

IN THE LABOUR COURT OF LESOTHO

LAC/REV/85/03
LC/REV/41/07

HELD AT MASERU

IN THE MATTER BETWEEN

THAMAHANE RASEKILA

APPLICANT

AND

TELECOM LESOTHO (PTY) LTD
THE ARBITRATOR (DDPR)

1ST RESPONDENT
2ND RESPONDENT

JUDGMENT

Date : 14/02/2008

Review of DDPR award - Application for condonation of late referral - Arbitrator failing to apply her mind to explanation advanced for delay - Award reviewed and set aside - Applicant's late referral condoned.

1. This is a case in which the applicant is seeking the indulgence of the court that his late referral of certain claims he is making against the respondent before the Directorate of Dispute Prevention and Resolution (DDPR) be condoned. The claims arose at various times between 1996 and 1999.

The list of the claims is very long, eleven in all. (See p.15 of the record).

2. They include inter alia, 47 leave days earned but not taken, 13th cheque, salary underpayments, sitting allowance for board meetings to mention a few. Applicant was employed by the respondent as Director of Information and Marketing.
3. On the 31st May 1996 he was appointed acting Managing Director of the respondent. He acted in that position until when his acting appointment was terminated in August 1999, whereupon he reverted to his substantive post.
4. At this time, relations between him and the respondent were quite acrimonious. Needless to emphasize, on the 31st may 2000, relations between him and the respondent were severed. That began long and drawn out battle between the parties which these proceeding are only a part of.
5. A good deal if not all of the claims which applicant seek to bring against the respondent relate to the period when he acted as the Managing Director. On the 29th August 2001, the applicant filed papers with the Registry of this court which were in effect DDPR referral papers. He brought them to this court because even though the DDPR was already established by law, it did not have offices to which claimants could go to file their claims.
6. It is not necessary to comment about the propriety of that approach, suffice to say in that referral, the applicant challenged the fairness of his dismissal as well as to claim the many things that he is now seeking condonation to file them out of time.
7. Fearful that he may be time barred, he filed another case No. LC/93/01 with this court praying for the same reliefs that he sought to refer to the DDPR. That claim was dismissed by this court on the 22nd October 2002, on the grounds *inter alia*, that the application was *lis pendens* in as much as the same

claim had been referred to the DDPR although it had been filed with the Registry of the Labour Court.

8. On the 1st September 2003, applicant filed a referral with the DDPR in respect of the various claims referred to earlier. He had separated these claims from the claim of unfair dismissal which by this time formed a separate referral. Given the time lapse since the claims arose, he accompanied his referral with a condonation application for late filing.
9. On the 4th November 2003, Arbitrator Moshoeshoe refused the applicant condonation and made a cost order in the amount of M3,250.00 against him. Applicant applied for the review of the ruling by the Labour Appeal Court on the 21st November 2003. As it would be expected the respondent opposed the application for review.
10. On the 10th February 2006, Mr. Maieane for the applicant and Mr. Kao for the respondent appeared before Peete J. and reported that there is a settlement being negotiated and what remained to be agreed upon was the question of costs. Thereafter the matter was set down several times but each time it was postponed because parties were still pursuing a settlement. There is no record of what became of the mooted settlement.
11. It is common cause that in August 2006, the Labour Code (Amendment) Act 2000, was amended by removing powers of review of DDPR awards from the Labour Appeal Court and vesting same in the Labour Court. Thus on the 13th April 2007, Peete J. sitting with assessors made the following order.

“It is hereby ordered that:

(a) “Consequential upon the passing of the Labour Code (Amendment) Act No 5 of 2006 and this issue principally being a procedural matter, LAC/REV/85/03 is remitted to the Labour Court for review as per section 226F of the Labour Code (Amendment) Act No 3 of 2000.

- (b) The Labour Court shall take into consideration special circumstances that precipitated the delay regard being had to the fact that the Labour Appeal Court was inclined to condone Matters filed with out undue but good reasons (sic).*
- (c) The Labour court shall also have regard to reasonable prospects of success.*
- (d) he matter to be heard within 30 days of this order by the Labour Court.”*

12. We have extracted this order to high light some of the difficulties it created for us. Firstly it gave this court 30 days within which to hear the review and yet the order itself was only made and filed with this court some seven (7) days later namely the 20th April 2007. It was thus almost impossible to comply with the order in regard to time frame.
13. Secondly, the order kind of suggests already what attitude this court must have in dealing with this matter. Thirdly, the order says this court must review while at the sametime instructing it to rehear the application in as much as it directs us to deal with the merits. Accordingly, we have sought to abide the order of the Labour Appeal Court as closely as we can whilst at the sametime seeking to remain within the ambit of the power vested on a review court by the law.
14. Section 227(1) and (2) of the Labour Code (Amendment) Act 2000 provides as follows:
- “(1) Any party to a dispute of right may in writing refer that dispute to the Directorate.*
- a) If the dispute concerns an unfair dismissal, within 6 months of the date of the dismissal.*
- b) In respect of all other disputes within 3 years of the dispute arising.*
- (2) Notwithstanding subsection (1), the director may, on application, condone a late referral on good cause shown.”*

