IN THE LABOUR COURT OF LESOTHO

LC/REV/65/06
LAC/REV/14/03

HELD AT MASERU

IN THE MATTER BETWEEN

AFRO ASIA ENGINEERING (PTY) LTD **APPLICANT**

AND

NTSOAKI MATSELA **1ST RESPONDENT**
DDPR **2ND RESPONDENT**

JUDGMENT

Date of hearing: 30/10/86

Review of DDPR award – Rule 16 of the rules of the court – If the applicant fails to attend a hearing, the court may dismiss the application, but before doing so the court shall consider any written submissions filed by that party pursuant to rule 15. DDPR refusing to condone late filing of rescission application – Arbitrator not giving applicant opportunity to address him fully – Principle of legality and fair trial violated – Applicant who is Chinese not assisted with interpreter – This denied applicant opportunity to ventilate his case. Regulation 29 of LN No.194 of 2001 – Court may upon consideration of convenience, justice and the object of the law condone non or defective compliance with mandatory provision. – Decision reviewed and set aside.

1. This is an application for the review of the award of the Directorate of Dispute Prevention and Resolution (DDPR) in which the latter refused to condone applicant's late filing of the rescission application and dismissed the applicant's application to rescind the award in A461/02.

2. This review application was filed on the 28th April 2003. The matter was set down for hearing on the 30th October 2006. On the scheduled day neither the applicant nor the respondents were in attendance. The matter had to be dealt with in terms of rule 16 of the rules of the court which provides that:

"16 If a party shall fail to appear and be represented at the time and place fixed for the hearing of an Originating Application or appeal or application, the court may, if that party is an applicant or appellant, dismiss the Originating Application appeal or application or in any case proceed to hear and dispose of the matter in the absence of that party or may adjourn the hearing to a later date;
Provided that before deciding to dismiss or dispose of any originating application or appeal in the absence of any party, the court shall consider any written representations by that party submitted in terms of rule 15."

3. On perusal of the record it turned out that Mr. Mphalane for the applicant had prepared and filed written heads of argument pursuant to rule 15 of the rules of the court. The court was therefore enjoined to exercise its powers under rule 16 with those written heads in mind. In other words in deciding the application in the absence of the parties, the court had to take into account and consider those submissions of the applicant.

4. The first respondent made a referral to the 2nd respondent sometime in 2002. In that referral she claimed for payment of certain monies which she said were underpayments for some eight months that she had worked with the applicant herein.

5. The first respondent further claimed that the applicant had employed her for a fixed period of one year. After she had been in employment for eight months, she was unfairly and prematurely terminated because she had asked the applicant to desist from breaching her contract and pay her as agreed. She therefore claimed for payment of salary for the remainder of the four months that she did not serve.

6. The referral was set down before the second respondent on the 1st July 2002 (see annexure "SZ2" of the notice of motion). For some reason the applicant did not attend and an award was made in favour of the 1st respondent by default.

7. The applicant was ordered to pay the 1st respondent M11,129.93 made up of M6,200.00 being underpayments for eight months and M3,600.00 being salary for the four months which applicant denied 1st respondent to work by prematurely terminating her contract.

8. After the applicant became aware of the award it approached the 2nd respondent for rescission of the default award. According to paragraph 5 of the founding affidavit of Shao Zhubin, the secretary of the respondent, the award was received by them sometime in July 2002. Since the award was issued on the 31st July it is inconceivable that the applicants could have received it that same day especially when they were not in attendance. July cannot therefore possibly be the month that they received the award.

9. The deponent to the founding affidavit says he was issued with a form at the DDPR which he was to fill. He avers that "due to some business I was engaged in and due to illness I was not able to do everything within a short time hence why the form was completed on the 9th December 2002." It is common cause that the applicant also filed an application for condonation of the late filing of the rescission application.

10. On the 01/04/03 the parties were called before the DDPR for the hearing of both the application for condonation of late filing of the rescission application and the rescission application itself. On the 4th April 2003 the learned Arbitrator Ntaote issued an award in which he dismissed both the applications.

11. On the 28th March 2003 the applicant filed a notice of motion in which he sought review of the learned Arbitrator's decision to refuse to condone the late filing of the rescission and consequently dismiss the rescission application.

12. The grounds upon which review is sought are the following:

12.1 When Mr. Shao Zhubin appeared before the 2nd respondent for the condonation and rescission hearing he was not given a chance to address the 2nd respondent fully. Only questions were posed to him in Sesotho and as a Chinese person and not conversant in Sesotho as well as English he believes that procedurally an interpreter should have been appointed to enable him to understand the proceedings and to properly motivate applicant's case.

12.2 Rescission and condonation should have been granted because it is clear from the record that whilst the hearing was held on the 1st June 2002, the notice of hearing was only dispatched by fax to the applicant on the 11th June 2004.

