IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 491/18

In the matter between:

PREMIER VALVES (PTY) LTD **Applicant**

and

WENDY JOYCE MCKIE **Respondent**

Heard: **21 July 2020 (*via* Microsoft Teams)**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, and publication on the Labour Court's website. The date and time for the hand-down is deemed to be on 8 August 2020 at 12:00**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

[1] The applicant seeks condonation for the late filing of a Statement of Response to the respondent's claim. This matter was initially enrolled on 14 July 2020 but was postponed in order to afford the applicant an opportunity to file and serve its written heads of argument. The application for condonation is opposed by the respondent.

Background:

[2] The respondent (Ms Mckie), was employed by the applicant with effect from February 2014 until 24 November 2017 when her services were terminated on the grounds of the applicant's operational requirements. Mckie then referred a

dispute to the Metal and Engineering Industries Bargaining Council (MEIBC) on 15 January 2019. Following various correspondences to the MEIBC about the status of the matter, the MEIBC ultimately responded on 4 May 2018 advising her that since the 30 day period had lapsed, she was required to refer the dispute for arbitration, and a referral form was provided to her in that regard.

[3] The dispute was then referred for arbitration on 9 May 2018, and set down for a hearing on 21 June 2018. At the arbitration proceedings, the MEIBC issued a ruling and declined to assume jurisdiction over the matter, as Mckie was not the only employee affected by the retrenchments.

[4] Mckie filed and served a Statement of Claim on 26 July 2018. In the absence of a Statement of Response, Mckie set the matter down for a default judgment on 27 February 2019. The Court, (per La Grange J) adjourned the proceedings and ordered Mckie to either file an affidavit to provide facts sustaining a conclusion that the matter was timeously referred to the Court, or in the alternative, to seek condonation. Mckie subsequently filed and served an application for condonation on 14 March 2019.

[5] The application for condonation for the late filing of the Statement of Claim was unopposed and was granted on 14 June 2019. Despite the late filing of the Statement of Claim having been condoned, no response was forthcoming, and Mckie again set the matter down for a default judgment on 15 October 2019. On 14 October 2019, the applicant had filed and served the Statement of Response without an application for condonation.

[6] The applicant made an appearance on 15 October 2019 and sought an indulgence to submit an application for condonation for the late filing of Statement of Response. The applicant was granted until 24 October 2019 to file such an application. When that date came and went, Mckie again set the matter down for a default judgment on 3 December 2019. On 22 November 2019, the applicant filed and served its application for condonation, which Mckie opposed. The matter as set down for default judgment on 3 December 2019 was removed from the roll.

The legal framework and evaluation:

[7] The principles applicable to applications for condonation are trite. In accordance with the provisions of section 191(11)(b) of the LRA, the Court may on good cause shown, condone the non-observance of the time frames. *'Good cause'* was explained in *Melane v Santam Insurance Co. Ltd*[1] in the following terms;

> 'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the Respondent's interests in finality must not be overlooked"

[8] The Constitutional Court in *Brummer v Gorfil Brothers Investments (Pty) Ltd* has since pointed out that an application for condonation should be granted if it is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors outlined in *Melane*, including the nature of the relief sought, the nature and cause of any other defect in respect of which condonation is sought, and the effect of the delay on the administration of justice[2].

[1] 1962 (4) SA 531 (A) At 532b-E

[2] 2000 (5) BCLR 465 ; 2000 (2) SA 837 (CC) at para 3; See also *Ndlovu v S* 2017 (10) BCLR 1286 (CC); 2017 (2) SACR 305 (CC) (15 June 2017) at paras 22 – 23; *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as amicus curiae)* 2008 (2) SA 472 (CC) at 477A-B; *SA Post Office Ltd v CCMA* [2012] 1 BLLR 30 (LAC) at para [23], where Waglay DJP (as he was then) stated that;

> 'In my view, each condonation application must be decided on its own facts bearing in mind the general criteria. While the rules are there to be applied, they are not inflexible but the flexibility is directly linked to and apportioned in accordance with the interests of justice; prejudice; prospects of success; and finally, degree of delay and the explanation thereof.

