Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 13131/2015

Before: The Hon. Mr Justice Binns-Ward

Hearing: 10 December 2015
Judgment delivered: 17 December 2015

In the matter between:

KENNEDY TSHIYOMBO Applicant

And

THE MEMBERS OF THE REFUGEE

APPEAL BOARD First to Fourth Respondents

AND FOUR OTHERS Fifth to Eighth Respondents

JUDGMENT
(on issues stood over for latter determination in the judgment delivered on 18 November 2015)

BINNS-WARD J:

[1] On 18 November 2015 I handed down judgment reviewing and setting aside the refusal by the Refugee Appeal Board of the appeal to it by the applicant from the decision of the refugee status determination officer that his application for refugee status was unfounded. A substitutive order was made granting the applicant asylum.

The judgment has been published on the SAFLII website, **sub nom.** *Tshiyombo v Members of the Refugee Appeal Board and Others* [2015] ZAWCHC 170 (18 November 2015).

[2] As described in the earlier judgment, the respondents had been party to taking an order by consent before Dlodlo J as to the further conduct of the review application so as to render it ready for hearing on 10 November 2015. They failed to comply with the terms of the order. In particular, they did not file the administrative record that they were obliged to have done in terms of rule 53(1) of the Uniform Rules of Court and the terms of paragraph (a) of the court's order. They also did not deliver the answering papers, to which the terms of the order had committed them, or if they had changed their minds about opposing the application, give notice of the abandonment of their opposition to the review. That resulted in the application unnecessarily remaining enlisted for hearing in the opposed motion court. The prejudicial consequences of the respondents' failure to comply with the rules of court and the order to which they had agreed were set out in the earlier judgment.

[3] The first to sixth respondents (viz. the members of the Refugee Appeal Board, the refugee status determination officer and the manager of the Cape Town refugee reception centre) were called upon in the earlier judgment to show cause on 10 December 2015 why they should not be ordered to be personally liable for the additional costs incurred by the applicant as a consequence of the matter having had to be heard in the opposed motion court rather than in the unopposed motion court. All of the respondents were called upon to show cause on the same date why the Registrar should not be directed to forward a copy of the judgment to the Public Protector for her to consider investigating the evident systemic dysfunctionality in the Department of Home Affairs' administration of matters in which decisions concerning applications for asylum in terms of the Refugees Act 130 of 1998 are taken on judicial review. (The indications of the existence of systemic dysfunctionality were described in the earlier judgment.)

[4] In response to the notice to show cause, an affidavit by Ms Yvonne Banyamme Seboga was placed before the court. Ms Seboga is a senior legal administration officer in the Department of Home Affairs. Her affidavit was supported by a confirmatory affidavit by Mr Kabelo Sam Mogotsi, the Director: Litigation in the Department. Senior and junior counsel appeared for the respondents

on 10 December 2015. Counsel put in written argument in addition to their oral submissions. This judgment is concerned with the matters that were stood over for later determination in the judgment of 18 November.

[5] It is convenient to deal first with two legal contentions advanced by the respondents' counsel before examining the factual considerations relied upon by Ms Seboga to ward off the orders postulated in the notices to show cause.

[6] The first was the rather peculiar argument that the order taken by agreement before Dlodlo J 'ought to be construed as a contract rather than an order'. The respondents' counsel sought support for that submission in the judgment of Sholto-Douglas AJ in *Pierre Cronje v Adonis* 2010 (4) SA 249 (WCC). As I understood it, the argument sought, by means of the characterisation contended for, to dissipate the whiff of contempt that hung about the respondents' breach of the court's order with regard to the filing of the administrative record. It has no merit and the judgment in *Pierre Cronje* in fact contains nothing to support it.

