1IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NUMBER: JS 972/04

In the matter between:

DIAL TECH CC **APPLICANT**

And

DOROTHEA MARIA HUDSON **FIRST RESPONDENT**

THE DEPUTY SHERIFF
(RANDFONTEIN DISTRICT) **SECOND RESPONDENT**

JUDGMENT

MOLAHLEHI AJ

INTRODUCTION

[1] This is an application in terms of which Dial Tech CC, the applicant sought to have the default judgment granted by Cele AJ on the 14th September 2005, rescinded and to stay a writ of execution issued by the Registrar of the Labour Court on 19th October 2005. The application was brought in terms of s165 (a) of the Labour Relations Act No 66 of 1995 ("the LRA") alternatively the common law. The applicant further applied to have its

application amended to incorporate an application for condonation of the late filing of the rescission application.

[2] During June 2004, the first respondent, to whom I will refer to as "the employee," referred a dispute concerning unfair discrimination to the Commission for Conciliation Mediation and Arbitration ("the CCMA"). The dispute arose out of an alleged failure by the applicant to take reasonable steps to prevent pornographic material from appearing on the employee's computer screen.

[3] It is common cause that Mr Schweiger, the managing director, of the applicant downloaded pornographic material from the internet and because his computer was linked to that of the employee, the material popped up in the employee's computer. Mr Schweiger removed the pornographic pop up from the computer after receiving a complaint from the employee that the pornography material was offensive and degrading. The pornographic pop up were replaced by a pornographic screen saver on the employee's computer.

[4] The employee further alleged that after lodging the complaint, not only did Mr Schweiger ignore, refused to speak to her but also

ignored her work and related correspondence. Mr Schweiger also ignored a letter which she wrote to him suggesting that the two of them have a discussion with the view to resolving the matter.

[5] It is common cause that arising from the issue of the pornography, the employees referred two disputes to the CCMA for conciliation. The first dispute referral concerned discrimination arising from an alleged sexual harassment and the second related to the allegation of constructive dismissal. The progression of the two disputes and their end results are discussed below.

LABOUR COURT CASE

[6] The failure by the applicant to attend the conciliation hearing resulted in the CCMA issuing a certificate of non resolution which entitled the employee to refer the dispute to this court for adjudication.

[7] Consequent to the applicant's failure to file a notice of opposition to the employee's statement of case, the matter was placed before Cele AJ, on 14th September 2004, on the unopposed roll of the court. This resulted in the court, after hearing the version of the employee, granting a default judgement against the applicant in

terms of which the applicant was ordered to compensate the employee in the amount of R58 080-00.

[8] The court order was brought to the attention of the applicant by the employee's attorneys in a letter dated 27th September 2004, to which the court order was attached.

[9] On 5th October 2005, Mr Duvenhage, of the employee's attorneys of record contacted Mr Schweiger, as a following up to the letter of 27th September 2005, which the applicant seemingly did not respond to. The issue of the default judgment was discussed during this conversation and apparently, Mr Schweiger informed Duvenhage, that he was aware of the judgment and that his attorneys would contact him regarding the same.

[10] Having not heard from the applicant, two weeks after the above discussion, the employee sought a writ of execution which was issued on 19th October 2005 and executed by the sheriff on the 7th November 2005.

THE ARBITRATION CASE

[11] After her resignation on the 19th January 2005, the employee referred a constructive dismissal dispute to the CCMA. As a result

of the non attendance at the conciliation hearing by the applicant, the CCMA issued a certificate of non resolution of the dispute. The employee then referred the matter to arbitration.

[12] The applicant failed to attend the arbitration hearing which was held on the 23rd March 2005, resulting in the CCMA issuing a default arbitration award against the applicant. The applicant was, in terms of the arbitration ward required to pay the employee compensation in the amount of R 58 080-00.

[13] Because of failure to comply with the award by the applicant, the employee applied and obtained the certification of the arbitration award from the CCMA. The application to certify the arbitration award by the employee was not opposed despite it having been served on the applicant.

[14] On the 7th November 2005, after the attachment of property by the Sheriff, the applicant's attorneys contacted the employee's attorneys and suggested that the matter be resolved by way of negotiations. The process of negotiations failed. The employee's attorneys then contacted the applicant's attorneys and enquired as to the payment of the CCMA award. The applicant's attorneys, according to the employee, never reverted back to her attorneys

and after leaving two urgent massages with the applicant's attorneys on the 8th and 23rd November 2005, the employee released the attached movable property as it was of minimal value. The employee then proceeded to attach the bank account of the applicant.

