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

**JUDGMENT**

Reportable

Case no: JS 492 / 2015

In the matter between:

**KGABO MOABELO** **Applicant**

and

**GOLD FIELDS GROUP SERVICES (PTY) LTD** **Respondent**

**Heard: 5 August 2016**

**Delivered: 18 November 2016**

**Summary: Practice and procedure – barring provisions in terms of Rule 26 of the Uniform Rules – whether applicable in the Labour Court – considered**

**Practice and procedure – applications in terms of Rules 30 and 30A of the Uniform Rules – whether applicable in the Labour Court – considered**

**Practice and procedure – replication – whether replication permissible in terms of the Labour Court Rules – application of Rule 25(1) of Uniform Rules – considered**

**Practice and procedure – conduct by legal representatives – legal representatives have a duty to court to behave responsibly and in promoting expeditious litigation**

**Practice and procedure – replication – when competent in Labour Court proceedings – replication competent in current matter**

**Condonation – late filing of replication – condonation granted**

**Practice and procedure – application to strike out – application dismissed**

---

**JUDGMENT**

---

**SNYMAN, AJ**

Introduction

[1] The applicant has instituted a claim in the Labour Court, by way of a statement of claim filed on 10 July 2015, which claim is founded on contract and negligent misrepresentation. The matter concerns annual and performance bonuses allegedly due to the applicant, which he is claiming from the respondent.

[2] The respondent opposed the claim, initially by way of an answering statement filed on 24 July 2015 and later by way of amended answering statement filed on 2 November 2015. The respondent contended that the Labour Court does not have jurisdiction to entertain the negligent misrepresentation claim. It further contended that the applicant is simply not contractually entitled to the bonuses claimed.

[3] On 15 October 2015, the parties concluded a pre-trial minute, which was filed in Court on 2 November 2015. For all intents and purposes, the matter should have been ready to proceed to trial, after that.

[4] However, all went off course when the applicant attempted to file a replication on 29 October 2015, which the respondent objected to as being out of time and being an irregular step. Opportunistically, and when the respondent finally filed its amended answering statement on 2 November 2015, the applicant used the opportunity to file the exact same replication again, this time on 11 November 2015.

[5] The respondent contended that the applicant's replication was regulated by Rule 25(1) of the Uniform Rules of the High Court ('Uniform Rules'), since there was no provision in the Labour Court Rules providing for replications. According to the respondent, a replication must be filed within 15(fifteen) days of the answering statement being filed and if not, the applicant would be ipso facto barred from filing a replication. In this instance, the replication filed on 21 October 2015 was according to the respondent not made in time and thus an irregular step. The respondent then sought to apply Rule 30A of the Uniform Rules and gave the applicant written notice on 7 December 2015 to withdraw the replication or face an application to strike it out.

[6] Suffice it to say that the applicant did not withdraw the application, and an application in terms of Rule 30A to strike out the applicant's replication then followed, brought by the respondent on 13 January 2016. The applicant opposed this application, and added a further counter to the application to strike out, being that of applying for condonation for the late filing of the replication. It is all these interlocutory proceedings that came before me on 5 August 2016.

[7] As a point of departure, I must say that these interlocutory proceedings have in essence caused a case that could have been disposed of on the merits of the matter, long ago, to be unduly delayed. When litigating in the Labour Court, parties should always bear in mind, as a primary objective, that there exists a Constitutional imperative of the expeditious resolution of employment disputes.[1] Over formalistic litigation stands in the way of such an objective. This being said, I will now proceed to deal with the interlocutory applications now before me.

