

IN THE LABOUR COURT OF LESOTHO

LC/REV/02/12

HELD AT MASERU

In the matter between:

‘MONAHALI CONSTRUCTION

APPLICANT

and

**SOLINDABA TJAMA
DIRECTORATE OF DISPUTE PREVENTION
AND RESOLUTION**

**1ST RESPONDENT
2ND RESPONDENT**

JUDGMENT

DATE: 16/07/13

Practice and procedure - Condonation - Application for review for refusal of a condonation/rescission application - On the basis that the Arbitrator failed to apply his mind to the award issued out in default in that (i) he failed to consider that the employee had been engaged on temporary terms; (ii) that the employee had resigned on his own accord, and (iii) in failing to grant the rescission of the said default judgment - Court finds no irregularity in the conduct of the arbitration proceedings.

INTRODUCTION

1. This case arose from a default judgment granted by the Directorate of Dispute Prevention and Resolution (DDPR) in AO127/11(B) on 15th June, 2011 in favour of the 1st respondent and a subsequent rescission application by the applicant which was filed out of time.

2. Facts surrounding this case are briefly that the 1st respondent lodged claims that centered on payment of severance pay; weekly rest days; public holidays; overtime

and unpaid wages before the DDPR. The matter proceeded uncontested and the DDPR awarded judgment by default in favour of the 1st respondent. Dates are very critical in matters that impinge on condonation; hence they always form a reference point in a condonation application. The said award by default was handed down on 15th June, 2011. The 1st respondent subsequently filed an application for its rescission on 6th October, 2011; about four months after the judgment by default had been handed down. Having been filed out of time, the rescission application was accompanied by a condonation application for its late referral.

3. Condonation being a preliminary point, the DDPR commenced with it. It was however not granted and naturally the rescission application fell through. The learned Arbitrator dismissed the application on two grounds. Firstly, that the application did not meet the requirements set out in Regulation 26 (3) (g) of the DDPR Regulations (Labour Code (DDPR) Regulations, 2001) in that it did not state the relief sought. Secondly, that the applicant failed to make out a case for condonation.

GROUND OF REVIEW

4. Dissatisfied with this finding, the applicant instituted the present review application on the ground that the learned Arbitrator failed to apply his mind to the facts before him before granting the default judgment in that;

- (i) he failed to appreciate that the 1st respondent was a temporary employee and was therefore not entitled to the benefits that he claimed; and
- (ii) that the 1st respondent resigned of his own accord, and was not dismissed.

In essence, Counsel for the applicant, Advocate Khumalo, submitted that the learned Arbitrator did not exercise his discretion judiciously. He argued that the applicant is a construction company and by its very nature the work is temporary as it is dependent on the award of building contracts. Counsel contended that had the learned Arbitrator considered that the 1st respondent was not in the permanent employ of the applicant, he would not have awarded judgment in favour of the 1st respondent.

5. On the condonation application, Counsel submitted that the learned Arbitrator failed to take into account evidence tendered before him by way of an affidavit to prove that the 1st respondent refused to accept service of the rescission application. He further implored the Court to be mindful of its duty to dispense substantive justice and not dwell on technicalities. On that score, he asked the Court to give the applicant an opportunity to be heard. He further argued that the learned Arbitrator failed to consider all the elements of a condonation application *viz.*, explanation for the delay and prospects of success.

6. In defence 1st respondent's Counsel, Adv. Selimo argued that the applicant has raised grounds of appeal over which this Court has no jurisdiction. He submitted that the applicant is simply not satisfied with the decision of the DDPR and not the method of trial. In support of this argument Counsel cited a number of cases which drew a distinction between reviews and appeals.

PRINCIPLES GOVERNING CONDONATION

7. The principles governing the requirements for granting or refusing condonation are well established in law. In terms of these principles the Court or an Arbitrator has a discretion which is to be exercised judicially after taking into account all the facts before it/him or her as the case may be. The factors which the Court takes into consideration in assessing whether or not to grant condonation are enunciated in the classical case of *Melane v Santam Insurance Co., 1962 (4) SA 531* at 532 and are:

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

See also the distinguished author, *Herbstein & Van Winsen in Civil Practice of the Supreme Court of South Africa 4th ed., p. 897- 8* on the said factors. These four factors have been extended in *Foster v Stewart Scott Inc., (1997) 18 ILJ 367 (LAC)* to include;

- e) the respondent's interest in the finality of the judgment;
- f) the convenience of the Court; and
- g) avoidance of unnecessary delay in the administration of justice.

8. The Court went further to point out in *Melane's* case (*supra*) that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and the long delay. The respondent's interest in finality must also not be overlooked.

9. In an application for condonation, good cause is shown by the applicant giving an explanation that shows how and why the default occurred. There is plethora of authority that the Court could decline the granting of condonation if it appears that the default was willful or was due to gross negligence on the part of the applicant. In fact, the Court could on this ground alone decline to grant an indulgence to the applicant. Courts have repeatedly stated that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an explanation for condonation should be refused. What is needed is an objective conspectus of all the facts - See *Melane (supra)*.

