IN THE LABOUR COURT OF LESOTHO LC/25/09

LC/REV/297/06

LAC/REV.06/05

IN THE MATTER BETWEEN

ASHRAF ABUBAKER 1ST APPLICANT

KOLONYAMA CANDLE CO. 2ND APPLICANT

AND

MATHUSO KHELELI 1ST RESPONDENT

MAMOREN MAFEKA 2ND RESPONDENT

MAHLOMOLA MAFEKA 3RD RESPONDENT

# JUDGMENT

*Date: 18/02/10*

*Application for reinstatement of a review application dismissed for want of prosecution – Applicant must furnish reasonable explanation of failure to prosecute the review and show that he has a bona fide defence which carries some prospects of success – The applicant failed to furnish reasonable explanation for not prosecuting the review even after being sent reminders by the court – Court found application bona fide and only made to delay claim of the respondents – applicant lacks bona fide defence to respondents' claim as lacks prospects of success on the merits – Application for reinstatement refused.*

## BACKGROUND

1. This matter has a long history going back to 2001 when the three respondents together with several other colleagues were retrenched, by the applicants. Prior to October 2001, the applicants were employed by Kolonyama Candle Co. (Pty), carrying on business as Kolonyama Candle Company. There is no evidence who the Directors of this company were.

2. On the 1st October 2001, the 1st applicant signed an agreement of sale of Kolonyama Candle Co. (Pty) Ltd as a going concern. The 1st respondent purchased the business lock, stock and barrel together with other assets as well as the Trading name, Kolonyama Candle Company. The Agreement of Sale provided in clause 8 that the seller bears liability in regard to the business activities either with regard to trade creditors or employees prior to the effective date. Clause 17 provided that: "The seller shall remain solely responsible for all terminal benefits due to the staff in the event of the seller deciding to terminate their employment." (emphasis added).

3. There is no evidence that the seller terminated the services of the staff; thus becoming liable for payment of terminal benefits. All sides agree that the applicants are the ones who terminated the services of the respondents and other staff previously employed by the company prior to its sale. According to clauses 87 and 17 of the sale agreement the seller was by this time no longer liable for the terminal benefits as the termination of the staff was made after the effective date. The applicants were by this time the ones liable for the payment of terminal benefits.

## TERMINAL BENEFITS

4. It is common cause between the parties that the 1st applicant terminated the services of the three respondents and that this was after the effective date of 1st October 2001. It is also common cause that upon such termination the 1st applicant paid the three respondents only 30% of their severance pay. It is alleged that he said the full amounts due were too much for him to afford. For their part the representatives of the 1st applicant said the payment of

30% was a humanitarian gesture because they are otherwise absolved from liability by clauses 8 and 17 of the memorandum of sale. We have already shown that the two clauses absolved applicant only if the respondents were terminated prior to the date of sale, and this was not the case.

5. The dispute was initially referred to the Directorate of Dispute Prevention and Resolution (DDPR) under referral no. A0995/03. The respondents were then represented by the Labour Commissioner who claimed leave and severance pay on their behalf. Their claims for leave succeeded, but the claim for severance pay failed because they had not disclosed their income prior to 1st April 1993, when the Labour Code Order 1992 (the Code) commenced operation. That information would enable the arbitrator to decide whether they qualified for severance pay prior to the coming into operation of the Code.

6. The Labour Commissioner sought to take that award on review to the Labour Appeal Court in terms of the applicable law at the time. That review was however, never pursued. Sometime in 2004, the 3 respondents referred a fresh dispute to the DDPR this time suing in their own names. They were represented by their union, Lesotho Clothing and Allied Workers Union. The respondents had cited Kolonyama Candle Company as the respondent.

7. The representatives of the applicant herein successfully objected to the citation of Kolonyama Candle Company and said Kolonyama Candle Company (Pty) Ltd should have been cited as the respondent. Accordingly their referral was dismissed. The respondents filed yet another referral this time citing Kolonyama Candle Co. (Pty) Ltd as 1st respondent and Mr. Ashraf Abubaker as 2nd respondent.

