LAC/CIV/A/08/09

IN THE LABOUR APPEAL COURT

HELD AT MASERU

In the matter between

MORAMANE MABINA APPELLANT

AND

WATER AND SEWERAGE AUTHORITY 1ST RESPONDENT

DEPUTY PRESIDENT OF LABOUR COURT 2ND RESPONDENT

CORAM: HONOURABLE DR K.E.MOSITO A.J.

ASSESSORS: MR. M. MAKHETHA

MR. J. TAU

Heard: 26TH JANUARY, 2010

Delivered 4TH FEBRUARY, 2010

SUMMARY:

Appeal from judgment of the Labour Court – Labour Court reviewing award of DDPR on the basis of issues not addressed by parties – propriety thereof. -Practice – whether necessary to file resolution evidencing the authority of a deponent to depose on behalf a juristic person. Jurisdiction of Labour Court - labour Court exercised the powers of appeal and not reviews. – Appeal upheld on grounds that Labour Court decided the review application on issued neither pleaded nor raised.

JUDGMENT

MOSITO A.J.:

1. This is an appeal against the decision of the Labour Court reviewing and setting aside the award of the arbitrator of the

DDPR. In that case, the appellant had been charged with raping an employee of a company called Highland Security who was placed on duty at the respondent's premises on 6 November 2004. Disciplinary proceedings were instituted against him culminating in his dismissal. The appellant referred his claim for unfair dismissal to the DDPR on 30 May 2005. The matter was heard and concluded by default on 26 June 2006. The present respondent applied in vain for the rescission of the default judgment. The respondent took the matter to the Labour Court for review. The Court set aside the DDPR's award and the matter was remitted to the DDPR to start *de novo*. Appellant took an unsuccessful appeal to this Court. The matter was consequently heard *de novo* by the DDPR. It was heard on 1 April 2008. Consequently, the DDPR ordered the reinstatement of the Appellant in terms of section 73(1) of the **Labour Code Order 1992.** The present appellant proceeded to this Court on appeal against the judgment of the Labour Court.

2. There were basically four grounds of appeal before us. First, appellant complaint that the Labour Court had erred in holding as it did that the DDPR had applied a stricter test applicable in criminal proceedings which point had neither been raised by the parties before it nor argued. Second, the appellant complained that there Court had erred in dismissing the appellant's point that, the deponent to respondent's founding affidavit had not been duly authorised to depose to the affidavit on behalf of the respondent. The third ground was that the Court erred in rejecting appellant's complaint that he was denied the opportunity to call his wife as a witness. The last point was that the labour Court exercised the powers of appeal and not review when it had no such powers.

3. The appellant was out of time regarding the filing of the record and heads of arguments. He filed a substantive application for condonation in this regard. The principles applicable in an application for condonation for breach of the Rules Court are now well-established in this jurisdiction. The Court of Appeal of Botswana aptly summarized these principles in ***Attorney-General v Manica Freight Services (Botswana) (Pty) Ltd [2005] 1 BLR 35 (C.A.)) at 42D-43B*** as follows:

> *Condonation of a breach of the rules of court is granted not as of right but as an indulgence. It is accordingly necessary for an applicant for such condonation to show not merely that he has strong prospects of success on appeal but to give good reasons why he should receive such indulgence, that is, that he acted expeditiously when he discovered his delay and advance an acceptable explanation for the delay (see State v Elias Moagi 1974(1) BLR 37, CA at p 39; Solomon v Attorney-General (supra) at p 666D). There are, however, other factors which the court, in considering such an application, is also obliged to take into account. These are conveniently referred to and collected in Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa (4th Ed p 897-8. While applying to applications in South Africa, they are the same principles which are applicable in our law (see CF Industries (Pty) Ltd v The Attorney-General and Another [1997] BLR 657, CA).*
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> *Those factors include not only the degree of non-compliance, the explanation for it, the prospects of success and the importance of the case but also the respondent's interest in the finality of his judgment, the question of prejudice to him, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.*

> *In Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A) at p 532(C-D, Holmes JA said the following:*
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> *'Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are not 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 for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.'*
>
> *It is essentially a matter of fairness to both sides. (See Melane's case, (supra)).''*

4. It must further be borne in mind that an application for condonation is a matter which lies pre-eminently within the discretion of the Court.
5. The respondent did not really oppose the condonation application. The affidavit filed towards this purpose was that of respondent's legal representative. The affidavit of Advocate Masoabi does not really issuably address the above principles. It raises a general denial that papers had been filed by mistake and had to be withdrawn to be properly constructed, thereby leading to the delay in filing the heads of argument. In the present case, the appellant has in our view, satisfactorily explained the reasons for the delay.