Analysis

[8] From the outset, I must say that I consider the applicant's second replication filed on 11 November 2015 as being a poorly disguised and artificial attempt to circumvent the time limits in Rule 25(1) of the Uniform Rules the respondent sought to rely on (should these apply), opportunistically brought about by the

[1] See *Ferreira v Die Burger* (2008) 29 ILJ 1704 (LAC) at para 8; *Seatlolo and Others v Entertainment Logistics Service (A Division of Gallo Africa Ltd)* (2011) 32 ILJ 2206 (LC) at para 27; *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* (2010) 31 ILJ 273 (CC) at para 46 ; *Strategic Liquor Services v Mvumbi NO and Others* (2009) 30 ILJ 1526 (CC) at paras 12 – 13.

amendment of the respondent's answering statement effected on 2 November 2015. This replication, if regard is has to its contents, had nothing to do with the amendments effected by the respondent to its answering statement on 2 November 2015. It was identical to the replication filed on 21 October 2015, to the original answering statement. It thus remained a replication to what was contained in the original answering statement prior to amendment. The replication of 11 November 2015 thus cannot serve to replace the first replication filed on 21 October 2015, just because there was an amendment of the answering statement. Therefore, and for the purposes of deciding this matter, I will still consider the replication of 11 November 2015 to have been filed on 21 October 2015.

[9] I will decide this matter by firstly considering whether a replication in the course of proceedings in the Labour Court is indeed competent. Proceedings brought to the Labour Court on the basis of an envisaged trial is governed by Rule 6 of the Labour Court Rules. Provision is made for a statement of claim, an answering statement, followed by pre-trial proceedings.[2] There is clearly no provision for the filing of a replication.

[10] However, Rule 11(3) provides that if a situation arises in any proceedings before the Labour Court, which is not provided for in the Labour Court Rules, '… the court may adopt any procedure that it deems appropriate in the circumstances.' The provisions of Rule 11(3) have in the past been utilized by the Labour Court to in essence incorporate and adopt selected provisions of the Uniform Rules into the Labour Court dispute resolution proceedings. I commented on this in the judgment of *L'Oreal SA (Pty) Ltd v Kilpatrick and Another*[3] and said:

> 'From the outset, I must state that the High Court Rules do not apply to or regulate proceedings in the Labour Court. The Labour Court has its own rules. But, from time to time, it has been found that there is a lacuna in the Labour Court Rules relating to certain proceedings. What the Labour Court has

[2] Rules 6(1), (3) and (4).
[3] (2015) 36 ILJ 2617 (LC) at para 23. I again refer to the various examples of incorporation and adoption of the Uniform Rules by the Labour Court in the judgments set out in paras 23.1 – 23.7 and para 25 of the judgment in *L'Oreal*. See also *Chauke v Safety and Security Sectoral Bargaining Council and Others* (2016) 37 ILJ 139 (LC) at para 11.

> equally done in such cases is use its powers in terms of rule 11(3) of its own rules and import or adopt specific High Court Rules into its own proceedings.'

[11] The above being said, and where the Labour Court seeks to adopt, incorporate or apply the Uniform Rules, that cannot mean that the Labour Court is obliged to apply all these Rules as they stand. The Labour Court is entitled to be selective where it comes to this. For example, parts of a Rule as contained in the Uniform Rules can be adopted, and other parts not. The Labour Court, after all, has the power to adopt that which it considers appropriate. I similarly considered this situation in *L'Oreal*[4] and said:

> 'The distinction between the Labour Court importing selected provisions from another existing statute to develop its own general principles and rules, and the Labour Court actually being bound by such other statute, is critical. The distinction lies in the ability to be selective. If the Labour Court is bound by the statute and such statute specifically regulates the court's affairs, such as the LRA, then the Labour Court must apply all the provisions of such statute and cannot decide which to apply and which not to. But if the Labour Court imports to develop its own rules and principles of general application, then certainly it can be selective. The power of the Labour Court to develop its own rules and principles of general application is found in s 158(1)*(a)*(iii) and (iv), as well as s 158(1)*(j)* (which I have referred to above), together with rule 11(3) and (4)…'

I then concluded:

