

IN THE LABOUR COURT OF LESOTHO LC/41/09

HELD AT MASERU

IN THE MATTER BETWEEN

LABOUR COMMISSIONER OBO JOHN MOLELEKI SECHABA MOKHU MOTSOANE NKOTSI LEBOHANG SEBOTSA LEETO MOYEYE MOTLATSI RAMATABOEE MOKETE KHASAKE	APPLICANT
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AND

LESOTHO STEEL PRODUCTS (PTY) LTD THE MANAGING DIRECTOR	1 ST RESPONDENT 2 ND RESPONDENT
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JUDGMENT

Date: 08/07/10

Ruling read in court but full reasons reserved.

Condonation – Explanation for the delay must cover the entire period of the delay – The applicant is the one who must depose to the affidavit explaining the delay – Prospects – if a Labour Officer has not carried out investigations, it is impossible to assess whether the Labour Commissioner has brought a case worth going into battle for – The versions of the respective sides being diametrically opposed, applicant can't be said to have prospects in the absence of report of investigations – Condonation refused.

1. This is a case that exposes public officers downright failure to do their work properly, thereby prejudicing what could possibly be a legitimate claim of the employee(s) they are supposed to represent. The complainants herein are former employees of the respondents. They have been dismissed in circumstances, which if everybody did their work as they should, the ultimate loss of jobs which resulted could have been averted.
2. Complainants are part of a group of workers whom the respondents transferred to their operations in the mountains at Letseng Diamond mine on the 8th January 2009. On the 16th January 2009, the group approached the side Manager Mr. Fako demanding to be paid mountain allowance. The Site Manager conveyed their demand to the Managing Director, who responded that he would not be able to meet their demands and offered to return anyone who felt strongly about the payment of the allowance back to Maseru, where they had just been transferred from.
3. The response of the Managing director was communicated to the 1st and 2nd complainant who had represented the rest of the workers at the meeting with MD on the 20th January 2009. The two complainants were to go back to their colleagues to report, which is what they did. After reporting to the workforce, there was a work stoppage. A supervisor, one Mr. Mokhula was instructed by the MD to tell the workers to go on with their work. The employees responded that they would only resume work if their representatives 1st and 2nd complainants were reinstated.
4. Mr. Mokhula sought to explain to them that the two employees had not been dismissed, but the employees were not convinced. The Site Manager went to speak to the workers. He talked to them one by one, with a view to convince them that the two colleagues were not dismissed. Other employees understood and resumed their work, except the seven who are complainants herein.
5. The respondent then told them that they would be transferred back to Maseru, where they came from. A taxi was hired which ferried them back to Maseru where they had to report at the offices of the 1st respondent. For their part the complainants allege that on the 20th

- January they were told that they were dismissed, without any reasons being advised. They say that when they arrived in Maseru they reported at 1st respondent's office to collect their terminal benefits.
6. They allege that the Human Resources Manager told them to come back on the 23rd January to collect their benefits. They allege further that to their surprise on the 23rd, they were served with notifications of hearing which they refused to accept and instead demanded that they be paid their terminal benefits. From the office of the 1st respondent they went to the Labour Office which referred them to the DDPR to lodge a claim of unfair dismissal.
 7. This is where a failure to do the right thing occurred. If the Labour Office had sought to enquire from their employer, as they are in law entitled to do, what the problem was, they would have found that at that point in time no dismissal had occurred. Their timely intervention would have possibly saved the complainants from the final decision to dismiss them which was only carried out two days later on the 29th January 2009.
 8. Complainants referred what they termed a curt unfair dismissal claim accompanied with no reason to the DDPR. The respondent's answer revealed that there was in fact an unlawful strike at respondent's Letseng site on the 20th January 2009. Accordingly, the DDPR declined jurisdiction and referred the dispute to this court for adjudication on the 28th April 2009. The case was only filed with this court per DDPR's certificate on the 29th October 2009.
 9. Since this was some 9 months following the dismissal of the complainants, a condonation application had to admittedly accompany the main application. Mr. 'Nono who represented the applicant did not make a proper application for condonation. He only included a prayer of condonation in the Originating Application. Neither did he obtain an affidavit of the applicant or officers falling under her to explain why the case delayed to be referred to court.
 10. Mr. Lebone for the respondents picked these weaknesses and objected to the grant of the condonation. The hearing was scheduled for the 23rd March 2010. The court ruled that there was no proper application for condonation, but gave Mr. 'Nono the second chance to make a

proper application. The court further advised Mr. ‘Nono to take advantage of the opportunity to go back and redo the application to ensure that the Labour Officers carry out investigations which they had thus far not done, as the reports of the investigation would show if the Labour commissioner has prospects of success.

