LAC/CIV/A/10/2008

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

In the matter between:

THABO THOSO **APPELLANT**

AND

METRTOPOLITAN LESOTHO **RESPONDENTS**

CORAM: THE HONOURABLE MR JUSTICE K.E. MOSITO AJ.

ASSESSORS: MRS. M. MOSEHLE

MR. S. KAO

Heard on: 17th FEBRUARY 2012

Delivered on: 23rd FEBRUARY 2012

SUMMARY

Appeal from the judgment of the Labour Court – Labour Court reversing the award of the DDPR on the basis that there was no proper service of the Notice of Set down – the only issue before Court being whether there was no proper service. – the issue of wilfulness having not been debated in the Labour Court – in any event, whether or not there was wilfulness on the part of Respondent not constituting a reviewable ground but a decision on the facts and application of the Law relating to rescission – appeal allowed with costs on the basis that there was proper service.

JUDGEMENT

MOSITO AJ

1. This is an appeal against the judgment of the Labour Court reviewing and setting aside the decision of the Arbitrator of the Directorate of Dispute Prevention and Resolution (DDPR). That decision dismissed the present Respondent's application for rescission of Referral Case No A1050/04.
2. The facts that gave rise to the application before the Labour Court are that, the Appellant having been dismissed by his erstwhile employer (the Respondent herein), approached the DDPR for relief in case No A1050/04. Service of process in A1050/04 was effected by registered mail addressed to the Director, Metropolitan Life Lesotho and by fax allegedly received by Rets'elisitsoe Makara, Respondent's officer at Metropolitan Headquarters, Maseru. It is common cause that despite the aforementioned service, the Respondent did not attend the arbitration proceedings and the Appellant obtained judgment by default in August 2004 on the ground that he had been dismissed without a hearing.
3. The DDPR awarded Appellant the sum of M31, 500.00 representing compensation for unfair dismissal and payment in lieu of notice. The Appellant testified on his own behalf and suggested to the DDPR that he earned a minimum commission of M4, 500.00 per month. The Respondent alleged that it became aware of the award and subsequently launched an application for rescission on the 21st October 2004. The application was dismissed by the DDPR on the grounds that the Respondent had failed to provide a reasonable explanation for its failure to attend the hearing on the scheduled date and that the Respondent failed to show that it had prospects of success. The Respondent applied for review to the Labour

Court on 3rd May 2005 alleging that it was served with the award on 5th April 2005. The Respondent also contended that there was no proper service. The application for review was opposed on the grounds that it had been brought late without any explanation for the delay; and that there was no reviewable irregularity by the Arbitrator in refusing to grant rescission.

4. The Labour Court held that it had been proved that the Respondent was served with the rescission application on 28th February 2005 and not on 5th April 2005 as it was contended. The Court however held that the Arbitrator had erred in holding that "there was proper service of the Respondent when there was none" and, it proceeded to rescind the Arbitrator's award on the basis that he could not have properly exercised his discretion in the matter on the basis of wrong conclusions on the facts.
5. The Appellant appealed to this Court against the aforementioned decisions on the following grounds:

> "the Learned President of the Labour Court erred and misdirected himself in holding that there was a reviewable irregularity in the exercise of discretion by the Arbitrator in DDPR referral case **No. A 1050/04.**
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> the Leaned President of the Labour Court erred and misdirected himself in holding that merely because he could have been inclined to rescind the default judgment "so that all sides may be heard", he naturally and lawfully had the right to intervene and could thus interfere with the exercise of discretion by the Arbitrator.
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> the Learned President of the Labour Court erred and misdirected himself in holding that the Arbitrator's exercise of discretion was not proper because it was based "on wrong conclusions of fact". The Leaned President clearly erred in not appreciating that a complaint directed against

> conclusions of that [*sic*] is primarily a matter of concern of a Court sitting on appeal and not on review.
>
> the Learned President of the Labour Court was wrong in all respects in interfering with the exercise of discretion by the Arbitrator when there was no legitimate ground for him to do so on review."