> 'In crisp terms, where the Labour Court seeks to import or adopt to develop its own principles and rules of general application, it can be choosy …'

[12] I now turn to the issue of a replication being filed in the Labour Court. As sated, there is a *lacuna* in Rule 6 where it comes to such a step in the dispute resolution process. Is it then necessary to seek to incorporate or adopt a provision to allow for such an eventuality? If so, then clearly the most obvious place to go and find a provision to adopt would be in the Uniform Rules.[5] Rule 25(1) of the Uniform Rules provides as follows:

---

[4] (supra) at para 18.
[5] As said in *L'Oreal* (*supra*) at para 16: '… why reinvent the wheel if you can buy it off the shelf?'

> 'Within 15 days after the service upon him of a plea and subject to sub-rule (2) hereof, the plaintiff shall where necessary deliver a replication to the plea and a plea to any claim in reconvention, which plea shall comply with rule 22.'

Clearly certain textual changes would be needed in the context of Labour Court dispute resolution under Rule 6 of the Labour Court Rules. These is no plea in terms of the Labour Court Rules, but an answering statement. Similarly, Rule 22 of the Uniform Rules would not apply, as the requirements an answering statement must comply with is adequately regulated in Rule 6(3) of the Labour Court Rules. That being said, there should be no difficulty to consider a reference to a 'plea' in Uniform Rule 25(1) to mean 'answering statement' and a reference to 'Rule 22' of the Uniform Rules to mean Rule 6 of the Labour Court Rules.

[13] Considering that Rule 25(1) of the Uniform Rules could thus in my view readily be applied in the context of Labour Court dispute resolution, the next consideration is whether it should be applied. In my view it should, as there is a definite *lacuna* that needs to be filled.

[14] This *lacuna* has become more apparent with the Labour Court dealing with more and more contract claims,[6] pursuant to the application of Section 77[7] of the Basic Conditions of Employment Act ('BCEA')[8]. In these kind of contract claims, the possibility of counterclaims by respondent parties are a reality.[9] With counterclaims comes the need to plead to or answer a counterclaim, and this can then be done in terms of Rule 25(1) of the Uniform Rules, by way of an answering statement to the counterclaim. This is proper motivation for the application of Rule 25(1) in Labour Court dispute resolution.

[15] The matter at hand in this judgment however concerns the issue of a replication, the other form of process contemplated by Rule 25(1) of the

---

[6] See the most recent cases of *Renaissance BJM Securities (Pty) Ltd v Grup* (2016) 37 ILJ 646 (LAC); *Volschenk v Pragma Africa (Pty) Ltd* (2015) 36 ILJ 494 (LC); *Ramabulana v Pilansberg Platinum Mines* (2015) 36 ILJ 2333 (LC); *Somi v Old Mutual Africa Holdings (Pty) Ltd* (2015) 36 ILJ 2370 (LC).

[7] Section 77(3) reads: 'The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract'. This provision has been held to include any ancillary or collateral agreement to a contract of employment – see *Kruse v Gijima AST (Pty) Ltd* (2010) 31 ILJ 1898 (LC).

[8] Act 75 of 1997.

[9] See *Motitswe v City of Tshwane* (2014) 35 ILJ 3458 (LC).

Uniform Rules. It is so that a replication is not an essential pleading. It is only required in limited circumstances, but the fact remains that it may be required. A pertinent example of where a replication would be required is where a respondent pleads in an answering statement that the contract relied on by the applicant in support of a claim is invalid because the person at the respondent that concluded the contract did not have authority to do so, and in response to that, the applicant wishes to raised estoppel as a defence. Estoppel is normally raised in a replication.[10]

[16] Further examples of a need to replicate is found in *SA Broadcasting Corporation v Coop and Others*[11] where is was said:

> '… if the defendant in a defamation action were to admit publication of the defamatory words alleged but to plead that they were uttered on a privileged occasion, the plaintiff could replicate with an allegation of an improper motive. A plea of prescription should also be answered in the replication by alleging, for instance, that prescription has been interrupted.'

