

IN THE LABOUR COURT OF LESOTHO

LAC/REV/65/03

LC/REV/114/06

HELD AT MASERU

IN THE MATTER BETWEEN

MICHAEL TSEHLANA

APPLICANT

AND

THE ARBITRATOR DDP
LOTI BRICK (PTY) LTD

1ST RESPONDENT

2ND RESPONDENT

JUDGMENT

Date:11/08/2010

Review of DDP award refusing to grant condonation of late filing of a referral – Arbitrator failing to consider explanation furnished by applicant and instead considered irrelevant factors which did not discredit applicant’s explanation – Representation – Applicant refused legal representation yet 2nd respondent was legally represented – Award reviewed and set aside – Late filing of referral condoned and matter remitted to DDP to proceed on the merits.

1. The applicant was employed by the 2nd respondent as Accounts Clerk from 1988 till the 6th March 2002, when he was dismissed for an alleged misconduct. Following his dismissal he approached his lawyer who advised him to lodge a case of unfair dismissal with the Labour Court. On the 13th August 2002 he duly filed an Originating Application out of the Registry of this Court challenging the fairness of his dismissal.
2. The 2nd respondent filed its Answering Affidavit in which it raised

a point in limine that the claim fell outside the jurisdiction of the Labour Court. The matter was set down for hearing for the 11th June 2003. On the date of hearing the learned Deputy President upheld the point in limine raised by the 1st respondent and confirmed that the Labour Court no longer had the jurisdiction to deal with disputes of right that arise out of dismissal for misconduct or incapacity. She advised the applicant to refer his dispute to the Directorate of Dispute Prevention and Resolution (DDPR).

3. On the same day applicant filed a referral with the DDPR and duly accompanied it with an application for the condonation of the late filing of the referral. His explanation was that he had delayed because the matter had been filed in the Labour Court which later turned out to be a wrong forum. The applicant was asked if the case before the Labour Court had been dismissed or withdrawn. He did not know.
4. Counsel for the 1st respondent did not dispute applicant's explanation that the delay was caused by the erroneous filing of the dispute in the Labour Court. He however, criticized applicant and his lawyer for failing to heed the warning raised in his Answering Affidavit that the dispute fell under the jurisdiction of the DDPR. He contended that applicant's lawyer failed to advise him properly.
5. The learned arbitrator dismissed the condonation application basing herself on the following factors:
 - (a) The DDPR was established in 2000.
 - (b) In 2002 when the cause of action arose the DDPR had already commenced operations.
 - (c) By March 2002, when the dispute arose applicant and his lawyer ought to have been aware of the existence of the institution i.e. DDPR.
 - (d) Respondent advised applicant in its answer that the dispute fell under the jurisdiction of the DDPR but applicant and his lawyer did not withdraw the application until when they were told by the court.
 - (e) Applicant's referral is late by 9 months and that degree of lateness is not acceptable.

6. Applicant applied for the review and setting aside of the award and prayed for an order remitting the matter to start de novo before a different arbitrator. His grounds for review were that:
 - i) Applicant was denied legal representation while the 2nd respondent was represented by an advocate.
 - ii) Learned arbitrator failed to apply her mind to the pertinent issue whether granting condonation in the matter would be in accordance with the interests of justice and whether such condonation could be prejudicial to the 2nd respondent.
 - iii) Learned arbitrator failed to appreciate that the function of the DDPR is to mete out substantial justice between the parties and not simply to adopt technical and legalistic approach to such disputes.
7. The review was set down for hearing on the 25th August 2009. It came before Khabo DP and it emerged that the 2nd respondent had not filed an Answer. Mr. Macheli applied for a postponement to enable him to file the Answer. Even though the application was strenuously opposed by Advocate Mohau KC, Khabo DP exercised the discretion in favour of granting the postponement because she felt the issues raised need to be properly addressed.
8. In their Answer the respondent did not, as one would expect apply for the condonation of the late filing of the Answer. Counsel for the applicant did not query this approach. We therefore do not take it any further. However, 2nd respondent raised a point in limine that the review has been filed out of time. It can be assumed that the point in limine is speculative because it did not allege when the applicant became aware of the award vis-à-vis the date on which he filed for the review.
9. Applicant filed a Replying Affidavit confessing that he cannot even explain how he came to file the review on the 15th October 2003, when the award had been handed down on the 12th

