

IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: J1865/00

In the matter between:

Applicant

and

Respondent

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JUDGMENT

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**FRANCIS AJ**

- 1.This is an application for condonation in terms of the provisions of Rule 12 of the Labour Court Rules. The applicant, a former employee of the respondent seeks to have the late filing of her statement of claim condoned.
- 2.The applicant alleges that she was dismissed verbally for no valid reason on 10 December 1998. It appears that a dispute in respect of an alleged unfair dismissal was referred to the Commission for Conciliation, Mediation and Arbitration (the CCMA) on 15 January 1999. It is apparent that the referral of the dispute was signed on 15 January 1999 but was only referred to the CCMA on 17 February 1999. In the referral of the dispute to the CCMA in LRA form 7.11 it is alleged that the dispute is an alleged automatically unfair dismissal based on a dismissal pursuant to the applicant taking maternity leave.
- 3.As at 12 March 1999 the dispute that had been referred for conciliation remained unresolved. The applicant applied on 20 September 1999, which is some six months later for the matter to be arbitrated. The respondent contends that the applicant has given no explanation for this delay.
- 4.The applicant avers that she discovered on 8 May 2000, some eight months after applying for arbitration in the

matter, that the CCMA did not have jurisdiction to hear the matter. On 24 May 2000, some 14 months after the certificate of the outcome of the referral for conciliation, the applicant filed a statement in this Court together with her condonation letter.

5. The applicant's condonation letter reads as follows:

*"Here follows the reasons why I believe my referral should be condoned:*

6. I referred this dispute to the CCMA for conciliation on 17/02/99;

7. On 12/03/99, conciliation failed (annexure "B") and I was advised to apply for arbitration; I applied on the 20/09/99;

8. This delay for arbitration was caused primarily by the Legal Aid Board which was assisting me in this matter; (see annexure "C"); this did not help me until I went to the RAU Law Clinic in Kew on the 20/9/99;

9. We never received any notice from the CCMA concerning arbitration date; RAU Law Clinic made many inquiries to the CCMA in this regard (See annexure "D");

10. I heard about the CCMA not having jurisdiction in this matter only on the 8/5/00 (annexure "E");

11. Rau Law Clinic advised me on the 15/05/00 to contact Wits Law Clinic as they (RAU) will not be able to give a legal representative to accompany me to the Labour Court;

12. On the 17/5/00 Wits Law Clinic referred me back to Rau Law Clinic.

Because of these reasons, I believe my referral should be condoned"

13. It is trite that this Court may on good cause shown, condone the applicants non observance of the time frame laid down in section 191(11)(a) of the Act. Condonation is not there for the asking. An applicant for condonation will have to show good cause for his or her late referral. This Court would have regard to the degree of lateness, the prospects of success and the importance of the case. These factors are not individually decisive and an objective conspectus of all the facts must be had. In this regard see *Melane vs Santam Insurance Company Limited* 1962(4) SA 531 (A) at 532 C - F where the following was said:

*"In deciding whether sufficient cause has been shown, the basic principle 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 therefor, prospects of success, and the importance of the case. Ordinarily these facts interrelate: they are not individually decisive, for that would be a piecemeal approach incompatible with true discretion, save of course that if there are no prospects of success there would be no point in granting condonation.”*

#### *The degree of lateness*

14. Mr Barlow who appeared for the respondent argued that the applicant has not explained her lateness fully. He argued that the referral to this court had taken place some 14 months after conciliation at the CCMA had failed. He contended that on the applicant's own version the dismissal took place in December 1998, being almost two years ago. He submitted that the applicant had failed to discharge the onus of explaining the degree of lateness in a manner which would be acceptable to this Court.

