

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

CASE NUMBER: Js 294/05

In the matter between:

Windybrow Centre for the Arts

Applicant

and

SACCAWU obo S J Gina & Others

Respondent

JUDGMENT

MOLAHLEHI AJ

Introduction

- [1] This is an application in terms of Rule 12 of the Labour Court Rules, in which the applicant, Windybrow Centre for the Arts, seeks condonation for the late filing of its notice of opposition to the respondent's statement of case. The statement of case concerns an alleged unfair dismissal of the respondent's members by the applicant.
- [2] The applicant is a parastatal entity, reporting directly to the Department of Arts and Culture. The applicant is managed by a manager who reports to a Board consisting of non-executive directors and a Chairperson. According to the founding papers of the applicant, the manager does not

have authority to make decisions with regard to instituting and defending legal actions against any person on behalf of the applicant. The manager is obliged to obtain the Board's authorisation for any decision that has financial implication, including the appointment of attorneys to defend or institute action on behalf of the applicant.

Background

- [3] It is common cause that the applicant was served with an application in terms of s191 (5) (b) of the Labour Relations Act 66 of 1995 (the LRA) on 11 April 2005, by the respondent. In terms of the application the respondent's members claimed to have been unfairly dismissed by the applicant. At the time of serving its papers on the applicant, the respondent's application did not have a case number neither was its statement of case signed. The applicant filed its response on 27 May 2005 and thereafter the parties held two pre-trial meetings.
- [4] On the 3rd May 2005, the Ms Adams of the attorneys of record contacted the respondent telephonically to enquire about the case number. The respondent furnished the applicant's attorneys with the case number on the same day.
- [5] It would appear that the issue of non compliance with rule 6 (3)(c) of the Rules of the Labour Court was raised by the respondent at a pre-trial meeting, the minutes of which are recorded in a pre-trial minute dated 8 June 2005. Rule 6 (3), required the applicant to have delivered its response to the respondent's statement of case within 10 days of receipt thereof.

- [6] The applicant attributed the lateness in the filing of its response to the internal difficulties it encountered soon after the dispute between it and the respondent arose. The difficulty in opposing this matter arose after the applicant's Board was disbanded by the Minister on 1 April 2005. It took 60 (sixty) days to reconstitute the Board and even thereafter it took some time to convene the Board to consider this matter and to give a mandate on what approach to be adopted, in dealing with the matter.
- [7] The authority on how to proceed with the matter was issued by the Chairperson of the Board according to the applicant on the 25th May 2005. The decision authorised that the respondent's case be opposed and that Thompsons Attorneys be appointed as their attorneys of record.
- [8] Apparently an interim appointment of attorneys of record was made by the manager towards the end of April 2005. The attorney's instructions were limited to filing notice to oppose and this was done purely to avoid the matter being placed on an unopposed roll of the court. In its replying affidavit the applicant indicates that the attorneys were not formally appointed as full appointment required a decision of the Board because of the cost implications.
- [9] The respondent's opposed this application and argued that the application was 22 (twenty two) days late, there was no good cause shown by the applicant for the lateness and that there were no prospects of success on the part of the applicant's case.

The Legal Principles

- [10] Any party initiating any proceedings in the Labour Court is required by rule 3 of the rules to apply for a case number before serving documents

on the other party. The procedure in general is that in the event of failure to settle at the conciliation stage, the launching of a statement of case begins with an application for a case number which is done through Form 1 of the rules and subsequent, to be followed by filling a statement of claim as set out in Form 2 of the rules.

- [11] The provisions of rule 3 are similar to those of rule 31(3) of the CCMA Rules. In *Kungwiwni Residential Estate & Adventures Sports Centre Ltd v Mhlongo N.O & others* (2006) 27 ILJ 953 (LAC), the court in dealing with the provisions of rule 31(3) of the CCMA Rules held that:

“Firstly, the respondent was perfectly entitled to refer to rule 31(3) and to rely upon the absence of a case number as a reason for not filing a notice of opposition.”

- [12] It is undisputed that the respondent served the statement of case without a case number which amounted to non compliance with the rules. The statement of case was also not signed in breach of rule 6 (1) (c) of the rules of the Labour Court which reads as follows:

“A document initiating proceedings, known as a ‘statement of claim’, may follow the form set out in Form 2 and must-

(a) ...

(b) ...

(c) be signed by the party to the proceedings;”

- [13] In terms of s158 (1) (f) of the LRA, the court has the discretion to condone the late filing of any document. The court is further given the discretion in terms of rule 12 (2), on good cause shown, to condone non-compliance with any period prescribed by the rules.