[17] In *Solidarity and Others v Eskom Holdings Ltd*[12] the Labour Court dealt with a reliance the doctrine of quasi-mutual assent (a species of estoppel) in a replication. The Court said:[13]

> 'The issue to be decided, then, is whether there was an actual agreement between the parties; and if not, if Solidarity can rely on Eskom's manifestation of assent. …'

The aforesaid is a prime example of how a replication works in further defining the issues in dispute that need to be determined by the Court.

[18] Accordingly, and in my view, provision must be made for a replication to the answering statement in the context of Labour Court dispute resolution proceedings, if circumstances require it. This replication is not intended to answer to the facts as pleaded in the answering statement, in a manner such as a replying affidavit in motion proceedings would do. It is only intended to

[10] See *Nydoo v Vengtas* 1965 (1) SA 1 (A); *Benson v Robinson & Co (Pty) Ltd* 1967 (1) SA 420 (A)
[11] (2006) 27 ILJ 502 (SCA) at para 63.
[12] (2012) 33 ILJ 464 (LC) at para 11.
[13] Id at para 14.

provide a legal defence, so to speak, to a case as raised or pleaded by the respondent party in the answering statement. This would most often arise in the case of estoppel[14], but as referred to above, there can be other instances as well.

[19] If the content of the applicant's replication in this instance is considered, he seeks to raise an issue of *arbitrio bono viri*. This is a defence that applies in the case where one party to a contract is afforded a contractual discretion, and entails the principle that such a discretion must be exercised reasonably and in good faith. As held in *NBS Boland Bank v One Berg River Drive and Others Deeb and Another v ABSA Bank Ltd Friedman v Standard Bank of South Africa Ltd*[15]:

> 'All this does not mean that an exercise of such a contractual discretion is necessarily unassailable. It may be voidable at the instance of the other party. It is, I think, a rule of our common law that unless a contractual discretionary power was clearly intended to be completely unfettered, an exercise of such a discretion must be made *arbitrio bono viri* (cf. *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 707A–B; *Moe Bros v White* 1925 AD 71 at 77; *Holmes v Goodall and Williams Ltd* 1936 CPD 35 at 40; *Belville-Inry (Edms) Bpk v Continental China (Pty) Ltd* 1976 (3) SA 583 (C) at 591G–H, and *Remini v Basson* 1993 (3) SA 204 (N) at 210I–J). …'

[20] The Court in *Erasmus and Others v Senwes Ltd and Others*[16] dealt with the application of the principle of *arbitrio bono viri* in the context of employment contracts, and said:

> '… the contractual right, which the first respondent had to amend any of the terms of the employment contracts, did not amount to a *condictio si voluero* (an unfettered discretion*)*, which would have made the contracts, void. The first respondent's power to amend its prestation, viz, its own obligation to subsidise the medical scheme premiums, was not objectionable because the power had, by law, to be exercised *arbitrio bono viri*, ie, "the decision of a

[14] Estoppel has been often considered by the Labour Court – for the most recent examples see *National Union of Mineworkers v Wanli Stone Belfast (Pty) Ltd* (2015) 36 ILJ 1261 (LAC); *Saldanha Bay Municipality v SA Municipal Workers Union on behalf of Wilschut and Others* (2016) 37 ILJ 1003 (LC); Association of Mineworkers & Construction Union & others v Anglogold Ashanti Ltd (2016) 37 ILJ 2320 (LC); *Chidi and Others v University of SA* (2015) 36 ILJ 709 (LC).
[15] [1999] 4 All SA 183 (A) at para 25.
[16] [2007] JOL 18965 (T).

