



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 739/13

KING EDWARD VII SCHOOL

Applicant

and

JACKSON G D

Respondent

Heard: 26 February 2014

Delivered: 3 June 2014

JUDGMENT

TLHOTLHALEMAJE, AJ

INTRODUCTION:

- [1] This matter initially came before this Court as an unopposed application for condonation for the late filing of the Applicant's statement of response in the main application. The condonation application was unopposed until a day before the set down date. The matter was nevertheless argued by the parties in Court and heads of argument were submitted by both parties. However, due to averments made in the course of the opposition of the matter, and before judgment could be delivered, a Rule 11 application was launched by

the Applicant to re-open the condonation application and to allow for further evidence in relation to the service of the condonation application on the Respondent. The Respondent vigorously opposed the latter application.

- [2] For reasons that will appear clearer in the course of determining the application for condonation, little purpose will be served in considering the subsequent Rule 11 application. In my view, this subsequent application was indeed superfluous.

The application to postpone or dismiss:

- [3] As already indicated, the application remained unopposed until 25 February 2014. A notice of intention to oppose, together with an 'affidavit of non-service' and written heads of argument were filed on behalf of the Respondent in which the following contentions were made:

3.1 The hearing of the application should be postponed, or in the alternative, the application should be dismissed on account of lack of service.

3.2 As a result of lack of service, the Respondent or his attorneys of record were unaware of the application until at a late stage when the Registrar of this Court had issued a directive that the parties should file written heads of argument relating to the application for condonation.

3.3 Enquiries were then made with the Applicant's attorneys of record to establish what application the directive related to. It was only thereafter that the Respondent became aware of the condonation application.

3.4 The Respondent's attorneys then enquired from the Applicant's attorneys how service of the application was effected. From the response that was received, it became evident to the Respondent's attorneys that various e-mail addresses were incorrect and the fax of the Applicant was not received. Only one e-mail address was established to be correct. The Applicant's attorneys could not provide proof of service on the e-mail address as requested.

3.5 As the Respondent's attorneys needed time to consider the application and obtain his further instructions, and to further advise him on further possible grounds in opposing the application, the application was only opposed on the grounds of non-service.

3.6 In order for the Respondent to be afforded an opportunity to properly consider the application and file opposing papers, the Applicant was on 24 February 2014 requested to remove the matter from the roll. It had refused to do so, hence only written heads in support of the opposition due to non-service was filed.

[4] The Applicant had filed an affidavit of service deposed to by Zithulele Ndlebe, a Candidate Attorney who had averred that:

4.1 On 29 November 2013, she had served a copy of the Applicants' condonation application on the Court. Attempts were made to serve a copy on the Respondent's attorneys of record at a fax number without any success. She had previously utilized the same fax number before in serving documents on the Respondent's attorneys without problems.

4.2 Having failed to successfully serve the application she had ultimately contacted the Respondent's attorneys on 10 December 2013 to request an alternative fax number. A Ms. Vicky of the Respondent's attorneys had confirmed that there was no alternative fax number. Ndlebe had then requested to serve the application via e-mail and she was furnished with an e-mail address being [.....] She had then served the application by e-mail at that address on that day.

4.3 On 13 December 2013 she had then successfully served a copy per fax on the Respondent's attorneys. She confirmed that the contact details were correct.

[5] Michael Yeates of the Applicant's attorneys also deposed to a service affidavit in which he confirmed that he was contacted by Ms. Botha of the Respondent's attorneys on 14 February 2014, and was informed him that the application for condonation was not received. His response was that the

application was served by e-mail as per the service affidavit of Ndlebe, and also by fax. It had since transpired that service by fax was nevertheless not successfully transmitted. Yeates had nevertheless served the application again by fax on 17 February 2014.

- [6] Ms Nina Kim Botha of the Respondent's attorneys of record had confirmed that she had contacted Yeates as she was unaware of the application for condonation. Yeates had then on 14 February 2014 informed her that Ndlebe had thought that she had properly effected service by fax when this was not the case. Yeates had then served the application by fax on 17 February 2014. On 18 February 2014 she had then requested further proof of service of the condonation application. She had further advised Yeates that the e-mail address used for her candidate attorney was incorrect and as such she could not have received the application. Botha further requested a read receipt in respect of the e-mail sent to [.....] as there was no proof that the application had been sent at that e-mail address. When such proof could not be adduced, she had then requested the matter be removed from the roll.
- [7] Having considered the averments made by Ndlebe, Yeates and the response of Botha, I am satisfied that the Applicant has made out a case that all reasonable attempts were made at properly serving the Respondent with the application in question. There does not appear to be a response to Ndlebe's averments that all attempts at serving the application at the Respondent's attorneys' known fax number had proven to be unsuccessful. When this mode of service had failed at the time, there was consent from Ms Vickie Blancke of the Respondent's attorneys that the application could be served via e-mail, which she had then done on 10 December 2013 as per her Annexure 'ZFN3' as attached to her affidavit.
- [8] Short of physically serving the application, in view of the problems encountered in transmitting service by fax, I am satisfied that all reasonable attempts were made to properly serve that application. In the circumstances, it would be unfair to dismiss the application or even postpone it in circumstances where the Applicant was not at fault. It is in the light of these conclusions that the subsequent Rule 11 application to re-open the hearing of

