IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR770/06

In the matter between:

MINISTER OF CORRECTIONAL SERVICES	Applicant
and GENERAL PUBLIC SERVICES SECTORAL BARGAINING COUNCIL	1st Respondent
COMMISSIONER P KIRSTEIN N.O.	2nd Respondent
PUBLIC SERVICE ASSOCIATION obo AC DU PREEZ	3rd Respondent

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JUDGMENT

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FRANCIS J

1. This is an application to review and set aside an arbitration award made by the second respondent (the commissioner), in terms of which he had found that the third respondent's member, AC Du Preez was entitled to be paid a special danger allowance in an amount of R3 900.00.

2. The application was opposed by the third respondent.

3. The applicant had received a copy of the award on 12 January 2006. The review application was filed on 5 April 2006. It should have been filed on or before 22 February 2006. It was therefore filed 45 days late.

4. The applicant's notice of motion did not contain a prayer for condonation. However, in

the founding affidavit, it has dealt with the delay and prospects of success. Mr Pio who appeared for the applicant, sought from the bar an order to amend the notice of motion to include a prayer for condonation. The application to amend the notice of motion to include a prayer for condonation is granted. The application for condonation was not opposed by the third respondent.

5. The applicant's legal administration officer deposed to the founding affidavit. The reason given for the delay is that after the award was received on 12 January 2006 by the applicant, an instruction to investigate the possibility of bringing a review application was transmitted per telephonic fax transmission to the offices of the state attorney on 30 January 2006. The instruction was received by an attorney at the state attorney's office on 2 February 2006. The attorney attempted unsuccessfully to contact the legal administration officer of the applicant on 3rd and 6th February 2006. She was on both these dates busy representing the applicant in other arbitration hearings and could not be reached telephonically. The attorney had also unsuccessfully attempted to transmit a letter to her by facsimile on 9, 10 and 16 February 2006 respectively. On 16 February 2006 she received a telephone call from the attorney who informed her that he was unable to get through on the fax number provided to him in the instruction letter. She then gave him an alternative fax number and he undertook to fax the letter to that number. After she did not receive the letter from the attorney she telephoned his office to enquire about it on several occasions but was not able to make contact with him. She was able to contact him on 20 February 2006. He informed her that he could also not get through on the alternative fax number that she had provided to him. She then provided a further alternative fax number to him. The attorney transmitted the letter on 21 February 2006. She replied to the letter on the same day and sent the attorney the relevant documentation and arbitration award as requested by him.

6. The applicant stated that in terms of the internal procedure of the state attorney's office, authority must be obtained before counsel could be instructed. He was only able to obtain this authority from the deputy state attorney on 24 February 2006. The brief instructing counsel to advise on the feasibility of bringing a review application was delivered at his chambers on 28 February 2006. On 10 March 2006 she was advised by the attorney that counsel informed him that he could not furnish an informed opinion without a consultation with officials of the applicant to obtain further instructions. As a result it was agreed that a consultation would be held on 14 March 2006. However, on 13 March 2006 she was telephonically informed by the attorney that counsel was unexpectedly tied up in a matter that was to proceed on 14 March 2006 and that the consultation would have to be postponed to 17 March 2006. During the consultation on 17 March 2006, counsel informed that two matters, similar to the matters at hand, are currently pending in this Court. Counsel then requested that the documents pertaining to those matter be provided to him before a final decision to bring a review application was made. On 20 March 2006 it was decided to proceed with this review application, after documentation pertaining to the other matters was provided to counsel. The applicant apologised for any inconvenience the delay may have caused to this Court or any of the respondents and that it was not wilful and did not cause prejudice to any of the respondents.

7. The applicant contended that it has excellent prospects of success. The applicant contended that it will be noted from the award that the dispute related to the interpretation and application of resolution 78/96 of a collective agreement concluded in the chamber of the Public Service Bargaining Council for the Department of Correctional Services. Resolution 78/96 regulates when members are entitled to receive a special danger allowance. It provides as follows:

"All parties agree that the special danger allowance will be payable with effect from 1

July 1995 to

i) all personnel of the disciplinary occupational class who are physically involved with the safe custody, detention, training and rehabilitation of persons classified as maximum security and prisoners....".

8. Mr and Mrs du Preez testified on behalf of the third respondent. Mr Du Preez is the spouse of Mrs du Preez and employed at Zonderwater Medium A Correctional Centre. Mr du Preez testified on the classification process of a maximum security prisoner and on the strength of the period through which they are kept there.

