IN THE LABOUR COURT OF LESOTHO

LAC/REV/161/05
LC/REV/443/06

HELD AT MASERU

IN THE MATTER BETWEEN

SHALLAE NTABEJANE	**APPLICANT**
AND	
MASHAILE MASHAILE	**1ST RESPONDENT**
THE ARBITRATOR (L. MALEBANYE)	**2ND RESPONDENT**
THE DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION	**3RD RESPONDENT**

JUDGMENT

Date of hearing : 06/03/07
Review – Regulation 29(2)(a) of Labour Code Directorate of Disputes Prevention and Resolution – Whether the rule prescribing that rescission of an award be made within 10 days is intended to exclude right to a hearing – Under the common law courts have inherent power to rescind default judgments – A party in default must be given opportunity to apply rescission of a default judgment
Evidence – Arbitrator misconstruing evidence thus proceeding to hear a claim of unfair labour practice on which DDPR does not have jurisdiction.
The award reviewed and set aside.

1. After the conclusion of submissions on this matter the court made a ruling upholding the review application and dismissing the

default judgment made in favour of the 1st respondent against the applicant by the 3rd respondent. The court however reserved the reasons for its ruling. What now follows are those reasons.

2. 1st respondent was allegedly employed on a day to day basis as a driver's mate helping applicant's taxi driver, on the 01/10/03. He was paid M20.00 at the end of each day.

3. Starting October 2004 he was converted to a month to month employee and was paid M500.00 per month. He was dismissed at the end of March 2005.

4. 1st respondent made a referral to the 3rd respondent (DDPR), in which he challenged the fairness of his dismissal. He also claimed that he be paid certain monies representing the difference between what he should have been paid according to the law and what he was actually paid (underpayments).

5. The referral was scheduled to be heard on the 29th June 2005. According to the record only the 1st respondent, who was then the complainant attended court. The applicant, who was the 1st respondent's employer was not in attendance.

6. Relying on section 227(8) of the Labour Code (Amendment) Act 2000 which gives the arbitrator power to postpone a hearing or dismiss the referral or grant an award by default, if a party to a dispute fails to attend a hearing, the learned arbitrator decided to grant an award by default in favour of the 1st respondent.

7. The award ordered the reinstatement of the 1st respondent with payment of lost wages for the four months that he had been out of employment. His claim for underpayments was however not successful.

8. Applicant received the default award on the 10th August 2005. On the 22nd August he filed an application for the rescission of the default award. The application was dismissed on the ground that the referral was made after the lapse of 10 days contrary to regulation 29(2)(a) of the Labour Code Directorate of Disputes Prevention and Resolution Regulations 2001. That regulation

provides that a party applying for variation or rescission of an award must do so "within 10 days of the date on which the applicant became aware of the arbitration award or ruling."

9. Applicant filed an application of the review of the said award(s) of the DDPR. Quite clearly, the learned arbitrator followed the route of strict adherence to the rules at the risk of denying the applicant his fundamental right to be heard.

10. It is trite that, the rules are for the convenience of a court, but the court is not for the rules. Thus even where the rules make no provision for a condonation application, a court will readily invite a defaulting party to purge his default by making the necessary application for condonation of his default.

11. This approach is well founded in the common law, since courts have inherent power to rescind default judgments. "Thus, it has been held that the defendant has a right, quite apart from the provisions of the relevant rule, to apply for rescission of a default judgment." (see Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa; 1997 Juta & Co 4th Edition pp. 539-540).

12. Furthermore, the approach is informed by the fundamental principle of audi alteram partem rule, which dictates that no man should be condemned unheard. The tenets of the principle were aptly summarised in the case of Mamonyane Matebesi .v. The Director of Immigration and Others. [1997-1998] LLR-LB 455 at pp460-461 as follows:

> *"Whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in her liberty or property or existing rights. Unless the statute expressly or by implication indicates the contrary, that person is entitled to the application of the audi alteram partem principle.*
> *"The right to be heard is a very important one, rooted in the common law not only of Lesotho but of many other jurisdictions."* (Emphasis added).

13. We have emphasized the phrase referring to taking or making of adverse decision because this is precisely what the learned arbitrator did when she made a default judgment against applicant which she later refused to rescind. The application was refused without affording the applicant the opportunity to be heard why he has not complied with the rule that says rescission applications must be filed within 10 days of a party becoming aware of the award. That decision in turn had the ripple effect of condemning the applicant without hearing in the main case as well.

14. There is no doubt that the DDPR performs a public function not only towards its staff, but towards its clients as well namely, employers and employees. There is nothing in regulation 29 to suggest that it (the regulation) was intended to exclude the right to be heard. (See also Lesotho Electricity Corporation .v. M. Moshoeshoe [1997-1998] LLR-LB 412 at p.415 and Selikane P. Selikane & 33 ors .v. LTC & ors [1999-2000] LLR-LB 127 at p.131].

15. On the strength of the foregoing remarks it is apposite to hold that in a situation such as the present where a party made an application out of time, the learned arbitrator dealing with the matter had the discretion whether to condone or not to condone the late filing of such an application. The discretion could only be exercised if the applicant had applied for condonation. Since the applicant had – evidently not done so, no harm would have resulted if he had been advised to avail himself of that opportunity.

16. In the circumstances we would be inclined to remit the matter back to the DDPR with an order that the applicant be afforded the opportunity to make an application for condonation. That would then rest the present matter. However, there is another issue which though not covered in the applicant's founding affidavits comes out clearly from the record. Since this is the issue of law it would be futile to refer the matter back to the DDPR without making a comment on it. This is the issue to which we now turn.

