

SOUTH AFRICA / JUDGMENT

# Liquor Runners Johannesburg CC v Smit (J 456/12) [2014] ZALCJHB 253 (15 July 2014) [2014] ZALCJHB 253

## COURT

Labour Court Johannesburg

## BEFORE

Tlhotlhamajie

## CASE / FILE NUMBER

J456/12

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

## JUDGMENT

Not Reportable

Case no: J456/12

LIQUOR RUNNERS JOHANNESBURG CC.....Applicant

and

JANNIE SMIT.....Respondent

Heard: 4 December 2013

Delivered: 15 July 2014

TLHOTLHALEMAJE, AJ

Introduction and

**background:**

- [1] The Applicant seeks condonation for the late filing of a statement of defence. The Respondent opposed the application.

[2] The Respondent initially referred a dispute to the Commission for Conciliation, Mediation and Arbitration on 20 October 2011 following upon his alleged unfair dismissal by the Applicant on 17 September

2011. The alleged dismissal followed upon events that took place during a disciplinary enquiry that the Respondent was called upon to attend and to answer to allegations of misconduct. During the course of the disciplinary enquiry, the Respondent alleged that he was compelled to sign a full and final settlement agreement leading to the termination of his services. He further alleged that he had signed the settlement agreement under duress and threats from the Director of the Applicant.

[3] At a conciliation meeting held on 11 November 2011, the Applicant raised a preliminary issue to the effect that the CCMA lacked

jurisdiction on account of a settlement agreement entered into between the parties. A CCMA Commissioner had issued a ruling on 10 April 2012 and agreed with the Applicant that the CCMA lacked jurisdiction. The Respondent had filed his statement of claim on 12 May 2012. The Applicant's statement of defence was filed on 28 May 2012, some two weeks out of time.

[5] In further opposing the application for condonation, the Applicant submitted that the application should be dismissed on the grounds that it was defective in that no notice of motion/prayers was attached to the affidavit and had not complied with the rules of the court. The argument as I understand it pertains to Rule 7 of the Rules of this Court[1]. The Court in *Trans Trans-African Insurance Co Ltd v Maluleka*[2] had occasion to deal with non-observance of the rules of the Court and had stated the following'

'No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.'

[6] It can therefore be accepted that this court has discretion to condone the non-observance of the provisions of Rule 7, which

discretion must be exercised judicially upon a proper consideration of the circumstances of each case and further with due consideration

as to what is equitable to both sides. In this case, the Applicant had contended that the purpose of the Notice of Motion is purely to inform the other party that some form of relief was sought, and it had in any event attached same to the Statement of Defence which had reached the Respondent. In this regard, it was contended that the Applicant was well aware that condonation would be sought.

[7] The Applicant had filed its statement of defence in terms of Rule 6

(3) of the Rules of this Court. In that statement, it had also notified the Applicant of its intention to apply for condonation, albeit such a notice was in ineloquent terms. In my view, the Applicant was indeed aware of this application, and to this end, I fail to appreciate what prejudice it has suffered as a result of non-compliance with Rule 7. It would clearly be unfair to simply dismiss the application for condonation on those grounds. This defect did not prejudice the Respondent in any manner as the purpose of an

application for condonation is clear.

[8] The Respondent had also raised an issue surrounding the locus standi of Nic Koupis, the Applicant's Director to depose to the founding affidavit. In this regard, it was submitted that the Applicant had failed to attach any form of resolution authorising Koupis to act on its behalf. In response, the Applicant had made reference to the Respondent's statement of claim where he had averred that he was 'threatened by one Nic Koupis, being the Director of the Respondent'. As correctly pointed out on behalf of the Applicant, it was common cause between the parties that Koupis is indeed the Director of the Applicant. In this regard, and based on the Respondent's own averments, I again fail to appreciate the reason such averments would be made and yet at the same time the locus standi of the individual in question be disputed. In my view, the submissions surrounding the lack of locus standi on the part of Koupis are baseless and should thus be rejected. To this end, it is concluded that the application for condonation is properly before the court.

The legal framework in respect of applications for condonations and evaluation:

[9] The court's discretion when considering applications for condonation derive from the provisions of section 191 (11) (b) of the LRA and also Rule 12 of the Rules of the Conduct of Proceedings. Thus on good cause shown, the Court may condone the non-observance of the time frames stipulated inter alia in section 191 of the LRA or in the Rules of this court.

[10] The test for determining whether good cause or sufficient cause has been shown was articulated in *Melane v Santam Insurance Co. Ltd*[3] in the following terms;

'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, 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 to compensate prospects which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the Respondent's interests in finality must not be overlooked"

The degree of lateness and explanation thereof:

[11] As already indicated above, the applicant filed its statement of defence some two weeks out of time. The delay is not excessive.

