

IN THE LABOUR COURT OF LESOTHO

LC/REV/113/07

HELD AT MASERU

IN THE MATTER BETWEEN

MONTY KHADI

APPLICANT

AND

TOTAL LESOTHO (PTY) LTD  
THE ARBITRATOR - N.T. NTAOTE

1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT

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## JUDGMENT

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*Date : 14/10/09*

*Application for condonation of late filing of review -  
Applicant gave deliberately false information of date of  
receipt of the award - Such calculated to mislead the  
court as such condonation cannot succeed - Condonation  
- Applicant must apply expeditiously after he discovers his  
delay to have it condoned - The delay must be explained  
and the explanation must cover the entire period of delay  
- Condonation refused and application dismissed with  
costs.*

1. This is an application for the condonation of the late filing of a review application. The applicant was employed by the 1<sup>st</sup> respondent as a salesman on the 10<sup>th</sup> April 1999. On the 1st April 2004 he was promoted to be Managing Director of the 1<sup>st</sup> respondent. On the 8<sup>th</sup> December he was summoned to a hearing where he was charged with gross dishonesty, breach of company code and/or purchasing code and none adherence to health, safety environment and quality standards and policies and procedures.

2. The applicant did not attend the hearing. He was tried in absentia, found guilty as charged and dismissed. He referred a dispute of unfair dismissal to the DDPR. The referral was arbitrated on the 20<sup>th</sup> July 2006 and the award was handed down on the 24<sup>th</sup> August 2006. The arbitrator found the dismissal of the applicant to have been procedurally and substantively fair. He also found the applicant to have acted frivolously in filing and prosecuting an otherwise useless claim. He awarded costs against the applicant and directed that he (applicant) should pay M10,000-00 to the 1<sup>st</sup> respondent for acting frivolously.
3. On the 13<sup>th</sup> October 2006, the applicant filed the application for review of the award of the DPR on a number of grounds. Section 228F(1)(a) of the Labour Code (Amendment) Act 2000 (the Act) provides that a party who seeks to review any arbitration award shall apply to the Labour Court for an order setting aside the award within 30 days of the date the award was served on the applicant.
4. The applicant was clearly life to this section, hence his averrements in paragraph 8 of the Founding Affidavit that, *“this award, though dated 24<sup>th</sup> August 2006 was only delivered to me on the 15<sup>th</sup> September 2006...”* This was clearly meant to show that as of the 13<sup>th</sup> October 2006, when he filed the review application applicant was still within the 30 days stipulated in section 228F(1)(a) of the Act.
5. On the 8<sup>th</sup> November 2006, the 1<sup>st</sup> respondent filed its notice of intention to oppose as well as an answering affidavit. The General Manager to whom the applicant was responsible, Mr. Cecil Mahloko is the one who deposed to the answering affidavit. He raised a point in limine that the review application has been filed outside the 30 days prescribed by the Act. He specifically disputed applicant’s averrements that he received the award on the 15/09/06. He attached annexure “TL1” which is a photocopy of DDPR register for awards and signatures of persons who collected the awards and the date thereof. The register showed that the award being sought to be reviewed was collected and signed for by the applicant himself on the 29<sup>th</sup>

August 2006. This meant that when the review was filed on the 13<sup>th</sup> October it was infact late by 15 days.

6. According to the court file, nothing was done thereafter until the 28<sup>th</sup> January 2008, when the applicant filed an application for the condonation of the late filing of the review application. This was some 2 years and 2 months after the applicant was alerted to his default. Applicant's explanation was that:

*"I must mention at this juncture that I had always thought that I obtained the award on the 15<sup>th</sup> September 2006, while infact it appears that I collected it on the 29<sup>th</sup> August 2006. I verily aver that there seems to have been a genuine mix up of dates."*

7. The 1<sup>st</sup> respondent swiftly opposed the application for condonation. The new Managing Director Mr. Thakabanna Nyokana deposed to an opposing affidavit in which he disputed that there was any mix up of dates. He averred under oath that *"the applicant was deliberately misleading this Honourable Court when he declared that he obtained the award on the 15<sup>th</sup> September 2006. This is why he even fails to inform the court what caused the mix up of the date."*
8. This court is inclined to agree with Mr. Nyokana's interpretation of the conduct of the applicant. All indications are that he lied under oath when he purported to have been served with the award on the 15<sup>th</sup> September 2006. The word he used is that the award was *"delivered"* to him. That statement is at variance with the hard fact discovered by the 1<sup>st</sup> respondent that the applicant personally collected the award from the DDPR and even signed for it. He cannot have forgotten in such a short time that the award was not delivered to him but he picked it himself. Could that also be explained as a mix up?
9. If that were to be so that would be a very lame excuse for giving what is a glaringly misleading information. Application's attempt to justify giving a false date of receipt is that there was a mix up. As Mr. Nyokana rightly pointed out applicant has not informed the court what factors could have led to the mix up. Even his

reply to Mr. Nyokana's answering affidavit still failed to plug that gap in his attempt to explain the discrepancy in the dates. These considerations have led us to draw an adverse inference that the applicant is not being truthful in his attempt to explain his delay. He is clearly hell bent to mislead the court about the exact date that he received the award. For this reason the court cannot come to his rescue.

10. There is a further reason why this condonation application cannot be granted. It is that the applicant took two years after he became aware of his default to apply for condonation. In Phethang Mpota .v. Standard Lesotho Bank LAC/CIV/A/06/08 (unreported) Mosito A.J referred with approval to the decision of the Botswana Court of Appeal in Attorney General .v. Manica Freight Services (Botswana) (Pty) Ltd [2005] 1 BLR 35, where it was held that:

*“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.”*

In a more recent decision, the Court of Appeal of Lesotho also confirmed the principle of expeditiousness in the case of Commander of Lesotho Defence Force & Another .v. Sekoati C. of A (CIV) No.8/2007 where it 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.”* (See also Lesotho Milling Co. (Pty) Ltd .v. DDP & Another LC/REV/423/06 (unreported)).

11. Not only has the applicant taken a long time to seek condonation after he became aware that he was late. He has also failed to furnish an explanation for the delay. He has sought to explain the delay between 29<sup>th</sup> August 2007 and 13<sup>th</sup> October 2007 which he ascribed to the mix up in the dates. He

has not explained the delay between the 7<sup>th</sup> November 2006, when they were made aware by the Answer of the 1<sup>st</sup> respondent that the review application was late, and the 28<sup>th</sup> January 2008 when the condonation was filed.

12. In the case of Phethang Mpota *supra* Mosito AJ held at page 9 paragraph 13 of the typed judgment that the explanation for the delay must cover the entire period in respect of which condonation is sought. The appellant's application for condonation was refused among others, for failing to explain why it took him three months after late noting of appeal to apply for condonation. This case is very similar, as such there is no reason why this court should not follow the ratio in the Phethang Mpota case. In the circumstances the condonation is refused and the application is dismissed, with costs as a mark of displeasure at the applicant's attempt to mislead the court by deliberately falsifying the date of receipt of the award.

THUS DONE AT MASERU THIS 18TH DAY OF NOVEMBER, 2009.

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

**M. MOSEHLE**  
**MEMBER**

**I CONCUR**

**L. MATELA**  
**MEMBER**

**I CONCUR**

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

**MR. SHALE**  
**MR. MACHELI**