APPLICANT'S CASE

[15] The explanation given by the applicant for not responding to the applicant's statement of case are set out in its founding papers as follows:

> *"17 Due to the fact that the employee was awarded the maxim sum of compensation in the CCMA, I was under the bona fide impression that the employee was precluded in law from continuing with her claim for unfair discrimination in the above Honourable Court. The applicant therefore took no steps to oppose the unfair discrimination claim."*

[16] During argument and in its papers, the applicant argued that the judgement was erroneously granted because the compensation awarded to the employee in the unfair discrimination case arose from the same facts and circumstances as those of the constructive dismissal claim.

[17] The applicant further submitted that the judgement was erroneously granted in that the respondent failed to disclose to the court that she had already been awarded compensation in the maximum amount in the constructive dismissal claim. In this regard counsel for the applicant argued that the court would not have granted compensation in the same amount had it been made aware of the compensation awarded by the CCMA.

[18] The applicant sought to rescind the default judgement on the basis that:

> *"3.1 The applicant was not wilful default in failing to oppose the unfair discrimination which culminated in the default judgement.*
>
> *3.2 The applicant has a bona fide defence to the discrimination claim which culminated in the default judgement."*

[19] It is common cause that the judgement was granted in the absence of the applicant. It is also common cause that the applicant's application to rescind the court order was filed late. In this regard the employee raised as a *point in limine*, in her opposing affidavit concerning the lateness of the rescission application. In response

the applicant filed an application seeking to incorporate the condonation application in to its main application.

[20] There are therefore two matters for this court to consider, the first being the application for condonation and the second, an application for the rescission of the order granted by Cele AJ. Consideration of the second matter will depend on the applicant succeeding in the first matter.

[21] With regard to the second matter, the applicant contended that the court order was erroneously granted and that it (the applicant) was not in wilful default in failing to file the notice to oppose the statement of case of the employee and that it has a *bona fide* defence to the discrimination case.

CONDONATION APPLICATION

[22] As stated above, there is no doubt that the application for rescission of the default judgement was late and accordingly the applicant was obliged to file an application for condonation. The initial rescission application did not incorporate an application for condonation despite the fact that the applicant was aware of the need to do so. The application for condonation was lodged as a

response to the *point in limine* raised by the employee in her opposing affidavit.

[23] The rescission application was served on the employee on the 15th December 2005 and the notice of the intention to amend the application to incorporate the application for condonation in to the rescission application was served on 16th March 2006. The amended notice was served on the applicant on the 18th April 2006.

[24] In terms of rule 16A (1) (b), any party affected by a default judgement may apply for the rescission of the judgement within 15 (fifteen) days after acquiring knowledge of such an order or judgment granted in the absence of that party. The rule requires that other interested parties be notified of the application. The court has a discretion, upon good cause shown, to set aside the order or judgement on such terms it deems fit.

[25] The employee in this case contended that the applicant became aware of the court order through a letter faxed on 28th September 2005, to which the order was attached. The applicant in its founding affidavit, on the other hand, states that it became aware of the judgement on the 11th October 2005, when it received the above letter from the applicant. In her responding affidavit the

employee admitted the contents of paragraph 18 (eighteen) of the applicant's founding affidavit wherein it is stated:

> "*On or about 11 October 2005, the applicant received a letter from Niewoudt and Associates, the employee's attorneys of record to which a court order dated 14 September 2005 was annexed".*

[26] It is therefore common cause that the applicant became aware of the court order through the letter dated 27th September 2005, from the employee's attorneys. While the applicant claims to have received the said letter on the 11th October 2005, it does not indicate how the letter reached it.

[27] In passing, however, a closer look at annexure FA2, being the said letter, reveals at the top that this letter was faxed to fax number 011 412 3138 from fax number 011 764 4512 on the 28th September 2005. Annexure F reveals that the former fax number belongs to the applicant and the latter to the employee's attorneys.

[28] In the heads of argument Mr Swiegers, counsel for the employee, submitted that the applicant should have brought its application for rescission no later than the 19th October 2005. On the applicant's version, the application should have been made before the 1st

November 2005. The application was more than 50 (Fifty) days late on the version of the employee and more than 40 (forty) days on that of the applicant.

[29] In the light of the admission of the contents of paragraph 18 (eighteen) of the applicant's founding affidavit by the employee, it seems to me that the period from which the applicant became aware of the default judgement has to be calculated from the 11th October 2005. This calculation does not however change the fact that the application for rescission was late nor is there a significant difference in the punctuality of the application.