Notwithstanding the non-excessive nature of the delay, it is still incumbent upon the applicant to show that it deserves the indulgence

of the Court.

[12] In explaining the delay, the Applicant's Nicos Antonion Koupis averred that he was in Cyprus and only returned on 1 June

2012. He attached a copy of his travel itinerary which showed that he had travelled from 24 May 2012. The Applicant had only secured the services of its attorneys of record on 8 June 2012 and thereafter, instructions were issued to draft the opposing papers. He submitted that the delay was not caused by any tardiness.

[13] In response, the Respondent's contention was that Koupis only departed on 24 May 2012 and had 12 days within which he could have attended to the answering statement. Furthermore, it was submitted that upon his return on 1 June 2012, he had only secured a legal practitioner on 8 June 2012, and thus did not explain which practitioners were secured and the reason an appointment with them was only made a week later. It was further contended that no reason was given for the three more days it took to file the answering statement after the attorneys were instructed.

[14] It is trite that an application for condonation should be filed without delay as soon as a party to litigation becomes aware of the need to file such an application[4]. To enable this court to properly exercise its discretion, a party seeking condonation must set out all the facts and circumstances

relating to the delay, and most importantly, must provide a satisfactory explanation and account for each period of the delay.

Any period of delay that is unaccounted for, will result in an indulgence being refused[5].

[15] In *Moila v Shai N.O. and Others*[6], Zondo JP (as he then was) had the following to say in respect of an explanation for the delay in filing a review application a year after the expiry period of six weeks:

'I do not have the slightest hesitation in concluding that this is a case where the period of delay is excessive and the appellant's

purported explanation for the delay is no explanation at all. I accept that the case is very important to the appellant. However, the weight to be attached to this factor is too limited to count for anything where the period of delay is as excessive as is the case in this matter and the explanation advanced is no explanation at all. If ever there was a case in which one can conclude that good cause has not been shown for condonation without even considering the prospects of success, then this is it. Where, in an application for condonation, the delay is excessive and no

explanation has been given for that delay or an “explanation” has been given but such “explanation” amounts to no explanation at all, I do not think that it is necessary to consider the prospects of success.’

[16] The delay in filing the responding statement is not excessive in the extreme as opposed to the facts in Moila. The Respondents is however correct in pointing out that the delay was not explained in full by the Applicant, even though the latter had also pointed out that it took 5 working days for Koupis upon his return to attend to the matter, and further that it took two days thereafter to file the responding statement. Even then, it is still required of the Applicant to explain each aspect of the delay, and to this end, those seven days referred to by it remain unexplained. Be that as it may, in the light of the plausible nature of the explanation given, I am of the view that the explanation cannot be regarded as ‘no explanation at all’. Notwithstanding the fact that the explanation is devoid of detail, I am further of the view that it is indeed satisfactory.

Prospects of success:

[17] In explaining the approach to the issue of prospects of success, this court in *Gaoshubelwe and Others v Pieman's Pantry (Pty) Ltd*[7] stated that:

‘The prospects of success or bona fide defence on the other hand mean that all what needs to be determined is the likelihood or chance of success when the main case is heard. See *Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd* 1975 (1) SA 612 (D) and *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765 (A-C).’

[18] In this regard, the Applicant submitted that it had excellent prospects of success as the Respondent chose the easy way out rather than go through the disciplinary enquiry. It was further submitted that the authenticity of the audio recordings relied upon by the Respondent in respect of the events leading up to the conclusion of the settlement agreement were placed in dispute, and that he was confronted with allegations of misconduct and afforded an opportunity to defend himself. He instead chose to resign and to receive benefits resulting from his resignation. It was submitted further that the Applicant had signed the agreement in the presence of two other witnesses who would testify to that effect, and further that he was not threatened or coerced into signing the agreement.

[19] The Respondent’s contention was that he did not leave on his own free will but was forced to leave and treated unfairly. It was contended that he was forced to sign the settlement agreement under duress or alternatively undue influence, which is severely prejudiced his rights. He was further not paid all the monies due to him in that it was not correct that he had benefitted from the settlement agreement. It was further contended that he had feared for his life to the extent that he had no choice but to sign a grossly unfair and prejudicial agreement which he would not have signed but for the threats of the applicant through its Director, Mr. Koupis. As a result of the threats against his life and person by the Applicant it was submitted that the Respondent lacked the proper capacity or alternatively the intention

to engage in unlawful and enforceable contract. His labour and contractual rights were violated to the extent that he was precluded from receiving payment for his outstanding leave and notice pay. It was also submitted that his resignation and simultaneous signing of settlement agreement was little more than a means by which the applicant sought to achieve legitimacy for the unfair dismissal.

