

IN THE LABOUR COURT OF LESOTHO

LAC/REV/22/05
LC/REV/313/06

HELD AT MASERU

IN THE MATTER BETWEEN

E. RIVER TEXTILES (PTY) LTD

APPLICANT

AND

DIRECTORATE OF DISPUTE
PREVENTION AND RESOLUTION

1ST RESPONDENT

FUSI RATSEBE

2ND RESPONDENT

JUDGMENT

Date of hearing: 29/08/07

Ruling made: 29/08/07

Review of DDPR award - Arbitrator entertaining application for variation of the award more than a year after handing down of award - No condonation application made for late application - Arbitrator lacks jurisdiction to hear such application - Matter remitted to DDPR for exercise of discretion by arbitrator whether condonation is desirable.

1. This review application arises out of the award of the learned Arbitrator Malebanye of 18th November 2004. The 1st respondent filed referral A1727/02 complaining about his dismissal. According to the award of the learned Arbitrator “a settlement agreement to the effect that the respondent company shall reinstate applicant

back to his position with effect from 31st March 2003 was reached on the 5th March 2003 and the claim for unfair suspension was withdrawn.”

2. It turned out that the employer did not honour the settlement agreement. Applicant went back to the DDPR “with a view to proceeding on to arbitration.” (See p.2 of the award). The Learned Arbitrator decided that “under the circumstances, I take it that conciliation has failed. The matter shall therefore be heard at arbitration in respondent’s absence.”
3. Indeed the learned arbitrator proceeded to hear the evidence of the 2nd respondent. She found 2nd respondent’s dismissal to be substantively unfair and ordered that he be reinstated back to his initial position without loss of earnings. The award was made on the 29th July 2003. Whether the learned arbitrator was correct to have considered failure to honour a settlement agreement as evidence that conciliation had failed, is a moot point, but one which we are not presently called to decide, because it is not referral A1727/02 that is under review.
4. On the 14th July 2004 the 2nd respondent filed referral A0557/04 with the DDPR claiming payment of salary for the period of twelve months that he alleged the arbitrator had ordered that it be paid in award A1727/02. They alleged that the only problem was that the amount due had not been quantified and the Labour Court had had a problem enforcing a figure that was not quantified.
5. No amount of distortion of the award of the learned arbitrator in A1727/02 can give rise to the statement attributed to the learned arbitrator namely, that she ordered payment of salary but failed to quantify it. The learned arbitrator has not even made a slightest reference to the issue of salary for the period that the 2nd respondent was out of employment. In any event on the 10th August 2004, the learned arbitrator Shale dismissed the referral on the ground of jurisdiction. In particular he said he was not competent to interfere with another arbitrator’s award.

6. On the 30th August 2004, 2nd respondent filed another referral A0872/04 this time seeking variation of award A1727 on the ground that it failed to stipulate the amount to which he was entitled. This was exactly a year after the award had been handed down. In paragraph 4 of his founding affidavit in support of the variation application, the 2nd respondent said he had received the award itself on the 4th August 2003.
7. Despite the application for variation having been made almost a year after the 2nd respondent received the award, the latter did not accompany his application with a condonation application. The learned arbitrator proceeded to hear the application for variation. On the 18th November 2004, the learned arbitrator handed down an award agreeing to vary the award. She ordered that applicant should pay 2nd respondent's wages for eight months which amounted to M5,200-00.
8. On the 18th February 2005, applicant applied for review of the award of the learned arbitrator in referral A0872/04 on the grounds, inter alia, that the 2nd respondent filed for variation out of the time limit required, the consequence of which is that the 1st respondent ought not to have heard the said application.
9. The 2nd respondent filed an opposing affidavit in which he contended that the applicant's own review application was filed far beyond the time allowed by the law. As for the contention that his own application for variation was filed outside the time permitted by the law he said in response that he became aware of the award at the time that he was trying to apply for enforcement of award No.A1727 at the Labour Court.
10. It is common cause that what is purportedly the record of the proceedings in referral A0872/04 was filed on the 23/05/05. Other than the documents which formed the subject of the application for variation, no record of what transpired at the hearing was kept. Accordingly the learned arbitrator's record is composed of only the attachments, being the documents used to institute or relied upon in the application for review. The 2nd respondent filed his own answering affidavit on the 13th July 2007.