12.3 The delay is not inordinate and the learned Arbitrator is given a wide discretion to condone any breach of the rules.

13. We will start with the 2nd ground for review. A close look at the Award of the Arbitrator and annexure "SZ2" shows that there is a conflict in the dates of hearing of the main matter. Annexure "SZ2" which is the notice of set down says the matter is set down for 01/07/02. In his award the learned Arbitrator says the referral was heard on the 01/06/02.

14. This is a serious conflict which could only be resolved by the 2nd respondent, by doing either of two things. Either the arbitrator could have acted in terms of section 228E(6) (b) which provides that an Arbitrator who issued an award may on his own accord or on the application of any affected party vary or rescind an award

"(b) in which there is ambiguity or an obvious error or omission, but only to the extend of that ambiguity, error or omission."

15. If the arbitrator did not become aware of the error after the award was handed down, he or she still had the opportunity to clarify the situation by filing an affidavit to inform the review court of the correct dates on which the referral was actually heard.

16. None of the two possible actions were taken by the 2nd respondent. This court cannot speculate what the correct date of hearing is or ought to be. Accordingly, the point taken by the applicant that he was served with the notice of set down after the matter had already been heard cannot but be accepted. In other wards the applicant only became aware of the case against them when it had already been heard and finalized on the 1st June 2002. This is contrary to the *audi alteram partem* rule that no man can be condemned unheard.

17. If the record of proceedings of the 1st April 2003 when the condonation and rescission applications were heard are relied upon, it becomes immediately clear that the applicant has got a point, when he says he was not given the opportunity to address the 2nd respondent fully, except that only questions were posed to him by the Arbitrator.

18. The record of the rescission proceedings is worth quoting in full: It goes like this;

"1. Respondent company's representative:
2. says he received the award in July 2003 date unknown to him.
3. *Application for rescission appears to have been made on 09th December 2002."*

This is the length and breath of the record. What then follows is the Ruling.

19. There is no basis for disbelieving the applicant when he says he was not given the opportunity to address the tribunal fully in the face of such a record. Infact it is clearly a summary, it does not show precisely who said what through the hearing.

20. A point that is further worth noting is that the award and the record conflict with each other. According to the summary (of the proceedings), applicant herein said he received an award on a date that is unknown to him. In the award the arbitrator says applicant said he "received and therefore became aware of the Award on the 20th day of August 2002."

21. The question that arises is which is the date that the applicant actually received the award. The Answer should be borne by the record. That this is not discernable from the record can only further lend credibility to the claim that applicant was not given sufficient opportunity to address the arbitrator fully to ventilate his case. This is contrary to the principle of legality and fair trial.

22. The averrement that the applicant, who is neither proficient in Sesotho nor English was peppered with questions by the arbitrator in Sesotho is not denied. It is also not denied that he was not afforded the opportunity to be assisted by an interpreter to enable him to appreciate the proceedings he was taking part in. Regulation 22(2)(g) of the Labour Code (Directorate of Disputes Prevention and Resolution) Regulations 2001 enjoin parties to hold a pre-arbitration conference to consider, inter alia, "whether an interpreter is required, and if so, for how long and for which languages." This pre-arbitration step ought to have been followed if the applicant herein was to be able to properly ventilate his case before 2nd respondent.

23. A close look at the award reveals that the learned arbitrator placed heavy reliance on the consideration that the rescission application should have been made within 10 days of the applicant being aware of the award, because the word "shall" is used. Two things need to be said about this.

24. First the applicant contend that notwithstanding regulation 29 on which the learned arbitrator relied; the arbitrator had a discretion whether to allow the presentation of the rescission application outside the ten days. It seems to this court that indeed the arbitrator has a wide discretion whether to allow requests for rescission.

25. Section 15 of the Interpretation Act No.19 of 1977 provides that, "every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

26. In his book Interpretation of statutes, Juta & Co. p.227 G.E. Devenish admits that although the terms peremptory and mandatory on the one hand, or directory and permissive on the other hand have been part of accepted legal usage "….there is a lack of clarity in regard to their precise meaning and application".

27. Thus in Nkisimane & Others .v. Santam Insurance Co. Ltd 1978(2) SA430(A) Trollip JA had this to say:

"Preliminarily I should say that statutory requirements are often categorized as "peremptory" or "directory". They are well known, concise and convenient labels to use for the purpose of differentiating between the two categories. But the earlier clear-cut distinction between them (the former requiring exact compliance and the latter merely substantial compliance) now seems to have become somewhat blurred. Care must therefore be exercised not to infer merely from the use of such labels what degree of compliance is necessary and what the consequences are of non or defective compliance. This must ultimately depend upon the proper construction of the statutory provision in question or in other words upon the intention of the lawgiver as ascertained from the language scope, and purpose of the enactment as a whole and the statutory requirements in particular. Thus on the one hand, a statutory requirement construed as peremptory usually still needs exact compliance for it to have the stipulated legal consequence, and any purported compliance falling short of that is a nullity. On the other hand, compliance with a directory statutory requirement,

although desirable, may sometimes not be necessary at all, and non or defective compliance therewith may not have any legal consequence."

