REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 1145/12

TSHIDZIAMBI TSHIVHASE-PHENDLA **Applicant**

and

UNIVERSITY OF VENDA **Respondent**

Heard: **04 September 2013**

Delivered: **28 January 2014**

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] This is an opposed application for condonation for the late filing of the Applicant's statement of case. The Applicant's main claim is based on an alleged automatically unfair dismissal on the ground of sex as contemplated in section 187(1)(f) of the Labour Relations Act (The LRA). Secondly, she also claimed to have been discriminated against as contemplated in section 6 of the Employment Equity Act 55 of 1998 (The EEA). In the alternative, she also

alleged that she was unfairly dismissed as contemplated in section 188 read together with section 191(5) of the Act.

Background:

[2] The Applicant, a Professor, was initially employed by the University of Pretoria as a Senior Lecturer and Director of UNESCO-IICBA on 1 January 2001. Whilst in that position, she was then appointed onto the Council of the Respondent in 2005. On 6 December 2006 she was appointed by the Respondent as Professor in its Department of Teacher Education. On 1 February 2007 she was appointed in the Respondent's faculty of Human and Social Sciences (Education Department). On 1 October 2008, she was appointed as Dean of the Respondent's School of Education. She remained in that position until her dismissal on 1 November 2011.

[3] The events that led to the Applicant's dismissal can be summarised as follows;

> In June 2010, the Respondent had appointed Deloitte and Touche (Deloitte) to conduct investigations into alleged irregularities pertaining to the awarding of a tender and appointment of an entity known as Clean Shop. This entity was appointed to provide cleaning services at the Respondent. Clean Shop was appointed for the periods 14 May 2007 to July 2007 and 16 August 2007 to 28 February 2009. The Applicant was interviewed by two individuals from Deloitte on 07 September 2010 and was informed that its purpose was to investigate allegations that she had received a bribe from Clean Shop in exchange for the latters tender being favoured by the Respondent's Council.

[4] The Applicant had conceded during the interview that she had in May 2006, whilst still employed by the University of Pretoria, met one Trevor Mulaudzi, who was the sole owner of Clean Shop, and another person named Moloto. The two individuals were referred to her by one Neluheni, an Administrative

Officer employed by the Respondent. She had however contented that the meeting with the two individuals from Clean Shop at the time was merely for them to look around the bathrooms of the University of Pretoria, as this company had never cleaned in a University before. She had denied any allegation of impropriety in the granting of the tender to Clean Shop.

[5] Deloitte had submitted its report on 05 November 2010. Amongst its findings was that the process of the appointment of Clean Shop was irregular in that Mulaudzi had improperly influenced the Registrar (Nemadzivhanani) and the Applicant to ensure that Clean Shop was appointed to provide cleaning services at the Respondent. It was further recommended that disciplinary action be taken against the Applicant for agreeing to meet with the representatives of Clean Shop without following procedures and for allegedly accepting a bribe from Mulaudzi. The Applicant was charged with misconduct on 15 February 2011 and suspended on 24 April 2011. A disciplinary enquiry was held on 1, 2, 24 and 25 August 2011. Her services were terminated on 1 November 2011. She had lodged an appeal on 16 March 2012, which appeal was heard and dismissed on 24 April 2012. The Applicant statement of case was filed with the Court on 6 June 2012 even though it appears to have been served on the Respondent on 22 May 2013.

The legal framework:

[6] The discretion of the Court enjoys when considering applications for condonation derive from the provision of section 191(11)(b) of the LRA and also Rule 12 of the Rules of Conduct of Proceedings. Thus on good cause shown, the Court may condone the non-observance of the timeframes stipulated *inter alia* in section 191 of the LRA.

[7] The test for granting condonation was articulated in Melane v Santam Insurance Co Ltd[1] in the following terms;

[1] [1962] (4) SA 531 (A) at 532 B-E

> "In deciding whether sufficient cause has been shown, the basic principal 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 therefore, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save off course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the Respondent's interests in finality must not be overlooked"

Expanding further on the above principles, the Labour Appeal Court in *NUM v Council for Mineral Technology*[2] added 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"

The degree of lateness:

[8] In her affidavit in support of the application, the Applicant had averred that the Delay was approximately four months. In written heads of argument filed on her behalf, it was contended that the delay was only 49 days. On the other hand, the Respondents contention was that the delay was 150 days.

