

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

CASE NO: JR 1884/07

In the matter between:

THE MINISTER OF SOCIAL DEVELOPMENT

APPLICANT

AND

Y. VELDHUIZEN

RESPONDENT

JUDGMENT

NYATHELA AJ

Introduction¹

[1] This is an application for condonation in terms of Rule 12(3) of the Rules of the Labour Court to condone the late filing of a statement of defence.

[2] The application is opposed by the respondent.

The parties

[3] The applicant is the Minister of Social Development and is cited in his official capacity as nominal head of the Department of Social Development.

[4] The respondent is Y Veldhuizen, an employee of the applicant.

The facts

- [5] The respondent in this application is an employee of the applicant. He is employed as a Chief Social Worker. On or about September 2001, respondent applied for an advertised position of Director: Information Management. He was not shortlisted for the position.
- [6] The applicant conducted interviews of shortlisted candidates and on 01 September 2002, one Ms F. Nxumalo was appointed to the position.
- [7] Respondent lodged a grievance regarding the applicant's failure to shortlist him. On 31 October 2002, respondent received a response from the Director – General stating that he was not suitably qualified to be short listed due to lack of necessary experience.
- [8] Respondent was not satisfied with applicant's reasons for not shortlisting him and he eventually made a referral to the Labour Court. Respondent alleged in the referral that the applicant unfairly discriminated against him by not shortlisting him for the advertised position.
- [9] Respondent served the statement of claim on applicant on 04 September 2007 and filed same with the court on 11 September 2007.
- [10] On 18 December 2007 applicant filed a response to the statement of claim with the court but the said response to the statement of claim was not accompanied by an application for condonation.

[11] On 08 February 2008, applicant filed an application for condonation together with a response to the statement of claim with the court.

[12] It is this application for condonation which is the subject of the current proceedings.

Analysis

[13] This is an application for condonation for the late filing of the response to the statement of claim. The application has been brought in terms of Rule 12 of the Labour Court Rules.

[14] Rule 12 provides as follows: “*Extension of time limits and condonation –*

(1) The court may extend or abridge any period prescribed by these rules on application, and on good cause shown, unless the court is precluded from doing so by an Act.

(2)....

(3) The court may, on good cause shown condone non compliance with any period prescribed by these rules”.

[15] In *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A)-the then Appellate Division of the Supreme Court considered the meaning of “*on good cause shown*”or “*on sufficient cause shown*”and formulated the factors which need to be considered in this regard. These factors are: the degree of lateness, the explanation for the delay, the prospects of success and the importance of the case. The court held that the above factors are interrelated and should be

considered as a whole and are not individually decisive on whether condonation should be granted or not.

- [16] The approach in the *Melane* case has been followed by the Labour Appeal Court in amongst others the following: *Foster v Stewart Inc. (1997) 18 ILJ 367(LAC)*, *All Round Tooling (Pty) Ltd v NUMSA (1998) 8 BLLR 847 (LAC)*, *PPWAWU & others v AF Dreyer & Co. (Pty) Ltd (1997) 9 BLLR 1141 (LAC)*.
- [17] In the *All Round Tooling* Case, the Labour Appeal Court held that an applicant should apply for condonation as soon as he or she realises that his or her papers are out of time. The court proceeded to hold that a practitioner's busy schedule is not an acceptable explanation for delay in observing time limits. The latter view is similar to the approach adopted in the *PPWAWU* case referred to above.
- [18] However, in *NUM v Council for Mineral Technology (1999) 3 BLLR 209 (LAC)* at page 211 paragraph G-H, the Labour Appeal Court has added a further principle to be considered, namely, "*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*". This principle was also followed in *A Hardrodt (South Africa) (Pty) Ltd v Behardien & others (2002) 23 ILJ 1229 (LAC)*.
- [19] The issue I have to determine in this matter is firstly whether applicant has provided a reasonable and acceptable explanation for the delay and if so, whether applicant has reasonable prospects of success on the main case.
- [20] It is not in dispute that the respondent filed its statement of claim on 11 September 2007. The applicant did not file a response to the statement of claim to the respondent's statement of claim within 10 (ten) days as required by Rule 6(3)(c) of the Rules of the Labour Court but only did so on 18 December 2007. Furthermore,

the said response to the statement of claim was not accompanied by an application for condonation. The latter application was only filed on 08 February 2008.

