THE LABOUR COURT OF SOUTH AFRICA
AT CAPE TOWN

Not Reportable

CASE NO: C742 /2021

In the matter between:

B.A. BOSCH Applicant

AND

THE PIXLEY KA SEME DISTRICT MUNICIPALITY Respondent

Heard: 6 November 2024
Delivered: 15 November 2024

JUDGMENT

DUBA AJ

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Introduction

[1] This is an opposed condonation application for the late filing of a statement of case in which the Applicant alleges discrimination and sexual harassment.

[2] On 11 January 2021 the incident occurred at the premises of the Respondent where councilor Sintu, a member of the Respondent Council, allegedly sexually and/or indecently assaulted the Applicant in full view of a male witness, inappropriately touched the Applicant between her legs.

[3] A dispute of unfair discrimination was declared at the Commission for Conciliation Mediation and Arbitration (CCMA) on 25 June 2021, a certificate of non- resolution was issued on 25 July 2021, as the Commission could not conciliate the matter.

[4] The statement of case together with the condonation application was served on 10 December 2021 and filed on 15 December 2021.

The test to grant condonation

[5] The relevant legal principle to be applied in an application for condonation are well established. This Court has a discretion, which must be exercised judicially on a consideration of the facts of each case and in essence, it is a matter of fairness to both sides.

[6] In **Melani v Santam Insurance Co Ltd**[1] it was held that:

[1] (1962) (4) SA 531 (A)

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"…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 facts are interrelated, they are not individually decisive, for that would be a piecemeal 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 prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked".

[7] The test to apply in determining whether to grant or refuse condonation application has been stated by the Constitutional Court in **Grootboom v National Prosecuting Authority & Another[2]:**

"50 In this Court the test for determining whether condonation should be granted or refused is the interest of justice. If it is in the interest of justice that condonation be granted, it will be granted. If it is not in the interest of justice to do so, it will not be granted.

The interest of justice is determined by having regards to the following: (a) the degree of lateness (b) the explanation for the lateness or the failure to comply with the time frames (c) prospects of success or bona fide defense in the main case; (d) the importance of the case; (e) the respondents' interest in the finality of the judgment; (f) the convenience of the court.

[2] (2014) 35 ILJ 121 (CC)

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As a general rule proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interest of justice".

[8] The onus is on the Applicant seeking condonation to satisfy the court that condonation should be granted. In the employment disputes there is an additional consideration which applies in determining whether the onus has been discharged, as was held in **National Union of Metalworkers of SA obo Thilivali v Fry's Metal (A Division of Zimco Group) and Others**[3]:

"There is, however, an additional consideration which applies in employment in determining whether an Applicant for condonation has discharged this. This fundamental requirement of expedition. The Constitutional Court has, as a matter of fundamental principle, confirmed that all employment law dispute must be expeditiously dealt with and any determination of the issue of good cause must always be conducted against the drop of this fundamental principle in employment law".

[9] The fundamental requirement of expedition is not to be ignored. In **Toyota SA Motors v Commission for Conciliation, Mediation and Arbitration & Others**[4]**,** the Constitutional Court emphasized that one of the fundamental purposes of the Labour Relations Act was to establish a system for the quick adjudication of labour disputes. When it assesses the reasonableness of a delay, the Court must not lose sight of this purpose.

[10] It is in this context that the application for condonation stands to be determined. The Applicant in an application such as the present seeks an indulgence and bears the onus to show good cause.

[3] (2015) 36 ILJ 232 (LC) at par 25
[4] (2016) 37 ILJ 313 (CC)

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The degree of lateness

[11] In terms of section 10(2) of the Employment Equity Act (EEA)[5] provides that any party to a dispute concerning this Chapter may refer the dispute in writing to the CCMA within six months after the act or omission that allegedly constitutes unfair discrimination.

[12] The EEA in section 10(6) if the dispute remains unresolved after conciliation: -

- (a) any party to the dispute may refer it to the Labour Court for adjudication.

[13] Also, section 10(7) of the EEA provides that the relevant provisions of parts C and D of Chapter V11 of the Labour Relations Act, with the changes required by context, apply in respect of a dispute in terms of this chapter.

[14] On 25 July 2021 CCMA issued the certificate of non-resolution. The statement of case was served on 10 December 2021 and filed on 15 December 2021, with a condonation application.

[15] The Applicant argued on her heads that the referral is approximately 2 months and weeks late, as the referral was due on the 27 September 2021.

[16] According to the Applicant as parties attempted to reach settlement, a delay of just more than two months is not excessive and should, in the interest of justice,

[5] 55 OF 1998

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be condoned. The Applicant contend that her explanation for the delay is sufficient to condone the relative short delay.