[7] In making the order Dlodlo J was giving directions for the further conduct of the matter. That the directions had been formulated in a manner that gave effect to an agreement between the parties in no manner detracted from their character as the terms of a court order. Dlodlo J was concerned with regulating the conduct of the application so as to bring it efficiently to hearing. He was not concerned with making a contract for the parties. In directing that the administrative record be filed by a given date, the learned judge was regulating the performance by the respondents of the obligation that was independently imposed upon them in terms of rule 53(1). The sub-rule itself fixes the time within which the record must be produced, but the court may in terms of rule 27 and its common law and constitutional authority to regulate its own procedures accede to an application by the parties to lengthen or shorten the time period prescribed in the rules. That is what Dlodlo J did when he made the order.

[8] *Pierre Cronje* was a case about the interpretation of a court order. The question in *Pierre Cronje* was whether a period of 30 days referred to in an agreement which had been made an order of court was 30 calendar days, as it would be on an ordinary semantic construction of the deed of agreement, or 30 court days, as it would be if the ordinary rule in respect of the construction of court orders were applied. It

was held that because the terms of the deed had been incorporated in a court order, the order fell to be construed in accordance with the rules of court concerning the computation of time in court days. Acknowledging the existence of apparently conflicting authority on the point, the learned acting judge found support for the approach he had chosen to adopt in the fact that the agreement in question had been concluded with the expressed intention that its terms would be incorporated in a court order. Neither of the parties in *Pierre Cronje* had contended that the court order in issue was not an order, but only a contract.

[9] The second legal contention advanced by the respondents' counsel was that it had been 'incumbent' upon the applicant, when the respondents failed to deliver any answering affidavits in accordance with the timetable set out in the order, to apply through the chamber book for an order compelling them to do so, and entitling him to enlist the matter for hearing on the unopposed motion roll should they fail to comply with the order. Counsel referred in this regard to Western Cape Division Consolidated Practice Note 37(19), which provides:

> Applications may be brought through the Chamber Book in the following matters:-
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> ….
>
> (19) applications to compel the filing of opposing papers where a notice of opposition has been filed, but no further steps have been taken by the respondent, failing which the matter may be enrolled on the unopposed roll.

[10] Practice Note 37(19) found no application on the facts of the current matter. PN 37(19) applies without curial intervention when a respondent fails to comply with *the rules*. It does not apply when there already is *an order* in place regulating the further conduct of the application. It is not intended to deal with the situation that arises when a respondent who has been party to obtaining an order regulating the conduct of the proceedings ignores the order. Indeed, it would have been inappropriate for a judge to make an order in chambers in terms of PN 37(19) while the prior order of Dlodlo J remained extant. It is true that the applicant could have requested the respondents to confirm that their failure to comply with the existing order for the delivery of their answering papers signified that they no longer wished to oppose the application, and had such confirmation been forthcoming, he could have taken steps to obtain the enlistment of the matter on the unopposed roll. Whether such a request would have been dignified with a response is doubtful in the extreme, however. As described at length in the earlier judgment, the State Attorney's repeated

requests for instructions from the respondents in this matter went unheeded. Thus, nothing in the second contention advanced by the respondents' counsel militates convincingly against the appropriateness of a *de bonis propriis* costs order or a referral of the matter to the Public Protector for investigation.

[11] Ms Seboga testified that the Department of Home Affairs is involved in a large number of litigious matters in courts throughout the country. The matters involved concern a variety of issues. The number of matters in which proceedings have been commenced against the Department annually has increased by approximately a third between 2012 and 2015. In 2012 there were 1840 new cases, while in 2015, 2435 new matters had been instituted against the Department by the beginning of December. The litigation is dealt with by the office of the Director: Litigation. The director allocates the matters to the legal administration officers in his unit, of whom Ms Seboga is one. As of May 2015 there were seven legal administration officers in the Department's litigation unit. Ms Seboga averred that the officers are unable to cope with the workload. The result has been that some officers have become demoralised and resigned. One of the officers resigned in May. Another one left at an unspecified date during the year. One of the remaining officers has been on maternity leave since the beginning of August. No mention is made of the vacant posts being filled and no explanation has been offered as to why they should not have been filled. The implication in Ms Seboga's evidence is that as from the beginning of August four legal administration officers in the Department's litigation unit have been trying to cope with the work of seven officers in an already under-capacitated office.

