

IN THE LABOUR COURT OF LESOTHO

LC/REV/110/06

LAC/REV/61/03

HELD AT MASERU

IN THE MATTER BETWEEN

PATRICIA MAAPESA

APPLICANT

AND

ELLERINES HOLDINGS LTD

H. MOSHOESHOE

1ST RESPONDENT

2ND RESPONDENT

JUDGMENT

Date of hearing: 21/11/07

Review of DDPR award - Application for review must point out an alleged irregularity or illegality and not merely concerned with flaws in the reasoning.

1. This is an application for the review of the award of the 2nd respondent, who is the arbitrator of the Directorate of Dispute Prevention and Resolution (DDPR). It follows that even though the originating application does not state so, she is in fact cited in a nominal capacity.
2. The applicant was an employee of the 1st respondent. On the 22nd July 2002, she was served with a letter of suspension pending disciplinary hearing. The applicant later

that day tendered her resignation. However, the Manager of the 1st respondent wrote back and informed her that her resignation was not accepted and that she remained suspended with full pay pending the outcome of investigations regarding cash discrepancies.

3. Applicant was subsequently served with a letter summoning her to a disciplinary enquiry on the 25th July 2002. The applicant did not attend the enquiry. The enquiry did not proceed and was postponed to the 26th, and the applicant was advised accordingly. She still did not attend.
4. It would appear that the enquiry proceeded in her absence because the next correspondence she got was informing her that she had been found guilty as charged and that her services had been terminated. On the 12th September 2002 the applicant issued an originating application out of the Registry of this court challenging the fairness of her dismissal. Pleadings were closed and the matter was set down for hearing on the 23rd April 2003. It was however postponed to the 12th June 2003, when it came before court and the court declined to hear the matter on the ground that it no longer had jurisdiction in the light of section 226(2) of the Labour Code (Amendment) Act 2000.
5. Applicant referred the dispute to the DDPR on the 15th July 2003. Since the referral was outside the statutory time limit of six months, she duly accompanied it with an application for condonation. The application was opposed. It was in due course argued and the learned arbitrator in a lengthy award, ruled against granting the application and dismissed it.
6. On the 10th October 2003, the applicant filed an application for the review of the award of the learned arbitrator. The review application was filed with the Labour Appeal Court. It remained pending before that court until the law was amended in August 2006, thereby making the Labour Court

the forum for the review of the awards of the DDPR. This explains why the review application is now being heard by this court.

7. Applicant's grounds for review are found from paragraph 5 to paragraph 6 of her founding affidavit. They can be summarised as follows:

(a) The learned arbitrator acted irregularly by dismissing my application for the alleged conduct of my erstwhile attorney in lodging my complaint with the Labour Court in the first place when the DDPR was already in existence.

Applicant contended that she cannot be held accountable for the wrongs committed by her attorney in a field in which she is a lay person and he a professional.

(b) Whilst the law establishing the DDPR was promulgated on the 25th April 2000, the DDPR itself was set up in January 2002 and the 2nd respondent failed to show the means that were adopted to inform the legal fraternity and members of the public that the DDPR was now in existence.

(c) The learned arbitrator was biased in favour of the 1st respondent in that she held that the delay of five months was too long and she proceeded to consider and determine the case on the merits under the guise of considering prospects of success.

8. It is trite law that "where a statute creates a power of review, the appellate body is limited to a consideration of the legality or validity of the decision under examination." (See Baxter's Administrative Law 3rd Edition p.256). It is also trite that the question whether to grant or not to grant a condonation is one of a discretion, which must be exercised judicially. Once

the authority vested with the discretion has exercised it, the appellate tribunal will not lightly interfere with such discretion. (See Paul Sebeta Mohlaba & Ors .v. Commander Royal Lesotho Defence Force & Another 1991-1996 LLR - LB 235 at p.242.

9. Virtually all the applicant's so-called grounds of review are infact grounds of appeal with the exception of only one ground to which we will turn shortly. As it was held in National Union of Retail and Allied Workers Union & Another .v. Court President (Labour Court) & Another 1997-1998 LLR - LB 495 at 503, a review application properly so-called must point to irregularities "relating to the conduct of the proceedings in the (DDPR) consisting of for example any irregularity committed by the (DDPR) other than alleged flaws in its process of reasoning or exercise of its discretion."
- 10 With the exception of the alleged bias none of the grounds listed in paragraph 7 pass the test. However, it is difficult to conclude that the arbitrator was biased simply because she did what the law empowers her to do. It is part of the arbitrator's function to pass judgment on the length or otherwise of a delay being sought to be condoned. When the arbitrator concludes as she did in casu that the five months period by which applicant delayed to bring her claim to court is in her opinion too long, she cannot be said to be biased.
11. Mr. Sello for the applicant argued further that as a further demonstration of her bias the 2nd respondent considered and decided applicant's case on the merits under the guise of considering prospects of success. With respect this is not what the learned arbitrator did. The learned arbitrator said "I do not see how she will be able to prove constructive dismissal and at the same time try to convince me to reinstate her." Further down the same paragraph she says "I have also not been convinced that applicant can prove the procedural unfairness where she herself has resigned."

12. It is clear from these remarks that the learned arbitrator concedes that she has not heard the evidence. She however places a question mark on how the applicant would discharge the burden of proving the things she referred to in the light of the facts before her. That in our view is not dealing with the merits but simply saying even if the trial were to be allowed to proceed it seems applicant will prima facie have a mountain to climb to discharge the burden that lies ahead of her. (See Loti Brick (Pty) Ltd .v. Thabiso Mphofu & Others 1995 - 1996 LLR - LB 446 at 450. Even less likely is to infer from those remarks that the learned arbitrator was showing bias.
13. We accordingly come to the conclusion that there is no basis to interfere with the exercise of the discretion in this matter. The review application is therefore dismissed. The 1st respondent asked for costs without pointing to any untoward behaviour of the applicant that warrants that costs be imposed. We accordingly have made no order as to costs.

THUS DONE AT MASERU THIS 22ND DAY OF NOVEMBER 2007.

L. A. LETHOBANE
RRESIDENT

L. MOFELEHETSI
MEMBER

I CONCUR

R. MOTHEPU
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

MR. SELLO
MR. DE BEER