IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO: D518/04

In the matter between:

NUMSA	First Applicant
CHERYL JOSEPH	Second Applicant

and

HILLSIDE ALUMINIUM	Respondent

JUDGMENT

MURPHY, AJ

1. The second applicant seeks condonation for the late referral to the Labour Court of a dispute regarding her dismissal. The dispute has been referred in terms of section 191(5)(b)(i) alleging that the dismissal was automatically unfair because the reason for the dismissal was that she took action or indicated an intention to take action against her employer by exercising certain rights conferred on her by the Labour Relations Act. In particular, her pursuit of a claim of sexual harassment.

2. Section 191(11) of the Labour Relations Act provides that the referral of a dispute to the Labour Court for adjudication in terms of subsection (5)(b) must be made with 90 days after the bargaining council or (as the case may be) the commissioner has certified that the dispute remains unresolved. In terms of section 191(11)(b) the Labour Court may condone non-observance of the time frame on good cause shown.

3. The second applicant was dismissed by the respondent on 4 August 2003. She then referred a dispute regarding her alleged unfair dismissal to the Metal and Engineering Industry's Bargaining Council ("the MEIBC") on 4 October 2003. The dispute was not resolved at conciliation and the MEIBC issued a certificate of non-resolution on 12 December 2003. On 18 December 2003, the first applicant, (NUMSA) referred the dispute to arbitration at the instance of MEIBC.

4. On 17 February 2004, the respondent made application to the MEIBC to be allowed legal representation at the proceedings. This was opposed by NUMSA, acting on behalf of the second applicant. A ruling was made in favour of the respondent and legal representation was granted. Thereafter, NUMSA brought an application for a postponement in order that the second applicant could instruct attorneys. This too was granted.

5. In correspondence addressed by the respondent's attorneys to NUMSA on 18 February and 9 March 2004, the respondent's attorneys requested NUMSA to indicate which legal representative would be appearing on behalf of the second applicant. NUMSA replied on 10 March 2004 indicating that Mr. S Khanyile, a legal officer of NUMSA, would be appearing on behalf of the second applicant.

6. The matter was then subsequently set down for arbitration on 29 April 2004.

7. Some time after this, it is not clear when, the second applicant instructed a firm of attorneys to represent her. On or about 19 April 2004 the second applicant's attorney telephoned the respondent's attorneys and requested a postponement because having recently come on record they required further time to prepare for the

arbitration. The respondent consented to the postponement. The matter was subsequently set down for arbitration on 14 June 2004.

8. At the proceedings of 14 June 2004, the second applicant's attorney, despite being the referring party, raised a point *in limine* that the MEIBC lacked jurisdiction to arbitrate the dispute. In an arbitration award dated 24 June 2004, the arbitrator upheld the point *in limine* that the MEIBC did not have jurisdiction because the matter concerned an alleged automatically unfair dismissal and thus ought properly to have been referred to the Labour Court.

9. About six weeks later, on 4 August 2004, the second applicant filed a statement of case with the Labour Court in terms of Rule 6.

10. Given that the MEIBC issued a certificate declaring the dispute to remain unresolved on 12 December 2003, it was incumbent on the second applicant to refer the dispute to the Labour Court in terms of section 191(11)(a) on or before 11 March 2004. The applicant's statement of case, as already stated, was only filed at court on 4 August 2004. This means that the statement of case was delivered approximately 146 days late. Accordingly, the second applicant was obliged to make application for condonation in terms of section 191(11)(b), which she has done.

11. In determining whether good cause exists, a court is enjoined to have regard to the degree of lateness; the explanation for the lateness; the prospects of success; and the importance of the case - *Melane v Santam Insurance Company Ltd* 1962(4) SA 531(A) at 532C-F. The court has a discretion to be exercised judicially upon a consideration of all the facts, and essentially it is a matter of fairness to both sides. Ordinarily the considerations, which are taken into account, are seen

as interrelated. No single consideration is individually decisive. Where, as in this case, one is dealing with a lengthy delay, the applicant for condonation is obliged to give a full and extensive account of the delay to assist the court determine whether the explanation for it is reasonable or not. The explanation must be sufficient to enable the court to determine how the delay came about and to allow an assessment of the applicant's motives and conduct for the purpose of making a finding of reasonableness.