8. As would be expected service would not be effected on Kolonyama Candle Co. (Pty) Ltd as its whereabouts or those of its Directors could not be traced. In short the respondents were being given a raw deal to be required to cite Kolonyama Candle Co. (Pty) Ltd, which had sold itself to Mr. Abubaker and was continuing to run it under its trade name Kolonyama Candle Company. Mr. Abubaker as the 2nd respondent was however, not as lucky. He was found

and was duly served.

9. The 3 respondents testified that Mr. Abubaker and not Kolonyama Candle Co. (Pty) Ltd gave them notice of termination of their services in October 2001. This was soon after the memorandum of sale was signed. They testified further that he only paid them 30% of their severance pay. The 3 respondents prayed the DDPR to order Mr. Abubaker to pay them the balance of their severance pay in the amounts that were stipulated in respect of each of them.

10. Mr. Matete who appeared for Mr. Abubaker sought succour from the clauses of the memorandum of sale and said Mr. Abubaker is absolved from liability for payment of terminal benefits by the said memorandum. The arbitrator was not convinced by the fact that it had not been the defence of Mr. Abubaker that he was not liable to pay the benefits in terms of the memorandum. His approach was instead that he was willing to pay, save that he could not afford to pay in full due to financial consideration. Accordingly, the arbitrator found Mr. Abubaker liable and ordered him to pay the 3 respondents balances of their severance pay.

## REVIEW

11. On the 19th January 2005, Mr. Abubaker filed review application No. LAC/REV/06/05 before the Labour Appeal Court as the court vested with review powers over awards of the DDPR at the time. This situation was changed by the Labour Code (Amendment) Act No.5 of 2006, which vested powers of review of DDPR awards in the Labour Court. This explains why the case number of this case changed to LC/REV/297/06. The applicant's Notice of Motion was supported by an affidavit deposed by his erstwhile representative Mr. Matete and not the applicant himself. It is questionable whether this was the right thing to do. We however make no further comment about it.

12. Equally questionable is whether the review could properly be entertained by the court given that the award which was dated 25th November 2004, was according to the DDPR records served on the applicant on the 2nd December 2005 and yet the review application was only filed on the 19th January 2005. Section

228F(1)(a) of the Labour code (Amendment) Act No.3 of 2000 provided that a party to a dispute who seeks to review any arbitration award issued under the code as amended must apply to the Labour Court for an award within 30 days of the award being served on the applicant. Clearly, the 30 days would have lapsed on the 1st January 2005 and any approach to the court after that date ought to have been accompanied by a condonation application. This was not done in casu.

13. On the 8th December 2006, the representative of the applicant collected tapes of the arbitration proceedings to go and transcribe them to enable them to file the record in accordance with the rules. However, no record was filed until the respondents filed an application on the 23rd April 2009, to dismiss the review. The notice of motion was served on the attorneys of the applicant who promptly filed a notice of withdrawal as attorneys of record for the applicant on the 24th March 2009. The application to dismiss the review was set down for hearing on the 16th July 2009.

14. On the date of hearing only the three judgment creditors were in attendance. I directed the Registrar to write a letter to Mr. Abubaker personally ordering him to file the record of the DDPR arbitration proceedings within 3 days failing which the review application would be dismissed. In the meantime the matter was postponed to 24th July 2009. The letter was duly written and served on Mr. Abubaker by hand on the same day.

15. The letter did not elicit any response from Mr. Abubaker. On the 24th July 2009 when the matter was called Mr. Abubaker was still not in attendance. Only the three judgment creditors were present. Noting that the matter is old dating back to October 2001, noting further that not only has the record not been filed despite a reminder by the Registrar, but also the application to dismiss the review has not been opposed, the court resolved to grant the application to dismiss the review application for want of prosecution as prayed for by the respondents. On the 27th July 2009, the 1st applicant was duly informed by letter from the Registrar that the review had been dismissed. Furthermore, he was required to pay the judgment creditors in accordance with the

award of the DDPR not later that 10th August 2009.

