

IN THE LABOUR COURT OF LESOTHO

LC/REV/97/10

HELD AT MASERU

In the matter between:

PICK `N PAY HYPERMARKET (PTY) LTD

APPLICANT

and

**MOKONE MOKONE
DIRECTORATE OF DISPUTE PREVENTION
AND RESOLUTION**

**1st RESPONDENT
2nd RESPONDENT**

JUDGMENT

Date: 21/10/11

Review application - An Arbitrator granting an award by default when applicant's representative was finalising another matter in before another Arbitrator - Dissatisfied with the situation applicant attempted to have the award rescinded - Application for rescission refused - Applicant herein seeking to have the said award reviewed, corrected and set aside on grounds of irrationality - Award rescinded and set aside.

1. The applicant is herein seeking the review, correction and setting aside of the award of the Directorate of Dispute Prevention and Resolution (DDPR) in A 0282/10. The award had been issued by default. Dissatisfied with it, the applicant filed an application seeking its rescission, but it was unsuccessful, hence this review application.

2. Circumstances surrounding the review application are common cause. It is indisputable that applicant's Counsel had two matters scheduled for hearing on 19th May, 2010 before the DDPR one being *Nthabiseng Mahlaku v Crabtree A 0289/10* and *Mokone Mokone v Pick `N Pay Hypermarket (Pty) Ltd A 0282/10*, the subject of the present review application. The matters were scheduled to be

heard at 0830 and 1100 hours respectively. Applicant's Counsel related to the Court that he duly proceeded with the first case at 0830, but the matter went beyond 1100 hours, thereby encroaching into the time allocated for the other case. It is not shown how long the time difference was. He intimated to the Court that he had informed 1st respondent's representative that he had another matter in another hearing room, a fact confirmed by the 1st respondent in his opposing affidavit to the review application. He said that he discovered to his utter dismay that the other matter had been disposed of by default. Disgruntled thereby, he approached the DDPR to have the award granted by default rescinded, and he was unsuccessful. The basis of the refusal being that he ought to have informed the learned Arbitrator of his predicament or sought a postponement of the second case. Applicant's Counsel is seeking a review of this award on the basis that it is irrational as he feels his non-attendance was not wilful.

3. Substantiating his review application, he submitted that the learned Arbitrator committed a gross irregularity in two major respects *viz.*, one, by proceeding with the hearing by default; and secondly, by failing to apply his mind to the explanation advanced for the default, which as far as he was concerned was reasonable.

4. The main test in a rescission application is whether failure to attend a hearing was wilful. The main issue for determination is therefore whether it was reasonable on the part of the learned Arbitrator to have dismissed the rescission application despite an explanation advanced on behalf of the applicant company indicating the circumstances in which the default occurred. In reply 1st respondent contended that applicant's Counsel's excuses are very lame as he had an option of sending another officer from his office to attend to one of the matters or could have sought a postponement.

5. In terms of the common law, the Court has power to rescind a judgment obtained on default of appearance provided that sufficient cause for rescission has been shown. The party seeking relief must –

- a) present a reasonable and acceptable explanation for his default;
- b) show that the application is bona fide and not made with the intention of merely delaying the plaintiff's claim; and
- c) show that on the merits he/she has a bona fide defence to the applicant's claim, which *prima facie* carries some prospects of

success, it being sufficient if he sets out averments which, if established at the trial, would entitle him to the relief asked for, he need not deal with the merits of the case or produce evidence that the probabilities are actually in his favour.

See - *Grant v Plumbers (Pty) Ltd 1949 (2) S.A 470*. The case has been cited with approval in a number of cases including *Loti Brick (PTY) LTD v Thabiso Mphofu & Others 1995-1996 LLRLB 446 at 450*.

IS THIS MATTER REVIEWABLE?

6. Applicant's Counsel contended that this matter was reviewable on grounds of irrationality, citing the learned author Herbstein & Van Winsen in *The Civil Practice of the Supreme Court of South Africa* 4th ed., in support thereof who stated the grounds for review as;

- a) absence of jurisdiction on the part of the Court;***
- b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;***
- c) gross irregularity in the proceedings; and***
- d) the admission of incompetent evidence, or the rejection of admissible or competent evidence.***

7. By being asked to grant an order of rescission the DDPR was being asked to exercise a discretion, a discretion to be exercised judicially, of course, upon consideration of all the facts. It has been held that there is no room for an exercise of a discretion in favour of an applicant for rescission where the default was wilful - See *Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd 1994 (3) SA 801 (C) at 805 F-I*.

