

IN THE LABOUR COURT OF LESOTHO

LC/08/09

HELD AT MASERU

IN THE MATTER BETWEEN

POTLAKO THABANE
THATO MAKARA

1ST APPLICANT
2ND APPLICANT

AND

WORKMEN'S COMPENSATION
TRUST FUND COMMITTEE
MINISTRY OF LABOUR & EMPLOYMENT
ATTORNEY GENERAL

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT

JUDGMENT

Date : 09/09/09

Application for condonation of late filing of a claim - The claim found to be res judicata as it has been dealt with and concluded by the DDPR - Factors considered by the court in determining condonation of late presentation of a claim not fulfilled by the applicants - Applicants' delay of nine years was found inordinate and not satisfactorily explained - From the facts as outlined in the Originating Application applicants have no prospects of success because applicants lacked requisite university qualification to be upgraded as they demand - condonation application dismissed with costs.

1. This is an application for the late filing of a claim of unfair labour practice. The two applicants are both serving employees of the 1st respondent. They were employed around June 1999 as Compensation Officers, and placed at Grade E for the purposes of remuneration.

2. In April 2000, Government upgraded the entry point of civil servants with university degree to Grade F. Two colleagues of the applicants who held certificates from the Centre for Accounting Studies, which are classified as equivalent to a first degree were upgraded. The applicants who admittedly held diplomas were not upgraded.
3. Applicants contend that the two colleagues who were upgraded are doing the same work as they do. They contended further that *“by upgrading a certain group of employees and leaving another group of employees doing the same work and employed in similar circumstances,”* the 1st respondent has committed an unfair labour practice. They accordingly sought the intervention of this court to remedy the alleged unfair labour practice.
4. Since the course of action arose in April 2000; when the change was introduced, and the applicants only approached this court for relief on the 3rd April 2009; the applicants accompanied their Originating Application with an Application for Condonation of the late referral of the dispute to the court. There is no doubt that the delay of nine years to refer a case to court as has happened in casu is inordinate; as such it needs to be explained to the satisfaction of the court.
5. Applicants’ explanation for the delay is that the matter was being handled internally and that they had honestly believed that it would be resolved there. They averred that the internal process took a long time as there were many stages they had to go through and each stage failed to give its response timeously. When the internal process failed to deliver the applicants turned to the Ombudsman. It is not clear what recommendation the Ombudsman made. Presumably they were not successful, hence their approach to this court.
6. In response counsel for the respondents raised a point of law in limine that the application is *res judicata* in as much as the same claim was referred to the DDPR by the applicants against the 1st respondent in 2008. The dispute was arbitrated and an award was issued on the 15th October 2008 dismissing the

applicants' referral. An award of arbitrator Thamae of the 18th October 2008, was annexed to the Answer as proof.

7. Respondents contended further that the applicants are guilty of material non-disclosure in as much as they failed to disclose the fact that they applied for and were granted condonation by the DDPR and the merits of the application were finalized, as such no further condonation is necessary. The applicants have not denied any of these averrements. It follows that they are considered as admitted.
8. The reading of the award of Arbitrator Thamae shows that applicants referred the dispute of underpayment as a result of respondent's failure to upgrade them to Grade F. Evidence adduced to support the claim was the same allegations as those being raised in this court. Before this court the applicants are pursuing exactly the same claim save that this time they have styled it unfair labour practice in order to bring it under the jurisdiction of this court. Otherwise the facts and the parties are exactly the same; except for the addition of the Ministry of Labour and Employment and the Attorney General. However, the relief is sought against the first respondent as the employer.
9. The applicants are clearly seeking a second pronouncement on their claim by this court. That is not right. If they are dissatisfied with the outcome of the arbitration proceedings, the correct procedure is to apply for the review of the award of the arbitrator. Starting a new case in a different court on the same facts, is not only inappropriate and unacceptable. It is also an abuse of process for which applicants deserve to be punished with an order of costs against them.
10. To show their true colours applicants did not even disclose in the affidavit of Potlako Thabane that this matter has been at DDPR, where it was arbitrated. This is clear evidence of frivolity. We agree with counsel for the respondents that applicants having been condoned at DDPR and their complaint heard and finalised, there is no need for yet another condonation, as that would result in the duplication of the work already done. and accomplished by the DDPR.

11. Mr. Moshoeshoe for the respondents had argued further that the applicants have not fulfilled the well known requirements for an application for condonation. Those requirements were aptly summarised in *Melane .v. Santam Insurance Co. Ltd* 1962 (4) SA531 (AD) at 532. The factors which the court will consider are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case.
12. It was submitted on behalf of the respondents that the applicants have not explained why they delayed to present the case to court timeously. It was argued that what they purport to constitute an explanation is infact a narration of what transpired in those years that they were sitting with the pain of not being paid as they believe they should have been paid. Mr. Moshoeshoe contended that the applicants were not entitled to wait for nine years to bring the matter to court while allegedly waiting for response from the authorities they referred their complaint to. For these reasons he submitted that the explanation was not satisfactory. We are in agreement with Mr. Moshoeshoe that even if applicants were seeking internal settlement, which thing they were right to do; that did not entitle them to wait for nine years. That is too much as such, convincing explanation is necessary why it took them nine years to approach courts. In the absence of satisfactory explanation, we are entitled to believe that resort to the courts is an after-thought. Indeed no satisfactory explanation has been proffered.
13. It was argued further that even if a satisfactory explanation had been given, the applicants have not shown that they have prospects of success. Indeed the affidavit of Potlako Thabane says nothing about prospects. Mrs. Shale for the applicants argued that the prospects of the applicants can be gleaned from the totality of the case the applicants are seeking to present to court.
14. From the facts supporting the claim, gleaned from the main application, it cannot be correct that the applicants have prospects of success. Firstly the plea of *res judicata* raised by counsel for the respondents is well taken. Accordingly, it

quashes any possible prospect the applicants might hope to have on the merits. Secondly, even assuming, the matter was rightly brought to this court; by their own admission, applicants were not university degree holders in April 2000, neither were their diploma certificates considered as equivalent to university degree. They could not therefore claim a right to be paid at the same grade as persons who are by their own admission, more academically qualified than they were.

15. This court agrees with Mr. Moshoeshoe that the applicants have not fulfilled the requirements for the grant of a condonation. Even considering the facts as a whole the applicants have no case on the merits. It would therefore be a waste of time to condone their late referral. (See Ramphoma .v. Middlestown (Pty) Ltd LC/REV/454/06 Phethang Mpota .v. Standard Lesotho Bank LAC/CIV/A/06/08 Queen Komane & Another .v. City Express Stores (Pty) Ltd LAC/CIV/A/05/08 (unreported). In the premises the application for condonation cannot succeed. It is accordingly dismissed with costs.

THUS DONE AT MASERU THIS 21st DAY OF OCTOBER 2009

L. A. LETHOBANE
PRESIDENT

L. MATELA
MEMBER

I CONCUR

D. TWALA
MEMBER

I CONCUR

FOR APPLICANTS:
FOR RESPONDENT:

MRS. SHALE
MR. MOSHOESHOE