IN THE HIGH COURT OF THE REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG, PRETORIA

Case number 57110/2011

20/8/2012

In the matter of

THE DIRECTOR GENERAL OF THE DEPARTMENT OF LABOUR First Applicant

THE COMPENSATION COMMISSIONER Second Applicant

And

THE WORKFORCE GROUP (PTY) (LTD) Respondent

17/08/2012

JUDGMENT

BAM AJ

1. The first applicant is the designated official to administer the provisions contained in the Compensation for Occupational Injuries and Diseases Act No 130 of 1993 ("COIDA"). The second applicant is an officer appointed in terms of section 2 of COIDA to assist the first applicant in the performance of his functions.

2. The respondent, commonly known as a labour broker, conducts the business of providing temporary employment services. In its capacity as an employer, the respondent is registered with the second applicant in accordance with the terms of section 80(1) of COIDA.

3. In accordance with the provisions of section 83(1) of COIDA the respondent is obliged to pay, as an obligatory contribution to the compensation fund, an amount in accordance with a tariff of assessment by the first respondent.

4. On 11 October 2011 a default judgment was granted in favor of the respondent against the applicants (respondents 1 and 2) and three others, with the effect that:
   (a) (Prayer 2) the applicants (and the other three respondents) had to issue re-assessments to the respondent in accordance with an order of this Court dated 29 November 2010; and
   (b) (Prayer 4) any and all assessments issued by the first and/or second respondents which assessments were based on an increased assessment rate are contrary to and not in compliance with the Court Order dated 29 November 2010.
   (I have not referred to prayer 3 of the order in view of the fact that it was confirmed by counsel for the applicants and the respondents that same has been abandoned by the respondent. It turned on the repayment of certain payments made by the respondent.)

5. Two applications were argued before this Court. The applicants applied for the rescission of the said default judgment and the respondent applied for the review and setting aside of certain assessments made by the applicants. The particulars of the two applications are as follows:

   5.1 First application:

   (The application by the two applicants.)
   1. That the Court Order dated 11 October 2011, under case no 57110/11, be rescinded and/or set aside;
   2. That the respondent pay costs of this application on an attorney and client scale.

   (The application is opposed by the respondent.)

5.2 Second application:

(The counter application by the respondent.)

1. That the applicants' decision taken on 4 August 2011 to increase the rate applicable to the respondent's undertaking by 40% as from 1 March 2007 be reviewed and set aside.
2. That the applicant's assessment dated 27/09/2011 issued in pursuance of the decision taken on 4 August 2011 be reviewed and set aside.
3. That the applicants' assessment dated 30/03/2011 in respect of the 2008 year assessment be reviewed and set aside.
4. That the applicants be ordered to pay the respondent's costs on the attorney-and client scale.

(Both applicants oppose the application.)

6. Pertaining to the first application the following facts are of importance:
   (i) On 4 October 2010 the respondent issued a notice of motion in this Court against the two applicants and three others, seeking an order, on an urgent basis, *inter alia,* to compel the applicants to issue re-assessments to the respondent in accordance with an order of this Court dated 29 November 2010;
   (ii) The application was served, apparently by hand, on the applicants on 5 October 2011. According to the two date stamps on a copy of the notice it appears that the notice was served on the applicants at the offices of the Legal Services of the Department of Labour;
   (iii) In the notice the applicants are notified that, if they intend opposing the application, they had to notify the respondent's attorney of record before 16h00 on Friday, 7 October 2011, and to file their opposing affidavit within 10 days after having filed the notice of their intention to oppose;
   (iv) It is further stated in the notice that if no notice of intention to oppose is filed, that the application will be made on 11 October 2011 at 10h00;
   (v) The applicants failed to file a notice to oppose and no answering papers were filed. The applicants were in default on the day of the hearing of the matter.
   (vi) The relief sought by the respondent was accordingly granted by default by this Court on 11 October 2011.

7. It is trite that the applicants have to advance a good reason for their default and that it has to be shown that they have a *bona fide* defense. I will firstly deal with the question whether the applicants have shown good cause for their default. It is common cause that the issue about the question whether the applicants have a *bona fide* defense is integrated with the issue regarding the merits of the respondent's application, referred to above as the second application.

8. In the founding affidavit of the applicants, deposed to by ms Ella Ntshabela, a director within the finance department of the *Compensation Fund*, it is stated that the applicants were not in willful default. Although it is admitted that the application was served on *the applicants' office* on 5 October 2011, it is averred that the application only reached the second applicant's legal department on 11 October 2011 at around 15h00. It is further stated that the second applicant has a standing agreement with the Sheriff that all legal processes and documents are to be taken to the second applicant's legal services and to be served on an official designated to receive legal documents for the second applicant. It is also stated that the application in question was not served in accordance with the above arrangements with the Sheriff, but that it was instead served on the second applicant's *general registry office*.

