IN THE LABOUR COURT OF LESOTHO **LC/REV/25/2012**
A0621/2011

HELD AT MASERU

In the matter between:

MOLAHLI EDWIN MOLAHLI	**APPLICANT**
And	
MORIJA PRESS BOARD	**1st RESPONDENT**
DDPR – ARBITRATOR (M. MOLAPO – MPHOFE)	**2nd RESPONDENT**

JUDGMENT

Hearing Dates: 08/05/2013; 05/06/2013; 10/07/2013
Application for review of the 2nd Respondent arbitral award. 1st Respondent making an application for condonation from the bar to file its answering affidavit. 1st Respondent not providing a satisfactory explanation for the delay in filing its answer – court finding period of over one year delay inordinate - 1st Respondent further not pleading prospects of success. Court dismissing the application for condonation and directing that the matter proceed in the merits. Court not finding merit in the grounds of review raised on behalf of Applicant – Court dismissing the review application. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for the review of the 2nd Respondent arbitral award. It was heard on this day and judgment was reserved for a later date. Applicant was represented by Advocate Mosuoe while Respondent was represented by Advocate Mabula. The brief background of the matter is that Applicant had referred a claim for unfair with the 2nd Respondent, wherein he challenged both the substantive and procedural fairness of his dismissal. The matter was heard and an award was issued on the 6th March 2012, dismissing his referral.

2. Thereafter, Applicant initiated the current review proceedings to have the said award reviewed, corrected or set aside herein. Five grounds of review were raised on behalf of Applicant. The review application was not formally opposed, as no answer had been filed on behalf of Respondent. However, at the commencement of proceedings, 1st Respondent representative made an application for condonation to be allowed to file an answering affidavit out of time. Both parties made their representation after which We delivered a ruling refusing to accept the 1st Respondent answering affidavit. Our full reasons are recorded in the following.

SUBMISSIONS AND FINDINGS

Condonation for late filing

3. It was argued by Advocate Mabula, on behalf of 1st Respondent, that at all material times he was under the impression that the answering papers had been filed. He stated that he had given such a mandate to his clerks, after preparing same. He added that this Court is a master of its own rules and that it can condone any breach of its rules provided there is sufficient cause. He referred the Court to Rule 27 of the *Labour Court Rules of 1994*. He maintained that there is sufficient cause and added that 1st Respondent should be indulged, particularly as it has expressed its intention to oppose the matter.

4. The application was opposed by Advocate Mosuoe, who argued that the late filing an answer should not be condoned. He submitted that over a year had lapsed from the time that they had served their application upon 1st Respondent. He added that 1st Respondent cannot be heard to argue that it was under the impression that an answer had been filed, especially when it was his responsibility to ensure that their pleadings were in order prior to date of hearing.

5. He argued that this Court cannot allow Advocate Mabula to shift a blame for failure to file on a clerk, when he failed on his obligations. He argued that clearly 1st Respondent had not interest in the matter, hence its failure to file an answer in time. He added that if this application is granted, Applicant will be greatly prejudiced in the conduct of 1st Respondent clearly shows its intention to delay finalisation of the matter.

6. We found that there was no sufficient cause for failure on the part of 1st Respondent to file its answering affidavit. We agreed with Advocate Mosuoe that it was the responsibility of 1st Respondent to ensure that its pleadings were in order prior to the date of hearing. In Our view the said responsibility is two pronged nature, in that it is not only towards themselves but also towards the Court. This places an even heavier obligation on Respondent to ensure that pleadings are in order in preparation for the hearing.

7. It was therefore inexcusable for 1st Respondent to have failed on its obligation and only try to cure fault on its part by shifting the blame to its clerk. We were of the opinion that 1st Respondent had clearly demonstrated a high level of lack of seriousness in these proceedings. Evidence to this was the fact that, even this application for condonation for late filing of the answer, was made from the bar. This clearly illustrated that this matter had been abandoned and that 1st Respondent no longer had an interest in it. We were inclined to agree with Applicant that 1st Respondent was using the processes of this Court to delay finalisation of this matter.

8. Moreover, notwithstanding the absence of a reasonable explanation for the delay, We found that 1st Respondent had failed also to satisfy one of the foremost requirements for an application for condonation, namely the prospects of success. The importance of this element is to be seen in the case of *Phethang Mpota v Standard Lesotho Bank LAC/CIV/A/06/2008.* In this case, the Court noted that, although the requirements for the granting of a condonation application are interrelated, the absence of the prospect of success makes it pointless to grant an application for condonation.