6. Advocate K.K. Mohau KC who appeared for the Appellant submitted before us that, although several grounds have been filed against the decision of the Labour Court, those may all be collapsed into one issue: whether the Arbitrator had indeed erred (as held by the Labour Court) in holding that there was proper services of the process in referral Case No 1050/04 upon the Respondent and, refusing to rescind his award in the matter.
7. Advocate S. Phafane KC for the Respondent however, submitted that the real question in this appeal is whether the Respondent proved a *good cause* before the DDPR. He submitted that, the real issue is whether the Respondent satisfied the relevant requirements of a rescission application to justify the holding of the Labour Court that the DDPR erred in refusing to grant the rescission application. He submitted that the Labour Court was entitled to interfere with the award of the DDPR given that the learned Arbitrator made a mistake of Law that materially affected his decision. Alternatively, he submitted that the learned Arbitrator's decision failed to take into account the relevant and material evidence affecting the issue he had to decide. He argued that the issue was whether there was wilfulness on the part of the company in not appearing at the hearing regard being had to the fact that the process had been correctly served on the Respondent, it was not brought to the attention of the managing director of the Respondent. Advocate K.K. Mohau KC countered that the issue of

wilfulness was not the one raised and argued before the Labour Court. He argued that the only issue argued and on which the Labour Court decided the case was whether there was proper service.

8. The issues raised and argued before the Labour Court are contained in paragraphs 11 and 12 of its judgment of the Labour Court as follows:

> "The company applied for the review of the award on the grounds that, there was no service on the company as is required by the law. Furthermore the applicant contended that the learned Arbitrator misconstrued the legal principles governing rescission and that if that was not so, he would have granted so that all parties could be heard before final award is handed down.
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> There is no dispute that service was effected on the applicant in terms of Regulation 9(c) of the DDPR Regulations which provides as follows:
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> > "(9) where a document is served on an employer, the document may be served by:
> >
> > "(a) .....
> >
> > "(b) .....
> >
> > "(c) sending a copy to the employer by registered post, fax or electronic mail if it has a postal address, fax number or email address."
>
> It is not in dispute that *in casu* the Notice of Set Down was faxed to the office of the applicant, where it was admittedly received by Mr Rets'elisitsoe Makara.
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> It is not denied that the correct office for which the Notice of Set Down was intended was that of the Managing Director. It is also not dispute that the set down did not reach that office.

9. In light of the above, I agree with Advocate Mohau that, upon a closer scrutiny of the grounds of appeal filed, those may all be collapsed into one

issue subject of review, *viz*: whether the Arbitrator had erred (as held by the Labour Court) in holding that there was proper services of the process in referral Case No 1050/04 upon the Respondent and, refusing to rescind his award in the matter. The issue whether the learned Arbitrator's decision failed to take into account the relevant and material evidence affecting the issue he had to decide, and whether there was wilfulness on the part of the company in not appearing at the hearing regard being had to the fact that the process had been correctly served on the Respondent were neither pleaded nor argued before the Labour Court.

10. In several of its decisions the Court of Appeal of Lesotho has more than once deprecated the practice of relying on issues which are not raised or pleaded by the parties to litigation. See for example **Frasers (Lesotho) Ltd vs Hata-Butle (Pty) Ltd 1995 – 1999 LAC 698; Sekhonyana and Another vs Standard Bank of Lesotho Ltd 2000-2004 LAC 197; Theko and Others v Morojele and Others 2000-2004 LAC 302; Attorney-General and Others v Tekateka and Others 2000 – 2004 LAC 367 at 373; Mota v Motokoa 2000 – 2004 LAC 418 at 424. National Olympic Committee and Others vs Morolong 2000 - 2004 LAC 449.**

11. Thus, whatever their merits, the issues whether the learned Arbitrator's decision failed to take into account the relevant and material evidence affecting the issue he had to decide, and whether there was wilfulness on the part of the company in not appearing at the hearing regard being had to the fact that the process had been correctly served on the Respondent, could not be properly argued before this Court because they were neither pleaded nor argued before the Labour Court. The Labour Court could not properly consider them. There is yet another problem with regard to the issue whether the learned Arbitrator misconstrued the legal principles

governing rescission and that, if that was not so, he would have granted that all parties could be heard before final award was handed down. This is clearly a ground of appeal and not review.

