

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

LC/REV/39/2012

A0421/2008

IN THE MATTER BETWEEN

MALINEO MAFISA & 37 OTHERS

APPLICANTS

AND

LESOTHO FLOUR MILLS LTD

1ST

RESPONDENT

DDPR

2ND

RESPONDENT

JUDGMENT

Application for the review of the arbitration award. Condonation application for late referral of review within the review application. 1st Respondent raising a point in limine that it is improper to include a condonation application in the main review. Court not finding merit in claim and dismissing the point in limine. Court further not finding merit in the condonation application and dismissing same. Court also 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 A0421/2008. The brief background of the matter is that Applicants were employees of the 1st Respondent until their termination. They referred a dispute with the Directorate of Dispute Prevention and Resolution (DDPR) for breach of contract. After several sittings before the DDPR, Applicants were ordered to file an application for condonation for the late referral of their claims.
2. The condonation application was duly filed and argued. Thereafter, the learned Arbitrator issued an award wherein He dismissed the said application. Unhappy with the said award, Applicants initiated the current review proceedings. They had also applied for condonation for the late filing of the application, in the review application.
3. In answer, 1st Respondent raised a *point in limine* in terms of which he challenged the propriety of applying for a condonation within the review application. He specifically argued that the two applications must be separated. The argument was strongly opposed. We, at the request of parties, allowed them to argue the matter holistically. Having heard them, Our judgment follows.

SUBMISSIONS AND ANALYSIS

Condonation within a review application

4. 1st Respondent's case was that in terms of the Rules of this Court, an application for condonation cannot and should not be made within another application. He submitted that it has to be made separately to make it easy for 1st Respondent to answer and for the Court to make its decision. Applicant's answer was simply that there is no irregularity in the procedure adopted.

5. We agree with Applicant particularly because 1st Respondent has not referred Us to any Rule of procedure that prohibits this approach. There is basically no evidence of 1st Respondent allegations. Further, We have found the application and the affidavit detailing out the Applicant's case is broken into headings which single out the arguments in a clear manner, for Us to comprehend and follow. We therefore find no impropriety as suggested.

CONDONATION APPLICATION

6. Applicants' case was that immediately after receipt of the award, they sent it to his union and instructed them to lodge an appeal on their behalf. They only learned around the 15th May 2012 that the review had not been lodged. They further learned that the union official, who was seized the matter, had deserted and the file could not be found. They then

gave the union a copy of the award to proceed to initiate review proceedings. They submitted that the delay was not wilful, in as much as it was not occasioned by either them or their union.

7. Regarding the prospects, Applicants submitted that they have prospects of success in that there is evidence of an agreement between them and 1st Respondent. It was argued that agreement places an obligation on the part of 1st Respondent which has not been performed to date.
8. 1st Respondent answered that Applicants have failed to give convincing reasons for the delay in filing the application for review. It was argued that Applicants are attempting to shift the blame to an unknown union official whose name they have opted not to disclose. It was added that Applicants do not even say when it is that the award was reviewed by them or on their behalf.
9. On the prospects of success, it was submitted that Applicants have none. It was submitted in addition that Applicants merely claim the existence of an obligation without stating its content. It was argued that Applicants have failed even on this element. It was prayed that the Court refuse the condonation and dismiss the review application.
10. In an application for condonation, there are several requirements that must be satisfied. Out of all the

requirements, only two are key and these are the explanation for the delay and the prospects of success. We wish to note that in giving an explanation for the delay, an applicant party must explain the entire period of delay with sufficient particularity to enable the Court to duly exercise its discretion. In the case of *Phetang Mpota v standard Lesotho Bank LAC/CIV/A06/2008*), at paragraph 13, in addressing the issue of the explanation for the delay, the Court made the following remark,

“With regard to the explanation, such must cover the entire period in respect of which the condonation is sought.”

11. Regarding the prospects of success, the Court in the above authority made the following comment,

“prospects of success or bona fide defence on the other hand mean that all what needs to be determined is the likelihood or chance of success when the main case is heard.”

In essence, all that is required of an applicant party is that they must give sufficient detail for the Court to be able to determine if they will succeed. These prospects must be related to matter in respect of which the condonation is sought.