12. Additionally, there should be an acceptable explanation tendered in respect of each period of delay. Condonation is not there simply for the asking. Applications for condonation are not a mere formality. The onus rests on the applicant to satisfy the court of the existence of good cause and this requires a full, acceptable and ultimately reasonable explanation. One of the primary purposes of the Labour Relations Act is to ensure that disputes are resolved expeditiously, especially dismissal disputes. The intention is that disputes alleging unfair dismissal should be referred to conciliation within 30 days of the dismissal (section 191(1)(b)(i)); that the conciliation process be completed within 30 days (section 191(5)) and that disputes for adjudication by the Labour Court should then be referred within 90 days of the end of the conciliation process. For a variety of reasons these time periods are often not complied with in practice. Nevertheless, to do justice to the aims of the legislation, parties seeking condonation for non-compliance are obliged to set out full explanations for each and every delay throughout the process. An unsatisfactory and unacceptable explanation for any of the periods of delay will normally exclude the grant of condonation, no matter what the prospects of success on the merits. The latter principle was stated by Myburgh, JP in *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at 211G-H:

> There is a further principle which is applied and that is 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 delay, an application for condonation should be refused.

13. Similarly, in *Chetty v Law Society of Transvaal* 1985(2) SA 756(A) at 765 the then Appellate Division confirmed that good prospects of success alone are not enough in the absence of a reasonable explanation for the default.

14. The applicant was dismissed from her employment on 4 August 2003. It took a year to the day before she filed a statement of case with the Labour Court on 4 August 2004. The referral to conciliation took place 2 months after the dismissal namely on 4 October 2003. The second applicant tenders no explanation for this delay of 30 days in her founding affidavit. Initially she claimed that the reference to conciliation and the conciliation meeting took place within the time limits prescribed by the Act and the rules of the bargaining council. The respondent has denied this in its answering affidavit and submitted that the referral for conciliation to the MEIBC was 35 days late. In her reply the second applicant merely notes the contents of this averment and offers no explanation whatsoever for the delay. Nor is it clear from the papers whether the late referral was condoned and hence whether the bargaining council complied with the necessary jurisdictional preconditions before attempting to conciliate the dispute. Nothing turns on this from a jurisdictional point of view, in that this court, in the absence of any challenge to the certificate of non-resolution, is entitled to assume it has jurisdiction in regard to the referral for adjudication provided, of course, that all the other jurisdictional preconditions are met. Nevertheless, before I can decide whether good cause exits for condonation of the late referral to

adjudication, there must be some explanation for the delay leading up to conciliation. A full picture of the manner in which the dispute has been processed is required.

15. Moreover, and perhaps most importantly, the second applicant's explanation for the overall delay as set out in her papers falls woefully short. She states simply that conciliation occurred, that she was represented by a union official who subsequently left the employ of the union and that the matter was then referred to her attorneys during May 2004. Her attorney was of opinion that the dismissal constituted an automatically unfair dismissal and accordingly decided to argue the point of jurisdiction on 14 June 2004.

16. Accepting that the second applicant may have been poorly advised by her representative on the question of jurisdiction, which may to some extent justify the failure to refer the dispute to the Labour Court before the matter was handed to her attorneys in May 2004, there is no explanation at all on record for why the second applicant's attorney waited until 14 June 2004 to raise the jurisdictional point. No attempt was made by the second applicant to remedy the defect by an immediate referral to the court once she (through her attorneys) became aware that the MEIBC most probably lacked jurisdiction. Instead, the second applicant waited until 14 June 2004 and argued the point of jurisdiction before the arbitrator. Why she preferred to seek a ruling from the arbitrator is not clear. There was no need to do so. The second applicant had a right to refer the matter directly to the Labour Court without waiting for a ruling from the arbitrator, unless there was a costs issue involved. No explanation has been offered in this regard. It is also not clear from the papers at which point in time the applicant became aware of the jurisdictional issue. What is more there is no explanation for the 6 week delay in referring the matter to

the Labour Court after receiving the arbitrator's ruling on 24 June 2004. By preferring to seek a ruling from the arbitrator, which arguably was entirely unnecessary, the second applicant effectively delayed the referral of the matter to adjudication for a period of 3 months and essentially has given no explanation for following that particular course.

17. Accordingly I am in agreement with the submission made by Mr. Alexander, who appeared on behalf of the respondent, that the second applicant's explanation for the late referral of the dispute to adjudication is not suitably full to evaluate the second applicant's motives and conduct in relation to the various delays. To re-cap: there is no justification at all of the delay in bringing the conciliation proceedings; there is no affidavit from any official of NUMSA explaining the reason for the delay from 12 December 2003 until April 2004 when the matter was referred to the applicant's attorneys; the period from April 2004 until 14 June 2004 is also not adequately explained, in that there is no account as to when the issue of jurisdiction became apparent and why the attorneys chose the course of conduct which they did; and finally there is no account whatsoever for the delay from the receipt of the arbitrator's ruling on 7 July 2004 until the filing of the statement of case on 4 August 2004.

19. The difficulties is in this regard are compounded by the unusually cryptic manner in which counsel for the second applicant, Mr. Bingham, chose to deal with the condonation application in his heads of argument. For reasons best known to him, he limited his submission to a single paragraph, which reads:

> The merits are so overwhelmingly in the applicant's favour that on the principle set out in *Melane v Sanlam Insurance Company Ltd* 1962(4) SA 531(A), the respondent's point *in limine* falls to be dismissed with costs.

