

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: J777/23

In the matter between:

CRYSTAL BAILEY PRETORIUS

Applicant

And

TAUSTEEL (PTY) LTD

First Respondent

JOHANNES JACOBUS APPELGRYN

Second Respondent

Heard: 24 October 2023

Delivered: 05 February 2024

JUDGMENT

ADAMS, AJ

[1] The Applicant has sought condonation in this matter for the late filing of her Statement of Claim, which is 21 days late.

[2] Briefly, the Applicant contends that the reason for lateness was due to the Applicant having to source funds to pursue the matter and falling ill, resultantly being booked off by her medical practitioner for a period of a week. The condonation application was served at the same time as the Statement of Claim.

[3] The Respondent has opposed the application on the basis that, *inter alia*, there is no affidavit deposed to by the Applicant personally (same has been deposed to by her Attorney); there is no proper explanation for the default; there is no prospect of success and that the Applicant has failed to show good cause.

[4] In *NUM v Council for Mineral Technology*¹, the Labour Appeal Court confirmed the approach in *Melane v Santam Insurance Co Limited*² as the approach to adopt when considering condonation applications. That is, that the factors to be considered are the degree of lateness, the explanation for the delay, the prospects of success and the prejudice to both parties.

[5] It set out a further principle that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial.³

[6] In *Grootboom v National Prosecuting Authority and Another*⁴, the Constitutional Court held that the standard for considering an Application for Condonation is the interests of justice. It found that the concept of “*the interests of justice*” is so elastic that it is not capable of precise definition but includes, “*the nature of the relief sought, the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended Appeal; and the prospects of success.*”

[7] The Constitutional Court held that the ultimate determination of what is in the interests of justice must reflect due regard to all of the relevant factors, with the particular circumstances of each case determining which of them are relevant.⁵

[8] It re-emphasised that condonation cannot be had for the mere asking and that a party seeking condonation must make out a case entitling it to the Court’s indulgence, that is, it must give a full explanation for the non-compliance with the rules and the explanation must be reasonable enough to excuse the default.⁶

Explanation for the delay

¹ [1999] 3 BLLR 209 (LAC).

² 1962 (4) SA 531 (A) at 532 C to F.

³ See: *NUM* (Id fn 1) at para 10.

⁴ 2014 (1) BCLR 65 (CC) at para 22.

⁵ *Grootboom* (Id fn 4) at para 22.

⁶ *Grootboom* (Id fn 4) at para 23.

[9] In the matter of *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others*⁷, the Court held as follows:

“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 Courts 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. The mere listing of significant events which took place during the period in question without an explanation for the time that lapsed between these events does not place a Court in a position properly to assess the explanation for the delay. This amounts to nothing more than a recordal of the dates relevant to the processing of a dispute or application, as the case may be.”

[10] In *AMCU obo Shuping and others v Africa Mining and Crushing SA (Pty) Ltd*⁸, the Labour Appeal Court held that, once it has accepted that the period of delay was not excessive:

“[T]he test is whether an explanation has been tendered and not whether a satisfactory explanation has been proffered⁹

and further that:

“[T]he interests of justice sometimes demand that if there is an explanation, prospects of success on the merits ought to be considered. The door should not just be closed without considering the merits.”¹⁰

[11] I do not find the delay of 21 days to be excessive.

⁷ (2010) 31 ILJ 1413 (LC) at para 13.

⁸ (2022) 43 ILJ 610 (LAC).

⁹ *AMCU* (Ibid) at para 18.

¹⁰ *AMCU* (Id fn 8) at para 20.

[12] It appears to me from the submissions made by the Applicant in her Affidavit that the Applicant has attempted, at all times, to prosecute her claim despite the hindrances she may have faced.

[13] Whilst the Applicant's founding affidavit has been deposed to by her Attorney of Record, I do not agree with the Respondent's contentions that there is no evidence before the Court that the Applicant has confirmed the allegations contained therein.

[14] The Applicant deposed to her Replying Affidavit wherein she has specifically stated at paragraph 3 thereof that:

"In this affidavit, I set out my reply to the Answering Affidavit. Certain contentions in the Answering Affidavit are matters for legal argument and will consequently be dealt with an argument, to the extent necessary. In respect of allegations of fact not specifically dealt with in this reply, I stand by the allegations in the Founding Affidavit as deposed to by my legal representative. To the extent that allegations in the Answering Affidavit are contrary to those contained in the Founding Affidavit, they are denied."¹¹

and further, that:

"... provided that my legal representative is able to speak to the facts present in respect of the condonation application and which facts have been canvassed with my legal representative at the time by myself."¹²

and further,

"it should further be noted that I expressly confirm that that as set out by my legal representative in the condonation application."¹³

¹¹ See: para 3 of the Replying Affidavit at pp 355.

¹² See: para 12 at pp 357.

