

**HELD AT MASERU**

**In the matter between:**

**KHAUHELO MOENO**

**APPLICANT**

**And**

**SECURITY LESOTHO (PTY) LTD**

**RESPONDENT**

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**JUDGMENT**

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*Hearing Date: 5<sup>th</sup> September 2013*

*Application for rescission of judgment obtained by default. Application being unopposed – Court proceeding on the basis of the unchallenged factual averments of Respondent. Respondent failing to meet the requirements for a rescission application – Court dismissing application and reinstating its judgment.*

**BACKGROUND OF THE ISSUE**

1. This is an application for the rescission of judgment obtained by default on the 13<sup>th</sup> May 2013. The matter was heard on this day and judgment was reserved for a later date. Parties herein are cited as they appear in the main claim. Advocate Mohapi appeared for Respondent and Advocate Nono appeared for Applicant. The background of this matter is essentially that Applicant lodged an unfair dismissal claim with the Labour Court. In terms of his originating application, he sought compensation of 24 months wages. The matter proceeded in default due to non attendance on the part of Respondent.
2. However, the having considered Applicant's evidence and submissions, the Court made an award of 5 months wages, in favour of Applicant instead. It is the said order that Respondent seeks to have rescinded. The rescission application is not opposed and this was confirmed by Applicant's representative. This essentially means that the factual averments of Respondent remain unchallenged and that the

Court will proceed to apply the law on them, as they appear in the Respondent's pleadings. Our judgment is thus in the following.

### **SUBMISSIONS AND ANALYSIS**

3. Respondent's case is that it was served with the originating application to the Applicant's claim for unfair dismissal. It then passed them onto its representatives for action. Respondent was only shocked to later learn that judgment had been obtained by default in the matter. It also learned that its representative had failed, contrary to its mandate to oppose the matter. It was added that there is a *bona fide* defence to the main claim in that Applicant was duly notified about her hearing but that she decided not to attend. Further, that Applicant had indeed participated in an unlawful strike hence her dismissal.
4. It was further added that this Court had committed a number of irregularities, among which is the fact that Applicant's representative seems to have been the one who was testifying for and on behalf of Applicant, which was improper. Further, that the Court had turned itself into a handwriting expert by comparing and concluding that the signatures in issue belonged to one and the same person. On these bases, it was prayed that this application be granted.
5. There are three requirements that must be met in order for a rescission application to sustain. These requirements were laid out in the case of *Loti Brick (Pty) Ltd v Thabiso Mphofu and Others* 1995 LLR at 446-550, as follows,  
“(a) *The applicant must give a reasonable explanation for his default;*  
*(b) The application must be **bona fide** and not made with the intention of merely delaying the plaintiff's claim;*  
*(c) the applicant must show that he has a **bona fide** defence to the plaintiff's claim, 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).”*

6. *In casu*, Respondent has indeed shown that it initiated the processes to defend the claim lodged by Applicant. It is clear from Respondent's pleadings that, thereafter, it took no further steps to ensure that its representative took all the necessary steps to actually have the matter defended. This essentially explains Respondent's surprise when it was served with the order of this Court for enforcement. It may well be that Respondent was surprised at the sight of the court order, but that was the result of inactiveness on its part in this matter. It is the inactiveness on the part of Respondent that lead Us to conclude that Respondent's defence was nothing, but intended to delay Applicant's claim.
7. From the submissions of Applicant, it is clearly attempting to shift the blame for failure to attend on its attorneys. In Our view, this attempt would have been valid if these proceedings were by way of motion, in which case the presence of a party is not required once they have given instructions and deposed to all relevant documents. However, *in casu*, the circumstances involve a trial, which by its nature requires the presence of parties to give evidence of their own accounts. This cannot be done by a representative on behalf of its client but by the client himself.
8. In view of this said, We find that the explanation for default on the part of Respondent is not satisfactory thus rendering the reasons for its default inexcusable. Whereas there are circumstances under which a party may rely on negligence of its representative to explain its default, as shown above, that cannot sustain as an excuse *in casu*. It would set a very ruinous precedence if this Court were to allow parties to freely rely on the fault of their representative to exonerate themselves from liability.
9. On the issue of the prospects of success, We are convinced that Respondent has a defence to the Applicant's claim in the main action. It has set out facts which if established at trial may sustain its defence. That notwithstanding, the mere fact that a party has prospects of success, does not mean that this Court will readily grant the application for rescission. We say this because, it is an established principle of law that where an explanation for default is not satisfactory, it renders the strong

prospects of success to pale into insignificance (see *Thabo Teba & 31 Others vs. LHDA LAC/CIV/A/06/09*).

10. In view of this said above, We therefore find that the Respondent's prospects of success have been weakened by its unsatisfactory explanation for default, which has in turn led Us to conclude that not only the Respondent's claim but also this application, are meant to delay Applicant's claim. On the issue of alleged irregularities in the judgment of this Court, there are procedures laid out in law that a dissatisfied party may invoke. A proper procedure is by way of review and not a rescission. For this Court to attempt to address this issue, that would be tantamount to an attempt to review its own judgement. Consequently, we decline to make a pronouncement on this issue.

#### **AWARD**

We therefore make an award in the following terms:

- a) That the application for rescission is refused;
- b) That the judgment of this Court is reinstated; and
- c) That there is no order as to costs.

**THUS DONE AND DATED AT MASERU ON THIS 14<sup>th</sup> DAY OF OCTOBER 2013.**

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

**Mr. MOTHEPU  
MEMBER**

**I CONCUR**

**Mr. KAO  
MEMBER**

**I CONCUR**

**FOR APPLICANT:  
FOR RESPONDENT:**

**ADV. 'NONO  
ADV. MOHAPI**