IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO. 49/14

In the matter between:-

MAK'HUMALO EVELYN HLEKWAYO APPLICANT

AND

MOUNTAIN STAR LODGE (PTY) LTD RESPONDENT

CORAM : **MAJARA C.J.**
MUSONDA, AJA
PEETE, AJA

HEARD : **22ND JULY 2015**
DELIVERED : **7TH AUGUST 2015**

Summary

Employee claiming severance package and public holidays, overtime and weekly rest before DDPR. Employer not appearing. Default judgment entered in respect of severance pay. DDPR refusing to enter judgment in respect of public holidays, overtime and weekly rest due to lack of particulars. The employee challenging DDPR's refusal as the claim was unchallenged; there was no need to call evidence.

Musonda AJA delivered the judgment of the Court.

1.0 This is an appeal from the judgment of the Labour Appeal Court dated 18 July 2014. The background to this appeal is that the appellant had referred a claim for severance pay, unpaid public holidays, overtime and weekly rest days to the Directorate of Dispute Prevention and Resolution herein referred to as DDPR. On 16th May 2012, the matter was heard in default of appearance by the first respondent. The appellant was awarded severance package in the sum of M7,753.84. The claim for public holidays, overtime and weekly rest day in the sum of M64,579.59 was rejected.

1.1 The Arbitrator opined that the appellant did not tabulate the exact days she claimed she only submitted a global figure. For that reason it was difficult to ascertain exactly, whether or not she was actually owed monies, as she claimed without knowing the exact dates she was referring to.

2.0 Dissatisfied with the learned Arbitrators award the appellant applied for review to the Labour Court.

2.1 The gravamen or essence of the application for review was that the learned Arbitrator erred by proceeding to hear the merits. In terms of section 227 (8) the Labour Code (Amendment) Act No.3 of 2000, he only had three options: (1) to dismiss the referral, (2) to postpone it, or (3) to grant an award by default. Having elected to grant the award by default, the learned Arbitrator was precluded from hearing the evidence, but to grant the claim as they appeared in the referral form. Under the Labour Code (Directorate of Dispute Prevention and Resolution) Regulations 2001, Regulation 22 (2) (d) states that:

> *"In pre-arbitration conference, the parties shall attempt to reach consensus on the following: (d) The precise relief claimed and if compensation is claimed, the amount of the compensation and how it is calculated (f) discuss the reception of documentary evidence and (g) the reception of affidavit evidence".*

The Labour Code (Conciliation and Arbitration Guidelines) notice 2004, Guideline 25 (2) confers discretion on the Arbitrator to allow each party to give evidence, call witnesses, question witnesses, and address concluding remarks."

2.2 The Labour Court in its judgment agreed with the content of section 227 (8) of the Labour Code Act, but sharply differed in its interpretation.

2.3 The Labour Court was of the view that the section requires the leading of evidence in either three situations, nor does it preclude the reception of evidence. The court characterised the interpretation advanced by the appellant before the court as narrow and self-suited. They went on that section 227 (8), does not operate in a vacuum from other principles of law and in particular the principles of evidence.

2.4 The court further held that:

> *"It is a trite principle of evidence that he who alleges, bears that onus of proof. They cited the case of United Clothing v Phakiso Mokoatsi and Another[1] in which case it was held that:*
>
> *"the duty is cast upon a litigant to adduce evidence that is sufficient to persuade the court at the end of the trial or defence as the case may be should succeed:*

[1] LAC/REV/436/2006

2.5 That what would rather prevail at the end is that if there is no evidence to contradict the evidence of the claimant, then the court must proceed to make a decision on the basis of the unchallenged evidence of the claimant and make an appropriate order. The case of *Theko v Commissioner of Police and Another*[2] *and Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd*[3], were cited in support of that propositions of the law.

2.6 The application to review was refused and the appellants applied to the Labour Appeal Court to review the judgment of the Labour Court. The reasons advanced in the Labour Appeal Court, were the same as those advanced in the Labour Court. The application to review before the Labour Appeal Court was generated by the refusal of the Labour Court, to accept the appellant's interpretations of section 227 (8) and Regulations 19 of the Labour Code (Directorate of Disputes Preventions and Resolution) Regulations 2001.

3.0 The Labour Appeal Court interpreted Regulation 19, which is couched in these terms:

19. "If a party to a dispute fails to attend the arbitrations hearing, the Arbitrator may:-

(a) postpone the hearing;

[2] 1991-1992 LLR LB 231
[3] 1984 (3) sa 623

(b) dismiss the referred, or

(c) grant the award by default."

3.1 In view of the Labour Appeal Court, the effect of the above provisions of the Act and Regulations is to the effect that the DDPR has to consider whether or not to grant the order that the Arbitrator considers would meet the justice of the case, where such case requires the DDPR to decide whether or not to grant default judgment. A 'default judgment' is binding judgment in favour of either party, based on some failure to take action by the other party. Most often it is judgment in favour of the plaintiff, when the defendant has not responded to summons or has failed to appear before a court of law. In the absence of such evidence, it is difficult to understand how the court can elect as to what kind of judgment or determination it should make. In the opinion of the Labour Appeal Court, the DDPR is not precluded from entertaining evidence where it has to make a decision on whether or not to grant default judgment.

3.2 Labour Appeal Court, was of the view that it would be difficult for the DDPR to grant default judgment in the sum of M64,579.59, without hearing evidence as to how that figure is arrived at.

