

IN THE LABOUR COURT OF LESOTHO

LC/REV/149/2006
LAC/REV/9/2005

HELD AT MASERU

IN THE MATTER BETWEEN:

MICHAEL FAKO

APPLICANT

AND

M. MONOKO (NO)
DIRECTORATE OF DISPUTE
PREVENTION AND RESOLUTION
LESOTHO BREWING COMPANY

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

JUDGMENT

Date: 23/04/2008

Review of DDPR award - Application for condonation of late referral - Arbitrator wrongly applying Act No3 of 2000 to a case that predates that law- Applicant lateness ought to have been assessed on the basis of the common law - Arbitrator failing to consider the explanation proffered for lateness and the prospects of success of the applicant - that failure constitute improper exercise of a discretion - Award reviewed and corrected by condoning applicant's late referral. Matter remitted to DDPR to proceed on the Merits.

1. This is an application for the review of the award of the 1st respondent in which he refused to condone applicant's application for Condonation of the late referral of his claim for unfair dismissal. The facts giving rise to this matter are simple and largely common cause.
2. The applicant was employed by the 3rd respondent as a driver, based in Leribe. On the 14th April 1986 he was arrested by the Police on suspicion of involvement in the theft of liquor belonging to the 3rd respondent. He was subsequently released on bail, after which he attempted to present himself with a view to continue with his work. He was turned back and told to come back when his criminal case had been finalized.
3. On the 16th September 1986 the Leribe Magistrate discharged him. He sought to resume his work as his case had now been concluded. The employer refused to allow him back. He was not even issued with a letter formally informing him that he had been dismissed and what the reason if any for that dismissal was.
4. In July 1987 he issued summons in the Magistrate Court for the district of Maseru in civil case number CC842/87. The 3rd respondent defended the action. Pleadings closed and the matter was scheduled to be heard on the 29th February 1997. Since the Labour Court had since commenced operation with exclusive jurisdiction on labour matters, Magistrate Mokoena before whom the matter was enrolled transferred it to the Labour Court.
5. The applicant filed the matter in the Labour Court in Case No. LC/51/97. It remained pending on the roll of the Labour Court. Following the establishment of the DDPR and the court of appeal judgment in Attorney General vs. S.Kao C.of A (CIV) No26 of 2002 which said that all matters that come to trial after a statutory change in the procedure by which such matters must be dealt with, such matters are to be tried in terms of the new procedure; the applicant withdrew the matter in the Labour Court on the 4th July 2003, and filed it with the 2nd respondent in referral No. A0948/03.

6. The applicant accompanied his late referral with an application for condonation outlining the reasons that have resulted in him bringing the referral to the DDPR late. The condonation application was heard on the 30th September 2003. The 3rd respondent did not oppose it. On the 27th December 2003, the 1st respondent issued an award refusing to grant applicant condonation on the ground that the delay is inordinate and “in legal terms the dispute is taken to have prescribed by a period of seventeen years.” He contended that the dispute ought to have been referred to the DDPR “within six months of the date of the dismissal of the applicant.”
7. Applicant applied to have the award of the learned arbitrator reviewed on the ground that he had failed to exercise the discretion vested in him judicially, in that he did not consider applicant’s explanation and the fact that he had prospects of success. This is infact a very sad story of someone who has been caught in the web of statutory changes that each time his matter was ripe for a hearing would change the procedure by which the case was to be determined.
8. In the circumstances the poor litigant has had to remove his matter from one forum to the other leading to the lapse of immensely long time with his case still undecided. It was plainly legally wrong for the learned arbitrator to apply the provisions of section 227(1)(a) to applicant’s case when it predates the section in question. The applicant’s case having arisen in 1986 should be dealt with in terms of the law applicable at that time. The Employment Act 1967 and its 1977 amendment never regulated the time for the filing of claims for wrongful/unfair dismissal. Accordingly the common law applied.
9. The proper exercise of a discretion in the circumstances would have been to enquire whether the applicant brought his claim to the Magistrate Court after an unreasonably long time after his purported dismissal. Furthermore, applicant’s explanation for bringing the claim to the DDPR after seventeen years should have been considered, as well as the prospects of success.

10. Section 227(2) of the Labour Code (Amendment) Act 2000 empowers the Director to “condone a late referral on good cause shown.” As Holmes JA held in the leading case of *Melane .v. Santam Insurance Co. Ltd.* 1962 (4) SA 531 at 532:

“In deciding whether sufficient cause (good cause) has been shown, the basic principle is that the court has a discretion to be exercised judicially upon consideration of all the facts and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated they are not individually decisive for that would be a piecemeal approach incompatible with a true discretion.”

11. Looking at the award of the learned arbitrator, it becomes immediately clear that he took into account the degree of lateness and he stopped there. There is no indication that he considered the valid and unopposed explanation that the applicant proffered for the lateness. It is obvious that the learned arbitrator did not consider the good cause shown by the applicant and this was irregular in as much as the arbitrator did not exercise his powers in accordance with the enabling statute vide section 227(2) of the Act.
12. The learned arbitrator enquired from the applicant if he had prospects of success. The applicant answered that; “I was expelled by the company without being called to answer for myself or be reprimanded if I made a mistake.” This testimony was never contradicted. It follows that apart from a good explanation for the lateness, the applicant also established that he had a prima facie strong case on the merits.
13. That seventeen years had lapsed since the course of action arose, was not a blame that could justifiably be placed at the door of the applicant. He has at worst been failed by the system itself. His case would lie in one forum for many years

and by the time he sought to have it prosecuted changes in the law necessitated that it be removed from that forum. For his part applicant was doing every thing that he had to do to have his case prosecuted. In the circumstances a judicial exercise of the discretion by the arbitrator in this matter would have led to one and only irresistible conclusion to condone the late referral and allow the claim to proceed on the merits. Accordingly, the award of the learned arbitrator refusing condonation is reviewed, corrected and set aside and the following substituted therefore; the applicant's late referral of the claim is condoned and the matter is remitted to the DDPR to proceed on the merits. There is no order as to costs.

THUS DONE AT MASERU THIS 23RD DAY OF JUNE 2008.

L. A. LETHOBANE
PRESIDENT

J. M. TAU
MEMBER

I CONCUR

D. TWALA
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

MR. SHALE
MR. LOUBSER