[21] The applicant's explanation for the delay is that after being served with the respondent's statement of claim on the 04th September 2007, he instructed an attorney to handle the matter. Between the 04th September 2007 and the 18th December 2007 when the response to the statement of claim was filed, the attorney and in some instances Counsel were busy with consultations with its officials as well as perusing documents which were voluminous. Furthermore, the instructed attorney took leave early in December 2007 and handed over the matter to Mr David Mtshweni who had no personal knowledge of the issues hence the response to the statement of claim was only filed on the 18th December 2007.

[22] On the issue of the explanation for the delay, respondent's contention is that applicant does not have a reasonable explanation since it is a State institution with sufficient resources which could have enabled it to comply with the time limits.

[23] In my view, applicant's explanation for the delay does not show that it regarded compliance with the time limits stipulated in the rules to be a serious matter. Applicant knew as early as the 04th September 2007 that it will need to file a response to the statement of claim within ten (10) days from date of receipt of the statement of claim. For the period 04 September 2007 to 18 December 2007, applicant was fully aware that the response to the statement of claim had not been filed as required by the rules. However, applicant's attitude appears to have been that for as long as the instructed attorneys still needed time to consult and peruse documents, nothing should be done about compliance with the rules. At any rate, one finds it unacceptable that perusing documents and consulting with officials could justify a delay in filing a response to the statement of claim.

[24] Furthermore, applicant has not specified which documents its officials have been looking for which allegedly contributed to the delay. It has further not shown why such documents if any were so crucial to formulating the defence such that it should just turn a blind eye to adhering to time limits. In the light of the fact that respondent's contention that it had attached a bundle of documents relevant to the dispute to its statement of claim has not been disputed, applicant's explanation that

it was seeking documents hence the delay cannot be accepted. At any rate, whatever documents applicant needed if any, were within its control since it is the custodian of the information which led to the dispute and thus the alleged search for documents cannot justify the delay.

[25] Applicant's contention that the instructing attorney and Counsel were busy with other matters hence the delay cannot be accepted. Firstly the Labour Appeal Court has already held in the *All Round Tooling* and *PPWAWU* cases referred to above that a practitioner's busy schedule cannot constitute an acceptable reason for failure to comply with time limits. What compounds the issue in this matter, is that applicant is a State institution which has an in house legal department as well. Applicant has furnished no explanation as to why it could not utilise its in house legal department to handle this matter if its preferred attorney and Counsel were too busy to can handle the matter timeously. Furthermore, there is further no explanation as to why applicant with the resources at its disposal could not instruct another attorney or Counsel to handle this matter within the time frames allowed by the rules if the appointed attorney and Counsel were too busy. In my view, applicant is to blame for the delay. Applicant's conduct in the circumstances is inexcusable.

[26] As pointed out above, the Labour Appeal Court has held in the *All Round Tooling* case that an applicant should apply for condonation as soon as he or she realises that his or her papers are out of time. In this matter, when applicant lodged the response to the statement of claim on 18 December 2007, he was aware that the said response to the statement of claim was late, yet he did not apply for condonation at that stage.

[27] Applicant only applied for condonation on 08 February 2008. Applicant's explanation that the delay from the 18th December 2007 to the 08th February 2008 was caused by the fact that the attorney and officials involved in this matter were on summer vacation is not acceptable. Applicant was aware on the 18th December 2007 that the response to the statement of claim does not comply with the rules since it was out of time and was not accompanied by an application for condonation. Applicant was therefore aware at that time that the issue of

condonation was both crucial and urgent and should therefore have taken steps to ensure that there is no further delay in lodging the application for condonation. For applicant to simply wait for the time when all the affected people could conveniently return from their summer vacation to deal with this matter is inexcusable. Applicant does not in any way seem to have bothered about the fact that the response to the statement of claim was out of time. There is further no reasonable and acceptable explanation as to why the application for condonation was not done early in January 2008 since the summer vacation had ended by then. In my view, applicant has not lodged the application as soon as possible after realising the need to lodge the application as was held in *All Round Tooling* case.

[28] Based on the analysis above, I find that applicant does not have a reasonable and acceptable explanation for the delay in this matter.

[29] In the light of the decision in *NUM v Council for Mineral Technologies* referred to above, that “*without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial*”, I am of the view that it would be academic to still consider whether applicant has prospects of success on the main application.

[30] Applicant has therefore failed to show good cause for the granting of condonation in this matter.

Order

[31] I make the following order:

(a) The application for condonation is dismissed.

(b) The respondent’s application will proceed on an unopposed basis.

(c) I make no order as to costs

Nyathela AJ

Date of Hearing : 21 April 2009

Date of Judgment : 22 September 2009