4.0 Dissatisfied with the Labour Appeal judgment, the appellant appealed to this court.

5.0 The first ground was that the two courts below did not appreciate the spirit and purport of the provisions of sections 227 (8) of the Labour Code (Amendment) Act No. 3 of 2000 as read in conjunction with Regulation 19 of the Labour Code (Directorate of Dispute Prevention and Resolutions) Regulations 2001.

5.2 It was a misdirection to grant judgment to the Respondent who did not contest the claims.

5.3 The claims having constituted liquidated claims, there was no need for evidence. The Arbitrator ought to have taken judicial notice of the public holidays in the Kingdom of Lesotho.

5.4 There was sufficient evidence to grant the two claims before the Arbitrator.

6.0 We shall deal with grounds 5.1, 5.2 and 5.3 together as they are interrelated.

6.1 The appellant has sharply focused on the legal interpretation of section 227 (8) and Regulations 19. The

issue the appeal raises, is how the Arbitrator conducts himself or herself under these legal provisions. Has the inherent discretion of someone acting in quasi judicial capacity been extinguished under these provisions? Does an Arbitrator cease to act judiciously under these provisions, by rubber stamping the claimant's claim. For the sake of clarity "rubber-stamping" is defined by the Concise Oxford English Dictionary (Tenth Edition) at page 1249 as-

> *"A person acting to give automatic authorization, without having the authority or ability to question or reject".*

6.2 We shall revert to the above discussions after examining provisions of employment law in another jurisdictions. The Employment Tribunal (Constitutions and Rules of Procedure) Regulations 2004 of England, have incorporated the "overriding objective". The purpose of the "overriding objective" is to enable Tribunals and Chairmen to deal with cases justly. Justly includes: ensuring that the parties are on equal footing, dealing with the cases in ways which are proportionate to the complexity or importance of issue, ensuring that it is dealt with expeditiously and fairly and saving expenses. Further a tribunal or Chairman shall seek to give effect to the overriding objective, the parties shall assist the tribunal or the Chairman to further the overriding objective.

6.3 It would be in our view a legal, juridical and logical fallacy, within the context of the legislation in question, to say an Arbitrator seized with power to dismiss, postpone or enter default judgment, has no inherent jurisdiction to seek clarification of the claims or call evidence to justify such claims. To put it in another way can an Arbitrator remain 'meek and mute' in the face of an unintelligible or ambiguous claim. Can such an Arbitrator be said to be acting judiciously? We think not. Even if a respondent does not appear, it does not mean he should be penalised more than what the justice of the case demands, having regard to his/her act or omission otherwise the Arbitrator will be putting a premium on unjust enrichment by the claimant. The Legislature did not intend that the Arbitrator as a person exercising "Quasi Judicial Power" shall have his inherent power extinguished under these provisions. This is illustrated in the already cited provisions of the Labour Code Directorate of Disputes Prevention and Resolutions) Regulation 2001 and Labour Code (Conciliation and Arbitration Guidelines) Notice 2004,

6.4 We do not agree with the appellant that the Arbitrator did not give reasons for rejecting the other claim. The reasons appear on p.34 of the record and we quote:-

> *"Appellant stated further that she is owed public Holidays, overtime and rest days, but she did not tabulate the exact days she claims she only submitted the total amount claimed. For this reason, it will be difficult to ascertain exactly whether or not she is actually owed monies as she claimed without knowing the exact dates she is referring to."*

Additionally at p.42 of the record, the Arbitrator had prodded the appellant to clarify her claim. Mr Mosuoe was ambivalent as to whether it was wrong for the Arbitrator to seek particulars. At one point he said there was nothing wrong, but calling for evidence was wrong.

6.5 We are in agreement with the Arbitrator, that there was no material placed before him to enter judgment in the sum of M64,579.59. He who asserts must prove.

6.6 We agree with the Labour Court, that the Arbitrator is not excluded to seek clarification and call evidence, save and except that authorities cited by the Labour Court, concerned a full trial, while in this case, it was a matter of a default judgment.

6.7 The Labour Appeal Court, was on firm ground when the court rejected the preferred interpretation by the appellant. The legislation itself by conferring jurisdiction on the Arbitrator to dismiss, objectively construed means he/she can dismiss for want of evidence. He/she can postpone to call evidence or enter default judgment where on the face of it, the claim is clear and an unambiguous. Regulation 22 (2) (f) and (g) prescribes how documentary and affidavit evidence is received. Further support of our holding is found in Guideline 25 (2) which confers discretion on the Arbitrator to allow parties to call evidence, as already alluded to.

6.8 In conclusion we have anxiously exercised our minds, whether it would be equitable to outrightly dismiss the claim for public holidays, overtime and rest days, when it is uncontroverted that the appellant worked. The philosophy underlying labour adjudication is to achieve or do substantial justice and not technical justice, given that the bargaining power syndrome is in favour of the employer. The employee is in a weaker position, more so as in this case where the claimant was of humble education.

We therefore modify the judgment of the Court a quo by remitting the Award of holidays, overtime and rest days, back to the Arbitrator. The appellant bears the burden to particularise the claim by indicating hours dates and years.

The amount will attract interest from the date of the award until payment at the Bank of Lesotho short-term lending rate.

The following orders is made:-

1. The appeal is partially successful.

2. There being no appearance from the Respondent we make no order as to costs.

I agree **N. MAJARA**

CHIEF JUSTICE

DR P. MUSONDA

ACTING JUSTICE OF APPEAL

I agree **S. PEETE**

JUSTICE OF APPEAL

For Appellant : Mr M. Mosuoe

For Respondent : No appearance