IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA90/14

In the matter between:

POPCRU GROUP OF COMPANIES (PTY) LTD **Appellant**

and

THATO MAHLASE **First Respondent**

UNIQUE STANDING INVESTMENTS **Second Respondent**

Delivered: 20 August 2015

Coram: Waglay JP, Ndlovu JA *et* Makgoka AJA

***EX TEMPORE* JUDGMENT**

WAGLAY JP

[1] On 12 April, first respondent served its statement of case upon the Appellant, wherein he claimed damages for breach of his employment contract in terms of section 77(3) and section 77A(e) of the Basic Conditions of Employment Act, No. 75 of 1997 (BCEA).

[2] According to the first respondent, he was employed by the second respondent on a fixed term contract, which was to have terminated by effluxion of time on 31 July 2014, but that his contract was unlawfully terminated in June 2010. The total amount due to him consequent upon the alleged breach is just over R1.25-million.

[3] The first respondent seeks payment for his alleged loss from the

appellant on the grounds that the appellant has taken over the business of the second respondent and, as such, in terms of section 197 of the Labour Relations Act No 66 of 1997 (LRA), the appellant falls into the shoes of his old employer.

[4] The first respondent's statement of case curiously included an annexure setting out a list of documents he intended to utilise to support his claim.

[5] The appellant, it appears was taken by surprise by being confronted with this claim. It wrote to the first respondent requesting that first respondent deliver the discovered documents so that it could consider them and thereafter draft its statement of defence. The documents discovered included the contract of employment between the first and second respondent, minutes of various meetings, *etc*. The first respondent supplied some but not all of the discovered documents. Three months after the first respondent provided some of the documents, the appellant had still not filed its statement of defence, so on 21 August 2012, the second respondent made an application for default judgment. About a month later, the appellant filed its statement of defence.

[6] The statement of defence, in a sense, denies that there was any transfer of business, as contemplated in terms of section 197 of the LRA. Additionally, the appellant averred that the first respondent was never its employee hence the question of a breach of the employment contract does not arise. These averments are, in fact, a complete defence to the first respondent's claim.

[7] The first respondent failed to react to the statement of defence for about seven months and persisted with his application for default judgment. The first respondent held the view that since the rules that govern proceedings in the Labour Court provide that a statement of defence must be filed within 10 days of the receipt of the statement of case, a statement of defence filed outside this period is meaningless unless accompanied by an application to condone its late filing.

[8] I may at this stage mention that such belief as held by the first respondent is unwarranted and it was for this reason that the practice manual that regulates proceedings in the Labour Court, specifically provides that unless a party who is served with a process out of time objects to the process, there is no need to apply for condonation and if there is an objection, it must be communicated within 10 days of the late process being served.

[9] That notwithstanding, and although the first respondent did not overtly object to the statement of defence, he did indicate his objection by persisting with his default judgment application. This obviously would not have alerted the appellant to the fact that it should proceed and apply for condonation. Nevertheless, the Labour Court, in fact, ordered the appellant to apply for condonation for the late filing of his statement of defence and the appellant did so. The application was opposed by the first respondent.

[10] The condonation matter came before the Labour Court, which dismissed the application with costs but granted the appellant leave to appeal its order to this Court. I see no need to go through all the requirements for condonation, they are trite. I also do not need to analyse all the reasons proffered by the court *a quo* in refusing the application, save to mention that it clearly erred when it held that the appellant would have had in its possession the documents sought by it. This was speculative and not borne out by what was before the court, although I would agree with the court *a quo's* decision that the documents were not necessary for the appellant to file its defence. A further misdirection by the court *a quo* was to hold that the appellant's averments amounted to bare denials, which should not be entertained.

[11] I fail to appreciate what the court expected the appellant to add, especially if one takes into account that no objection to the plea [response] was raised by the first respondent, who in any event has the *onus* to prove that: (i) he was an employee of the appellant either

because he was employed by it or, (ii) by virtue of a section 197 transfer. Clearly, the appellant had explained the reason for the delay and that it had a defence to first respondent's claim. For these reasons alone, I am of the view that condonation should have been granted.

Order

[12] In the result, I make the following order:

1. The appeal succeeds with no order as to costs.

2. The order of the Labour Court is substituted as follows:

"2.1 Condonation for the late filing of the statement of response is granted.

2.2 There is no order as to costs."

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Waglay JP

I agree

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Ndlovu JA

I agree

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Makgoka AJA

APPEARANCES:

FOR THE APPELLANT:	Adv J L Basson
	Instructed by Grosskopf Attorneys
FOR THE RESPONDENTS:	Edward Nathan Sonnenbergs INC