[30] In its response to the *point in limine* raised by the employee, the applicant states in its replying affidavit that:

> *"I again refer the Honourable Court to paragraph 19 to 22 of my founding affidavit in which I explain the reason for the applicant launching this application on the 15 December 2005."*

[31] It is appropriate at this point to deal with the application to amend and incorporate the condonation application into the main application. In dealing with this issue, I am guided by the decision of Ngcobo J in *Affordable Medicines Trust & others v Minister of*

Health & Another 2005 (6) BCLR 529 (CC), where the court in dealing with the principles governing the granting or refusal of an amendment held that an amendment will always be granted unless it will cause an injustice to the other side which cannot be cured by an order for costs.

[32] In the present case, it seems to me that the employee will not suffer any prejudice if the amendment is allowed. Accordingly, I am of the view that it would be in the interest of justice and fairness to grant the application to amend and incorporate the condonation application into the rescission application. The application to amend and incorporate the application for condonation into the main application is accordingly granted.

[33] I now proceed to deal with the condonation application for the late filing of the rescission application. As stated earlier, it is obvious that the applicant did not file the rescission application within 15 (fifteen) days of acquiring the knowledge of the existence of the judgement as required by rule 16A of the Rules of the Labour Court.

[34] The reason for the delay in filing the rescission application can be found at paragraphs 19 to 22 of its replying affidavit which reads as follows.

> *"19 It is apparent from this court order that the above Honourable Court awarded compensation to the employee in an amount equivalent to twelve months remuneration. Since this sum was identical to the quantum of the compensation awarded to the employee in the arbitration award, I was under the bona fide but mistaken impression that the court order and the arbitration award referred to the same matter and the applicant was therefore required to pay compensation to the employee in the sum of R58 080, 00 in satisfaction of the arbitration award.*
>
> *20 On or about 2 November 2005, the Deputy Sheriff arrived at the applicant's principal place of business and attached certain movable property in satisfaction of writ of execution…*
>
> *21 During the period 7 to 25 November 2005, Lorinda Marias ("Marias") of Van Rhyneveld Attorneys, the application's attorney of record, attempted to settle the matter with the employee's attorneys of record, but was unable to do so.*

22 On 25 November 2005, Marais telefaxed a letter to the employee's attorneys of record which sets out the sequence of these settlement negotiations."

LEGAL PRINCIPLES

[35] The principles governing the requirement for granting or refusal of condonation are well established in our law. In terms of these principles the court has a discretion which is to be exercised judicially after taking into account all the facts before it. The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non compliance with the prescribed time frame, (b) the explanation for the lateness or the failure to comply with time frames, (c) *bona fide* defence or prospects of success in the main case; (d) the importance of the case, (e) the respondent's interest in the finality of the judgement, (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice. See *Foster v Stewart Scott Inc (*1997) 18 ILJ 367 (LAC).

[36] These factors are not individually decisive but are interrelated and must be weighed against each other. 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.

[37] In an application for condonation, good cause is shown by the applicant giving 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.

[38] 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 Zulu Electrical and Engineering Wholesalers (PTY) Ltd* 1975 (1) SA 612 (D) and *Chetty v Law Society* 1985 (2) SA at 765A-C.

[39] A further principle which was enunciated in *Melane v Santam Insurance Co Ltd,* 1962 (4) SA 531 (A) at 532C-F, 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 the delay, an application for condonation should be refused. It has also been held by the courts that the applicant should bring the application for condonation as soon as it becomes aware of the lateness of its case.

EXPLANATION FOR LATENESS

[40] In applying the above legal principles to the facts of this case, it is clear that the rescission application was excessively late, the explanation for the lateness is unsatisfactory and insufficient and prospects of success are weak if not non existent. The reasons for these conclusions are set out below.

[41] On its own version the applicant became aware of the court order on the 11th October 2005 which makes the application over 40 (forty) days late. This period is in my view excessive. The application should have been filed by the 1st November 2005.

[42] There are also difficulties with the case of the applicant regarding the explanation for the delay. As stated above the explanation is both unsatisfactory and insufficient. In its founding affidavit at paragraph 19 (nineteen) which is quoted in full above the applicant stated the reason for the delay was due to the fact that Mr

Schwieger operated under a *bona fide* but mistaken impression that the court order and the arbitration award referred to the same matter and that what was required of him was to pay R58 080, 00.