EVALUATION

10. The thrust of applicant's case was that the learned Arbitrator had failed to apply his mind to the condonation application by not considering all the factors to be considered in assessing whether or not to grant condonation. The applicant argued that they had prospects of success on the merits. The learned Arbitrator had refused the condonation application on the basis that the applicant had not made any averment on the degree of delay, explanation thereof and prospects of success. The question then becomes whether each and every one of the four factors has to be considered as suggested by applicant's Counsel. It depends on the particular circumstances of each and every case. Each case has to be determined on its own merits.

11. As pointed out in *Melane's* case (*supra*), factors for consideration in a condonation application are interrelated; they are supposed to be weighed against one another. In *casu* the degree of lateness was never alluded to at the DDPR nor the explanation for the delay tendered. It is common cause that rescission proceedings were only instituted after applicant's Managing Director was confronted with a warrant for his arrest in execution of the DDPR award. He paid in Five Thousand Maloti (M5, 000.00) which his Counsel stated in papers that he paid only to avoid incarceration and not as an acknowledgment of indebtedness to the 1st respondent. The applicant attributed his delay to the refusal by the 1st respondent to accept service of the application for rescission. It had duly filed an affidavit to prove same before the DDPR. Counsel for the applicant indicated that the learned Arbitrator ignored this affidavit, thereby committing an irregularity. The learned Arbitrator did not find the reason sufficient to grant condonation. It is however worth noting that by the time rescission processes were initiated the applicant was already out of time, and this was already after the DDPR award had been enforced or executed by this Court.

12. Parties have to act swiftly in instituting their claims. The Court held in *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC)* that an applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of the delay, and what is more, the explanation must be reasonable. Applicant's case fell far short of these requirements. A delay, whose length was unfortunately not disclosed in this case, induces a reasonable belief that after such delay the Order has become unassailable and a litigant is entitled to assume that the losing party has accepted its finality and does not intend to pursue the matter any further.

13. Assuming for a moment that prospects could be considered, still one discerns a contradiction. On the one hand, the applicant averred that he had no contractual relationship with the 1st respondent, and on the other it says he was temporary because the nature of his work depended on the availability of building contracts. How can an employment relationship be non-existent and temporary at the same time? It is surely a contradiction in terms. On the face of it, applicant's prospects are bleak. In *NUM v Council for Mine Technology (1999) 3 BLLR, 209 at 211* the Court held that ***"a case with a long period of delay, coupled with an unacceptable explanation far outweighs whatever prospects of success the applicant may have."*** In this case, as aforementioned, the situation is worse because prospects are rather vague.

14. The granting of condonation is an indulgence. It is accordingly necessary for an applicant for such condonation to show not merely that he or she has strong prospects of success on the merits but to give good reasons why he or she should receive such an indulgence, that is, that he acted expeditiously when he discovered his delay and advanced an acceptable explanation for such delay. The Court's power to grant relief should not be exercised arbitrarily and upon the mere asking, but with proper judicial discretion and upon sufficient and satisfactory grounds shown by the applicant. In the determination whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides in which the Court will endeavor to reach a conclusion that will be in the best interests of justice - see *Herbstein & Van Winsen (supra)* at p. 897.

15. DDPR awards are not subject to appeal; hence even if in the circumstances of this case, the Court could have come to a different conclusion, it cannot interfere. As long as the Arbitrator is found to have applied his or her mind to the question that was before him or her, the Court restrained from interfering. It can only interfere where the Arbitrator acted mala fide or from an ulterior/improper motive; if he or she had not applied his or her mind to the matter or failed to exercise his discretion at all or if he had disregarded the provisions of a statute - See *Shidiack v Union Government (Minister of the Interior) 1912 AD, 642 at 651-2*. Applicant's Counsel argued that the learned Arbitrator had failed to apply his mind to the case that was before him at the DDPR but from the papers filed of record and submissions made it is our view that he did apply his mind to the case.

16. Evaluating the facts of this case and submissions tendered by both Counsels, it is clear that the applicant failed to make a successful case for condonation in that it failed to address itself to the degree of lateness and the explanation for the delay which are some of the basic requirements in a condonation application.

17. The Court held in *Mphausa v Multi Cleaning Services 1994 (10) SALLR 60* that if there is no satisfactory explanation for the delay, that should be the end of the matter and there is no need to consider other factors like the prospects of success and the importance of the case. This case has been cited with approval in a number of our cases including *Mojalefa Phomane v C&Y Garments, DDPR LC/REV/382/06 (Leslil)*. In a later judgment of *Moila v Shai NO & Others (2007)*

28 ILJ 1028 (LAC) it was held that where in an application for condonation the delay is excessive and no explanation has been given for that delay or an explanation amounts to no explanation at all it is not necessary to consider the prospects of success. The Court would therefore dismiss the appeal without even considering the prospects of success. Because the degree of lateness was not mentioned and the learned Arbitrator found no satisfactory explanation for it, he could not even proceed to consider the prospects of success on the merits.

ORDER

18. The Court has identified no irregularity in the conduct of the case before the DDPR. It therefore finds no reason to disturb the award in A0127/2011.

There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 16TH DAY OF JULY, 2013.

F.M. KHABO
PRESIDENT (a.i)

L. MATELA
MEMBER

I CONCUR

R. MOTHEPU
MEMBER

I CONCUR

REPRESENTATION:

FOR THE APPLICANT : ADV. M.A. KHUMALO
FOR THE 1ST RESPONDENT : ADV. K.J. SELIMO