[9] Significant with a determination of such applications is that condonation cannot be had for the mere asking, and that a party is required to make out a case entitling it to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay[3]. In the end, the explanation must be reasonable enough to excuse the default.[4]

[10] Equally important is that an application for condonation must be filed without delay and/or as soon as the applicant becomes aware of the need to do so[5]. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the Court may take a dim view, absent a proper and satisfactory explanation for the further delays.[6]

[11] The Statement of Response was supposed to have been filed and served within 10 days from the date of the condonation for the late filing of the Statement of Claim having been granted, *i.e.* from 14 June 2019. Thus, at most, the Statement of Response ought to have been filed and delivered on 2 July 2019. It was only delivered on 14 October 2019, some 73 court days out of time. The period of the delay is indeed excessive as conceded on behalf of the applicant. Other than that period, and in view of the Court's Order issued on 15 October 2019 to the effect that an application for condonation should be filed on 24 October 2019, the Order was only complied with on 22 November 2019, some 21 days late.

[12] In support of the application for condonation, Mr Allis, the applicant's attorney of record and deponent to the founding affidavit, averred that even though the delay is lengthy, this should be viewed in the light of the Respondent having also being required to seek condonation for the late filing of the Statement of Claim. Clearly this contention is misplaced. The reasons that Mckie had to

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The issue of delay must be viewed in relation to the expedition with which the law expects the principal matter to be resolved'

[3] *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited* 2017 (6) SA 90 (SCA) at para 6

[4] *Ndlovu v S* at para 31 *supra at fn 3*

[5] See *All Round Tooling (Pty) Ltd v NUMSA* (1998) 8 BLLR 847 (LAC); *Rennie V Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) At 129G where it was held:

'whenever an appellant realises that he has not complied with a rule of court he should apply for condonation without delay.'

[6] See *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) At 449G

bring an application for condonation have been set out in her founding affidavit in that regard and accepted by this Court when it granted her condonation. Thus, her application is a completely separate matter from that of the applicant insofar as non-observance of the time frames is concerned. Clearly the circumstances necessitating that Mckie and the applicant to seek condonation are different.

[13] Equally worrisome with the delays to the extent that the applicant contended that it was not aware of the order granting condonation is that on its own version, Mckie's application for condonation was initially opposed and was thereafter by consent, agreed to. The applicant through Mr Allis, further averred that the applicant only got to know of the order when the matter was set down for a default judgment. This was despite his averment that there was consent to grant condonation. This averment is indeed extraordinary in that it is unheard of for legal representatives to consent to an order but not bother to find out whether that consent order was made an order of Court or not.

[14] Central to the applicant's explanation for the delay as averred by Allis is that it was involved a restructuring, which included changes to the structure of its local board, and further that there were a series of further retrenchments and costs cutting initiatives. That process was only 'finalised during the course of May and June 2019', and as a result of additional workload being placed upon the HR department, it became difficult to obtain full instruction in the matter. Further delays were occasioned by the fact that the Director of the applicant is based in the United Kingdom, and there was nobody who could depose locally to the affidavit

[15] Other than the delays occasioned by the applicant's restructuring, Allis further averred that he had a bereavement in his family which led to his 'productivity for the past several months' compromised due to his family responsibilities and caring for his sickly parent over the 'past five odd months'.

[16] Mckie in opposing the application averred that the Statement of Response was filed some three and a half months without valid reasons for the delay being furnished. She further averred that any submissions made in regards to

the delay or the circumstances leading to her retrenchment are not supported by any documents nor are there any confirmatory affidavits.

[17] To a large extent, I agree with Mckie that the explanation proffered by Allis is not satisfactory. Only general averments were made in regards to the alleged restructuring or unavailability of personnel from whom instructions were to be taken or for the purposes of consultations. No attempt was made to demonstrate as to when or how any means were taken to secure timeous consultations and settling of papers. The excuse regarding the Director being in the United Kingdom is even more ridiculous in the light of modern technology through which the affidavit or Statement of Response could have been settled. Such an excuse can hardly serve as a legitimate one. It is not even necessary to deal with Allis' contentions regarding his personal bereavement and personal problems, in that all that is stated was that he was unproductive for five months without any elaboration. On the whole, any delay attributable to the applicant's alleged administrative constraints or Allis' personal bereavement or problems cannot in the absence of anything further, serve as a legitimate excuse.

[18] Even more concerning however is the applicant's failure to explain its failure to comply with the order of this Court issued on 15 October 2019 to file the application on 24 October 2019. No attempt was made to explain the delay between 24 October 2019 and 22 November 2019.

[19] It is trite that in the absence of a reasonable and satisfactory explanation, there would be no need to consider the issue of prospects of success. In *Grootboom v National Prosecuting Authority and Another*, [7] however, Zondo J held that:

> "Although the existence of the prospects of success in favour of the party seeking condonation is not decisive, it is an important factor in favour of granting condonation.

[7] (2014) 1 BLLR 1 (CC); 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); (2014) 35 ILJ 121 (CC) at paragraphs 50 - 51

> The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice."