28. In Shalala .v. Klerksdorp Town Council and another 1969(1) SA582 the court referred to the Appellate Division case of Maharaj & Others .v. Rampersad 1964(4) SA638 which it said laid down the test to be followed in cases where peremptory and/or directory terminology is used. The court per Colman J. referred to a passage at p.646C where Van Winsen A.J. as he then was stated:

"the enquiry, I suggest, is not so much whether there has been "exact" "adequate" or "substantial" compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a court might hold that, even though the position as it is, is not identical with what it ought to be, the injunction has nethertheless been complied with. In deciding whether there has been compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance."

29. Dealing with the facts of the case before him Colman J noted that:

"the purpose of the requirement that the application be made within 14 days is to ensure that there will be no undue delay in bringing the matter before court. It is clearly against public policy that the type of dispute envisaged, involving as it does a dislocation in the control of manucipal affairs, should remain unresolved for longer than is necessary."

30. The learned Judge concluded by finding in favour of the applicant as follows:

"The applicant did not bring the matter before the court as he was enjoined to do, but it does not follow from that that the object of the relevant injunction was thereby frustrated or materially impaired."

31. The above two quotations in my view fit hand in glove with the facts of the present case. There can be no doubt that the 10 day time frame stipulated in regulation 29(2) was decided upon with the considerations of expediency as well as the principle of finality to litigation in mind. Failure to meet that time frame does not necessarily mean that the aforegoing considerations are defeated.

32. As the learned authour in Interpretation of statutes supra states at p.228, courts do frequently condone none compliance with ostensibly mandatory provisions "by weighing up all the relevant considerations such as inter alia convenience, justice, and the object of the law."

33. It is trite that when a statute authorises judicial or quasi-judicial powers which impact on individual or property rights, there is a presumption that in the absence of an express provision or clear intention to the contrary, the powers so given must be exercised in accordance with the principles of natural justice. (See Devenish supra at p.178).

34. The fact that the effect of the 10 days limit if complied with to the letter, is to deny the applicant herein the opportunity to be heard must influence the decision whether to condone non-compliance with the prescribed time frame or not. The object of the Labour Code (Amendment) Act, which established the DDPR, we suggest, is not to deny a legitimate respondent like the applicant herein the right to be heard.

35. Furthermore, given the central role played by the principle of *audi alteram partem* in our law, it would be justified to conclude that considerations of justice require that the applicant's failure to comply with the 10 days time limit be condoned and the applicant be afforded the opportunity to defend the claims against him.

36. Finally, on this point assuming the 10 days time limit is indeed mandatory and therefore that failure to comply with it is fatal, we will be at square one, where we say the effect of the statute is to deny the applicant herein the right to be heard. I have already

observed that I discern no intention on the part of the legislature at least in the principal law viz. Labour Code (Amendment) Act 2000 to deny a party failing to comply with the rule the right to be heard.

37. At best, such intention can be discerned from regulation 29(2) itself. Legal Notice No.194 in which the regulations are published is a subsidiary legislation. It is trite that *audi alteram partem* may only be excluded by statute either expressly or by necessary implication. Delegated legislation however, may not do so. An attempt by delegated legislation to do so as is apparent on the face of regulation 29(2) renders that regulation to be adjudged unreasonable and *ultra vires*. (See Devenish supra at p.179).

38. The second comment that needs to be made regarding the approach of the learned Arbitrator in inflexibly adhering to the 10 days time limit is that, the learned Arbitrator himself is confused as to when exactly the applicant herein received the award. The conflicting dates in the record and in his own award leaves us in the dark as to what the correct date is. It would appear applicant said at the hearing that he has forgotten the date. The date of the 28th August which appears in the Award would therefore seem to be the arbitrator's own creation in as much as it is not borne by the record. Even if applicant may have been late; there is no evidence showing by how much he was late, such that the arbitrator might feel the delay was inordinate.

39. For these reasons we conclude that the award of the DDPR in referral No. A1787/02 must be reviewed, corrected and set aside and it is so decided. It is ordered that the dispute between the parties should be heard de novo by the DDPR.

THUS DONE AT MASERU THIS 15TH DAY OF NOVEMBER 2006.

L. A. LETHOBANE
PRESIDENT

M. MOSEHLE **I CONCUR**
MEMBER

L. MOFELHETSI **I CONCUR**
MEMBER

FOR APPLICANT: **N. MPHALANE & CO.**
FOR RESPONDENT: **No appearance**