9. *In casu*, no prospects of success were alleged by 1st Respondent as it has only attempted to explain the delay in filing the answer, which explanation We found to lack merit. By necessary implication, this means that it becomes pointless to grant the application for condonation under the circumstances. We further considered the lapse of time from the time that Applicant was aware of the review proceedings to the time that they seek condonation. The period is inordinate as it is over a

year. On the basis of all this said above, We therefore refused the application for condonation and directed that the matter proceed in the merits unopposed.

The merits

10. It was submitted on behalf of Applicant that the learned Arbitrator failed to consider that the General Manager, who appeared on behalf of 1st Respondent, had no authority to appear before the DDPR. It was argued that it is a requirement of law that there, where one of the litigants is a juristic persons, then there must be an authority to represent, which must be backed by a resolution of the board of directors. In support of the above proposition, the Court was referred to the case of *'Mantsoaki Malakane v Standard Lesotho Bank LC/REV/525/2006* (unreported).

11. It was further argued that worse still was the fact that there was nothing apparent that the General Manager had authority to represent the 1st Respondent company. It was added that evident to this is the fact that all times during the arbitration hearing, the General Manager would refer to himself as the Chief Executive Officer while at times he would maintain his rank of General Manager. The Court was referred to page 11 of the record, wherein the following exchange is recorded,
"Q: At the beginning of the proceedings, you promised to furnish us with a document that authorises us to provide us with such document but you never did?
A: Yes, I am represe..ting. I do not recall that i ever made such a promise.
Q: Now that you do not recall, you will agree with me that we never received such a resolution?
A: Yes.

12. Whenever it is alleged that the learned Arbitrator ignored or disregarded certain evidence, of an applicant party to review proceedings, the Court must be referred to a specific portion of the record of proceedings, wherein the ignored or disregarded evidence is reflected. This requirement is premised on the fact that the party against whom allegations of irregularities are made, is not and cannot be brought before Court to state their side. This abnormally is cured by reference to the record of proceedings to prove the allegations of irregularities. This is the

essence of a record of proceedings in review matters, irrespective of whether the review is opposed or not. The above extract suggests that Applicant was challenging the right of 1st Respondent representative on the ground of absence of a resolution. As a result, other than its absence, there was no further ground upon which the challenge was based. This essentially means that all other arguments of challenge alleged by Applicant are merely bare allegations of facts.

13. In the case of *Mokone v Attorney General & others CIV/APN/232/2008,* the Court had the following to say in relation to bare allegations,

"As can be seen respondents have just made a bare denial. It would not be enough to just make a bare denial .... If one does not answer issuably then his defence will be considered no defence at all,"

It is Our view that this principle equally applies in relation to claim by parties. As a result, where a party has barely alleged a claim, that is not enough for the court to make a finding in their favour. Consequently, where a bare claim has been made, it becomes both unsatisfactory and unconvincing and should be considered no claim at all.

14. On the issue of the absence of the resolution, it is clear from the extract that it was never raised as a challenge before the learned Arbitrator. Applicant merely brought it up but never took it further. No explanation has been given by Applicant, as to why the argument was never advanced and there is nothing to suggest that the learned Arbitrator prohibited parties from arguing it. As a result, the learned Arbitrator was right in ignoring it, moreso given that it only came up during the cross examination of the 1st Respondent representative, one Chele. At the time that it was brought up, the proceedings had by far advanced, suggesting that it was not an issue.

15. It was further argued that the learned Arbitrator erred in that She admitted hearsay evidence. In amplification, it was submitted that the learned Arbitrator relied on the evidence of one Mokoenya Chele, to find the dismissal of Applicant fair. It was added that the evidence of Chele was not firsthand but rather what he was told. It was stated that in giving his evidence, he would indicate that what he was testifying to, was

what he was told. It was added that the learned Arbitrator relied on documentary hearsay evidence tendered by the same witness.

16. It was further submitted that Chele narrated the evidence of one 'Malipuo Molibeli, which was led in the initial plant level disciplinary hearing. The Court was referred to the minutes of the initial plant level hearing, in support. When asked where this evidence being referred to is reflected in the record of proceedings before the DDPR, Applicant indicated that he could not point the Court to a particular page, where this is shown.

17. While the admission and reliance on hearsay evidence is a reviewable irregularity, the averments of Applicant are no more than just bare allegations without supporting facts. We have dealt with this issue in addressing the first ground of review. We therefore express the same sentiment that this is just a bare allegation of a claim that lacks supporting evidence in order to sustain. To re-deliberate on this issue would be no more than an academic exercise, which would not serve any purpose *in casu*. We accordingly invoke the authority in *Mokone v Attorney General & others (supra)* and dismiss this review ground.