> good man". The first respondent's power was therefore subject to reasonableness. Given the rights and interests of both parties, which had to be balanced, the reduced subsidy breached the contract. …'

[21] The applicant has raised the principle of *arbitrio bono viri* in its replication, in answer to the respondent's case pleaded in the answering statement to the effect that the applicant's bonus claim was subject to the respondent's performance scheme rules, which rules included that the respondent had a discretion where it came to awarding such a bonus. This in my view is clearly a proper issue that not only could, but actually should, de dealt with in a replication. Assuming the Court accepted, on deciding this case, that the respondent had such a discretion, then that would be the end of the applicant's contract claim, unless these was another basis to justify the applicant's claim still under the contract. This other basis of justification must be pleaded in the pleadings that are exchanged, and this can thus only be done in a replication. I am therefore satisfied that it was competent for the applicant to raise the issue of *arbitrio bono viri* in the replication he filed.

[22] This brings the time limit in Rule 25(1) of the Uniform Rules into play. I am similarly satisfied that the time limit for the filing of a replication would equally apply in the Labour Court dispute resolution proceedings. After all, Rule 6 itself contains time limits where it comes to the filing of an answering statement and the holding of a pre-trial. The decision for an applicant to file a replication cannot be left open ended. Therefore, any replication to a respondent's answering statement in terms of Rule 6(3) of the Labour Court Rules must be filed within the 15(fifteen) day time limit in terms of Rule 25(1) of the Uniform Rules.

[23] But where it comes to the consequences of a failure to comply with the 15(fifteen) day time limit, I see no need to import the barring provisions in Rule 26[17] of the Uniform Rules, which the respondent has sought to do. In my view, the concept of *ipso facto* barring and all of its consequences will add a complication to the dispute resolution process never envisaged when the Labour Court rules were adopted and would detract from the inherent

[17] The Rule reads: 'Any party who fails to deliver a replication or subsequent pleading within the time stated in rule 25 shall be *ipso facto* barred'.

component of flexibility where it comes to the application of processes under the Labour Court Rules. I believe that in the Labour Court, the process must be allowed to flow, and only if late filing of any pleading is actually raised as an issue by one of the parties, this failure must be dealt with by way of condonation proceedings. An example of this can be found in clause 11.4.2 of the Practice Manual[18] which deals with opposing and replying affidavits filed outside of the prescribed time limits in Rule 7 (the Rule that deals with motion proceedings in the Labour Court), and which reads:

> 'Where the respondent or the applicant has filed its opposing or replying affidavits outside the time period set out in the rules, there is no need to apply for condonation for the late filling of such affidavits unless the party upon whom the affidavits are served files and serves a Notice of Objection to the late filing of the affidavits. The Notice of Objection must be served and filed within 10 days of the receipt of the affidavits after which time the right to object shall lapse.'

[24] Although there is no similar provision in the Practice Manual where it comes to proceedings under Rule 6, I see no reason why these exact same considerations could not be applied to answering statements or replications filed outside the prescribed time limits in such proceedings. This would apply to the time limits in terms of Rule 6(3) of the Labour Court Rules and in the adopted Rule 25(1) of the Uniform Rules. Should the applicant in the case of the filing of an answering statement and the respondent in the case of a filing of a replication, object to the late filing of such pleading by the other party, then an application for condonation must be made, and decided. If there is no such objection, the matter proceeds in the normal course to the stage of set down for trial. This approach is entirely incompatible with having an *ipso facto* barring provision in place. Therefore, Rule 26 of the Uniform Rules in my view does apply to Labour Court dispute resolution proceedings.

[25] There can be no doubt that the applicant's replication was filed late. The respondent's answering statement was filed on 24 July 2015. This means that if the applicant wanted to replicate, it needed to file such a replication within 15(fifteen) days of such date, being on or before 17 August 2015. As I have

[18] Practice Manual of the Labour Court – effective 1 April 2013.

said above, the proper replication in this instance was filed on 21 October 2015, making the replication some 9(nine) weeks' late.