[20] In the light of a number of material disputes of facts on the papers, the issue in this case is whether the Applicant has shown the likelihood or chances of success when the main case is heard. The main issue in contention in this case is whether the entering into the settlement agreement and the subsequent resignation of the applicant was voluntary. In such cases it will be required of the Respondent to show in what material respects he was forced into entering into this agreement. Furthermore in the light of the charges that led to the disciplinary enquiry, it needs to be shown that the decision to abandon that enquiry and to enter into the settlement agreement was made voluntarily. On the other hand the Applicant's main contention has always been that the settlement agreement was entered into voluntarily. On the papers, it is difficult for the Court to even make a prima facie finding.

[21] In *Brummer v Gorfil Brothers Investments (Pty) Ltd*[8], Jacob J had stated that the interests of justice should be an overall consideration when dealing with applications for condonation.

Thus where the court cannot on the papers make a prima facie finding on the issue of prospects of success, and further having had regard to other considerations pertaining to whether good cause has been shown, the interests of justice will demand that the parties be afforded an opportunity to ventilate these issues in Court.

[22] In this case, in the light of the non-excessive nature of the delay in filing the statement of response and the explanation given in that regard, it would be contrary to the interests of justice, and indeed be iniquitous to deny the Applicant an opportunity to defend the claim against it. In coming to this conclusion, it is also taken into account that the applicant had always intended to defend this matter. This is evident from that fact it attended to it at the CCMA when the dispute it was initially lodged, and where it had raised the preliminary issues already referred to.

[23] I have further taken into account the parties' submissions in regard to the issue of prejudice. In the light of the circumstances

of this case and its history, it is my view that it is the Applicant that stands to suffer more prejudice, especially in circumstances

where it had assumed that no further disputes would arise following the entering of the settlement agreement. Further taking into account considerations of law and fairness, it is deemed appropriate not to make any order as to costs.

Order:

- i. The late filing of the statement of response by the Applicant is condoned.
- ii. There is no order as to costs.

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Tlhotlhamaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. P Venter

Instructed by: L & V Attorneys

For the Respondent: BC Lee of Lee and McAdam Attorneys

[1] '7 Applications:- (1) An application must be brought on notice to all persons who have an interest in the application. (2) The notice of application must substantially comply with Form 4 and must be signed by the party bringing the application. The application must be delivered and must contain the following information- (a) the title of the matter; (b) the case number assigned to the matter by the registrar; (c) the relief sought; (d) an address of the party delivering the document at which that party will accept notices and service of all documents in the proceedings; (e) a notice advising the other party that if it intends opposing the matter, that party must deliver an answering affidavit within 10 days after the application has been served, failing which the matter may be heard in the party's absence and an order of costs may be made; and (f) a schedule listing the documents that are material and relevant to the application. (3) The application must be supported by affidavit. The affidavit must clearly and concisely set out- (a) the names, description and addresses of the parties; (b) a statement of the material facts, in chronological order, on which the application is based, which statement must be sufficiently particular to enable any person opposing the application to reply to the document; (c) a statement of the legal issues that arise from the material facts, which statement must be sufficiently particular to enable any party to reply to the document; and (d) the relief sought...

[1] '7 Applications:-

(1) An application must be brought on notice to all persons who have an interest in the application.

(2) The notice of application must substantially comply with Form 4 and must be signed by the party bringing the application. The application must be delivered and must contain the following information-

(a) the title of the matter;

- (b) the case number assigned to the matter by the registrar;
  - (c) the relief sought;
  - (d) an address of the party delivering the document at which that party will accept notices and service of all documents in the proceedings;
  - (e) a notice advising the other party that if it intends opposing the matter, that party must deliver an answering affidavit within 10 days after the application has been served, failing which the matter may be heard in the party's absence and an order of costs may be made; and
  - (f) a schedule listing the documents that are material and relevant to the application.
- (3) The application must be supported by affidavit. The affidavit must clearly and concisely set out-
- (a) the names, description and addresses of the parties;
  - (b) a statement of the material facts, in chronological order, on which the application is based, which statement must be sufficiently particular to enable any person opposing the application to reply to the document;
  - (c) a statement of the legal issues that arise from the material facts, which statement must be sufficiently particular to enable any party to reply to the document; and
  - (d) the relief sought...
- [2] 1956
- (2) SA 273 (A) at 278F – G.
- [3] 1962
- (4) SA 531 (A) at 532B-E
- [4] See *Meintjies v HD Combrinck* (Edms) Bpk 1961
- (1) SA 262 (A) at 263 H-264B.
- [5] See *NUMSA and another v Hillside Aluminium*
- [2005] 6 BLLR 601 (LC)
- [6] (2007) 28 ILJ 1028 (LAC) at para 34
- [7] 2009 30 ILJ 347 (LC) at para 27

[8]

[2000] ZACC 3; [2000]

(2) SA 837 (CC) at 839 F

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