IN THE LABOUR COURT OF LESOTHO **LC/REV/33/10**

HELD AT MASERU

In the matter between:

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY **APPLICANT**

and

ROSALIA PHOKOANE RAMOHOLI **1st RESPONDENT**
DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION **2nd RESPONDENT**

JUDGMENT

Date: 26/09/11

Application for review - On the basis that the Arbitrator misdirected himself by granting condonation in a matter filed way outside the period prescribed by statute - The test is whether the Arbitrator applied his mind to the case by weighing facts tabled before him against the legal principles regulating the grant of condonation - Court finds the Arbitrator to have exercised his discretion properly - Respondent ordered to pursue the matter on the merits at the DDPR if she so desires.

INTRODUCTION

1. This Court is called upon to review, correct and set aside the award of the Directorate of Dispute Prevention and Resolution (DDPR) in Referral No.0683/09 on the basis that it was fraught with procedural irregularities. The crux of the review application is that the learned Arbitrator misdirected himself by granting condonation in a matter which was lodged seven (7) years after the dispute had arisen, a delay he considered excessive and unreasonably out of time. He based his contention on the following factors;

(a) That a delay of seven (7) years was inordinate, a factor which the learned Arbitrator even acknowledged in his award;

(b) That the explanation that 1st respondent's delay was actuated by the exhaustion of local remedies was not justifiable; and further

(c) That the learned Arbitrator disregarded the element of prejudice that the applicant would suffer as a result of granting condonation in a matter that was so unreasonably delayed.

2. The circumstances leading to this dispute are briefly that the 1st respondent was substantively engaged as a Principal Community Participation Officer, Field Operations on 2nd March, 2000. She was, however, subsequently appointed Acting Deputy Manager, Mohale Operations Branch, on 12th June, 2000 an appointment which was terminated in July, 2002. The crux of her dispute which culminated in a case before the DDPR was that she was not given an acting allowance for the duration of the said acting position.

3. It is common cause that the 1st respondent wrote to the Chief Executive Officer (CEO) of the Lesotho Highlands Development Authority (LHDA) on 8th August, 2002 communicating her grievance regarding the purported non-payment of her acting allowance for the period June, 2000 to July, 2002. The Chief Executive responded by his letter dated 20th September, 2002 in which he brought to the 1st respondent's attention that LHDA had introduced a new remuneration strategy which changed the erstwhile policy regarding acting allowances. He further indicated in the said letter that the policy had been adopted in April, 1999 but only came into effect on 1st September, 2002 having only been approved by the Lesotho Highlands Water Commission (LHWC) on 28th August, 2002 and applied retroactively from 1st April, 2002. It was pursuant to this policy that the CEO decided that the 1st respondent was only entitled to an acting allowance from 1st April, 2002 to 31st July, 2002, effectively four months. Dissatisfied with his decision, the 1st respondent approached the DDPR claiming payment for the remaining twenty-one (21) months from the commencement of her acting appointment in June, 2000 to July, 2002 when the acting appointment was terminated.

4. The applicant disputed the claim contending that the 1st respondent is only entitled to an allowance covering four months from 1st April, 2002 when the policy was effected not for any period prior thereto. Applicant's Counsel argued that the

amendment to the remuneration strategy was introduced in April, 1999 long before the 1st respondent could lodge her grievance with the LHDA CEO. He argued further that the latter made it clear in August, 2009 in their conversation with the 1st respondent that he would no longer entertain the matter. This essentially meant that the matter was closed.

5. There seems to be a dispute on whether the acting appointment was more senior than 1st respondent's substantive position with 1st respondent claiming that the position she acted in was more senior than her substantive one, when the applicant on the other hand claimed that it was junior. She also testified before the DDPR that applicant's Personnel Regulations, 1999, provided that when an employee acts in a senior position he/she gets the difference between her position and the one he/she is acting in and conversely that if the acting position is lower than the incumbent's substantive position, the employee will get payment equivalent to three (3) notches up her substantive position.

6. At the outset of the proceedings applicant's Counsel, Advocate Ntaitsane raised a point ***in limine*** in which he implored the Court to regard 1st respondent's answer as non-existent by virtue of it having been filed outside the time prescribed by the rules of this Court. He prayed that the matter proceed unopposed.