20. In his appearance before me, Mr. Bingham added little to his heads of argument with regard to the explanation for the delay and instead focused entirely on the applicant's assumed prospects of success. In the circumstances, the conclusion is inescapable that the applicants have failed to provide a reasonable explanation for the delay and therefore did not satisfy the requirements for granting condonation. On that ground alone the application must fail. Again it deserves emphasis, condonation is not there for the asking. Applicants have an onus which they are obliged to discharge by way of sufficient evidence. Should they fail to make out a proper case, by failing to offer a reasonable explanation for all the periods of delay in making the referral, they risk being unsuccessful in their condonation application, no matter how strong the prospects of success on the merits.

21. Despite the totally deficient rationalization for the delays, Mr. Bingham has prevailed upon me to make an exception in this instance because, so he claims, the applicant's prospects of success are overwhelmingly in her favor and the nature of the dispute is of particular importance. The applicant's case is that she was a victim of unwelcome sexual advances by one of her superiors. Thereafter, she lodged a grievance internally resulting in a disciplinary hearing at which led to the alleged culprit was acquitted on the sexual harassment charges. The applicant was aggrieved by this outcome and referred the dispute to the CCMA in terms of item 7(7) of the Code of Good Practice on the Handling of Sexual Harassment Cases, issued in terms of section 203 of the Labour Relations Act. The applicant claims that as a result of her referral of the dispute to the CCMA she was charged with breaching the respondent's sexual harassment policy. And this then led to her

unfair dismissal.

22. The respondent avers that the second applicant was dismissed for having committed the following offences:

- She acted in breach of the confidentially requirement (clause 5.6) contained in the respondent's sexual harassment policy by persisting with allegations of sexual harassment against her superior at her workplace after the finalization of the disciplinary hearing.
- She further allegedly acted in breach of clause 5.1 of the policy in that she made unfounded and frivolous allegations against her superior to the effect that he had arranged for her to be transferred to another department because she had resisted his sexual advances.

23. Accordingly the respondent denies that it dismissed the applicant because of her refusal to withdraw her complaint against her superior.

24. In regard particularly to the second charge against the applicant it was contended that she was aware that her transfer had been initiated by the Human Resources Services: Superintendent and had nothing to do with the superior against whom she had lodged the complaint. This much was evident from documentation that was in her possession and accordingly the allegations that her transfer had been effected by the superior concerned were false and made knowingly.

25. Sexual harassment is a scourge in the workplace and courts should naturally proceed cautiously, but sympathetically, towards applicants that allege being a victim to it. Moreover, the dismissal of a complainant who has made allegations of sexual harassment should be approached with extreme circumspection and even suspicion, especially when, as in this case, there are indeed indications on record that the employer appears to have taken umbrage at the applicant's referral of the dispute to the CCMA. By the same token, there is also evidence on record that the respondent unquestionably informed all parties throughout that every effort should be made to ensure confidentiality during the further investigations of the alleged sexual harassment and that perhaps the second applicant had not been as circumspect as she ought to have been. For that reason, while I have some sympathy with the second applicant and her attempts to prosecute her complaint, I am not persuaded that the prospects of success are overwhelmingly in her favor. Whether or not she was the victim of sexual harassment and subsequent victimization is not possible to say. From the limited information available, her prospects of success, at best, can be described as reasonable. Had she clarified the delays in referring the matter to adjudication, the importance of the issue and her reasonable prospects of success most likely would have compensated for the long delay. However, unfortunately, as I have said, absent any explication whatsoever for some of the periods in issue, it is regrettably not possible to grant condonation.

26. In the final result, the second applicant may not have been as well served by her representatives as she might have hoped. Still, any lack of diligence on the part of her representatives of itself does not justify the granting of her condonation. There is a limit beyond which a litigant cannot escape the results of her representatives lack of diligence or the inconsistency of the explanation tendered -*Saloojee & Another NNO v*

Minister of Community Development 1965 (2) SA 135 (A) @ 140H-141D. Such, nonetheless, does militate against making a costs award against the second applicant.

27. In the premises, I make the following orders:

1. The application for condonation in terms of section 191(11)(b) of the Labour Relations Act is refused.

2. The application in terms of section 191(5)(b)(i) is dismissed.

3. There is no order as to costs.

MURPHY, AJ

Date of Hearing: 17 March 2005
Date of Judgment: 20 April 2005
APPEARANCES:
For the Applicant: Adv. M. Bingham
Instructed by: Brett Purdon Attorneys

For the Respondent: Mr. M. Alexander
Deneys Reitz Attorneys