IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C833/05

In the matter between:

THEMBA JONI AND 82 OTHERS

Applicants

and

SERVEST (PTY) LTD t/a
FICA QUALITY CLEANING SERVICES

Respondent

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JUDGMENT

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FRANCIS J

*Introduction*

1. This is an application for condonation for the late filing of the respondent's statement of response. The application was opposed by the applicants.

*The background facts*

2. The applicants were employed by the respondent. They were dismissed by the respondent after they had embarked on an unprotected strike action in 2002. The dispute was referred to conciliation and after conciliation had failed to this Court for

adjudication.

3. The applicants served and filed their statement of claim on 2 December 2005. A notice to oppose was served and filed on 20 January 2006 which was outside the 10 ten-day period. The respondent's statement of response should have been filed on 19 December 2005. The matter was enrolled for default judgment on 30 March 2006 before Pillemer AJ. The respondent's attorney appeared at the hearing and Pillemer AJ made the following order:

*"1. The application is removed from the roll.*

*2. The respondent is directed to deliver its response by no later than 7 April 2006.*

*3. The respondent is ordered to pay the costs of today's proceedings."*

4. The respondent did not file its statement of response on 7 April 2006 in terms of the aforesaid court order but did so on 11April 2006. The statement of response case was filed some 16 weeks late and was not accompanied with an application for condonation.

5. The matter was enrolled for a pre trial conference before Tip AJ on 28 January 2010. Both parties attended court and by agreement the parties were ordered to file a full signed pre-trial conference minute by 16 February 2010. The pre-trial minute was only filed on 21 May 2010.

6. The applicants raised the following preliminary point in the pre-trial minute:

*"24.1 Applicant party served the Respondent party with its statement of claim on the 2nd December 2005 and accordingly notified the Respondent that it had 10 (ten) days to file its opposition thereto if it so wished.*

*24.2 The prescribed 10 (ten) days on which the Respondent was supposed to file its opposition to the Applicant party's statement of claim lapsed on 19 December 2005.*

*24.3 The Respondent filed its notice of intention to oppose the Applicant's statement of claim on 16 January 2005 without filling its opposition thereof.*

*24.4 The matter was before Honourable Acting Justice Pillemer on 30th March 2006, almost 14 months when the Respondent had not yet filed its opposition yet whereby the Court ruled that the matter be removed from the roll that day and the Respondent to deliver its response to the Applicant's statement of claim by not later than 7 April 2006 and the Respondent was further ordered to pay the costs of that day's proceedings.*

*24.5 The Respondent did not only fail to comply with that order of the above Honourable Court but also failed to file an application for condonation of the late filing of its opposing statement which was filed 9 days after the date of the said Court Order. Thereby failing to show good cause why it failed to comply with the above said Court Order including but not limited to why should the Court entertain its opposing papers".*

7. The matter was enrolled for trial on 1 February 2011 before Steenkamp J. The following order was made:

*"1. The matter is postponed sine die;*

2. *The Respondent is ordered to furnish the documents requested by the Applicant on 17 May 2010 to the Applicant by not later than 8 February 2011. The Applicant is ordered to file consolidated bundle of documents by not later than 22 February 2011;*

3. *The Respondent's attorney is ordered to pay the Applicant's costs, including costs for travel and accommodation de bonis propriis.*

4. *The Registrar is directed to enrol the matter for trial on the first available date after 22 February 2011 for 4 days;*

5. *The Registrar is directed to ensure the presence of an interpreter from Xhosa to English and vice versa."*

8. The matter was enrolled for trial commencing 15 August 2011. On 5 August 2011 the respondent filed an application stating that it would on 15 August 2011 be seeking an order for the following relief:

*"1. Condoning the late filing of the Respondents Statement of Defence (in as much as same may be necessary);*

*2. Directing that costs of this application be paid by the Applicant only in the event that the application is opposed.".*

9. The deponent to the condonation application was the respondent's attorney, Brett Carnegie who stated as follows in his affidavit:

*"1. I am an adult male attorney practicing on my own account at 17Gb, Waverley Business Park, Mowbray, 7700.*

*2. The facts herein contained are within my personal knowledge, except where*

*the contrary appears from the context, and are both true and correct.*

3. *I am duly authorised to bring this application and depose to this affidavit on the Respondent in the main Actions behalf.*

4. *This is an application for the condonation of the late filing of the Respondents statement of defence in accordance with the court order of the Honourable Acting Justice Pillemer ordered on the 30th March 2006.*

5. *Many years have passed since the issuing of the order and my colleague, Mr Alfred Ntela, for the Applicants has insisted that I launch an application for condonation of the late filing of the Respondents statement of defence in this matter. I was well aware of the implication of the Court order and worked hard at preparing the Respondents Statement of Defence to have it delivered timeously. I cannot recall the precise details of why the Statement of defence was delivered on the date when it was, however I can only assume that same was delivered with the consent of the Applicants attorneys at that time. I do not have a file note recording same and for this I apologise, however the fact that there was consent for the late filing is evidenced by the fact that no further steps were taken by the Applicants legal representatives to hold the Respondent as being in Contempt of Court.*

6. *In fact, as far as I can make out, no further action was taken by the Applicants attorneys until their withdrawal as attorneys of record in October 2006.*

7. *I believe that Mr Ntsela is taking a cheap shot to try and gain some advantage in the litigation and submit that he should have launched an application for contempt of court or set the matter down for a default hearing. Instead, he has chosen to procced with trial preparation in this matter, including the*

*conclusion of a pre-trial minute and the setting of the matter for trial. There would be no prejudice to the Applicants case arising from the late filing of the statement of Defence.*

*8. I submit that the matter is ready to proceed to trial and that the late filing of the Statement of Defence be condoned.*

*9. In the premises I submit that the applicant has made out a case for the relief sought in the Notice of Motion to which this affidavit is attached. I accordingly ask the court to grant the relief sought."*

10. The condonation application was opposed by the applicants on 5 August 2011 on several basis. It was contended that the application was defective and was not filed within the prescribed time limits. There was inordinate delay in filing the application for condonation of the late filing of its opposing papers and that the respondent was in contempt of Pillemer AJ's order. It was contended that a party that needs to apply for condonation must do so immediately upon its first realisation that condonation must be applied for. The respondent's attorney was present in court on 30 March 2006 when the order was made. The respondent was ordered to file its opposing papers by 7 April 2006. The respondent's attorney had attached his signature to the statement of defence on 22 February 2006. He has failed to give a plausible explanation in his supporting affidavit why if the statement of response was ready on 22 February 2006 which was eight days before he made his surprise appearance in court on 30 March 2006 it was not filed within eight days. The deponent stated that he was present in Court on 1 February 2011 when the attorney was warned by Steenkamp J for not having applied for condonation for the late filing of the respondent's opposing papers

even when he signed a pre-trial minute with an *in limine* point to this effect and he said that he would argue condonation at the trial stage.

11. It was further pointed out by the applicants in the answering affidavit that the application was defective and did not specify or reflect the degree of lateness and that the respondent did not deal with prospects of success. The applicants stated that the respondent does not have prospects of success in the trial. It was stated that the dismissals of the applicants were not effected for a fair reason and in accordance with a fair procedure as stated in the pre-trial minutes of the matter. It was stated that the respondent does not have any prospects of success in the trial of this matter and hence it silence on this important issue in condonation applications. It was stated that the court should not entertain or grant condonation to an application which failed to advance degree of lateness, reasons for the lateness not known and or based on assumptions, prospects of success, prejudice and failure to show good cause. The applicants denied that there was consent from the applicants previous attorney for the respondent not to comply with the court order of 30 March 2006 and the respondent was put to the proof thereof.

12. The respondent filed a replying affidavit on 12 August 2011. It has stated *inter alia* that it has good prospects of success and referred to the statement of response that was filed. It confirmed that Steenkamp J had raised the issue of the condonation application with the respondent's attorney and that he had said he would deal with it at the trial hearing.