[26] The respondent took issue with the late filing of the applicant's replication using Rule 30A of the Uniform Rules[19], by giving the applicant notice of removing the cause of complaint by withdrawing the replication, and when the applicant then failed to oblige, by bringing an application to strike out. The applicant retaliated by contending that the respondent improperly relied on Uniform Rule 30A, and should have instead relied on Uniform Rule 30[20] in bringing the application to strike out. The applicant further contended that the respondent deliberately did not utilize Rule 30 because the respondent did not adhere to the time limit in Rule 30(2)(b)[21]. It is this kind of to and fro that should have no place in employment law dispute resolution, and constitutes a clear indication why several of the Uniform Rules in fact have no place in the Labour Court dispute resolution process.

[27] This would certainly be the case with the application of Rules 30 and 30A of the Uniform Rules. There is no need to burden the Labour Court with deciding under which Rule an application to strike out must be brought and having to consider all the complexities associated with these Rules that have manifested itself in the High Court, which includes the question as to what exactly is an 'irregular step'.[22]

[28] In my view, Rules 30 and 30A of the Uniform Rules do not apply to Labour Court dispute resolution proceedings. The provisions of these Rules thus cannot be utilised in conducting litigation in the Labour Court. There are sufficient provisions in the Rules of the Labour Court itself where it comes to these kind of interlocutory applications, and issues of condonation, and no

[19] Rule 30A(1) reads: 'Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.' Rule 30A(2) then reads: 'Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet.'

[20] Rule 30(1) reads: 'A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.'

[21] This Rule imposes a 10 (ten) day time limit.

[22] See for example *Cochrane v The City of Johannesburg* [2010] JOL 25952 (GSJ); *Standard Bank of SA Ltd v Sewpersadh and Another* [2005] JOL 13336 (C); *Chelsea Estates and Contractors CC v Speed-O–Rama* 1993 (1) SA 198 (SE) at 202E–G; *Molala V Minister of Law and Order and Another* [1993] 3 All SA 255 (W) at 256 – 257.

need to defer to the Uniform Rules. Rule 11(1) of the Labour Court Rules provides:

> 'The following applications must be brought on notice, supported by affidavit:
> *(a)* Interlocutory applications;
> *(b)* other applications incidental to, or pending, proceedings referred to in these Rules that are not specifically provided for in the rules; and
> *(c)* any other applications for directions that may be sought from the court.'

And where it comes to any issue of condonation, Rule 12 of the Labour Court Rules provides:

> '(1) The court may extent or abridge any period prescribed by these Rules on application, and on good cause shown, unless the court is precluded from doing so by an Act. …
>
> (3) The court may, on good cause shown, condone non-compliance with any period prescribed by these Rules.'

[29] Accordingly, and where a replication is not filed within the prescribed time limit, and the respondent party objects to this, an application for condonation must be brought by the applicant in terms of Rule 12 of the Labour Court Rules. In *Lumka and Associates v Maqubela*[23] the Court held:

> 'In the Labour Court applications for condonation in relation to breaches of that court's rules are governed by rule 12 of the Labour Court Rules which provides that the court may extend or abridge any period prescribed by the rules on application and on good cause shown. …'

This application for condonation must comply with the normal principles associated with condonation applications.[24] If the applicant does not bring such an application for condonation in the face of the objection received from the respondent, then the respondent can file an interlocutory application in terms of Rule 11(1)(a) of the Labour Court Rules to set aside or strike out the replication. It is as simple as that.

[23] (2004) 25 ILJ 2326 (LAC) at para 21.
[24] This is discussed below in this judgment.

