

**IN THE LABOUR COURT OF LESOTHO      LC/REV/14/10**

**HELD AT MASERU**

**IN THE MATTER BETWEEN**

**LEBOHANG SOLOMON THAMAE                      APPLICANT**

**AND**

**WATER & SEWARAGE AUTHORITY              RESPONDENT**

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## **JUDGMENT**

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*Date:09/11/2010*

*Review – section 228F(a) requires application for review to be made within 30 days of the date of receipt of the award by applicant – Applicant filing review one year and five months after becoming aware of the award – Condonation – Applicant failing to accompany late review with application for condonation – Counsel seeking to explain delay in his submissions – Explanation must be furnished on sworn affidavit – The court could grant applicant indulgence to make belated condonation application but such indulgence would be a futile exercise as applicant has no prospects of success – Application dismissed.*

1. The applicant herein was admittedly employed by the respondent on the 1<sup>st</sup> November 2004. He was employed as a labourer responsible for fixing pipes, digging trenches, materials gathering and filing. He was responsible to Mr. Putsoane who in turn was responsible to the Manager for Water Production Mr. Mohapi Jessie.
2. On or around 12<sup>th</sup> September 2007 applicant appeared before a disciplinary enquiry charged with insubordination and habitual

- absenteeism. Evidence was led showing that applicant came late to work without bothering to furnish explanation for his lateness. At work he would just sit down and not do the work. Putsoane called the Manager Mr. Jessie on at least two occasions to come and witness the behaviour of applicant, who would be sitting down during working hours while others are doing the work.
3. He was further accused of refusing to take his supervisor's instructions. Evidence showed that he would leave work before knock off, without seeking the permission of his supervisor. Mr. Putsoane testified that he spoke to the applicant several times seeking to get him to change his behaviour. Putsoane said applicant told him that he was conducting himself in the manner he was, because he was busy fixing his issues with an unnamed Minister.
  4. Mr. Jessie admits that applicant complained to him that he felt he should be treated and remunerated as a plumber and not as a labourer. Jessie says he told him that the procedure required that there should exist a vacancy which will be advertised. After closure of applications a shortlist is made and thereafter shortlisted candidates are called for interview. Applicant still did not heed the explanations and continued to misconduct himself. He called him privately to get him to change his behaviour, but he still did not listen. He wrote him letters of reprimand but he defiantly responded that he would seek assistance from other supervisors.
  5. As applicant continued to absent himself despite reprimands, Mr. Putsoane recommended that disciplinary action be taken. He was charged as aforesaid, found guilty and dismissed. The date of hearing was admittedly 12<sup>th</sup> September 2007. He was dismissed on the 10<sup>th</sup> October 2007, even though the letter wrongly cited the date as 7<sup>th</sup> September 2007, a date earlier than the admitted date of hearing.
  6. Applicant referred a dispute of unfair dismissal to the DDPR which was concluded on the 6<sup>th</sup> October 2008. The award which confirmed the dismissal as procedurally and substantively fair was handed down on the 9<sup>th</sup> October 2008. Applicant applied for the review of that award on the 17<sup>th</sup> March 2010, some one year and five months after the handing down of the Award. In his Founding Affidavit applicant

says he received the award on the same date that it was handed down vide paragraph 4 of the Founding Affidavit.

7. Section 228F(a) of the Labour Code (Amendment) Act 2000 provides that a party that seeks to review any arbitration award made under the Act must apply to the Labour Court for an order setting aside the award “within 30 days of the date the award was served on the applicant....” It follows that the delay of one year and five months to file the review was inordinate.
8. Despite the inordinate delay the applicant did not accompany his Review Application with an Application for the Condonation of late filing of the Review. The respondent did not pick up the point in their Answering Affidavit. They (the respondent) only raised the point in their heads of argument. Even then Counsel for the respondent was not aware, when the applicant became aware of the Award. He submitted that he is entitled to assume that applicant became aware of the award on the date it was handed down because applicant had not averred in his Founding Affidavit when he became aware of the Award. This was of course factually wrong when regard is had to paragraph 4 of the Founding Affidavit, which specifically says applicant became aware of the award on the 9<sup>th</sup> October 2008.
9. Mr. Ntsene for the applicant conceded, correctly in our view that the point raised is a point of law as such it can be raised at any stage of the proceedings. He contended that the point has been raised on the basis of an assumption because the respondent has no information regarding when the applicant became aware of the Award. I have already shown that paragraph 4 of the Founding affidavit shows that applicant became aware of the Award on the 9<sup>th</sup> October 2008. The point was clearly well taken.
10. Mr. Ntsene did not seek the indulgence of the court to apply for the condonation even if belatedly. He however, sought to explain the delay in his heads of argument. Application for condonation is a request for an indulgence. Such request must be made on oath in a sworn affidavit, honestly and truthfully furnishing the reasons for the delay. Mr. Ntsene’s attempt to furnish the explanation in his Heads of Argument was therefore clearly improper and unprocedural.

11. Such an error on the part of Counsel ought not, as a rule spell the end of the road for an innocent litigant's case. This court would have no hesitation to grant applicant the indulgence to file affidavits to explain his delay as it is required by the law. This court was however constrained by the decision of Holmes J.A. in *Melane .v. Santam Insurance Co. Ltd* 1962 (4) SA531 at 532, where the learned Judge of Appeal said while the factors to be considered in assessing whether to grant condonation may on a general conspectus of all the facts, compensate each other, there is however, no point in granting condonation where there are no prospects of success.
12. Applicant's only ground of review which in effect is an appeal is based on the fact that the letter of dismissal says it was written on the 9<sup>th</sup> September 2007. He contended at the arbitration that this means he was dismissed prior to the date of the hearing, which was the 12<sup>th</sup> September 2007. Arbitrator accepted the evidence of the author of the letter Mrs. Puseletso Rangoako who said under oath that the date of the 09<sup>th</sup> September was a typographical error.
13. There was no irregularity committed by receiving such evidence and relying on it. This is even more so when regard is had to the fact that the applicant did not challenge Ms. Rangoako when she said the mix up in the dates was a typographical error. She justified her averments by referring to the fact that in its body the letter referred to the hearing that was held on the 12<sup>th</sup> September 2008.
14. Applicant's reliance on the finding that indeed the 9<sup>th</sup> September was an error, is clutching at the straws and falls far short of saving him from sinking. It cannot constitute a legitimate ground of review which can by any stretch of logic be found to render the Award reviewable. For this reason it would be a futile exercise to seek to extent leniency to the applicant by allowing him the indulgence to make a belated application for condonation, because on the papers filed of record, he does not have the prospects of success on the merits. Accordingly, the application is dismissed on account of having been filed long after the lapse of time permitted by the law.

THUS DONE AT MASERU THIS 15TH DAY OF FEBRUARY, 2011.

**L. A. LETHOBANE**  
**PRESIDENT**

**L. MATELA**  
**MEMBER**

**I CONCUR**

**M. MOSEHLE**  
**MEMBER**

**I CONCUR**

**FOR APPLICANT:**  
**FOR RESPONDENT:**

**MR. NTSENE**  
**MR. MASOABI**