this application is deemed to be superfluous. Furthermore, it needs to be emphasized that the right of the Respondent to oppose the application is acknowledged. It is however my view that it would not be in the interests of expeditious resolution of this matter to simply postpone the application in circumstances where every reasonable attempt at serving the application were frustrated by circumstances beyond both parties' control.

CONDONATION APPLICATION:

- [9] The requirements for condonation were enunciated in the well-known decision 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 inter-related: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, 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 of the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. The respondent's interests in finality must not be overlooked.'

- [10] In expanding further on the principles set out in *Melane*, the Labour Appeal Court had in *NUM v Council for Mineral Technology*² had held that;

'There 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 prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused. (cf. *F Chetty v Law Society, Transvaal* 1985 (2) 756 (A) at 765 (A-C);

¹ 1962 (4) SA 531 (A) at 537C-F.

² [1999] 3 BLLR 209 (LAC) at para 10

National Union of Mineworkers and Others v Western Holdings Gold Mine
(1994) 15 ILJ 610 (LAC) at 613 (E)).’

The delay and explanation thereof:

[11] The statement of case in terms of which the Respondent sought specific performance in terms of his contract of employment and payment in the amount of R128 532.00, or alternatively payment by the Applicant in the amount of R66 712.00 as damages, was filed and served on 22 October 2013. In accordance with the Rules of this Court, a statement of response was supposed to have been filed on 5 November 2013. The Applicant had however only done so on 13 November 2013, some six days late.

[12] In my view, the delay is indeed negligible. Be that as it may, the Applicant is still required to satisfy the Court that a reasonable and acceptable explanation for that delay has been proffered. The application was supported by a founding affidavit deposed to by the Applicant’s business manager, Mr Ian Sim in which he averred that the delay was not excessive; that the Applicant had excellent prospects of success in defending the main claim as well as that there was a lack of prejudice suffered by the Respondent, more so in the light of the consent already given by the Applicant to the late filing. The following further averments were made;

12.1 The delay was attributable to the fact that the Applicant’s School Governing Body as well as management had to convene a meeting in order to jointly decide whether or not to oppose the Respondent’s statement of claim. It was submitted that this was a requirement that the Applicant had to meet especially in the light of the fact that the Respondent is an employee of the School’s Governing Body, and remunerated by it.

12.2 It was submitted that the joint decision making process was a requirement in order to decide on a way forward and in order to issue a mandate regarding further steps to be taken, if any. These delays were attributed to difficulties the Applicant faced, including the fact that the

members of the School Governing Body are not full time employees of the Applicant, and as a result, challenges were posed in getting all the members together for a meeting which was held on 4 November 2013.

12.3 Due to the delays experienced, the Applicant's attorneys had requested an indulgence from the Respondent's attorneys to file the response out of time. Although the indulgence was granted, the Respondent's attorneys held the view that the Applicant still needed to file its condonation application, which it had duly done on 10 December 2013.

[13] Notwithstanding the constraints faced by the Respondent, Adv Venter had on his behalf in opposing the application, submitted that;

13.1 The applicant has not accounted for some days from receipt of the statement of case until eventually filing a response. In this regard, it was submitted that the Applicant failed to account for each day that it was late.

13.2 The Applicant's explanation was not reasonable and acceptable, as it did not make every possible attempt to refer the dispute timeously.

[14] It is trite that an application for condonation should be filed without delay as soon as a party to litigation becomes aware of the need to file such an application³. To enable this court to properly exercise its discretion, a party seeking condonation must set out all the facts and circumstances relating to the delay, and most importantly, must provide a satisfactory explanation and account for each period of the delay⁴. In this case, the statement of case having been received on 22 October 2013, the Applicant's members of the School Governing Body, who are not its full time employees could only resolve on 4 November 2013 to oppose the application. Even though the delay between these periods is not explained with particularity, I am satisfied that the Applicant acted with due haste in the light of the constraints it faced in having to hastily convene a meeting of the School Governing Body. Given the period of the delay and the constraints faced by the Applicant, it cannot be

³ See *Meintjies v HD Combrinck (Edms) Bpk* 1961 (1) SA 262 (A) at 263 H-264B.

