



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Of no interest to other judges

Case no: J 625/13

In the matter between:

KHUMHOLD WHOLESALE FOODS &

COMMODITIES (PTY) LIMITED

Applicant

and

JOHAN FREDERICK WILSENACH

First Respondent

CHANTAL SLABBERT

Second Respondent

Heard: 15 January 2016

Delivered: 25 February 2016

Summary: Application for condonation for the late filing of answering affidavit in application brought in terms of section 158 (1)(a)(iii) of the Labour Relations Act 66 of 1995.

Application granted, no order as to costs. The application is referred for the hearing of oral evidence in terms of rule 7 (8) (b) and the affidavits to be treated as statements of claim and response in terms of rules 6 (1) and 6 (3) of the Labour Court Rules. The parties are ordered to hold a pre- trial conference in terms of rule 7 (8) (a) of the Labour Court Rules, within 14 days of the date of this judgment being handed down.

JUDGMENT

HARDIE, AJ

- [1] This is an opposed application for condonation brought in terms of section 158 (1) (f) of the Labour Relations Act 66 of 1995 ("the Act"), seeking to condone the late delivery of the Applicant's answering affidavit in the Respondents' application brought in terms of section 158 (1) (a) (iii) of the Act on 28 March 2013.
- [2] As the Registrar purported to set the matter down on 1 December 2015 for both the condonation application and "sec 158 1 (c)" of the Act to be heard before me, the parties' legal representatives prepared themselves to argue both the condonation application as well as the application in terms of section 158 (1) (a) (iii) of the Act when the matter was heard on 15 January 2016. This precipitated my requesting the parties to file further heads on the law related to the amending of notice of motions. Having now considered the notice of set down, it is quite apparent that the parties' legal representatives were needlessly misled by it. The main application brought by the Respondents, is not one brought in terms of section 158 (1) (c) of the Act. That section relates to the Labour Court making an arbitration award or any settlement agreement, an order of court. To the extent that what is written on a notice of set down sent out by the Registrar is determinative of what must be dealt with by the Labour Court when the matter is heard, which I don't need to decide

now, in this case it was impossible for the parties to comply with that notice, because there is no section 158 (1) (c) case that has been brought under the above case number. I am thus satisfied that the only application which I am to consider is that brought by the Applicant in terms of section 158 (1) (f) of the Act.

- [3] In dealing with the application for condonation, I am guided by the *dictum* in *Melane v Santam Insurance Co Ltd 1962 (4)SA 531 (A)* at 532- E which reads as follows:-

“... the basic principle is that the court has a discretion, to be exercised judicially upon consideration of all the facts, in essence, it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation thereof, the prospects of success and the importance of the case. Ordinarily these facts are interrelated: 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 will be no point in granting condonation. What is needed is an objective conspectus of all the facts. Thus, a slight delay and a good explanation may help to compensate for the prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. The respondent's interest in finality must not be overlooked.”

- [4] What is apparent from the Applicant's explanation for the delay in filing its opposing affidavit, is that from inception it sought independent labour law advice first from a labour law consultant, Mr Kevin Scott, and then when he failed to deliver the goods, from an attorney, Ms Jana Hartmann. The Applicant's opposing papers should have been delivered on 11 April 2013, but were only properly delivered on 11 October 2013, accompanied by the requisite application for condonation. The Applicant concedes that the delay was substantial. It is however, common cause that Ms Jana Hartmann served a notice of opposition and answering affidavit on the Respondents' attorneys on 3 July 2013 and 10 July 2013 respectively, but that she did not file them with the Labour Court. Nor were they accompanied by the requisite application for condonation.

- [5] In opposing the section 158 (1) (a) (iii) application, the Applicant raised various defences, which *prima facie* can be dispositive of the case, if found to be valid. These are the following, namely the Respondents were never employees of the Applicant, and therefore their claims for unpaid remuneration and benefits are unfounded; the Respondents have failed to make the necessary averments in their founding affidavit to sustain any cause of action in either statute or contract; and the claim for unpaid remuneration and benefits is not one that should have been brought in terms of section 158 (1) (a) (iii) of the Act.
- [6] I am satisfied that whilst the Applicant could have acted more vigorously to pursue its opposition to the Respondents' section 158 (1) (a) (iii) claim, by *inter alia* chasing up its labour consultant and lawyer, the importance of the issues raised in its defence, and its apparent prospects of success make up for the substantial delay and the less than satisfactory explanation for it.
- [7] I am also of the view that the Respondents should have foreseen that their claim would precipitate a dispute of fact, and hence that they should have made their referral to the Labour Court in terms of Rule 6 of the Labour Court Rules. In the interests of justice, I propose to remedy that as I am entitled to do, in terms of the provisions of Rule 7 (8) (b) of the Labour Court Rules.
- [8] As the Applicant sought an indulgence from the Labour Court in bringing the Application for Condonation, and whilst it has been successful in being granted same, this is not an appropriate case where costs should follow the result. The Respondents were entitled to seek to persuade this Court that condonation should not be granted.
- [9] I hereby make the following order:
1. The Applicant's application for condonation is granted.
 2. The main Application brought by the Respondents in terms of section 158 (1) (a) (iii) of the Act, is referred for the hearing of oral evidence in terms of rule 7 (8) (b) and the founding and opposing

affidavits filed of record are to be treated as statements of claim and response in terms of rules 6 (1) and 6 (3) of the Labour Court Rules.

3. The parties are ordered to hold a pre- trial conference in terms of rule 7 (8) (a) of the Labour Court Rules, within 14 days of the date of this judgment being handed down.
4. There is no order as to costs.

Hardie, AJ

Acting Judge of the Labour Court

APPEARANCES

For the Applicant: L Frahm- Arp

Instructed by: Fasken Martineau Attorneys

For the Respondents: R Atcheson

Instructed by: Lee and McAdam Attorneys