[9] In order to deal with the factual dispute as above, it would be appropriate to look at the sequence of events as gleaned from the parties' pleadings. The Applicant had averred that she had referred two disputes to the Commission for Conciliation, Mediation and Arbitration (The CCMA). She did not indicate the dates on which those cases were referred to the CCMA. She had however

[2] [1999] (3) BLLR 209 (LAC) at p211 paragraph G-H

made reference to a copy of a "Jurisdictional Ruling"[3] issued by Senior Commissioner GS Jansen van Vuuren (The Commissioner) of the CCMA application.

[10] From that ruling, it is recorded that the dispute under case no GATW5550-12 pertaining to an alleged unfair dismissal and section 74(2) of the Basic Conditions of Employment Act was referred on 2 May 2012. That matter was set down for a con/arb hearing on 4 June 2012. The Applicant having objected to that process, the matter was only conciliated and a certificate of non-resolution was issued, which reflected the dispute as pertaining to dismissal due to misconduct.

[11] In the Commissioners ruling, it is further recorded that the Applicant had on 22 August 2012 requested arbitration by filing her LRA Form 7.13. For the first time, the Applicant had described the nature of her dispute as relating to automatically unfair dismissal and unfair labour practice. The dispute was set down for arbitration before the Commissioner on 29 October 2012. He had discovered that the Applicant had referred another dispute to the CCMA on 22August 2012 under case number GATW10707-12. This dispute pertained to an alleged dismissal on account of having laid charges of sexual harassment against the Respondent's Vice-Chancellor. She had also applied for condonation for the late referral of that dispute, and had also claimed that her dismissal was automatically unfair and further that she was unfairly discriminated against.

[12] Following a request by the Applicant's legal representative at that hearing that the two disputes should be consolidated, and notwithstanding the fact that the condonation application under dispute GATW10707-12 had not been considered, or the fact that this latter dispute had not been conciliated, the Commissioner nevertheless proceeded to consolidate the two disputes and afforded the Applicant an opportunity to refer an alleged automatically unfair

[3] Marked "A" as attached to her founding affidavit

dismissal dispute as well as the alleged sexual harassment matter to this Court.

[13] That ruling in terms of which the Applicant's matters were consolidated was issued on 30 October 2012. Section 191(11) of the LRA provides that a referral of a dispute to this Court for adjudication in terms of subsection 5(b) must be made within 90 days after the council or a commissioner has certified that the dispute remained unresolved. In this case, the 90 days will be calculated from the date that the ruling was issued. "Day" is defined in the Labour Court Rules and the Practice Manual of the Labour Court of South Africa as meaning;

> "any day other than a Saturday, Sunday or public holiday, and when any particular number of days is prescribed for the doing of any act, the number of days must be calculated by excluding the first day and including the last day"

[14] For practical reasons and in order to give the Applicant the benefit of the doubt, it will be taken that she had filed her statement of case on 23 May 2013. On a proper interpretation of the definition of "day", the *dies* expired on 11 March 2013. The delay in filing the statement of claim is there for exactly 50 days. In my view, this delay is indeed excessive, *albeit* not in the extreme.

The explanation for the delay:

[15] To enable this Court to properly exercise its discretion, a party seeking condonation must set out all the facts and circumstances relating to the delay, and most importantly, must provide a satisfactory explanation and account for each period of the delay. Any period of delay that is unaccounted for, will result in an indulgence being refused[4]. Furthermore, it is trite that an application for condonation must be brought as soon as the party becomes aware of the need to do so[5].

[4] See NUMSA and Another v Hillside Aluminum [2005] 6 BLLR 601 (LC)
[5] See Saloojee & another N.N.O v Minister of Community Development 1965 (2) SA 135 (A)

[16] As can be gleaned from her submissions, the Applicant did not file an application for condonation as soon as she became aware of the need to do so. She attributed the failure to do so, or the delay for the filing of her statement of claim due to the lack of funds. It was submitted on her behalf that she had persistently pursued her case and did not allow time to pass unnecessarily. It was further submitted that the Court should accept that lack of funds is a reasonable explanation, and reference in this regard was made to Gaoshubelwe and Others v Pie Man's Pantry (Pty) Ltd[6]. The Applicant further explained the delays as follows;

[17] Her current attorney of record, Mr. Joubert, who had assisted her at the CCMA and her appeal hearing, had advised her that proving an automatically unfair dismissal would be difficult and that she needed an attorney. Joubert had however explained to her that he would not assist her on a contingency basis and that she would have to pay him upfront for his services. After receipt of the ruling she had instructed her attorney of record to take the matter to this Court and to apply for a case number.

