

IN THE LABOUR COURT OF LESOTHO

LC/REV/79/09

HELD AT MASERU

In the matter between:

LEPHALLO PAUL MOSEBO

APPLICANT

and

**PHAKOE FREIGHT MOTOR PARTS
(PTY) LTD**

1st RESPONDENT

**DIRECTORATE OF DISPUTE PREVENTION
AND RESOLUTION**

2nd RESPONDENT

JUDGMENT

DATE: 19th JANUARY 2012

Practice and Procedure - Review application filed four (4) months outside the prescribed thirty (30) days - It was in the circumstances accompanied by an application for condonation of its late filing in terms of Section 228F of the Labour Code (Amendment) Act, 2000- Principles regulating the granting of condonation for the late filing of an application considered - The explanation for the delay not satisfactory but mainly the applicant does not have prospects of success on the merits - Condonation application dismissed.

1. The applicant is herein seeking the review, correction and setting aside of the Directorate of Dispute Prevention and Resolution (DDPR) award in A0 648/08 in which his claim for unfair dismissal had been dismissed.
2. The dispute arose as a result of an incident that occurred on 29th June, 2008, in which the applicant was accused by the 1st respondent, his former employer, of attempting to steal some merchandise belonging to the

company. The applicant alleges to have been dismissed following this incident whilst the 1st respondent denies ever dismissing him. The bone of contention before the DDPR therefore revolved on whether the applicant had been dismissed or he left of his own accord. The learned Arbitrator concluded that the applicant had failed to discharge the onus that rested on him to prove that he had been dismissed. The applicant is before this Court to challenge this finding contending that the learned Arbitrator misdirected himself in that he failed to appreciate that it was 2nd respondent's conduct that led him to leave the workplace. As far as he was concerned, it was a case of constructive dismissal and the learned Arbitrator reached an unreasonable decision worthy of review.

3. Circumstances that led to the current dispute are that the applicant was engaged by the 1st respondent as a Clerk selling motor spares. On 29th June, 2008 he sold a spare part to a customer who later returned and complained to applicant's manager that what he found inside the box was not what he had asked for. It turned out that the box did not contain what it portrayed on the label. The applicant indicated in his evidence that ***"pads were found in a box containing discs"*** (loosely translated). In his testimony before the DDPR, the applicant testified that he was immediately summoned to answer. His explanation was that the merchandise was from their other branch in Mafeteng and the items could have been switched there. Dissatisfied with this explanation, the 1st respondent called in the police.

4. From this point the parties' stories diverge in respect of whether there was a dismissal or not. The applicant's version of events of the day in question is that after interrogating him the police appreciated his explanation and did not press charges. The police however informed him that the two Chinese managers intimated to them that they no longer wished to work with him. The applicant indicated that he reluctantly went to management to demand payment of his wages (p.11 of the record of proceedings before the DDPR) which were duly paid and he left 1st respondent's premises.

5. The 1st respondent's version on the other hand is that they never dismissed the applicant. They alleged that they paid the applicant his wages after demand and he was never seen at work thereafter. They further alleged that they attempted to contact the applicant telephonically but it was not available. As aforementioned, the learned Arbitrator concluded in his findings that the onus lay with the applicant to prove that he had been dismissed and that he had failed to discharge that onus. The DDPR award

was handed down on 19th May, 2009, and the application for review was instituted with this Court on 28th October, 2009 a difference of five (5) months and eight (8) days. In terms of Section 228 F (1) of the Labour Code (Amendment) Act, 2000 a review application before the Labour Court has to be lodged within thirty (30) days of the handing down of the DDPR award. Subsection (2) thereof provides, however, that on good cause shown, the Court may condone the late filing of a review application. Hence, the applicant accompanied his application for review with a condonation application. The applicant cites as his reason for the delay that he did not have sufficient funds to secure legal representation.

6. In considering a condonation application the following factors have to be taken into account;

- a) the degree of lateness;
- b) the explanation thereof;
- c) the prospects of success; and
- d) the importance of the case.