¹³ See: para 12 at pp 357.

[15] It is clear that the Applicant has confirmed the facts set out in the Founding Affidavit by her Attorney of Record, and that she has done so in a further Affidavit filed under oath, even if it was via a Replying Affidavit instead of a Confirmatory Affidavit.

[16] In terms of the explanation proffered by the Applicant insofar as the explanation for default is concerned, the Applicant has contended that same was as a result of her having to source funds in order to pursue the matter as well as falling ill. When one considers that the delay was not inordinate, and that same was a period of three weeks or under (fifteen working days to be exact), it cannot be said that this is not a reasonable explanation.

[17] It is clear that the Applicant has attempted to take the necessary avenues in order to prosecute her matter when one considers that:

17.1. the disputes were referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) on the same date that the Applicant resigned from her employ with the First Respondent;

17.2. the Applicant thereafter made application for a Consolidation/Joinder of the disputes (being her constructive dismissal and sexual harassment dispute in the CCMA), which joinder was not opposed by the Respondents; and

17.3. that the ruling in relation to same was only rendered on 26 April 2023.

[18] On this basis, since an explanation has been furnished, whatever its deficiencies raised by the Respondent, I am persuaded that the interests of justice demand that the Applicant's prospects of success ought to be considered.

Prospects of Success

[19] It is trite that in regard to the prospects of success, it is not necessary for an Applicant to prove that he or she will succeed when the merits of the matter are considered. It is sufficient to set out facts which, if established, would result in his or

her success.¹⁴ The Applicant claims that she was constructively dismissed and sexually harassed by the Second Respondent.¹⁵

[20] In terms of the Applicant's Statement of Claim (which is referred to in her Founding Affidavit), the Applicant has submitted that her claims against the Respondents are threefold namely:

20.1 Part A:

an automatically unfair constructive dismissal claim in terms of section 187(1)(f) of the Labour Relations Act¹⁶ (LRA) for which the Applicant claims compensation under section 194 of the LRA; alternatively, an unfair constructive dismissal claim for which the Applicant claims compensation under section 194 of the LRA; and

20.2 Part B:

an unfair discrimination claim in relation to sexual harassment, for which the Applicant claims the following:

20.2.1 compensation under section 50(2)(a) of the Employment Equity Act¹⁷ (EEA);

20.2.2 damages under section 50(2)(b) of the EEA; and

20.3 Part C:

a claim in terms of section 60 of the EEA for the Respondent's failure to:

20.3.1 consult all relevant parties;

20.3.2 take all the necessary steps to eliminate the sexual harassment and comply with the provisions of the EEA; and

20.3.3 do all that was reasonably practical to ensure that its director would not act in contravention of the EEA.

[21] The Applicant claims the following in respect of Part C:

21.1. compensation under section 50(2)(a) of the EEA;

¹⁴ See: *Public Servants Association obo Manamela v General Public Sectoral Bargaining Council and Others* (JR1354/18) [2020] ZALCJHB 155 (25 August 2020); *Mould v Roopa N.O. and Others* [2003] 1 BLLR 38 (LC) at para 34 and *Samuels v Old Mutual Bank* [2017] 7 BLLR 681 (LAC) at paras 17 and 22.

¹⁵ See: para 6.1 of the Founding Affidavit at pp 7.

¹⁶ No. 66 of 1995, as amended.

¹⁷ No. 55 of 1998

21.2. damages under section 50(2) of the EEA;

21.3. an Order under section 50(2)(c) of the EEA directing the employer to take steps to prevent the same unfair discrimination or a similar practice from occurring in the future in respect of any other employees.¹⁸

[22] In terms of the Applicant's claim for an automatically unfair constructive dismissal as contained in the Statement of Claim, the Applicant has contended that she was automatically unfairly constructively dismissed as per section 186(1)(e) of the LRA, as her work environment was made intolerable by the Second Respondent. The Applicant has further contended in her Statement of Claim that as a result of the intolerability she could not be reasonably expected to continue with the employment relationship in light of the following:

22.1. the alleged continued threats of the termination of her employment, threats of assault and the threats of placing the Applicant on indefinite suspension and/or short time at any given time;

22.2. the Applicant sought to retain her job but was then allegedly placed on short time after submitting a sick note due to ill health. The Applicant contends that this proved that the Second Respondent was willing to fulfil the previous threats of termination of her employment made against her;

22.3. the Second Respondent was the director of the First Respondent and her direct superior, allegedly resulting in an imbalance of power as the Applicant was younger than the Second Respondent and occupied a junior position. This purportedly robbed the Applicant of any opportunity to lodge any form of internal grievance;

22.4. the alleged marginalisation of the Applicant;

22.5. the fact that it was allegedly made known to the Applicant that she had been employed solely for the Second Respondent's personal reasons;