[17] It is also submitted by the Applicant that in the matter of **NEHAWU obo Mofokeng & Others v Charlotte Theron Children's Home[6]:**

> *"…the Labour Appeal Court held the provisions of subsection 10(6) and 10(7) of the EEA must be read together when determining the prescribe time periods applicable for the referral of a dispute contemplated in Chapter 11 of the EEA. The provisions of subsection 10(7) stipulate that the relevant provisions in part C and D of the LRA shall find application in dispute referred to in Chapter 11 of the EEA. The Labour Appeal Court further held that a reading of the provision of section 10(7) of the EEA was such that the 90 days' time period contemplated in section 136(1)(b) of the LRA was equally applicable (within context) to proceedings contemplated in subsection 10(6) of the EEA, and further that 90 day time period contemplated within the provisions of section 136(1)(b) of the LRA (within context) must computed from the date the dispute was declared as unresolved.*

[18] The Respondent on its heads submit that the EEA determines that a matter must be referred to the CCMA within six months from the date of the allege offence. The Applicant had 30 days to refer the matter either to arbitration at the auspices of the CCMA alternatively within the same period to the Labour Court for adjudication.

[6] (2004) 25 ILJ 2195 (LAC)

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[19] According to the Respondent the Application is 4 months and 15 days late if calculated from the date of issuing the certificate of outcome.

[20] The Respondent further submit that according to their calculations the delay is not miniscule, this is exacerbated as the Applicant did not even indicate the degree of their lateness and leaves it to the court to guess the degree of lateness. They submit that the Court is entitled to draw a negative from this fact.

[21] After the certificate of non-resolution has been issued, the Applicant had 90 days to serve and file the statement of case. Therefore, referral is over two months late.

[22] In my view the degree of lateness is material, but it should however not be considered in isolation.

The reasons for the delay

[23] On the founding affidavit the Applicant stated that she consulted counsel in September 2021 via zoom due to Counsel being affected by the Covid-19 pandemic. During the consultation it was brought up that the Respondent in past had made certain settlement proposals. Then Counsel advised that prior to formal institution of the proceedings, the reign be taken up with the municipality again in an attempt at settling the dispute.

[24] The union attorney tried to correspond with the municipality which bore no fruit.

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[25] Then Counsel has to be briefed again to deal with the matter, who attended to the drafting of the application beginning of December 2021, as the Counsel had a pre-existing workload.

[26] The Respondent argued that the Applicant failed to give proper account of the delay and attribute the delay to the illness of the counsel. The Applicant failed to indicate that his illness prevented him from drafting the application.

[27] It is the Respondent submission that the Applicant does not even attempt to explain why she only consulted with her counsel on 1 September 2021. The only explanation made is between 1 September 2021 and 10 December 2021, which is the workload of counsel and it is not an excuse why papers were filed late.

[28] The Respondent submit that where counsel is too busy or unavailable, he or she should not take on any new instructions.

[29] The Respondent relied on **Hardrodt SA (Pty) Ltd v Behardien**[7] and Others:

> *The Labour Appeal Court restated the guidelines laid down in Queenstown Fuel Distributors CC v Labuschagne NO and Others; that there must be good cause for condonation in the sense that the reasons tendered for the delay have to be convincing. In other words, the non-compliance with the six-week time period must be compelling. The onus is on the Applicant for condonation to satisfy the Court that condonation should be granted.*

[7] (2002) 23 ILJ 1229 (LAC)

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[30] The Applicant's attempt to explain the delay on account of the allege exigencies of counsel's exigencies is not acceptable. If such an explanation is offered, it should at least be supported with some evidence of particular exigencies which prevent the statement of case being drafted within a shorter period. Attorneys operating under deadlines or where matters are overdue should ascertain counsel's ability to act with the required degree if celerity before issuing them with a brief. (see Allround Tooling (Pty) Ltd v NUMSA & Others [1998] 8 BLLR 847 (LAC).

[31] In short, the Applicant representative took steps, but did so not with the required sense of urgency that the circumstances required. There is an explanation for the delay but it is a weak one because it does not really get to grip with explaining the lethargic pace of their efforts and is lacking in the necessary detail in places.

[32] As the Respondent argued that the Applicant's application does not cover all the days of the delay and the explanation lacks any details. There is thus no reasonable explanation before this court to exercise its discretion to grant condonation.

[33] In present matter the Court is guided by the matter of **Chemical Energy Paper Printing & Allied Workers Union & Others v CTP Limited** at par 18[8]:

> *"the respondent's argument was that in view of the unsatisfactory nature of explanation and the length of delay this is one of those cases in which it was not necessary for the court to even consider the other factors*

[8] JS 215 /2010

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mentioned by the court in Melani's case. In an earlier judgment I reviewed what I consider to be the main authorities on this principle and concluded as follows:

> *"…in light of current jurisprudence, it seems that in condonation applications where the explanation for one or more significant periods of delay is absent or completely inadequate this may constitute a sufficient reason for refusing condonation, but even in such instances, adjudicators in exercising their discretion are not precluded from still considering the prospects of successes."*

[34] The Labour Appeal Court confirmed in principle that without a reasonable and acceptable explanation for the delay the prospects of success are immaterial: **Miya v Putco Limited; unreported judgment of the Labour Appeal Court DA 17/89 SEE ALSO PPAWU AND Others V a F Dreyer and Company (Pty) Ltd [1997] 9 BLLR 1141 (LAC); Toyota Marketing v Schmeizer [2002] 12 BLLR 1164 LAC** at par 15: it should be noted that in the two latter cases. The approach as set out in Miya was qualified with a measure flexibility, in that failure to provide a reasonable and acceptable explanation for a delay was not regarded necessarily as an absolute bar to condonation.

