IN THE LABOUR COURT OF LESOTHO LC/REV/351/2006

HELD AT MASERU

IN THE MATTER BETWEEN:

METROPOLITAN LESOTHO APPLICANT

AND

THABO DANIEL THOSO 1ST RESPONDENT
ARBITRATOR N. RANTSANE 2ND RESPONDENT

JUDGMENT

Date : 13/11/08
Review of an award refusing to grant rescission of a default judgment – Service was made to the registered office of the employer by fax but the fax did not reach the Managing Director who had to deal with the case – Service not completed - The employer not having been served the default was not willful – Default judgment is only a procedure available to courts to speed up machinery of justice. It is not intended to deny defaulting party the chance to be heard – Courts have substantial discretion to rescind defaults judgments – Award reviewed and set aside and default judgment rescinded.

1. This is an application for the review of the Award of the Directorate of Dispute Prevention and Resolution (DDPR) dated 28th January 2005. The review was filed on the 3rd May 2005, some three months after the Award was handed down. In his Founding Affidavit the Regional Manager, Mr. Mothae, averred that the applicant became aware of the Award on the 5th April 2005. This then made the review to be within the 30 days within which a party is expected to file a notice of review after it

became aware of the Award. (Vide section 228F (1) (a) of the Labour Code (Amendment) Act 2000 (the Act)).

2. In his Answer the 1st respondent denies that applicant became aware of the Award on the 5th April. He averred that the applicant was served with the award on the 28th February 2005. He attached annexure "TT1" which purported to be a "Confirmation of Service of Arbitration Award" made by one M. Matela. The 1st respondent went further to raise a point *in limine* that the review application has been filed outside the 30 days provided by section 228F(1)(a) of the Act.

3. In reply the applicant fired a barrage of criticism against annexure "TT1". Mr. Mothae filed a Replying Affidavit in which he contended, *inter alia*, that the annexure does not show who M. Matela is and in what capacity he effected the service of the award. He went further to state that the annexure does not show the person upon whom the service was effected and the capacity in which such a person received the service.

4. On the face of it annexure "TT1" is a standard DDPR form that is used to evidence service of an Award. It has two parts that evidence different ways in which service may be effected. It could be by either leaving a document at the registered office or place of business of the employer or by collecting it from the offices of the DDPR. The marking of M. Matela on "TT1" shows that he effected service by leaving the Award at the registered office or principal place of business of the employer.

5. That method of service is envisaged by regulation 9(b) of the Labour Code (Directorate of Dispute Prevention and Resolution) Regulations 2001 which provides:

> *"9 where a document is served on an employer the document may be served by:*
>
> *(a)…..*
>
> *(b) leaving a copy of the document at the employer's registered office or principal place of business with any person who is at least 16 years old and in charge of the premises at the time."*
>
> *(c)……*

Clearly the regulation envisages that the process will be left with a person of not less than 16 years of service. Annexure "TT1" does not as Mr. Mothae correctly avers in his Replying Affidavit, say upon whom the Award was served.

6. Mr. Mohau contended that the signature of the person who received the award resembles that of Mr. Mothae. Whilst the naked eye view might conclude that there are similarities, it does not provide conclusive proof. Furthermore, it cannot cure the defect that M. Matela's return of service does not tell us that person of the apparent age of 16 years on whom he served the Award. Clearly the information contained in annexure "TT1" does not comply with the requirements of regulation 9(b). It therefore falls short of disproving applicant's claim that it was served with the award on the 5th April 2005.

7. The applicant is seeking review of the Award in which the 2nd respondent refused an application to rescind a default Award that ordered the applicant to pay 1st respondent M31,500-00 as compensation for unfair dismissal. The application was made in terms of section 228E(6) of the Act which provides that the arbitrator may on his own accord or on the application of any affected party:

> *"…..vary or rescind an award:*
> *(a) erroneously sought or erroneously made in the absence of any party affected by that award."*

8. The applicant deposed through an affidavit filed by Mr. Mothae that it failed to attend the hearing because the Managing Director for whom the Notice of Set Down was intended did not receive it. He averred that the process was sent to the office of the applicant by fax where it was received by one of the employees by the name of Retselisitsoe Makara. Instead of passing it to the Managing Director's office, he faxed it to the Mafeteng Branch of the applicant which is where the 1st respondent was stationed.

9. The Mafeteng Branch also did nothing about the set down because it assumed that the head office was simply keeping them informed about matters of their branch that the head office

was dealing with. Mr. Makara filed a supporting affidavit in which he confirmed Mr. Mothae's affidavit on those aspects that related to him. Mr. Mothae deposed further that neither him nor the Managing Director were in willful default as they did not receive the Notice of Set Down.

10. In his award the learned Arbitrator ruled that "the above reason cannot stand to support an Application for Rescission." (See p.2 of the Award). He stated that the applicant ought to show that it was not served or that having been served the default was not deliberate. He stated that the applicant defaulted because of the negligence of its employees, as such he dismissed the rescission application.

11. 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 found that this is a case where rescission should have been granted so that all parties could be heard before final award is handed down.

12. 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:

> *"(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. Retselisitsoe Makara.

13. 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 disputed that the set down did not reach that office.

