

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

REPORTABLE

Case number JS663/08

In the matter between:

LINDA OLDING

Applicant

And

CLEAR CHANNEL INDEPENDENT (PTY) LTD Respondent

Judgment

Molahlehi J

Introduction

1]This is an application for condonation for the late filing of the statement of case filed, with this court by the applicant. The disputes which the applicant seeks to have the court adjudicate upon concerns an alleged constructive dismissal allegedly arising from racial and gender discrimination.

Background facts

2]The applicant who was employed by the respondent as an accountant resigned from her employ on the 2nd January 2008. She thereafter referred a constructive dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA) on 17th January 2008. The parties having failed to reach a

consensus during the conciliation process, the commissioner issued the certificate of outcome on the 9th April 2008. The applicant filed her statement of case on the 18th September 2008.

3]The statement of case was 2 (two) months and 9 (nine) days late. The applicant attributes the lateness of the statement of case to what transpired between her attorney Ms Botha and counsels who had been briefed at different times to handle her matter. One of the counsels returned the brief after agreeing to be involved in the matter. The other reason given for the delay is the fact that Ms Botha went on maternity leave.

4]As concerning the circumstances surrounding her resignation the applicant states the following in the statement of case:

“8 For the period which the Applicant was employed with the Respondent, she was subjected to almost daily disrespect, racist remarks and verbal abuse from the Respondent’s employees.

9 The conduct referred to in paragraph 8 above had become more prevalent and increasing as the Applicant’s employment had continued.

10 The conduct mentioned in paragraph 8 above was reported to the Management of the Respondent on several occasions.

11 The Respondent had investigated only couple of the complaints reported and had failed to ensure and / or implemented procedures to protect the Applicant from the conduct set out in paragraph 8 above, and/or sanction its employees that committed the conduct complained of set out in paragraph 8 above.

12 As a result of the continues (sic) conduct set out in paragraph 8 above, and the Respondent’s failure to ensure that the conduct is

stopped as set out in paragraph 11 above, the Respondent made continued employment intolerable for the Applicant.”

The applicable legal principle

5]The approach to be adopted in dealing with an application for condonation was dealt with in *Gaoshubelwe & others v Pie Man's Pantry (Pty) Ltd* [2008] JOL 22302 (LC), wherein at paragraph [24] the court held that in an application for condonation the applicant is in essence seeking the extension of the time frames provided for in the Act, through the indulgence of the court. The factors which the court has to take into account in considering whether or not to grant condonation are set out in that judgment as follows:

- “(a) to show that the degree of lateness or non-compliance with the prescribed time frame is not excessive;*
- (b) to provide an explanation for every aspect of the period of the lateness or the failure to comply with time frames;*
- (c) to show that there (sic) prospects of succeeding or has bona fide defence when the matter is considered and when considered in the main case;*
- (d) to show the importance of the case;*
- (e) to show interest in the finality of the matter and the convenience of the court; and*
- (g) has to show avoidance of unnecessary delay in the administration of justice (see Foster v Stewart Scott Inc (1997) 18 ILJ 367 (LAC).*

6]The court went further in that case to say the following:

“[25] The court in excising its judicial discretion to grant condonation

does so by taking into account that the above factors which the applicant has to show are not individually decisive but are interrelated and must be weighed against each other. And 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 the long delay.

[26] An applicant in an application for condonation has to show good cause by providing an explanation that shows how and why the default occurred. There is authority that the court could decline the granting of condonation if it appears that the default was wilful or was due to gross negligence on the part of the applicant. In fact the court could on this ground alone decline to grant an indulgence to the applicant.

[27] The prospects of success or bona fide defence on the other hand mean that all what needs to be determined is the likelihood or chance of success when the main case is heard (see Saraiva Construction (Pty) Ltd v Zululand Electrical & Engineering Wholesalers (Pty) Ltd 1975 (1) SA 612 (D) and Chetty v Law Society, Transvaal 1985 (2) SA 756 (AD) at 765A–C)."