[43] There is no explanation as to how this mistake was made in particular in relation to the fact that the CCMA documentation and that of the court are different. The CCMA case number is different to that of the court. The CCMA award is signed by a commissioner whereas the court order is signed by the Registrar of the Labour Court.

[44] Conversely, on the other hand, at paragraph 25 (twenty five), of its founding affidavit, the applicant stated that the reason for the delay was due to a "*bona fide* impression" that the employee was precluded in law from continuing with her claim for unfair discrimination once she was awarded the maximum compensation in the CCMA for the alleged constructive dismissal.

[45] Assuming, the alleged *bona fide* mistake was to be accepted, the question that then arises is why did the applicant not do anything on receipt of the letter on 11th October 2005.

[46] The applicant was in law obliged to apply for condonation, without any delay, as soon as it realized that it was out of time in filing its

application for rescission. See *Zululand Anthracite Colliery v Commission for Conciliation, Mediation and Arbitration & Another* (2001) 22 ILJ 1213 (LC).

[47] The explanation is unsatisfactory and is a manifestation of an irresponsible attitude towards, the interest of the employee by the applicant. It is an attitude that reflects lack of interest in reaching finality of the judgment.

[48] The other reason raised by the applicant in its papers is that the delay was occasioned by the negotiation process which is supposed to have commenced on the 7th November 2005, and ended on the 25th November 2005. The letter does not assist the case of the applicant for a number of reasons. In fact the letter exposes the weaknesses of the applicant's case in as far as the condonation application is concerned. Paragraph 9 (nine) of the letter reads as follows:

> *"9 On 24 November 2005 Adv M Van As was briefed and he indicated that it would only be possible for him to consult on the 28 of November 2005 and that he would attend to the application for condonation."*

[49] The last paragraph (not numbered) of the same letter reads as follows:

> "*We hereby formally inform you that Counsel will on Monday 28 November 2005 attend to apply to have the this matter rescinded and will attend to an application to stay the writ of execution. You are therefore requested to stay any action in terms of the writ of execution.*
>
> *Yours faithfully*
>
> *Labour Law Department*
>
> *Per: LORINDA MARAIS"*

[50] Even if it was to be assumed that the delay was occasioned by the negotiation process, there is no explanation as to what happened between 11th October 2005 and 7th November 2005, a period of 19 (nineteen) days. At the time of writing the letter, the applicant, was already aware of the need to apply for condonation. There is also no explanation why the application for condonation was not filed on 28th November 2005 or soon there after, as per the indication in the letter and in addition, there is no explanation as to why it was not made at the same time with the rescission application.

[51] It is apparent that the applicant has to take full responsibility for failing in the first instance to ensure that the rescission application was filed within the prescribed period in terms of the rules of this court and secondly for failing to apply for condonation as soon as it became aware that its application for rescission was late. This responsibility arose after the expiry of the prescribed period of filing a rescission application.

[52] As stated above, one of the reasons advanced by the applicant for the lateness is the negotiation process that was initiated by its attorneys which commenced on the 07th November 2005. Given that the application was already late, there was still a need for the applicant to explain this period. In addition the applicant has failed to explain the period from 28th November 2005 which is a point at which the negotiations clearly failed to resolve the matter. It can be safely said that after this date there could not have been any expectation that the negotiation process could serve any further purpose in the resolution of the matter and it is clear from the letter that that was the understanding of the applicant.

PROSPECTS OF SUCCESS

[53] As indicated above, another factor which the court takes into account in considering whether or not to grant condonation are the prospects of success or *bona fide* defense in the main case. In my view, for the reasons set out below, there are no prospects of success or *bona fide* defense on the part of the applicant's case.

[54] Mr Schweiger in dealing with the issue of *bona fide* defence in his founding affidavit attested:

> *"28 I am advised and do submit that that the default judgment was erroneously sought and granted in the absence of the applicant (as contemplated in Section 165(a) of the LRA) because the compensation in the unfair discrimination claim results from the same facts and circumstances for which the CCMA awarded compensation to the employee in the constructive dismissal claim."*
>
> *29…*
>
> *30 In so far as the merits of the unfair discrimination claim are concerned, I can confirm that the employee and I had viewed the pornographic material together on a number of occasions during which the employee had not complained about such material.*

> *31 When the employee did complain about the presence of the pornographic material on the computer screen which I shared with the employee, I immediately took steps to remove the pornographic material from the computer and therefore can only assume that I had failed to properly delete the pornographic material… which thereafter appeared on the computer as a screen saver. This was an error on my part and not a deliberate omission."*

[55] Mr Schweiger further attested that it was not due to willful default that he failed to oppose the unfair discrimination claim. The "*bona fide* impression" that he claims to have laboured under arose; it would appear, at the time of receipt of the court order. He does not deal with why he did not file the notice to oppose the employee's statement of case. In my view this again points to the brazen disregard and the cavalier attitude on the part of the applicant for the rules of the court. If indeed his mistaken belief was *bona fide*, then he should have filed notice to oppose and took a *point in limine* when the matter came before the court.

