IN THE LABOUR COURT OF SOUTH AFRICA

(CAPE TOWN)

CASE NUMBER: C156/2011

DATE: 7 AUGUST 2013

In the matter between:

SAMWU obo J BASSON Applicant

and

SWELLENDAM MUNICIPALITY Respondent

J U D G M E N T

STEENKAMP, J:

This is the judgment in the second condonation application before me today, that is the condonation application of the respondent, Swellendam Municipality.

It is by now trite that the factors to be taken into account are those set out in Melane v Santam Insurance Company Limited 1962 (4) SA 531 (A) at 532 C-F, i.e. the degree of lateness; the explanation therefor; the prospects of success; and the

importance of the case.

As the Appeal Court said in that case, 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. I should add that the Court has already this morning granted condonation to the applicants, SAMWU and its member, Mr Johannes Basson, in its application for condonation for the late filing of its statement of case.

This Court and the Labour Appeal Court has held in the past that in cases where the explanation for the delay is so wanting that it really amounts to no explanation, the Court is not required to consider the remaining factors and may dismiss the condonation on this ground alone. This Court recently repeated it in the unreported judgment that Mr *Whyte* referred to, of NUM v Transhex Operations (Pty) Ltd, case number C861/2012.

However, as Mr *Leslie* pointed out, the Labour Appeal Court has also held that this principle is to be qualified with a measure of flexibility and that failure to provide a reasonable and acceptable explanation is not necessarily an absolute bar to condonation. He referred in this regard to Nehawu on behalf of Mofokeng v Charlotte Theron Children's Home 2004

(25) *ILJ* 2195 (LAC), specifically paragraphs [7] and [23].

In considering the explanation for the delay, Mr *Leslie* also drew the Court's attention to the old judgment of Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 353 where the Appeal Court pointed out that:

> "The defendant must at least furnish an explanation of his own default sufficiently full to enable the Court to understand how it really came about and to assess his conduct and motives".

He also referred to Burton v Thomas Barlow and sons (Natal) 1978 (4) SA 794 (T) at 797 C-D where the Court said:

> "In determining whether or not there is a reasonable explanation for the failure of a defendant to give timeous notice of intention to defend, one cannot fairly apply as inflexible criteria the standards of a *bonus diligens paterfamilias* in the conduct of his own affairs. Some allowance must be made for *bona fide* errors and omissions. As the cases on the earlier rules of Court show, fault on the part of the

> defendant does not preclude relief unless the failure to comply with the rules of Court has been intentional or due to indifference or to gross negligence".

In the case before me, the statement of response was delivered more than a year late. That is clearly an excessive delay and the Court primarily has to consider the explanation therefor and whether the failure to file its statement of response in time was intentional or due to indifference or gross negligence.

It is common cause that the respondent, that is the Municipality, received the applicant's statement of case in March 2011 already. However, that is where the tragedy of errors commenced. The Municipality's former acting municipal manager, one Steenkamp (no relation), instructed a senior attorney at the Municipality's Cape Town attorneys, Mr John MacRobert, to oppose the dispute, or so he thought. The instructions were apparently faxed to Herold Gie Attorneys, but the Municipality used an out of date fax number that was previously used by Herold Gie's property department. As a result Mr MacRobert never received the instruction. The Municipality inexplicably did nothing further and Steenkamp's term of office ended in August 2011. It appears from the

evidence on affidavit before me and I have to accept it, based on the rule in Plascon-Evans, that the new incumbent, Nel, was apparently not aware of the status of the matter and that is why he did not follow it up. For a period of nine months, between May 2011 and February 2012, neither party took any further steps in the matter. In saying this, I do not wish to lay any blame on the applicants, but it does appear that they did not take any steps to prosecute it or to follow up on it either.

On 27 February 2012 the union and Mr Basson then applied for default judgment. It is only at that stage that the human resources officer of the Municipality, Ms Beyers, contacted the Municipality's attorneys, Herold Gie, to find out what had happened to the matter. It appears from her affidavit that she was under the impression that default judgment had already been granted.

At that stage another attorney, Mr Shakesh Sirkar, took over the matter. It appears that he had some difficulty getting hold of Beyers. In this regard I share Mr *Whyte*'s scepticism about the inability of an attorney to get hold of his instructing client for a period of about two months in this day and age of quick and easy communication such as cell phones, even if it is so that Ms Beyers was travelling and attending training courses at the time.

Be that as it may, Sirkar got hold of Beyers on the 8th of May 2012. She then travelled from Swellendam to Cape Town to consult with counsel on the 18th of May 2012. The Municipality delivered its statement of response and its application for condonation on the 31st of May 2012. The main period of delay is clearly then that between or leading up to the stage when Mr Sirkar entered the fray. The Municipality should have done more to follow up during that time.

The case law holds that an applicant for condonation should explain each period of delay. The explanation in this regard falls short. However, it does appear that the Municipality did take steps at an early stage to instruct its attorneys, albeit that those steps were unsuccessful, apparently due to human error. In that regard the facts of this matter are distinguishable from those in NUM v Transhex.

I must agree with Mr *Leslie* that the Municipality has at all times intended to defend itself in this matter and that its conduct was not aimed at frustrating litigation or merely delaying the outcome. The conduct of its office bearers was negligent but it was not intentional, deliberate or perhaps due to gross negligence. Given that background, the Court does need to consider the prospects of success.

The Municipality seeks to prove, should oral evidence be allowed, that Mr Basson as a union official organised and participated in unprotected strike action. That is something that can only be decided once the Court has heard oral evidence. It may well be that the union will be able to show that Basson did not participate in the strike action, or even if he did, that the Municipality acted inconsistently and that it should not have dismissed him, given that he had continued to work for the Municipality for a period of nine months and thus that there was no breakdown of trust. However, those are issues to be decided by the trial Court after hearing evidence and argument based on that evidence.

Should condonation be granted, there is no real prejudice to the applicants. Default judgment has not yet been granted. This is not an application for rescission, and giving the Municipality the opportunity to place its version of events before the Court will not prejudice the applicants unduly at this stage.

In those circumstances I am persuaded that condonation should be granted.

The question of costs remains. It is a matter of concern to the

Court that if costs should be granted against the Municipality, who applies for an indulgence, it will have to be funded by the ratepayers of Swellendam due to the dilatoriness and negligence of its office bearers. However, this is not a case where those office bearers either acted without a mandate or were called to show why they should not be ordered to pay the costs personally. In those circumstances I grant the following order:

1. **CONDONATION IS GRANTED FOR THE LATE FILING OF THE APPLICANTS' STATEMENT OF CASE, WITH NO ORDER AS TO COSTS.**
2. **CONDONATION IS GRANTED FOR THE LATE FILING OF THE STATEMENT OF RESPONSE.**
3. **THE RESPONDENT IS ORDERED TO PAY THE APPLICANTS' COSTS IN RESPONDENT'S CONDONATION APPLICATION.**

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STEENKAMP, J

APPEARANCES

APPLICANT: J Whyte of Cheadle Thompson & Haysom

RESPONDENT: G Leslie

Instructed by Powell Kelly Veldman, Swellendam.