[18] On 02 November 2012 the Applicant had approached the Legal Aid Board of South Africa for assistance. She was advised by the Board on 5 November 2012 that her application for assistance was successful, and an appointment was made for her to meet a Sarel Langeveldt on 30 November 2012. However, on 5 December 2012 she was advised that her application for legal aid was refused on the grounds that she did not have reasonable prospects of success. She had exercised her right of appealing this decision on 10 December 2012, and was on 25 February 2013 advised that her appeal was unsuccessful.

[19] In December 2012 and January 2013, she had also sought the assistance from the Commission for Gender Equality. She had also approached the Law Society of South Africa, and was referred to Potgieter Marais Attorneys whom she had approached in February 2013. Despite the promise of *pro bono*

[6] [2009] (30) ILJ 347 (LC)

assistance this did not materialise. On the advice of the Law Society she had approached attorneys Adams and Adams in March 2013 to obtain legal advice. Throughout, she had been in contact with Joubert who had advised her that a statement of case needed to be filed after counsel was briefed, and further that an application for condonation needed to be filed. Joubert had then found Adv. Darby to assist the Applicant, their first consultations took place on 5 March 2013. Adv. Darby had requested further documents from the Applicant, and this had resulted in further delays.

[20] Further delays were occasioned by Adv. Darby being ill for two weeks, and it was only on 26 March 2013 that Adv. Darby could look into the matter and started drafting papers. On 8 April 2013 Adv. Darby had informed Joubert that further documentation was still required. At the same time, another application had been launched by the Applicant in the High Court. That case was settled in May 2013 and some funds had become available to finalise the statement of case and condonation application. On 25 April 2013 Darby had required more information from Joubert, and on 10 May 2013 the statement of case was finalised after the required outstanding information was obtained. However, it was only on 20 May 2013 after further telephonic consultations and amendments had been effected that the Applicant received a copy of the statement of case and condonation application to sign it.

[21] In opposing the application, the Respondent's contention was that the fact that the Applicant could not afford legal representation is not acceptable enough as an explanation, as there were several avenues available to her. The Respondent viewed the Applicant as malicious in persisting with this matter, and also labelled her a vexatious litigant in view of the fact Legal Aid had rejected her application for assistance on account of her claim lacking prospects of success. Furthermore, it was submitted that at the time that the jurisdictional ruling was issued, the Applicant was legally represented and she knew that she had to refer her dispute within 90 days.

[22] It was further submitted on behalf of the Respondent that as early as 19 November 2012, the Applicant's attorneys of record had sent correspondence to the Respondent, and that there was nothing that prevented her from filing her statement of claim. It was argued that as the Applicant was always legally represented, even if she anticipated that her statement might be filed late, she could have filed it in any event, or got pro bono advice.

[23] It is my view that a lack of funds as an explanation for a delay in complying with time frames should not always be regarded as being reasonable and acceptable. Each case needs to be looked at in terms of its own circumstances, and an evaluation should be made as to whether that explanation should indeed be acceptable. It is not unusual for unrepresented parties, especially indigent and unsophisticated employees who have lost their jobs to directly approach this Court and lodge their claims by completing the standard Form 6. Some of these statements of claim might in the end appear incomprehensible, but at most, an attempt has been made to comply with the prescribed time frames. In most cases, where the statement of claim is found to be incomprehensible, this Court would normally direct the Applicant party to file supplementary affidavits or an amendment. In most cases where these unrepresented applicants appear before Court, they would normally be referred to the *pro bono* office which by all accounts is doing a sterling job in assisting needy litigants.

