

HELD AT MASERU

In the matter between:

SOUTH ASIA INTERNATIONAL (PTY) LTD

APPLICANT

And

**NEO MOJALEFA
THE DDP**

**1st RESPONDENT
2nd RESPONDENT**

JUDGMENT

Date: 30th April 2013

Review application of DDPR arbitral award. 1st Respondent applying for dismissal of the review application for want of prosecution. Applicant requesting a postponement of the matter – Court refusing the application for postponement and directing parties to deal with the application for dismissal for want of prosecution. Applicant’s representative withdrawing as Applicant’s attorney of record. Court finding that the withdrawal is intended to frustrate the proceedings and allowing 1st Respondent to proceed with the application for dismissal. Court finding merit in the application and granting same. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for the dismissal of the review application for want of prosecution. It was heard on the this day and judgment was reserved for a later date. Facts surrounding this application are basically that 1st Respondent referred a claim for unfair dismissal with the 2nd Respondent, under referral number A0120/2006 . On the 23rd March 2006, 2nd Respondent issued an award in terms of which Applicant was ordered to pay 1st Respondent an amount in the sum of M11, 576.00 as his underpayments. Thereafter, Applicant instituted an application for review of the said arbitral award.

2. On the date of hearing, Applicant was represented by Advocate Chobokoane while Respondent was represented by Mr. Molefi. Advocate Chobokoane sought a postponement of the matter. We declined to grant the postponement but rather adjourned for 2 hours to allow him to get in touch with his client. He had stated that although he had full instructions, the purpose of the postponement was for him to find out if client was still interested in pursuing the matter, in line with his initial instructions.
3. After the adjournment, Advocate Chobokoane indicated that he had not been successful to find client and insisted on the postponement. The application for postponement was opposed and after argument, We declined to grant it. Immediately after the delivery of Our ruling on the postponement application, Advocate Chobokoane withdrew his representation of Applicant in the matter. The withdrawal was noted and that notwithstanding, We resolved to proceed with the matter. Our full judgment is thus in the following.

SUBMISSIONS AND FINDINGS

Application for postponement

4. Advocate Chobokoane submitted that he sought a postponement of the matter on the ground that the person who had instructed him was late, as he had died in a bank robbery in January this year. He stated that thereafter, he tried to find out who was in charge of the Respondent company but did not succeed. He stated that he does not have instructions on the matter and does not know if his client is still interested in prosecuting the matter.
5. Advocate Chobokoane added that the last time that he had contact with this clients was in 2012. He stated that he sought the postponement to find out if the Applicant company was still in existence and if the person in charge was interested in pursuing the matter. When asked when he received the notification of hearing and what he did after receipt of same, he stated that he received it sometime in March 2013 and that he was not able to do anything in that period to this day.
6. In reply, Mr. Molefi submitted that the application for postponement was baseless and not genuine. He submitted that initially, Advocate Chobokoane had stated in chambers

that he had the full instructions but wanted to know if client was still interested in pursuing the matter to finality. He added that in Court, Advocate Chobokoane is now arguing something different, as he is now claiming that he does not have instructions. He stated that all the information about Advocate Chobokoane's client dying and what he did thereafter, are all new issues which were never canvassed before and are thus an afterthought. Mr Molefi maintained that the Application was baseless and not genuine and stood to be dismissed.

7. It is trite law that a postponement is granted not as a right but an indulgence, which may be granted in favour of an applicant party upon good cause being shown. The principle in an application for postponement was laid down in the case of *Real Estate Services (Pty) Ltd v Smith (1999) 20 ILJ 196* and has been adopted by our Courts (see *Tumo Lehloenya and Others v Lesotho Telecommunications Corporation LC/20/2000*). In that case Revelas J had this to say, at page 199,
“In courts of law, the granting of an application for postponement in an indulgence by the court exercising its judicial discretion. A reasonable explanation is usually required from the party seeking the postponement.”
8. *In casu*, Advocate Chobokoane has given inconsistent explanations for his request to have this matter postponed. Initially, the basis of the postponement was that he wanted to confirm his initial instruction. Later he raised issues which he did not raise before in chambers, among which is the fact that the person who instructed him is late and that he is not sure if the Applicant company is still in existence. We are of the view that indeed this is an afterthought as it was never canvassed before, more so given that Advocate Chobokoane stated that he was not able to secure client in the 2 hour adjournment given.
9. Further, whereas he had said he had full instructions but wanted to confirm them, he now argues the absence of such instructions. These versions of his submissions are inconsistent with one another. In the case of *Lerotholi v Tau & others CIV/APN/338/2012*, Mahase J had to say the following about inconsistency,
“As a result the respondents mutually distractive and inconsistent averments have done a great blow on their case.”