9. Two deputy directors, namely Messrs D S van der Merwe and M Mthimunye testified on behalf of the applicant. Van der Merwe testified that the third respondent's contact with maximum security prisoners was only "accidental" and that she was never exposed to any special dangers. As a consequence it would not make any sense to pay this danger allowance to her. This testimony was corroborated by Mthimunye. The commissioner said in his award that:
"The key to interpretation of a collective agreement is in the first instance to ascertain the intention of the parties from the words which they use to express their agreement."
It was contended that although the evidence presented to the commissioner showed that the third respondent was not exposed to any special danger, this was not properly taken into account by the commissioner when making his award. In making the award, the commissioner committed misconduct in relation to his duties as a commissioner; and/or committed a gross irregularity in the conduct of the arbitration proceedings and/or exceeded his powers and his award should be reviewed and set aside.

10. It was contended by the applicant that the commissioner had ordered the applicant to pay compensation to the third respondent in an amount of R3 900.00. The commissioner was

not competent to award compensation in a dispute pertaining to the interpretation of an application of a collective agreement. In doing so, the commissioner exceeded his powers and as a consequence the award should be reviewed and set aside.

11. It is clear from the condonation application that the applicant was served with a copy of the award on 12 January 2006 and that the review application was only filed with this Court on 5 April 2006. As stated above it is 45 days late. The period is lengthy.

12. It is apparent from the explanation given for the delay that there is no explanation for some of the periods. First there is no explanation given about why the applicant waited up to 30 January 2006 to instruct the state attorney to investigate the possibility of a review application. An explanation is then given about what happened between 2 February and 21 February 2008 when the attorney was able to send a letter to the legal administrator who responded on the same day. This was at the end of the six-week period. There is simply no explanation given why after authorisation was obtained to brief counsel on 24 February 2006, he was only briefed on 28 February 2006. By this time the applicant knew that the six-week period had expired. There is no explanation given about what happened between 28 February and 10 March 2006 after counsel had said to the attorney that a consultation meeting should be arranged with the applicant. There is no explanation why the consultation could not be arranged for the 10 or 11 March 2006 and why only for 14 March 2006. The consultation meeting then had to be postponed to 17 March 2006 because counsel was unexpectedly tied up in a matter that was to proceed on 14 March 2006 and that the consultation would have to be postponed to 17 March 2006. There were clearly some delays on the part of the applicant's counsel. No explanation was given why another counsel could not be briefed. There are surely other labour law counsels available in Pretoria. There is further no explanation given why, after it was decided on 20 March 2006 to proceed with the review application, that

it was only filed with this Court on 5 April 2006.

13. The applicant counsel informed this Court from the bar that there were certain internal difficulties at the state attorney's office in briefing counsel. Those internal difficulties were not spelt out in the application. Even if there were, these would only have been for the period 21 and 24 February 2006 when the attorney obtained authorisation to brief counsel. There was simply no sense of urgency on the part of counsel, the applicant and its attorney. They paid more attention to other matters and adopted the approach that they would simply apply for condonation on some flimsy basis and that this Court will grant condonation.

14. I am satisfied that the applicant has failed to explain the delay adequately as stated above. The explanation why this matter could not be dealt with the necessary urgency is clearly not adequate. It was not good enough only to leave messages and not follow this up seriously. In some instances there is no explanation and in others the explanation is weak. It then becomes unnecessary to consider the question of prospects of success. In this regard see *Moila v Shai N.O. and Others* (2007) 28 ILJ 1028 (LAC); *Mgobhozi v Naidoo NO & Others* (2006) 27 ILJ 786 (LAC) at paragraph 34; *A Hardrodt (SA) (Pty) Ltd v Behardien & Others* (2002) 23 ILJ 1229 (LAC) at 1233; *LIBRAPAC CC V Fedcraw & Others* (1999 (20) ILJ 1510 (LAC) at paragraph 12.

15. The application for condonation stands to be dismissed. It follows that the review application stands to be dismissed.

16. There is no reason why costs should not follow the result.

17. In the circumstances I make the following order:

17.1 The condonation and review application is dismissed with costs.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT:	P PIO INSTRUCTED BY STATE ATTORNEY
FOR THIRD RESPONDENT:	F J VAN DER MERWE
DATE OF HEARING:	16 SEPTEMBER 2008
DATE OF JUDGMENT:	19 SEPTEMBER 2008