IN THE LABOUR COURT OF LESOTHO **LC/REV/11/2008**

HELD AT MASERU

In the matter between:

HAJI MOOSA **APPLICANT**

and

`MARETHABILE RAMALEFANE **1ST RESPONDENT**
DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION **2NDRESPONDENT**

JUDGMENT

DATE: 28/11/13

Review of an arbitral award - Refusal by the Arbitrator to rescind an award granted in favour of an employee - On the basis that the employer failed to show prospects of success and prejudice he would suffer by the default award - Court concludes that the employer being a layperson, coupled with having language limitations couldn't reasonably be expected to know the essential elements of a rescission application, had to be guided accordingly - Award reviewed and set aside.

INTRODUCTION

1. This is an application for the review and setting aside of the award of the Directorate of Dispute Prevention and Resolution (DDPR) in F 033/07 in which the learned Arbitrator had refused to rescind an award granted by default in favour of the 1st respondent. The learned Arbitrator had refused to grant the rescission application on the ground that the employer had neither failed to show that he had any prospects of success or that he would suffer any prejudice if the judgment was not rescinded. She, however, remarked in her judgment that even if he had shown prospects of success, the fact that she found his explanation for failure to attend the hearing unsatisfactory would not make any difference in her decision. The claims brought by the 1st respondent before the DDPR revolved on notice pay; severance payment; leave pay; and overtime.

2. Neither the 1st respondent nor his Counsel of record was in attendance during the review proceedings. She had, however, filed opposing papers. Before we could proceed we had to ensure that she was aware of the hearing. Applicant's Counsel informed us that he had made several attempts to contact the 1st respondent's Counsel, but only met him by chance in the course of the week preceding the hearing and reminded him informally that the matter was proceeding. Over and above this, Court's records reflect that 1st respondent's Counsel was duly served with a ***"Notice of Hearing"*** by the Registrar of this Court on 20th May, 2013. The Court having satisfied itself that the 1st respondent had been duly informed of the date of hearing, proceeded to hear the matter in her absence.

BACKGROUND TO THE DISPUTE

3. This dispute arises from applicant's failure to attend an otherwise scheduled hearing at the DDPR in Mohale's Hoek on 1st October, 2007. He conceded that he arrived late and by the time he arrived the matter had already proceeded in his absence and judgment entered against him. He said he was late by one hour. He indicated that he was late because his vehicle broke down at Van Rooyen's Gate, and he had to be fetched in another vehicle. Applicant pointed out that besides Mohale's Hoek he had other businesses in Mafeteng and in the Republic of South Africa.

4. The applicant averred that he tried to explain to an officer of the DDPR why he was late, but he or she informed him that the best he could do in the circumstances was to apply for the rescission of the award. Apparently the officer also told him that lawyers were not allowed. He left and later filed a rescission application in which he apologised for being late and asked to be given a second chance as he had evidence to support his case against the 1st respondent. He stated further that he would be prejudiced if the rescission application was not granted.

5. The applicant contended that he had a valid defence against applicant's claim because 1st respondent had defied his instructions when he transferred him to his other business in Mafeteng, and decided not to come to work subsequently. As far as he was concerned she had deserted.

GROUNDS OF REVIEW

6. The applicant's case is that the rescission application had been refused erroneously. He denied he was in any way liable to the 1st respondent.Applicant's Counsel contended that the learned Arbitrator failed to appreciate that the applicant was a layperson and could not know the essentials of a rescission application, it being a legal concept. He argued that the applicant needed to be guided. He emphasised that his predicament was exacerbated by the fact that he could speak neither Sesotho nor English. Applicant's Counsel referred the Court to the first paragraph of the award where it clearly reflected that applicant's wife interpreted for him during the proceedings relating to the rescission application. The issue of the language limitation was therefore acknowledged.

7. The applicant indicated that he was asked to give an explanation for his failure to attend the hearing and he did but he was not aware that there were other things he ought to explain such as prospects of success. Applicant's Counsel attributed this to the fact that the applicant was a layperson, and underscored the need for guidance from the learned Arbitrator. He contended that the applicant had a bona fide defence and felt the DDPR ought to have availed him the opportunity to put his case across. He submitted that failure on the part of the learned Arbitrator to have guided the applicant on what was expected of him was highly irregular and rendered her award reviewable.

THE COURT'S PERSPECTIVE

8. A brief preview of what was expected of the applicant in order to succeed in his rescission application will lay a ground for the evaluation of this review application. The law on essential elements of a rescission application has been widely traversed by Courts over the years. In order to succeed in a rescission application, the applicant must show good cause which is made up of two essential elements ***viz.,***

> ***a) that the party seeking relief must present a reasonable and acceptable explanation for his default;***
>
> ***b) that on the merits such party has a bona fide defence which prima facie carries some prospects of success.***

For these see ***Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 765 B-D.*** Both these elements must be met. See also ***Marais v Standard Credit***

Corporation Ltd 2002 (4) SA 892 (W). On the home front, the classical case on the issue is ***Loti Brick (Pty) Ltd v Mphofu and Others 1995 - 96 LLRLB 446 at 450***. These cases reflect established common law grounds on rescission.

