

IN THE LABOUR COURT OF LESOTHO

LC/REV/386/06

HELD AT MASERU

IN THE MATTER BETWEEN

TSEPISO VIVIAN BAHOLO

APPLICANT

AND

LOTI BRICK (PTY) LTD
N. NANTSANE - ARBITRATOR

1ST RESPONDENT
2ND RESPONDENT

JUDGMENT

Date : 19/08/09

Application dismissed and reasons for judgment reserved.

Review of DDPR - Applicant filed application for review after the 30 days prescribed by section 228F (1)(a) of the act - Condonation - Requirements for condonation application considered - Applicant failed to furnish satisfactory explanation for delay and to show that she has prospects of success - Application for condonation refused.

1. This matter was scheduled to be heard on the 19th August 2009. It proceeded as scheduled and was concluded the same day. At the end of the hearing the court pronounced a ruling dismissing the review application. The reasons for the ruling were reserved and promised to be furnished at a later stage. These are now those reasons.

2. The applicant was dismissed on the 1st October 2004. The dismissal followed a disciplinary hearing in which applicant was charged among others, of dishonesty by using the telephone management system code allocated to her colleague. Applicant pleaded guilty and was dismissed.
3. On the 21st February 2005, she referred a dispute of unfair dismissal to the DDPR. She referred the dispute with the assistance of the Legal Section of the Labour Department. On the 27th April 2005, an award was issued which found the dismissal of the applicant to have been substantively and procedurally fair.
4. Applicant avers that she received the award on the 3rd May 2005. On the 28th June 2005 applicant issued a Notice of Motion praying for the condonation of the late filing of the review and that the award issued on the 27th April 2005 be reviewed, corrected and set aside. The first respondent filed an opposing affidavit deposed to by its then Managing Director Mr. Mthwalo.
5. According to the court record, applicants' attorney was furnished with the record for transcription by the Registrar, on the 9th February 2006. The transcribed record was filed with the court on the 29th November 2006. It however, emerged on the 2nd April 2008, when the matter was scheduled to be heard, that Counsel for the 1st respondent had not been served with the record. The matter was then bound to be postponed.
6. The matter was set down for hearing on the 18th June 2008. It was again postponed due to the ill-health of Counsel for the applicant. It had to be postponed yet again on the 27th October 2008 and on the 19th May 2009. It finally proceeded on the 19th August 2009. It turned out on the date of the hearing that applicant's then Counsel Mr. Metsing no longer represented her. She had sought and obtained the services of the Labour Department through its legal officer Ms. Russel.

7. Before considering the merits of the review, the court dealt with the issue of condonation of the late filing of the review application. In terms of section 228F(1)(a) of the Labour Code (Amendment) Act 2000, a party to a dispute who seeks to review the arbitration award should apply to the Labour Court within 30 days of the date the award was served on the applicant. In casu the applicant alleges she received the award on the 3rd May 2005. She issued the Notice of Motion seeking the review of the award on the 28th June 2005, approximately two months after she was served with the award.
8. Accordingly, applicant accompanied her review application with an application for the condonation of the late filing of the review. The factors that a court of law will take into account in considering an application for condonation are now well established and these are found in such cases as *Melane .v. Santam Insurance Co. Ltd.* 1962(4) SA 531(A). The guiding principle is that condonation is not there for the asking. It is an indulgence, the granting of which requires that a party in default must show sufficient cause for it to be granted.
9. In *Melane's* case *supra* the appellate division laid the following rule which has been followed with approval in many subsequent cases:

“In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a 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, save of course that if there are no prospects of success there would be no point in granting condonation.” (P. 532C-D) See also *Phetang Mpota .v. Standard Lesotho Bank* LAC/CIV/A/06/08 (unreported) and the cases therein cited.

10. Applicant's delay in filing the review is not inordinate, being a delay of under 30 days. Her explanation for the delay however, is not convincing. She avers that she delayed because she had financial problems and that she was collecting funds to enable her to engage the services of a lawyer. In his opposing affidavit Mr. Mthwalo asked the court to discard the reason for the delay being advanced by the applicant.
11. He contended that:

“applicant was represented by the labour Commissioner's office at the DDPR and it will be noted that the said office provides services for free, they even appear before this Honourable Court. Why would applicant want to pay money, engage new counsel who was not privy to the facts when she could have retained the old counsel for free.”

At the hearing hereof Mr. Macheli for the 1st respondent also hammered this point home that applicant has not explained why she abandoned free legal service in favour of one that required her to pay. He contended that the return of the Labour Office Legal Officer to represent the applicant shows that the Legal Service of the Labour Department has always been available to the applicant.

12. We are in agreement that if indeed applicant delayed to bring this case for the reason of lack of funds to brief Counsel, she has only herself to blame, because she has always had free legal services of the Labour Department at her disposal. Ms Russel sought to argue that the departure of the applicant's Counsel Mr. Metlae also contributed to the delay. Mr. Macheli argued to the contrary that the alleged departure of Mr. Metlae is not pleaded as such it is prejudicing the 1st respondent in as much as it is taking them by surprise. We agree. It follows that applicant's explanation for her failure to file the application in court is not satisfactory and as such it cannot successfully support an application for condonation.

13. As it has been held in *Mphausa .v. Multi Cleaning Services* 1994 (10) SALLR 60:

“A party approaching the court after the time lapse prescribed by law is obliged first and foremost to explain his delay to the satisfaction of the court. Failing the explanation the court has no jurisdiction to hear the matter. If the explanation has been given then the court may go on to consider the prospects of success because as Holmes J.A. in the case of Melane .v. Santam Insurance Co. Ltd 1962 (4) SA 531(A), notwithstanding everything else that may favour the application in a condonation application, there is no point of granting condonation where there are no prospects.” See also *Posholi Mapeshoane .v. Lesotho Telecommunications Corporation LC/16/96* and *Thamahane Rasekila .v. TELECOM LESOTHO (Pty) Ltd LC/REV/132/06* (unreported).

14. It follows that if the explanation is not satisfactory that is the end of the story. There is no need to even consider prospects of success. Mr. Macheli contended that the condonation application should be refused because the applicant had not shown that she had prospects of success. This was very true. Not only had the applicant not satisfactorily explained her delay, she had failed to show the court that she had any prospects of the merits. In the circumstances the condonation application was refused and the review application was dismissed. There is no order as to costs.

THUS DONE AT MASERU THIS 29th DAY OF SEPTEMBER, 2009.

L. A. LETHOBANE
PRESIDENT

R. MOTHEPU
MEMBER

I CONCUR

M. THAKALEKOALA
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

MS. RUSSEL
MR. MACHELI