[20] To the extent that the Court is required to consider the totality of factors, in *Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd*, [8] it was held that a consideration of prospects of success merely implies a determination of the likelihood or chance of success when the main case is heard. A similar approach was followed in *Seatlholo & others v Entertainment Logistics Service (A division of Gallo Africa Ltd)*[9], where it was held that the test is whether the applicants would succeed in the main action if the facts pleaded by them in their condonation application were established at trial. Equally so, the prospects of success do not entail an applicant having to prove on a balance of probabilities that he or she would succeed when the merits of the case are heard[10].

[21] In *Mulaudzi*[11] however, the Supreme Court of Appeal held that it is advisable in such applications, to set forth briefly and succinctly such essential

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[8] 2009 30 ILJ 347 (LC) at para 27

[9] (2011) 32 ILJ 2206 (LC) para 24

[10] *Production Institute of South Africa (PTY) Ltd v CCMA & others* (Case No: JR1974/2009) at para 12; See also *SA Democratic Teachers Union v Commission for Conciliation, Mediation & Arbitration & others* (2007) 28 ILJ 1124 (LC) at para 38, where it was held that;

> 'A commissioner in considering prospects of success does not have to pronounce on the merits of the case. All that the commissioner needs to do is to investigate whether on the averments made by the applicant there is a *prima facie* case, that there is a chance of succeeding when the main case is heard. In other words to establish whether there is a reasonable prospect of success on the merits, it suffices if an applicant can show a prima facie case through setting out averments which, if established at the proceedings of the main case, would entitle the applicant to some relief. The applicant need not deal fully with the merits of the case'

[11] *Supra* fn 5 at para [34]

information as may enable the court to assess an applicant's prospects of success. The court was therefore bound to make an assessment of an applicant's prospects of success as one of the factors relevant to the exercise of its discretion, 'unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration.' This would be in circumstances where there was flagrant breach of the rules, excessive delays, and where no acceptable explanation was forthcoming.

[22] In consideration of the above legal principles, it is taken into account that a delay of three and a half months is excessive, *albeit* not in the extreme. It further having been concluded that the explanation for the delay was unsatisfactory, it further needs to be taken into account that extensive averments were made by both sides in respect of the merits of the matter and the prospects of success in that regard. It is common cause that Mckie was dismissed due to the applicant's operational requirements. Various disputes of facts have been raised on both sides, and it cannot be said that the applicant does not enjoy some reasonable prospects of successfully defending Mckie's claim.

[23] A further consideration is that the pleadings have been closed and the matter should be ripe for a hearing but for the filing of pre-trial minutes. In my view, and given the stage where the proceedings are, it would not be in the interests of justice to deny condonation. Any prejudice that Mckie complained of is indeed legitimate, but can be overcome by the dispute being fully ventilated for her to assert her rights, rather than the claim being dealt with on an unopposed basis, which would clearly not serve the administration of justice, or assist in expeditious resolution of disputes.

[24] The mere fact however that condonation is to be granted does not imply that the applicant should be absolved from the consequences of its conduct and failure to adhere to the time frames, and in particular, orders of this Court. In this regard, the requirements of law and fairness dictate that even if successful, the applicant ought to be burdened with the costs of this

application, inclusive of the wasted costs occasioned by the postponement on 14 July 2020.

[25] The reasoning behind the order of the wasted costs is that this matter was initially set down for a hearing on 5 June 2020, and was removed from the roll by the Court. The relevance of this date is Mckie's written heads of argument were filed and served in May 2020 in anticipation of the 5 June 2020 set-down. Notwithstanding, the applicant had not made any attempts to file written heads of argument despite the matter being removed from the roll. The filing of written heads of argument in motion proceedings is mandatory as prescribed in paragraph 11.6.2 of the Practice Manual read together with Rule 18 of the Rules of this Court. The postponement therefore on 14 July 2020 occurred in circumstances which were unnecessary and at a cost to Mckie, had the applicant complied with the provisions of the Practice Manual and the Rules of this Court.

[26] Accordingly, the following order is made;

Order:

1. The late filing of the Applicant's Statement of Response is condoned.

2. The Applicant is ordered to pay the costs of this application, inclusive of the wasted costs occasioned by a postponement of these proceedings on 14 July 2020.

3. The parties are directed to, convene and conclude a pre-trial conference, and to file signed pre-trial minutes in that regard within 30 days of the date of this order.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Mr I. T Allis, of Allis Attorneys
For the Respondent:	Adv. C Grant, instructed by GJ Brits Attorneys