THE POINT IN LIMINE

7. As a starting point, it is worth mentioning that Labour Law regime in Lesotho has been subjected to a number of changes. Reviews of DDPR awards had from its establishment in 2000 been handled by the Labour Appeal Court, but in 2006 this power was transferred to the Labour Court. With this came an amendment to the Labour Code Order and its accompanying Rules. Rule 16 and 17 of the of the Labour Appeal Court Rules, 2002 were incorporated into the Labour Court Rules, 1994 through Legal Notice No. 173 of 2006 (Labour Court (Amendment) Rules, 2006). Rule 17 (6) of the said Rules provides that;

> ***Any person wishing to oppose the application to review shall within 14 days of receipt of a notice referred to in sub-rule (2) (application for review) deliver an affidavit in answer to the allegations made by the applicant.***

It is common cause that the applicant filed an application for review on 28th May, 2010, and the 1st respondent only filed an intention to oppose on 14th September, 2010, and the answer on 22nd March 2011, ten (10) months after the institution of

review proceedings. Applicant's Counsel drew to the Court's attention that the notice of set-down he served on the 1st respondent on 11th November, 2011 was accompanied by an affidavit of the Acting CEO in which he indicated that the 1st respondent had been barred from filing any documents by virtue of having failed to file pleadings within the statutory time limits. Applicant's Counsel further submitted that the record of proceedings was served on time by the applicant on 23rd June, 2011.Considering the totality of all these factors he felt that 1st respondent's answer should not be allowed to form part of the pleadings.

8. In reaction, Advocate Lerotholi for the 1st respondent acceded to having failed to file an answer within the prescribed time-limit. He however pointed out that the 1st respondent only approached the Labour Commissioner's office to have her grievance against the applicant addressed on 28th June, 2010. He further pointed out that he was hampered by the administrative process in reacting to applicant's papers on time. He pointed out that the dispute does not come directly to his Department viz., Legal Section but is received by the Labour Commissioner's office which in turn refers it to the Chief Legal Officer of the Ministry, and it is only then that it can be referred to his Section where they would have to ascertain whether a case is worth pursuing or not. He further pointed out that in their Notice of Intention to Oppose, they had stated that they would only file answering papers as and when the record of proceedings had been availed to them. He cited as further reason for the delay that the 1st respondent was pursuing local remedies, and he prayed in turn that the Court take their answer as valid.

9. There is therefore no question that the 1st respondent failed to file her answering affidavit within the prescribed fourteen (14) days, thereby violating Rule 17 (6) of the Labour Appeal Court Rules, 2002. Clearly, this matter was handled in a very shoddy manner from the applicant herself delaying to approach the Labour Department and his legal Counsel at the Labour Department failing to file papers on time. With all said and done, we feel inclined to condone this non-compliance with the Rules of this Court. We feel that in the interests of justice, and because of the uniqueness of the case, the Court should pronounce itself on its merits which as fate would have it also impinges on a delay. We are persuaded in this regard by Rule 27 (2) of the Labour Court Rules, 1994 which empowers this Court to condone any non-compliance with its Rules. Each case of course depends on its merits. The said Rule provides that:

> ***Notwithstanding anything contained in these Rules, the Court may in its discretion, in the interests of justice, upon written application,***

or oral application at any hearing, or of its own motion, condone failure to observe the provisions of these Rules.

10. By suggesting that the Court ignore 1st respondent's answer, applicant's Counsel is asking this Court to consider the answer as invalid and of no force or effect. Rule 27 (1) of the Labour Court Rules 1994, provides that;

Failure to comply with any requirements of these Rules shall not invalidate any proceedings unless the Court otherwise directs.

The point raised by the applicant that the matter proceed unopposed is therefore dismissed, and the Court shall proceed to determine the merits of the case. The relief that was open to the applicant when the 1st respondent failed to answer within the prescribed time was to have applied for judgment by default in terms of Rule 14 of the Labour Court Rules, 1994 instead of purporting to bar the 1st respondent from answering.

THE REVIEW APPLICATION

11. This matter appears to have been plagued by delays from its inception. It is common cause that 1st respondent's claim was referred to the DDPR on 7th September, 2009. Applicant's Counsel contended that the cause of action arose on 8th August, 2002 when the 1st respondent first lodged her grievance with the LHDA CEO. This was not disputed. It appears that the 1st respondent also acknowledged that her claim had prescribed, much as she doesn't say when the cause of action arose. Hence, she accompanied her referral to the DDPR with a condonation application for the late filing thereof, which was granted. In terms of Section 227 (1) (b) of the Labour Code (Amendment) Act, 2000, the matter ought to have been referred within three (3) years. The matter was therefore without question delayed.

12. Section 227 (1) (b) of the Labour Code (Amendment) Act 2000 provides that:

(1) Any party to a dispute of right may, in writing, refer that dispute to the Directorate -

(a) if the dispute concerns an unfair dismissal, within 6 months of the date of the dismissal;

(b) in respect of all other disputes, within 3 years of the dispute arising.

It goes further to provide in Subsection (2) that;

(2) Notwithstanding subsection (1), the Director may, on application, condone a late referral on good cause shown.