[14] For the court to condone non-compliance with the time frames set out in the rules the applicant has to show good cause for the lateness. Good cause entails the following;

- (a) the degree (period) of the lateness,
- (b) the explanation of lateness and prejudice to both parties,
- (c) prospects of success;
- (d) the respondent's interest in the finality of the dispute,
- (e) the convenience of the court; and
- (f) avoidance of unnecessary delay in the finality of the dispute.

This is not exclusive and the factors are not individually decisive.

Rule 6 (3) (c) on the other hand provides:

“A response must be delivered within 10 days of the date on which the statement of claim is delivered”

[15] In *Foster v Stewart Scott Inc* (1997) 18 ILJ 367(LAC) the court held:

“It is well settled that in considering applications for condonation the court has discretion, to be exercised judicially upon a consideration of all the facts. Relevant considerations may include the degree of non-compliance with the rules, the explanation therefor, the prospects of success on appeal, the importance of a case, the respondent's interest in the finality of the judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice, but the list is not exhaustive. These factors are not individually decisive, but are interrelated and must be weighed one against the other. A slight delay and good explanation for the delay may help to compensate for prospects of success which are not strong. Conversely, very good prospects of success on appeal

may compensate for an otherwise perhaps inadequate explanation and long delay.”

[16] In his heads of argument and during argument, Mr Thompson, attorney for the applicant referred to the case of *Saraiva Construction (PTY) Ltd v Zulu Electrical and Engineering Wholesalers (PTY) Ltd* 1975 (1) SA 612 (D), where the court held that good cause is shown by the applicant giving an explanation that shows how and why the default occurred. It was further held in this case that the court could decline the granting of condonation if it appears that the default was wilful or was due to gross negligence on the part of the applicant. In fact, the court could on this ground alone decline to grant an indulgence to the applicant.

[17] A further principle which was enunciated in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.

Evaluation

[18] It is apparent as stated above that the statement of case was served without a case number and was also not signed. It is not clear from the papers as to how the stamp of the court was placed on the respondent's application which was filed in terms of s191 (5) (b) without a case number. In all probabilities it seems that there was an error that may have occurred in the registrar's office.

- [19] Whatever the case may be, the fact is that the respondent's service of its documents on the applicant failed to comply with the requirements of both rules 3 (1) and 6 (1) (c) of the rules of this court. If the approach in *Kungwiwni Residential Estate's* case referred to above was to be adopted, then it would mean that the respondent never served its papers on the applicant. In terms of this approach it could be said that because of the defect in the service by the respondent, the applicant was not obliged to file a response.
- [20] The other approach, which seem to me in the circumstances of this case to be the most appropriate, is to regard the date of service as being the date on which the applicant's attorneys were informed of the case number by the respondent.
- [21] It is not clear from the papers as to when did the respondent obtain the case number. What is clear however is that the applicant was informed of the case number, on the 3rd May 2005, when its attorneys of record made the inquiry about the matter. This in my view should be regarded as the time at which the service of the respondent was rectified. Accordingly, on the basis of this the applicant was 8 (eight) days out of time in filing its response.
- [22] Having regard to the circumstances and the attitude the respondent adopted in dealing with this matter, I do not believe that it can be said that the period of the delay was excessive. It is my view that on this ground alone, the applicant is entitled to condonation.
- [23] It can also not be said that the applicant wilfully or due to gross negligence ignored compliance with the prescribed time frames. The

correspondence from the applicant clearly indicates that the applicant had an interest and was committed in having the matter resolved. It was the applicant who followed up with the respondent regarding the case number.

[24] As regarding the issue of prospects of success, the respondent has not disputed the averment by the applicant that its members were not productively employed by the applicant. This in my view, points to both a *bona fide* defence and an arguable case by the applicant in the main case.

[25] Having regard to the circumstances of this case, I see no reason why the costs should not follow the result.

CONCLUSION

[25] In the circumstances the following order is made:

1. The applicant's late response to the respondent's statement of case is condoned.
2. The respondent is to pay costs of this application.

MOLAHLEHI AJ

DATE OF HEARING : 08 FEBRUARY 2007

DATE OF JUDGMENT : 26 FEBRUARY 2007

Appearances

For the Applicant : M THOMPSON (OF THOMPSONS ATTORNEYS)

For the Respondent: M_{PHO} MJEZA (UNION OFFICIAL FOR SACCAWU)