



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 968/16

In the matter between:

VINOTHEN MOODLEY

Applicant

and

EON CONSULTING (PTY) LTD

Respondent

Heard: 17 November 2017

Delivered: 28 November 2017

JUDGMENT: CONDONATION APPLICATION

MAMOSEBO AJ

- [1] This is an application to condone the late filing of a Statement of Response by Eon Consulting (Pty) Ltd (Eon Consulting), the respondent in the main action. For convenience, I will refer to the parties as they appear in the papers.

A brief factual background

- [2] On 06 December 2016 the applicant, Mr Vinothen Moodley, served a default judgment on the respondent, Eon Consulting. The respondent claims that the said default judgment was retrieved from the junk mail folder by Ms Sithole, its employee, only in March 2017.
- [3] The applicant filed its statement of claim on 22 November 2016. Eon Consulting, although aware of the statement of claim by 13 March 2017, only served its statement of response on 27 June 2017. The explanation proffered by Eon Consulting is that it was experiencing an upheaval caused by large scale retrenchment processes and resignations of its employees, including senior personnel. No one was designated to monitor its fax to email through which all its legal documents were received. The problem of an unmonitored fax, according to Eon Consulting persisted for four months and is responsible for the statement of response being filed 135 days out of time. The applicant on the other hand contends that the statement is 201 days out of time. On either construction it must be determined whether such delay is inordinate and stands to prejudice the applicant.
- [4] Mr Itzkin, counsel appearing for Eon Consulting, sought to convince me that the allegations in the applicant's statement of claim are disingenuous and this Court lacks jurisdiction to hear the matter on procedural aspects because the applicant failed to approach this Court by way of an application in terms of section 189A (13) and (18) of the Labour Relations Act¹ (the LRA) and, instead, seeks relief based on section 191(5)(b)(ii) of the LRA. Counsel submitted that Eon Consulting has good prospects of success and that if condonation was not granted Eon Consulting will still be able to defend the matter as the Court will not be closing the door in its face. It will, however, be precluded from opposing

¹ Act. 66 of 1995 as amended.

the employee's unfair dismissal claim on the basis of its pleaded case as alleged in its statement of response.

- [5] Condonation may be granted at the discretion of the Court. In *Mankanyi v Anglo gold Ashanti Ltd*² the Constitutional Court stated:

"The test for the grant of condonation is whether the interests of justice permit. Factors relevant to this enquiry include, but are not limited to, the extent and cause of the delay, the prejudice to the opposing litigant, the reasonableness of the explanation, the importance of the issues to be decided and the prospects of success. The enquiry entails weighing each factor against others and determining where the interests of justice ultimately lie."

- [6] Condonation is not to be had merely for the asking. The Constitutional Court in *Grootboom v National Prosecution Authority and Another*³ made the following instructive remarks:

"In this Court the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. It is not in the interests of justice to do so, it will not be granted. 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."

² [2011] BLLR 527 at para 8.

³ 2014 (2) SA 68 (CC) at paras 50 – 51.

- [7] The applicant's claim in the main action is based on an unfair dismissal following a restructuring and retrenchment process. The applicant served its statement of claim by fax on 24 November 2016. Of significance is that Eon Consulting does not allege that the statement of claim was faxed to the wrong fax, but that there was no one from its side to monitor that the fax is received. After the resignation of Ms Pamela Apps on 31 October 2016 whose duty it was to monitor faxes, no one was assigned to perform the function.
- [8] It is required of Eon Consulting to show good cause for the delay and account in full therefor before condonation can be granted. Mr Gibson, counsel for the applicant, has demonstrated the four gaps where Eon Consulting has not furnished any explanation justifying reasonable cause for the delay. These are between 22 November 2016 and 06 March 2017; 13 March 2017 to 25 May 2017; April 2017 to 24 May 2017; On 26 May 2017; 12 June 2017 to 27 June 2017.
- [9] Eon Consulting has not shown good cause for referring the dispute late. A period of 6 months is substantial. Mr Itzkin argued that the right to fair labour practices⁴ must also be afforded to Eon Consulting. I agree. I am, however, not satisfied with the explanation furnished by Eon Consulting for the delay. In my view, it was pure negligence and short-sightedness coupled with a flagrant disregard for the Rules of this Court. The explanation does not even attempt to cover the entire period for the inordinate delay. The Labour Appeal Court in *NUM v Council of Mineral Technology*⁵ restated the following principle:
- "Without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial."
- [10] I am of the view that the applicant stands to be prejudiced if condonation is granted. It would also not be in the interests of justice to condone the late filing

⁴ Section 23 of the Constitution of the Republic of South Africa, 108 of 1996, as amended.

⁵ (1999) 2 BLLR 209 (LAC).

of the statement of response. Therefore, this condonation application stands to fail.

Costs

[11] Although Eon Consulting asked for costs in the notice of motion, it did not press for costs in oral argument. Mr Itzkin did not seek any costs order notwithstanding opposition. Mr Gibson argued for the dismissal of the application with costs. There is no reason why costs should not follow the results.

[12] In the premise, the following order is made:

Order

1. The late filing of the statement of response is not condoned.
2. The respondent, Eon Consulting (Pty) Ltd, is ordered to pay the costs of this application.

MC Mamosebo

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: Advocate Christopher Gibson
Instructed by: Ismail & Dahya Attorneys

For the respondent: Advocate Riaz Itzkin
Instructed by: Cowan- Harper Attorneys

LABOUR COURT