



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: 27628/2021

(1)	REPORTABLE: YES/NO	<input checked="" type="checkbox"/>
(2)	OF INTEREST TO OTHER JUDGES: YES/NO	<input checked="" type="checkbox"/>
(3)	REVISED: YES/NO	<input type="checkbox"/>
SIGNATURE		DATE
<i>Mosopa</i>		01/07/2021

In the matter between:

**SOUTH AFRICAN RESTRUCTURING AND
INSOLVENCY PRACTITIONERS ASSOCIATION NPC**

Applicant

v

**CHIEF EXECUTIVE OFFICER:
GOVERNMENT PRINTING WORKS
MINISTER OF HOME AFFAIRS**

First Respondent

Second Respondent

**DIRECTOR-GENERAL:
DEPARTMENT OF HOME AFFAIRS**

Third Respondent

JUDGMENT

MOSOPA, J

INTRODUCTION

1. The mission of the Government Printing Works (“GPW”) is to provide cost-effective, reliable and timeous services to all spheres of government in printing, to deliver equitable information to the public and disseminate government information through technology, innovation and service excellence. To this end, it is the function of the GPW to print and publish Government Gazettes and legal notices and this duty includes amongst others, the processing of requests for quotations and publication of notices in the Legal Gazettes A, B and C.
2. The applicant (South African Restructuring and Insolvency Practitioners Association NPC) seeks a final mandatory order against the respondents on an urgent basis, in terms of Rule 6(12) of the Uniform Rules of Court, to compel the respondents to ensure that the Legal Gazettes A, B and C are published every Friday without interruption and delay. Further, to ensure that all requests for quotations and for publication of notices in the Legal Gazettes A, B and C are attended to promptly and, to ensure that such notices appear in the Gazettes as requested.

URGENCY

3. The respondents contended that this matter is not urgent, as the applicant knew about the service failure of the first respondent on 5 February 2021 and on 9 March 2021, in its letter of demand, threatened to bring an urgent application in the event the first respondent does not remedy the situation. Despite all this, the applicant failed to bring the urgent application timeously.
4. Notshe AJ, when called upon to determine a similar situation in the matter of ***East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others [2011] ZAGPJHC 196*** at para 8, observed;

“In my view the delay in instituting proceedings is not, on its own a ground, for refusing to regard the matter as urgent. A court is obliged to

*consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might be an indication that the matter is not as urgent as the applicant would want the Court to believe. On the other hand a delay may have been caused by the fact that the Applicant was attempting to settle the matter or collect more facts with regard thereto.” (See also **Luna Meubel Vervaardigers v Makin and Another 1977 (4) SA 135 (W)**).*

5. In casu, numerous correspondence was exchanged by the parties leading up to the launch of the current application. I am satisfied that the applicant gave a proper and reasonable explanation for the delay in bringing the application and also gave reasons why it will not be afforded substantial redress in due course. I was thus satisfied that the matter is urgent.

AUTHORITY

6. The applicant failed to annex the resolution authorising the deponent to depose to an affidavit on its behalf, to its founding affidavit. A resolution dated 10 March 2021, from the board meeting of the applicant, is annexed to the applicant’s replying affidavit and was done so after the respondents raised a point-in-limine in respect of a lack of authority to depose to the founding affidavit.
7. The current application was issued on 3 June 2021, meaning that the resolution authorising the deponent to act as such was in fact adopted before the issuing of this current application. The best way for the respondents to have attacked the lack of authority was to have used the provisions of Rule 7(1). (See **Ganes and Another v Telekom Namibia Ltd 2004 (3) SA 615 (SCA)** at 624I-625A; **Unlawful Occupiers, School Site v City of Johannesburg 2005 (4) SA 199 (SCA)** at paras [14]-[16]). It is for this reason and the fact that the resolution is annexed to the replying affidavit, that this point ought not to succeed.

DISCUSSION

8. The applicant is a non-profit company, comprising of various practitioners as its members and this application pertains only to its members who are insolvency practitioners. This application is brought in the interest of members of the applicant and in the public interest, in terms of section 38(d) and (e) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”).
9. Section 38(d) and (e) of the Constitution provides the following:

“[38] – Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

(d) anyone acting in the public interest.

