IN THE LABOUR COURT OF LESOTHO **LC/REV/36/10**

HELD AT MASERU

IN THE MATTER BETWEEN

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY **APPLICANT**

AND

PHOLE NTENE **1ST RESPONDENT**
DDPR **2ND RESPONDENT**
M. LEBONE-MOFOKA **3RD RESPONDENT**

JUDGMENT

Date: 16/03/2011
Review – Arbitrator refusing to grant postponement and proceeding with the case in the presence of only one party _ Arbitrator misconstrued the facts placed before her why it was necessary to seek a postponement – Arbitrator considering irrelevant factors not raised by either party concerning filing of authority to represent – Counsel honestly stated he forgot about the case – Annoying as the reason is, it is no justification to deny an innocent litigant the right to present its case – Costs order could sufficiently compensate the respondent – Arbitrator acted unreasonably in refusing the postponement – Award reviewed and set aside – Matter remitted to DDPR to start de novo before different arbitrator.

1. This is a fairly straight forward case which should not have protracted this long had the arbitrator and the parties before her heeded the provisions of section 27(2) of the Labour Code Order 1992 (the Code) as amended which provides:

> *"(2) The court shall not be bound by the rules of evidence in civil or criminal proceedings and it shall be the chief function of the court to do substantial justice between the parties before it."*

The provisions of this section apply to the arbitration proceedings before the DDPR in the same way that they apply to proceedings before the Labour Court.

2. The 1st respondent was on applicant's version retrenched at the end of December 2009, along with the rest of other employees who worked under a special project called Highlands Natural Resources and Rural Income Enhancement Project (HNRRIEP). His own version is that he remained in employment until end of March 2010, by virtue of the decision of the Highlands Water commission to extend his contract by three months after December 2009.

3. This may or may not be so. We are not at this point in time called upon to decide this point. The fact is that applicant considered 1st respondent to have been terminated in December and only engaged in special assignments in January and February, for which he was remunerated. On or around 22nd February 2010, 1st respondent filed a case with this court against the present applicant together with HNRRIEP, the Ministry of Tourism, Environment and Culture and the Attorney General. Only the present applicant answered the Originating Application.

4. Pleadings closed and when the matter was ripe for hearing, counsel for the applicant brought to the attention of Advocate Thene for the 1st respondent that the dispute should have first been attempted to be conciliated before being filed with this court. Mr. Thene understood and filed notice of withdrawal of the matter from this court on the 10th March 2010. On the 24th March 2010 they filed a referral with the DDPR in which 1st respondent challenged the fairness of the retrenchment and claimed payment of certain monies which he said were for under payments and non-payment of salary for the months of January-March.

5. The referral was set down for conciliation on the 3rd May 2010. Mr. Roberts filed an affidavit in which he showed that he was instructed by the applicant to represent the authority at the DDPR on the 3rd May 2010. (see annexure DGRB1/2 to Roberts' Founding Affidavit). He in turn wrote back on the 20th April 2010 accepting the instruction and confirming that *"…..we will attend the hearing of the matter on 3 May 2010 at DDPR."* (see annexure DGRD1/1).

6. On the date of the conciliation only the 1st respondent and his legal representative Mr. Thene, were in attendance. No one was present from the applicant's office directly or from Mr. Roberts' office. Confronted with that situation the arbitrator says *"after a grace period of forty five minutes was allowed for respondent's representative to arrive, in vain, I decided to proceed with the matter in their absence at the request of applicant."*

7. She goes further to state in her award that:

> *"shortly before the proceedings started one Mrs. Mateboho Tohlang of Webber Newdigate came in to request postponement of the matter. She explained that she had been sent by Mr. Roberts, respondent's representative who said he had forgotten about the case."*

The arbitrator recorded that applicant i.e. 1st respondent through his lawyer, vehemently opposed the application saying that it was unreasonable and that too much time had lapsed before the representatives showed up, as such the matter be proceeded with as a ruling had infact already been made to proceed in their absence. The arbitrator says she refused the request for a postponement because;

> *"the respondent's officers have not filed authority to represent, indicating Mrs. Tohlang and/or her colleagues as representatives. There was further no indication that parties will be legally represented. As a result I found Mrs. Tohlang to have had no locus standi in the matter."*

8. It is common cause that Mrs. Tohlang was excluded from the arbitration, because she did not have the authority to represent, while Mr. Thene was allowed to be part of the proceedings, because he was able to produce the required authority to represent. It is further common cause that 1st respondent presented his uncontroverted evidence on the alleged underpayments, which the arbitrator ruled to sever from the main claim of unfair retrenchment which was referred to this court. Since the evidence was not challenged 1st respondent's claim of underpayments of M104,464-00 as well as nonpayment of salary for the months of January to March were granted by default.

9. Applicants did not apply for the rescission of the award, but instead applied directly to this court to have the decision to refuse applicant the indulgence to postpone the proceedings on the 3rd May 2010 reviewed and set aside, on the ground that it was unreasonable, high-handed and that it shut the doors of the court on the face of the applicant thereby denying them justice. Counsel for the 1st respondent did not challenge this approach, perhaps rightly so in the light of the principle that was laid in Lephole Mpheu .v. Tseko Machaha & 4 Others CIV/APN/194/07 (unreported). The rule is that whilst it is true that default judgments are rescindable "the default judgment which is obtained irregularly is reviewable." (Per Guni J.).

