IN THE LABOUR COURT OF LESOTHO **LC/REV/62/11**
A0129/2011

HELD AT MASERU

In the matter between:

MAHOKO SETIPE **APPLICANT**

And

NIEN HSING INTERNATIONAL (PTY) LTD **1ST RESPONDENT**
THE DDPR **2ND RESPONDENT**
ARBITRATOR M. MASHEANE NO **3RD RESPONDENT**

JUDGMENT

Date: 28th February 2013
Application for the review of an arbitral award. 1st Respondent failing to file its answer in time – application for condonation being made. 1st Respondent failing to explain the delay satisfactorily – Court finding delay to be inordinate – condonation being dismissed and the matter proceeding unopposed. Applicant raising two review grounds,
- learned arbitrator erred in basing her decision on irrelevant considerations – Court finding facts considered relevant to the matter.
- learned arbitrator erred in failing to apply her mind to the peculiar facts placed on record – Court finding that this point is an appeal disguised as a review.
Application for review being dismissed and no order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for the review of an arbitration award of the DDPR which was handed down on the 11th June 2011 in referral A0129/2011. It was heard on this day and judgement was reserved for a later date. Two grounds of review were raised by Applicant in this matter in terms of which he prayed that the DDPR award be reviewed, corrected and set aside. These grounds were in the following,

"The learned arbitrators decision was in error and or misdirected owing to the fact that it almost entirely premised on irrelevant considerations in that it relied holus bolus on the logic that the respondent's evidence is more probable than the applicant's witnesses owing to the fact that other witnesses were in close proximity to the incident.

The learned arbitrator erred by failing to apply the mind to peculiar facts allured to and appreciating the fact that the last witness of the applicant gave evidence to the effect that a brawl ensued as between the applicant and her complainant colleague which was at the instance of the complainant colleague."

2. Facts surrounding this matter are basically that Applicant had referred a claim for unfair dismissal with the DDPR. An award was issued in favour of 1st Respondent herein on the 11th June 2011. Thereafter, Applicant lodged the present application with this Court on the 28th July of 2011 and service of application was made on 1st Respondent on the same date. The matter was then set down for hearing on the 14th February 2013 and the date of hearing was made known to all parties. On the date of hearing, the 1st Respondent was not in attendance. However, the matter did not proceed as it was postponed to this day. It was only on this day that the 1st Respondent filed their answer to the review application accompanied by an application for condonation.

3. The condonation application was not opposed by Applicant. Rather, both parties suggested to the Court that the condonation be granted by agreement and further that 1st Respondent pay the costs of the day. Both parties were however informed that an application for condonation is granted on merit and not per an agreement of parties. As a result, 1st Respondent was given the opportunity to motivate its application unopposed. Its submissions and Our ruling are in following.

SUBMISSIONS AND FINDINGS

Condonation

4. It was submitted on behalf of 1st Respondent that they were served with the review application on the 28th July 2011. Further that at the time that they were served with the

application, they were in the process of changing their legal representatives. In the end of the process, an instruction was issued by the Human Resources Manager to his assistant to instruct then the newly appointed legal representatives to oppose the matter and to forward to them all relevant documentation including the record of proceedings before the DDPR.

5. The 1st Respondent was only surprised when they discovered on the 11th February, just 2 days before the date of hearing, that they had not opposed the matter. Upon this discovery efforts were made to oppose the matter hence why they were only able to file their answer on the 28th February 2013, together with this application. They stated that their delay in filing an answer was not wilful but due to the negligence of their Assistant Human Resources Manager, who unfortunately was no longer working with them.

6. It was further submitted that there are high prospects of success in that there was a clear breach of the rules of this Court evident from the founding papers of Applicant. Further, that the grounds raised by Applicant were appeal and not review grounds which in effect meant that this Court had no jurisdiction to entertain this matter. It was furthermore argued that Applicant had no case as the learned Arbitrator had made a valid ruling.

7. In an application for condonation, there are certain requirements that must be met. These requirements were laid out in the case of *Melane vs. Santam Insurance Co. Ltd 1962 (4) SA 531 (A)* as follows;
   a) The degree of lateness and an explanation thereof;
   b) The prospects of success in the main claim; and
   c) The importance of the case.
   The dictates of this authority have been adopted and cited with approval by our Courts in a plethora of cases (see *Phetang Mpota vs. Standard Lesotho Bank LAC/CIV/A06/2008; Tsepiso Baholo vs. Loti Brick (Pty) Ltd & another LC/REV/386/06; Director Teaching Service Department & others vs. 'Mamoletsane Makhakhe & others LC/REV/45/2009).*

8. Upon our analysis of the submissions of 1st Respondent, We noted that a period of almost 3 years nearly went by before 1st

Respondent could react to this matter, since receiving both the application for review as well as the DDPR record of proceedings. In Our view, this period is quite inordinate and would depend of a very strong and sufficient explanation in order to render it ordinate. We found the explanation proffered by 1st Respondent to lack in several respects.

