

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

**LC/REV/05/2013
B020/2012**

IN THE MATTER BETWEEN

NAPO MOEKETSI

APPLICANT

AND

**EDCON T/A JET STORES
DDPR**

**1st RESPONDENT
2nd RESPONDENT**

JUDGMENT

Application for review being filed out of time together with an application for condonation. In determining the condonation application, Court finding the explanation to be reasonable to explain the delay. However, Court finding that prospects of success relied upon relate to the merits of the claim before the DDPR. Court finding that Applicant has no prospect of success in the main review application. Further, that the reasonable explanation given, does not in any way augment the non-existent prospects of success in the review application. Court refusing the condonation application and dismissing the review application for want of jurisdiction. No order as to costs being made.

BACKGROUND OF THE DISPUTE

1. This is an application for the review of the arbitration award in referral B020/2012. Applicant had initially referred a claim for unfair dismissal with the 2nd Respondent. The matter was heard in default of 1st Respondent. Nevertheless, Applicant's referral and claims were dismissed through an award issued on the 1st October 2012. It is this award that Applicant wishes to have reviewed, corrected and/or set aside.

2. Several grounds of review have been raised on behalf of Applicant. However, because the review application was filed out of time, it was accompanied by an application for condonation. This application was strongly opposed and having heard the submissions of both parties, Our judgement follows.

SUBMISSIONS

3. It was Applicant's case that he delayed by only two months in filing this application. He argued that this delay is not inordinate and that it has not and will not prejudice 1st Respondent in any manner. It was further Applicant's case that he failed to file the review application within the prescribed time limits, because he had no money with which to instruct a lawyer to file this application on his behalf. He only had enough money in January 2013, hence the late referral.
4. It was further Applicant's case that compounding to his late filing, was the fact that his letter of termination had referred him to the CCMA in South Africa, for redress of his grievance against the decision of his Respondent to dismiss him. He then spend a good amount of time researching about the CCMA and its rights in Lesotho. Furthermore, that regarding the time limits, he had a conflict with his initial union representative who thereafter refused to assist him with the matter. He thus had to wait until he had enough money to afford the services of a lawyer.
5. Applicant further submitted that he had prospects of success in that the learned Arbitrator had committed a serious mistake of law that materially affected His decision and or failed to consider relevant facts, and or considered irrelevant facts. It was submitted that the learned Arbitrator erred in holding that Applicant's dismissal was procedurally fair notwithstanding the following:
 - i. That 1st Respondent had charged him under a South African disciplinary policy;
 - ii. The review committee to which he was directed to appeal to was constituted and indeed sat in South Africa and that this denied him the right to a fair appeal hearing;

- iii. That the same review committee which sat in south Africa made a decision against him without giving him the hearing;
 - iv. The decision to dismiss him was made in South Africa;
 - v. He was not given the chance to mitigate his dismissal as he was not able to attend the appeal hearing in South Africa;
 - vi. His letter of dismissal was made in South Africa and it refers him to the CCMA for redress;
 - vii. The chairperson of his initial hearing was a South African and did not have a work permit. As a result he had no right to work in Lesotho and therefore that the decision he made was null and void;
 - viii. He was not terminated by his employer but by another company in South Africa which did not employ him;
 - ix. After receiving his letter of termination he got another one, which was still from South Africa, which purported to terminate his employment.
 - x. The second letter did not even purport to cancel or withdraw the first letter and that this prejudiced his legal rights.
6. It was further argued that this case is not only important to Applicant but within Our jurisdiction as it will determine if it is proper for a foreign company to dismiss someone working within this Court's jurisdiction.
7. 1st Respondent answered that it is not accurate that Applicant did not have money as he had just been paid his terminal benefits. Further, that over and above that, he earned M15,193.00 as his salary and could from that salary be able to pay for legal fees. Regarding the confusion created by the letter of termination, it was argued that it could not have led to the delay in filing a review. It was added that the letter relied upon, without admitting, could at least be said to have caused a confusion in relation to the DDPR case, which Applicant eventually lodged hence the review.
8. About conflict with the union representative, it was argued that the explanation be found to be unreasonable as Applicant has not stated what this conflict was, so that the Court could

determine if it had a bearing on the representations and consultations.

9. On the prospects of success, it was argued that these issues were never the case before the DDPR and that as such they were never put before the learned Arbitrator to consider. It was further argued that these issues are being raised by Applicant for the first time on review. It was submitted that in terms of the law on review, parties are confined to what took place at the initial hearing in the *court a quo*.
10. It was further argued that Applicant is attempting to use these proceedings to argue the legality of his dismissal which is matter that falls to be determined by the 2nd Respondent. It was added that, this being the case Applicant has no prospects of success in the review application and that this coupled with the fact that there is no reasonable explanation offered, the condonation application should be dismissed with costs.
11. In reply, Applicant submitted that all submissions by 1st Respondent in answer, have not been pleaded. It was argued that they are being raised from the bar and that this is contrary to the rule in motion proceeding that parties must stand and fall by their pleadings. Specific reference was made to the argument relating to the salary of Applicant and the fact that the issues on prospects of success were never raised before the DDPR. It was argued that these are new issues altogether.
12. It was conceded by Applicant that the issues raised in the prospects of success were never raised during the arbitration proceedings. It was however argued that the law on reviews allows for parties to raise issues which were never raised in the initial hearing on review. It was added that the learned Arbitrator ought to have required parties to address those issues during arbitration proceedings and that in failing to do so, He committed a huge anomaly.
13. We have gone through the pleadings of parties and have confirmed that most of the submissions made on behalf of 1st Respondent have not been pleaded. Regarding the issue of the

