

IN THE LABOUR COURT OF LESOTHO

LC/REV/39/10

HELD IN MASERU

IN THE MATTER BETWEEN

LIEKETSENG MOHAPI MABATHOANA

APPLICANT

AND

DDPR

1ST RESPONDENT

M. KETA (ARBITRATOR)

2ND RESPONDENT

MASERU CITY COUNCIL

3RD RESPONDENT

JUDGMENT

Date: 13/10/2010

Condonation of late filing of a review - Principles governing the grant of condonation of late filing of a review considered - Explanation for the delay of 6 months not satisfactory - Prospects - applicant does not have prospects of success on the merits - Application dismissed with costs

1. The applicant referred a dispute of right to the 1st respondent claiming payment of acting allowance in accordance with a verbal instruction that she should assume responsibilities of the office of Senior Committee Officer following the transfer of the incumbent of the position to another section. Applicant says the verbal communication was later confirmed by letter written by the Principal Human Resources Officer dated 05/07/07.
2. The letter of the Principal Human Resources Officer was soon retracted by the Town Clerk by letter dated 2nd August 2007. The Town Clerk pointed out that the acting appointment contemplated in the letter of 5th July 2007, was erroneous and incapable of enforcement because, the position of Senior Committee Officer is

at grade LA4 as such appointment to it required authorisation of Local Government Service Commission. Secondly, he stated that acting appointments require occupants thereof to be capable of filling the position permanently if need arose. Given applicant's academic qualifications she did not qualify to hold the position substantively.

3. Applicant lodged a complaint with the office of the Ombudsman. The Town Clerk responded to the complaint and we assume satisfactorily, because the Ombudsman seems to have closed his file on the matter. Applicant referred the dispute to the 1st respondent. Applicant presented her evidence before the arbitrator to substantiate her claim. She was thereafter cross-examined at length by Mr. Phatsisi who represented the 3rd respondent. The thrust of his cross-examination was to establish that the Principal Human Resources Officer did not have the authority to write the letter purporting to appoint applicant to act in the position of Senior Committee Officer and that only the Town Clerk could author such a letter.
4. At the close of the cross-examination, the learned arbitrator sought to arrange a date for the next hearing as it was time to adjourn. The representative of the 3rd respondent was then going to start adducing evidence to rebut applicant's claim. The applicant rose and the following exchange ensued:

Applicant: May I please withdraw my case here?

Arbitrator: Pardon?

Applicant: Can I withdraw my case here at DDPR?

Arbitrator: Withdraw it?

Applicant: Yes please

Arbitrator: The whole case?

Applicant: Yes all of it

Arbitrator: Why if I might ask?

Applicant: I feel the procedures here required me to have had

legal background, and that I didn't have a representative I feel I have to go back to prepare.

Arbitrator: But you were given an opportunity to do so from the beginning

Applicant: Yes but my understanding was that this would be easy, for example I thought I can just hand every document necessary but when I became aware that I should it has become too late. So when you don't understand certain things, you miss major things.

Arbitrator: But you did have an opportunity 'Me Lieketseng when we started and you said you would proceed and I said if you feel you need a legal practitioner you could get it and you said you would proceed. At this stage I cannot allow you to withdraw the matter, but if you no longer want to prosecute your case it is fine, I will dispose of the case then you can see what you will do if you still want to pursue it legally.

Applicant: Okay, I want to withdraw it.”

5. On the same day i.e. 19/11/08, the learned arbitrator made an award in which he dismissed the referral on account of applicant's failure to prosecute it to finality. On the 29th June 2009, applicant applied for the review of the award of the learned arbitrator on the following grounds:
 - (a) The learned arbitrator acted irregularly in dismissing the referral on the ground that applicant said she was no longer willing to pursue the matter, something she never said.
 - (b) The learned arbitrator allowed 3rd respondent to have legal representation when applicant represented herself.
6. Since the review application was admittedly made after the lapse of 30 days after applicant became aware of the award,

the review application was accompanied by an application for condonation of late filing. The explanation furnished for the late filing was that the applicant became aware of the award in mid January. She averred that during the period she was undergoing treatment for major depression, which condition seriously affected her memory such that she barely remembers ever receiving the award. She averred further that the death of her brother in February 2009 exacerbated the condition. She attached a confirmation letter from Dr. Kolobe of Medicare Family Clinic in which he stated he has consulted Mrs. Mabathoana on three occasions between 27/08/07 and 28/05/09. He stated further that the patient complained about forgetfulness insomnia and anxiety which were diagnosed to be caused by depression.

