REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT, JOHANNESBURG

Reportable

Case no: JA12/12

In the matter between:

NATURE'S CHOICE PRODUCTS (PTY) LTD **Appellant**

and

FOOD AND ALLIED WORKERS' UNION **First Respondent**

SEABELA, M C AND 6 OTHERS **Second and Further Respondents**

Heard: **16 May 2013**

Delivered: **05 February 2014**

Summary: Condonation was sought in the Labour Court for the late delivery of a response to a claim; the application was dismissed there, *inter alia*, for not dealing with the defence and prospects in the application for condonation; lack of detail in the explanation for the delay also criticised. The response was delivered together with the application for condonation; although a copy of the response was not attached to the application, it was referred to in the supporting affidavit and incorporated into that affidavit by reference. Explanation for the delay, although not punctilious, held on appeal to have been sufficient. On appeal held, given circumstances, condonation ought to have been granted; appeal upheld.

Coram: Waglay JP, Coppin *et* Francis AJJA

JUDGMENT

COPPIN AJA

[1] This is an appeal against the judgment and order of Basson J in the Labour Court, dismissing, with costs, the appellant's application for condonation for the late filing of its statement of response to the respondents' statement of claim. Leave to appeal was granted to this Court on petition.

[2] The second and further respondents are members of the first respondent. They were employed by the appellant at its plant in Alrode, Alberton, until 31 January 2010 when the employment of each of them was terminated by the appellant, allegedly due to its operational requirements. The respondents disputed the fairness of the dismissals and referred the matter for conciliation to the Commission for Conciliation, Mediation and Arbitration ("*CCMA*").

[3] A notice of the referral to the CCMA was served on the appellant, but the appellant did not appear at the conciliation. The CCMA accordingly issued a certificate of non-resolution of the dispute. The respondents then instituted proceedings in the Labour Court.

[4] On 11 May 2010, the respondents served their statement of claim on the appellant by facsimile. The appellant was supposed to deliver its response within ten (10) court days of service of the statement of claim. It is common cause that this period would have expired on 25 May 2010. However, the appellant failed to deliver its response. Apparently, as a result, the respondents served on the appellant an application for default judgment by facsimile on 12 July 2010.

[5] On 15 July 2010, the appellant's attorneys contacted the respondents' attorneys and requested a copy of the statement of claim and informed the respondents' attorneys that they will be opposing the application for default judgment as they had not received the respondents' statement of claim. On 16 July 2010, the appellant's attorneys proposed to the respondents' attorneys that they be granted an indulgence to file an application for condonation together with the appellant's statement of response. This was agreed to between the parties.

[6] On 28 July 2010, the appellant served its statement of response together with its application for condonation on the respondents. The respondents opposed the

condonation and filed an answering affidavit in respect of that application. The appellant did not file a replying affidavit.

[7] Approximately almost a year after the filing of its condonation application, the matter was heard by the court *a quo* on 16 August 2011. On that day, the court *a quo* granted the order dismissing the condonation application with costs and furnished comprehensive reasons for its order on 21 September 2011.

[8] The court *a quo* having considered the averments made in the affidavits concluded *inter alia* as follows:

> '*[10] I am in agreement with the submission on behalf of the employees that the excuses tendered for the delay are far from compelling. The explanation certainly does not fully explain the full period of the delay. Moreover, where an employer is faced with an application for default, it is certainly expected that the employer acted with expedience and not wait for another 16 days before filing a statement of defence. I am therefore not persuaded that the explanation for the delay is compelling and accordingly the application for the delay should fall on this ground alone.*
>
> *[11] Even if the court is wrong in rejecting the explanation for the delay as not being reasonable, the court is further of the view that the application for condonation should fail in light of the fact that the employer does not provide any reasons whatsoever for its 'reasonable prospects of success' except to refer to its statement of response.*'

[9] The appellant contends on appeal that the court *a quo* erred in numerous respects, *inter alia* and in particular, in finding: that the degree of lateness was egregious; that there was no explanation for the full period of the delay; that the appellant did not act expeditiously after becoming aware that the respondents intended to apply for default judgment; that the explanation furnished for the late filing of the response was, in any event, not compelling; that the appellant failed to deal in its affidavits, in support of the application for condonation, with the prospects of success and in finding that the prejudice that the respondents would suffer, if condonation were to be granted, would not outweigh that which the appellant would suffer if condonation was not granted. It was also argued that the court *a quo* erred

in ignoring the actual statement of response of the applicant which was incorporated into its answering affidavit by reference.