reasonableness of the explanation for the delay, 1st Respondent has only addressed the issue of the letter of termination which is alleged to have raised confusion. We confirm that the rule in motion proceedings is that parties are confined to their pleadings. Instructive on this position is the authority of *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau No & Another (2009) 30 ILJ 279 LAC*, where at paragraph 25 of the judgment, the Court held as thus,

“In my view it is not open to the appellant to now argue the case which it did not foreshadow in its founding affidavit...”

In view of the above principle, We will only confine Ourselves to the submissions relating to the pleaded case of 1st Respondent.

14. In Our view, Applicant cannot rely on a letter that referred him to the CCMA after having referred his claim to the DDPR. The argument has simply and plainly been overtaken by events. Clearly, and as suggested by 1st Respondent, if at all there was any confusion, it could at best have served his case before the DDPR and not this court. As a result, We dismiss that argument as being without merit.

1. However, Applicant explanation for the delay was not solely premised on the confusion alleged to have been raised by letters of termination, but also on the lack of knowledge about the time limits and the fact that he had no money. While We accept these arguments as being unchallenged, the argument about the lack of awareness about the prescribed time limits cannot sustain. We say this because the time limits are prescribed in the rules of this Court which are the law. It is trite that ignorance of the law is no excuse in Our jurisdiction. As a result, the argument of Applicant in this premise is inexcusable and therefore unreasonable. Our attitude finds support in the High Court of Lesotho decision in *Molapo v Mphuthing & others CIV/APN/188/1994*, where the learned Maqutu J quoted an extract from the authority of *Evans v Bartlam 1937 2 All ER 646 at 649GH*, that
There is a rule that ignorance of the law does not excuse....”

15. Regarding the lack of funds, unless otherwise shown, We accept as being reasonable enough to justify the delay in the referral of this application. For this reason, We are therefore

content with the explanation given for the delay in filing this application.

16. Regarding the prospects of success, the 1st Respondent has addressed them in its pleadings. This appears under para 6 of its answer, which spans from paragraph 6.1 to 6.4. However, what has not been pleaded, is the claim that all the arguments in support of the prospects of success were not raised during the arbitration proceedings. This being the case, the rule in motion proceedings, as cited from *Evans v Bartlam 1937 2 All ER 646 at 649GH* by Maqutu J in *Molapo v Mphuthing & others (supra)*, equally applies against 1st Respondent on this point.
17. Nonetheless, We cannot ignore the concession made by Applicant that he did not raise the issues before the 2nd Respondent but that they are only coming up for the first time on review. We have stated before that this practice is forbidden in review proceedings, as it is contrary to the principle of *audi alteram partem* (see *Phakiso Ranooana v Lesotho Flour Mills (Pty) Ltd & another LC/REV/59/2011; Zinyathi Trading (Pty) Ltd v DDPR & others LC/REV/11/2013*). The principle of *audi alteram partem* applies both ways, that is, it must be afforded to all parties concerned and that includes the learned Arbitrator. By this, We essentially mean that the issues which are being raised for the first time on review, should have been raised with the learned Arbitrator to give Him the opportunity to address them..
18. In view of the circumstances of the case *in casu*, there are clearly no prospects of success as issues claimed to serve that purpose, are advanced in breach of the *audi alteram partem* rule. In Our view, it would be baseless and a waste of time to condone a claim which clearly would not have merit. Even though the explanation given is reasonable, it does not in any way augment the prospects of success and as such it would not be in the interests of justice to condone same. Consequently, the condonation application is refused.
19. It is trite law that a court has no jurisdiction over a decision that has been filed out of time unless the delay in filing such a claim has been condoned. In essence, it is through the

granting of condonation that the court becomes seized with jurisdiction over a prescribed claim. *In casu*, We have refused the Applicant's condonation application. This being the case, We remain deprived of jurisdiction to hear the review application as it was filed out of time and continues to remain so.

20. In coming to the above conclusion, We have relied on the authority of *Lesotho Brewing Company t/a Maloti Mountain Brewery v Lesotho Labour Court President & Another CIV/APN/435/95*, where the Court had this 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, if the interest of justice so demand.*"

AWARD

On the basis of the above reasons, we make the following award:

- 1) The condonation application is refused.
- 2) The review application is dismissed for lack of jurisdiction.
- 3) No order as to costs is made.

THUS DONE AND DATED AT MASERU ON THIS 15th DAY OF SEPTEMBER 2014.

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

MRS. RAMASHAMOLE

I CONCUR

MRS. THAKALEKOALA

I CONCUR

**FOR APPLICANT:
FOR RESPONDENT:**

**ADV. SEKONYELA
ADV. RAMPHALILE**