

**IN THE LABOUR COURT OF LESOTHO**

**HELD AT MASERU**

**LC/REV/104/2013  
C0148/2011**

**IN THE MATTER BETWEEN**

**KOALI MOLAPO**

**APPLICANT**

**AND**

**OK BAZAARS LESOTHO (PTY) LTD  
T/A SHOPRITE  
DDPR – ARBITRATOR (L NTENE)**

**1<sup>st</sup> RESPONDENT  
2<sup>nd</sup> RESPONDENT**

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**JUDGMENT**

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*Application for review of arbitration award. Application having been filed out of time together with an application for condonation. Court adopting a holistic approach to the matter. Court granting the condonation application. Court finding no merit in the allegation of irregularity that the matter was res Judicata when it was reheard. Court further finding that Arbitration was right in not considering evidence that was led in the rescinded matter. Review application being refused and 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 C0148/2011. However involved the history of this matter is, briefly Applicant initiated a claim for unfair dismissal with the Directorate of Dispute Prevention and Resolution (DDPR). In default of 1<sup>st</sup> Respondent, Applicant obtained an award in terms of which he was to be reinstated without loss of income in terms of section 73 of the *Labour Code Order 24 of 1992*. This award was delivered on 18<sup>th</sup> May 2012.

2. Subsequent thereto, the matter was reheard on the 30<sup>th</sup> August 2012 with both parties in attendance. On 29<sup>th</sup> September 2012, an award was issued dismissing Applicant's claim. Dissatisfied with the new decision, Applicant initiated the current review application, wherein he has raised only one ground of review. His complaint is that the learned Arbitrator sitting in the second hearing disregarded both the initial award and evidence tendered in those proceedings.
3. This application has been filed out of time and it was accompanied by an application for condonation. Both applications have been strongly opposed by the 1<sup>st</sup> Respondent. Having addressed Us on them holistically, Our judgment follows.

### **SUBMISSION AND ANALYSIS**

#### *Application for condonation*

4. Applicant's case is that after receipt of the arbitration award, he instructed his union representatives from the National Union of Commerce, catering and Allied Union (NUCCAW), to initiate review proceedings on his behalf. They then communicated later to him that the application had been made. Relying on their promise he waited for direction.
5. Applicant stated that he only learned later when he went to inquire about the date of hearing that the review was never made. Shocked at these findings he took his file from NUCCAW and instructed his current attorney's of record, Mosuo and Associates. It was only after the change in representation that the review was initiated. He added that clearly the delay was not occasioned by him but by the misrepresentation made by NUCCAW and he prayed that the late application be condoned.
6. On the prospects of success, Applicant's case was that he has prospects of success in that the learned Arbitrator erred by hearing the second referral without first dealing with the award issued by Mr. N. Moshoeshe by default. He argued that in view of this, the second matter was *res judicata*.

7. Respondent answered that Applicant has not addressed the degree of lateness in that he has not explained the period of delay. He submitted that wherein the award was reviewed on 29<sup>th</sup> September 2012, the review application was made and filed on 26<sup>th</sup> August 2013, which is about 10 months later. It was argued that Applicant has not explained what he did in that period.
8. On the prospects of success, it was argued that it is inaccurate that the matter is *res judicata*. It was submitted that the first award was rescinded hence the subsequent rehearing of the matter. It was argued that Applicant has no prospects of success and that as such the review be dismissed. The Court was referred to the case of *Melane v Santam Insurance company Ltd 1962(4) SA 531 AD*. It was submitted that in this case, the Court stated that without prospects of success, it is not necessary to consider other requirements. It was prayed that the condonation be dismissed.
9. When giving an explanation for the delay in the filing of an application, an applicant party is expected to explain the whole period of delay (*Phetang Mpota v standard Lesotho Bank LAC/CIV/A06/2008* at paragraph 13). This is what is technically referred to as *an explanation of the degree of delay*. *In casu*, We agree with Respondent that in his explanation, Applicant has not addressed this element. He has essentially failed to explain what he did in the 10 months between the date of issuance of the award and the actual initiation of the review application.
10. In so far as the prospects of success are concerned, We on the contrary find that Applicant has prospects of success. The requirement for prospects of success merely requires that a party show that he/she has a *prima facie* case should the application be granted (see *Napo Thamae & another v Agnes Mokone & another C of A (CIV) 16/2005*) at paragraph 11). The issue is not the actual merit of the case, as such matters are left for determination by the Court in the merits of the matter sought to be condoned. We therefore find merit in the argument for prospects of success.

