

IN THE LABOUR COURT OF LESOTHO

LC/REV/423/06

HELD AT MASERU

IN THE MATTER BETWEEN

LESOTHO MILLING CO. (PTY) LTD

APPLICANT

AND

DDPR

1<sup>ST</sup> RESPONDENT

MAKHAMA MOKHATHOLANE

2<sup>ND</sup> RESPONDENT

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## JUDGMENT

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*Date : 24/09/09*

*Condonation - Section 228F(2) of Act No.3 of 2000 requires a party seeking to review an award to file application with the Labour Court within 30 days of a party becoming aware of the award - Applicant filed review after 42 days of being aware of award but only applied for condonation two years later despite being aware more than a year earlier that condonation was necessary - Held: Condonation must be sought as soon as a litigant has discovered his delay - The inordinate delay to apply for condonation not explained - Condonation refused.*

1. The 2<sup>nd</sup> respondent was employed by the applicant on the 1<sup>st</sup> November 2002. He was dismissed on the 17/01/05, following a disciplinary hearing at which he was found guilty of gross insubordination. 2<sup>nd</sup> respondent referred a dispute of unfair dismissal to the DDPR.
2. At arbitration only the 2<sup>nd</sup> respondent tendered evidence. His testimony was that he worked at Tyre department. On a Friday

- a date of which he did not disclose, he was asked by a Manager by the name of Smith to hand over the keys of his department to him. He averred that this was at around 5.20 pm, which is well after knock off time which is at 5.00 pm.
3. Applicant stated that he had remained behind because he was cleaning his work place, including his workshop overalls. After he had hung his clothes, he locked the place and went to deposit the key with the security department. It is then that he met Mr. Smith who he says worked in a department other than his own. He asked him to give him the keys.
  4. Applicant testified that he told Mr. Smith that he would not give him the keys after hours. He testified that he told him further that, if he needed the key he must go and sign for it at the security after he had handed it in. He testified further that Mr. Smith blocked his way and demanded the key. In the meantime a security officer emerged and Mr. Smith told him that 2<sup>nd</sup> respondent was refusing to give him the keys.
  5. 2<sup>nd</sup> respondent testified further that he informed the security officer that he was refusing to release the keys to Mr. Smith because he did not know what he was going to do at his office after hours. He stated further that he had a problem to release the keys because he was at that time being surcharged for the loss of property in his department after he had released the keys to someone after working hours.
  6. According to evidence of 2<sup>nd</sup> respondent, he urged Mr. Smith to go and sign for the keys at the security department. He testified that Mr. Smith understood and the security officer left. He then went to the security department and handed over the keys. The following Monday he was called to the office and served with a notification of disciplinary hearing.
  7. It is common cause that the disciplinary hearing was conducted and the 2<sup>nd</sup> respondent was found guilty and dismissed. The 2<sup>nd</sup> respondent referred a dispute of unfair dismissal to the DDPR. He testified that he was charged with refusing to obey instruction to hand over the keys to Mr. Smith. He furnished the

- explanation as herein before narrated. At the end of his testimony 2<sup>nd</sup> respondent was subjected to cross-examination by the representative of the applicant. At the close of the cross-examination of 2<sup>nd</sup> respondent, applicant's representative did not lead any evidence in rebuttal. Parties went straight into closing submissions.
8. On the 28<sup>th</sup> July 2005, the learned arbitrator handed down an award in which she found that the applicant had failed to establish the substantive fairness of the dismissal. The reason for this finding was that the applicant did not lead evidence to prove its version of the events and also failed to successfully discredit evidence tendered by the 2<sup>nd</sup> respondent. On the procedural side the arbitrator found that the dismissal was procedurally unfair because the charge was not clear and the notification of hearing which was 24 hours notice, was insufficient. The arbitrator ordered that the 2<sup>nd</sup> respondent be reinstated with effect from 22<sup>nd</sup> August 2005.
  9. On the 10<sup>th</sup> October 2005, applicant launched the present application for the review, correction and setting aside of the award of the learned arbitrator. This was approximately 42 days after the handing down of the award and it would appear also since the parties became aware of the award. It is common cause that section 228F(2) of the Labour Code (Amendment) Act 2000, requires that a party seeking a review of an award of the arbitrator should file the application for the review of the award with the Labour Court within 30 days of the party being aware of the award.
  10. The record of the arbitration proceedings was duly filed. The 2<sup>nd</sup> respondent filed his answering affidavit. Thereafter the matter became ripe for hearing. The matter was set down for hearing on the 26<sup>th</sup> September 2007. The matter came before my sister Khabo DP. At the start of the hearing Mr. Ramakhula for the 1<sup>st</sup> respondent raised a point in limine that the review had been filed outside the prescribed 30 days as such it ought to have been accompanied by a condonation application.