[30] Accordingly, the respondent's application to strike out the applicant's replication in terms of Rule 30A of the Uniform Rules is incompetent. This Uniform Rule does not apply in Labour Court dispute resolution proceedings. For this reason, the respondent's application should fail. But, and in this instance, it is not that easy. The respondent's notice to the applicant to remove the cause of complaint because of what it contended to be the late filing of the applicant's replication, which it filed on 7 December 2015, can be reasonably considered to be an objection to such late filing, requiring a condonation application in terms of Rule 12. As said in *Temba Big Save CC v Kunyuza and Others*[25]:

> 'I agree with the Labour Court that a notice of objection does not need to be a document in the formal sense of a notice. …'

[31] If the applicant did not file a condonation application in response to this objection, I would have been inclined to strike out the replication because it was not filed in time[26]. But in this case, the applicant did bring an application for condonation, which was then opposed by the respondent. It is thus necessary to decide this condonation application, in order to determine if the applicant's replication can be allowed to stand, which I will now do.

Condonation

[32] Where it comes to deciding a condonation application, the law in this regard is well settled and laid out clearly in the case of *Melane v Santam Insurance Co Ltd*[27] as follows*:*

> *'*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

[25] (2016) 37 ILJ 2633 (LAC) at para 18.
[26] See *Temba Big Save* (*supra*) at para 19.
[27] 1962 (4) SA 531 (A) 532C-E.

there are no prospects of success there would be no point in granting condonation.'

[33] In the context of considering condonation applications in the Labour Court dispute resolution process, the Court in *Academic and Professional Staff Association v Pretorius NO and Others*[28] said:

> 'The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply with time frame; (c) prospects of success or bona fide defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice. .... It is trite law that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay.'

[34] As to how the explanation must be presented by an applicant in an application for condonation, the Court in *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others*[29] held:

> 'In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay. ….'

[35] I accept that the above references properly summarize what must be considered when an application for condonation is decided, and I will apply these in deciding the applicant's condonation application *in casu*.

[28] (2008) 29 *ILJ* 318 (LC) paras 17–18.
[29] (2010) 31 *ILJ* 1413 (LC) para 13.

[36] Starting with the length of the delay, a delay of 9(nine) weeks is fairly lengthy and would require a proper explanation for the delay.

[37] Turning then to the explanation provided, the applicant states that the respondent sought to amend its statement of claim by way of a notice of intention to amend filed on 24 August 2015, and that it was only obliged to file a replication if it wanted, after the amendment had been effected. According to the applicant, the due date for affecting an amendment was 21 September 2015, and the time limit for filing the replication only started running on that date. I do not think this reasoning is correct, because if the amendment was not affected by due date, there is actually no amendment and the original date of filing of the unamended statement of claim still remains applicable. But I need not decide such an issue, because even if the applicant may be wrong in how it interpreted the Rules relating to amendments and the application of time limits, it is still in my view a proper explanation for a delay.

[38] Then the applicant also explained that following a pre-trial conference held on 1 September 2015, it dawned on the applicant's attorney that it may need to raise the issue of *arbitrio bono viri*. It is then explained that the attorney initially believed this issue could be raised by way of an amendment to the statement of claim, and there were no time limits applicable to amendments. However, and following research, it was decided that the proper way to raise this issue was by way of a replication. The applicant further explained that because there was no provision for a replication in the Labour Court Rules, it was necessary to do further research with counsel to ascertain if this was even possible. Once again, and considering the issues that needed to be dealt with in this judgment, *supra*, I do accept that this is a proper explanation.

[39] I also consider that the respondent indeed delayed until 2 November 2015 to effect the amendment to the answering statement, despite having given notice of intention to do so as far back as 24 August 2015. As the respondent explained in the answering affidavit to the condonation aplication, its attorneys were under the mistaken belief that the amendment had been effected earlier, when it had not. As stated above, this delay did influence the further conduct

of the applicant, and not unreasonably so. At least, it can be said that both parties made mistakes in conducting their respective cases.

[40] I am satisfied that the delay in this instance occasioned in the filing of the replication in not unreasonable and had been adequately explained. I am equally satisfied that this is an instance where the applicant showed throughout that he had the intention of prosecuting the matter to finality, and it was only the intervention of fairly complex procedural issues that caused the further prosecution thereof to become bogged down.