[35] In this instance the explanation for the delay is patchy and unacceptable, but not wholly lacking. When considering the other relevant factors, I conclude that condonation is justified in this instance and should not be dismissed despite the weakness of the explanation and the long delay.

The prospects of success

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[36] It is for the Applicant to establish that there are sufficient reasons excusing the delay for non-compliance with the Court Rules.

[37] The Applicant submit that the prospects of success and the importance of the matter, the Court is referred to the fact that the Respondent does not seriously, or at all, dispute that certain counsellor inappropriately touched the Applicant between her legs.

[38] The Court is referred to the matter of **Premier Valves (Pty) Ltd v Mckie**[9]: the Court held that:

> *"a further consideration is that the pleadings have been closed and the matter should be ripe for hearing but for the filing of pre-trial minutes. In my view, and given the stage where the proceedings are, it would not be in the interests of justice to deny condonation."*

[39] The Applicant argued that when considering the importance of the matter, the Court is again referred to the crux of the dispute which involves a serious allegation of sexual harassment and discrimination.

[40] The matter of **McGregor v Public Health and Social Development Sectoral Bargaining Council and others**[10], the Constitutional Court held that:

> *Sexual harassment is the most heinous misconduct that plagues a workplace. Although prohibited under the labour laws of this country, it persists. Its persistence and prevalence pose a barrier to*

[9] (JS 491/18) [2020] ZALCJHB 127
[10] [2021] ZACC 14

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the achievement of substantive equality in the workplace and is inimical to the constitutional dream of a society founded on the values of human dignity, the achievement of equality and advancement of human rights and freedom… and non-sexism. Not only is it demeaning to the victim, but it undermines the dignity integrity and self-worth, striking at the root of that person's being. Writing in 1989, sounding the alarm that sexual harassment cannot be tolerated, highlighted that unwanted sexual advances in the employment sphere are not a rare occurrence and it is by no means uncommon. Unfortunately, that truth rings as loudly today as it did then. The only difference between now and then is that today we hold in our hands a Constitution that equips us with the tools needed to protect the rights that are violated when sexual harassment occurs. Yet, what this means is that for as long as sexual harassment persists. So, the Constitution becomes an eidolon, and its promises of equality and dignity, equality illusive.

[41] The Applicant further alluded that another aspect which justify the granting of condonation is the fact that the Court will have an opportunity to rule on the liability of municipalities towards employees who are sexually harassed by councilors.

[42] The Respondent argued that the Applicant does not have good prospects of success, as the allegations are denied. That the councilor is not an employee of the Respondent. The employee was disciplined by the municipal council and the councilor received a written warning.

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[43] It is further submitted that councilors are elected to the municipal council and not appointed to the municipality. The Respondent can therefore not be liable for the actions of the councilor. It is on this basis that the Applicant will not have good prospects of success in the main application.

[44] The difficulty in evaluating the prospects of success, given what is before the court at this stage of the proceedings, is that the parties have not yet had a pre-trial meeting in which the areas of dispute had been narrowed down. Most importantly, in a condonation application of this nature the court does not have the benefit of an award or judgment which has already dealt with the merits of the dispute, as a court has when dealing with condonation for late filing of a review application.

[45] In considering the allegation by the Applicant of sexual harassment and discrimination are serious in nature, as its undermine a person constitutional right and values of human dignity and integrity.

[46] Further the Respondent acknowledge the occurrence of the incident at the workplace. Although deny any liability and as councilors are elected to the municipality but not appointed by the municipality. The councilor was disciplined and issued with a written warning.

[47] In summary, it seems that the allegations are serious, if properly proved by the Applicant the allegation represents the serious form of discrimination in the workplace. The indeterminate status of the allegations certainly suggest that the Applicants prospects of success are not unreasonable.

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Prejudice

[48] The Court has to balance the interest of both parties. The Respondent submit that it will suffer prejudice as the relevant witnesses in the matter are no longer in the employ of the Respondent. The Applicant failed to make out a case for condonation, and the condonation should be dismissed.

[49] The Applicant submit that considering the seriousness of the allegation she deserves a hearing by the Court as she will be prejudiced because the matter has not adjudicated by any forum.

[50] It is the Court view that it is in both parties interest that matter be heard considering the issues raised and the importance of the matter.

The importance of the matter

[51] It is clear that it is in the interest of justice that this kind of a case be heard, considering that it has been acknowledged by the Respondent that incident occurred in the workplace.

[52] It will be important for the Court to determine that such conduct cannot be tolerated. Further the Court will have an opportunity to rule on municipal liability towards employees who are sexually harassed by the councilors.

[53] For the reasons given I make the following order:

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Order:

1. The condonation application for the late filing of the Applicant's statement of case is granted.

2. There is no order as to costs.

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J Duba

Acting Judge of the Labour Court

Appearances:

For the Applicant: Adv. T. Du Preez Instructed by Kramer Weihmann Incorporated

For the Respondent: State Attorney CC Davis

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