9. Firstly, the explanation given did not explain the entire period of delay from the 28th July 2011 to the 11th February 2013 as they simply stated that they changed representative and gave instructions to have the matter opposed. Secondly, there was nothing in their submissions to suggest that the 1st Respondent took any action in the interim to inquire about the status of the matter, if indeed they are or were interested in seeing it to finality. Thirdly, the matter was set down for hearing on the 14th February 2013 and no appearance was made on the side of 1st Respondent. What was striking in this is that they acknowledged that they were aware of the 14th February being the date of hearing but nonetheless failed to attend.

10. All these factors led us to conclude that the explanation given by 1st Respondent lacked merit and as such it was insufficient to render the period of delay ordinate. It is Our view that the explanation given for the delay was so inadequate that it rendered the degree of lateness so gross that this application had to fail on this ground alone. In view of Our conclusion, We deemed it unnecessary to even consider the prospects of success as to do so would only be an academic exercise for which this Court was not established.

11. In view of this said above, We accordingly made a ruling that the application for condonation was refused and that the matter would proceed unopposed. We were influenced by the view of the Labour Appeal Court in the above referred case of *Phetang Mpota vs. Standard Lesotho Bank* where it had the following to say,
"it is worth noting however that, exceptionally, the degree of non-compliance may be so gross and the explanation thereof so inadequate that the court may be moved to refuse condonation, regardless of the prospects of success in the main proceedings."

The Merits

12. It was submitted on behalf of Applicant that the learned Arbitrators decision was in error and misdirected in so far as the logic that she employed in making her conclusion. It was stated that she had made irrelevant considerations in coming to her conclusion in that it was sorely based on the pretext the evidence of the witness who was closest to the incident was more probable than that of other witnesses who were farther away. It was argued that the credibility of a witness is not based on proximity but to the truthfulness of their assertions.

13. The phrase "*irrelevant considerations"* suggests that rather than to take into account issues relevant for purposes of making their decision, the decision maker took into account other issues not related to the issue that the decision is being made on. In the DDPR proceeding, the issue was whether the Applicant had fought at work contrary to the rules of the employer. Evidence of several witnesses for each side was led and it heavily contradicted each leading to a stalemate. If the matter had ended at a stalemate, then 1st Respondent would have lost the battle as the evidentiary burden was on them to prove that the dismissal was fair.

14. However, the witnesses of Applicant then discredited their own evidence by admitting that the evidence of the witnesses of 1st Respondent was more probable since they were closest to the incident. This issue in Our opinion was very relevant towards the determination of the matter and given the circumstances of the case at the time. In a situation of a stalemate, the issue of credibility plays a very crucial role as it aids the decision maker in attaching weight to the evidence of witnesses. We do not fully agree with Applicant that proximity may not be used as a tool to determine credibility. Our position is that it cannot on its own as it would have to be supported by certain facts. In the present case, the issue of proximity was supported by an accession of Applicant witnesses that the evidence of 1st Respondent witnesses was more credible than theirs. Consequently, this point cannot succeed.

15. It was further submitted that the learned Arbitrator failed to apply her mind to the set of facts placed before her in that she rejected the evidence of one of the witnesses to the effect that there was a brawl between the Applicant and his colleague. It

was stated that the learned Arbitrator ought to have detected that there was an element of provocation that prompted the brawl. It was argued that in failing to apply her mind to these facts, the learned Arbitrator committed a gross irregularity in exercising her judicial powers.

16. The phrase *"failure to apply one mind"* was explained by the court in *Johannesburg Stock Exchange vs. Witwatersrand Nigel Ltd 1988 (3) SA 132 AD at 152 C-D* as follows,
" Proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fides or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the [commissioner] misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the [commissioner] was so grossly unreasonable as to warrant the interference that he had failed to apply his mind to the matter in the manner aforestated."

17. There is nothing contained in the averments of the Applicant on his second ground of review that meets the above stated test. In his illustration of how the leaned Arbitrator failed to apply her mind, Applicant seems to contest the merits of the matter. Our understanding of his contention is that given the evidence that was led during the arbitration proceedings, the learned Arbitrator ought to have come to a conclusion that Applicant was provoked by the complainant and that this led to the alleged assault.

18. The averments made do not suggest any failure on the part of the learned Arbitrator to apply her mind to the facts. In fact they suggest that the facts were considered safe that it was not properly by reason of the fact that the learned Arbitrator failed to detect that Applicant was provoked and as such came to a wrong conclusion. This in our view is not a valid review grounds and it accordingly fails.

AWARD

Having heard the submissions of parties, We hereby make an award in the following terms:

a) That this application is refused;
b) This award of the DDPR in A0129/2011 remains in force; and
c) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 4th DAY OF MARCH 2013.

T. C. RAMOSEME
DEPUTY PRESIDENT (AI)
THE LABOUR COURT OF LESOTHO

Mr. L. MATELA **I CONCUR**
MEMBER

Mrs. M. MOSEHLE **I CONCUR**
MEMBER

FOR APPLICANT: **ADV. RASEKOAI**
FOR RESPONDENT: **ADV. KAO**