[56] Mr Van As, counsel for the applicant, argued that it is a moot point as to whether an employee can be awarded compensation for

a constructive dismissal arising from sexual harassment in the CCMA and thereafter claim compensation in the Labour Court under circumstances in which the constructive dismissal and unfair discrimination arise from the same *facta probanda.* No authority was provided for reliance on this argument. This argument is also linked to the argument raised in the founding affidavit that the employee was not entitled in law from continuing with her discrimination claim once compensation was granted for the constructive dismissal claim.

[57] In essence the argument raised in the founding affidavit amount to the common law principle known as the "once and for all" which provides that in general a plaintiff must claim in one action all damages both already sustained and prospective which flow from one cause of action. The purpose of this principle is to prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation.

[58] The court in *Dube v Bana*. 1999 (1) BCLR 44 (ZH), held that the principle of "once and for all" requires a claimant to sue for all his or her damages in one action. In other words, the matter ends once an action has been pursued to a final judgment. If this was to be applied in the present case, then it would mean that once the

CCMA had issued compensation for the constructive dismissal then that would have been the end of the employee's right to claim from the applicant. From another perspective it could, on this argument, be said that the employee should have ensured that both the constructive dismissal and the discrimination claims were instituted in the same claim. This argument does not, as will appear later, have merit. See also Oslo *Land Co Ltd v Union Government* 1938 AD 584.

[59] In the *Dube's case* after analyzing the "once and far all" principle the court proceeded to draw a distinction between it and the concept, *facta probanda*. In this regard the court held that in the '*facta probanda*" approach;

> *"the emphasis is placed on differences in the evidence needed to support the claim or to prove different items of damage, with the result that substantial differences in evidence will be regarded as an indication that different causes of action are involved."*

[60] The *facta probanda* approach was formulated in the *Evins v Shield Insurance Co Ltd 1980 (2) SA 81, where* the Appellate Division considered the situation where one act caused different kinds of

patrimonial loss to a particular claimant. The court accepted that different kinds of patrimonial loss resulting from the same occurrence may constitute separate Aquilian causes of action, in respect of which prescription may begin to run at different times. In that case the court decided that separate causes of action arose from a motor vehicle accident where the plaintiff suffered patrimonial loss as a result of her own bodily injury and also loss of support as a result of the death of her husband. The court found that as a general principle, separate actions could be instituted for these two different kinds of patrimonial loss and prescription would begin to run at different times where the bodily injury and the death did not occur at the same time.

[61] Turning to the facts of the present case, it can be safely said that the "once and for all" principle does not apply. With the introduction of the Employment Equity Act (EEA) No 55 of 1998, sexual harassment is now deemed to be a form of unfair discrimination which affords employees relief whether they resign or not.

[62] The first case of sexual harassment to be heard under the EEA was *Ntsabo v Real Security CC* (2003) 24 ILJ 2341 (LC). Ms Ntsabo, a security guard, resigned after being sexually harassed by her

supervisor. As a result of this she claimed that she could no longer endure the situation. When her case came before the Labour Court, she claimed both compensation for an automatically unfair discrimination and constructive dismissal. She also claimed damages for the pain and humiliation she had endured and the medical expenses she had incurred as a result of the sexual harassment. The court held that Ms Ntsabo had indeed been harassed, that she had sought management's help, and that management had turned a deaf ear. The court also found that Ms Ntsabo would probably have continued working had the employer taken steps to protect her. Although Ms Ntsabo would probably not have resigned had she not been harassed, the court held that she could not claim that her dismissal was automatically unfair. This was because the dismissal itself was not linked to discrimination as defined in the LRA. In other words her dismissal was not in terms of s187 of the LRA. Her resignation was however, held to amount to a constructive dismissal. Ms Ntsabo was therefore awarded compensation equal to a year's salary for the constructive dismissal. On the other hand, the actions of the supervisor were found to have contravened the provisions of the EEA which includes harassment as a form of discrimination. She was awarded damages arising out of the sexual harassment by her supervisor.

