

HELD AT MASERU

In the matter between:

THOLOANA MATSOSO

APPLICANT

And

**PHOTO AND GIFT GALAXY (PTY) LTD
THE DDPR**

**1ST RESPONDENT
2ND RESPONDENT**

JUDGMENT

Date: 21st February 2013

Application for the review of an arbitral award. Review application being made out of time without a formal application for condonation – Applicant being given an opportunity to formally move an application for condonation. Applicant arguing - that the delay was occasioned by lack of sufficient funds to instruct a lawyer – Court not finding this a sufficient ground to justify the delay – Court finding delay to be inordinate and explanation inadequate. Court finding delay and explanation thereof so unsatisfactory that it is unnecessary to consider the prospects of success. Condonation being refused and the review application being dismissed for want of jurisdiction.

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. Realising that the review application had been lodged out of time, the Court called on parties to argue the issue of condonation as a precondition for the matter to be determined in the merits. Both parties were given time to make proper preparations and to make their presentations in Court in respect of both the condonation application as well as the review application. They were informed that the review application would only be considered in the event that the

Court found in favour of Applicant on his application for condonation. The ruling and reasons are therefore as follows.

SUBMISSION OF PARTIES

Condonation

2. Applicant submitted that he received the arbitral award dismissing his unfair dismissal claim on the 12th November 2010. At that time that he received the arbitral award, he was unemployed, which still is the position to date, and that as a result he had no money to pay for the legal services to have this matter intimated on his behalf. He stated that he has struggled to get employment but to no avail. He has even gone to the extent of physically going to the Republic of South Africa for some time to seek employment but to no avail. He is the bread winner at his home and he has been providing for his family through earnings from piece jobs that he has done.
3. Applicant further stated that it was only sometime in September 2011 that he had collected enough money, and to be specific M500.00, to be able to instruct a lawyer to lodge this application on his behalf. As a result this application was lodged in October 2011. He stated that although he was aware that the Legal Aid and Labour Departments were there to assist people in his position, he decided not to approach them for assistance. He indicated that he did not seek assistance from the Legal Aid because he had an impression that they only dealt with matters instituted in the ordinary civil and criminal courts and not the Labour Court. He did not approach the Department of Labour because they told him that they could not assist him with his DDPR case and he felt that he would get the same reaction from them.
4. He further stated that he has prospects of success in the matter in that the learned Arbitrator committed some gross irregularities that warrant interference with the award. He made reference to the fact that the 1st Respondent did not give evidence and was also not cross examined. Further that the learned Arbitrator relied on unsubstantiated facts to dismiss his unfair dismissal claim.
5. 1st Respondent replied that not having money was not a valid excuse given that there are government agencies that have

been established for the purposes of assisting people in the position of Applicant. It was further submitted that from the piece jobs that Applicant worked he could have used his earning to finance the institution of the matter if he was really serious about it. It was further submitted that Applicant's explanation for the delay is just a lame excuse to justify his lateness.

6. 1st Respondent further submitted that Applicant had no prospects of success as the arguments raised hereunder are a complete misrepresentation of what took place in the DDPR proceedings. It was stated that all parties gave evidence and were cross examined and that all relevant documents in support of their defence were tendered as evidence during the proceedings.

ANALYSIS

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 1 full year nearly went by before 1st Respondent could react to the DDPR award after receiving it. Applicant took this time to lodge this application notwithstanding his knowledge that the law is clear that an application for review must be lodged within a period of 30 days from the time that a party becomes aware of the arbitral award. 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

Applicant for delay in lodging the review application on time to lack in several respects.

9. Firstly, We find it difficult to believe that it took Applicant almost a year to come up with M500.00 to be able to instruct a lawyer to file this application for him. The difficulty in believing this is borne by the fact that he testified that he worked during the entire period in issue. Further that at some time, he went and lived in the Republic of South Africa in search for employment. In our view, given the picture that he has attempted to draw for the Court, we find it difficult that he could have been able to afford to abandon his family for some time and stay in South Africa if he was really as indigent as he led this Court to believe.
10. Secondly, the reasons that Applicant gave for not seeking the assistance of either the Legal Aid and the Labour Departments are not satisfactory. From his submissions, he failed to inquire from the Legal Aid if they would be able to assist him because he concluded on his own that they could not help him. He also failed to seek the assistance of the Labour Department because they said they could not assist him with his DDPR case. In our view whatever prejudice that he stands to suffer is self-imposed particularly as he had options which he deliberately omitted to explore. He relied on speculation to deny himself the privileges intended for people in his position.
11. All these factors led us to conclude that the explanation given by 1st Respondent lacks merit and as such it is insufficient to render the period of delay ordinate. It is Our view that the explanation given for the delay is so inadequate that it rendered the degree of lateness so gross that this application ought to fail on this ground alone. In view of Our conclusion, We deem 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. We are influenced by the view of the Labour Appeal Court in the case of *Phetang Mpota vs. Standard Lesotho Bank* LAC/CIV/A06/2008, 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.”
Consequently, this application is dismissed.

AWARD

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

- a) That the application for condonation is dismissed;
- b) That the review application is dismissed for want of jurisdiction; 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**

**Mrs. R. MOTHEPU
MEMBER**

I CONCUR

**Mr. S. KAO
MEMBER**

I CONCUR

**FOR APPLICANT:
FOR RESPONDENT:**

**IN PERSON
MS. WANDA SALEEM**