16. The 1st applicant did not comply with the award as directed. On the 14th August 2009, he was summoned to appear before the President on the 17th August to explain his failure to honour the award to pay the three respondents. The summons was issued in terms of section 34 of the Code. The 1st applicant duly appeared before the President on the appointed dated, accompanied by his legal representative Mr. Ntaote. They requested to be given an indulgence to apply for the reinstatement of the review. I duly granted them the indulgence. The application for reinstatement of the review was filed on the 21st August 2009. It was opposed.

17. The application was set down for hearing on the 18th February 2010. On the date of hearing the respondents were represented by their trade union representative Mr. Ramaliehe. Mr. Ntaote had sent his office clerk to inform the court that he was indisposed. I immediately informed the clerk that since the respondents are not legally represented Mr. Ntaote would not have been allowed to represent the applicant even if he was present as that would contravene section 28 of the Code which permits legal representation only where both sides are legally represented.

18. I further pointed out that Mr. Ntaote should have been aware of this situation the moment he was served with the notice to oppose the application. He should therefore have informed the applicant to personally be present so that he could prosecute his application as the legal representative would be barred by section 28 from appearing. Be that as it may I stood down the matter to 11.00 to enable the clerk to inform Mr. Abubaker to attend as his lawyer is barred by the fact that the 3 respondents are not legally represented.

19. To our surprise at 11.00 it was Mr. Ntaote who was in attendance and not Mr. Abubaker. He sought to explain the anomaly by claiming that the clerk had not made it clear to him that it was Mr. Abubaker who had to attend. This was clearly untruthful. Mr. Ntaote went on to say that he had not considered it necessary that

his client attends because he believed the application could be decided on the basis of the affidavits filed by the parties. Mr. Ramaliehe agreed and accordingly the court proceeded to determine the application on the basis of the affidavits filed by the parties.

20. The court adjourned to consider a ruling. After a brief adjournment a ruling was made refusing to grant the application for reinstatement. The reasons were to follow at a later stage. These are now those reasons. Reinstatement of a review which was in the absence of an applicant struck off due to none prosecution, is very much similar to a rescission of a default judgment entered into in the absence of another party. The principles governing the granting of both of them are therefore similar.

21. The principle governing the granting of an application for rescission was outlined in Loti Brick .v. Thabiso Mphofu & Others 1995-1996 LLR-LB 447, where it was held that an applicant for rescission and by definition reinstatement must show three things.

    (a) The applicant must give reasonable explanation of his default.

    (b) The application must be bona fide and not made with intention of merely delaying the plaintiff's claim.

    (c) The applicant must show that he has a bona fide defence to the plaintiff's claim. (See also Sechaba Ntsoeu .v. Thaele Seleke 1991-1992 LLR-LB 51, Maqalika Leballo .v. Thabiso Leballo 1993-1994 LLR-LB 292).

22. In Ndlela .v. Transnet Ltd (2004) 25 ILJ 565 at 573 it was held that;

> *"under the common law an applicant for rescission is required to satisfy two requirements:*
>
> - *a reasonable and acceptable explanation for the default.*
> - *a bona fide defence which prima facie carries some prospect of success."*

The learned judge went on to state that the requirement that good

cause be shown, is necessitated by the need to ensure that the element of wilfulness is absent. "The reasons for an applicant's absence or default must be set out because they are relevant to a question whether or not the default was wilful." At p.574A.