The employee who received it sent it to a wrong office in Mafeteng. It is not clear on the papers before Court why he did that, save that it is common cause between the parties that 1st respondent was stationed in Mafeteng. This could possibly lead Mr. Makara to believe that the document was intended for Mafeteng branch.

14. Stupid as that act of Mr. Makara would seem on the face of it to be, it had an effect of denying the applicant the opportunity to be present at the DDPR when the 1st respondent's referral was heard. It is apposite at this stage to refer to the often quoted words of Lord Atkin in Evans .v. Bartlam {1937} 2 All ER 646 at 649GH where the House of Lords was dealing with a rescission application as in the instant matter. This is what he said:

> *"For my part, I am not prepared to accept the view that there is in law the presumption that a one, even a judge, knows all the rules and orders of the Supreme Court. The fact is that there is not, and never has been a presumption that everyone knows the law. There is a rule that ignorance of the law does not excuse a maxim of a very different application."*

15. The learned Arbitrator was of the view that the applicant had been served and that it did not attend due to the negligence of its employee. That was a clear misconstruing of the evidence tendered on affidavit before him. Even though the process may have come through the applicant's fax machine, the evidence that was not disputed is that it did not reach the officer for whom it was intended. Clearly the service was not completed. It got cut before the Notice of Set Down reached the right person to deal with the case.

16. The learned Arbitrator failed to appreciate that where service is not effected personally on the defendant, the Court will operate on the assumption that the defendant has been served until the contrary is proved. Accordingly, a facsimile service gives rise to a rebuttable presumption that the other side has indeed been served. The applicant has been able to show that the Managing Director was not served and as such its non-

attendance was not willful. In RV Tosela 1942 EDL 175, the word "willful" was defined as:

> *"in general, apart from any particular context, an act is willful which is deliberate and intentional and not occasioned by ignorance, inadvertence, accident, physical disability or like causes not only is knowledge present but volition is brought actively."* (see also George Ntseke Molapo .v. Makhutumane Mphuthing 1995 – 1996 LLR – LB 516, and Letseng Diamonds (Pty) Ltd .v. DDPR & Others LC/REV/42/08 (unreported)).

17. Default judgments are a procedure by which courts fight delays in the administration of justice. The courts are however, given wide and substantial powers to rescind such decisions because they inherently have the bad side of colliding head-on with the *audi alteram partem* rule. In his judgment in Evans case supra, Lord Atkin says the rational for rescission of judgments is that:

> *"the principle is that unless and until the court has pronounced a judgment on the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any rules of procedure."* (See also Shallae Ntabejane .v. Mashaile Mashaile & 2 Others LC/REV/443/06 (unreported)).

18. In his submissions in support of his grounds of review Mr. Phafane pointed out that even if the officers of the applicant may have been negligent all they cry for is that the applicant be afforded the chance to be heard. applicant's cry find consolation in the words of Maqutu J. in George Molapo's case supra where he says:

> *"There is unfortunately a tendency among court practitioners to forget that default judgments, are not intended to be a denial of the audi alteram partem precept. The procedure is simply designed to speed up the machinery of justice." at p.520.*

Further down the same page the learned judge goes further to state:

> *"Courts have been given a substantial discretion to rescind defaults judgments. Although the trial court has a*

discretion to rescind a default judgment on "good cause" being shown, such a court should never forget that default judgments are intended to avoid delays and to put pressure on litigants to speed up the finalization of cases. They are not intended to prevent defaulting parties from putting their case before the courts." At pp520 – 521.

19. In the exercise of the discretion to rescind default judgments, courts are enjoined to guard against laxity and abuse of court process. To this end courts will refuse to grant rescission of a default judgment if the default is found to be willful. (See George Molapo's case supra at p.521). That will be a proper exercise of a discretion based on the proper assessment of the facts.

20. The exercise of the discretion in casu cannot have been proper based as it was on the wrong conclusions on the facts. The fact that the learned arbitrator concluded there was proper service when there was none, necessarily affected his proper exercise of the discretion. Furthermore, the learned arbitrator used the negligence of Mr. Makara to infer willfulness on the part of the applicant. That inference was not justified especially if regard is had to the definition of "willful" as proferred in Tosela's case supra. Ignorance or inadvertence, which are what Mr. Makara's action may amount to, do not constitute wilfulness.

21. In the absence of proper service and consequently no willful default the proper exercise of discretion would have been inclined to rescind the default judgment so that all sides may be heard before a final judgment is pronounced. (See Letseng Diamonds supra). The learned Arbitrator's failure to do so clearly constituted an irregularity that justifies interference with the Award. In the premises the Award in referral A1050/04 that refused the applicant rescission of the Award in referral No. A0712/04 is reviewed, corrected and set aside. The Award in referral No. A0712/04 is hereby rescinded and the referral shall be set down before the DDPR for determination of the merits. Neither side addressed us about costs. Accordingly we make no order as to costs.

THUS DONE AT MASERU THIS 2ND DAY OF DECEMBER 2008

L. A. LETHOBANE
PRESIDENT

J. M. TAU — I CONCUR
MEMBER

R. MOTHEPU — I CONCUR
MEMBER

FOR APPLICANT: — ADVOCATE PHAFANE KC
FOR RESPONDENT: — ADVOCATE MOHAU KC