



**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: JS 388/18

In the matter between:

**SIBUSISO MOFOKENG**

**Applicant**

and

**TELKOM SA SOC LTD**

**Respondent**

**Date heard: 16 November 2018**

**Delivered: 22 January 2019**

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**JUDGMENT**

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RABKIN-NAICKER, J

[1] This is an opposed application for condonation. The dispute between the parties involves an alleged substantively unfair dismissal for operational requirements.

[2] A certificate of outcome was issued on 11 December 2014. The applicant served a statement of claim on the respondent and on the Court by fax on 10

April 2015, However the original statement of claim was only duly lodged on 4 May 2015.

- [3] On 24 May 2016, the applicant applied for default judgment as the respondent had failed to oppose the matter. The respondent's legal representative appeared in Court on 24 May 2016 to oppose the default judgment contending that the referral was 'extremely late' and that the applicant had to apply for condonation as there was no referral before Court. In a transcript made of the hearing for default judgment, (filed by the applicant), before Whitcher, J on 25 May 2016, the respondent's representative stated as follows:

“...when the Statement of Case was actually filed or when we received it from our client, which is Telkom, under the circumstances, it did not have a fax transmission report from the Labour Court to actually indicate that on the same particular day the application or the referral was made and it was only filed later, therefore it prompted us to actually take the approach that the referral before court was improper in that there was no condonation application. That is why, M'Lady, we proceeded to actually reply as late as we did....”

- [4] The respondent's representative proceeded to argue that there was no need for it to apply for condonation for the late filing of its response, there being no notice of objection in terms of clause 11 (4) of the Practice Manual<sup>1</sup> and further stated: *“Under the circumstances, I will humbly request the Honourable Court to refer the matter to the opposed roll and direct that the parties hold a pre-trial conference and file the Pre-trial minute and costs to be costs in the cause.”* I note that Clause 11(4) applies to applications on motion and had no bearing on the matter before Whitcher J.
- [5] Whitcher, J proceeded to remove the matter from the roll but ordered the respondent to pay the wasted costs. She made no order directing the applicant to apply for condonation. The parties proceeded to have a pre-trial conference and to draft pre-trial minutes. When the matter came to trial it was postponed by Nkutha-Nkontwana J, the applicant was ordered to pay wasted costs.
- [6] Rule 5 of the Labour Court Rules states that:

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<sup>1</sup> Practice Manual of the Labour Court, April 2013.

“(1) Documents may be filed with the registrar in any one of the following ways, namely-

- (a) by handing the document to the registrar;
- (b) by sending a copy of the document by registered post; or
- (c) by faxing the document.

(2) A document is filed with the registrar-

- (a) on the date on which the document is handed to the registrar;
- (b) on the date on which the document sent by registered post was received by the registrar; or
- (c) on completion of the whole of the transmission of the fax.

(3) The original document must be lodged with the registrar. In the case of filing by faxing the document, the original document must be lodged within 5 days of it being faxed.”

[7] On the date that the statement of claim was served on the respondent and filed with the Registrar of this Court in terms of Rule 5(2)(c) on 10 April 2015, 89 calendar days had passed since the certificate of outcome was issued. It was thus not filed and delivered<sup>2</sup> out of time on a clear reading of the Rules. In fact, the submissions by the respondent’s representative before Whitcher J referred to above, reflect as much. The pre-trial minute reads:

“8. PRELIMINARY POINTS

8.1 The Respondent contends that the dispute was referred to the Court outside the prescribed 90 days following the issuing of a certificate of non-resolution.

8.2 Therefore, the Respondent submits that the Court lacks requisite jurisdiction to adjudicate this matter.

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<sup>2</sup> Rule 1 of the Rules of the Labour Court provides that 'deliver' means serve on other parties and file with the registrar;

8.3 The Applicant contends that the Respondent delivered its reply to the statement of claim outside the prescribed 10 days following service of statement of claim. The Applicant therefore objects to the acceptance of the Respondents reply.”

[8] I have determined that the statement of claim was not out of time when it was filed at Court. This is a matter that could have been decided by the trial court on the basis of the papers filed on record. At most, the applicant should have sought condonation for the late lodgment of the original papers on May 4 2015 (rather than on 15 April 2015). The respondent was exceedingly late in opposing the matter and it beggars belief that it has taken the stance that it need not apply for condonation and asked for the referral to be dismissed with costs. The statements made in the answering papers and in argument that the matter was postponed because the trial court judge agreed that a condonation application by the applicant was necessary is not reflected in the order dated 6 June 2018.

[9] In as far as it is necessary, I therefore will grant condonation for the short delay in lodging the original statement of claim. The applicant, has had to pay unnecessary costs herein. The respondent sat on a referral for more than a year and only filed its statement of response on the date of the default judgment. The question of whether it's statement of response will serve before the trial court, or not, is a matter for that Court to deal with.

[10] In all the above circumstances, I make the following order:

Order

1. Condonation is granted;
  2. The respondent is to pay the costs;
  3. The Registrar is directed to set the matter down for trial on notice to all parties.
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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mashiane, Moodley and Monama Inc

For the Respondent: Maserumule Attorneys