9. During argument, I asked mr Tokota SC, appearing for the applicants with mr Mashaba, whether he could address the Court pertaining to the apparent discrepancy in respect of the facts stated in the founding affidavit regarding where the application was served and the indication on the Notice of Motion that the application was served on the Legal Services of the Department of Labour. The service of the application, as indicated above, was conceded by the applicants. It is common cause that the second applicant is an officer appointed to assist first applicant in terms of section 2 of COIDA. Apart from submitting that the first and second applicants are housed at different locations, mr Tokota could not take the matter any further. It was pointed out by mr Van den Heever SC, appearing with mr Geyser for the respondent, that no explanation is advanced by the applicants why the first applicants default, and the reason therefore, was not addressed or referred to in the applicant's founding affidavit.

10. The fact that the applicants are State institutions, dealing with a huge work load, has to be kept in mind. It is appreciated that, due to the extent and nature of the work load of the applicants, delays in attending to any matter may occur. What, however, is a matter of concern is that the applicants clearly decided not to inform this Court why the Legal Services of the Department of Labour, upon which the application was served, did not react at all to oppose the application. There is further no explanation on record regarding the first applicant's default. The failure of the applicants to explain the latter's default, especially when it is taken into account that the application was served on the Legal Services of the Department of Labour, casts a shadow on the *bona fides* of the applicants. Both applicants were cited as parties in the application. Accordingly I am of the opinion that a finding that the applicants failed to show that they were not willfully in default is unavoidable. The applicants' contention that the matter was prematurely enrolled by the respondent is without substance and need no further comment.

11. The finding that the applicants were in willful default does however not mean that the applicants are not entitled to have the default judgment rescinded, it still has to be considered in the light of the nature of the applicants' defense and in view of the relevant circumstances of the case. As pointed out by mr Lekota, this Court has a discretion in that regard.
See **Harris v Absa Bank Ltd t/a Volkskas 2006(4) SA 527 TPD.**

12. I now turn to the merits of both applications. The initial dispute between the parties pertaining to the assessment tariff determined by the applicants, culminated in an opposed motion and a resultant order of this Court dated 29 November 2010. The present respondent was the applicant and the two applicants the respective respondents. The said order reads as follows:

"IT IS ORDERED

1. *THAT reviewing and setting aside the decision purportedly taken by the second respondent on 8 March 2007 to increase the assessment rate applicable to the applicant by 80% as from 1 March 2006 and to raise all the applicant's future assessments at the prescribed rate plus 80% ("the assessments").*

2. *THAT the reviewing and setting aside the assessments issued by the first respondent to the application based on the first decision ("the assessments").*
3. *THAT exempting the applicant in terms of Section 7(2)(c) of the Promotion of Administrative Justice Act No 3 of 2000 ("PAJA") from the obligation to exhaust the internal remedy provided for in section 91(1) of the Compensation for Occupational Injuries and Diseases Act No 130 of 1993 in respect of the assessments insofar as it may be necessary.*
4. *THAT extending the period of 180 days referred to in Section 7(1) of PAJA in terms of Section 9(1)9b) of PAJA insofar as it is necessary.*
5. *THAT the first respondent and the second respondent jointly and severally pay the costs of the application, which costs shall include the costs of two counsel."*

13. It is common cause that the applicants did not appeal the order of 29 November 2010. Consequently the applicants are bound in law to comply with the provisions of the said order. This is conceded by the applicants. Mr Tokota, however, submitted that the Court, in formulating prayer 2 of the order of 29 November 2010, could not have meant that all future assessments by the first applicant at the increased rate of 80% were prohibited. Mr Van den Heever contended the opposite and submitted that paragraph 2 of the order clearly prohibited all future increased assessments at the prescribed rate plus 80%.

14. In my view the order states that **the decision of the applicants dated 7 March 2007,** pertaining to the increase of the assessment as from 1 March 2006, and to raise all the future assessments at the prescribed rate and 80%, was reviewed and set aside. (My emphasis.) The order was directed at the contents of the applicants' decision dated 7 March 2007, and nothing else. The applicants were therefore, in my opinion, not prohibited by the said order to make any future assessment, including any increased assessment.

15. This issue, however, is not the crux of the matter. It has to be decided whether the applicants, in making the decisions addressed by the respondent, complied with all the requirements pertaining to the lawfulness or validness thereof. If the decisions of the

applicants, challenged by the respondent, are in fact lawful and in compliance with all the requirements, it would mean that the applicants will indeed have a *bona fide* defense to the application which resulted in the default judgment in question. If the decisions are not lawful and valid, it would necessarily follow that the applicants' defense will lack a material component and that the applicants would therefore not have a *bona fide* defense. Consequently, the respondent should therefore succeed with its counter application.