8. Applicant's case is that the learned Arbitrator committed a gross irregularity by proceeding with the hearing by default in the first place and secondly, by failing to apply his mind to the explanation advanced for the default. According to *Basson v Provincial Commissioner (Eastern Cape) Department of Correctional Services (2003) 24 ILJ, 803 (LC)* decisions shall "*fall within the purview of judicial review and be set aside, where they are found to be patently arbitrary or capricious, objectively irrational, or actuated by bias or malice, or by other ulterior or*

improper motive". The Court had also held in *Shidiack v Union Government (Minister of Interior) 1912 AD, 642 at 651 - 2* that if a presiding officer

has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of law either to make him change his mind or to substitute its conclusion for his own ... [but] there are circumstances in which interference would be possible and right. If for instance such an officer had acted mala fide or from ulterior or improper motives, if he had not applied his mind to the matter or not exercised his discretion at all, or if he had disregarded the express provisions of a statute – in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of a discretion, even if it considered the decision inequitable or wrong.

9. The Court had earlier held in *Johannesburg Stock Exchange and Another v Witwatersrand Nigel and Another 1988 (3) SA 132 (A) at 152 A - E* that in order to establish review grounds it may have to be shown that the Tribunal failed to apply its mind to the relevant issues in accordance with the *"behests of the statute and the tenets of natural justice"*. Such failure may be shown by proof,

inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwanted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the tribunal misconceived the nature of the discretion conferred upon it or took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated.

This case was cited with approval in the Labour Appeal Court case of *Lesotho Electricity Corporation v Ramoqopo and Others LAC/REV/121/05 [2006]* reported in www.saflii.org/ls/cases and by this Court in *Lesotho Highlands Development Authority v Rosalia Phokoane Ramoholi & The DDPR LC/REV/33/10* (unreported).

10. The issue then becomes whether this is a matter that warrants interference by this Court. Addressing the issues as raised, firstly, regarding the point of the learned Arbitrator proceeding by default, we feel the learned Arbitrator cannot be faulted as it appears that he was not aware that applicant's Counsel had another matter. Ideally, he ought to have been alerted to this fact either by the applicant's

Counsel himself or 1st respondent's representative as he was privy to applicant's Counsel's predicament. He in fact did not deny during the hearing of the rescission application that he was aware that applicant's Counsel was proceeding with another matter and in his opposing affidavit before this Court. We have a problem with the second stage, *viz*, the rescission application. The question being whether the learned Arbitrator in refusing the rescission application failed to apply his mind to the reasons advanced by applicant's Counsel. His reasoning for failing to grant rescission was that applicant's Counsel ought to have informed him that he was in another hearing room or he could have postponed the matter. We tend to agree with him on the first leg of his argument, but found it quite disingenuous for 1st respondent's representative to have withheld the information from the learned Arbitrator and decided to snatch judgment. The learned Arbitrator does not appear to have addressed himself to the circumstances surrounding the default of applicant's Counsel's appearance during the rescission application, he also failed to interrogate the essential ingredients in a rescission application. The fact that both cases were before the DDPR and a roll was duly tendered as evidence ought to have persuaded the learned Arbitrator otherwise. We found his decision to refuse to granted rescission in the circumstances surrounding applicant's case to have been rather unreasonable.

11. It is trite that *"[o]nce a reviewing Court is satisfied that the tribunal has applied its mind, it will not interfere with the result even if it would have come to a different conclusion - See Coetzee v Lebea No and Another (1999) 20 ILG, 129 (LC) per Cheadle AJ,* (as he then was). However, in the present case the Court finds that the learned Arbitrator failed to apply his mind to the case that was before him for the reasons mentioned above.

In the circumstances, we find ourselves having no alternative but to rescind the DDPR award in A 0282/10 and to order that the matter be heard by a different Arbitrator.

No order as to costs.

THUS DONE AND DATED AT MASERU THIS 21st DAY OF OCTOBER, 2011.

F.M. KHABO
DEPUTY PRESIDENT OF THE LABOUR COURT

R. MOTHEPU
MEMBER

I CONCUR

M. THAKALEKOALA
MEMBER

I CONCUR

REPRESENTATION:

FOR THE APPLICANT : ADV. N.T. NTAOTE

FOR THE 1st RESPONDENT : MR. L. LELOTHA