[10] The respondents, on the other hand, contend that the court *a quo* correctly refused condonation.

[11] The consideration of a request for condonation involves the exercise of a judicial discretion which has been described as a 'wide discretion', or a discretion "*loosely so called*". In *Motloi v SA Local Government Association,*[1] McCall AJA summarised the position on appeal as follows:

> '*[16] In my judgment the discretion conferred on the court of first instance in deciding whether or not to grant condonation for the late referral of a dispute is a wide discretion or a discretion "loosely so called". The court of first instance is required to arrive at a decision "in the light of all relevant considerations" such as the length of the delay, the prospects of success in the main application, the possible prejudice to the parties and the blame attaching to the parties (cf the Knox D'Arcy Ltd case (supra) at 362B-C). The court on appeal is in as good a position as the court a quo to decide whether or not good cause has been shown for granting condonation, and, that being so, it may substitute its decision for that of the court a quo if "it considers its conclusion more appropriate" (see the Bookworks (Pty) Ltd case (supra) at 805A-D).*'[2]

[12] It is thus established in the *Motloi* case that on appeal, this Court may substitute its decision for that of the court *a quo* if it considers its conclusion to be more appropriate.

[13] In *Motloi,* the court summarised the relevant considerations, which are also referred to in the frequently cited case of *Melane v Santam Insurance Co Ltd,*[3] as follows:

> '*…the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, in essence, it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation thereof, the prospects of success and the importance of the case. Ordinarily these*

[1] *Motloi v S A Local Government Association* [2006] 3 BLLR 264 (LAC) par [16].
[2] The cases referred to in the quoted *dictum* are: *Knox D'Arcy Ltd and Others v Jameson and Others* 1996 (4) SA 348 (SCA) at 362B-C and *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (W) at 805A-D.
[3] 1962 (4) SA 531 (A) at 532C-E.

facts are interrelated: they are not individually decisive, for that would be a piece-meal approach incompatible with a true discretion, save of course that if there are no prospects of success there will be no point in granting condonation. What is needed is an objective conspectus of all the facts. Thus, a slight delay and a good explanation may help to compensate for the prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. The respondent's interest in finality must not be overlooked.'

[14] It is apparent from the judgment of the court *a quo* that it was critical of the explanation for the delay tendered by the appellant and that it was of the view, in essence, that the appellant did not show any prospects of success, albeit without considering the statement of response which had been filed by the appellant together with its application for condonation and which was incorporated into the founding affidavit of that application by reference.

[15] Regarding the explanation for the delay, I am of the view that it was reasonable, although not punctilious, or very detailed. The respondents served their statement of case upon the appellant by facsimile. The appellant did not dispute that, but explained that the document did not come to the attention of its relevant personnel, because the fax number that had been used was a general number and the respondents did not draw their attention to the fact that the document had been served in that manner. The explanation is feasible. Before the situation was ameliorated by a practice directive, when service was by telefax, in the absence of, at least, telephonic confirmation that the fax was received by the intended recipient, problems were experienced which resulted in a slew of applications for rescission, and the situation which was referred to in *MTN v Van Jaarsveld and Others.*[4] The fact that the application for default judgment had been served by fax transmission to the same number to which the statement of claim had been sent, and that the former had come to the appellant's attention, while the latter did not, is not strange, or anomalous and does not detract from the reasonableness of the explanation that the statement of claim was not brought to the attention of the relevant persons at the appellant.

