

**HELD AT MASERU**

**In the matter between:**

**LEBOHANG PAUL MATSAPA**

**APPLICANT**

**And**

**CASHBUILD LTD (MAFETENG)**

**RESPONDENT**

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**JUDGMENT**

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*Date: 3<sup>rd</sup> April 2013*

*Application for reinstatement of a matter dismissed for want of prosecution. Applicant succeeding to meet the requirements for reinstatement of the matter. Court finding that due to legislative changes, it has no jurisdiction as the matter now falls within the jurisdiction of the DDPR. Court remitting the matter to the DDPR for Determination. No order as to costs being made.*

**BACKGROUND OF THE ISSUE**

1. This is an application for the reinstatement of LC/78/1996. The matter was heard on this day and judgment was reserved for a later date. The background of this matter is essentially that Applicant instituted an unfair dismissal claim with the Labour Court in 1996, under case number LC/78/1996. The Labour Court had then dismissed the Applicant's claim, leading the institution of review proceedings before the High Court, under CIV/APN/362/1998.
2. On the 6<sup>th</sup> August 2008, the High Court issued an order reviewing and setting aside the judgment of the Labour Court in LC/78/1996, and directing that the matter be commenced afresh. Subsequent thereto, the matter was reinstituted before the Labour Court but dismissed on the 22<sup>nd</sup> April 2010, for want of prosecution. Thereafter the current proceedings were instituted. The matter was opposed and both parties were given the opportunity to make representation.

3. We wish to note that during the proceedings, some of the submissions of the parties were outside their pleadings. However, on the premise of the rule in motion proceedings that parties must stand and fall by their pleadings, We will only consider the submissions of the parties to the extent that they relate and support their submission. This issue was also raised by Advocate Mpaka in his heads of argument and he supported it with two authorities in *Open Bible Ministries & another v Ralitsie Nkoroane & another* 1991 – 1992 LLR & LB 112 at 118; and *Director Hospital Services v Mistry* 1999 (1) SA 626 (A) at 635H – 636B. Our judgment is thus in the following.

### **SUBMISSIONS AND ANALYSIS**

4. It was submitted on behalf of Applicant that following the High Court Judgment, his then legal representative, Advocate Nathane, failed on his responsibility to have the matter set down for hearing. The result of the delay was the development of an acrimonious relationship between Applicant and his then representative. This led to Applicant taking his file and switching to his current representative, Advocate Nthontho. Applicant was only able to instruct his current representative sometime in June 2011. It was added that upon perusal of the Court's record, Advocate Nthontho discovered that the matter was dismissed on the 22<sup>nd</sup> April 2010 for want of prosecution.
5. Another discovery that was made by Advocate Nthontho, was that after the set down had been served upon Advocate Nathane, he had made communication to the Registrar of the Labour Court to inform her that his representation had been withdrawn by Applicant. Notwithstanding, the withdrawal advice, no steps were taken to ensure that service of the notification of hearing was made on Applicant, as the matter was rather dismissed for want of prosecution. The Court was referred to annexure LM1, being an order reviewing the judgment of the Labour Court in LC/78/1996, LM2 being the notice of set down and LM3 being the notice of withdrawal.
6. Advocate Nthontho argued that on the basis of the above, the failure to prosecute the matter on the part of Applicant was not intentional, as he was clearly not aware that it was scheduled to proceed on the day in question. He added that it would be unfair to punish Applicant for the negligent conduct of his

former representative. Reference was made to the case of *Thamae & another v Kotelo & another LAC 2005 at 583*, for the proposition. It was further submitted that the interest of justice favour the granting of this application in that Applicant was unfairly dismissed. It was added that as a result of the dismissal, Applicant lost out on his benefits and income, which he used to support and maintain his family. He thus prayed for the granting of this application.

7. In reply, Advocate Mpaka for Respondent submitted that it is clear from the submissions of Applicant that he blames his representative for the dismissal of the matter. He stated that there are circumstances under which a party cannot be allowed in law to place the blame on their representative. He submitted that the circumstances *in casu* are as such. He made reference to the cases of *Senone & another v Senone C of A (CIV) 48/2011* and *Darries v Sherriff, Magistrate's Court, Wynberg & another 1998 (3) SA 34 (SCA) at 44 B-G*. Advocate Mpaka submitted that in this case, Respondent had been in wilful default and the Court stated that there is a limit on legal representative negligence.
8. It was further submitted that Applicant had failed to meet the requirements for an application for reinstatement. It was submitted that Applicant had not set out the prospects of success and that the above given explanation for failure to prosecute was not satisfactory. It was argued that the averments made in relation to the prospects of success are not sufficient to warrant the granting of the order sought. Advocate Mpaka further argued that the averments do not make out a clear case, as they do not set out the details of the dismissal of Applicant.
9. Further, it was submitted that even assuming that the matter was to be reinstated, there is an issue of jurisdiction of this Court over the said matter. Advocate Mpaka argued that claims for unfair dismissal are arbitrable before the DDPR and not the Labour Court, in terms of section 226 (2) (d) of the *Labour Code (Amendment) Act 3 of 2000*. Furthermore, it was submitted that if this matter is to be properly placed before the DDPR, then the issue of prescription will take effect, in that claims for

unfair dismissal must be referred within 6 months of the cause of action arising.

