



**IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN**

Not Reportable

Case no: C785/16

In the matter between

**NKULULEKO DANILEYO**

**Applicant**

and

**INDGRO OUTSOURCING (PTY) LTD**

**Respondent**

**Heard: 22 March 2018**

**Delivered: 10 May 2018**

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**JUDGMENT**

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**RABKIN-NAICKER J**

- [1] The Court had to consider an application for condonation of the late filing of the respondent's answering affidavit to an application to make a settlement agreement an order of Court. The respondent was ordered to make such an

application by this Court on the 12 September 2017. I cite the parties as they appear in the main section 158(1)(g) application. The respondent should have delivered its opposing affidavit on or before 27 December 2016 but delivered it on the 23 August 2017. This was an excessive delay as respondent concedes.

- [2] The applicant, who was employed as a driver, was dismissed by the respondent on the 02 November 2016. On the 14 November 2016 the parties reached a settlement agreement under the auspices of the CCMA.
- [3] The material terms of the settlement agreement were that the applicant would be reinstated on the same terms and conditions of employment which governed the employment relationship prior to his dismissal from 9 September 2016; the applicant was to report for duty at the respondent's offices at 08h00 on 21 November 2016 and was to receive back pay in the amount of 2407.50 by no later than 18 November.
- [4] The respondent has set out the reasons for the excessive delay in filing its answering affidavit, in summary' as follows:
- \* The section 158(1) (c) application was served on the respondent on 9 December 2016 and the applicant made telephonic contact with an employee on the respondent Mr Gary Douglas to confirm he received the application;
  - \* Mr Douglas absconded in the last week of December 2016 and left South Africa and did not inform Mr Van Rensburg, the respondent's Employee Manager about the application;
  - \* Van Rensburg is the Respondent's Employees Relations Manager and part of his duties are to attend to all employment related issues which includes regularly appearing at the various CCMA offices throughout the country. As a result, he only became aware of the set down notice dated 1 August 2017 from this court for the hearing of the unopposed 158(1) (c) application (set down on the 12 September 2017) on the 11 August 2017;

\* He contacted respondent's attorney on the 14 August 2017 and instructed them to oppose the application; arrangements were made to obtain the contents of the Court's file. He consulted the respondent's attorneys on 23 August 2017."

- [5] In his answering affidavit to the condonation application, the applicant denies that Mr Douglas absconded from employment with the respondent and in amplification pleads that during the period 23 November 2016, up to 25 November 2016 after he had reported back to work in terms of the settlement agreement and was assisting with office work at the respondent, he was made aware that Mr. Douglas would be leaving in December 2016 and that this was a known fact amongst staff members at respondent's offices. This averment is not specifically denied in the replying papers.
- [6] The Court must ask if the explanation for the delay is reasonable, accepting that, on the principles of Plascon Evans principles; the evidence in the answering affidavit that Mr Douglas' departure at the end of December was a known fact by respondent's staff.
- [7] Mr van Rensburg further provides no supporting evidence regarding dates in respect of his alleged busy schedule away from the office.
- [8] In the Court's view this is a matter in which, there is no 'reasonable and acceptable explanation for the delay' so that 'the prospects of success are immaterial'.<sup>1</sup> However, I will take a cautious approach and deal briefly with the merits in any event.
- [9] The Company asked this Court to allow it to file a set of further papers in the main application, a supplementary affidavit to answer the replying affidavit. I will allow for this. In its answering affidavit to the pro forma application filed by the applicant, the company simply put up a defence to the section 1581)(g) application that it had complied with the settlement agreement and that the applicant had absconded on the 9<sup>th</sup> December 2016. It made no mention that it had not reinstated him on the same terms and conditions of employment. In reply

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<sup>1</sup> NUM v Council for Mineral Technology [1999] 3 BLLR 209 (LAC) at para 10

the applicant averred in paragraph 5 (f) that he was in fact given office work and subsequently night work on a 12 hour shift and on receipt of his pay slip was paid as a general worker. He states as follows:

“As a driver I use to work day shift or normal hours whereas as a general worker I had to work night shift (twelve hour shift). Prior my dismissal, my hourly rate as a driver was 26.75. Subsequent to reinstatement, I was required to work as a general work (sic) at an hourly rate of 16.90. A copy of pay slip is attached as annexure “ND1”.”

[10] In the supplementary affidavit, the respondent company for the first time takes the Court into its confidence that: “no driver positions were available”. It further avers that: “...in light of the fact that Danilyelo could not be appointed in the position of driver, as no driver positions were available, it was not possible to record the position of driver in the payslip as attached to the answering affidavit, as these payslips would be submitted to the client for payment. Accordingly the difference between the general worker and driver would have been paid at the end of the month in which Dalileyo tendered his services. The payment would have been made without the knowledge of the client.”

[11] It is noted that the respondent has no qualms about the new version it now presents in its supplementary affidavit. Further in specific answer to applicant’s paragraph 5f as quoted above, its plea amounts to the following:

“Save to admit that prior to Danilyeo’s dismissal he held the position of driver and was only required to work day shifts the remainder hereof is denied as Danileyo.”

[12] Taking all of the above into account, I do not consider that the respondent has any reasonable prospects of success in the main application. Given that I will not grant condonation for the late filing of the answering affidavit, the application in terms of s158 (1) (g) is considered to be unopposed. This is a matter where costs should follow the result more especially given the respondent’s conduct. I make the following order:

Order

1. The application for condonation is dismissed;
2. The settlement agreement under case number WECT 18061-16 is made an order of court.
3. The respondent is to pay the costs.

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H. Rabkin-Naicker

Judge of the Labour Court

#### Appearances

For the Applicant: Mampama Wonga Attorneys

For Respondent: Ria Matsala instructed by Hogan Lovells

LABOUR COURT