10. The issue is whether the learned arbitrator exercised the discretion to refuse applicant's request for a postponement properly, regard being had to the facts placed before her. In his Founding Affidavit Mr. Roberts says the Friday preceding the Monday the referral was set down for, he fell ill and had to leave the office mid-morning without checking his diary. On Monday morning, he went about his private business before getting to the office, totally oblivious of the set down, because he had left the diary at the office.

11. It was only at around 9.15 am when he got to the office and checked his diary that he realized that he had to be at DDPR for the case. He was at the Bloemfontein Office when he noticed this. He therefore had no option but to seek ways in which he could inform the court of his predicament and seek indulgence to have the matter postponed. He immediately called the DDPR office where he spoke to an officer by the name of Celina and requested her to convey his predicament to the arbitrator. She said in response that the court was already in session, accordingly she was unable to assist.

12. He called his partner Mrs. Mateboho Tohlang to rush to the DDPR to explain his circumstances and request a postponement. In her supporting affidavit Mrs. Tohlang says she did as requested by Mr. Roberts. On arrival she found Mr. Thene for the 1st respondent who told her that proceedings had begun, but at the time the arbitrator had gone out to fetch the recording machine. She averred that 3rd respondent is known to her.

13. On arrival the arbitrator asked who she was and what her interest in the matter was. She responded that she was appearing for the applicant on behalf of Mr. Roberts who had planned to be in attendance, but had over-looked the set down date because of his personal circumstances, which included his ill health on Friday 30th April. As earlier said Mr. Thene for 1st respondent rose to oppose the application and in due course the arbitrator ruled to refuse the request for a postponement.

14. Authorities abound that a respondent opposing an application for postponement finds itself in a superior position because he/she has a procedural right to have his/her case heard on the appointed day. Significantly, however, that right is weighed against applicant's reasons for a postponement. (see Ecker .v. Dean 1939 S.W. A. 22 at p.23 and Centirugo .v. Firestone (SA) Ltd 1969 (3) SA 318 at pp 320-321). Both these cases were concerned with a request for a postponement because applicant sought a particular counsel to be present and represent them when it was not even clear when that counsel would be available. Because the applicants in both cases had

alternative counsel to proceed with the case the application was refused because as the learned Judge said:

> *"All that is shown is that there is the possibility that Mr. Ecker may not be as effectively represented as he would wish owing to the peculiar position in which Mr. Kritzinger finds himself. Now it seems to me a litigant cannot say: I insist upon selecting my counsel; I insist upon having counsel from the local Bar and because of that insistence deprive the other side of procedural rights which are his due. As had been said, we have nothing to show that there is any impossibility in obtaining counsel from elsewhere."*

15. The present matter does not fall into the foregoing class of cases. Counsel simply sought a postponement because he had been rather careless and failed to consult his diary regarding Monday's business. He explains his ineptitude by the fact that he was unwell the previous Friday. Now, the learned arbitrator totally misconstrued the facts and started talking about the question whether an authority to represent had been filed. As Advocate Woker rightly pointed out evidence of instruction to represent is not necessary in a procedural application for a postponement. It is not unusual for counsel in a predicament such as that faced by Mr. Roberts to request a colleague to appear before a presiding judge to explain his unfortunate circumstances. It is infact respectful of counsel to do so rather than to just keep quite.

16. Rather than listen to the request and the circumstances that necessitated it, the learned arbitrator did what is often referred to as killing the messenger who brings bad news. She chased her out for allegedly having no locus standi. Yet another misdirection of significant proportion, when regard is had to the fact that Mrs. Tohlang did not purport to stand in for Mr. Roberts on the substantive application. She merely came to inform the court of Mr. Roberts' predicament and the learned arbitrator was enjoined to hear her out before making the decision whether to accept or to refuse the application.

17. The learned arbitrator went on to say that even Mr. Roberts had not filed the authority to represent as such he had no basis to apply for the postponement. This consideration, irrelevant as it was for the purposes of the application before the learned arbitrator, was used by her to reject the requested postponement. There is nowhere in the regulations and the guidelines used by the DDPR, where there is a requirement that a party seeking legal representation should file an authority to represent. Such a requirement has only been introduced for administrative convenience and should not be used as a mandatory legal requirement as was done in casu, because it is not.

18. Realizing that excuses tendered by her on behalf of Mr. Roberts were not being considered; because of the irrelevant consideration that both her and Mr. Roberts had not filed the authority to represent, Mrs. Tohlang sought to have the matter stood down so that she could get hold of officers of the LHDA to come and seek the postponement. That request too was turned down on the ground that those officers ought to be at court because the notice of set down was served on them and was received by them. Absence of officers of the applicant is understandable, because they had, to their knowledge briefed counsel, who had undertaken to attend the conciliation proceedings. The view of the learned arbitrator that they should have been at the court that day was an unreasonable expectation, if regard is had to how applicants had planned to deal with the case, which was through representation by Mr. Roberts.