7]This court has previously stated that whilst the factors mentioned above are interrelated and have to be weighed together, however the two factors that carry more weight are the reasonableness of the explanation and prospects of success. It is trite that without reasonable explanation for the delay, condonation is generally refused. The approach to be adopted where the explanation is unsatisfactory or where there is no reasonable explanation was set out in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C–F, where the court held that without a reasonable and acceptable

explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused. Another important consideration weighing whether or not to grant condonation is the steps that the applicant took as soon as it became aware that he or she was late in terms of the required time frames. In other words the applicant should bring the application for condonation as soon as he or she becomes aware of the lateness of its case. This is an important indicator as to the respect the applicant has for the court, its rules, care to the interest of the other party. This is also an important as to the extent to which the applicant has an interest in the matter and its speedy finalisation. This should be given considerable weight very similar to that of the explanation and the prospects of success.

8]In *National Union of Mineworkers v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC), held that :

“What is needed is an objective conspectus of all facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue of the delay, the prospects of success no matter how good the explanation for the delay, an application for condonation should be dismissed.”

Evaluation

9]In my view the explanation tendered by the applicant is unsatisfactory. Whilst the blame for the delay is largely attributed to the attorneys and the two counsels that were briefed to handle this matter, there is no evidence of the applicant ever enquiring as the cause of the delay. This in my view is a case envisaged in the principle set out in *Chetty v Law Society Transvaal* 1985 (2) SA 756 (A), where the court held that there is a limit beyond which

the court would be prepared to assist a litigant even where his or her attorney is entirely to be blamed for the delay.

10]The explanation of the applicant is unsatisfactory in several material respects. In the first instance Ms Botha says she returned to the office on the 1st October 2008 and that on her return to the office it came to her attention that no action had been taken in the preparation of the statement of case. There is however no explanation as to how this can be reconciled with the fact that the statement of case was filed on the 18th September 2008. There is also no indication as to the person who prepared the statement of case. There is further no explanation as to why the condonation application was not made as soon as the applicant became aware that the statement of case was late. In other words there is no explanation as to why was the statement of case not accompanied by the application for condonation. The application for condonation for the late filing of the statement of case was only filed on the 19th November 2008, some two months after the statement of case was filed. The background facts as presented by the applicant do not present a complex matter that required drafting of the statement of case by counsel. There is no explanation as to why the need to brief counsels who are blamed for contributing to the delay in filing the statement of case.

11]The unsatisfactory explanation of the applicant is not compensated by the prospects of success. The prospects of success have to be assessed within the principles governing constructive dismissal. The applicant claims that the constructive dismissal was a result of racial and gender discrimination. The assessment is not done on the basis of probabilities but on whether the applicant has put out facts that indicate *prima facie* a chance of succeeding when the matter is considered in the main case.

12]The approach that has been adopted by the courts indicates that because

constructive dismissal is an unusual form of dismissal it is not readily accepted as such. The burden to establish the existence of constructive dismissal rests with an employee alleging that he or she was constructively dismissed. In order to succeed in establishing the existence of constructive dismissal the employee has to adduce facts and circumstances showing the following:

- (a) continued employment has become intolerable for him or her;
- (b) the employer must have made continued employment intolerable;
- (c) no reasonable alternative to resignation was available to him or her and it was done as a matter of last resort;
- (d) he or she must have lodged a grievance before resigning;
- (e) he or she must have terminated the contract of employment (resigned);
and
- (f) he or she did not intend to terminate the employment contract, but resignation was his or her last resort.

13]In the present instance the applicant has made general allegations of discrimination which seem to suggest made her to resign. She claims that other employees acted in an abusive manner towards her. Those employees who are alleged to have abused her have not been identified in the statement of case nor in the condonation application. There is also no evidence that the applicant used the grievance procedure to address her complaints. This is not a case where it can be inferred that the applicant did not use the grievance procedure because she was not aware of its existence. She had previously been subjected to grievance proceedings which were lodged against her. The applicant has not provided an explanation as to why she never lodged grievance proceedings before she resigned.

14]In my view the applicant has in the light of the above discussion failed to satisfy the requirements for the granting of the condonation for the late filing of her

statement of case. I however, do not think it would be fair to order that the costs should follow the results.

15]In the premises the following order is made:

1. Applicant's application for the condonation of the late filing of her statement of case is dismissed.
2. There is no order as to costs.

Molahlehi J

Judge of the Labour Court

Date of Hearing : 21 November 2010

Date of Judgment : 2 February 2011

Appearances

For the Applicant: A.J. Van Tonder

Instructed by : Botha Van Vuuren Inc

For the Respondent: W. Hutchinson

Instructed by : Fluxmans Inc