15. Since applicant's claims concerned perceived outstanding rights that ought to have been referred within three years, applicant accompanied his referral with an application for condonation of late filing. However in his application for condonation, the applicant did not specify when each claim arose. He sought to argue that his dispute arose on the 31st May 2000, when he was dismissed and the respondent in turn failed to pay him all his accrued rights in terms of section 76(1) of the Labour Code Order 1992, which provides:

"76(1) the termination of any contract under the provisions of this part shall be without prejudice to any accrued rights or liabilities of either party under the said contract at the date of termination"

16. He was compelled by the arbitrator to state exactly when each claim arose. With regard to the 47 leave days he stated:

"During my time as acting MD. Not a particular year, as indeed I have already told you, staff used to accumulate leave in LTC and it were paid out when the concerned happened to leave the corporation for whatever reason "(see p.53 of record)".

17. He averred that he was not paid the 13th cheque or bonus during the entire period he was acting as MD i.e. between may 1996 and August 1999 and that he only became aware of his entitlement in this regard late after he was dismissed (see p. 54 of the record). With regard to gratuity he stated that he qualified for gratuity up to June 1998, when it was done away with. It means that his claim is for June 1996 to June 1998. He invited the intervention of the office of the Labour Commissioner to help him get paid the said gratuity to no avail. The Labour Commissioner advised him in August 2000 to take the claim to the courts.

18. The claim concerning compensation for commensurate housing also related to the time that he acted as MD. He

stated that he lived in a two bed room house while as MD he was entitled to a four bed roomed house. He was only accorded commensurate housing in December 1998. It follows that his claim is for June 1996 to November 1998. Regarding the furniture allowance he averred that the house he moved into in December 1998, did not have suitable furniture necessitating that he moved in with his own furniture. He is claiming furniture allowance for the period December 1998 to August 1999 when he was terminated. (See pp.58-59 of the paginated record).

19. The claim for reimbursement of a court fine relate to 1998 when he as the Managing Director was found guilty of contempt of court for failing to comply with an order of court in CIV/APN.224/98. The foreign travel claim arose in April 2000 when he was trying to clear his subsistence allowance and the then acting MD directed that a cheque already drawn in his name be cancelled. (See p. 63 of the record). The Bonitas refund relates to overcharges in respect of a medical aid scheme which was brought to the attention of the respondent around March or April 2000.
20. The claim for rental arose because he was allegedly not supposed to be charged rent whilst he acted as MD. At p.66 of the record he states, *"What happened is that for a person in MD position this rent ought not to have been drawn while I was in charge. This was also realized much later since my appointment was revoked. Infact it was deducted through and through since my initial appointment as acting MD until I reverted to my substantive position"*.
21. Applicant's last two claims relate to board allowance for the meetings of 21/05/00, 02/08/00 and 18/08/00. The last claim relates to alleged salary underpayment which allegedly occurred in April and May2000.
22. Applicant's explanation for his failure to approach court for relief earlier can be summarized into three. First he argues that the board has always been aware that he was not giving away his rights to the benefits he is now seeking to claim. At

pages 72-73 of the paginated record he referred the arbitrator to the letters that he wrote to the board on the 18/09/96, 05/05/97 and 18/08/98 in which he was seeking to remind the board about the benefits that he was entitled to as the MD.

23. At pp.48-49 of the record the applicant states that:
“There is documentation that proofs that these issues were brought to the attention of the respondent at the appropriate time(s). But unfortunately nothing could be done then. Now it is contested that this or that cannot stand today, yet the employer never really denied or disputed anything when I used to remind them of the outstanding benefits.”
24. The second reason can be understood to be that since the respondent never disputed his entitlement to the benefits he (applicant) had always genuinely believed that an amicable settlement would be arrived at. Thus in answer to the arbitrator’s question as to what he did to get specific remedy after it became clear that his letters were not getting him anywhere he stated:
“While still having harmonious relations with respondent, one tends to hope that at some stage the remedy would come about despite reiterated financial contrivances.”(See p. 76 the record.)
25. The applicant’s understanding in this regard would seem to be the one that informs his conclusion that the cause of action arose when the respondent failed to make good these long outstanding claims upon the severing of relations between them. Hence the following exchange at pp. 60 of the record:
“Rasekila: Yes my lady. The main reason for making these demands should not be misconstrued as though one would say how come you demand these things only after you have problems with this employer there is documentation in

there to prove that the issues were always brought to the attention of the board time and again since 1996. There is written proof that the board was sensitized accordingly every year.”