- August 2003. He however, sought to make a blanket application for condonation of the lateness which he could even verify. On the date of hearing Mr. Macheli for the 1st respondent indicated that he was withdrawing the point in limine concerning late filing and that he was not opposing applicant's application for condonation either. Accordingly, the condonation was granted unopposed.
10. The first ground of review is that the 2nd respondent was represented by a lawyer while applicant was denied representation by a lawyer. 2nd respondent's response to this point is two pronged. Firstly, deponent to the Answering Affidavit denied that the applicant was denied legal representation. She submitted that a request for legal representation was never made and no refusal was ever meted out. Secondly, she deposed that Mr. Kao who represented 2nd respondent "appeared in his capacity as Legal and Industrial Relations Officer of Association of Lesotho Employers (ALE)."
 11. In his Replying Affidavit applicant averred that he does not know deponent to the Answering Affidavit. He went on to say that she (deponent) was not at the DDPR on the day of the arbitration and that 2nd respondent was represented by the Managing Director and Mr. Kao who is an advocate of the courts of Lesotho. He averred that deponent cannot purport to testify to what took place at the arbitration when she was not there. He stated that for his part he was there as such he is "telling the court the truth of what happened when I say I was told that I could not be represented by a lawyer." (para 6).
 12. We are in full agreement with applicant that if Ms. Motseko was not in attendance at the arbitration, she cannot have personal knowledge of what transcribed during the proceedings except what she can gather from the records. Only Mr. Kao and Mr. Mthwalo who were present could depose to the facts of what took place. Alternatively, the learned arbitrator herself could have been requested to make an affidavit regarding what transpired. In the absence of affidavit from either of the three persons mentioned there is no basis for not believing applicant when he says he was denied legal representation.

13. Ms. Motseko deposed further that Mr. Kao was appearing at the arbitration as Legal and Industrial Relations Officer of ALE. The title that Mr. Kao is given at work cannot change the fact that he is a lawyer who is qualified to practice law in the courts of Lesotho. It follows from what we have said that there was an irregularity of inequality of arms in as much as one side was represented by a lawyer and the other was not. This is in direct conflict with section 228A (2) which says legal representation in proceedings before the DDPR is permitted if the parties agree or if the arbitrator exercise the discretion to allow legal representation.
14. Applicant contended further that the arbitrator failed to consider a pertinent question whether it would be in the interests of justice to grant the condonation and whether such condonation would prejudice the 2nd respondent. Indeed the learned arbitrator failed to apply her mind to the pleaded facts namely whether the delay if any was sufficiently explained. The applicant had filed his case with the Labour Court timeously. It seems to this court that it was reasonable explanation to say I delayed because I filed the case in a wrong court, but I had otherwise approached that forum timeously.
15. The learned arbitrator went on a tangent and considered criticism, which did not discredit the explanation proffered, namely that by the time the cause of action arose the DDPR had been in existence for a sufficiently long time for applicant and his lawyer to know about its existence. Applicant never said he filed the case with this court because he did not know about the existence of the DDPR. He said he was advised by his lawyer to take the case to the Labour Court.
16. In so advising applicant the lawyer was clearly wrong. As a general rule a litigant will not be punished for the wrong advise of his lawyer. At best a costs order will be made against him or other punitive action imposed. Denying them audi alteram partem like was the case in casu will seldom be invoked. We are in agreement with Advocate Mohau KC that the learned arbitrator did not apply her mind to the explanation for the delay

and indeed if she had she would have been inclined to condone the applicant's delay.

17. She accused applicant and his lawyer of failing to heed the advise of Counsel for the 2nd respondent when he raised a point in limine that the matter had been filed in a wrong court. She slated them for not withdrawing the matter once the respondent raised the preliminary point. Once again applicant and his lawyer may justifiably be criticized for their ineptitude in dealing with the matter but closing the doors of justice in their faces is not the answer.
18. Mr. Macheli for the 2nd respondent argued that if condonation is granted and the matter is remitted to proceed on the merits the 2nd respondent will be prejudiced because most of the officers who dealt with the case are no longer with the respondent. It is possible that witnesses have moved on, but applicant has not the slightest blame for this review to have taken the time it has taken to finalize.
19. Mr. Macheli contended that the prejudice is compounded by the fact that DDPR does not have the power to subpoena witnesses. Advocate Mohau KC doubted the validity of the submission and I share that doubt. In any event it is sheer speculation whether DDPR can subpoena witnesses or not. This is not the first case that is heard after some of the witnesses have moved on. It is the DDPR that knows how best to deal with such cases. We cannot make decisions for them, based on insufficient and unsubstantiated statements which are no more than a conjecture. Accordingly, the award of the DDPR that dismissed applicant's application for condonation is reviewed corrected and set aside. The late filing of the referral is condoned and the referral is remitted to the DDPR to proceed on the merits. There is no order as to costs.

THUS DONE AT MASERU THIS 12TH DAY OF OCTOBER, 2010.

L. A. LETHOBANE
PRESIDENT

J. M. TAU
MEMBER

I CONCUR

D. TWALA
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

MR. MOHAU KC
ADV. MACHELI