(e) an association acting in the interest of its members.”

I am therefore satisfied that the applicant meets the above requirements set out in this subsection.

10. It is common fact that the GPW is the only body authorised to publish Government Gazettes, which also include Legal Gazettes A, B and C. I do not wish to go into detail to explain what Legal Gazettes A, B and C entail, but in brief;

10.1 Legal Gazette A notices, comprise of notices in the administration of deceased estates, appointment of trustees and liquidators, notices of surrender of a debtor’s estate etc.;

10.2 Legal Gazette B notices, comprise of notifications of public auctions and execution sales and;

10.3 Legal Gazette C notices, include the publication of registration of political parties.

11. The work of the members of the applicant (insolvency practitioners) entails dealing with the financial affairs of insolvent estates and companies in liquidation or business rescue. To properly execute their mandate in terms of the statutory framework, it is required of them to publish notices in the Government Gazette and daily newspapers.

12. The first respondent experienced what was termed “technical glitches”, when its information technology and computer server crashed in February 2021. This meant that the Legal Gazettes which were meant to be published in the period of 5 February 2021 to 19 February 2021 were not published. The Legal Gazettes for the period under review were only published on 5 and 9 March 2021, respectively.

13. The effect of the late publication was that the notices in the Legal Gazettes could not simultaneously be published in the daily newspapers. Most importantly, the dates appearing in these notices were published after the date of notice of first meeting of creditors had already passed. These notices were thus irrelevant and of no use and effect as at the date of publication, the date of meeting of creditors had long passed.

14. The respondents attribute the problems encountered by the first respondent to load shedding and the COVID-19 pandemic. However, I must mention at this stage that what the respondents fail to prove is how the pandemic affects its work. No rosters are presented to show that they are not operating at full capacity. It is also expected of an institution like the first respondent to have a back-up generator to deal with continuous load shedding problems, but this was not presented by the first respondent. In an effort to mitigate the difficulties experienced by the first respondent, while it is still rebuilding the technical system which crashed, it has migrated to a manual system. What is not clear is when the technical system of the first respondent will be back and fully operational, as I was told that it is a complex system which will take time to repair.

15. The above was confirmed in a letter sent by the second respondent wherein the following was noted;

“In the interim, we have been able to devise a mechanism for processing eGazettes manually, as an endeavor to fulfill our mandate of disseminating Government’s information.”.

However, it appears that the manual system had its own problems. The applicant confirmed that the publication of notices dated 19 March 2021 were done timeously, but numerous requests for quotations sent via the manual system were not answered. It is common fact that before a Legal Gazette is published, the first respondent must first issue out quotations, i.e. for the amount or number of words and numbers used in the notice. Simply put, until a quotation is furnished by the first respondent, there can be no publication of a Legal Gazette. The applicant further contends that in some instances, where quotations are fully paid for, notices which were supposed to be published still do not appear in the Legal Gazettes.

16. This is despite the second respondent’s assurances when addressing Parliament on 19 May 2021, during the budget vote, as can be gleaned from the article in the Business Day dated 5 April 2021, where the second respondent said that the “technical glitches” experienced by the first respondent is a thing of the past and the interruptions had been attended to. What the second respondent acknowledges in the address, following the article in the Business Day (*supra*), is that these interruptions, “frustrated the legal system of the country in that gazettes were delayed and that interfered with the social and economic system of the country.”.

17. The continued interruptions will have the negative effect on the trade of the members of the applicant which the second respondent frowned upon when addressing Parliament. This in itself is a breach of a constitutionally guaranteed right.

18. The respondents are all organs of state and the first respondent is a public administration body, subject to a variety of constitutional controls. To this end,

the provisions of section 195(1)(g) of the Constitution is relevant and deserves mention;

“[195](1) – Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles;

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.”

19. In the matter of ***President of RSA v South African Rugby Football Union 2000 (1) SA 1 (CC)*** at para 133, the Constitutional Court held;

“[133] Public administration, which is part of the executive arm of government, is subject to a variety of constitutional controls. The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public...”

