



**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not reportable

Case no: JS 140/2019

In the matter between:

**KENNETH DUNCAN**

**Applicant**

and

**SWISS-SOUTH AFRICAN CO-OPERATION INITIATIVE**

**First Respondent**

**HELENE BUDLIGER ARTIEDA N.O**

**Second Respondent**

**JANNIE ISSACS N.O**

**Third Respondent**

**RACHAEL MADZIWANYAKA N.O**

**Fourth Respondent**

**DAVID DANIEL MOLOTO N.O**

**Fifth Respondent**

**SULLIVIAN JOSEPH O'CARROLL N.O**

**Sixth Respondent**

**THERO MICARIOS LESEGO SETILOENE N.O**

**Seventh Respondent**

**Heard: 21 May 2020, in view of the measures implemented as a result of the Covid-19 outbreak this matter was decided on papers.**

**Delivered: This judgment is handed down electronically by circulation to the parties' legal representatives by email, and release to this Court's library and SAFLII. The date and time for hand-down is deemed to be 10:00 on 14 August 2020.**

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## JUDGMENT

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**Mabaso AJ**

### **Introduction**

[1] The question to be answered in this matter is whether there was an unreasonable delay, by the Applicant, in delivering a response as directed by this Court, if so, should the delay in all the circumstances be condoned?

[2] This an interlocutory application wherein the Applicant seeks the following order:

1. *Condoning the **purported**<sup>1</sup> late filing of the Applicant's response to the special pleas taken by the Respondents in their response to the Applicant's Statement of Case;*
2. *Costs be awarded to the Applicant.*

[3] This application is opposed by the Respondents, and they seek a costs order against the Applicant. The genesis of this application is a statement of case delivered by the Applicant alleging an automatically unfair dismissal in terms of section 187 of the Labour Relations Act 66 of 1995 (the LRA). In turn, the Respondents delivered a statement of response wherein they raised jurisdictional points.

### **Background and analysis**

[4] Following the exchange of the ordinary pleadings in a trial matter before this court (statement of case and statement of response), on the face of the special pleas raised by the Respondents, parties' representatives unsuccessfully arranged for a pre-trial conference. As a result, the Applicant's attorneys approached this Court for a pre-trial conference trial before a

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<sup>1</sup> Own emphasis.

judge.<sup>2</sup> Indeed on 06 August 2019, before the Learned Cele J, the pre-trial minutes were concluded and filed. Due to the outstanding special pleas by the Respondents, Cele J made an order that the special pleas were referred to the motion court for determination, and “*the applicant is to file its response*” to the special pleas. That order did not specify the time-frame as to when this should be done.

- [5] This direction by Cele J was in line with para 10.3.1 of the Practice Manual which read thus,

Except for those matters that are the subject of case management (where the judge concerned will issue directions on how interlocutory matters are to be dealt with), all preliminary points raised in a statement of claim and any response to a statement of claim (including but not limited to applications for condonation of the late referral of a statement of claim or the late filing of any statement of response, special pleas and exceptions) will be set down for hearing on an interlocutory basis.

- [6] I interpose and rehearse the following general principles of pleadings, of the civil proceedings in the High Court. A defendant upon receipt of combined summons, after delivering a notice of intention to defend, may deliver their plea with or without a claim in reconvention. A defendant in its plea is compelled to either admit, deny, confess and avoid all the material facts alleged in the particulars of claim.<sup>3</sup> It is accepted that a defendant, within the body of the plea (plead over) would raise a special plea such as a plea in abatement, plea in bar or a dilatory plea.<sup>4</sup> If a special plea is raised, then a Plaintiff is expected, within 15 days after the service upon him a plea, to deliver a replication to any claim in reconvention. If a Plaintiff does not deliver

<sup>2</sup> Practice Manual, para 10.4.3

<sup>3</sup> HCR 22.

<sup>4</sup> Ibid. These may include lack of jurisdiction, *locus standi*, and *res judicata*.

the replication in this period, they are *ipso facto* barred from delivering such replication. However, the Rules of this Court do not specifically deal with these detailed steps, but it is trite law that in certain circumstances, the High Court Rules apply in this Court.

- [7] Counsel for the Respondents in their heads of argument urged this Court herein to follow what this Court said in *Moabelo v Goldfields Group Services (Pty) Ltd*<sup>5</sup> where it was held that,

“...[t]he decision for an applicant to file a replication cannot be left open ended. Therefore, any replication to a respondent’s answering statement in terms of Rule 6(3) of the Labour Court Rules must be filed within the 15(fifteen) day time limit in terms of Rule 25(1) of the Uniform Rules.”

- [8] *In casu*, the Respondents in their statement of response raised, *inter alia*, a dilatory plea and if upheld would collapse the Applicant’s main claim. I am aware that the Rules of this Court have no provision for replication; however, since the Applicant had not delivered a response, it would mean that the special pleas would have remained unanswered. I deem unnecessary to comment and/ or apply the *Moabelo dictum supra* taking into account that in para 12.2 of the pre-trial minutes, parties asked that Court to rule on the future conduct of the matter in respect of the preliminary points raised by the Respondents. Consequently, the response by the Applicant was not out of his own volition, but after being directed by the order of Cele J, as parties asked for a directive.