*The condonation application*

13. The leading case dealing with condonation application is *Melane v Santam Insurance Co Ltd* 1962(4) AD where the following was said at page 532 paragraphs C to D:

*"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 decision, 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 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 must 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 aforegoing clearly emerge from decisions of this Court, and therefore I need not add to the evergrowing burden of annotations by citing the cases".*

14. The respondent had to deal with the following facts in its application for condonation namely:

14.1 The degree of lateness;

14.2 The explanation for the lateness;

14.3 Prospects of success; and

14.4 The importance of the case.

15. The respondent was required to deal with all four requirements for condonation in its founding papers. It has not done so. It is trite that a party must make out its case in its founding affidavit. It cannot make out its case in its replying affidavit. This principle is dealt with as follows in *Herbstein & Van Winsen - The Practice of the High Courts of South Africa - Fifth Edition Volume 1* at pages 439 - 440:

*"The necessary allegations must appear in the supporting affidavits, for the court will not, save in exceptional circumstances, allow the applicant to make or supplement a case in a replying affidavit, and will order any matter appearing in it that should have been in the supporting affidavits to be struck out. If, however, the new matter in the replying affidavit is in answer to a defence raised by the respondent and is not such that it should have been included in the supporting affidavits in order to set out a cause of action, the court will refuse an application to strike out. It is well established that there exists a general rule that new matter may not be introduced by an applicant in the replying affidavit, but this is not an absolute rule and the court may in an appropriate case allow an applicant to do so. In the context 'new matter' is not synonymous with a new cause of action. The abandonment of an existing claim together with its cause of action and the substitution of a fresh and completely different cause of action does not amount merely to the introduction of 'new matter'.*

*The general rule which has been laid down repeatedly is that an applicant must stand or fall by the founding affidavit and the facts alleged in it, and that although sometimes it is permissible to supplement the allegations contained in that affidavit,*

*still the main foundation of the application is the allegation of facts stated there, because those are the facts that the respondent is called upon either to affirm or deny. The Appellate Division has held that it is not permissible to make out new grounds for an application in a replying affidavit. If the applicant merely sets out a skeleton case in supporting affidavits, any fortifying paragraphs in the replying affidavit will be struck out. .... On the other hand, where the applicant's supporting affidavits were defective inasmuch as they were based on hearsay evidence, the court held that the applicant could not make a case for the first time in the replying affidavit; and where the applicant had failed to allege locus standi to make the application it was held this could not be done in a replying affidavit. The applicant must make out a prima facie case in the founding affidavit."*

16. The respondent had to deal with the degree of lateness. The applicant's statement of claim was served on the respondent on 2 December 2005. The statement of response was served on 11 April 2006. It should have been filed on 19 December 2005. There is no explanation tendered why the statement of response was not filed on or before 19 December 2005. The respondent's counsel contended that Pillemer AJ after he had ordered the respondent to file the statement of response on 7 April 2006 had by implication condoned the late filing of the statement of response. In this regard see *Score Supermarket v Kente* [1992] 12 BLLR 1261 (LAC) where at page 1264, paragraph 10 it is stated as follows:

*"The second point which is, by way of the condonation application, sought to be raised in appeal is not stronger. In fact, it is a good deal weaker. It is contended in the alternative that the statement of case was filed late, and that although it was*

*accompanied by an affidavit seeking condonation, condonation was not granted. My view is that where the court dealt with the dispute without explicitly granting condonation it must be considered to have been implicitly granted."*

17. When the matter came before Pillemer AJ the respondent had not yet filed the statement of response. There was no application for condonation before him and it is unclear how he could have granted condonation when there was no such application. The matter was set down for default judgment and not an application for condonation. There is nothing before this Court or even by the respondent that Pillemer AJ had condoned the late filing of the statement of response. There was simply nothing to condone since the applicant had not filed a statement of response or condonation application. There is no indication in the order made by Pillemer AJ that he had condoned the late filing of the statement of response. It can therefore not be said that Pillemer AJ implicitly granted condonation since all that he had before him was the statement of claim.

