

IN THE LABOUR COURT OF LESOTHO

LC/REV/45/09

HELD AT MASERU

IN THE MATTER BETWEEN

**DIRECTOR TEACHING
SERVICE DEPARTMENT
TEACHING SERVICE COMMISSION
SENQUNYANE SECONDARY SCHOOL
SENQUNYANE SECONDARY
SCHOOL BOARD
THE ATTORNEY GENERAL**

1ST APPLICANT

2ND APPLICANT

3RD APPLICANT

4TH APPLICANT

5TH APPLICANT

AND

**MAMOLETSANE MAKHAKHE
DIRECTORATE OF DISPUTES
PREVENTION AND RESOLUTION**

1ST RESPONDENT

2ND RESPONDENT

JUDGMENT

Date: 06/05/10

Review application ought to be filed within 30 days of the party knowing the award being sought to be reviewed -

Late filing of the review must be accompanied by a condonation application - A party seeking condonation must furnish satisfactory explanation for delay - In the absence of explanation a condonation cannot be granted - Review dismissed for being out of time.

1. This is a review application arising out of the dismissal of the 1st respondent from a teaching post at Senqunyane Secondary School (3rd respondent) on the 19th February 2007. She however only received communication of her dismissal in April 2007. She sought to have the

dispute amicably resolved but she was literally thrown from pillar to post.

2. The 1st respondent testified at the DDPR that she went to the TSD to seek their intervention, but she was referred to the Ministry of Education. The latter in turn referred her to the TSC advising her to plead with the TSC to reconsider her dismissal. The TSC declined and referred her back to the Ministry. At the time that she referred the case of unfair dismissal against the 3rd respondent she had since been reabsorbed into the teaching service and was stationed at Melikane Secondary School in Qacha's Nek.
3. The arbitrator heard evidence tendered on behalf of both sides. For the applicants evidence was adduced by the principal of the 3rd respondent Mr. Tente Lebelo. He testified that 1st respondent was charged and found guilty of absence from duty from 20th June 2005 to March 2006. He averred that when the school noticed that 1st respondent had disappeared without giving reason, the Deputy Chairman of the Board was sent to find out why she was not coming to work.
4. The 1st respondent is said to have told him that she feared for her life as she had learned that students were baying for her blood, following a student protest at the school. Mr. Lebelo testified that he was sent to go and allay 1st respondent's fears and assure her that the school would afford her protection. However, the 1st respondent insisted that her conscience did not allow her to go back. The matter was reported to the TSC which directed that 1st respondent be charged as aforesaid. She was duly charged but failed to show up at the hearing. She was found guilty as charged in default and dismissed.
5. For her part 1st respondent testified that she failed to report for work when the school reopened after winter holidays, because she was on sick leave which was going to end on the 20th June 2006. Whilst she was on sick leave, there were students protests at the school and she learned from a relative that the protests were against certain teachers and she was one of them. She stated that the other teachers were Manthethe Makhakhe and Kotiti Diholo. She was advised by the relative who briefed her of the situation not to come to school due to the students anger towards her.

6. As a result she did not report to work when her sick leave expired on the 20th June 2005. She apparently jointly with the other two teachers reported the situation to the TSC and requested that a meeting be arranged with the School Board. The TSC advised her to request the LEC Schools Educational Secretary to arrange such a meeting. She did as advised, but no meeting was arranged. In the meantime the School Board sought to get her to sign mutual termination of contract forms which she declined to do.
7. She was then charged as aforesaid and the hearing was scheduled for the 13th March 2006. It was however postponed to proceed on the 8th May 2006 at the school. She testified that she arrived at the venue of the hearing on the 8th May between 7.00 am and 8.00 am. There were however neither teachers nor children and the Adjudicator also failed to arrive. At 11.00 she and her witnesses resolved to board the bus back to Maseru.
8. Her testimony to this effect was not challenged. If anything the record of the proceedings which the arbitrator saw, that no hearing was held on the 8th May 2006. The record showed that the hearing proceeded on the 9th May 2006 at 2.45 pm with all three teachers absent.
9. The learned arbitrator found that there was procedural unfairness in as much as the 1st respondent was found guilty without defending herself. He found that the 1st respondent waited for the adjudicator for a long time and her decision to leave when he did not show up was reasonable. Substantively, he found that the 1st respondent “absence from school was not willful and deliberate, but was caused by relevant authorities’ failure or reluctance to resolve her grievances and fears.” He accordingly found that the dismissal was substantively and procedurally unfair. He ordered the applicants to compensate the 1st respondent by paying her 12 months’ salary amounting to M37,200-00. The award was dated 20th February 2009.
10. The award was not honoured and the 1st respondent approached this

