rule 7(6) states:

"6(a) The Registrar must allocate a date for the hearing of the application once a replying affidavit is delivered or once the time limit for delivering a replying affidavit has lapsed, whichever occurs first.

(b) The Registrar must notify the parties of the date, time and place for the hearing of the application."

Rule 7A, which was inserted sometime later, specifically governs the procedure for reviews and is akin to Rule 53 of the Rules of the High Court. It seems to me that the rule clearly envisages that an application can be set down at the instance of a respondent once the time limit for delivering a replying affidavit has lapsed. In principle there can be no difference where the review is brought under Rule 7A and not Rule 7. Were it otherwise, an applicant for review could effectively hold the respondent to ransom. Without commenting on the merits of the review in the present matter, the failure to set the matter down has frustrated the applicants both in their endeavour to have the arbitration award made an order of court and in their attempts to oppose the review.

[7] The correspondence to the Registrar on behalf of the applicants was designed to obviate these unfortunate consequences. As I have indicated, the matter has now been brought to fruition by reason of the fact that the matter has been set down. I have nevertheless considered it appropriate to make these comments in order that situations of this sort do not again arise.

G. J. MARCUS

ACTING JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

DATE OF HEARING: 1 JUNE 1999

DATE OF JUDGMENT: 1 JUNE 1999

FOR THE APPLICANT: Adv Wiblin

Instructed by the Wits Law Clinic