[63] Whilst the cause of action in both the constructive dismissal and the sexual harassment cases may arise from the same facts and circumstances, their remedies are located in different statutes. The remedies for constructive dismissal and unfair discrimination are found in the LRA and the EEA respectively.

[64] In terms of the constructive dismissal, the matter is firstly, before reaching arbitration adjudication, processed through conciliation in terms of s135 of the LRA. If conciliation fails the employee is entitled to refer the matter to arbitration under the auspices of the CCMA or bargaining councils whichever is applicable. However, dismissal disputes, referred to conciliation in terms of s187 of the LRA, are adjudicated by the Labour Court if conciliation fails.

[65] Claims for constructive dismissal are governed by the provisions of s186 of the LRA, the relevant part of which reads as follows:

> *" (1) Dismissal means that-*
>
> > *(e) an employee terminated a contract of employment with or without notice because the employer made the continued employment intolerable for the employee"*

[66] Section 194(1) deals with compensation to be awarded in cases concerning dismissal, including constructive dismissal. The maximum compensation that a commissioner may award may not be more than the equivalent of 12 (twelve) months' remuneration calculated at the rate of the employee's salary on the date of the dismissal.

[67] On the other hand unfair discrimination is prohibited by the provisions of the EEA. Section 10(1) of the EEA reads as follows:

> *" (1) In this section, the word 'dispute' excludes a dispute about unfair dismissal, which must be referred to the appropriate body for conciliation and arbitration or adjudication in terms of Chapter VIII of the Labour Relations Act.*
>
> *(2) Any party to a dispute concerning this Chapter may refer the dispute in writing to the CCMA with six months after the act or omission that allegedly constitute unfair discrimination.''*

[68] The Labour Court is empowered by s50 of the EEA to order payment of compensation by the employer to the employee if it finds that the employee was discriminated against by the employer.

[69] Similarly, discrimination disputes are processed in the first instance, through the conciliation process in the CCMA or bargaining councils and upon failure of conciliation an employee is entitled to refer the matter to the Labour Court which has exclusive jurisdiction to adjudicate discrimination cases. The CCMA or bargaining councils do not have jurisdiction to adjudicate discrimination disputes unless both parties consent to arbitration under their auspices.

[70] In the present case the constructive dismissal arose out of the failure by the applicant to correct the intolerable environment that was created by its manager. Having found the employee to have been unfairly dismissed, the Commissioner, in exercising the discretion given to him by section 194(1) awarded the maximum compensation of 12 (twelve) months to the employee.

[71] On the other hand, the dispute concerning unfair discrimination arose out of the failure by the applicant to take reasonable steps to prevent sexual harassment in the form of pornography appearing on the employee's computer. It was on the basis of the conclusion that the employee was discriminated upon that the court ordered

the applicant to pay compensation in the amount of R58 080-00 to the employee.

[72] The applicant further contended that the order was given erroneously because the employee's legal representatives failed to disclose to the court the compensation granted in the arbitration award. In this regard Mr Van As argued that Cele AJ would not have awarded the same amount in compensation (R58 080-00) as that of the arbitration award if this fact was brought to the attention of the court.

[73] With due respect, I do not agree with this argument nor do I belief that the Cele AJ would have arrived at a different conclusion had the compensation in the arbitration award been brought to his attention. There is no provision in the LRA or the EEA that requires the court in awarding compensation for sexual harassment to take into account any compensation that may have been awarded by the CCMA. Even if this view was incorrect, the argument would still lack merit in that in a sense the argument amount to a complaint that the employee failed to raise a defense on its behalf. The applicant is in this regard the author of his own fate. Had Mr Schweiger taken reasonable steps to ensure that the applicant's interest are protected by filing notice to oppose, the applicant

would have had an opportunity to have raised this in its defense in the hearing.

[74] I see no reason why the costs should not follow the course.

CONCLUSION

[75] In the light of the above, I am of the opinion that the applicant's application for condonation for the late filing of its review application must fail.

[76] In the premises, the application is dismissed with costs.

MOLAHLEHI AJ

DATE OF HEARING : 13 DECEMBER 2006

DATE OF JUDGMENT : 29 MARCH 2007

APPEARANCES

FOR THE APPLICANT : **ADV VAN AS**

INSTRUCTED BY : **VAN RYNEVELD-BHIKA-SCOTT INC**

FOR THE RESPONDENT : **ADV SWIEGERS**

INSTRUCTED BY : **DUVENAGE ATTORNEYS**