18. It was further argued that the learned Arbitrator erred in that She failed to take into consideration the evidence of one Chele, during Cross examination. It was stated that in this evidence, Chele had conceded that he did not suggest to Applicant, during cross examination in the initial hearing, that that he never gave him permission to sell the Compact Discs. The Court was referred to page 12 of the DDPR record of proceedings.

19. It was further submitted that had the learned Arbitrator considered the above said evidence, She would have been influenced into finding that Applicant was not guilty of the offence that he was charged and dismissed for. It was added that Applicant was charged and dismissed for producing and distributing Compact Discs, containing 1st Respondent material, for personal gain. Further that this being the case, a

consideration of the evidence of Chele would have altered the conclusion of the learned Arbitrator.

20. We do confirm that the evidence at page 12 of the record is recorded as Applicant suggests. From the submissions of Applicant, he is attempting to argue that he was authorised to produce and distribute the said compact discs. However, We fail to find how having considered this evidence would have altered the finding of the learned Arbitrator. According to Applicant, he was charged and dismissed for producing and distributing 1st Respondent material for personal gain.

21. Assuming that Applicant was authorised to produce and distribute, this does not in any way address the second aspect of his charge and eventual dismissal, namely the issue of personal gain. The decision not to find Applicant guilty, merely on the premise that he was authorised to produce and distribute, while ignoring the latter aspect, would have been irrational. On this premise, third ground of review equally fails.

22. It was also argued that the learned Arbitrator erred in that She ignored, disregard and/or failed to consider the evidence of a job description of Applicant. It was added that this evidence would have influenced the learned Arbitrator into finding that it was the duty of Applicant to produce and distribute 1st Respondent materials. The Court was referred to page 8 of the record where reference is made to Applicant's job description, and in particular clause 1.7 thereof.

23. This review ground is related to the third ground of review in that it deals with the right of the Applicant to produce and distribute the 1st Respondent materials. We have already dealt with this issue and have pronounced Ourselves that even if the learned Arbitrator had considered it, it would not have altered Her conclusion. Essentially, to deal with this issue again, will only be for academic purposes which would not serve any purpose *in casu*. Consequently, We declined to comment any further, safe to reiterate Our stance in dealing with the 3rd ground of review.

24. On the last ground of review, it was argued that the learned Arbitrator erred in that She failed to consider that the matter

was still pending before the plant level committee, at the time that the proceedings before the DDPR were continuing. The Court was referred to page 13 of the record of proceedings in support. It was submitted that the record reflects that the matter was still pending before the plant level committee at the time that it was referred before the DDPR.

25. Page 13 of the record reflects the cross examination of Chele by Applicant. It reflects the following exchange,

" *Q: What are you holding?*
A: A letter from Mongoli oa Phethahatso Rev. G. L Ramatlapeng to Mr Molahli appeal for your dismissal.
Q:When is the date of letter?
A: 2nd August 2010
Q:Can you say that date is long after the applicant has referred the matter to DDPR?
A: Perhaps.
Q:After having read this letter you will agree that Mr Molahli's matter is still pending before KEL?
A: I do not know."

26. Before We deal with the argument of Applicant on this issue, We first wish to comment that there is nothing in the extract that suggests that the matter was still pending at the time that the arbitration proceedings were going on. At best the extract suggests that there was some form of communication, on the 2nd August 2010, regarding an appeal in relation to the Applicant's dismissal, after the matter had been referred, and no more than that. In the light of this said, the argument by Applicant that the matter was still pending during the arbitrator proceedings, does not find support in the above extract.

27. Moreover, this issue only came during the cross examination of Respondent witness, one Chele and was never taken further for the learned Arbitrator to consider. Therefore, the learned Arbitrator cannot be faulted for having failed to consider an issue that was never raised as a challenge. We further reiterate Our position in relation to the first ground of review that what was not raised as a challenge can safely be presumed not to be an issue. Consequently, this argument fails to sustain.

AWARD

We therefore make an award in the following terms:

a) The application for review is refused;
b) The award in A0647/2010 remains in force;
c) That the said award be complied with within 30 days of receipt herewith; and
d) There is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 28th DAY OF OCTOBER 2013.

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

Mr. S. KAO **I CONCUR**
MEMBER

Mr. R. MOTHEPU **I CONCUR**
MEMBER

FOR APPLICANT: ADV. MOSUOE
FOR RESPONDENT: ADV. MABULA