

IN THE LABOUR COURT OF LESOTHO

LC/REV/121/11

HELD AT MASERU

In the matter between:

JOSEPH NCHEJANE RALIAPENG

APPLICANT

and

DISA GARDENS (PTY) LTD  
DIRECTORATE OF DISPUTE PREVENTION  
& RESOLUTION

1<sup>st</sup> RESPONDENT  
2<sup>nd</sup> RESPONDENT

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## ***JUDGMENT***

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**DATE: 11/04/13**

*Practice and Procedure - Review of an arbitral award - Applicant failing to submit his claim within the stipulated time frame - Therefore accompanying his application with a condonation application for its late filing - Application for condonation unopposed - Arbitrator going ahead to determine the application for condonation despite it being unopposed - Courts including the DDPR cannot automatically condone non-compliance with its rules - The applicant had a duty to substantiate his case for condonation irrespective of the fact that it was unopposed.*

1. This dispute arose around 25<sup>th</sup> December, 2010 and the applicant filed his claim for unfair dismissal with the Directorate of Dispute Prevention and Resolution (DDPR) on 14<sup>th</sup> July, 2011, about seven months after the dispute had arisen. Because of the delay the applicant accompanied his claim with a condonation application. At the gist of this dispute is whether where a condonation application is uncontested, the DDPR has an obligation to proceed to deal with the merits.

2. In terms of *Section 227 (1) and (2) of the Labour Code (Amendment) Act, 2000* an unfair dismissal claim has to be filed within six (6) months of the dismissal. It provides further that the Director (DDPR) may condone the late referral of a claim on good

cause shown. It is common cause that although the respondent was represented at the DDPR hearing, they had neither filed opposing papers nor defended the condonation application. The learned Arbitrator went ahead to make a determination on the condonation application.

3. It is this determination that the applicant is seeking to have reviewed and set aside on the following grounds;

- (i) That the learned Arbitrator erred and misdirected herself in dismissing the condonation application when it was not opposed;
- (ii) That the learned Arbitrator failed to apply her mind to reasons put forward by the applicant for failure to refer the matter on time.

4. The reason the applicant had advanced for failure to file the claim within the prescribed period was that he was not well. He had testified before the DDPR that he had a problem with allergies and colds which had affected his feet. He had however not tendered proof of this illness. Applicant's Counsel contended that the learned Arbitrator committed an irregularity in determining the condonation application when it was not opposed. He submitted that the applicant was caught off-guard as he had not prepared himself to argue the condonation application. According to him, the applicant had assumed that since the condonation application had not been opposed the learned Arbitrator would simply dwell on the merits. He maintained that had the applicant been aware that the condonation application would be determined despite it being unopposed, he could have brought proof of his illness. Counsel argued that the learned Arbitrator ought to have gone straight into the merits of the case by virtue of it having not been opposed.

5. In reaction, 1<sup>st</sup> respondent's Counsel submitted that the matter was not reviewable as the applicant's Counsel is challenging the correctness of the learned Arbitrator's decision and is not pointing to any irregularities in the process. He relied for this submission on the case of *Johannesburg Consolidated Investment Co., v Johannesburg Town Council, 1903 TS 111* in which Innes CJ., pointed out that the word "review" "*denotes the process by which, apart from appeal, the proceedings of inferior Courts of Justice, both Civil and Criminal, are brought before this Court in respect of grave irregularities or illegalities occurring during the course of such proceedings...*"

### ***THE COURT'S ANALYSIS***

6. The DDPR is a creature of statute having been established by the Labour Code (Amendment) Act, 2000. It derives its powers and obligations from the four corners of

this piece of legislation. As aforesaid, condonation can only be granted upon “**good cause shown**” per Section 227(2) of the Labour Code (Amendment) Act, 2000. The determination of what constitutes a good cause is a discretion. The circumstance or cause must be such that a valid and justifiable reason exists why compliance did not occur and why non-compliance can be condoned. In the leading case of **Smith NO v Brummer 1954 (3) SA352 (O) at 357**, it was stated that courts are inclined to condone a breach of rules where (a) a reasonable explanation for the applicant’s delay is forthcoming; (b) the application is bona fide and not made with intent to delay the other party’s claim; (c) it appears that there has not been a reckless or intentional disregard of the rules of court; (d) the applicant’s case is not obviously without foundation; and (e) the other party is not prejudiced.

7. By contending that the learned Arbitrator ought to have dealt directly with the merits of the case as the application was unopposed, Counsel is basically saying that she ought to have granted the condonation application by default. In our view the fact that the condonation application was unopposed did not automatically guarantee an award by default. The Court would not automatically condone non-compliance with its rules. This would lead to a routine disregard of Court rules. The applicant still had a duty to prove his case on a balance of probabilities. He had a duty to adduce evidence to prove that a valid and justifiable reason existed why he could not file his claim on time. The learned Arbitrator was enjoined by **Section 227 (2) of the Labour Code (Amendment) Act, 2000** to ascertain whether the applicant had a “**good cause**” that could persuade her to condone non-compliance with Section 227(1) of the Labour Code (Amendment) Act, 2000 by which the applicant had to file his referral within six months. She dismissed the application on the grounds that the applicant had failed to give a reasonable explanation for the delay and because he had not dealt with prospects of success. As it is, even if the applicant had not accompanied his late referral with a condonation application she could raise the question of condonation **mero motu** if she established that the matter had been filed out of time.

8. The grant or refusal of condonation is a discretionary power that lies with the Court and the DDPR. In exercising such a discretion the Court or the DDPR has to take into account factors laid down in the classic case on the issue, **Melane v Santam Insurance Co., Ltd 1962 (4) SA 531 (A)**, which are;

- Degree of lateness;
- Explanation of the delay;
- Prospects of success; and
- The importance of the case.

We find the learned Arbitrator to have applied her mind to the reasons put forward by the applicant as she rationalised her decision to refuse the condonation application on two grounds that the applicant had failed to give a reasonable explanation of the delay and that he did not address the DDPR on prospects of success. The issue that the applicant had initially sought the intervention of the Labour Department in his dispute was only raised at the review stage in his founding affidavit but was not brought to the learned Arbitrator's attention at the DDPR. It does not appear in the record of proceedings. It is a trite principle of law that an issue that was not raised at the Court *a quo* cannot be raised for the first time in the superior Court - See *Islamic English Medium School v 'Matlatlae Masakale, DDPR LAC/A/07/08* (lesotholii) in which applicant's Counsel had raised for the first time issues at the Labour Appeal Court that were not raised before the Labour Court.

9. As long as there is no allegation that the discretion was not exercised judicially, the Court has no power to intervene. We appreciate that the applicant is a layperson but he is the one who had applied for condonation. If he felt cornered he could have sought a postponement in order to come prepared.

We find nothing irregular with the learned Arbitrator's determination of the condonation application that was placed before her. She was exercising her statutory obligation to ascertain whether the applicant had a "*good cause*" that warranted condonation. The review application is therefore dismissed. There is no order as to costs.

**THUS DONE AND DATED AT MASERU THIS 11<sup>TH</sup> DAY OF APRIL, 2013.**

**F. M. KHABO**  
**DEPUTY PRESIDENT**

**P. LEBITSA**  
**MEMBER**

**I CONCUR**

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

**I CONCUR**

**FOR THE APPLICANT : ADV., T. J. MOKOKO**

**FOR THE RESPONDENT: ADV., B. E. SEKATLE**