[41] Where it comes to considering prejudice, it is my view that this consideration clearly favours the applicant. It should be allowed to raise the issue of *arbitrio bono viri* and it can only do so properly and lawfully, if he pleads it. To refuse condonation will in effect preclude the applicant from raising the issue, which may be materially prejudicial to his claim. On the other hand, the respondent can still defend itself against this issue and contend this principle does not apply, and even if it does apply, that it did act reasonably and bona fide. The respondent does not even have to plead further to this. In the end, properly ventilating all issues that need to be considered in the pleadings not only benefits the parties, but the Court as well.

[42] Finally, and as to prospects of success, I have in effect fully dealt with this issue above, in this judgment, where I decided that it was competent and proper to raise the *arbitrio bono viri* principle in a replication.

[43] In all of the above circumstances, I exercise my discretion in favour of the granting of condonation for any late filing of the applicant's replication, which I consider to be in the interest of justice and a fair and proper ventilation of all the requisite issues at trial.

Conclusion

[44] In conclusion, therefore, the respondent's interlocutory application to strike out the applicant's replication must be dismissed. Further, condonation must be granted for the late filing of the applicant's replication. I consider it to be in the interest of justice and a fair and proper determination of all the issues relating to the applicant's claim that it be allowed to raise, and thus plead, the defence

of *arbitrio bono viri*. There is accordingly no further reason why this matter cannot proceed to trial, for final determination.

[45] This only leaves the issue of costs. In the judgment of *Irving v Amic Trading (Pty) Limited*[30] I dealt with a matter where the conduct by the two litigating parties were comparable to what is before me now. I believe the following *dicta* from the judgment in *Irving* equally applies *in casu*:[31]

> '… As I have touched on above, it is my view that what caused the progress of this matter to go astray was the attitude of the two parties' legal representatives towards one another. Each took offence to the others' conduct, and this completely tainted both of their actions in the conduct of the litigation. This was glaringly apparent when the matter was actually argued before me. …
>
> Whilst it is true that the legal representatives of the parties must vigorously serve the interests of their clients, they owe a duty to the court to ensure the proper administration of justice and in particular in the context of employment law disputes, an expeditious resolution of the dispute with the minimum of unnecessary formalities. …
>
> I intend to mark my displeasure at the conduct of the legal representatives of the parties in the conduct of this matter, by making no order as to costs, despite the punitive costs orders each asked for against the other. Perhaps the fact that each party must pay their own legal representative for what was a completely wasteful exercise would motivate the parties into focusing on the real issues and dispute at hand.'

[46] I cannot understand why it was necessary for two parties, both represented by experienced employment law attorneys, to adopt the attitudes they did where it came to the amendments, the replication, and then the condonation application, as they had done. It served no real purpose other than delaying the proceedings and escalating costs. Considering that the parties had completed pre-trial proceedings and filed a pre-trial minute by that time, if the amendment was simply effected in the normal course, the filing of the replication agreed to, and the Court file indexed in terms of Rule 22B, this

[30] [2014] JOL 32480 (LC).
[31] Id at paras 44 – 46.

matter would probably have been heard on the merits by now. Instead, close on a year has been wasted. Similarly to what I had done in *Irving*, I will mark my displeasure at this state of affairs by exercising my discretion in terms of Section 162(1) of the LRA by making no order as to costs.

Order

[47] For all of the reasons as set out above, I make the following order:

1. The respondent's application to strike out the applicant's replication is dismissed.

2. The late filing of the applicant's replication is condoned.

3. There is no order as to costs.

_____

S Snyman

Acting Judge of the Labour Court



Appearances:

| | |
|---|---|
| For the Applicant: | Adv L Malan |
| Instructed by: | Schindlers Attorneys |
| For the Respondent: | Mr J Norval of ENS Inc |