[12] The affidavits of Mr Mogotsi and Ms Seboga were directed at describing the currently under-capacitated condition of the Department's litigation unit. They averred that 10 intern posts for four-year LL.B graduates have been advertised to alleviate the workload. It was suggested that the additional posts might be filled with effect from the beginning of January 2016. The affidavits did not explain why the problems that manifested in the current matter are no more than yet further recurrences of the departmental shortcomings that have been lamented in a series of judgments reaching back to at least 2011.

[13] Ms Seboga admitted that the papers in the current matter had been referred to her for management in mid-July 2015, shortly after they had been served at the office

of the Department's Western Cape Provincial Manager. She had instructed the State Attorney to agree to an order in the terms made by Dlodlo J on 5 August 2015. She received a copy of the order on the day it was made. She stated that whilst it had occurred to her that 'serious consideration' should be given to not opposing the review, she did not furnish instructions to the State Attorney 'because [she] was simply overburdened with work and it therefore clearly slipped [her] mind to do so'. Ms Seboga did not, however, offer any explanation of how the matter could have been persistently overlooked in the context of the assistant state attorney's explanation to the applicant's attorney that his requests for further instructions had gone unheeded. The failure to provide any explanation in this respect detracts from the plausibility of Ms Seboga's explanation. It was also notable that Mr Mogotsi, as head of the litigation unit, said nothing to indicate any appreciation of the obvious shortcoming in his staff member's explanation, or of any intention to devise and put in place systems to prevent such delinquency recurring. If Ms Seboga's performance as a senior legal administrative officer is anything to go by, what might be expected from the interns that are reportedly to be appointed? They will presumably be more junior officials and comparatively inexperienced. A meaningful improvement can be expected only if an effective system of training and supervision is put in place.

[14] Ms Seboga also does not give any context to her assertion that she had seriously considered whether the review application should be allowed to go unopposed. One would assume that such consideration would be given by an official in the Department only after obtaining and considering the relevant record of proceedings before the refugee status determination officer and the Refugee Appeal Board. If Ms Seboga already had this record, her failure to give the State Attorney instructions in response to the applicant's attorney's correspondence about the respondents' failure to comply with Dlodlo J's directions for its production for the purposes of the review is all the more deplorable, however heavy her workload might have been.

[15] Does the aforementioned explanation afford sufficient reason not to refer the matter to the Public Protector for investigation?

[16] The respondents' counsel submitted in their written argument that the administrative failures by the Department of Home Affairs that have manifested in the current matter do not qualify for investigation by the Public protector in terms of

s 6(4) of the Public Protector Act 23 of 1994. The submission is misconceived. In terms of s 6(4) of the Act, the Public Protector is competent on her own initiative or on receipt of a complaint to investigate any alleged maladministration in connection with the affairs of government at any level or any alleged act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person. The failure by employees of the Department of Home Affairs to comply with duly promulgated rules of court and duly issued orders of court plainly amounts to misgovernment or maladministration. The nature of the delinquency involved equally plainly results, or is liable to result, in unlawful prejudice to applicants for judicial review of administrative decisions made by the Department.

[17] The respects in which the explanation tendered by the Department has been open to criticism give reason for concern whether the Department is able by itself, and without outside direction, to institute effective remedial measures. The object of an investigation by the Public Protector is not punitive, but remedial. It is to provide outside assistance if that is indicated.

[18] It is evident from what Ms Seboga has described that it is she, and not any of the first to sixth respondents personally, who should be responsible for the additional costs incurred as a consequence of the unnecessary hearing of the matter in the opposed motion court if a *de bonis propriis* order is to be made. The pertinent jurisprudence was recently comprehensively reviewed in *Lushaba v MEC for Health, Gauteng* 2015 (3) SA 616 (GJ). There is therefore no need for me to repeat the exercise in this judgment. Robinson AJ noted, correctly, that such an order is not to be made lightly. It is merited only in 'exceptional circumstances'. I think the general position has been fairly stated at para 69-70 of the judgment as follows:

> ….A legal advisor or legal representative is not to be punished with such a costs order for every mistake or error of interpretation. To err is, after all, human.
>
> [70] But there is a limit. That limit is, to my mind, crossed when one encounters the degree of indifference and incompetence evidenced in this case. Erring when trying to do one's work well is one thing. Not even caring is quite another. The public should not have to suffer this complete indifference and incompetence at the hands of public servants. In 1902 Innes CJ thought that it would be detrimental to the public service to 'mulct that official in costs where his action or his attitude, though mistaken, was bona fide'. [*Coetzeestroom Estate and GM Co v Registrar of Deeds* 1902 TS 216 and see *Absa Bank and Others v Robb* 2013 (3) SA

> 619 (GSJ) in para 14.] But circumstances appear to have changed, with not even censure from our highest courts being sufficient to induce public officials to public-minded service. Something is required to so induce them. Perhaps the answer lies in greater accountability.

As the authorities referred to in *Absa Bank and Others v Robb* supra, at para 13, illustrate, it is by no means unprecedented that costs *de bonis propriis* have been awarded against public officials where the circumstances have warranted it. *Lushaba* affords a more recent example of a matter in which such orders were made.

[19] As noted, the explanation offered by Mr Mogotsi and Ms Seboga for the non-compliance with the order made by Dlodlo J is by no means satisfactory in material respects. There has been no explanation of Ms Seboga's failure to comply with requests for further instructions by the State Attorney. The matter cannot have entirely 'slipped her mind' due to pressure of work, as she claims. Mr Kondlo's requests could not have served other than as reminders, which she appears to have ignored. The only consideration that has made me hold back from making a *de bonis propriis* costs order and referring the complaint to the Public Protector for possible investigation is the evidence that the Department is in the process of hiring additional staff to address the capacity constraints alleged in Ms Seboga's deposition. This restraint is being exercised with some diffidence, however, because undertakings that matters would improve have been given before, but no effective improvement has followed.

[20] I have dealt with the issue in this judgment and in the earlier judgment at some length so as to emphasise the seriousness with which this court views the repeated non-compliance by the Department's refugee section with the rules of court and certain orders of court. This is because the relevant misconduct is in breach of the Department's obligations in terms of s 165 of the Constitution and prejudicial to the basic rights of vulnerable persons.

[21] This judgment should be read as a warning to the public officials involved that the stage has now been reached when the perpetuation of the maladministration that has characterised the Department's conduct of the litigation in the current matter and several earlier cases is more likely to result in officials concerned being personally mulcted in costs. Furthermore, if the intended expansion of the relevant staff complement is not effective in addressing the problems that have manifested for years, this is likely to be seen by the courts as an indication of the need for outside

remedial intervention using the mechanisms available in terms of the Constitution. In *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another* 2008 (5) SA 94 (CC), 2008 (9) BCLR 865, at para 78, it was remarked by Madala J that '[g]enerally, relevant state departments are in the best position to assess the magnitude of the problems faced by their personnel and are similarly in the best position to address the systemic failure of state officials to perform their duties. These State institutions need to look at these failings holistically and consider the best manner in which to deal with the problems at hand.' Acknowledging the wisdom in that observation does not imply that the courts should in all circumstances eschew taking effective measures. Extraordinary costs orders and inviting the intervention of constitutional organs such as the Public Protector and the Public Service Commission are amongst the measures to which the courts can usefully resort when exceptional circumstances call for exceptional responses. The courts cannot be seen to appear to be feeble by failing to respond meaningfully in the face of the Department's failure to respond constructively to repeated judicial admonitions to address the systemic dysfunctionality described in the earlier judgment.

[22] In the result the eighth respondent (the Minister of Home Affairs in his representative capacity) will be ordered to pay the applicant's costs of suit. The applicant's counsel sought an order that such costs should be paid on the scale as between attorney and client. In my view such orders in cases like this redound only against the *fiscus* to the indiscriminate detriment of the common weal. Costs will therefore be awarded on the usual party and party scale

[23] The following order is made:

The eighth respondent is ordered to pay the applicant's costs of suit.

A.G. BINNS-WARD

Judge of the High Court