These principles were laid down in *Melane v Santam Insurance Co., 1962 (4) SA 531 at 532* and have been followed in a number of cases handed down by this Court on the question of condonation including *Mojalefa Phomane v C & Y Garments (Pty) Ltd & DDPR, LC/REV/382/06 (unreported)*, *Comfort Telephone Taxis (Pty) Ltd v DDPR & Motlatsi Makoala LAV/REV/15/10 (unreported)*, *Lieketseng Mohapi `Mabathoana v DDP & Maseru City Council LC/REV/39/10*.

7. The factors prescribed above are interrelated. ***“What is needed is an objective conspectus of 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 overlooked.”*** - See *Melane* (supra).

8. Applying these factors to the case before us, the time lapse is not slight and the explanation by the applicant that he had financial constraints is not compelling. The Court has on several occasions pointed out that the Government offers free legal services for the indigent through the Ministry of Labour and Employment. Moreover, there is the Legal Aid which charges a nominal fee based on the employee’s means. The applicant failed to take

advantage of these services. In the circumstances, financial constraints cannot be an excuse for a person to fail to pursue his/rights within the prescribed time-limits. This would also set a very bad precedence for this Court.

9. There appears to be no prospects of success on the merits. Without risking going into the merits, for one, the reviewability of the matter is questionable because the applicant seems to be challenging the outcome of the learned Arbitrator's decision and not the process. The general common law grounds of judicial review are illegality, irrationality, and procedural impropriety. Our labour law jurisprudence includes mistake of law as a ground for review in terms of Section 228F (3) of the Labour Code (Amendment) Act, 2000. The issue would therefore be whether applicant's grounds of review fall under the ambit of any of these grounds. According to *Coetzee v Lebea NO & Another (1999) 20 ILJ, 129 (LC)* "a review concerns itself with the manner in which a tribunal comes to its conclusion rather than with its result. An appeal on the other hand is concerned with the correctness of the result."

10. Secondly, applicant's Counsel pleaded constructive dismissal during the review proceedings which was neither the basis of applicant's claim before the DDPR nor appeared anywhere in the originating application. Constructive dismissal is indeed a form of dismissal, but one occurring at the initiative of the employee. With it a party accepts that he/she left employment at his/her initiative *albeit* under circumstances brought about by the employer creating an intolerable working environment. The applicant's case before the DDPR has always been that the dismissal was at the employer's initiative. The two concepts differ. It is improper to introduce a new ground at the review stage.

11. It is trite that an applicant must make out his/her case in the founding affidavit and that a Court will not allow applicant to make out a different case in reply or still less in his argument - see *Attorney - General v Michael Teka-Teka & Others C of A (CIV) No.7 of 2001*. The plaintiff/applicant is enjoined to state in concise terms what facts he intends to rely on and to prove and the defendant/respondent to do the same so that on the day of the trial neither party shall be taken by surprise - See *Beck's Theory and Principles of Pleading in Civil Actions* 6th ed., p. 43. These enables each side to come to Court prepared to meet the case of the other. See also the *Court of Appeal case of NEC of the LNOC & Others v Paul Motlatsi*

Morolong C of A (CIV) No. 26 of 2001 at P.12 cited with approval by this Court in *Chabeli Khomari v Maseru City Council LC 35/00* (reported in www.saflii.org/ls).

12. Thirdly, the applicant claims that he demanded payment from management following information from the police that the latter no longer wished to work with him. This clearly appears in paragraph 7.1.5 of his founding affidavit. He deposed “... *that day as I had been dismissed, and after my dismissal ... in the presence of the police, I demanded my salary.*” He took no effort to enquire from management about the statement by the police. On page 12 of the record he pointed out in cross - examination that he only contacted one of the managers, a Mr Xu, two weeks after the incident. The evidence about the police saying management no longer wanted his services was hearsay and could not be relied on. To lend credence to the evidence he ought to have requested the police to give evidence confirming management’s statement before the DDPR. It is likely that in a fit of anger, following the employer’s accusations regarding the vehicle part, the applicant demanded payment of his wages and left.

13. On the grounds set out above, the condonation application is dismissed. There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 19th DAY OF JANUARY, 2012.

F.M. KHABO
DEPUTY PRESIDENT OF THE LABOUR COURT

M. MAKHETHA
MEMBER

I CONCUR

J. TAU
MEMBER

I CONCUR

ADV. T.A. LESAOANA : FOR THE APPLICANT
ADV. K. MOTSELEBANE : FOR THE 1st RESPONDENT