[4] *MTN v Van Jaarsveld & others* (2002) 23 ILJ 1597 (LC) par [12].

[16] The appellant went on to explain that when it did receive the application for default judgment on 12 July, it reacted immediately. Its attorneys made contact with the respondents' attorneys, informed them that the appellant did not receive the statement of claim and requested a copy of it. A copy was received on 15 July and on 16 July the parties, through their respective attorneys, agreed that the appellant be given an opportunity to deliver an application for condonation together with its response to the statement of claim. It does not appear that any time period for the purpose was discussed or stipulated.

[17] The appellant explains that the preparation of the response and condonation necessitated consultations with certain persons, who are mentioned by name, who were no longer in its employment and that a further delay occured because of difficulties experienced in contacting and arranging to consult with and, ultimately, consulting with those persons. A consultation could only be arranged for Saturday, 24 July and the documents could only be finalised by 27 July. Service on the respondents' attorneys took place on 28 July. This explanation, in our view, is feasible. It is debatable whether more detail was required. We incline to the view that the explanation was sufficient. It is more than probable that there would have been consultations with various persons concerning the respondents' claim, a copy of which was received on 15 July; that relevant witnesses would have been identified and that a process ensued of tracing and engaging them and accommodating them with regard to dates and times for the purposes of consultation. As these persons were no longer employed by the appellant they were clearly no longer subject to its "beck and call'. Time taken to prepare the documents following the consultations, is not out of the ordinary, or unreasonable. In fact from the time it became aware of the default judgment to the time of delivering its response and the application for condonation, only about nine (9) court days had elapsed. I do not consider the criticism, that the appellant was being dilatory, after becoming aware of the default judgment, to be justified.

[18] The court *a quo* apparently did not consider the appellant's response to the statement of claim (i.e. its defence) in order to ascertain whether the appellant had reasonable prospects of success. The court *a quo* seemingly regarded the appellant's application as lacking in a fundamental respect, namely, including a

traversal of the appellant's prospects of success. The respondents, apparently, adopted the same approach since they did not, in their answering affidavit in the condonation application, traverse the appellant's response to their statement of claim, but, instead, confined themselves to a general denial of the appellant's averments in its founding affidavit that it had "*excellent prospects of success*". The court *a quo* and the respondents clearly did not regard the response to the particulars of claim, which was not annexed to the founding affidavit, to have been part of the condonation application, despite reference having been made to it in the founding affidavit and despite the appellant's averment that the response must be read as if specifically incorporated into the founding affidavit.

[19] Rule 12(1) of the Labour Court Rules provides that a court may extend or breach any period prescribed by the Rules on application "*on good cause shown*", unless the court is precluded from doing so by the Act. Rule 12(3) provides that the Labour Court may, on "*good cause shown*", condone non-compliance with any period prescribed by the Rules. I have already referred to the cases of *Motloi* and *Melane* where the term "*good cause*" was given a practical meaning and in which the two main requirements that have crystallised, namely the explanation for the delay and prospects of success, are discussed. What is relevant at this juncture, however, is the issue of *onus*. It is for the applicant who seeks condonation to "*show*" good cause.

[20] Rule 27 of the High Court Rules is the equivalent of Rule 12 of the Labour Court Rules. It was held in *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd*[5] that:

> '*[i]t is well-established that an applicant for any relief in terms of Rule 27 has the burden of actually proving, as opposed to merely alleging, the good cause that is stated in Rule 27(1) as a jurisdictional prerequisite to the exercise of the court's discretion. Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352G. The applicant for any such relief must, at least, furnish an explanation of his default sufficiently full to enable the court to understand how it really came about and to assess his conduct and motives (Silber v Ozen Wholesalers (Pty) Ltd (supra at 353A)). Where there has been a long delay the court should require the party in*

[5] *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd* 2000 (3) SA 87 (W) at 93; See also: *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA); 4 B All SA 37 R6.

default to satisfy the court that the relief sought should be granted. Gool v Policansky 1939 CPD 386 at 390.'