“Arbitrator: Mm.

“Rasekila: It is quite obvious that I never gave anybody a feeling that I was no longer interested in enjoying the full benefits lawfully accorded me by the board.”

26. The next reason that Mr. Rasekila tendered for approaching the court late is the dire financial strait in which the respondent was at the time. The following extract from his submissions before the DDPR should make his position clear:

“Perhaps I may just point out that the difficulties involved then were so huge that the Corporation could not meet all its obligations with ease. It owed huge money by way of overdraft in excess of M4.7m. with Lesotho bank. The very house referred to here could not be attended to due to lack of finances.”(See pp.58-59 of the paginated record.)

At pp. 60-61 he states:

“It is quite obvious I never gave anybody a feeling that I was no longer interest in enjoying the full benefits accorded me by the board. I also did not want to be seen to be interested in sucking a dying cow dry of its milk. After all the milk from a dying cow is as bad as poison itself. Again I could not press on compensation then and show no sympathy for the difficulties involved in paying staff their salaries. Staff even took the Corporation to court for failure to meet some of the obligations for which I had to endeavor to cover for it. Even some of the claims went on for a long time perhaps even now, between staff and the corporation.”

27. With regard to prospects, the applicant pointed out time and again that he had prospects of success in as much as he has documentation to substantiate his claims. Furthermore, he contended that the respondent never denied its obligation to pay him as claimed, save that the respondent did not have funds to meet the claims.
28. In response to the applicant's explanation for delay, the respondent failed to challenge the validity of the reasons advanced by the applicant. On the contrary Mr.Kao on behalf of the respondent sought to challenge the validity of the applicant claims, an issue which was not at the time before the arbitrator for determination. The arbitrator too allowed herself to be misled and sought to deal with the merits of the claims which the applicant had not yet had the opportunity to support by evidence which he (the applicant) had repeatedly said he had in abundance. This was a grave misdirection and an irregularity which calls for the interference with the award..
29. Furthermore, the arbitrator failed to consider and give due regard to the applicant's explanations for his delay. The applicant repeatedly stated that he considered his claims to have arisen on the date that the respondent failed to pay his claims upon termination of the relationship. No ruling was made on this pertinent submission. It was instead relegated to the side line by asking him (applicant) why he bothered to apply for condonation if that was the date he considered the dispute to have arisen. Clearly even that question called for a specific ruling whether in the circumstances it was necessary to apply for a condonation or not. It was, on the contrary left hanging right up to the end. This was again an irregularity.
30. Applicant made a lengthy submission on his claims. He was taken to task to identify when each arose. He did attempt to do so even though he kept on saying even if some may have arisen in 1996 or 1997 he never gave them up and the respondent knew that he still laid claim to them. However

there are those he was able to identify when they arose such as the Bonitas over charges, the 13th cheque, the board allowances and the salary underpayments. Some of these claims the respondent even conceded them.

31. No attempt was made to address the lateness of each claim if any and to consider whether such claims were disputed by the respondent. They were all clubbed under the general statement that the *“referral is inordinately out of time and that it cannot be justified.”* This statement is factually incorrect if regard is had to the lengthy justification that applicant gave why he filed the referral late. This is in fact a clear testimony that the arbitrator failed to consider and give due weight to the applicant’s explanation for his lateness. *We* are of the view that even if some of the claim might appear to be inordinately late the same cannot be said of all of them e.g. salary underpayments and the Bonita’s overcharges.
32. If due weight had been given to the contention that the respondent had all along acknowledged its indebtedness to the applicant and that its failure to pay was essentially due to the bad financial situation in which it found itself at the time the arbitrator would have been inclined to condone the applicant’s lateness if any. Alternatively she would have ruled in his favour that since they had all along not disputed their indebtedness to him, they should have paid up all what was due to him at the time of separation.
33. In the circumstances the arbitrator’s award of 4th November 2003 is hereby reviewed and set aside in its entirety. The applicant’s application for condonation of the late filing is hereby granted. The claim is referred back to be dealt with on the merits by a different arbitrator. There is no order as to costs.

THUS DONE AT MASERU THIS 5TH DAY OF MARCH 2008

L. A. LETHOBANE
PRESIDENT

D.TWALA
MEMBER

I CONCUR

L.MATELA
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

IN PERSON
MR. MATOOANE.