- [9] This Court has its powers as *inter alia* stated in section 8(6)(e)(i) read with ss 8(4) (b) of the Superior Court Act 10 of 2013 which provides that the function or power vesting on the Judge President of this Court may be delegated to any other judicial officer (*in casu* Cele J) in respect of the management of

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<sup>5</sup> JS 492/2015 [2016] ZALCJHB 449 (18 November 2016), at para 22.

procedures to be adhered to in respect of case flow management. Rule 11 of the Rules of this Court provides that,

*“11 Interlocutory applications and procedures not specifically provided for in other rules*

*(1) The following applications must be brought on notice, supported by affidavit:*

*(a) Interlocutory applications;*

*(b) other applications incidental to, or pending, proceedings referred to in these rules that are not specifically provided for in the rules; and*

*(c) any other applications for directions that may be sought from the court.*

*(2) The requirement in subrule (1) that affidavits must be filed does not apply to applications that deal only with procedural aspects.*

***(3) If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems appropriate in the circumstances.***

***(4) In the exercise of its powers and in the performance of its functions, or in any incidental matter, the court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act.”<sup>6</sup>***

[10] As both parties asked this Court to give direction, Cele J made an order that the special pleas be referred to the motion roll and the Applicant to deliver a response.

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<sup>6</sup> See also Paras 10.3 of the Practice Manual.

[11] As the order does not specify the period as to when the response is to be filed, the Applicant contends that it should have been within a reasonable time. I agree with this contention, as it is in on all fours with Rule 11 (3) and (4) which requires that this Court act in a manner that it considers expedient in the circumstances to achieve the objects of the Act. Now, since prayer 1 of the Applicant's notice of motion refers to this application as a "*purported*" condonation application, the question is whether it is necessary for the Applicant to bring this application. The answer is yes, as it was required to give reasons as to what happened between 06 August 2019 and the date of launching this application, 21 November 2019.

[12] As indicated above there is no definite time frame set by the order, by analogy to the time frames provided in Rule 6 of the Rules of this Court, trial proceedings, and apply the uniform rules applicable in trial proceedings in the High Court in determining what could be a reasonable time in the circumstances. All labour disputes are expected to be resolved as soon as possible. Rule 6 of this Court provides that a response has to be delivered within 10 days, and the High Court Rules provide that replication should be delivered within 15 days. Now, taking that into account, it is my conclusion that a reasonable time in these proceedings will be 15 days from 06 August 2019, the date that the Court made an order that the Applicant should deliver its response. Therefore, my conclusion is that the Applicant delayed in delivering the response therefore he had to bring a condonation application.

[13] The standard for consideration in a condonation application is the interests of justice. A court has a discretion in exercising its powers in determining whether a late delivery should be condoned or not. Some of the factors to be considered are the extent of the delay, cause for the delay, reasonableness of the explanation for the delay, and prejudice. However, if the delay is excessive, a court may refuse an application for condonation without

considering other factors. Meaning, that the degree of delay may be the only factor in determining a condonation application, as the LAC in *Collet v CCMA and Others 2014 6 BLLR 523 (LAC)* at para 38, expounded the principles applicable thus:

“There are overwhelming precedents in this Court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules of court condonation may be refused without considering the prospects of success. In *NUM v Council for Mineral Technology*, it was pointed out that in considering whether good cause has been shown the well-known approach adopted in *Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A)* at 532C–D. [also reported at [1962] 4 All SA 442 (A) – Ed] should be followed but:

“(T)here is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.”

[14] The Applicant in this condonation application does not explain what happened between 06 August 2019 and 31 October 2019. The only explanation is between 01 November 2019 and the time when this application was delivered.

[15] In a condonation application, a party is expected to give an explanation for the entire period of delay. In this matter, as indicated above, the Applicant has not provided reasons for the delay as to what happened in the latter part of August, September and October, which is almost 3 months. Under the circumstances, I am of the view that the reasons, about post 31 October 2019, provided are not sufficient to justify the late delivery of the response and the delay is inordinate. I must indicate that it is not necessary for this Court to

consider the prospects of success due to what I have stated in this paragraph. Therefore, this application is dismissed.

[16] In respect of costs, the provisions of section 162 gives this Court a discretion. In this matter, the main claim is unfair dismissal and the Applicant has approached this Court in terms of the LRA, and the Applicant cannot be personally blamed for the delay in delivery of the response as he has been legal represented. Under the circumstances, I conclude that there should be no order as to costs.

[17] I therefore make the following order:

1. The Applicant delayed in delivering the response to the special pleas.
2. The condonation application for the late delivery of the response is dismissed.
3. No order as to costs.

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**S Mabaso**

Acting Judge of the Labour  
Court



Appearances:

For the Applicant: David C Feldman Attorneys

For the Respondent: Bowman Gilfillan Inc