12. The only issue that fell to be considered by the Labour Court was whether there was no service on the company as is required by the law. In my opinion, there is no need to consider all the grounds of appeal detailed out in paragraph 5 above. The second ground alone will dispose of this appeal. It reads that: the Learned President of the Labour Court erred and misdirected himself in holding that the Arbitrator's exercise of discretion was not proper because it was based "on wrong conclusions of fact". The Leaned President clearly erred in not appreciating that a complaint directed against conclusions of that [*sic*] is primarily a matter of concern of a Court sitting on appeal and not on review.

13. It is clear from the papers and also in argument before us that, it was not in dispute that *in casu,* the Notice of Set Down was faxed to the office of the Respondent, where it was admittedly received by Mr Rets'elisitsoe Makara. It was also not denied that the correct office for which the Notice of Set Down was intended was that of the Managing Director. It is also not dispute that the set down did not reach that office.

14. As a general rule documents initiating proceedings, whether by way of application or action as well as notices of set down, are required to be served on opposing litigants. This is fundamental to the judicial process as service is the method by which a respondent, defendant or other interested party is informed that some order is to be sought that will or may affect it. The act of service is a formal one which is required to be carried out by the official appointed for the area where service is effected. Without service the proceedings are not properly initiated.

15. Regulation 9(c) of the DDPR Regulations does not require that for service to be proper, it must reach a particular officer of the company. It is difficult to find the legal basis for the Labour Court's holding that unless the document reached the office of the Managing Director, then it would not be proper service. Regulation 9(c) of the DDPR does not support that proposition. It is correct that whoever addressed the document inserted the office of the Managing Director as the office that he wished could receive the process, but that does not make it the law that, unless the document reached the office of the Managing Director, then it would not be proper service

16. In addition, in terms of section 306 of the **Companies Act 1967**:

> Any notice, order or rather document which by this Act may be or is required to be served upon a company, external company or unregistered association may, if it cannot be served as in this Act is otherwise expressly prescribed of unless the Court shall otherwise direct, be served by leaving the same at, or sending it by prepaid registered post to-
>
> (a) The registered office, in the case of a company;
> (b) Any place of business established in Lesotho in the case of an external company;
> (c) The head office or principal place of business in Lesotho in the case of an unregistered association.

17. In terms of the Companies Act a company is obliged to select a registered office within Lesotho, a record of which is retained at the office of the Registrar of Companies. The records of the Registrar of Companies are open for public inspection. As a result of this, obtaining an address at which service is the company`s registered office can be rendered by furnishing an affidavit from the person who has conducted an inspection at the office of the Registrar of Companies reflecting the company`s registered office. A company is not required to disclose to the Registrar of Companies its

principal place of business. Consequently service on a principal place of business may present difficulties of proof. It would not always be within the knowledge of the plaintiff or applicant that a particular address upon which service is to be or has been effected is the principal place of business to the defendant or respondent within the court`s jurisdiction. If it is within the knowledge of the plaintiff or applicant an appropriate affidavit establishing this fact can be placed before court.

18. In my opinion therefore, l am unable to find that the DDPR had erred in finding as it did that the service was proper. The Labour Court therefore erred in reversing the decision of the DDPR on this aspect.

19. Regarding the proper application of the Law or principles relating to rescission, as I understand the Respondent's case, they were complaining that the DDPR had not apply the Law correctly or that it was wrong in its decision on the Law because it misapplied the principles relating to rescission applications. In my opinion these is a ground of appeal and not review. The Labour Court is not empowered to entertain appeals from the DDPR. It might be the Labour Court it have come to a different decision from that reached by the DDPR on the issue whether or not to grant rescission. However, the Court was not entitled to intervene in these regard as no reviewable irregularity was disclosed by the facts.

20. In the result the appeal succeeds with costs, and order of the Labour Court is changed to read that: "the application is dismissed with costs."

12. This is the unanimous decision of the Court

K.E.MOSITO AJ

Judge of the Labour Appeal Court

For Appellant: Adv. K.K. Mohau KC

For Respondent: Adv. S. Phafane KC