18. Even if it could be said that Pillemer AJ had condoned the late filing of the statement of claim, the respondent has also not complied with the order made by him. The respondent had to file the statement of response by 7 April 2006 and did so on 11 April 2006 without applying for condonation. There is no proper explanation tendered for non compliance with the court order. The respondent's attorney has stated that he could not recall the precise details of why the statement of response was delivered on the date when it was, however he could only assume that same was delivered with the consent of the applicants attorneys at the time. He said that he does

not have a file note recording same and apologised for this, however the fact that there was consent for the late filing is evidenced by the fact that no further steps were taken by the applicants legal representatives to hold the respondent in contempt of court. The respondent is economical with the truth. I would have expected that the respondent's attorney would have recorded the agreement or even written a letter or kept a note of this in his file. He could not indicate when exactly this agreement was concluded and with whom in particular it was concluded with. The period of delay in filing the statement of response was sixteen weeks.

19. This brings me to the question of prospects of success. Nowhere is it stated in the founding papers what the prospects of success is. Since this not dealt with in the founding papers, it is unnecessary to consider was is stated in the replying affidavit. The respondent has not dealt with the other requirements for condonation in the founding affidavit.

20. I am not satisfied that the respondent has made out a proper case for condonation and the application stands to be dismissed.

21. The application stands to be dismissed for another reason. It is trite that a condonation application should be brought as soon as the need for such an application ought to have been apparent. The respondent has given no plausible explanation why it has only brought the condonation application on 5 August 2011. The pre-trial minute was filed on 21 May 2010. It is clear from the minute that the applicants had raised a point *in limine* about the late filing of the statement of response which was

not accompanied with an application for condonation. The pre-trial minute was filed by the applicants new representatives. Despite this, the respondent still did not apply for condonation. The matter was enrolled for trial on 1 February 2011 when the court asked the respondent's failure to apply for condonation. The respondent's attorney stated that he would deal with this at the trial. Again it is not explained why no such application was made. There is still today no explanation given why the respondent did not apply for condonation soon after it became aware that there was a need to do so.

22. I accept that the courts should be slow in closing the court doors for any party. The rules of this Court permit a party who has not complied with the rules to apply for condonation. An applicant who is seeking condonation is in essence seeking an indulgence and must therefore be candid with the court and give an explanation about how it came that it did not comply with the rules of this court or court orders. The doors of this Court were shut by the respondent's attorney who it had entrusted to deal with this matter. They should seek recourse from him.

23. It was contended by Mr Sher who appeared for the respondent that the condonation application was brought in terms of rule 12(1) of the rules of this Court. He argued that the applicant should have used the provisions of rule 12(2) by putting the respondent on terms for not having applied for condonation. I do not agree that the applicants should have issued a notice to compel in terms of rule 12(2). The applicants did not apply for the matter to be dismissed as a result of the respondent's failure to apply for condonation. It is the respondent who is applying for condonation

and should have made out a proper case for condonation. It is telling that the respondent's attorney has deposed to an affidavit without any confirmatory affidavit by the respondent. The respondent's attorney was mandated to act on behalf of the respondent. The respondent cannot hide behind the negligence of their attorney. The applicant's services were terminated in 2002 and it is now nine years later and this matter has still not been determined by this Court.

24. The application stands to be dismissed.

25. There is no reason why costs should not follow the result.

26. In the circumstances I make the following order:

26.1 The application for condonation is dismissed with costs.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

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| FOR THE APPLICANTS | : | A NTELA UNION OFFICIAL |
| FOR RESPONDENT | : | M SHER INSTRUCTED BY B CARNEGIE ATTORNEYS |
| DATE OF HEARING | : | 15 AUGUST 2011 |
| DATE OF JUDGMENT | : | 16 AUGUST 2011 |