12. *In casu*, Applicant has failed to explain the entire period of delay. As 1st Respondent has shown, Applicant has failed to state when it is that they received the award. As a result, the period between the unknown date of receipt of the award and the 15th May 2012 is unexplained. Further, Applicants

have shifted the blame for their failure to file on time, to another person, without stating their name. It is Our view that they should have disclosed the name to enable the 1st Respondent to authenticate their claims.

13. Regarding the prospects of success, it is Our view that they are bare in law. Applicants have merely made mention of an obligation without stating what the said obligation entailed. It is trite law that bare allegations of facts are unconvincing and cannot be relied upon to make a conclusion. In addressing bare allegations of facts, the High Court of Lesotho in *Mokone v Attorney General & others CIV/APN/232/2008*, made the following remark,

“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. Consequently, We find that in making bare allegations of facts, Applicants have failed to show that they have prospects of success.

14. In addition to this said above, the alleged prospects do not show any irregularity in the procedure adopted to make the award in issue. We have noted that the prospects relate to documents annexed to the Applicants founding affidavit, as MM3 and MM4. These are documents detailing offers made to Applicants by respondent regarding their benefits.

15. Moreover, We have also considered the grounds of review that Applicants rely on. Applicants claims that the learned Arbitrator erred by not granting the condonation application despite the fact that it was unopposed. This ground would not sustain for a simple reason that it places a challenge against the decision of the learned Arbitrator. We have stated before that in law a challenge against the decision, as is the case, is best addressed through an appeal and not review procedure.

16. The distinction between a review and an appeal, and the consequential remedies, was made in the case of *J. D. Trading (Pty) Ltd t/a Supreme Furnishers v M. Monoko & others LAC/REV/39/2004*, as follows,

“The reason for bringing proceedings on review is the same as the reason for taking them on appeal, namely to set aside a judgment already given. Where the reason for wanting to set aside a judgment is that the court came to the wrong conclusion on the facts or the law, the appropriate remedy is by way of an appeal. where on the other hand, the real grievance is against the method of the trial, it is proper to bring the case for review.”

17. Secondly, Applicants claim that the learned Arbitrator erred in that he failed to properly conceive the principle of prescription. It is argued that there were negotiations and a promise to pay which were not honoured hence the review.

Reference was made to a document labelled MM5 which was not tendered and has not been tendered to date despite an order to do so.

18. Without the referenced MM5, there is no proof of interruption of prescription and hence no evidence of misconception of the principle. Applicants have again made bare allegations of facts without supporting prove. As we have already stated, bare allegations of facts are unconvincing and cannot be relied upon to make a conclusion. We are therefore convinced that in refusing the condonation application, Applicants stand no prejudice as their review has no merit.

19. On the basis of the above reasons, we deem it fit to refuse the condonation application and decline jurisdiction to hear and determine the Applicant's review. We are supported in this stance by the High Court of Lesotho decision in *Lesotho Brewing Company t/a Maloti Mountain Brewery v Lesotho Labour Court President & Another CIV/APN/435/95*, where the Court held as follows,

“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.”

COSTS

20. 1st Respondent asked that the matter be dismissed with costs, on the ground that the application is frivolous. It was submitted in amplification that this is an old matter which is affecting Respondent financially. Applicants answered that they have not been frivolous in any way in as much as 1st Respondent has failed to show how. It was submitted that Applicants are merely exercising their legal right to seek redress against errors committed by the learned Arbitrator. They prayed that a request for costs be dismissed.

21. We stated before that costs are awarded only in extreme circumstances of either frivolity or vexations conduct or both. Further that these two must be shown and not just alleged. 1st Respondent has barely alleged frivolity on the part of Applicants without illustrating how this is so. We have more than reiterated the principle on bare allegations and see not need to re-reiterate same. Even the substantiation given does not demonstrate frivolity, but a mere claim of a prolonged matter. We therefore agree with Applicants that they have not been shown to have been frivolous.

AWARD

We therefore make an award as follows:

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

**THUS DONE AND DATED AT MASERU ON THIS 11th DAY
OF MAY, 2015**

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

MR. MOTHEPU

I CONCUR

MR. MATELA

I CONCUR

FOR APPLICANT:

ADV. THELISI

FOR RESPONDENTS:

ADV. MABULA