[24] The Applicant in this case on the other hand cannot by all accounts be described as needy or unsophisticated. In referring all her disputes to the CCMA, she had always been legally assisted, when at that stage there was no need for legal representation. In as much as her endeavours to secure the assistance of the Legal Aid, Law Society and Commission for Gender Equality are acknowledged, at the same time, her attorneys of record throughout had an obligation to advise her that she could have approached the Court on her own and timeously filed her statement of claim whilst pursuing other avenues in securing funds. It was not sufficient for her attorneys to simply inform her

that her case could not be taken on account of lack of funds as there were other avenues open to her as directly pointed to on behalf of the Respondent.

[25] As I have already indicated above, the Applicant could simply have been advised to approach the Court on her own and filed a statement of claim on time. Being a Professor, it is doubted that she would have encountered any difficulties in completing a simple standard Form 6. That Joubert attorneys insisted on some funds before the Applicant could be assisted is beyond comprehension. In my view, the delay in this case in filing a statement can not be attributed to the Applicant's lack of funds alone. It was purely due to bad legal advise or no advice at all from her attorneys of record, who were more concerned with their fees than giving the Applicant proper advice that would cost her nothing. To this end, given the Applicant's personal circumstances, her explanation in regard to the late filing of the Applicant's statement of claim is not regarded as reasonable or acceptable.

Prospects of success:

[26] In pursuing this case, the Applicant has made serious allegations against the Respondent's Vice-Chancellor, Mr Mbati. The Applicant alleged that from the commencement of Mbati's appointment in January 2008, the latter had made sexual suggestions and conducted himself in such a manner towards her. The Applicant further alleged that she commenced a romantic relationship with Mbati with effect from May 2008. In October 2008 the Applicant was appointed Dean of the School of Education.

[27] A further serious allegation the Applicant had levelled against Mbati was that the latter had on 24 February 2009, raped her, resulting in her undergoing a HIV test on 27 February 2009. Following a report issued by Deloitte on 05 October 2010 regarding the allegations in respect of the Clean Shop tender, and further recommendations that the Applicant be subjected to disciplinary action, she had then in December 2010 terminated her romantic liaison with Mbati. Thereafter she had refused to take his telephone calls until when he

summoned her to his office in February 2012, and informed her of the intention to charge her with misconduct.

[28] On 15 February 2011 the Applicant was furnished with a "charge sheet" further charges were added on 17 February 2011. On 1 March 2011 she had received a letter inviting her to show cause why she should not be suspended. On 12 April 2011 she had received a formal letter of suspension. Additional charges were levelled against her in July 2011 and her suspension was extended in August 2011. On 14 September 2011 she had lodged a sexual harassment complaint against Mbati. On 1 November 2011 she was issued with a letter of termination of her services. This was followed by the full outcome of a disciplinary hearing on 9 November 2011. An appeal hearing was held and her dismissal confirmed on 24 April 2012. In between these events, reports surrounding accusations of criminal conduct were levelled against the Applicant in the daily "Sowetan". The Applicant's main contention was that she has not been charged by the Respondent's Council and that as a result of these events, she has shown that *prima facie* she has prospects of success in her claim against the Respondent on the grounds of automatically unfair dismissal.

[29] The Respondent's contention was that a disciplinary hearing was held on 1 and 2, 24 and 25 August 2011. It was only during her cross-examination during those proceedings that the Applicant had made allegations that Mbiti had previously sexually harassed her and coerced her into a sexual relationship. These allegations had never been made in any forum before, and thereafter, the Applicant was invited to lodge a grievance. She had done so on 14 September 2011 and a mediation process was instituted in accordance with the Respondent's policies. The process did not take the matter any further since the outcome of the disciplinary process was issued on 31 October 2011, and the Applicant was then dismissed on 1 November 2011.

[30] Subsequent to her dismissal, the Applicant had then approached the "Sowetan" and alleged that Mbiti had previously sexually harassed her. This had led to a front page article in that paper titled "*Varsity head was a sex-pest, colleague*". According to the Respondent, Mbiti denies ever having had a sexual relationship with the Applicant or having sexually harassed her in any way. In its arguments, the Respondent had contended that the Applicant had no prospects of success on the merits of her claim in that the allegations of sexual harassment were an after-thought and a fabrication. This emanated from the Applicant's contention that there was a quid pro quo liaison, which became consensual and thereafter became rape. In the Respondent's view, the Applicant was dismissed for ordinary misconduct and had thus not made out a case of sexual harassment or discrimination.