13. The gist of the review application is that the 1st respondent brought her claim way beyond the statutory three year limit, and applicant's Counsel felt the DDPR should not have entertained it under any circumstances. He therefore sought the review and setting aside of the award on the basis that the learned Arbitrator misdirected himself in granting condonation in a claim that was inordinately late.

14. In explaining her delay in instituting proceedings before the DDPR, the 1st respondent submitted that she had been attempting to have the matter settled amicably by exhausting local remedies. It was not disputable that in 2007, she also sought the intervention of the office of the Ombudsman.

15. Applicant's Counsel submitted that whilst he appreciates that the learned Arbitrator has a discretion in terms of Section 227 (1) (b) of the Labour Code (Amendment) Act, 2000 (quoted above) to condone the late filing of a referral ***"on good cause shown"*** he feels that he has failed to exercise such a discretion judicially. He contended that he ought to have considered all of the following factors;

- When the dispute arose;
- The degree of lateness;
- The reasons for lateness;
- The prospects of success; and
- The prejudice to be suffered should condonation be granted.

These are of course the standard considerations in a condonation application.

According to him, the learned Arbitrator seem to have placed too much emphasis on the reasoning behind the delay only without considering all the other factors. He submitted that the learned Arbitrator treated the degree of lateness lightly and ought to have dismissed the claim on this aspect alone. As far as he was concerned this was a mistake of law which materially affected his decision. He pointed out that the cause of action arose on 8th August, 2002 when the 1st respondent lodged her grievance with the LHDA CEO. She lodged her proceedings with the DDPR

on 7th September, 2009, a difference of seven years and close to one month. Although the learned Arbitrator acknowledged that the delay was inordinate, he condoned it on the basis that the 1st respondent had prospects of success.

16. In substantiating his point that this was a condonation that could not be condoned, he cited this Court's judgments in ***Lesotho Wholesalers & Caterers Workers' Union and 33 Others v Metcash Lesotho Limited & Another LC 44/99*** (Saflii) and ***Khotso Sonopo & Lesotho Telecommunication Corporation LC 67/95*** (Saflii). In the former case the Court considered a delay of four (4) months and eight (8) days and in the latter of seven (7) months to be inexcusable. He concluded that he found the matter reviewable in terms of Subsection (3) of Section 228 F of the Labour Code (Amendment) Act, 2000 (as amended by the Labour Code (Amendment Act 2006).The question for determination by this Court is whether or not the DDPR was correct in granting condonation to the 1st respondent in the circumstances of this case. Undoubtedly, the degree of lateness is serious. We however find it advisable at this juncture to pause and ponder whether this matter is reviewable.

IS THIS MATTER REVIEWABLE?

17. Section 228F (3) of the Labour Code (Amendment) Act, 2000 as amended by the Labour Code (Amendment) Act, 2006 sets out grounds for review and provides that;

> ***The Labour Court may set aside an award on any grounds permissible in law and any mistake of law that materially affects the decision.***

With "***grounds permissible in law***" the law anticipates the normal common law grounds for judicial review. It is trite law that decisions shall ***"fall within the purview of judicial review and be set aside, where they are found to be patently arbitrary or capricious, objectively irrational, or actuated by bias or malice, or by other ulterior or improper motive"*** - See ***Basson v Provincial Commissioner (Eastern Cape) Department of Correctional Services (2003) 24 ILJ, 803 (LC)***. As it is, the applicant is challenging the rationality/reasonableness of the learned Arbitrator's decision in condoning the institution of an action after a delay of seven years. The learned Arbitrator's decision to condone or not to condone a delay in the filing of a case, as anticipated by Section 227(2) of the Labour Code (Amendment) Act, 2000 is discretionary, to be exercised judicially of course. So the question of whether or not the learned Arbitrator was correct in condoning the

late referral would depend on whether or not he exercised his discretion properly. If so, this Court will not have no reason to interfere.

18. The grounds for review have been a subject of a host of authorities. In ***Johannesburg Stock Exchange and Another v Witwatersrand Nigel and Another 1988 (3) SA 132(A)*** at 152 A-E the Court held that in order to establish review grounds it may have to be shown that the Tribunal failed to apply its mind to the relevant issues in accordance with the ***"behests of the statute and the tenets of natural justice"***. Such failure may be shown by proof, "***inter alia, that the decision was arrived at arbitrarily or capriciously or malafide or as a result of unwanted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the tribunal misconceived the nature of the discretion conferred upon it or took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated" - See National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd 1972 (3) SA 726 (A) at 735F-G, Northwest Townships (Pty) Ltd v The Administrator, Transvaal and Another 1975 (4)SA 1(T) at 8D-G.***

These were cited with approval in the Labour Appeal Court case of ***Lesotho Electricity Corporation v Ramoqopo and Others LAC/REV/121/05 [2006]*** reported in ***www.saflii.org/ls/cases***.

