

**IN THE COURT OF APPEAL FOR THE REPUBLIC OF
BOTSWANA HELD AT GABORONE**

COURT OF APPEAL CIVIL APPEAL NO. CACGB-105-12
INDUSTRIAL COURT CASE NO. APP-28-10

In the matter between:

Air Botswana

Applicant

and

**Thembo Lebang
Johnson Popo
Moses Oodira
Ntu Tsele
Makuku Mathodi
Letsweletse Botsang
Joba Matlale
Sebopelo Moseki
Zachariah Mooketsi
Mogorosi Mpalang
Moremi Moremi
Gopolang Magashula
Kaprico Humu
Noah Rantsho**

**1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent
7th Respondent
8th Respondent
9th Respondent
10th Respondent
11th Respondent
12th Respondent
13th Respondent
14th Respondent**

Mr Attorney M. M. Chilisa for the Applicant

Mr Attorney J. B. Akoonyatse for the Respondents

RULING

LEGWAILA JA

1. This is an application for condonation for late payment of security for costs. It was paid into court three weeks later

than it ought to have been paid. The respondents' attitude to the application is that they will "*abide by the decision of the Court*". The application is therefore not opposed.

2. The explanation for the delay is that it was "*the result of an oversight on the part of the Appellant's legal representative, brought about in large part by the desire of the parties to settle the dispute without the need to prosecute the appeal*".
3. In the case of **MELANE v SANTAM INSURANCE CO. LTD 1962 (4) AD 531 at page 532 C-E** Holmes JA explained –

"In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success tend to compensate for a long

delay. And the respondents' interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits."

4. The degree of lateness is three weeks and the explanation for the delay blames the applicant's attorneys. On the importance of the case, the applicant's original grounds of appeal showed a serious misconception as to what was reviewable. The grounds of appeal complained mainly of issues relating to the evaluation of evidence by the arbitrator. Such issues relate to the merits. This, notwithstanding, the judge *a quo*'s commendable judgment explained the difference between review and appeal. Herbstein and Van Winsen in, The Civil Practice of the Supreme Court of South Africa 4th Ed Juta & Co. 1997 at page 929 give this simple statement on grounds for review –

"The grounds upon which proceedings can be brought under review --- are as follows:

- (a) absence of jurisdiction on the part of the court;*
- (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;*
- (c) gross irregularity in the proceedings, and,*

(d) *the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.”*

5. At page 932 the learned authors explain further –

“The reason for bringing proceedings under review or appeal is the same, sc to have the judgment set aside. Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however, the real grievance is against the method of the trial, it is proper to bring the case on review.” (See also RAPHETHELA v AG [2003] 1 BLR 591 @ 595 D-E)

6. To his credit, counsel for the applicant in his arguments before the court stayed clear of matters relating to the merits. Counsel’s arguments were made under the following three headings:-

- A. Award did not resolve dispute between the parties;
- B. Arbitrator determined issues not submitted to him;
- C. There was never a valid submission to arbitrator.

7. The arguments under the first heading were adequately answered by the judge *a quo* at pp 16-18 of her judgment. I need not go over the same ground. Under Heading C, the argument was that the dispute was not referred within a

reasonable time. This is based on the fact that the matters in dispute went as far back as the year 2000. The first point is that the referral was consensual. The introductory part of the arbitral award points out –

“1.3 Both parties confirmed before the Arbitrator that they had voluntarily agreed to refer the dispute to the Arbitrator, Mr Thembo Lebang.”

8. The second answer is that it appears to the court that the applicant in raising this issue was simply clutching at straws. Having agreed to refer the matter to the arbitrator, it is too late to argue that the dispute was not referred within a reasonable time. In any case, that point was not raised during the referral. The applicant was alleged to have reneged on an agreement reached in 2000.

9. The applicant’s contention under Heading B alleges –

“It was never part of his mandate to determine how future overtime entitlements were to be computed. In so far as the issue of overtime was concerned, his jurisdiction was limited to determining the Respondents’ entitlement to any arrear overtime.”

10. This contention is based on paragraph 4.4.2 of the Award which stated –

“From then onwards, Respondent should implement the three weeks cycle shift with a ceiling of 144 hours. Any additional hours worked to be treated as overtime.”

11. In their heads of argument, the respondents replied –

“57. With respect to the latter of the 2 points above it is admitted that:

(a) on the common cause facts as aforesaid, the Arbitrator’s mandate was to determine whether the claimants were due overtime for the period effective December 2000 “to date”.

(b) the Arbitrator however went further than his mandate and made an award at paragraph [4.4.2] directing that, in future, should the claimants work beyond 144 hours they should be paid overtime.

58. The Arbitrator was not entitled to make an award with respect to future claims for overtime and it is conceded that only in this very narrow respect, the arbitrator exceeded his jurisdiction.”

12. Did the Arbitrator exceed his jurisdiction? To be more precise, did the Arbitrator make any reference to the “future”? The word future does not appear on the paragraph complained of.

13. It seems to me that paragraph 4.4.2 of the Award was read out of context and I told the parties so. To understand the import of paragraph 4.4.2, one must refer back to the last sentence of paragraph 4.4.1 which reads –

“Respondent must work out the overtime and pay all the drivers accordingly from December 2000 when there was a written decision by the Acting General Manager of Air Botswana.”

14. It appears to me that the words at paragraph 4.4.2 that *“from then onwards ...”* mean from *“from December 2000 onwards,”* implying, up to the date of implementation.

15. It should be noted that paragraph 4.4.4 of the Award directs –

“This award should be implemented within the next 30 days from the date of this award.”

16. Future and indefinite awards could not be implemented within 30 days of the award.

17. If the statement in paragraph 4.4.2 had been made after the statement in paragraph 4.4.4, the argument that it was referring to the future would be tenable.

18. If I am wrong in the view I hold, there is another way of interpreting the mandate of the Arbitrator. Regarding the full context of the dispute, it is my view that the desire of the parties was not only to solve the ills of the past but also to provide a way for harmonious future relations as well. The relationship between the parties was not going to end 30 days from the date of the award. The employment, and therefore the relationship, was going to continue beyond the date of the implementation of the award. Therefore the mandate could not have been fashioned in such a way that the solution it provided should cease to be applicable post the date of implementation. That would immediately require another arbitration. That would have been an absurd way of solving problems. Problems are solved with a view to having a harmonious future and not only the harmony of the moment of decision.
19. Therefore viewed in that light, the Arbitrator would have been within his mandate if he understood the mandate to extend to future industrial relations.

20. That, notwithstanding, I believe this is an issue that presents an arguable case, using the terminology of this court's decision in the case of **TAWANA v THE STATE [1984] BLR 272 CA.**

21. In the result, the delay in payment of security for costs is condoned.

DELIVERED IN OPEN COURT AT GABORONE THIS 1st DAY OF FEBRUARY 2013.

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E. W. M. J. LEGWAILA
JUSTICE OF APPEAL