11. The matter was heard again on the 8th July 2010. It turned out that Mr. ‘Nono had included two more claims which never formed part of the issues that the DDPR conciliated. These were a claim of discrimination and underpayments. The affidavit supporting the application for condonation had been deposed to by Mr. Moleleki complainant No.1. Mr. Lebone for the respondent contended that the person who should have properly deposed to the affidavit supporting condonation ought to have been an officer of the applicant. He averred that Mr. Moleleki’s depositions are hearsay.
12. With regard to prospects he contended that in the absence of investigations which he said would have established that complainants were not dismissed as alleged; there are no prospects of success. He contended further that the alleged under payments are not part of the issues that the DDPR referred to this court. He submitted that there is nothing that prevented applicant from referring the dispute of alleged wrong calculation of wages independently to the DDPR, where such claim could possibly be quickly resolved through conciliation. At the close of the arguments the court made a ruling dismissing the application. This is what the court said.
13. This court has considered applicant’s application for condonation of the late filing of the application for review. The length of delay from the date that the DDPR issued the certificate declining the jurisdiction to entertain the matter is 6 months. Mr. ‘Nono for the applicant sought to argue that the delay is not unreasonable. The point is that the time is calculated from the date of dismissal which according to the respondent was 27/01/2009. According to the applicants they were dismissed on the 20/01/2009, however the uncontested depositions of the respondent show that this is not correct.
14. The explanation furnished for the delay must cover the entire period of delay. (see *Mpota .v. Standard Lesotho Bank LAC/CIV/A/06/08*). In casu the period between 27th January 2009 and 28th April 2009 is

self explanatory. During that time the matter was pending before the DDP. Applicant is enjoined to explain the delay between May 2009 and October 2009. Since the applicant in this matter is the Labour commissioner, she is the one, or officers under her who should explain the delay. The complainants on behalf of whom the office is suing can at best only file supporting affidavits.

15. Contrary to what should happen, the complainants are the ones who have filed the founding affidavit purporting to explain the delay. They went no further than to say that after the certificate referring the matter to this court was issued they learned that the matter would be referred to the legal section, by the Labour Commissioner. They averred that they rightly in our view followed up with the legal section where they found that their file had not yet been received. They however, did not establish why the file had not yet been transferred to legal section. It follows that they do not know why the file delayed to be referred to legal section.
16. Mr. ‘Nono argued that it delayed due to internal procedures. This may well be so, but there is no affidavit from the Labour commissioner or one of her juniors dealing with the matter or Mr. ‘Nono himself for that matter confirming this. His (Mr. ‘Nono’s) statement to this effect amount to giving evidence from the bar. It follows that there is no justifiable explanation for the delay between 28th April and 30th October when the matter was finally filed in this court.
17. Once the delay is not satisfactorily explained, that should be the end and a condonation application ought not to succeed. However, we may just observe that there is yet another reason why this application for condonation should not succeed. That is that *ex facie* the papers filed of record, there are no prospects of success.
18. This is the Labour commissioner’s application. The prospects of success should be gleaned from reports of investigations which the Labour commissioner through her subordinates (Labour Officers/Inspectors) would have mounted which would show the conduct of each side to the dispute and why it is felt that one side has to be whipped into line by instituting legal proceedings against it.

19. There is no report that shows that the Labour commissioner has a strong case worth going into battle for. It is only the word of the complainants which has not been verified which the officers are relying upon. That completely weakens the case of the applicant. For these reasons the application for condonation of the late filing of the claim for unfair dismissal was refused. The claims of alleged underpayments and discrimination were referred back to the DDPR for conciliation and possible arbitration should conciliation fail.

THUS DONE AT MASERU THIS 3RD DAY OF MARCH 2011

L. A. LETHOBANE
PRESIDENT

J. M. TAU
MEMBER

I CONCUR

D. TWALA
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENTS:

MR. 'NONO
MR. LEBONE