11. The matter was scheduled for hearing before this court on the 21st June 2007. However on the 21st June 2007 counsel for the applicant withdrew as applicant's attorneys of record. The matter was accordingly postponed. It was rescheduled for the 29th August 2007. It turned out that applicant had neither briefed new counsel nor were they personally present. The matter accordingly proceeded in their absence in terms of rule 16 of the Labour Court rules.
12. Quite clearly every stage that this case has gone through is replete with irregularities of one form or the other. These irregularities cut across the entire case as all sides are one way or the other to blame for non compliance with the rules pertaining to the conduct of proceedings under the Code as amended.
13. The applicant's own fault starts with the filing of its review application. According to the founding affidavit of Mr. Serame the Personnel Manager, they received the award in A0872/04 on the 22nd November 2004. It would appear that they acted swiftly to seek the review of the award because, Mr. Serame's founding affidavit was sworn to on the 6th December 2004, which was well within the 30 days prescribed by the law.
14. For some unexplained reason the applicant sat with the papers and only issued them out of the registry of this court on the 17th February 2004. It is however apparent that the time of the signing of the founding papers coincided with the festive season when firms normally close and proceed on Christmas and New Year holidays. This is only apparent but it has not been pleaded by the applicants.
15. It is however, surprising that 2nd respondent raises applicant's lateness which on the face of it can easily be explained by the intervening festive period, while his own variation application is so terribly late. Of course 2nd respondent has sought to explain the lateness by saying he only became aware of the award when he was applying for the enforcement of the award in A1727/02. He however, does

not say when it was when he sought to enforce the said award. However, nothing turns on that argument because in his own affidavit in support of the application for variation, he mentioned that he became aware of the award on the 4th August 2003.

16. At the time that he filed for the variation a year had lapsed since the award was issued and only five days remained before a year lapsed since he became aware of the award. Surely comparing the two infractions of the applicant and the 2nd respondent, that of the applicant is very minor and on the face of it, it is easy to explain, let alone that everything had still been done on time, but for the delay in filing the process in court.
17. Of the two infractions, this court has the jurisdiction to condone that of the applicant as it is the matter properly before it. As for that of the 2nd respondent condonation for it can only be sought at the DDPR which is where the jurisdiction to condone that lateness lies. In the light of the remarks we have made, we would be inclined to condone applicant's lateness. This will in turn enable us to go back and correct the proceedings backward because as it has often been said; two wrongs do not make a right. In order to be able to put the proceedings in this matter on a correct path from their inception we must first do the right thing and the right thing in this matter would be to correct applicant's infraction by condoning it.
18. As we said the matter proceeded in the absence of the representatives of the applicant. The ground on which the review is sought is laid in a sworn affidavit of Serame. Accordingly, the presence or non-presence of a representative of the applicant was not very material as that ground was on its own a self supporting evidence which is deposed to on oath. Thus even if the representative had attended only to tell the court that he had nothing to add, and that he stands and falls by his papers filed of record, the court would be enjoined to consider the affidavits as we have duly done *in casu*.

19. We note that no record was kept by the learned arbitrator as required by the rules, in particular regulation 30 of the Labour Code (Directorate of Disputes Prevention and Resolution) Regulations 2001. That is however not the issue we are called upon to decide. The issue that calls for our intervention is that of the timing of the application for review.
20. As we said regulation 29(2) of the regulations provides that the application for variation or rescission of an arbitration award shall be made within 10 days on which the applicant became aware of the award or ruling. The 2nd respondent herein admittedly made his application almost a year after he became aware of the award.
21. As it was held in the case of Lesotho Brewing Co. t/a Maluti Mountain Brewery .v. Lesotho Labour Court President & Another CIV/APN/435/95, where a claim is presented to court outside the time allowed by the law, the court to which such claim is presented is deprived of the jurisdiction to hear such a claim. The jurisdiction of the court will only arise from that court exercising the discretion condoning the failure to comply with the stipulated time, if the interests of justice so demand.
22. Since the 2nd respondent did not accompany his application for variation with an application for condonation of his lateness, it follows that the learned arbitrator also did not exercise her discretion to condone the lateness. Having not done so, it follows that she proceeded to entertain a variation application over which she lacked jurisdiction. It is for this reason that we concluded that the award of the learned arbitrator is materially flawed and as such it ought to be reviewed and set aside. However, the matter is remitted back to the DDPR for appropriate application for condonation to be made to enable the learned arbitrator to exercise the discretion vested in her whether it is, or it is not, in the interests of justice to condone 2nd respondent's late filing of the application for variation. We made no order as to costs.

THUS DONE AT MASERU THIS 31ST DAY OF AUGUST 2007

L. A. LETHOBANE
PRESIDENT

L. MATELA
MEMBER

I CONCUR

M. MOSEHLE
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

NO APPEARANCE
MR. MOLATI