19. In distinguishing review from appeal, the Court in ***Coetzee v Lebea NO and Another (1999) 20 ILJ, 129 (LC)*** Cheadle AJ (as he then was) concluded at p.130 that;

> ***The seeds of the distinction between the two remedies lie in the phrase so commonly used to describe a process failure in the reasoning phase of a tribunal's proceedings -'the failure to apply one's mind'. That test is different from the one that applies to an appeal, namely, whether another Court could come to a different conclusion. Accordingly, once a reviewing Court is satisfied that the tribunal has applied its mind, it will not interfere with the result even if it would have come to a different conclusion. The best way of applying one's mind is whether the outcome can be sustained by the facts found and the law applied.***

Judicial review is a very restrictive remedy as opposed to appeal.

20. Having made this analysis, we now proceed to determine whether the learned Arbitrator can be said to have applied his mind to the issue that was before him, which was an application for condonation. Looking at the record of proceedings before the DDPR which was barely a page, the 1st respondent put her case that she delayed lodging the proceedings as she was attempting to solve the matter amicably. She indicated in the record that;

> ***l have constantly been trying to communicate this with respondent*** (applicant herein) ***since 2002.In August 2009 l was told that the CEO will not entertain my matter.***

As aforementioned, there was a dispute regarding the question of whether the position the 1st respondent was acting in was senior to her substantive one. Her version is that the position was senior, hence she claimed the difference in wages, whilst the applicant submitted, on the other hand, that it was actually junior. In response to the 1st respondent's averments before the DDPR, applicant's Counsel had implored the DDPR to refuse to grant condonation on the basis that the delay was inordinate and that the explanation thereof was not compelling.

21. In his award, the learned Arbitrator spelled out the ingredients for a successful condonation application as set out in the leading case on the subject ***viz Melane v Santam Insurance Co., Ltd 1962(4) SA 531***at ***532***. Holmes JA., stated therein that;

> ***In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon consideration of all the facts. Among the facts usually relevant are the degree of lateness, the explanation thereof, the prospects of success and the importance of the case…If there are no prospects of success there would be no point in granting the condonation.***

In his evaluation of the case that was before him, the learned Arbitrator conceded that the referral was inordinately late, but found that there were prospects of success because there was no explanation why the 1st respondent had been offered acting allowance for four months when the Company argued that she was not entitled thereto. He contended that the 1st respondent be afforded an opportunity to present her case on the merits. He relied further on Holmes JA's remarks that;

> ***…what is needed is an objective conspectus of the facts. Thus a slight delay a and a good explanation may compensate for the 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.

22. On analysis, we are satisfied that the learned Arbitrator applied his mind to the case, and the manner in which he exercised his discretion cannot be challenged. We feel he gave a fair consideration to the matter which had been submitted to him for decision. Whether he was right or wrong in the Court's view, it is not for us to interfere. In reaching this decision we further took inspiration from the case of ***Shidiack v Union Government (Minister of the Interior) 1912 AD, 642, at 651-2*** in which the Court held in respect of the person who exercises a discretion that;

> ***if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of law either to make him change his mind or to substitute its conclusion for his own …There are circumstances in which interference would be possible and right. If for instance such an officer had acted mala fide or from ulterior or improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute – in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of a discretion, even if it considered the decision inequitable or wrong.***

The case was cited with approval in ***Pharmaceutical Manufacturers Association of SA and Others: in re: Ex parte Application of the President of the RSA and Others 2000 (3) BCLR 241(CC).***

23. It is our considered opinion that applicant's Counsel mainly challenged the degree of lateness and the reasoning thereof but did not challenge the prospects. Without risking dwelling on the merits, he ought to have shown that the 1st respondent did not have a case on the merits. He did not address the DDPR on these salient points ***viz.,*** whether indeed the position the 1st respondent occupied was senior to her substantive one; whether she was entitled to her claim or not; and what the LHDA policy was prior to the new dispensation. He seemed to have concentrated on the time lapse. In terms of Melane ***(supra)*** all the principles regulating the grant of condonation ***"are interrelated; they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation…what is needed is an objective conspectus of***

all the facts." The various factors for consideration must be put on a scale and weighed against one another.

On the above premise, the review application is dismissed, and the 1st respondent is at liberty to pursue her claim on the merits before the DDPR.

There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 26th DAY OF SEPTEMBER, 2011.

F.M. KHABO
DEPUTY PRESIDENT

L. MOFELEHETSI **I CONCUR**
MEMBER

R.MOTHEPU **I CONCUR**
MEMBER

FOR THE APPLICANT: ***Adv.,T. Ntaitsane***
FOR THE RESPONDENT: ***Adv., T. Lerotholi on behalf of the Labour Commissioner.***