10. In view of the above reasons, We found value in 1st Respondent's argument that the application for postponement was baseless and not genuinely sought. In Our opinion the inconsistencies in the Applicant's submissions have done a great blow to its case. This is sufficient to justify the refusal of the application for postponement. We accordingly found that Applicant had failed to provide a reasonable explanation for the postponement and dismissed the application. We then directed the parties to proceed to deal with the application for dismissal for want of prosecution.

Dismissal for want of prosecution

11. As earlier indicated, after the delivery of Our ruling, Advocate Chobokoane suddenly withdrew his representation. We intimated to Advocate Chobokoane that We felt that his sudden withdrawal was not genuine but that it was rather intended to frustrate the proceedings. His response was simply that he had nothing further to submit. As a result, We resolved to proceed with the matter and allowed 1st Respondent to proceed with his application for dismissal for want of prosecution.

12. Mr. Molefi stated that the review application was lodged sometime in June 2006. He submitted that since the institution of this application, Applicant has not done much to prosecute the review application. He stated that it was only after he had filed this application that Applicant followed up on the record of proceedings. He further submitted that this behaviour is a clear indication of either lack of interest in the matter or an attempt to frustrate execution of an award granted in 1st Respondent's favour.

13. He added that the withdrawal of Advocate Chobokoane from these proceedings further affirms his argument of intent to frustrate the execution of the award, in that it was only initiated after the Court had refused to postpone the matter. He submitted that this is a clear abuse of court processes which cannot be countenanced by this Court. He prayed for an order dismissing the review application and reinstatement of the award of the DDPR.

14. In an application for dismissal for want of prosecution, there are three requirements. These requirements were laid out by

Lyons J (a.i) in *The Liquidator Lesotho Bank v Flora Selloane Seleso CIV/T/58/2002*, while citing with approval the authority in *Allen v Sir Alfred McAlpine & Sons* [1969] 1 All ER 543, where the Court set out the test as thus,

“ 1. inordinate delay;

2. that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable;

3. and the defendants are likely to be seriously prejudiced by the delay.”

15. In Our view, Applicant has been able to establish that the delay is inordinate in that this matter was first lodged in 2006. Almost seven years have passed since the matter was lodged with this Court. Further, having withdrawn from the matter, Applicant’s representative has waived the Applicant’s right to be heard and has thus denied both himself and Applicant the opportunity to explain the delay. The delay thus remains inexcusable by reason of the absence of a credible excuse.

16. Furthermore, 1st Respondent has demonstrated that the effect of the delay has been to frustrate the execution of his award. This is obviously prejudicial to 1st Respondent who obtained judgement from the 2nd Respondent just over 7 years ago. We are further drawn to this conclusion by the sudden withdrawal of Applicant’s representative from the proceeding, upon the Court’s refusal to indulge them to further delay the matter. This is indeed an abuse of the processes of this Court. Consequently, We find that 1st Respondent has been able to meet the requirements for an application for dismissal for want of prosecution and We accordingly grant same.

AWARD

We therefore make an award in the following terms:

- a) That the application for dismissal for want of prosecution is granted;
- b) The award of the DDPR in referral A0120/2006 remains in force;
- c) That the said award must be complied with within 30 days of receipt herewith; and
- d) That there is no order as to costs.

**THUS DONE AND DATED AT MASERU ON THIS 22nd DAY OF
JULY 2013.**

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

**Ms. P. LEBITSA
MEMBER**

I CONCUR

**Mr. M. MALOISANE
MEMBER**

I CONCUR

**FOR APPLICANT:
FOR RESPONDENT:**

**ADV. CHOBOKOANE
MR. MOLEFI**