[31] The dispute between the parties appear to centre around the dismissal of the Applicant in relation to the tender awarded to Clean Shop. By all accounts, this had what had led to her dismissal. The matter however does not appear to end with this observation, and it is clear to me that there are other considerations at play. As correctly submitted on behalf of the Applicant, and further in reference to *MS v CS Centre for Child Law AS Amicus Curiae*[7], the test for determining if condonation should be granted is whether it is in the interest of justice. A similar approach was followed in *Brummer V Gorfil Brothers Investments (Pty) Ltd*[8] where Jacoob J stated that the interest of justice should be an overall consideration when dealing with applications for condonation. Amongst other factors that need to be considered is also whether the issues to be decided are important or significant.

[32] In my view, there are other factors that are more important in this case than the mere fact of the dismissal for misconduct. The Applicant's case in the alternative rests on an allegation of automatically unfair dismissal, more specifically surrounding the allegations of sexual harassment. The Respondent is a public institution, and the allegations and counter-allegations

[7] [2011] (2) SACR 88 at para 15
[8] [2000] (2) SA 837 (CC) at 839F

between the Applicant and Mbiti are clearly now in the public domain. Whether the publication of these allegations was initiated by the Applicant or not is now irrelevant. If condonation is not granted, it would imply that these issues, which are of importance to the community of the Respondent and the public at large are not properly ventilated. In the eyes of the Respondents community, the Applicant will remain a criminal whilst Mbiti will always be viewed as "*sex pest*". It can thus not be in the interest of justice that these issues remain unresolved.

[33] The above reasoning is in line with the fact that a consideration needs to be made as to whether the issues to be decided are important or significant. The issue of the dismissal for misconduct is not as much as important or significant as the issues surrounding the allegations made in regard to the Applicant and Mbiti. In my view, a consideration of these factors, including the interest of the Respondent in putting them to finality is paramount. To that end, even though the main issue related to the dismissal for misconduct, and the fact that the allegations of sexual harassment had indeed surfaced belatedly, I am satisfied that considerations of the interest of justice and indeed the interest of the Respondent as a public institution dictate that the application for the application for condonation be favourably considered. Furthermore, in the light of factual disputes pertaining to these serious allegations, it would not be competent for this Court to even make a *prima facie* determination of the prospects of success based on the pleadings.

Other considerations:

[34] The contentions made on behalf of the Applicant that the importance of this case lie in the fact that the purpose in pursuing it is to protect the rights of the Applicant or those of other woman faced with discrimination and or sexual harassment should be viewed with scepticism. In fact, these submissions amount to redherring given the facts of the case and more specifically, the belated manner with which the Applicant had made allegations of impropriety against Mbiti. In my view, the importance of this case lies in the fact that the

allegations and counter-allegations between the Applicant and Mbiti emanate within their relationship in a public institution. If there is any truth in any of these allegations and counter-allegations which are now in the public domain, it would not only be in the interest of justice, but also in the interest of the Respondent and its community that they be properly ventilated in Court by way of a trial.

[35] In considering other factors pertinent to this application, I am of the view that the issue of prejudice should be viewed in relation to what is in the interest of the Respondent and its community as a whole as already illustrated above. A worrying factor in this case is that it took about almost a year between 5 October 2010 when the Deloitte report was issued and 1 November 2011 when the Applicant was finally dismissed. In fact, it took a further five months after the dismissal for the appeal process to unfold. The Respondent can thus not complain that a delay of fifty days can even be more prejudicial to it in light of its own dilatoriness in disposing of the disciplinary enquiry long after the Deloitte report was issued.

[36] Following up on an objective conspectus of all factors that need consideration in respect of applications of this nature, and further having weighed these against each other, I am satisfied that even though the Applicant has not proffered a satisfactory and acceptable explanation for a delay of fifty days in filing her statement of claim, she has ultimately shown good cause, and her application for condonation should thus be granted. Furthermore, considerations of law and fairness dictate that a cost order should not be made, and that each pay should pay its own costs. In the premises the following order is made;

Order:

1. The late delivery of the Applicant's statement of claim is condoned.
2. There is no order as to costs.

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Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv F Darby
	Instructed by Joubert Attorneys
For the Respondents:	Mr. KS Makapane
	Of Bowman Gilfillan INC.