9. Lesotho did not stop there. It deemed it prudent to give Arbitrators guidelines on the various legal issues that they are daily confronted with. To this end, Section ***27(3) of the Labour Code (Conciliation and Arbitration Guidelines) Notice, 2004*** obliges an Arbitrator faced with a rescission application to consider the following factors:-

(i) the degree of the default;
(ii) the reasonableness of the explanation;
(iii) the prejudice to the parties; and
(iv) prospects of success.

These factors are in tandem with the common law requirements.

10. Applicant's Counsel submitted that the learned Arbitrator committed a serious irregularity by focussing exclusively on the degree of lateness, to the exclusion of the other factors. As far he was concerned these factors have to be considered cumulatively. In short, it is necessary to show a ***bona fide*** desire to persist in the claim or in the defence, as the case may be, and the default must be satisfactorily explained.

11. We agree with applicant's Counsel that the factors are interrelated and cannot be taken in isolation. Hence, the learned Arbitrator's remark that it would make no difference even if the applicant had shown that he had prospects of success was not in order. Because the two essential elements must co - exist for a successful rescission application, they must both be probed.

12. The learned Arbitrator was fully alive to the fact that the applicant had indicated that he had evidence to prove his case against the 1st respondent. She pointed out in her award that the applicant ***"indicated that he had evidence to prove his case against respondent, however, he did not mention the nature of evidence he has that would prove the case in his favour."*** We feel that the fact that the applicant mentioned that he had evidence, ought to have prompted the question ***"what evidence?"*** from the learned Arbitrator particularly when she was confronted with a case where it was critical to ascertain whether a party had a ***prima facie*** case as required by law. The question would have helped her in

her assessment whether or not the applicant had any prospects of success. The story would have perhaps been different if the applicant had not alluded to having any evidence.

13. In the case of ***Greenberg v Meds Veterinary Laboratories (Pty) Ltd 1977 (2) SA 277 (T) at 278***, the Court indicated that it is sufficient if the applicant makes out a ***prima facie*** defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.

14. One is reminded here that the applicant was before a labour arbitration forum which by its very nature has as its bedrock the principles of informality and accessibility. The fact that the applicant is a layperson and the patent communication limitations that he had induces a feeling that the learned Arbitrator ought to have afforded the applicant some guidance not necessarily to build his case but to elicit information that would help her exercise her discretion judiciously by determining whether applicant's case met the legal requirements set out in the case of ***Chetty (supra)*** read in conjunction with ***Section 27 (3) of the Labour Code (Conciliation and Arbitration Guidelines) Notice, 2004.***

15. We are further motivated in our conclusion by the ***audi alteram partem*** rule which is a principle of natural justice. The ***audi alteram partem*** rule dictates that as much as possible parties must be afforded an opportunity to present their side of the story. The principle is all about promotion of fairness or equity between the parties. Rescission applications should therefore not be refused easily. In ***George Nts`eke Molapo v Makhutumane Mphuthing & Others 1995 - 1996 LLRLB*** 516, Maqutu J., (as he then was) raised a concern over what he termed an ***"unfortunate tendency"*** among Court practitioners to forget that default judgments are not intended to be a denial of the ***audi alteram partem*** rule. He pointed out at p. 520 that default judgments more often than not collide head on with the rule, but they are not intended to prevent defaulting parties from putting their cases before Courts.

16. In the same vein, the Court in ***Silverthorne v Simon 1907 TS 123*** remarked that default judgments stem from:

> ***a desire to avoid delays and the protraction of litigation and the Court will consequently always grant leave to purge a default judgment 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 opposing party will not be prejudiced thereby.

Both Justice Maqutu's and the sentiments expressed above were cited with approval in this Court's decision of ***Lesotho Freight and Bus Service Corporation v Teboho Prosente and Directorate of Dispute Prevention and Resolution LC/REV/06/11*** (Reported in SAFLII***)***.

17. We feel applicant's case is one of those that the dictates of fairness demanded that he be guided in his case or be advised to seek legal Counsel in order to motivate his rescission application, whether successfully or not but he would have at least been given a fair opportunity to present his case. We have a duty as labour dispute resolution mechanisms to resolve disputes expediently, but we should not undermine our main duty which is in the ultimate analysis; to dispense justice.

18. It is our considered opinion that this is one case where fairness dictates that the applicant is afforded an opportunity to present his case. We therefore come to the following conclusion:

(i) That the DDPR award in F033/07 be reviewed and set aside;

(ii) That the matter be remitted to the DDPR to be heard afresh before a different Arbitrator;

(iii) Applicant's Counsel did not insist on costs, there is therefore no order as to costs.

THUS DONE AND DATED AT MASERU THIS 28TH DAY OF NOVEMBER, 2013.

F.M KHABO
PRESIDENT OF THE LABOUR COURT (a.i)

P. LEBITSA **I CONCUR**
MEMBER

M. MOSEHLE **I CONCUR**
MEMBER

FOR THE APPLICANT: MR. Q. LETSIKA

1ST RESPONDENT NOT IN ATTENDANCE