20. Mr Seima in argument, contended that the respondents did not demonstrate egregious conduct on their part, which warrants attraction of judicial intervention. This is so because the respondents demonstrated their seriousness in addressing the problem by, *inter alia*, migrating to the manual system, increasing staff capacity and allowing staff to work overtime. In support of this contention, he relied on the matter of ***Mwelase and Others v Director-General, Department of Rural Development and Land Reform and Another 2019 (6) SA 597 (CC)***. Mr van der Merwe, on behalf of the applicant, contended that the ***Mwelase*** matter is distinguishable from the matter in casu, and that I must not follow the principle laid down in ***Mwelase***.

21. I fully agree with the argument made by Mr van der Merwe on behalf of the applicant, as the applicant in casu does not seek the appointment of a “special master”, like the Court did in the ***Mwelase*** matter, but rather an order compelling the respondents to perform their statutory mandate and to publish

the Legal Gazettes A, B and C every Friday, without interruption or delay. The facts of this matter in any event do not warrant such.

22. The respondents concede that there are problems encountered by the GPW, but they are working on the problems.

FINAL INTERDICT

23. For the applicant to be successful, it must prove the following;

- 23.1 the existence of a clear right,
- 23.2 injury actually committed or reasonably apprehended, and
- 23.3 lack of an adequate alternative remedy.

24. For the members of the applicant to fulfill their statutory mandate, they rely on the first respondent to publish the Legal Gazettes. It is not disputed that certain Legal Gazettes which were supposed to be published, were not published by the first respondent and in some instances, there were delays in the publication of such Legal Gazettes.

25. The members of the applicant could not effectively serve their clients due to the failure on the side of the first respondent. It is also not in dispute that in the process, they lost money as they had already paid for quotations and the delay in publication rendered these notices of no use and effect.

26. Despite numerous letters exchanged between the applicant and the respondents, that they are attending to the problem, and despite the second respondent's assurances, the problems experienced by the applicant since February 2021 still persist. In my view, the applicant was left with no alternative but to seek the court's intervention. I am therefore of the view that the applicant met all the requirements for the final relief they are seeking.

27. Mr Seima's contention that the applicant, in their letter of demand threatened to institute claims for damages for the service failure of the respondents,

serves as an alternative remedy available to them has no merit, in that even if this threat is executed, it cannot remedy the current situation faced by the applicant. The only remedy available to the applicant is for the respondents to build capacity so as to perform according to the requests made by the applicant and other members of the public.

COSTS

28. In the matter of ***Biowatch Trust v Registrar, Genetic Resources and Others 2009 (10) BCLR 1014 (CC)*** at para 56 (also reported as ***2009 (6) SA 232 (CC)***), Sachs J observed;

“[56] I conclude, then, that the general point of departure in a matter where the state is shown to have failed to fulfill its constitutional and statutory obligations, and where different private parties are affected, should be as follows: the state should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs orders against any private litigants who have become involved. This approach locates the risk for costs at the correct door - at the end of the day, it was the state that had control over its conduct.”

29. The circumstances involving the matter in casu, falls squarely within the principle laid down in the ***Biowatch*** matter. The respondents failed to fulfil their statutory obligations and it was only the respondents who had control over its conduct. The respondents are as such liable for costs of the application.

ORDER

30. In the consequence, the following order is made;

1. The application is considered urgent in terms of Rule 6(12), the requirements of the rules of court in respect of notice, service and time

periods being dispensed with and the applicant's departure therefrom is condoned;

2. The respondents are ordered to ensure that the Legal Gazettes A, B and C are published every Friday without interruption or delay;
3. The respondents are ordered to ensure that all requests for quotations and publication of notices in the Legal Gazettes A, B and C shall be attended to promptly, and that such notices shall appear in such Gazettes as requested, and;
4. The respondents are ordered to pay the costs of this application and two counsel, including the costs occasioned by the employment of senior counsel.



MJ MOSOPA
JUDGE OF THE HIGH
COURT, PRETORIA

Appearances:

For the applicant: Adv M van der Merwe SC

Adv B Winks

Instructed by: Jaco Roos Attorneys Inc

For the respondent: Adv E Seima SC

Instructed by: The State Attorney, Pretoria

Date of hearing: 24 June 2021

Date of judgment: Electronically transmitted