11. In law the requirements for condonation must be considered together and not individually, so that strong prospects may compensate the weak explanation given for the delay (see *Napo Thamae & another v Agnes Mokone & another (supra)* at paragraph 13). As a result, while Applicant has not been able to satisfy the first requirement in full, that is, the failure to explain the degree of delay, his strong prospects of success compensate for his weak explanation. Further, We are drawn more to this conclusion by the fact that Respondent does not even challenge the explanation but only the degree of delay. Consequently, the condonation application succeeds.

### *Merits*

12. Applicant's case is that the learned Arbitrator disregarded the evidence of an award issued by Arbitrator N. Moshoeshoe, as he then was, which granted him an award in default of Respondent. It was argued that due to existence of that award the matter had finalised and was thus *res judicata* when brought before the learned Arbitrator Ntene. It was argued that by hearing it, the learned Arbitrator committed a grave irregularity.

13. It was further Applicant's case that the learned Arbitrator erred by not considering evidence led in the initial proceedings before arbitrator N. Moshoeshoe. The Court referred to annexure *KM3* to the Founding Affidavit. This is the outcome of the initial hearing. It was argued that had this annexure been considered, the learned Arbitrator would have learnt that the chairperson of the initial hearing investigated the matter in the absence of Applicant.

14. Respondent answered that the matter was reheard because the initial award was rescinded. The Court was referred to page 1 of the record of proceedings, in support. It was submitted that at page 1 of the record of proceedings, the learned Arbitrator granted the rescission after hearing the Respondent's case, and Applicant having openly stated that he did not oppose the application. It was argued that the argument about the matter being *res judicata* when it was reheard, cannot sustain.

15. On the evidence in the form of annexure *KM3* having been ignore, it was submitted that the said document may have been tendered in the initial hearing but not in rehearing. It was argued that this being the case, the learned Arbitrator was right in not considering *KM3* as it was not evidence before Her. It was added that even the record of proceedings does not reflect the said document to have been tendered. It was prayed that this argument be dismissed as well.

16. We have gone through the initial record of proceedings, specifically at page 1 as referenced by Respondent. At this page the following is recorded,

*“Application for rescission*

*Applicants Addresses*

*Reason for non-attendance*

*As stated in the affidavit on the date of hearing i fell ill. Therefore I delayed to send someone to represent the company she unfortunately arrived late and was advised to apply for rescission.*

*Prospects of success*

*Respondent was caught red handed in the possession of goods that were not paid for.*

*Respondent:*

*I do not approve the application for rescission.*

*RULING*

*The application for rescission is granted.*

*Reason will follow.”*

17. Clearly, the rehearing cannot be clarified as *res judicata* as the initial award was rescinded. This meant that it had been reopened. The defence of *res judicata* requires that one establish that the current and old matters be based on the same set of facts and have been finalised between the same parties (see *Potlako Thabane & another v Workmen’s Compensation Trust Fund Committee & two others LC/08/2009*). Clearly *in casu*, these requirements have not been met.

18. Regarding *KM3*, We wish to confirm that Applicant has not referred Us to any portion of the record where it was tendered in the rehearing proceedings. As a result, this leads Us to conclude that it was never tendered in the arbitration proceedings in issue, as Respondent alleges. As a result, the learned Arbitrator was right in not considering it. This is the position irrespective of the fact that the said document may have been tendered in the initial arbitration proceedings. Therefore, this argument also fails.

**AWARD**

On the strength of the above reasons, we make an award as follows.

- 1) That the review application is refused.
- 2) The award of the 2<sup>nd</sup> respondent in C0148/2011 is hereby reinstated and must be complied with within 30 days of issuance herewith.
- 3) No order as to costs is made.

**THUS DONE AND DATED AT MASERU ON THIS 11<sup>th</sup> DAY OF FEBRUARY, 2015.**

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

**MR. KAO**

**I CONCUR**

**MR. TŠEUOA**

**I CONCUR**

**FOR APPLICANT:  
FOR 1<sup>st</sup> RESPONDENT:**

**ADV. MOSUOE  
ADV. RAFONEKE**