16. It is common cause that the applicants have in fact issued re-assessments after 29 November 2010. These are the decisions the respondent is seeking to have reviewed and set aside. They are listed as follows:

    (i) On 4/08/2011, in a letter regarding the respondent's assessment, emanating from the office of the second applicant, signed by a *Mrs Harmse* as second applicant, it is stated that the rate applicable to the respondent was increased to 40% in respect of the year 2006.
    According to the applicants' founding affidavit, (page 15), the aim of the applicants' decision reflected in this letter was *"to comply with the court order of 29 October 2010".*

    (ii) On 30/03/2011 the applicants forwarded a Notice of Assessment to the respondent for the year 2008 reflecting an assessment and an increase of 80%.

    (iii) On 27/09/2011 a notice of assessment was sent to the respondent in pursuance of the decision taken on 4 August 2011.

17. The respondent's case pertaining to the reasons for review and setting aside of the aforesaid decisions of the applicants, are the following:

    (i) The administrator who took the decision was not authorized to do so by the empowering provision.
    (ii) The said administrative action was materially influenced by an error of law.

(iii) The said administrative action was taken for a reason not authorized by the empowering provision.

(iv) The administrative action was taken because of irrelevant considerations or relevant considerations were not considered.

(v) The administrative action was taken arbitrarily or capriciously.

(vi) The administrative action was not rationally connected to the purpose of the empowering provision.

(vii) The administrative action taken deviates from the applicants' own policy as set out in its *"POLICY ON REDUCTION AND LOADING OF THE RATES THAT INDIVIDUAL EMPLOYERS ARE ASSESSED ON."* as such deviates from and fails to satisfy the applicants' own standards and/or demands of reasonableness.

18. It is the applicants' case that ms Ella Ntshabela, the official who deposed to the applicant's founding affidavit and the replying affidavit, was the person who took the decision to assess the respondent at a higher rate. During argument it became clear that ms Ntshabele's delegation and authorization to make the relevant decisions, challenged by the respondent, was the main issue of dispute between the parties. Ms Ntshabela, as stated above, is employed in the capacity of director within the finance department of the Compensation Fund. In the replying affidavit ms Ntshabele stated the following regarding this issue:
"It is further worth noting that the Director-General's power, in terms of section 85(2), to determine a higher tariff of assessment can be delegated as was the case in the current matter. In short I do hold delegated authority from the Director-General."
(Section 85(2) of COIDA empowers the Director–General to assess an employer at a higher rate.)

19. The respondent attached a document to its replying affidavit marked WFG 15 (page 286). It is stated on behalf of the respondent that this document was furnished to the respondent by the applicants at the time of the application of October 2010. The contents of the document consist of a schedule referring to the delegation of certain functions of the first respondent in respect of, amongst others, the functions provided for in section 85(1), 85(2) and 85(3) of COIDA. Section 85 provides for variation of tariff

assessment, which is clearly one of the prominent aspects in this matter. It was submitted by Mr Van den Heever that the delegation and authorization of the officer who took the decision relevant to the application of October 2010 was at that stage also disputed and that the applicants attempted to proof the delegation of powers to make the assessments by relying on the contents of the said document. This submission was not contested on behalf of the applicants. In the matter at hand mr Tokota relied heavily on the contents of the said document, which in his submission was proof of the delegation of the first applicant's powers to make the assessments in question, to ms Ntshabela.

20. I have considered the contents of the relevant document and the submissions by counsel and have arrived at the conclusion that the contents of the document prove nothing else but that certain powers of the first applicant should be delegated to specific appointed members of the first applicant's staff.

21. It is common cause that no documentary proof of ms Ntshabele's authorization and delegation by the Director–General was attached to the applicants' papers. Accordingly, what was before Court in that regard, was no more than the *ipse dixit* of ms Ntshabele. Mr Tokota submitted that in view of the contents of the document, WFG 15, ms Thabela's word should be held to be sufficient proof of her delegated powers. It should therefore be accepted (a) that it is practice, and to be expected, that the Director-General will have to delegate his powers in terms of the provisions of COIDA , and,(b) that the powers in question were in fact delegated to ms Ntshabela.

22. However, the question remained whether the applicants were not obliged to prove that ms Nsthabela was in fact the delegated person at the relevant time, especially in view of the fact that it was pertinently contested by the respondent.
In this regard mr Van den Heever referred me to **Kasiyamhuru v Minister of Home Affairs and Others 1999(1) SA 643 WLD** 649 D, submitting that the applicants were obliged to furnish proof of ms Ntshabela's delegated powers.

