

**IN THE LABOUR COURT OF LESOTHO**

**LAC/REV/03/04  
LC/REV/143/06**

**HELD AT MASERU**

**IN THE MATTER BETWEEN**

**LEETO MALATALIANA**

**APPLICANT**

**AND**

**DIRECTORATE OF DISPUTES  
PREVENTION AND RESOLUTION  
LESOTHO BREWING CO. (PTY) LTD**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT**

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**JUDGMENT**

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**Date of hearing : 28/11/06**

*Late filing of an application for review – Section 228F(1)(a) of Act No.3 of 2000 – Review must be filed within 30 days of a party being aware of the award – Late filing of review must be accompanied by application for condonation backed with an explanation for the delay – Application dismissed for being late, and not being accompanied by any explanation.*

1. The applicant was employed by the 2<sup>nd</sup> respondent as a truck driver. He was dismissed on the 12<sup>th</sup> October 1998 following a disciplinary enquiry in which he was found guilty of “being found in possession of company product i.e. 15 bottles 750 ml castle and trying to remove them without covering documents on 12/09/98.”

2. On the night of the 12<sup>th</sup> September 1998, the applicant had driven the company vehicle through the main gate of the respondent. He was accompanied by one Tilane Mohapi. A security officer by the name of Mapesela testified at the disciplinary hearing that when they searched the applicant's vehicle they discovered about 15 quart bottles of castle lager.
3. He testified further that the applicant and his colleague requested them to allow them to return the beer but they refused. They reported the incident to their Head Office and proceeded to impound the vehicle and its contents.
4. At the hearing the applicant sought to deny liability and instead shifted the blame to his companion whom he said he was the owner of the beer found on the vehicle. He further suggested that the said Mohapi had badgered him to convey the beer to his home until he agreed.
5. When he was asked if he was intimidated to commit the act he said that Mohapi "...had a demeanour of an army officer and that he felt compelled to accede to his demands" (see p.27 of the paginated record). However, when he was asked why he did not seek the assistance of a security officer on reaching the gate he said "he was not the type to rat on a colleague."
6. Needless to say applicant was found guilty and dismissed on the 12/10/98 as earlier said. It was only in February 2001 that the applicant lodged a case of unfair dismissal with the Labour Court. As it can be seen this was exactly two years and four months after the applicant got dismissed.
7. Since this was after the enactment of the Labour Code (Amendment) Act 2000 (the Act) which established the 1<sup>st</sup> respondent and clothed it with the power to determine claims of unfair dismissal by arbitration, the Labour Court declined jurisdiction and dismissed the application for the condonation of late filing of the unfair dismissal claim. The application was dismissed by the Labour Court in February 2003.

8. On the 27<sup>th</sup> August 2003, which was another six months after the Labour Court declined jurisdiction, the applicant filed a referral with the 1<sup>st</sup> respondent again accompanied by a condonation application for the late filing of the referral.
9. The referral was heard on the 1<sup>st</sup> October 2003. The award was issued on the 6<sup>th</sup> October 2003. The 1<sup>st</sup> respondent refused to condone the late filing of the referral on the ground that the delay was inordinate.
10. It is not clear from the record when the applicant received the award of the 1<sup>st</sup> respondent which refused to grant him condonation of the late referral. However, applicant issued a notice of motion out of the Registry of this court seeking review of the award of the 1<sup>st</sup> respondent on the 23<sup>rd</sup> January 2004.
11. This was some two months and three weeks, assuming he became aware of the award on the date of its delivery. Section 228F (1)(a) of the Act provides that application for review of the DDPR awards shall be made within 30 days of a litigant being aware of the award.
12. In recognition of his delay the applicant has prayed in paragraph 4 of the Notice of Motion that his delay in filing this application be condoned. However, no attempt is made by the applicant to explain his delay.
13. Section 228F(2) of the Act as amended empowers the court “on good cause shown...to condone the late filing of an application to review an arbitration award.” This court has interrogated the concept of “good cause” on a number of cases.
14. In paragraph 2.5 of his heads of argument Mr. Loubser for the 2<sup>nd</sup> respondent, correctly summarised the relevant factors that the court would consider to arrive at a conclusion whether good cause has been shown as “the degree of lateness, the explanation therefor, the prospects of success, the importance of the case and the prejudice to the opposing party (see *Khotso Sonopo .v. Lesotho Telecommunications Corporation LC67/95* (unreported) and