17. In her award, the learned arbitrator states at page 3 that "in his uncontested testimony applicant indicated that he was dismissed without any reason being given. He was also not charged and

called to a hearing in order to defend himself." (P.10 of the paginated record). Since the testimony was uncontested the learned arbitrator found for 1st respondent and payment of 4 months lost wages.

18. The summary of evidence on which the learned arbitrator premised her finding is however at variance with the transcribed evidence of the complainant, 1st respondent herein, as reflected on pages 19-20 of the paginated record. It will be helpful to quote the conversation that went on between the arbitrator and the complainant, 1st respondent.

"**Arbitrator**: "Then you are saying your dismissal was unfair because you were not charged and given the opportunity to defend yourself. What happened that you were dismissed?
Complainant: It was after the association (the union) asked my boss for a meeting, about this issue of the underpayments, and my boss when getting this letter calling for a meeting, he expelled me from the job.
Arbitrator: When receiving the letter that the association (the union) asked to meet with him?
Complainant: Yes my lady.
Arbitrator: It was going to be discussed the issue of the underpayments?
Complainant: Yes my lady.
Arbitrator: You had complained to the association that you were not paid rightly?
Complainant: Yes my lady.
Arbitrator: Then just when he received that letter he told you to go?
Complainant: He told me to go.
Arbitrator: Without giving you reasons as to why you should go?
Complainant: He said you have sued me, I do not want to see you in my yard.
Arbitrator: He said you should go because you have sued him?
Complainant: Yes my lady.
Arbitrator: To the Association (the union).
Complainant: Yes my lady.

Translated into English by J.P. Sehlabaka, High Court Interpreter.

It is clear from this transcript of 1st respondent's testimony that it is incorrect to say as the learned arbitrator says that he said he was dismissed without any reason being given.

19. This dismissal can be governed by section 66(3)(a) and (c) of the Code which provide:

> "(3) The following shall not constitute valid reasons for termination of employment.
> (a) Trade Union membership or participation in trade union activities…..
> (b) …..
> (c) The filing in good faith of a complaint or grievance, or the participation in proceeding against an employer involving the alleged violation of the Code , other laws or regulations or the terms of a collective agreement or award."

20. Section 22 of the Act provides:

> "(1)(a) Every person has the right
> (i) to participate in forming a trade union
> (ii) to join a trade union; and
> (iii) to participate in its lawful activities.
> (b) …..
> (c) Any breach of the provisions of this sub-section is an unfair labour practice."

21. Section 226(1)(b) provides that "The Labour Court has the exclusive jurisdiction to resolve (disputes concerning) unfair labour practice." Quite clearly the dismissal of the 1st respondent should be classified as an unfair labour practice in as much as his trade union membership influenced the employer to dismiss him. In paragraph 9 of his answering affidavit the 1st respondent says as much that "….applicant herein told 1st respondent that his son (Tsosane Ntabejane) would never ever any more work with him, as now 1st respondent is a union member."

22. It is trite that section 66(3)(c) envisages the referral of complaints or grievance to fora that are legally empowered to resolve such complaints under the law. Those fora would be this court, the DDPR or the Labour Department. Since 1st respondent had not yet filed a complaint with any of these for, section 66(3) would clearly not apply.

23. The only basis for challenging 1st respondent's alleged dismissal would therefore be in terms of section 66(3)(a), which as we have shown in paragraphs 21 and 22 above constitutes an unfair labour practice, which only the Labour Court has exclusive jurisdiction to adjudicate. This is the dispute which the arbitrator would be expected to have issued a certificate referring it to the Labour Court for adjudication pursuant to section 226(3) of the Act.

24. We accordingly came to the conclusion that despite not affording applicant the opportunity to apply for condonation; thereby denying herself the exercise of a discretion vested in her whether to condone the late application, the arbitrator erred in granting default judgment in a matter over which the DDPR did not have jurisdiction. We thus concluded that the entire proceeding was irregular, and that the default judgment itself must be set aside. We found ourselves in good company of Cullinan C.J as then was in Maqalika Leballo .v. Thabiso Leballo & Another [1993-1994] LLR-LB 275 at 282, where after considering the facts the learned C.J. concluded:

> *"As I see the judgment was therefore irregular. The defendant clearly acquiesced in the matter for a number of months. Nonetheless, if a judgment is irregular, the defendant is entitled ex debito justitiae to have it set aside."*

25. The view that we hold is that it will be a futile exercise to refer the matter back for exercise of a discretion on condonation when even after the exercise of such discretion the DDPR would have no jurisdiction over the stage that follows namely; to confirm the default judgment, or to re-hear the matter if condonation were granted. For these reasons the default judgment was set aside as an irregular judgment.

26. This is not to suggest however that the 1st respondent is without remedy. He is in no way to blame for the delay in finalizing this matter. Accordingly, the 1st respondent is at liberty to reinstitute his claim before the Labour Court within 30 days from the date of this judgment accompanied with the necessary application for condonation. We have made no order as to costs.

THUS DONE AT MASERU THIS 8TH DAY OF MARCH 2007

L. A. LETHOBANE
PRESIDENT

R. MOTHEPU **I CONCUR**
MEMBER

L. MATELA **I CONCUR**
MEMBER

FOR APPLICANT: **MR. MOHOBO**
FOR RESPONDENT: **MR. P. KEBISI OF DEMOUW**