IN THE LABOUR COURT OF LESOTHO

LC/REV/570/2006

HELD AT MASERU

IN THE MATTER BETWEEN

NAFISA MOOSA	**1ST APPLICANT**
HANIF OSMAN	**2ND APPLICANT**

AND

DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION	**1ST RESPONDENT**
SITSANE DAVID LETSIE	**2ND RESPONDENT**

JUDGMENT

Date: 21/05/08
Application for reinstatement of a review application struck off for want of prosecution – Applicant negligent by not following up their case – joinder – principles applicable to joinder considered and applied – Maxim interest republicae ut sit finis litum – there must be an end to litigation applied – Application dismissed.

1. This is an application for the reinstatement of a review application which was dismissed on the 22nd October 2007 for want of prosecution. The events leading to this application are as follows: The 2nd respondent was

dismissed from work on the 9th June 2006 following a disciplinary hearing.

2. He referred a dispute of unfair dismissal to the 1st respondent. The referral was scheduled to proceed before the 1st respondent on the 4th July 2006. The applicants failed to attend the hearing. The Arbitrator was satisfied that the notice of set down was served personally on the 2nd applicant. He accordingly resolved to proceed with the arbitration in the absence of the applicants. He handed down the award in which he ordered the applicants to pay 2nd respondent an amount of M9,360.00 as compensation for unfair dismissal and M365.00 as underpayments.

3. The award was handed down on the 2nd August 2006. It was served on the applicants on the 18th September 2006. On the 20th October the applicants applied to have the award reviewed and set aside. On the 20th November 2006, applicants moved an application for stay of execution pending the outcome of the review application.

4. In due course the Registrar called for the record of the arbitration proceedings. It turned out that the arbitrator had kept the record in the form of handwritten notes. It was transferred to the Registrar on the 18th May 2007. On the 4th June 2007, the Registrar caused it (the record) to be sent to the applicants. The file copy of the covering letter shows that it was sent to the 2nd applicant. They were required to transcribe the notes and return the typed version to the DDPR for certification.

5. The applicants did not respond. On the 10th September 2007, the Registrar wrote to both applicants reminding them that they are expected to file the record and that they should do so within 30 days of the receipt of the letter, or show cause why the review application cannot be dismissed for non-prosecution.

6. Even that reminder did not attract any response from the applicants. On the 22nd October 2007, the 2nd respondent approached the court and asked that the review application be dismissed for want of prosecution. It was duly dismissed and on the 2nd November 2006, the Registrar wrote applicants a letter informing them that their application had been dismissed and as such they are expected to comply with the award and pay 2nd respondent as ordered by the DDPR.

7. Still nothing was done by the applicants until the 2nd respondent approached the court for enforcement of the award. On the 10th March 2008, the court issued a warrant of detention to enforce payment in terms of section 34 of the Labour Code Order 1992 (the Code). Thereafter the court messengers visited the place of business of the applicants, but they did not find the 2nd applicant against whom the warrant had been issued.

8. When the applicants realized that attempts were being made to enforce the award, they instructed a lawyer, Mr. Motsoari to apply for the reinstatement of the review application on the roll. On the 28th April 2008, Mr. Motsoari filed an application for reinstatement which he accompanied with an application for stay of execution. On the same day he approached the court for the grant of the interim order for stay of execution. I refused to grant the stay, but directed that the 2nd respondent file his opposing affidavits if any within 7 days and that the application be heard on an urgent basis as it involved the liberty of an individual.

9. The application was opposed as such it had to be placed on the contested roll. On the 21st May 2008, the application was argued. Mr. Tsoeunyane who appeared for the applicants had essentially two reasons that he advanced for applicants' failure to prosecute the application. The first is that the applicants had briefed one Mr. Mohapi Motlere to represent them in this matter both at the DDPR and in this court. The said Mr. Motlere

is the one who failed to do the work applicants entrusted him to do.

