

HELD AT MASERU

In the matter between:

PAY 'N SAVE

APPLICANT

and

NTHABISENG KUPUZA

RESPONDENT

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***JUDGMENT***

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*Date: 09/01/12*

***Rescission application - Following a judgment by default as a result of applicant's failure to attend the hearing - Whether default wilful - Issue dependent on whether the application meets the essential elements for a successful rescission application - Court finds respondent to have failed to controvert applicant's grounds for rescission - Application therefore granted as prayed.***

1. The applicant is herein seeking the rescission of a judgment by default in favour of the respondent granted by this Court on 18<sup>th</sup> August, 2009.
2. The respondent is applicant's former employee, and this application arises from her dismissal from applicant's employ on 1<sup>st</sup> March, 2008. She contended in her originating papers that she started working for the applicant on 29<sup>th</sup> August, 2006 until her services were terminated on the said date without prior notice and without a valid reason. Dissatisfied with this, she lodged an unfair dismissal case with the Directorate of Dispute Prevention and Resolution (DDPR) challenging the fairness of the said dismissal. The latter however declined jurisdiction when the applicant raised as a defence that the dismissal had been prompted by operational reasons. The matter was duly referred to this Court being an appropriate forum. According to the

respondent this was the first time that she learnt that she had been dismissed on account of operational requirements.

3. In her application before this Court she prayed that her dismissal be declared both substantively and procedurally unfair on the basis that the applicant had not informed her of the reason for her dismissal and it had flouted basic procedural rules including consultation and exploration of alternatives to retrenchment. She sought reinstatement as a relief and alternatively twelve (12) months compensation.

4. The applicant however failed to enter appearance. Hence, the filing of an application for default judgment on 16<sup>th</sup> March, 2009 with the handing down of the judgment on 18<sup>th</sup> August, 2009 granting judgment as prayed. In reaction, the applicant filed the present rescission application alleging that they never received any Court processes, and only came to know of respondent's case before this Court upon receipt of a letter summoning them to the Court in execution of the award. They therefore ask the Court for an opportunity to defend themselves against the unfair dismissal claim as they feel they have prospects of success and a bona fide defence against the respondent's claim. As far as they are concerned, the respondent was dismissed because the applicant company was ailing financially and it had to cut down on staff in its three stores. They further allege that the respondent had been consulted throughout the retrenchment process. They submitted that if the rescission application is not granted, they would be highly prejudiced. They contend that the respondent failed to prove that they were ever served with the Court processes.

5. In response, the respondent contended that the applicant was well aware of the Court processes as they had been served on it but it chose not to answer. They submitted that applicant failed to explain why he failed to appear and felt there was no reasonable explanation for the default of appearance.

### ***THE COURT'S ANALYSIS***

6. The requirements for a successful rescission application are trite and have been restated in a number of cases including *Loti Brick v Thabo Mpofu 1995- 1996 LLR, 446 at 450*. In order to succeed in a rescission application the applicant 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/she need not deal with the merits of the case or produce evidence that the probabilities are actually in his/her favour.

7. Applicant's case in this application is that it was never served with Court processes relating to respondent's claim before this Court. It is alleged on behalf of the applicant that it only got to know that respondent had a case before this Court upon receipt of summons to appear before it for the enforcement of a judgment that was granted by default. They further alleged that they last heard of respondent's case before the DDPR when jurisdiction was declined. In ascertaining whether or not to grant the rescission application we are confronted with a problem in that respondent nowhere attempts to controvert applicant's version that they were never served by way of proving that it in fact received the Court processes. The respondent seems to rely on the statement made by this Court in the judgment by default that "*it emerged that the respondent had been properly served on each occasion, and even acknowledged receipt of the process*". As it is, the Court made this statement basing itself on the unchallenged *viva voce* evidence tendered by the respondent.

8. In order to have rebutted applicant's claim that it was never served, the respondent ought to have proven that it was indeed served and show how the service was effected. The applicant seems to have advanced, on the face of it, a plausible reason for the default of appearance and on a balance of probabilities shown that they have a bona fide defence. They attached to their application for rescission a letter informing the respondent of her retrenchment dated 1<sup>st</sup> February, 2008 and styled "*Annexure B*" when the respondent on the other hand alleged to know nothing about the purported retrenchment. The letter bears respondent's signature and she does not deny the presence nor the authenticity of this letter. The respondent has failed to controvert applicant's claim of non-service and to rebut its claim that it has a bona fide defence against the claim in the main. In the circumstances the

Court is left with no alternative but to rescind its judgment handed down on 18<sup>th</sup> August, 2009. This would enable it to hear applicant's version and make an informed decision in determining the fairness or otherwise of respondent's dismissal.

9. The rescission application is therefore granted as prayed.

There is no order as to costs.

**THUS DONE AND DATED AT MASERU THIS 09<sup>TH</sup> JANUARY 2012.**

**F.M.KHABO**  
**DEPUTY PRESIDENT OF THE LABOUR COURT**

**M.MAKHETHA**  
**MEMBER**

**I CONCUR**

**L.MOFELEHETSI**  
**MEMBER**

**I CONCUR**

**FOR THE APPLICANT : ADV., NTAOTE**

**FOR THE RESPONDENT : ADV., KOTO**