⁴ See *NUMSA and another v Hillside Aluminium* [2005] 6 BLLR 601 (LC)

said that no attempts were made to timeously file the response to the statement of claim.

Prospects of success:

- [15] The Respondent has been and is still in the employ of the Applicant as a teacher since April 1997 in terms of a written contract of employment. In launching the main application, his contention was that in terms of clause 5.4 of the contract of employment, he is entitled to a 50% contribution of his Medical Aid from the Applicant since his date of employment. The Applicant had however failed to pay the said contribution from the inception of the contract, and to this end, he was entitled to payment in the amount of R128 532.00 as specific performance in terms of the contract, or in the alternative, damages in the amount of R66 712.00, due to breach of contract.
- [16] In its response, the Applicant had contended that the Respondent first raised the issue of alleged breach of contract in September 2009 when he alleged that the Applicant was liable for 50% of his medical fes, and that he was however making more that 50% contribution to those fees. He was informed that despite the provisions of the contract of employment, the Applicant contributed more that was required, and that he was required to contribute accordingly. He was further informed that his contract did not provide for increased payment of medical aid contribution, and as such, was not entitled to increased payments.
- [17] The Respondent had again in February 2013 raised the issue, and was informed that 50% of the contribution related to his medical aid fes and not the entire medical aid fees including his dependents. Despite this response, the Respondent still held the view that the Applicant was in breach of his contract of employment.
- [18] In regards to the approach in dealing with the aspect of prospects of success, this Court in *Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd*⁵ stated the following:

⁵ 2009 30 ILJ 347 (LC) at para 27.

'The prospects of success or bona fide defence on the other hand mean that all what needs to be determined is the likelihood or chance of success when the main case is heard. See *Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd* [1975 \(1\) SA 612](#) (D) and *Chetty v Law Society, Transvaal* [1985 \(2\) SA 756](#) (A) at 765 (A-C).'

- [19] In his written heads of argument, the Respondent submitted that the Applicant failed to incorporate the response into the condonation application, and has thus not under oath committed to the version stated therein. This contention can however not be sustainable in that at paragraph 25 of his founding affidavit, Ian Sim had specifically stated in dealing with the aspect of prospects of success that the Applicant had prospects of success in defending the Respondent's claim, and in this regard, had referred to the 'statement of claim as if specifically incorporated herein'. It is apparent that reference to 'statement of claim' is erroneous as what should be referred to is the 'statement of response'. In this regard, I am of the view that the Applicant cannot be prejudiced by such an obvious error, and I am satisfied that the statement of response has been incorporated into the application for condonation, and should thus be considered.
- [20] Sim had further averred in his founding affidavit that the Respondent had misinterpreted his contract of employment and had erroneously found the Applicant to be responsible for contributing 50% for both his own medical aid and that of his dependents. In this regard, it was contended that the medical contribution related to the Respondent's medical aid fees and not to the Respondent's dependents, who are also members of the medical aid.
- [21] Having had regard to the above, I am satisfied that the Applicant has demonstrated that given the nature of the dispute, which *prima facie* requires an interpretation of the contract of employment, it has a *bona fide* defence to the Respondent's claim. Furthermore, the interests of justice, it being also one of the fundamental requirements in considering such applications⁶, requires that the Applicant be afforded an opportunity to defend the claim against it.

⁶ *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] (2) SA 837 (CC) at 839 F

[22] In conclusion, in the light of the negligible extent of the delay in filing a response to the Respondent's main claim, the satisfactory and acceptable explanation proffered in that regard, and the Applicant's *bona fide* defence to the Respondent's claim, I am of the view that the Applicant has shown good cause for an indulgence to be granted. Furthermore, considering the circumstances of this application, it cannot be said that there is any suggestion that there is or was a deliberate attempt on the part of the Applicant to frustrate the expeditious finalisation of this matter. Any contention that the delay in question might impact on the memory of the witnesses, and moreso in view the claim before the court is clearly misplaced. Furthermore, I am of the view that the delay in question has not prejudiced the Respondent in any manner as he remains employed. On the contrary, it is the Applicant that stands to suffer more prejudice if the application is not granted in view of the claim before the court. In regards to costs, it is further my view that considerations of law and fairness dictate that each party must bear its own costs.

Order:

- i. The Applicant's late filing of its statement of response to the Respondent's statement of claim is condoned.
- ii. Each party is to pay its own costs.

Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Ms. Z Ngwenya of DLA Cliffe Dekker Hofmeyer

For the Respondent: Adv. PJL Venter

Instructed by: D and K Attorneys

LABOUR COURT