The Appellant went further to demonstrate the absence of prejudice to the respondent. Advocate Masoabi's contention is that, the respondent is already enjoying the fruits of the judgment and therefore, it would be prejudicial to respondent if appellant were to be granted condonation. This is not what is meant by prejudice in this context. To uphold this argument would stand on the way of applicants for condonation simply because the opposing litigant is already enjoying the fruits of a potentially and legally unjustified judgment.

6. Advocate Masoabi also field what he entitled point of law in limine. An examination of these so called points in limine, reminded one of the remarks of Melunsky JA in the Lesotho Court of Appeal's decision in ***Makoala v Makoala (C of A (Civ) 04/09)*** wherein he deprecated this practice. However, the parties agreed in casu that the issues should be addressed holistically.

7. When the matter was about to be heard before us, therefore, the court directed the parties to argue the prospects of the appeal with the merits. If the application for condonation fails, then the appeal would be struck off the roll. If the application for condonation, then, the Court will proceed to determine the merits of the appeal. We proceed now to consider the prospects of success. In so doing, we proceed to consider the merits of this appeal.
8. For convenience, I intend to start with the second ground. Regarding the second ground, the appellant complained that the Court *a quo* had erred in dismissing the appellant's point that, the deponent to respondent's founding affidavit had not been duly authorised to depose to the affidavit on behalf of the respondent. The law on this subject has been considered on various occasions.

The full bench of the Cape Provincial Division of the Supreme Court of South Africa considered the question of proof of authority to institute motion proceedings on behalf of a company in the case of **Mall (Cape) (Pty) Ltd v Merino Kooperasie Bpk 1957 (2) SA 347 (C),** and observed as follows at 352 AB:

> *"The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution but I do not consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating not some unauthorized person on its behalf. Where, as in the present case, the respondent has offered no evidence at all to suggest that the applicant is not properly before the Court, then I consider that a minimum of evidence will be required from the applicant."*

9. The Court of Appeal of Lesotho has also considered the question whether a resolution to institute or oppose an application on behalf of a legal person should always be filed. Mahomed JA held as follows in the case of **Central Bank of Lesotho v Phoofolo 19851989 LAC 253 at 258 J – 259 B**:

> *"The respondent had contended in the Court <u>a quo</u> that there were two technical grounds on which the appellant's opposition should fail. The first technical ground was that no resolution, evidencing the authority of the Governor to depose to an affidavit on behalf of the appellant, or to represent the appellant in the proceedings, was filed. This objection was without substance, and was correctly dismissed by Molai, J. There is no invariable rule which requires a juristic person to file a formal resolution, manifesting the authority of a particular person to represent it in any legal proceedings, if the existence of such authority appears from other facts. In the present case the authority of the Governor to represent the*

> *appellant in the proceedings in the Court a quo appears amply from the circumstances of the case, including the filing of the notice of opposition to the application."*

10. Indeed the Court of Appeal relying on **Tattersall and Another v Nedcor Bank Ltd 1995 (3) SA 222 (A)** where it was held at 228 GH that a copy of the resolution of a company authorizing the bringing of an application need not always be annexed, held in **Revenue Authority v Olympic Off Sales** C OF A (CIV) NO.13/2006 rejecting this type of argument. This was particularly so where there was sufficient *aliunde* evidence of authority and where the denial of authority is a bare one, like in the present case. The Court held that:

> *[15] In view of the aforegoing I have come to the conclusion that the second respondent has in fact proved that he had the necessary authority to oppose the application on behalf of the first respondent and to file an answering affidavit on behalf of all the respondents. I accordingly find that the court a quo erred in upholding the applicant's point in limine.*

11. The deponent in the present case, deposes that she is "a Manager Strategic and Human Resource and as such entitled to [depose] to this affidavit." She also indicates that the facts to which she deposes are within her personal knowledge. In our view, this point was correctly rejected by the Labour Court.
12. The third ground was that the Court erred in ignoring appellant's complaint that he was denied the opportunity to call his wife as a witness. This issue does not appear to have been raised in the papers before the Labour Court by the Appellant. I therefore do not see how it can be raised at this stage.
13. The other ground of appeal was that the labour Court exercised the powers of appeal and not review when it had no such powers.

There is a clear distinction between an appeal and a review, as is explained by Herbstein and Van Winsen, **The Civil Practice of the Supreme Court of South Africa,** 4th ed., 932:

> *"The reason for bringing proceedings under review or appeal is usually the same, to have the judgment set aside. Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however, the real grievance is against the method of the trial, it is proper to bring the case on review. The first distinction depends, therefore, on whether it is the result only or rather the method of trial which is to be attacked."*

See also **Nkuebe Khoeli v Hertig Mapeshoane 1963-1966 HCTLR 127 at 128 C-D**; and ***Judicial Service Commission and Others v Chobokoane 2000-2004 LAC 859,*** where Steyn P remarked as follows at 864 A-B:

> "It should be borne in mind that, when exercising review functions, the court is 'concerned with the legality of the decision, not its merits' (Baxter, Administrative Law, 306)."

14. It is clear from reading the Court a quo's judgment that Labour Court reviewed and analysed the evidence afresh and came to a different conclusion on the merits of the case. This is apparent from paragraphs 19 to 25 of its judgment. This was clearly wrong. This ground of appeal must therefore succeed.

15. Regarding the first ground of appeal, in several of their decisions, the Court of Appeal of Lesotho and this Court have deprecated the practice of granting orders which are not sought for by the litigants. See for example **Nkuebe v. Attorney General and Others 2000 – 2004 LAC 295 at 301 B – D; Mophato oa Morija v. Lesotho**

Evangelical Church 2000 – 2004 LAC 354. In the latter case this Court (per Grosskopf JA) said the following at page 360:-

> "*The appellant's first ground of appeal was that the court a quo erred in making the above order when neither the appellant nor the respondent had asked for it. Counsel for the respondent, on the other hand, submitted that the court a quo was fully entitled to grant such an order since the notice of motion included a prayer for further and/or alternative relief.*
> *I do not agree. The relief which a court may grant a litigant in terms of such a prayer cannot in my view be extended to relief which he has never asked for and which is not even remotely related to what he has asked for. It is equally clear that the order was not granted at the request of the respondent and it does not appear on what grounds the court a quo could order the respondent."*

16. Similarly, the Court of Lesotho and this Court have more than once deplored the practice of relying on issues which are not raised or pleaded by the parties to litigation. See for example **Frasers (Lesotho) Ltd vs Hata-Butle (Pty) Ltd 1995 – 1999 LAC 698; Sekhonyana and Another vs Standard Bank of Lesotho Ltd 2000-2004 LAC 197; Theko and Others v Morojele and Others 2000-2004 LAC 302; Attorney-General and Others v Tekateka and Others 2000 – 2004 LAC 367 at 373; Mota v Motokoa 2000 – 2004 LAC 418 at 424. National Olympic Committee and Others vs Morolong 2000 - 2004 LAC 449.** On this ground alone, this appeal would certainly succeed.

17. It is clear therefore that there are prospects of success in this appeal. The application for condonation is granted as prayed. In our view therefore, this appeal must succeed on account of grounds 1 and 2 discussed above. It is accordingly so ordered.

18. This is a unanimous decision of this Court.

DR K.E. MOSITO AJ.
Judge of the Labour Appeal Court

For Appellant	:	Advocate P. Masoabi
For 1ST Respondent	:	Advocate L.A. Molati