10. In reaction to Respondent's reply, Advocate Nthontho submitted that the issue of prescription cannot hold as the matter was already proceeding before this Court. On the issue of the prospects of success, it was argued that Court has a wide discretion on the issue, which discretion must be based on all the facts presented. On the issue of jurisdiction of the Court in this matter, Advocate Nthontho argued that the Court had jurisdiction at the time that it dismissed the matter. He added that given the current position of the law, having granted the reinstatement order, the Court has a wide discretion to give the appropriate remedy on what route to be followed by parties. On the issue of negligence of the legal representative, Advocate Nthontho argued that the authority cited was misplaced and inapplicable in that, *in casu* it is not the party that was negligent.
11. The principles applicable in an application for reinstatement of a matter dismissed for want of persecution are similar to the principles applicable in an application for rescission. The principles applicable in an application for rescission were laid out in the case of *Melane v Santam insurance Company Ltd 1962 (4) SA 531* and adopted by our Courts in a plethora of cases. In adopting these principles, the Court in *Loti Brick v Thabiso Mphofu & others 1995 -1996 LLR-LB 447*, held that a party to a rescission application must show the following,
  - a) That there is a reasonable explanation for the default; and
  - b) That there are *bona fide* prospects of success.
12. Flowing from these above principles, what is of prime importance, from the submission of Applicant, is why he failed to attend the matter on the scheduled date of hearing. It is Our opinion that the explanation he has provided, is reasonable enough to satisfy the first requirement. Clearly the notification of hearing was not communicated to him, but to his former representative and nothing was done after Applicant's former representative had communicated his withdrawal to the Registrar of this Court, to make Applicant aware that his case had been set down for hearing.

13. Obviously, Applicant failed to attend because the date of hearing was not brought to his attention. Thus, it cannot be accurate that he blames his former representative for failure on his part to attend the hearing. We do concede that an element of negligence of the former representative comes into play, but in a very limited sense that does not dilute the fact the he was not notified about the date of hearing. We are of the view that, under the circumstances, Applicant could have been expected to have turned up for the proceedings of the 22<sup>nd</sup> April 2010.
14. This is clear from LM2 and LM3. LM2, on the one hand, is the notification of hearing which was served on Advocate Nathane on the 19<sup>th</sup> March 2010. LM3, on the other hand, is the letter from Advocate Nathane to the Registrar of this Court. None of these letter were sent to Applicant for him to react, hence why he did not. It would thus be unfair to hold Applicant at fault over something that was never brought to his attention. Had he at least been aware about the date of hearing, this Court would not hesitate to find him in wilful default. We also note and acknowledge the authority in *Thamae & another v Kotelo & another (supra)*, and agree with Applicant that it would be unfair to punish him by refusing this application under the circumstances.
15. On the issue of prospects of success, We are convinced from the submissions of Applicant that he has good prospects. His averments establish a valid claim of unfair dismissal. It is not necessary for Applicant to set out the details of his dismissal. Applicant has also been able to illustrate the prejudice suffered and that which he continues to suffer as a result of the dismissal that he seeks to challenge. In law, once this is the case, then this application must be granted (see *Loti Brick (Pty) Ltd v Thabiso Mphofu and Others 1995 LLR-LB 447*).
16. On the issue of jurisdiction, We acknowledge that this Court may not have jurisdiction over Applicant's claim, owing to the changes in legislations. However, what remains is that at the time it was dismissed, this Court had jurisdiction. The changes in legislation have not affected Applicant's right over the claims but have rather changed the forum in which such rights may be enforced. As rightly pointed out by Advocate Nthontho, having granted reinstatement, the Court will use its discretion

and give parties direction on how to proceed further with the matter.

17. However, giving such direction depends on the subsistence of the matter and by necessary implication, its reinstatement. What we are saying in essence is that, We cannot give parties direction on how to deal with the matter before we reinstate it. In relation to the issue of prescription of the matter, We agree with Applicant that it cannot sustain. The fact that this matter is continuing before this Court, breaks the effect of prescription. Consequently, the argument that this matter is prescribed does not hold water.

### **AWARD**

We therefore make an award in the following terms:

- a) That the application for reinstatement is granted;
- b) The matter is remitted to the DDPR for determination; and
- c) That there is no order as to costs.

**THUS DONE AND DATED AT MASERU ON THIS 22<sup>nd</sup> DAY OF JULY 2013.**

**T. C. RAMOSEME  
DEPUTY PRESIDENT (AI)  
THE LABOUR COURT OF LESOTHO**

**Miss P. LEBITSA  
MEMBER**

**I CONCUR**

**Mrs. L. RAMASHAMOLE  
MEMBER**

**I CONCUR**

**FOR APPLICANTS:  
FOR RESPONDENT:**

**ADV. NTHONTHO  
ADV. MPAKA**