11. The learned Deputy President upheld the point and ordered counsel for the applicant to address her on condonation. Ms. Sephomolo for the applicant contended that she had been taken by surprise and asked for a postponement to enable her to prepare. The postponement was granted. The matter was scheduled for 30<sup>th</sup> October 2008. On that day Counsel appeared before Khabo DP in chambers and asked for a postponement as they were exploring an out of court settlement. Significantly however, no formal application for condonation had been filed yet.
12. On the 21<sup>st</sup> November 2008, the applicant purported to file an application for condonation. The Founding Affidavit was deposed to by Advocate Makeka who is an authorized legal representative of the applicant in this review application. He averred that from records of the DDPR it is apparent that the applicant received the award on the 10<sup>th</sup> August 2005. When it filed the review on the 10<sup>th</sup> October 2005, the applicant was 30 days late. It is questionable whether it is proper that the condonation is made by Mr. Makeka as counsel for the applicant. Since the respondent did not raise it we will take it no further.
13. The matter was scheduled for hearing on the 24<sup>th</sup> September 2009. The 2<sup>nd</sup> respondent came accompanied by a union official who purported to represent him. The court enquired what has happened to Mr. Ramakhula who in terms of the court record is still the legal representative of the 2<sup>nd</sup> respondent. It turned out that the 2<sup>nd</sup> respondent has lost contact with his lawyer and he did not know why he was not in attendance.
14. The court ruled that in the absence of formal withdrawal of Mr. Ramakhula, the union official could not be allowed to step in and purport to represent 2<sup>nd</sup> respondent. It was his duty (2<sup>nd</sup> respondent) to consult his lawyer and ensure that he was aware of the date of hearing of his case. The court permitted Mr. Macheli for the applicant to proceed with the condonation application in default of attendance by 2<sup>nd</sup> respondent's attorney.

15. Mr. Macheli contended that the delay was not inordinate and that there is reasonable explanation in as much as Advocate Makeka has deposed that both he and his assistant Ms. Sephomolo were indisposed. The affidavit of Mr. Makeka does not say when they were approached to review the award and when they returned from leave of absence due to ill health.
16. The court invited the 2<sup>nd</sup> respondent to respond to the condonation application. His response was short and to the point. He said he opposed the granting of the condonation because a lot of inconvenience and prejudice has been visited upon him by the delay in finalizing the matter. The court brought to the attention of Mr. Macheli that the applicant has taken more than a year to file the condonation after they were made aware that it was necessary to seek condonation. It took them another year to set the condonation down for hearing. The court enquired why the 2<sup>nd</sup> respondent should be prejudiced any further.
17. Mr. Macheli said they took a long time because they were negotiating a settlement. If that was so that reason would have been deposed to in an affidavit supporting the condonation. It is not so. The applicant has sought to explain only the period of delay between 10<sup>th</sup> August 2005 and 10<sup>th</sup> October 2005, when the review was filed. The further delay between 26<sup>th</sup> September 2007 when they became aware that a condonation application had to be made and 21<sup>st</sup> November 2008, was not explained.
18. The Labour Appeal Court decision in Phethang Mpota .v. Standard Lesotho Bank LAC/CIV/06/08 is particularly relevant to this case. At pp6-7 of the typed judgment Mosito A.J. referred with approval to the Botswana case of Attorney General .v. Manica Freight Services (Botswana) (Pty) Ltd [2005]1 BLR 35 (C.A) where the Court of Appeal said the following in respect of a condonation application:

*“It is of course, well established that in order to succeed in an application such as the present the applicant must, by way of affidavit set forth good and substantial reasons for the application, that is reasons why the appeal was not*

*timeously noted and also provide grounds of appeal which prima facie show good cause why the leave sought should be granted.....*

*Condonation of a breach of the rules of court is granted not as of right but as an indulgence. It is accordingly necessary for an applicant for such condonation to show not merely that he has strong prospects of success on appeal but to give good reasons why he should receive such indulgence, that is, that he acted expeditiously when he discovered his delay and advance an acceptable explanation for the delay....”*

At paragraph 12 of the judgment the learned Mosito A.J. referred to the Court of Appeal case of Commander of Lesotho Defence Force & Another .v. Sekoati C. of A (CIV) No.8/2007 where it was held that *“condonation should be sought as soon as non-compliance with a rule becomes apparent; a failure to do so could result in prejudice to a respondent.”*

19. From what we have said above, it is clear that the applicant’s delay of 30 days to file the review is not satisfactorily explained. Counsel’s attempt to make excuses for the applicant which at best ought to have been made in support of applicant’s case for condonation is just not convincing. As for the delay between the time applicants became aware of their default and the time they purportedly filed such an application, it is not explained at all. There can be no doubt that this delay coupled with a further one year before setting down the application has as the 2<sup>nd</sup> respondent has said caused him prejudice.
20. The 2<sup>nd</sup> respondent, as a successful party has interest in the finality of this litigation so that he can enjoy what the judgment has awarded him. This matter has taken far too long and the applicant has not shown that it has interest in it reaching finality. (See Mohlomi Seutloali .v. DPP C. of A (CR1) 14/06 and Nathanael Mokhotho .v. Learned Magistrate & 3 Others C. of A (CR1) 10A/08.). The delay is inordinate and it is not explained. For this reason it does not justify the grant of the indulgence sought. Accordingly, the condonation is refused and the award of the DDPR is confirmed.

THUS DONE AT MASERU THIS 4TH DAY OF NOVEMBER, 2009.

**L. A. LETHOBANE**  
**PRESIDENT**

**L. MOFELEHETSI**  
**MEMBER**

**I CONCUR**

**M. MAKHETHA**  
**MEMBER**

**I CONCUR**

**FOR APPLICANT:**  
**FOR RESPONDENT:**

**MR. MACHELI**  
**NO APPEARANCE**