

IN THE LABOUR COURT OF LESOTHO

LC/REV/06/11

HELD AT MASERU

In the matter between:-

**LESOTHO FREIGHT & BUS SERVICE
CORPORATION**

APPLICANT

and

TEBOHO PROSENTE

1st RESPONDENT

DIRECTORATE OF DISPUTE

2nd RESPONDENT

'PREVENTION AND RESOLUTION

JUDGMENT

DATE: 09/09/13

Review of an arbitration award - Refusal to grant rescission of a default judgment - Proceedings having been commenced by the Applicant (respondent at the DDPR) - The latter having given his defence but failing to attend the hearing on the day the claimant was to present his claim - The 1st respondent (then applicant) awarded judgment by default - Applicant unsuccessfully applying for rescission - Court feels in the circumstances of the case the rescission application ought to have been granted - Matter remitted to the DDPR to be heard afresh.

1. The applicant is before this Court to have the award of the Directorate of Dispute Prevention and Resolution (DDPR) in A0 327/10 (b) reviewed, corrected and set aside.
2. This matter was referred to the DDPR on or about March, 2010 and was intermittently heard over a number of days commencing on 2nd June, 2010 up to

the 19th August, 2010, the hearing that culminated in the current dispute. The applicant had all along been represented in the dispute before the DDPR but was not represented on the 19th August, 2010. The matter proceeded by default and an award was delivered in favour of the 1st respondent.

3. It is common cause that when the matter was postponed to the 19th August, 2010 the applicant herein had already fielded two witnesses and closed its case. What remained was for the 1st respondent herein to present his case as the applicant (respondent/defendant at the DDPR) had commenced proceedings. On this particular day, it was the applicant's or complainant's turn to present his claim. As aforementioned, there was no representation on behalf of the then respondent (applicant herein), and an award was issued by default. Following the default award, the applicant filed an unsuccessful rescission application. The learned Arbitrator had ruled that the applicant ought to have come to purge its default by sending someone from its employ to relay its predicaments for the failure to attend the hearing on the 19th August, 2010 rather than send Mr. Ntaote.

4. It is common cause that Mr. Ntaote had all along been applicant's representative of record. Hence, in all the hearings hitherto the 19th he had represented the applicant. The Court wishes to underscore this factor as it relates to the reason for applicant's failure to appear on the date in issue. Mr. Ntaote submitted in the application for rescission before the DDPR that he was informed by applicant's Managing Director prior to the 19th that his mandate had been terminated, and applicant would henceforth be represented by an internal representative. He explained that the failure to attend the hearing on the 19th had been occasioned by a communication breakdown between applicant's Managing Director and its Principal Secretary (PS Ministry of Works). The confusion seems to have arisen from an impression by Mr. Ntaote that his mandate had ceased to exist as soon as it was withdrawn but it appears the Company, on the other hand, laboured under an impression that he would complete all the matters that were pending before him.

THE COURT'S VIEW

5. As earlier alluded to, it was the defendant who started the proceedings and what remained outstanding was to hear the complainant's version. It is common cause that by sheer coincidence Mr. Ntaote was at the DDPR on the 19th August, 2010 to attend to another matter. He met the complainant and intimated to him that the applicant was bringing in its own internal representative. As it turned out there was no representation of the applicant, and a judgment by default was granted in favour of the 1st respondent. In reaction, applicant filed an unsuccessful rescission application.

6. Mr. Ntaote's explanation for his non-attendance was accepted. This is borne out by the learned Arbitrator's remarks in paragraph 16 and 17 of his award. He remarked therein:-

I have no reason to doubt the averments of applicant's representative to the effect that he was told that his mandate had ended. This was shown by his presence in the DDPR premises on the day in question with a different mandate as alleged by the respondent. It should be noted that this was not denied by applicant's representative and as such I take it to be accurate. Further, I have no reason to doubt the reasonable (sic) of the explanation advanced by the applicant's representative for his failure to appear on behalf of applicant (sic). In my view, applicant's representative has been able to advance a reasonable explanation for his failure to attend.

He, however, went further to indicate in paragraph 17 that:-

Applicant's representative is not a party to [the] hearing but merely a representative.

7. Mr. Ntaote appears to have been acting on the applicant's instructions and was not a mere representative. He was privy to why the applicant failed to attend the hearing. Hence, he filed a rescission application. If he had not appreciated how the miscommunication arose he would have left the applicant Company to fend for itself.