[21] It has also been held in respect of Rule 27 of the High Court Rules, that the applicant should satisfy the court on oath that it has a *bona fide* defence.[6] In this regard, it has been held that the least that the applicant must show is that his or her defence is not patently unfounded and that it is based on facts which, if proved, would constitute a defence.[7]

[22] It is also trite that an applicant must make out a case in its founding affidavit for the relief that it seeks. The respondents relied upon *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa,*[8] where it was held with reference to motion (i.e. application) proceedings, that it was not open to a litigant, when using the affidavit procedure, to merely annex a document to an affidavit and request the court to have regard to it. The court there held that what was required was the identification in the affidavit of portions of the document on which reliance is placed and an indication of the case which is sought to be made out on the strength of that document, or the portions on which reliance was placed.

[23] In this case, the appellant did not attach a copy of the response to the founding affidavit. But what it did, was to, in its founding affidavit, in respect of its averment that it had excellent prospects of success, "*specifically refer to its response which has been filed evenly*" with the condonation application (including the founding affidavit) and request "*that it be read as if specifically incorporated*" in the founding affidavit. The question is whether this was sufficient to identify which response was being referred to and whether the response, by being incorporated, become an explanation (or outline) under oath of its defence?

[24] Reliance by the respondents on *Swissborough* in support of their submission that the appellant cannot simply make reference to a document and request the court to have regard to it, is misplaced. That case is clearly distinguishable. What was said in *Swissborough* was that an applicant cannot simply attach documents to its

[6] See *inter alia Ford v Groenewald* 1977 (4) SA 224 (T) at 225G.
[7] See *inter alia* the *Groenewald* case (*supra)* and *Oostelike Transvaalse Ko-operasie Bpk v Aurora Boerdery* 1979 (1) SA 521 (T) at 523D-H.
[8] *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 342F-G.

founding affidavit and require the court to establish, from somewhere within the pile of documents, averments to support the application. The Court in *Swissborough* held that if a document is attached to an application, then the portion(s) of the document, which are relied upon, must be clearly identified. In this case, that situation did not pertain, instead, the relevant document, namely, the appellant's response, although not attached to the founding papers, was, nevertheless, identified in the affidavit and incorporated into that affidavit by reference.

[25] Much was also made of the fact that the response to the respondents' claim was not attached to the application for condonation. But this contention of the respondents' loses sight of the fact that the response was delivered with the condonation application and that its contents was incorporated, by reference, in the founding affidavit in that application. The fact that the appellant did not also attach a copy of the response to its affidavit does not detract from the merits of the condonation application. The papers filed in the matter, at that stage, were not voluminous, or such that it would have been inconvenient to find the response. All that such attachment would have served to do, was to, unnecessarily, increase the volume of the papers. .

[26] I am of the view that condonation ought to have been granted, because the content of the response, having been incorporated into the founding affidavit, was under oath by virtue of such incorporation; the response was actually delivered (i.e. filed and served) and there was to be no further delay in awaiting the response; the response was detailed and contained what would be a defence, at least against a claim for reinstatement and the averment that the dismissal was substantively unfair; the respondents did not deal at all with the response to indicate why the response could not be said to contain a defence and the explanation tendered for the delay, although not too detailed, was feasible.

[27] With regard to the issue of costs, I am of the view, having considered all of the circumstances in light of the law and equity, that there should be no order for costs, the result being that the parties would each bear their own costs.

[28] In the result, the following is ordered:

1 The appeal is upheld.

2 the order of the Labour Court is set aside and substituted with the following order:

"the late delivery of the respondent's response to the applicants' statement of claim is condoned".

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Coppin AJA

Acting Judge of the Labour Appeal Court

I agree:

_____

Waglay JP

Judge President of the Labour and Labour Appeal Court

I agree:

_____

Francis AJA

Acting Judge of the Labour

Appeal Court

APPEARANCES

FOR THE APPELLANT: S Snyman

Instructed by Snyman Attorneys

FOR THE RESPONDENTS: J. Brickhill

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