Lesotho Wholesalers & Catering Workers Union & 33 Others .v. METCASH Lesotho Ltd & Another LC44/99 (unreported)).

15. In deciding whether to condone a late filing the court is in essence exercising a discretion. The general rule is that a discretion must be exercised judicially i.e. it must be exercised, reasonably, rationally and with due regard to the behests of the statute being given effect to (see JDG Trading (Pty) Ltd t/a Supreme Furnitures .v. M. Monoko No and 20 Others LAC/REV/39/04, and Frasers Lesotho .v. DDP & Another LC/REV/82/06 (both unreported)).
16. As we indicated the applicant has not explained his delay. We do not know if this was an oversight. However, it would be interesting what explanation the applicant would give this time round, regard being had to the fact that the history of this case is littered with delays at every stage that the applicant has sought to take steps to pursue its prosecution. There is not a single time that he acted timeously.
17. The only issue which counsel for the applicant addressed at length is the prospects of success. Mr. Makhera for the applicant put up a spirited argument that his client had good prospects of success if he were to be allowed to challenge the fairness of his dismissal.
18. That unfortunately does not seem to be the case if regard is had to the record of the disciplinary proceedings. Applicant clearly colluded with his companion at that time, Mr. Mohapi to remove beers from the 2<sup>nd</sup> respondent's site without proper documents.
19. When the applicant was confronted, he sought to put blame on his colleague and said he had pressured him to take the beers. When he was asked why he did not seek help if Mr. Mohapi had proved too much for him by his military style exhortation, he said he was not the type to inform on a colleague. This clearly showed he was actively taking a part in the act of which they were found guilty.
20. It is common cause that on appeal he made even more disclosures that they had in fact attempted to remove 20 bottles of beer even though subsequently only 15 were found at the security department

where they were taken for safekeeping. He cannot therefore be heard to say he has good prospects in the face of such admissions.

21. The length of the delay is not capable of determination in the light of the fact that the applicant has not disclosed when the award was served on him. It is his duty as a person seeking indulgence of the court to put all relevant information before the court to assist it to come to an informed conclusion.
22. That the unending pursuit of this matter is causing 2<sup>nd</sup> respondent a prejudice does not beg the question. Public policy dictates that there should be an end to litigation. The applicant does not seem to appreciate this. It is now eight years since this matter first arose. It is still dragging in the courts in circumstances which are entirely of applicant's own making.
23. We have no material placed before us why we should exercise a discretion in favour of the applicant to condone his late filing of an application to review a decision refusing condonation of a late referral of a dispute to the DDPR.
24. Infact in refusing to condone his late referral the DDPR exercised a discretion vested in it. Unless it is suggested that it acted irrationally, unreasonably or was influenced by malice in refusing the condonation application, the decision is not reviewable simply because applicant is not happy with it.
25. For the above reasons we are of the view that the review application is late and there being no explanation for it, it cannot be condoned. Accordingly, we come to the conclusion that this matter must be put to rest. The application is dismissed and we have made no order as to costs.

**THUS DONE AT MASERU THIS 12<sup>TH</sup> DAY OF DECEMBER 2006**

**L. A. LETHOBANE**  
**PRESIDENT**

**R. MOTHEPU**  
**MEMBER**

**I CONCUR**

**L. MATELA**  
**MEMBER**

**I CONCUR**

**FOR APPLICANT:**  
**FOR RESPONDENT:**

**ADVOCATE MAKHERA**  
**ADVOCATE LOUBSER**