22.6. the Second Respondent allegedly constantly berated the Applicant's performance and humiliated her in front of her colleagues. The alleged use of derogatory and profane language was used daily when he allegedly spoke to her. The job description was allegedly haphazardly and unilaterally changed. The Applicant was allegedly never counselled or placed on performance management in order to give her

¹⁸ See: para 3 of the Statement of Claim at pp 16 to 17.

the opportunity to understand the allegations of poor performance, or to make representations, or to improve her performance. The allegations, according to the Applicant, were unsubstantiated and unfair.¹⁹

[23] In terms of the Applicant's claim regarding sexual harassment, the Applicant has claimed in her Statement of Claim that she was allegedly discriminated against as per section 187(f) of the LRA. The Applicant further contends that she was sexually harassed by the Second Respondent as per section 6(3)(1) of the EEA.

[24] Section (6)(3) of the EEA provides that harassment is a form of discrimination and is prohibited on any one or more grounds of unfair discrimination as listed in subsection (1).

[25] In support of the above the Applicant has contended in her Statement of Claim that the Second Respondent's conduct falls squarely within the ambits of sexual harassment, in more than one form, as provided for in the Code of Good Practice.

[26] It is further the Applicant's contention that the Second Respondent used his privilege, authority and resources in an attempt to intimidate and groom the Applicant into ceding to his demands for her to be his mistress. The Applicant contends that this was unfair discrimination on the ground of sex and/or gender and/or sexual orientation.²⁰

[27] Insofar as the breach of section 60 of the EEA is concerned, the Applicant contends in her Statement of Claim that the First Respondent is liable for its failure to discharge its obligations in terms of section 60 of the EEA for the following reasons:

27.1. the Second Respondent is the sole director of the First Respondent and is required in terms of the code of good practice to ensure that sexual harassment is not perpetuated within the workplace;

¹⁹ See: paras 29 to 29.6 of the Applicant's Statement of Claim at pp 24 to 25.

²⁰ See: paras 30 to 33 of the Applicant's Statement of Claim at pp 25.

27.2. the Second Respondent as a director of the Respondent has a greater duty to create and maintain a working environment which is free from sexual harassment. The Applicant contends that the Second Respondent's conduct towards the Applicant is particularly grievous in the circumstances;

27.3. the First Respondent allegedly does not have a sexual harassment policy nor has it communicated or educated its employees on the provisions of the Code.²¹

[28] In the matter of *Total Facilities Management Co (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*,²² the Court held in considering the prospects of success that a pronouncement does not need to be made on the merits of the case. All that is required is an investigation whether, on the averments made by the Applicant, there is a chance of succeeding when the main dispute is heard.

[29] I am satisfied that in the event that the Applicant is able to prove the allegations that have been made in her Statement of Claim, at a trial in due course, that the Applicant has prospects of success.

[30] In fact, the Respondent's Answering Affidavit drew more questions than answers with regards to the relationship between the parties, whether consensual or not, and whether this was indeed used as a weapon in the Applicant's employment relationship to render it intolerable as claimed by the Applicant.

[31] It is not in dispute that the Applicant was employed by the First Respondent. If the working environment had indeed become intolerable on the grounds listed by the Applicant in her Statement of Claim, and the Applicant is able to prove this with evidence at a trial in due course, she will satisfy the onus of proving a constructive dismissal.

[32] I am satisfied that the Applicant has reasonable prospects of success.

²¹ See: para 34 to 34.3 of the Statement of Claim at pp 26.

²² [2008] 1 BLLR 73 (LC).

Prejudice

32.1. In the matter of *Liberty Life Association of Africa v Kachelhoffer N.O. and Others*²³, the Court held as follows insofar as prejudice is concerned:

“The enquiry into whether prejudice is present or not entails comparing the present position of the parties involved with what it would have been had proceedings been instituted within reasonable time. Prejudice will be considered present if because of the delay the recollections of parties or the person is being reviewed have paled; persons who have to depose to Affidavits or testify are no longer available; and where documentary or other forms of evidence ... none of those considerations is present in the case. The fact that certain costs might have been duplicated can be remedied by appropriate costs orders and, in our view, does not constitute a remediable prejudice.”

[33] In weighing up the prejudice to the respective parties and the authorities above, I find that the prejudice to the Applicant should condonation be refused would far outweigh that to the Respondents should condonation be granted given the relatively short period of delay.

[34] Having taken all of these factors into consideration, I therefore find that it would be in the interests of justice to grant Condonation.

[35] In the premises, the following Order is made:

Order

1. The Condonation of the late filing of the Statement of Claim is granted.
2. There is no order as to costs.

R. Adams

²³ (2001) 22 ILJ 2243 (C) p 2260 H – I.

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant:

Adv Palesa Shai

Instructed by:

Ferreira Attorneys

For the respondent:

Adv Dirk Vetten

Instructed by:

ESC & Kaka Attorneys