19. The learned arbitrator was clearly annoyed by counsel's suggestion that he had forgotten about the set down. As Advocate Woker said that reason sounds irritating to say the least. It is however, no justification for shutting the doors of the court on the applicant, who in good faith was expecting that he was going to be represented by counsel, who whether for good reason or due to negligence, failed to carry out the mandate.

20. If the learned arbitrator considered the ill health to have been a justifiable reason for the forgetfulness, he would exercise the discretion to postpone the hearing in favour of the applicant. If she considered the reason altogether unreasonable as she clearly did, she would have avoided to shut the doors of justice on the applicant, but postponed the case and made an appropriate order of costs to compensate 1st respondent for the inconvenience he suffered. This was the approach of this court in Cashbuild (Pty) Ltd .v. DDPR & Others LC1910 (unreported).

21. Clearly the learned arbitrator acted unreasonably in failing to weigh the reasons that counsel for the applicant tendered through the person of Mrs. Tohlang. If he was in Bloemfontein at the time that he noticed that he had the case before the DDPR, there was no way that he could make it to Maseru for the conciliation. This was sufficient reason to grant the postponement, irritating as it may have been. This is more so when the respondent put it on record that he was not likely to suffer any prejudice if the postponement was granted. The learned arbitrator could postpone the hearing and reserve the issue of costs until the date when Mr. Roberts appeared before her to more fully explain his predicament, or she could impose the cots right away, but reserve applicant's right to be heard by postponing the matter.

22. The right to be heard is fundamental to our law. Thus the court will always be inclined to grant a postponement sought in circumstances such as the present or a rescission application, or reinstatement of a case on the roll. In Ntseke Molapo .v. Makhutumane Mphuthing 1995-1996 LLR-LB 516 Maqutu J as he then was, stated that defaults judgment are intended to avoid delays and to put pressure on litigants to speed up finalization of cases. They are not intended to prevent defaulting parties from putting their case before the courts," at pp 520-521. In casu the learned arbitrator did exactly that, when she proceeded to hear 1st respondent's evidence and awarded him the relief sought without hearing the side of the applicant.

23. Counsel for the applicant contended that they could not even be accused of delaying the finalization of the case as the 3rd May was only the first date of set down and the arbitrator still had 30 days to further pursue the conciliation, pursuant to section 227 of the Labour Code (Amendment) Act 2000 (the Act). Indeed in terms of section 227(4) of the Act, conciliation is mandatory. The arbitrator is required to issue a report if the dispute remains unresolved after the 30 day period.

24. Subsection (7) of the Act provides that:

> *"subject to subsection (8) the conciliator shall issue the report referred to in sub-section (6) as soon as the 30 day period expires unless the party who refers the dispute fails to attend….in which case the report shall only be issued after 30 days calculated from the date of that meeting."*

In terms of sub-section (8) "if the other party to the dispute fails to attend the meeting referred to in sub-section (7), the conciliator may issue the report immediately." (emphasis added). We have highlighted the word "may" to underscore that the arbitrator has a discretion, which she must in all cases exercise judicially. To do so she must avoid unreasonableness and arbitrariness, both acts which applicant accuse her of.

25. We are unable to exonerate her from the charges when considering that she failed to consider the facts of the circumstances of Mr. Roberts that were put before her. She added salt to the wounding by chasing out the messenger sent to explain the situation and proceeded to dismiss the application on totally irrelevant considerations, which had not even been pleaded by the 1st respondent.

26. It would appear that the learned arbitrator was somehow persuaded by the argument that the representatives of the applicant came after she had already made a ruling to proceed with the matter in their absence. That was her ruling and she was quite entitled to reverse it in the interest of justice, once the facts placed before her necessitated that it be changed. After

all she had made the ruling unaware of Mr. Roberts' reasons or those of the officers of the applicant to be absent. Once the reasons were placed before her, she was entitled to reverse the ruling.

27. What makes her conduct highly arbitrary and therefore irregular is that when Mrs. Tohlang arrived, the proceedings had not yet commenced. Only a ruling to proceed had been made. The proceedings commenced after Mrs. Tohlang explained Mr. Roberts' predicament and pleaded that the arbitrator must not close the door of the court on the applicant. All that was not heeded and the arbitrator resolved to proceed with just one party. That was highly unreasonable, arbitrary and as such irregular. Accordingly, the application for the review of the decision of the arbitrator to refuse to grant applicant a postponement as well as the proceedings that followed is granted as prayed. Accordingly, the proceedings in A0300/10 are reviewed, corrected and they are set aside as irregular proceedings. The arbitrator ought to have granted the postponement sought. In the premises the referral is remitted to the DDPR to start de novo with conciliation before a different arbitrator. There is no order as to costs.

THUS DONE AT MASERU THIS 6TH DAY OF JULY 2011

L. A. LETHOBANE
PRESIDENT

M. THAKALEKOALA **I CONCUR**
MEMBER

M. MAKHETHA **I CONCUR**
MEMBER

FOR APPLICANT: **ADV. WOKER**
FOR RESPONDENT: **ADV. MAKHABANE**