IN THE LABOUR COURT OF LESOTHO **LC/REV/19/09**

HELD AT MASERU

IN THE MATTER BETWEEN

KOPANO TEXTILES (PTY) LTD **APPLICANT**

AND

MOTSEARE QOKOLO **1ST RESPONDENT**
SELLO MONAMOLI **2ND RESPONDENT**
MAJARA MAJARA **3RD RESPONDENT**
MOROLONG TOTA **4TH RESPONDENT**
ARBITRATOR – M.M.A. SENOOE **5TH RESPONDENT**

JUDGMENT

Date : 11/09/09
Condonation – Requirements thereof – If explanation is not satisfactory there is no need to consider other requirements – Prospects – There is no point of granting condonation where there are no prospects of success – Condonation refused.

1. The first four respondents are employed by the applicant company as security guards. Even at the time of the referral of the dispute they were still employees of the applicant. With the assistance of their union Lesotho Workers Clothing and Allied Workers' Union, the respondents referred a dispute of unpaid weekly rest days and public holidays on which they claimed to have worked. They also claimed unpaid overtime.

2. It would appear that the applicant did not dispute the claims, except overtime. This resulted in the claim for overtime being withdrawn. The amounts for weekly rest and public holidays were worked by the union in conjunction with the

representatives of the applicant. Accordingly, there was no dispute on the claims as well as the amounts due.

3. When it came to payment of the amounts due, the applicant had no problem with paying the 4th respondent. His claim was accordingly settled. The applicant had an objection to the payment of the first three respondents, because they had a criminal case pending in the Leribe Magistrate Court for suspected theft of the stock of the applicant. The employer wanted the amounts due to them withheld until the finalization of the case, or that they repay the value of the stock allegedly stolen by them.

4. When no agreement could be reached the dispute was referred to arbitration. The applicant wanted the value of the stolen stock to be set off from the money due to each of the three respondents. The arbitrator concluded that the employer has failed to establish the essential elements of set off namely; whether there is reciprocal indebtedness and whether the debt is liquidated.

5. The arbitrator concluded further that even assuming the employer was claiming set-off for the loss of the stock as a result of the negligence of the respondents, such set-off could only operate if there was prior agreement between the respondents and the applicant authorizing the employer to effect such a set off. In the absence of any agreement, she concluded the set off could not be effected.

6. The award was handed down on the 26th November 2008. It is not clear when it was served on the applicant. However, on the 20th March 2008, the applicant caused the proceedings to be brought under review by this court. The grounds upon which the review is sought are that the learned arbitrator misdirected herself by holding that essential elements of set off were not proved. Secondly, it was contended that the learned arbitrator erred in holding that there has to be agreement between the parties for the defence of set off to stand.

7. It is common cause that in terms of section 228F(a) of the Labour Code (Amendment) Act 2000 (the Act), a party who seeks to review an arbitration award issued under the Act should apply to the Labour Court for an order setting aside the award within 30 days of the date the award was served on him. In acknowledgement of the fact that the review application was filed some three months after the award was issued, the applicant accompanied their application for review with an application for condonation of the late filing of the application.

8. Section 228F(2) provides that *"on good cause shown the Labour Appeal Court (now the Labour Court per Labour Code (Amendment) Act No.5 of 2006) may condone the late filing of an application to review an arbitration award."* In essence the court is vested with a discretion which it must in all cases exercise judicially. *"Good cause"* is often used interchangeably with *"sufficient cause."* In the leading case of Melane .v. Santam Insurance 1962(2) SA531 at 532 Holmes J.A. interrogated the requirements for sufficient cause which was required to be shown by the Rules of the Appellate Division of South Africa in these words:

> *"In deciding whether sufficient cause has been shown, the basic principle is that the court has 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 factors 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 granting condonation."*

See also Phethang Mpota .v. Standard Lesotho Bank LAC/CIV/A/06/08 (unreported) at p.9 of the typed judgment and the cases therein cited).

9. The condonation application was made by one Tsikoane Letuka who simply said he is an employee of the applicant and as such is authorized to depose to an affidavit. The only reason he advanced for the delay is that the Director of the company was out of the country. He had allegedly gone to China to attend to his wife who was taken ill. The deponent did not disclose the capacity in which he is himself employed. Neither did he say who the Director who had allegedly gone to China is, nor attach proof of his absence in the form for instance, a visa endorsement or prove of hospitalization of the wife if any, or any proof of any kind. It is a bare allegation which is not supported by any proof whatsoever. It is totally unsatisfactory and unconvincing.

10. In the absence of sufficient explanation for the delay it becomes unnecessary to even consider whether the other factors have been satisfied. The 30 day time frame is a statutory requirement and non compliance with it can only be condoned if there is a good reason why it was not complied with. A litigant who has failed to comply with that time frame has a duty to purge his default and to do so, he must satisfactorily explain his default.

11. Even if we were to bend over backwards and say we accept the explanation for what it is worth, there is another reason why this condonation application should not succeed. That is lack of prospects of success in the main application. There are two main reasons why the main application for review is doomed to fail.

12. The first reason is that none of the so-called grounds for review constitute prima facie reviewable irregularity. Both are clear evidence of discontentment with the merits of the award and not the manner of arriving at it (the award) as a review proper requires. (See Lawrence Baxter, Administrative Law, Juta & Co. 1996 at p.305). The second is that, the main defence of the applicant which was the pending criminal case against the first three respondents has fallen away in that the criminal case has admittedly been withdrawn. (See paragraph 8 of 1st respondent's answering affidavit). It follows that the applicant

no longer has any set-off to hold onto, which it might wish to effect, if it was successful in the prosecution of the respondents. For these reasons we see no good reason why the respondents should be inconvenienced any longer by granting condonation when the applicant has no case in the main application. Accordingly, condonation is refused and the award of the DDPR is confirmed.

THUS DONE AT MASERU THIS 26th DAY OF OCTOBER 2009

L. A. LETHOBANE
PRESIDENT

M. THAKALEKOALA **MEMBER**	**I CONCUR**
R. MOTHEPU **MEMBER**	**I CONCUR**
FOR APPLICANT:	**ADV. MOHAPI**
FOR RESPONDENT:	**ADV. AKHOSI**