15. The applicant's explanation for the delay is as follows:

- 10.1 She referred a dispute for conciliation which had failed to resolve the dispute on 12 March 1999. She was advised to apply for arbitration. She only did so on 20 September 1999. It is clear that the advice that she was given was incorrect. From her statement of claim it appears that this Court has jurisdiction to entertain her claim. In her condonation letter the applicant stated that she approached the Legal Aid Board for assistance. She did not indicate when exactly she approached the Legal Aid Board. However, she annexed a copy of a letter to her condonation letter from Cheadle Thompson & Haysom to the Legal Aid Board in Pretoria. The letter is dated 16 April 2000 and is signed by a V Madonsela. It is a merit report to the Legal Aid Board which deals with the prospects of success in her matter. It is not clear whether the Legal Aid Board granted the attorneys instructions to proceed with the matter after having received the aforesaid letter.
- 10.2 In her condonation letter the applicant stated that she did not get any assistance from the Legal Aid Board and thereafter approached the RAU Law Clinic in Kew on 20 September 1999. The matter was then

referred to the CCMA for arbitration on 20 September 1999. This date is however incorrect as a letter from the CCMA indicates that the matter was referred to arbitration on 11 August 1999. This letter was also annexed to the applicant's letter of condonation. The following appears from the letter:

*"CCMA has no jurisdiction to arbitrate if dismissal was on the grounds of pregnancy. Close file*

*E M Vilakazi collected this document on the 17 May 2000, after being sent by Labour Court (Paul) to bring proof from CCMA. She only knew about this ruling on the 18/5/00."*

What is significant about this letter is that a copy of it was not sent by the CCMA to the applicant. The file was closed without her being informed that the CCMA did not have jurisdiction to arbitrate the matter.

There is also a letter from RAU Clinic dated 27 March 2000 to the CCMA with reference GA54858 enquiring *inter alia* about a date of hearing. Once she discovered on 18 May 2000 that the CCMA did not have jurisdiction to hear the matter did she refer it to this court without much delay.

16. I am satisfied that the applicant has fully explained her delay in referring the matter to the CCMA only in August 1999. She is a lay person and is unrepresented. The delay was caused *inter alia* by the wrong advice that she was given, by delay caused by the Legal Aid Board in deciding about her application and the fact that the CCMA did not advise her earlier that it did not have jurisdiction to hear the matter. It is also not clear why her attorneys, Cheadle Thompson and Haysom, did not advise her to approach this court. This is not a matter where the applicant did not do anything about her dispute.

### *The Prospects of Success*

17. It was argued by Mr Barlow that the applicant's statement of claim is vague and embarrassing in that it refers to an automatic dismissal/retranchment or a dismissal without valid reasons. I do not agree. While the applicant has not eloquently set out her case, I am satisfied that the applicant's prospects of success are not altogether without merits. The CCMA has already found that it lacks jurisdiction in the matter. A closer reading of the applicant's statement of claim indicates that the dismissal relates to an automatic unfair

dismissal. It would appear that she has made out a case for an automatic dismissal relating to her pregnancy. She will however still have to prove her case at a trial.

### *Prejudice*

18.Mr Barlow argued that condonation should not be granted because the respondent has suffered prejudice. This is strictly speaking not a factor to be taken into account when determining an application for condonation. Mr Barlow was however unable to indicate what prejudice the respondent has suffered. It would appear that only two persons were involved in the dispute between the applicant and the respondent. The respondent's witness is still around. It is not merely sufficient for a party to merely state that it will suffer prejudice. It has to indicate to the court what prejudice has been suffered. This court cannot assume that prejudice will be suffered without any facts placed before it.

### *Importance of Case*

19.Mr Barlow argued that there is no peculiar importance to this Case and this is not a matter of considerable importance in the labour arena. I do not agree with him. Dismissal relating to pregnancy is in my view an important matter in the Labour arena. Women are still the most vulnerable members of our community and an issue relating to pregnancy is important for many women out there.

20.The actions of the applicant have demonstrated that she had at all times intended to pursue her claim against the respondent. I am satisfied that this is a matter where condonation should be granted.

21.In respect of costs I am not satisfied that this is a matter in which a cost order is warranted.

22.In the circumstances:

- (1) The applicant's late filing of her statement of claim is condoned;
- (2) No order as to costs is made.

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FRANCIS AJ

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

: 10 NOVEMBER 2000

: 16 NOVEMBER 2000

: IN PERSON

: ADVOCATE BARLOW INSTRUCTED BY WERTHEM BECKER ATTORNEYS