

Sneller Verbatim/al

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: JS758/01

2001-08-15

In the matter between

GODFREY RABELA SISHANA

Applicant

and

SABC

Respondent

J U D G M E N T

LANDMAN J: Mr Godfrey Rabela Sishana alleges that he was dismissed from his services with the SABC on 28 May 2000. He referred a dispute to the CCMA on 8 March 2000 and again a further dispute concerning his dismissal on 30 May 2000. It is common cause that the SABC attended the conciliation meetings on both occasions and that the parties were unable to reach an arrangement.

Thereafter Mr Sishana drew up, and according to him, served several documents by registered post on the SABC, the respondent in this case. In his affidavit, which he attested to on 4 July 2000, concerning proof of service, as required by rule 4(2)(e) of the rules of this court, Mr Sishana said that he served a

notice of motion, affidavits and annexures/statement of claim with annexures on the respondent by registered post. Particulars are given of the address, the date and the registered slip. The affidavit concludes by saying:

"I further state that the envelope posted contained the documents concerned."

Ms Cloete, a personal assistant to the chief executive officer of the SABC, has filed an affidavit in support of an application for condonation of the late filing of the SABC's statement of response. In her affidavit she says that on 4 July 2001 she received and signed for an A4 envelope addressed to the chief executive officer, Mr Peter Matlale, from the SABC messenger. It contained a document from the CCMA stating that the dispute between Mr Sishana and the SABC remained unresolved. She says:

"I forwarded these documents to the Industrial Relations Department, as I could see that they had to do with labour matters."

On 30 July she consulted with Mr Khumalo of the SABC's attorneys and he showed her a document which he said was Mr Sishana's statement of case, and asked whether she had seen it. She says the document was not contained in the envelope which she received on 4 July. She also says that neither of the two bundles of documents which are in the court file were in the envelope. She says that had she received the documents, she would have handed them over to the Industrial Relations Department, as she had done with the certificate of outcome that she had received that day.

In a statement of response that was confirmed under oath, Mr Sishana says:
The affidavit of Madelein Sharlene Cloete is devoid of any truth and should be dismissed as it sought to mislead the court, thereby obstructing justice, which is a serious criminal offence. In the light of this the court is advised to lay charges of prejudice and/or *crimen injuria*.

- 4.2 The applicant posted both form 1 (application for case number) and form 2 (statement of claim with two CCMA certificates of outcome attached) in one envelope as arranged by the applicant and stapled by Ms Juliet Dakgata, admin clerk at the Labour Court, on 27 June 2001 to the respondent. Attached are certified copies of the said items which were submitted to both Ms Dakgata and Mr Paul Ramashole, who are employees of the Labour Court.
- 4.3 The envelope was sealed in the presence of the two above mentioned officials after a lengthy discussion regarding the objection to my noble intention to send form 2 as arranged with the CCMA certificates, as they believe it was a duplication since the corporation/ respondent had been provided a copy in my presence by the CCMA commissioner earlier on the same day, but finally accepted my explanation. I informed the two that I want to avoid delaying tactics by the respondent and preferred giving them the information rather than wait for them to request it from the court. And I saw nothing wrong with sending the documents that I could have provided this during the hearing, if need be, since there was no difference on the claim as compared to the context of the affidavit dated 20 June 2001 pertaining to this issue.
- 4.4 Surely it is not my responsibility to carry the cost for a multi billion company such as the SABC and thus I agreed to and advised not to personally send the two bundles of files to them, but insisted on leaving them behind at the Labour Court, against the advice of the Court officials as well as other people I consulted. Though, again, I could have provided this information to the presiding judge on the day of the hearing. I just wanted to make things easier for everyone and also felt that it was fair for me to provide this information prior so that both the respondent as well as the judge do get enough time to peruse the documents, though I could submit other documentation later.

- 4.5 It is a known fact that the respondent was given more than enough time to respond against the normal practice and said procedure, but failed to utilise this grace. A default judgment was awarded on 24 July 2001 and respondent received the posted mail on 2 July 2001, as per the attached confirmation receipt of the Auckland Park post office which bears the stamp of the respondent.
- 4.6 While it is understandable that Mr Maserumule, who is the director at the respondent's legal representative firm, is also an acting judge at the Labour Court, it is totally unacceptable; absurd and insulting that the integrity of the judicial system (Labour Court) could be undermined in this despicable manner as per the respondent's conduct in filing its intention to oppose the default judgment.
- 4.7 It goes without saying that the respondent's conduct is consciously premeditated and deliberate, which obviously cannot be disputed as a wilful default, especially when considering all the information supplied by the applicant regarding this dispute, as well as letters from respondent's representative, notwithstanding the contents thereof, amongst other disturbing issues. It is on this basis that the applicant wishes to register the strongest objection to respondent's application/request in totality as stated in its notice of motion, as well as the statement of reply for costs."