10. Ms Senooe for the 2nd respondent raised two points in relation to this submission. First, she contended that it is unlikely that applicant could have briefed the said Mr. Motlere to represent them at the DDPR, because legal practitioners are not permitted to appear in the DDPR. Indeed there is nothing to prove the applicants' statement that they instructed Mr. Motlere to appear on their behalf at the DDPR.

11. Furthermore, Ms Senooe contended that the applicants were clearly negligent in that they failed to follow up their case which was in the hands of Mr. Motlere. That the applicants were negligent begs no question. It was their duty to follow up their case and constantly check on their so-called representative to know the status of their case, more so when Mr. Motlere had already allegedly disappointed them by failing to represent them at the DDPR.

12. There is however, an even bigger reason why this argument must not be accepted. This is that the argument is false. The Authority to Represent in this matter appoints the applicants themselves as their own representatives. The name of Mr. Motlere only surfaces now for purposes of trying to justify applicants' own ineptitude in dealing with this matter.

13. It was further argued on behalf of the applicants that they never received the Registrar's letter informing them about the availability of the record and calling on them to file the transcribed record. This may or may not be so, but whatever the correct position is, it is a further demonstration of applicants don't care attitude. They are the applicants in this matter and they ought to have followed it up with the view of bringing it to finality. It seems however, that they only filed it to block execution and thereafter they forgot it.

14. It was argued further that the applicants have good prospects of success because the company which allegedly employed the 2nd respondent has not been joined. This is an argument that should have been advanced at the DDPR in a rescission application. It is common cause that the applicants did not seek to first rescind the DDPR default award, but came straight to this court on review. Ms Senooe for the applicant argued, correctly in our view that this was irregular.

15. Be that as it may, Section 228F of the Labour Code (Amendment) Act 2000 (the Act) empowers this court to set aside an award of the DDPR on any ground permissible in law or any mistake of law that materially affects the decision. The issue is whether non-joinder of the company as alleged materially affects the DDPR award. In my view it does not. As it was said in Herbstein & Van Winsen The Civil Practice of the Supreme Court of South Africa 4th Ed. Juta & Co. 1997, a party must be joined if it has:

> *"a direct and substantial interest in any order the court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party…."* P.170.

16. A party is said to have a direct and substantial interest if it has;

> *"an interest in the right which is the subject matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation."* (Herbstein & Van Winan supra at p.172).

The subject matter of this litigation is the unfair dismissal of the 2nd respondent and the alleged underpayment of his wages. The 2nd applicant avers in his Founding Affidavit that he is the Managing Director of Nash Investments (Pty) Ltd which allegedly employed the 2nd respondent. Clearly therefore, the mouth through which NASH

Investments can be able to participate in and defend these proceedings is through the 2nd applicant himself. Clearly therefore the joinder of Nash Investments (Pty) Ltd can only be done for convenience. Its interests are otherwise sufficiently represented through the citing of its Managing Director. It follows therefore, that the non-joinder does not materially affect the decision of the DDPR.

17. The review application in this matter has all the hallmarks of a shoddy job. One distinct example is the Notice of Motion which is not signed in accordance with the rules. It is therefore as good as not before the court, and strictly speaking therefore, there is nothing to reinstate on the roll. However, for the reasons that we have advanced and in the light of the principle that there must be finality to litigation expressed in the maxim *interest republicae ut sit finis litum*, this application cannot succeed. (see Thaki Phoba .v. CGM Industrial (Pty) Ltd LAC/CIV/A/05/03 (unreported) and James Tsehlana .v. Moradi Crushers & Another LC/REV/11/06 (unreported). The application is accordingly dismissed and there is no order as to costs.

THUS DONE AT MASERU THIS 28TH DAY OF MAY 2008

L. A. LETHOBANE
PRESIDENT

M. MAKHETHA **I CONCUR**
MEMBER

L. MOFELEHETSI **I CONCUR**
MEMBER

FOR APPLICANTS: **MR. TSOEUNYANE**
FOR RESPONDENT: **MS. SENOOE**