

HELD AT MASERU**In the matter between:****LEHLOHONOLO NTHOLENG
MOKONE SELLANE****1st APPLICANT
2nd APPLICANT****And****THE DDPR
C.G.M INDUSTRIAL (PTY) LTD****1st RESPONDENT
2nd RESPONDENT**

JUDGMENT

Hearing Date: 16th May 2013

Application for review of the 1st Respondent arbitral award. Review application lodged out time together with an application for condonation. Respondent not opposing application for condonation - Court accepting the Applicants' averments as they appear in the pleadings. Applicant failing to provide a reasonable explanation for the delay but succeeding to establish prospects of success. Court finding that prospects of success pale into insignificance if the explanation for the delay is unsatisfactory. Court refusing the condonation application and dismissing the review application for want of jurisdiction. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is an application for the review of the 1st Respondent arbitral award in referral A0991/2008. It was heard on this day and judgement was reserved for a later date. Applicants were represented by Advocate Molati while 2nd Respondent was represented by Advocate Matoane. The background of the matter is essentially that Applicants referred unfair dismissal claims with the 1st Respondent sometime in early 2009. An award was issued on the 12th July 2009, in terms of which Applicants' claims were dismissed.

2. It was only on the 22nd July 2011 that Applicants lodged the review application with this Court. Realising that the said application had been lodged out of time, Applicants lodged an applicant for condonation of their late filing of the review application. The condonation application has not been opposed. This essentially means that We will proceed on the premise that the factual averments of Applicants, as contained in their pleadings, are a true reflection of what took place. In the light of this background, Advocate Molati for Applicants proceeded on his submissions. Our judgement on the matter is thus as follows.

SUBMISSIONS AND FINDINGS

3. It was submitted on behalf of Applicants that they only became aware of the existence of the arbitral award in referral A0991/2008 sometime early 2010. Upon being aware about the award, Application then instructed their union, FAWU, to proceed to institute the current proceedings. Applicants later became aware that the review application as not filed contrary to their instructions. They were only able to approach their current counsel of record sometime in July 2011, hence the referral of the matter on the 22nd July 2011 and the accompanying application for condonation.
4. It was added that the failure to file the review within the prescribed time was not deliberate on the part of Applicants, but due to fault on the part of their initial representatives. It was argued that Applicants cannot be punished for the negligent acts of their representatives especially where representation had not been withdrawn. The Court was referred to the case of *Napo Thamae & another v Agnes Kotelo & another LAC 2000-2004*, where the Court held that neglect of a representative should not always be visited upon the client, but that the Court must consider the circumstances of the matter.
5. It was further submitted that there are prospects of success in the matter in that the learned Arbitrator made a finding not supported by any evidence at all. It was added that the learned Arbitrator contradicted himself by finding that the dismissal was not an appropriate sanction only to dismiss the Applicants' referral. It was further submitted that 2nd

Respondent will not suffer any prejudice in the event that this applicant is granted.

6. For an application for condonation to succeed at least two core requirements must be met and these are a satisfactory explanation for the delay and the prospects of success. In explaining the requirements for a condonation application to be granted, the Labour Appeal Court in *Thabo Teba & 31 Others vs. LHDA LAC/CIV/A/06/09*) had the following to say, *“A party seeking condonation must give a full explanation for the delay which must cover the entire period of delay. The explanation must be reasonable. If prospects of success are strong, this is not enough to justify the granting of condonation. The various factors for condonation must be put on a scale and weighted against one another. Prospects of success pale into insignificance where there is an inordinate delay coupled with the absence of reasonable explanation for the delay.”*
7. Over one year has lapsed from the time that the Applicants became aware of the award, to the time that they had the matter referred with this Court. In Our opinion, this period is inordinate as it has by far exceeded the 30 days period prescribed in law, for a review application to be made (see section 228F of the *Labour Code Order 24 of 1992*, as amended). As a result, in order to compensate the delay, Applicant’s explanation must cover the entire period to the delay.
8. In Our view, Applicants have failed to explain the entire period of the delay, in failing to file the review application with this Court, within the prescribed time limits. While they allege that they only became aware about the award sometime early 2010, it is not clear exactly when this was. Evidently, Applicants are not able to make a proper account of the time that they became aware of the arbitral award. It is further not clear when it is that they became aware that the review had not been field contrary to their instruction.
9. Applicants have attempted to place the blame for the delay in lodging the review application, on their initial representative. However, We have considered the circumstances of the matter and have found that Applicants carry the bulk of the blame if

not entirely. We say this because, Applicants have not been able to account for the entire period of the delay. Their failure to account fully suggests neglect on their part. Our approach to this matter finds support in the holding of the Court in *Napo Thamae & another v Agnes Kotelo & another (supra)*, wherein the Court of Appeal held that a court must evaluate the conduct of an applicant party. Having evaluated the conduct of Applicants, We find that they have failed to provide a reasonable explanation for the delay.

10. On the prospects of success, what is required is merely for an applicant party to prove *prima facie* that there is a case to answer in the main claim. This essentially means that the Court must look at the averments as they appear to determine if they make out a case. In Our opinion, Applicants have succeeded to make out a case in the main claim with specific reference to allegations of irrationality in the arbitral award. These allegations are *prima facie* review grounds, which if proven entitle Applicants to remedies under review proceedings.
11. However, given the Applicant's failure to satisfactorily explain the delay after over 1 year, their prospects of success have paled into insignificance. We cannot grant an application for condonation to a party that ignores the rules, merely on account of strength of their prospects of success. In Our view, this would set a very ruinous precedent that undermines the principle of legality.
12. In coming to the above conclusion, We are guided by the decision of the Labour Appeal Court in *Thabo Teba & 31 Others vs. LHDA LAC/CIV/A/06/09*, where the Court had the following to say,
"A litigant is entitled to closure of litigation. Finality in litigation is intended to allow parties to get on with their lives. After an inordinate delay, a litigant is entitled to assume that the losing party has accepted the finality of the order and does not intend to pursue the matter any further. Granting condonation after an inordinate delay would be to undermine the principle of legality and cannot be in the interest of justice."

13. Having come to the conclusion above, this Court has no jurisdiction to entertain the main review application. We accordingly dismiss the review application for want of jurisdiction. Our conclusion is based on the holding of the High Court in the case of *Lesotho Brewing Company t/a Maloti Mountain Brewery vs. Lesotho Labour Court President & Anotehr CIV/APN/435/95 (unreported)*, where the Court had the following to say,

“Where a claim is presented to court outside the time allowed by the law, the court to which such a claim is presented is deprived of the jurisdiction to hear such a claim. The jurisdiction of the court will only arise from that court exercising the discretion condoning the failure to comply with the stipulated time...”

AWARD

We therefore make an award in the following terms:

- a) The application for condonation is refused;
- b) The review application is dismissed for want of jurisdiction;
and
- c) There is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 14th DAY OF OCTOBER 2013.

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

**Mr. S. KAO
MEMBER**

I CONCUR

**Mr. R. MOTHEPU
MEMBER**

I CONCUR

**FOR APPLICANT:
FOR RESPONDENT:**

**ADV. MOLATI
ADV. MATOOANE**