7. The Town Clerk Mr. Lebamang Tlali filed an Opposing Affidavit in which he disputed the allegation that the applicant became aware of the award in mid January. He averred that he had perused the DDPR's register of service of awards and found out that applicant collected the award on the same date that it was issued. He averred that the applicant is deliberately misleading the court regarding when she became aware of the award.
8. He further disputed applicant's alleged ill-health and contended that the whole thing is a made up story calculated to cover up applicant's breach of the rules. He averred that applicant is still an employee of the 3rd respondent, just like he is. He averred that he is unaware of a medical certificate of a condition complained of by the applicant or even her complaint about the alleged condition. Applicant has been executing her job efficiently without any hassles the Town Clerk deposed.
9. Mr. Tlali deposed further that the applicant lacked prospects of success in as much as she is the one who voluntarily declined to prosecute her case before the 2nd respondent. Section 228F (b) empowers the court to condone the late filing of an application for review on good cause shown. As it was held in *Melane .v. Santam Insurance Co. Ltd* 1962 (4) SA 531 at 532;

“in deciding whether (good cause) has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon consideration of all the facts and in essence it is a matter of fairness to both sides. Among the facts usually relevant is 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 may tend to compensate for a long delay. And the respondent’s interest in finality must not be over looked.”

10. The applicant did nothing to deal with the 3rd respondent’s damaging attack on her attempt to explain her delay. She was berated as untruthful when she claims to have become aware of the award in mid January. She has not rebutted this disparaging attack on her excuse. This could justifiably be interpreted as an admission of her untruthfulness; more so because the arbitrator made it clear at the hearing that “(now that you) no longer want to prosecute your case it is fine, I will dispose of the case then you can see what you will do if you still want to pursue it legally.” (p.58 of the typed record). The award was issued the same day and the record reflects that she took her copy the same day. She has not denied this. It follows that applicant was not being candid when she said she became aware of the award in mid January.
11. Equally discredited is the explanation that applicant was so ill that she could not attend to review the award. If she was ill as she claims the first person to know would be deponent to the opposing affidavit as the Chief Executive of the 3rd respondent. As he says, he has never been made aware of applicant’s

alleged condition and goes further to say applicant has in any event been executing her duties efficiently. This has not been denied. In any event the letter of Dr. Kolobe shows that applicant already had the condition even prior to November when the arbitration was held. The letter merely says she was diagnosed to be suffering from depression, but does not brand it so serious as to affect her memory as she alleges. For these reasons the applicant's explanation for the delay is not satisfactory.

12. If applicant became aware of the award on the 19th November 2008, when it was handed down she ought to have filed her review latest by the 18th December 2008. She only filed the application on the 19th June 2009, exactly 6 months out of time. No doubt this length of delay is inordinate when regard is had to the fact that the review ought to have been filed within 30 days after applicant became aware of the award.
13. This review application is a typical case of an abuse of process. As the record clearly shows, the applicant of her free will decided she was no longer prosecuting the referral. However she turns around in a deposition under oath and said she never said so. As regards her 2nd ground of review, again the record exposes that the applicant herself turned down the opportunity to find a lawyer. Under Section 228A (2) (a) a party may be legally represented if the parties agree. According to the record applicant agreed to the arrangement whereby 3rd respondent was represented by its officer whilst she represented herself. It follows that the applicant does not have even the slightest prospect of success in this review application.
14. Even assuming the review were to proceed and result in the arbitration being reopened, the chances of applicant succeeding in her principal claim for acting allowance has no chance of succeeding. Admittedly her acting appointment was annulled by the Town Clerk's letter of 2nd August 2007, for the reasons therein stated. She cannot claim to be still acting. She conceded under cross-examination that letters such as that she

relies upon to found a claim for acting allowance can rightly only be written by the Town Clerk. This means the letter she is relying upon is *ipso facto* null and void. It follows that the issue being pursued is futile and merits no special sympathy.

15. Finally respondent's interest in having finality to this issue must be respected. The issue was explained in detail to applicant at work. She took it to the Ombudsman. It was explained and file closed. She took it to DDPR and after she realised the futility of her claim abandoned it. In a dramatic twist she took the same award on review before this court this time basing her case on complete lies. The condonation application cannot succeed. As a mark of displeasure at applicant's lies under oath the condonation application is dismissed with costs.

THUS DONE AT MASERU THIS 7TH DAY OF DECEMBER, 2010.

L. A. LETHOBANE
PRESIDENT

M. MAKHETHA

I AGREE

MEMBER

J. M. TAU

I AGREE

MEMBER

FOR APPLICANT:

MR. NTAOTE

FOR RESPONDENT:

MR. SHALE