8. This case is rather unique in that unlike in normal circumstances where a default judgment is granted by virtue of failure by the respondent to attend a hearing; in *casu* the latter had started the proceedings and therefore tendered its defence prior to the then applicant's claim. When the learned Arbitrator heard applicant's claim by default, he was already privy to applicant's defence. All that remained on the 19th August, 2010 was to hear the complainant's claim.

9. The Court has a discretion to rescind a judgment after evaluating the circumstances that caused respondent's failure to attend a hearing. The applicant has to establish that he or she was not in wilful default. We do not fault the learned Arbitrator to have proceeded by default on the 19th because there was nothing formal before him to explain applicant's non-attendance. However, a rescission application was lodged wherein the reasoning for the default was advanced. It is our considered opinion that in ascertaining the merits or demerits of the rescission application the learned Arbitrator ought to have considered the following factors:-

- (i) That the applicant had all along, but for the 19th August, been represented which was an indication that they wished to have the matter defended to finality;
- (ii) That the applicant had already advanced his defence to complainant's claim and closed its case. He was therefore already aware of applicant's defence;
- (iii) That he had concluded that the applicant had ***“successfully argued prospects of success”*** - paragraph 26 of the award; and
- (iv) That he had further asserted in paragraph 25 of his award that he was ***“convinced, as evidence and arguments suggest [ed] that applicant corporation had no part in the occasioning of the alleged prejudice”***.

10. Whilst we appreciate how much of a nuisance non - attendance of a party/parties to Court proceedings can be but in ascertaining the wilfulness or otherwise of such failure to attend every case has to be determined on its particular circumstances. In *George Nts'eke Molapo v Makhutumane*

Mphuthing & Others 1995-1996 LLRLB at p.516 Justice Maqutu (as he then was) remarked that “[T]*here is, unfortunately, a tendency among court practitioners to forget that default judgments are not intended to be a denial of the audi alteram partem precept. The procedure is simply designed to speed up the machinery of justice”.*

11. A default judgment basically revolves around neglect. The learned Arbitrator did concede that Mr. Ntaote’s explanation for failure to attend the hearing on behalf of the applicant was excusable, but overlooked the fact that the reasoning impinged on the applicant as well because it related to a misunderstanding of whether the newly engaged employee would only take up new cases and not part-heard ones or he/she would take off from where Mr. Ntaote left. It was not reasonable to have divorced Mr. Ntaote from the Company as he did. The learned Arbitrator had suggested in the rescission application that the applicant ought to have made its own representations. We feel that in the circumstances of this case it was not prudent to have separated Mr. Ntaote, the Company representative, from the Company. In our view, his explanation sufficed.

12. Courts or alternative dispute resolution mechanisms such as the DDPR have a duty to maintain discipline, speed up litigation and finalise cases but these should be weighed against the *audi alteram partem* principle (the duty to afford the other side a hearing). Among other things, the concept of speedy resolution of disputes should not be at the expense of justice. Courts of law and institutions entrusted with the delivery of justice should strive to dispense justice and not dwell too much on legal technicalities. As we indicated that this case is unique, we feel in the circumstances, the learned Arbitrator could have granted the rescission and finished off the case. According to one of the eminent authors on Civil Procedure Isaacs in **Beck’s Theory and Principles of Pleading in Civil Actions**, 4th ed., at p.154 default judgments are based on:-

a desire to avoid delays and the protraction of litigation and the court will consequently always grant leave to purge a default where the justice of the case requires it, more especially if it is improbable that the

action will be delayed by the granting of the application, or if the opposite party will not be prejudiced thereby.

13. It is in the interests of justice that this Court orders that the matter be remitted to the DDPR to be heard afresh before a different Arbitrator. The award in AO 327/10 (b) is reviewed and set aside.

There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 09TH DAY OF SEPTEMBER, 2013.

F.M. KHABO

PRESIDENT OF THE LABOUR COURT (a.i)

L.MATELA

I AGREE

MEMBER

L. RAMASHAMOLE

I AGREE

MEMBER

For the applicant: N.T. Ntaote- Employer's Forum

For the 1st respondent: L.J. Molefi – Lesotho Wholesalers, Catering and Allied Workers' Union (LEWCAWU)