23. In his Founding Affidavit Mr. Abubaker stated that upon the withdrawal of his then representatives he was left on his own. He stated further that prior to his lodging the review application; the respondents had on the 23rd February 2004 launched a review application against an award which was in his favour. He stated that respondents have not prosecuted that review till this day and he had hoped that the respondents would be bound to prosecute their review first as it came earlier to his. He stated further that he thought the court would frown upon the matter once it realizes that the respondents had proceeded with the matter twice and by withholding information that they had earlier lodged a review on the same matter.

24. It is significant that the applicant was aware that his lawyers had withdrawn and yet he took no steps to obtain alternative legal representation. The review allegedly filed by the respondents on the 23rd February 2004, was infact filed by the Labour Commissioner acting on behalf of the three respondents. The Labour Commissioner has infact since withdrawn that application.

25. The Labour Commissioner's failure to prosecute that review cannot be a justification for applicant not to prosecute his own review, especially when the applicant was aware that 'these were two independent applications which ought to have been pursued independently.' (see paragraph 6 of the applicant's Founding Affidavit). At best the applicant could have done what the respondents did in casu and moved the court to dismiss the review application of the Labour Commissioner for want of prosecution.

26. He did not do so, hoping instead that the court would frown upon the review when it realized that the respondents had proceeded with the matter twice. There was no way the court could know that this was so, because the applicant had not mentioned it in his papers. It is not even being raised now as a defence, but as what the applicant had hoped would happen. We cannot therefore deal

with it.

27. The view that we hold is that the explanation of the applicant for failing to prosecute the review is flimsy to say the least. The applicant does not tell the court what he did after he became aware that his then attorney had withdrawn as his representative. This court went out of its way and gave him the opportunity to prosecute the review and even warned him that failure to act may result in the dismissal of the review. Not only did he not respond, even before this court he has not addressed that reminder which we are of the view that he ignored.

28. The court was then left with no alternative but to dismiss the review application. After that the Registrar wrote him a letter on the 27th July 2009, informing him that the review had been dismissed and that the award of the DDPR now had to be complied with. He still did not respond and even before this court he has not furnished an explanation why he did not respond to the Registrar's letter.

29. It was only when he received the section 34 summons requiring him to come and explain to the President why he was not complying with the DDPR award, that the applicant surfaced. It was only at this late stage that he sought to have the review reinstated. As we see it, his failure to prosecute the review was wilful because he unjustifiably expected the respondents to prosecute their own review before his. Furthermore, he ignored reminders from this court to arrange for the finalization of the review.

30. The application is clearly not bona fide. It has all the elements of an application that is made merely to delay the claim of the respondents. If the applicant is serious about the review he would have acted the moment he got this court's reminders that the record be filed to enable the review to be finalised. He ignored the reminders and only took steps when the matter got to enforcement, which shows that it is only execution of the award that he is against. As for the review he is not serious about it.

31. In his application, the applicant has not said anything about prospects of success. Looking at the history of this matter, the

applicant does not have prospects. The clauses of the sale agreement he sought saccour under, do not indemnify him as he alleges, because it is him and not the company he bought, who terminated the services of the respondents. Moreover, he has already paid part of the benefits being claimed save that he shot paid the respondents by 70%.

32. The applicant cannot pick and choose. It is either he is absolved from paying severance pay in which case he does not owe the respondents anything. If he is liable to pay as is the case in casu, he must pay in accordance with the law and not choose what he feels he can pay. For these reasons the reinstatement was refused and the order dismissing the review was confirmed. By the same token the award of the DDPR dated 24th November 2004 was confirmed.

**THUS DONE AT MASERU THIS 16TH DAY OF MARCH 2010.**

**L. A. LETHOBANE**

**PRESIDENT**

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| **D. TWALA** | **I AGREE** |
| **MEMBER** | |
| **L. MOFELEHETSI** | **I AGREE** |
| **MEMBER** | |
| **FOR APPLICANT:** | **MR. NTAOTE NO** |
| **FOR RESPONDENTS:** | **MR. RAMALIEHE** |