court to enforce the award in terms of sec. 34 of the Code. On the 17th June 2009. It emerged from the enforcement application that the applicants had been served with the award on the 12th March 2009. Applicants were to appear before court on the 29th June 2009, but no one showed up. The summons was reissued on 6th July 2009 summoning applicants to appear before court on the 13th July 2009 to explain their failure to honour the award.

11. This time Mr. Moshoeshoe for the 1st, 2nd and 3rd respondent appeared before Khabo DP and asked for a postponement as he said they were unaware of the award. On the 27th July he appeared before the President and reported that they were going to apply for the review of the award. The review application was duly filed on the 21st July 2009.
12. Given the date when the DDPR says the respondent, not their legal representatives, were served with the award, the review application was filed four months and two weeks after the respondents became aware of the award. According to section 228(F)(1)(a) of the Labour Code (Amendment) Act 2000 (the Act) a review must be filed within 30 days of the date the award was served on the applicant.
13. The applicants were undoubtedly late in filing their application for review. They were therefore enjoined to accompany their application for review with a condonation application. This they sought to do, but failed to support the application with an affidavit explaining their delay and indicating if there are any prospects of success in the main application.
14. Counsel for the 1st respondent spotted this weakness and raised a point in limine that the applicants have failed to establish the grounds for condonation. Mr. Mokobocho for the applicants conceded that the applicants have failed to show cause why the condonation should be granted. The principles applicable for the grant of a condonation were pronounced in the case of *Melane .v. Santam Insurance Co. Ltd* 1962 (4) SA531 (A) at 532. It was stated that:

“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 compatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of the thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."

15. The principle laid in Melane's case supra has been followed in many cases and still remain a fundamental guide to the courts in deciding whether to grant a condonation. (see Solomon .v. Attorney General {1997} BLR 663 CA, Motlatsi Mosase .v. REX (2005-2006) LAC 206 at 208, National University of Lesotho .v. Motlatsi Thabane C of A (CIV) No.3 of 2008 (unreported). Phethang Mpota .v. Standard Lesotho Bank, LAC/CIV/06/2008 (unreported).
15. Primarily a party that presents a claim outside the statutorily stipulated time frame is enjoined to satisfactorily explain why there was a delay. (see Attorney General .v. Manica Freight Services (Botswana) Pty Ltd {2005} 1 BLR 35(C.A)) Lesotho Milling Co. (Pty) Ltd .v. DDPR & Another LC/REV/423/06 (unreported) and Phethang Mpota .v. Standard Lesotho Bank supra). As it was said in the Botswana case "condonation of a breach of the rules of court is granted not as a right but as an indulgence. It is accordingly necessary for an applicant for such condonation..... to give good reasons why he should receive such an indulgence."
16. Factors justifying granting of a condonation would be laid out in a supporting affidavit to the application for condonation. Since applicant did not file any supporting affidavit it follows that they

failed to explain their delay in presenting the review to court. In the absence of an explanation for the delay an applicant for condonation cannot get the indulgence he seeks. In the premises the court cannot afford applicant the indulgence to condone the late filing. Accordingly, the application for condonation is refused and the review application is dismissed for being out of time. By the same token the award of the DDPR in referral A065108 is confirmed.

THUS DONE AT MASERU THIS 9TH DAY OF SEPTEMBER, 2010.

L. A. LETHOBANE
PRESIDENT

L. MOFELEHETSI
MEMBER

I CONCUR

R. MOTHEPU
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

MR. MOKOBOCHO
MS. KHALANE