

IN THE LABOUR COURT OF LESOTHO

LC/REV/85/09

HELD AT MASERU

In the matter between:

MAFUBE INVESTMENT HOLDINGS (PTY) LTD

APPLICANT

and

**ERIC MAKATAKATA TS'OANA
DIRECTORATE OF DISPUTE
PREVENTION AND RESOLUTION**

**1st RESPONDENT
2nd RESPONDENT**

JUDGMENT

Date: 17/11/10

Practice and procedure - Applicant alleging that the applicant was not able to attend DDPR proceedings due to the improper service of the notice of set - down - Court finds that the notice ought to have been served on the Employers' Association as a legally constituted representative of the applicant - Applicant's Counsel's argument of improper service upheld.

1. The applicant herein seeks the review and setting aside of an award in A 0720/08 which was granted by the Directorate of Dispute and Resolution (DDPR) in default. The award in question related to a rescission application which had been dismissed by the DDPR because of failure by the applicant to attend the hearing. The original hearing had also proceeded by default. The basis on which review is sought is that it came about as a result of an improper service of processes on the part of the DDPR. Applicant's Human Resource Officer averred in her founding affidavit, on applicant's behalf, that their failure to attend DDPR proceedings was not wilful, and they would be highly prejudiced if the award were to stand, as they have a valid defence against 1st respondent's claim.

2. The facts which precipitated this dispute are that the 1st respondent got a DDPR award in his favour on 15th October, 2009 given by default due to applicant's failure to attend the proceedings before the DDPR. Applicant's Human Resource Officer deposed in her founding affidavit that she was shocked to receive the said award because she was not aware that they had not been represented at the hearing. She acknowledged having received the notice of set-down, but indicated that knowing that they were represented, she assumed that the said notice was just for information, and that their legal representative had been served. Her immediate reaction, she says, was to approach the Association of Lesotho Employers, their legal representative who informed her that they had not been aware of the set-down for the rescission application, hence couldn't attend. It is applicant's case in this review application that the DDPR award had been erroneously granted because the notice of set-down had not been properly served. Hence, this application to have the said award reviewed and set aside.

It emerged from the award that when the rescission application was heard by the DDPR neither the applicant nor the 1st respondent attended. The DDPR duly dismissed the application in terms of Section 227(8) of the Labour Code (Amendment) Act, 2000 which provides that;

If a party to a dispute contemplated in subsection (4) fails to attend the conciliation or hearing of an arbitration, the arbitrator may -

(a) postpone the hearing;

(b) dismiss the referral; or

(c) grant an award by default.

3. The 1st respondent neither filed any intention to defend nor opposing papers to this review application. He also failed to attend the review proceedings. The matter therefore proceeded unopposed. The crucial question at this juncture is what constitutes proper service of DDPR processes.

HOW AND WHEN IS A LAWFUL SERVICE OF DDPR PROCESSES EFFECTED?

The issue also prompts the question whether it was proper for the DDPR to have served the Company personally when the rescission application had clearly been

lodged by the Association of Lesotho Employers, its lawful representative or agent as evidenced by Annexure “M1” to the review application?

There appears to be no guidelines on who DDPR processes have to be served in order for the service to be considered proper. The Labour Code (Directorate of Disputes Prevention and Resolution) Regulations, 2001 merely provide guidelines on the modes of service. It is our considered opinion that by virtue of appointing the Employer’s Association to initiate rescission proceedings on its behalf, the Association served as the Company’s legal representative or an agent lawfully authorised to receive service of legal processes including the notice of set- down. Authority need not be express but may be implied from a power to institute or defend legal proceedings on behalf of a party. Employers’ Associations are legally authorised to represent employers. To this end, Section 228A (1) of the Labour Code (Amendment) Act, 2000 provides that;

In any proceedings under this Part, a party to the dispute may appear in person or be represented only by -

- (a) a co-employee;***
- (b) a labour officer, in the circumstances contemplated in Section 16(b);***
- (c) a member, an officer of a registered trade union or employers’ organisation (emphasis mine); or***
- (d) if the party to the dispute is a juristic person, by a director, officer or employee.***

4. It being a legally recognised representative of employers, and duly appointed to institute proceedings on behalf of the applicant, as it did by lodging the rescission application, the Association of Lesotho Employers was mandated to receive DDPR processes on behalf of the applicant. The DDPR therefore ought to have served the notice of set - down on the Association. The Court has satisfied itself that failure by the applicant to attend the DDPR proceedings relating to the rescission application had not been wilful.

5. In reaching this decision, the Court also drew inspiration from the ***audi ulteram partem*** (hear the other side) rule. This is a principle of natural justice which

promotes fairness by requiring persons exercising statutory powers which affect the rights of property of others to be afforded a hearing before the exercise of such powers - see *Sefularo v President of Bophuthatswana (1994) 15 ILJ 1276*. It is all about fairness to hear both sides.

In the circumstances, the Court upholds applicant's representative's submission that the applicant had not been properly served. The award in A 0720/08 dismissing the rescission application is therefore reviewed and set aside. The Court orders that the rescission application be set - down afresh and parties be served properly. In respect of the applicant, the set-down should be served on the Association of Lesotho Employers which initiated the rescission application.

THUS DONE AND DATED AT MASERU THIS 17TH DAY OF NOVEMBER, 2010.

F.M. KHABO
DEPUTY PRESIDENT

J. TAU
MEMBER

I CONCUR

D. TWALA
MEMBER

I CONCUR

FOR THE APPLICANT: ADV. MACHELI
FOR THE RESPONDENT: NO REPRESENTATION