

IN THE LABOUR COURT OF LESOTHO LC/REV/37/10

HELD AT MASERU

IN THE MATTER BETWEEN

**LABOUR COMMISSIONER (OBO)
MPHO MAHULA**

APPLICANT

AND

**CELL ONE (PTY) LTD
DDPR**

**1ST RESPONDENT
2ND RESPONDENT**

JUDGMENT

Date: 21/09/2010

*Review - Award refusing condonation and rescission of
default award reviewed and set aside due to
unreasonableness in light of evidence presented.*

1. The applicant herein approached this court for the review and setting aside of the award of the 2nd respondent in which she dismissed the referral of the applicant because both parties failed to show up on the day the matter was set down. The application was not opposed.
2. Counsel for the applicant sought to apply for the rescission of the award that dismissed the referral and advanced an explanation for the failure of the parties to attend court on the date the matter was allocated to proceed. The reason applicants gave was that the parties had been directed by the arbitrator herself to go and negotiate a settlement. The parties had agreed to meet for negotiations on the 13th August 2009, but unbeknown to both parties the referral was proceeded with and dismissed on the 10th August 2009.

3. Since the applicants only filed the rescission application on the 17th March 2010, they accompanied it with a condonation application. The applicant annexed forms that showed that the rescission and the condonation were made simultaneously and they bore the same referral number.
4. The 1st respondent filed an opposing affidavit in which it raised a point in limine that contrary to the rules the applicant had not accompanied the condonation application with the rescission sought. They said they were unaware of the application for rescission and contended that in its absence there is no point of considering the application for condonation.
5. The representative of the applicant explained that the confusion was caused by the Case Management Officer (CMO) who refused when he sought to file two separate applications namely rescission and condonation. This is despite the fact that applicant had already filled forms for both rescission and condonation which were signed on the 10th March 2010 (see Annexure "A" to applicant's founding affidavit).
6. Applicant explained further that the CMO proceeded to make them fill another form in which the applications for condonation and rescission were combined. The CMO even proceeded to allocate that application a number A0350/09 (b) while the one they sought to file was just A0350/09. The allocation of two different referral numbers would seem to this court to lend credit to applicant's explanation regarding why there was no separate application for rescission.
7. However Counsel for the applicant requested that he be allowed to make copies of the rescission application for the benefit of the Court because he said he had served the 1st respondent with a copy. He went on to say he would have no difficulty if the 1st respondent is given a further chance to peruse the rescission application and file opposing papers if any.
8. It is significant that in their opposing papers the 1st respondent

had not denied the reason advanced by the applicant for both parties' failure to attend Court on the 10th August. The learned arbitrator proceeded to uphold 1st respondent's point in limine that there was no point considering the application for condonation in the absence of a substantive application for rescission.

9. Applicant applied for the review of the award of the learned arbitrator on the ground that it was unreasonable for the arbitrator to decide as she did, because the rescission application was infact before her and pointed to annexure "C" to the founding affidavit. The substantive application for rescission may not have been before the learned arbitrator at the time. However, from the response of applicant's representative it was clear that the rescission application was there and that it had only been excluded from being part of the docket due to confusion at the point of registration and filing of the referral.
10. The learned arbitrator seems to have closed her mind to the explanation that was advanced by applicants. As we said the explanation as corroborated by the fact that even the application form before her, now bore registration number A0350/09 (b). We agree with Mr. 'Nono that the learned arbitrator was unreasonable in closing her ears, eyes and mind not only to the explanation advanced, but also to the fact that the form before her referred to "Condonation and Rescission" and that it bore a number that showed that there was another referral carrying the same number which came before the one before her.
11. Mr. Nono contended further that the award dismissing applicant's referral was in any event irregular because parties were still at conciliation. If indeed parties were going to meet in a negotiation forum on the 13th August 2010 it is clear that the conciliation was not exhausted. The learned arbitrator ought to have been inclined to get a report of the outcome of the negotiations which the parties said they had engaged in on the 13th August 2009. If no agreement had been reached she would then have been inclined to rescind the premature award

and proceed to arbitrate the dispute.

12. As things stand, the learned arbitrator did not even consider the condonation application allegedly because there was no rescission application. In light of what we have said herein before the decision was clearly unreasonable and accordingly calls for the interference of this court. In the light of the fact that conciliation had not been exhausted, the award dismissing the referral was clearly premature. It is accordingly reviewed corrected and it is set aside. The referral is referred back to the DDPR for conciliation and in the event that conciliation fails arbitration in terms of the law by a different arbitrator.

THUS DONE AT MASERU THIS 21st DAY OF SEPTEMBER, 2010.

L. A. LETHOBANE
PRESIDENT

M. MAKHETHA
MEMBER

I CONCUR

L. MOFELEHETSI
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

MR. NONO
NO APPEARANCE