IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: C 501/98

DATE: 5-8-1999

In the matter between:

S ACHILLES Applicant

and

HE OTTO IMPORT AND EXPORT (PTY) LTD Respondent

J U D G M E N T

BASSON, J:

[1] This is an application for the condonation of the late filing of a statement of response, where the applicant in this application is the respondent in the main matter.

[2] The applicant has failed to file a statement of response even today and has seen fit to file instead an application for condonation in terms of Rule 12(3), in which it sets out the grounds on which it claims indulgence from this Court.

[3] Rule 12(3) reads as follows:
"The Court may on good cause shown, condone non-compliance with any period prescribed by these rules".

[4] It is trite that the principles set out in the well-known judgment Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A) at 532C-F apply in applications for condonation of this kind where the Court has to weigh up the different factors, which would include the degree of the lateness, the explanation therefor and the prospects of success, as well as the importance of the matter:

"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, 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 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. And the respondent's interest in finality should not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits. I think that all the foregoing clearly emerge from decisions of this Court, and therefore I need not add to the evergrowing burden of annotations by citing the cases".

[5] It appears that the statement of response was late in the sense that the statement of case had already been filed on 22 January 1999.

[6] After no response was filed by the respondent, the parties reached an agreement in terms whereof the statement of response had to be filed 10 days after 12 May 1999. However, the application for condonation was filed only on 30 July 1999, without the necessary statement of responce as was required in terms of this agreement (at paragraph 2 thereof).

[7] I therefore regard the period of being out of time as being very late indeed.

[8] I now have to have regard to the explanation for the lateness.

[9] It is clear from the explanation offered that the applicant always intended to oppose the matter. However, due to the negligence of its attorneys, the statement of response was not filed timeously. It appears that the attorneys in question had no less than two opportunities within which to file timeously, first in terms of the Rules and second in terms of the agreement reached between the parties. However, in both instances the applicant's attorneys failed to comply. In fact, even today, there is no statement of response available as had been agreed between the parties.

[10] I believe that there is a limit within which a litigant can explain non-compliance with the Rules by referring to the negligence of the attorneys involved. In my view, this limit has been transgressed *in casu.* It is therefore not an acceptable explanation on the basis of the two opportunities provided, and of the non-compliance even today, for the applicant to rely on its attorneys' negligence. See in this regard Salojee and Another v Minister of Community Development 1965 (2) SA 135 (A) at 141C-E:

" There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of the Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is very little reason why in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are".

[11] In the event, there is a long period of delay coupled with a very weak and unacceptable explanation.

[12] The question remains whether the prospects of success could make up for the fact that there is no proper explanation for the long period of delay in complying with the Rules of this Court.

[13] In this regard I was addressed on the basis of a retrenchment dismissal. A further supplementary affidavit was provided by the applicant. This affidavit dealt with financial losses sustained by the applicant at the time of the dismissal of the respondent. It was also stated that a certain outlet, (the "Joseph" outlet of the applicant) had to close down at this time and that there was thus no work available due to operational requirements.

[14] It was further stated that the respondent was indeed an employee at the time, that is, January 1998, and that the following letter attached as "EDW3" to the application for condonation was the letter of dismissal:
"We hereby give you one month's notice of our intention to terminate your services at the end of February 1998."

[15] It was further stated that the letter was prompted by the financial difficulties and the closure of the “Joseph outlet” and that it was accordingly a retrenchment dismissal.

[16] The founding affidavit, (in the application for condonation - at paragraph 17 to 18) also confirmed the closure of the “Joseph” outlet and the breakdown in the turnover of the outlet at which the respondent worked and added the following:
"The applicant's decision to terminate the respondent's services was then communicated to the respondent and on 20 January 1998 the respondent was notified in writing that his employment with applicant would end on 28 February, as it was clear from a copy of the aforesaid notice annexed hereto marked 'EDW3'."

[17] On this basis it was argued by the applicant’s representative that the decision to retrench was communicated to the respondent and that this constituted compliance with section 189 of the Labour Relations Act, 66 of 1995 (“the Act”) which requires proper consultations in terms of these provisions of the Act.

[18] However, there was no indication in the founding affidavit of any such consultations taking place.

[19] The applicant further argued that it was not only on the basis of retrenchment that the respondent was dismissed in January 1998. The applicant contended that the respondent had worked in terms of a so-called "fixed-term contract" and that the contract had merely come to an end.

[20] However, a reading of the said employment contract (attached to the application for condonation as "EDW4") showed that the employee (the respondent) was described as a "permanent casual worker" of the applicant.

[21] It was also stated that the employee (the respondent) must receive 14 days' written notice (at paragraph 5.1 dealing with the termination of the contract). At page 4 of the said contract (below the signatures of the parties) it is stated (and this does not even appear to be part of the contract as it is below the signatures):
"Please note that this contract runs on a monthly basis."

[22] There is, however, no termination date in the contract as one would expect from a “fixed-term” contract. There is also no indication that the contract was renewed every month.

[23] The respondent had worked for the applicant for five months (at the very least). Therefore, I believe that the respondent must at the very least have had a reasonable expectation to continue in this position. It was not argued (and it was not set out at all in the affidavits) that there was no reason to have such reasonable expectation.

[24] Moreover, the reliance of the respondent on a "fixed-term" contract must be assessed in the light of the contradictory statement that the employee was indeed retrenched and that it was merely:
"The timing thereof (that) was changed to April 1998" (as it was also put during argument).

[25] In view of the totally contradictory statements in regard to the dismissal of the respondent as being either retrenchment or on the basis of the expiry of a fixed-term contract, I am not persuaded that the prospects of success are very strong in this matter. Indeed, they appear to be weak.

[26] The respondent also relies on a discrimination dismissal. In this regard it was stated during argument that the defence of the applicant would not be the inherent requirements of the job, it would merely deny that there was any discrimination perpetrated against the respondent in favour of female employees.

[27] Taking all of the factors into account as set out in Melane v Santam Insurance Co Ltd (*supra*), that is, the degree of the lateness, the explanation therefor and the reasonable prospects of success, I believe that this application should be refused.

[28] In the event the application is dismissed with costs.

[29] The default judgment will be heard on a date to be arranged between the Registrar and the respondent, that is to say, the applicant in the main matter.

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Basson, J

Appearing for the applicant:	Mr JW Harmse of De Klerk Mandelstam
Appearing for the respondent:	Mr T Brivik of Michael Bagraim & Associates
Date of hearing:	5 August 1999

Date of judgment: *Ex tempore*