I should also add here that the application for condonation was triggered by the receipt of the notice of set down which had been sent by the registrar of this court to both the parties, advising them that an application for default judgment would be heard today. This is in accordance with the rules of court. I refer to a judgment which I delivered holding that this is the correct and proper procedure and that direction to the contrary, that the registrar should not serve the notice of set down on the respondent, was not in accordance with the rules. This case seems to indicate why the framers of the rules were of the opinion that the notice

of set down should be sent to both parties.

In considering an application for condonation, it is necessary to take into account the well-known requirements set out in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F, where it was said:

"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."

In this particular matter the SABC has alleged that the envelope was received by it on 4 July and disposed of as indicated in Ms Cloete's affidavit. However, even if it was included, then it appears that the application for condonation and the filing of the statement in response was made on 31 July, which would be some two weeks out of time. The explanation for the delay which has been offered by Ms Cloete is that the envelope only contained a certificate of outcome by the SABC and did not contain the statement of case or the form 1. I have set out an extract of her affidavit, where she says that she received one document, but sent other documents to the Human Resources Division. Why she would use the word in the plural is not entirely clear and may be a cause of concern.

Mr Sishana's case is entirely different. He stated under oath in his statement in response to the application for condonation that he sent the statement of case in that envelope. This raises questions of credibility. Do I

believe Ms Cloete, or do I believe Mr Sishana? These matters are difficult to decide on paper, and strictly speaking, if I could not come to a conclusion I should refer the matter for oral evidence so that the credibility of these witnesses and any other witnesses who may be relevant may be tested. However, in the interests of justice I have decided to take a more robust approach and to take the view that I am entitled to consider the explanation for the delay, but that must not be taken into consideration in isolation, but weighed up against the other considerations set out in *Santam v Melane*. One of the reasons why I have decided to take the robust approach and not refer this matter for hearing of oral evidence, is that there is no prospect that oral evidence could be heard by this court before February 2002. It clearly would not be in Mr Sishana's interest to have this matter hang in the air until then, nor would it be fair to the SABC.

I have considered whether I should grant condonation in this matter. It appears to me that the statement of opposition which has been filed shows that the SABC has a *prima facie* defence, although it is difficult to arrive at this conclusion, because the statement of case does not comply with the rules of court and the cause of action is not set out as is required. But nevertheless the SABC has set out in its statement of response certain facts which could amount to a defense. That, in the circumstances of this case, appears to be the best that it can do.

I have also taken into account the importance of this case. Clearly it is an important case because although it appears only to deal with questions of dismissal, I have heard in argument this morning that there are broader and wider issues involved, including issues relating to corporate government. Therefore it would appear that this is a case which should be heard by a court of law, such as the present court.

I should also mention that even if this matter were to have proceeded on an unopposed basis, this court would have had difficulty in determining what Mr Sishana's cause of action was, and more in particular, it would have had difficulty in considering the relief which he sought. Mr Sishana was seeking an order compelling the SABC to pay him R2,2 million per month, as from the date prior to his dismissal until the matter is finalised. This amount, however, it was submitted excludes legal, admin, pension, medical and study fees.

In the circumstances, it appears to me, that justice will only be done to the parties by making the following order, which I do:

1. The respondent's late filing of its statement of case is hereby condoned.
2. The respondent is granted leave to defend this matter.
3. The applicant is given 30 days to amend his statement of case so that it will comply with the rules of this court.
4. On service of an amendment to the applicant's statement of case the respondent is ordered to file any amendments to its statement of opposition as it may wish to do so, and if it does so, the amendment must be filed within 15 days of receipt of the amended statement of case.
5. There will be no order for costs.

I should indicate briefly why I make no order for costs. That is, because I am unable to determine decisively whether the version put forward by Mr Sishana as regards the contents of the envelope, or that of Ms Cloete is correct and in the circumstances it would not be fair for me to make an order of costs in this matter.

Signed and dated at BRAAMFONTEIN this 12th day of September 2001.

A A Landman

Judge of the Labour Court of South Africa

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