23. Section 3(1) of COIDA provides for delegation of powers by the first respondent.
" **3 Delegation of powers and assignment of duties by Director-General**
(1) The Director-General may, subject to such conditions as he or she may determine, delegate any of his or her powers or assign any of his or her duties to the commissioner, or any officer or employee referred to in section 2(1)9b), and may at any time cancel any such delegation or assignment."

24. From the wording of the wording of section 3 it is clear that any delegation may at any time be withdrawn by the Director-General. In my opinion it was accordingly incumbent on the applicants to furnish documentary proof of ms Ntshabela's delegation and that the delegation had not been withdrawn at any time. As discussed above, the document, WFG 15, does not provide proof of ms Ntshabela's alleged delegation at all.

25. To attach documentary proof of the delegation of ms Ntshabela would have been a simple exercise. No reason for the applicants' failure in this regard was advanced by Mr Tokota. It is further surprising that no attempt was made to have such delegation, if it indeed existed, available at court when the arguments commenced.

26. I find myself in respectfully agreement with the sentiments and considerations expressed in **Kasiyamhuru**, *supra*, regarding the lack of proof of the delegation. In my view the failure of the applicants in this matter to furnish proof of the delegation of ms Ntshabela, is fatal to the applicants' case, pertaining to both applications.

27. The respondent's contention, or ground for review, namely that the administrative action taken deviates from the applicants own policy, seems to be a consideration in favor of the respondent. However, in view of my finding regarding the delegation issue, I deem it unnecessary to consider that issue in any depth.

28. The applicants further contended that respondent should have availed himself of the internal remedy provided for in the provisions of section 90 and 91 of COIDA. Mr Tokota submitted that the respondent should have applied to the first applicant to have the decisions in question reviewed in terms of the provisions of section 90, or appealed against the decisions of the first applicant in terms of the provisions of section 91.

29. Mr Van den Heever argued that the first applicant's powers regarding review of decisions are limited, in terms of the provisions of section 90, to claims for compensation or an award for compensation. I agree with mr Van den Heever, the provisions of section 90 are clear and unambiguous. No provision is made for the review of assessments applicable to this matter.
The relevant part of section 90(1) reads as follows:
"The Director-General may after notice, if possible, to the party concerned and after giving him an opportunity to submit representations, at any time review any decision in connection with a claim for compensation or the award of compensation on the ground . . ."

30. Regarding a possible appeal in terms of sect 91 of COIDA, it has to be considered whether a valid decision by the first applicant existed which could have been subject to an appeal in terms of the provisions of the section.
Section 91(1) provides as follows:
"Any person affected by a decision of the Director-General . . . may, within 180 days after such decision, lodge an objection against that decision with the commissioner in the prescribed manner."

Section 91 provides for an objection against a decision of Director-General (first applicant) to be lodged with one of his sub-ordinates, the Compensation Commissioner (second applicant). (See definition of *commissioner* in section 1 of COIDA.) The objection will then be heard by a presiding officer in the first applicant's department, designated by the first applicant. This situation seems to be arguably untenable, especially in view of the history of the disputes between the parties.

31. However, in view of my finding that the decisions in question, purportedly taken by a delegate of the first applicant, are unlawful and un-valid, the decisions relevant to this matter could not, and cannot be subject to an appeal in terms of the provisions of sect 91 of COIDA.

32. The parties are in agreement that this matter justifies the costs of two counsel. This aspect was not argued in court, but is contained in a letter addressed to me by counsel the day after the hearing. Pertaining to the second application, in view of the history of the dispute between the parties, the costs order as sought by the respondent should be granted.

Accordingly I make the following order:

AD FIRST APPLICATION

1. The applicants' application for the rescission of the default judgment dated 11 October 2011 under case no 57110/11 is dismissed.
2. The applicants are ordered to pay the costs, including the costs of two counsel.

AD SECOND APPLICATION

1. The applicants' decision taken on 4 August 2011 to increase the rate applicable to the Respondent's undertaking by 40% as from 1 March 2007 is reviewed and set aside.
2. The applicant's assessment dated 27/09/2011 issued in pursuance of the decision taken on 4 August 2011 is reviewed and set aside.
3. The applicants' assessment dated 30/03/2011 in respect of the 2008 year of assessment is reviewed and set aside.
4. The applicants are ordered to pay the respondent's costs, including the costs of two counsel, on the attorney-and-client scale.

A J BAM ACTING JUDGE OF THE HIGH COURT.

17 Augustus 2012