

HELD AT MASERU

In the matter between:

**POPE JOHN XXIII HIGH SCHOOL
THE SCHOOL BOARD**

**1st APPLICANT
2nd APPLICANT**

And

**TŠABANG TELUKHUNOANA
CATHOLIC SCHOOL SECRETARIAT
TEACHING SERVICE DEPARTMENT (TSD)
THE ARBITRATOR (L. NTENE)**

**1st RESPONDENT
2nd RESPONDENT
3rd RESPONDENT
4th RESPONDENT**

JUDGMENT

Date: 3rd December 2013

Application for reinstatement of a matter dismissed for want of prosecution. Respondents only indicating their intention to oppose the application without actually opposing same. Further Respondent failing to attend hearing on the scheduled date and matter proceeding both unopposed and by default. Court finding merit in the application and granting the application for reinstatement of the matter. Court further finding that there can only be one certified record of proceedings of the DDPR and directing Applicants to proceed in terms of Rule 16 of the Labour Appeal Court Rules on the basis of the record that they have.

BACKGROUND OF THE ISSUE

1. This is an application for the reinstatement of review application that was dismissed for want of prosecution. It was heard on this day and judgment was reserved for a later date. Applicants were represented by Adv. Metsing and there was no appearance for the Respondents.

2. The background of the matter is that 1st Respondent had referred a claim for unpaid salary with the DDP, wherein the 4th Respondent was the presiding Arbitrator. It was 1st Respondent's case, at the DDP, that he worked for the 1st Applicant for 6 months during which period he was not paid. The learned Arbitrator made a finding in 1st Respondent's favour that the Applicants must pay him the salaries claimed. The said award was issued on the 26th June 2010 and later served upon the Applicants.
3. Unhappy with the arbitration award, the Applicants then initiated review proceedings wherein it sought the review, correction or setting aside of the 4th Respondent arbitration award. Shortly thereafter an intention to oppose and an answer were filed on behalf of the 1st Respondent. Subsequent thereto, 1st Respondent filed an application for dismissal of the review application for want of prosecution. The said application was then set down hearing on the 20th June 2013. On this day both parties failed to attend the hearing and the Court dismissed both the application for dismissal for want of prosecution as well as the application for review, for want of prosecution.
4. On the 5th July 2013, Applicants then lodged the current application wherein they sought the reinstatement of the review application. Subsequent thereto, Respondents only filed their notice of intention to oppose and no further processes. Applicant then had the matter enrolled for this day. We wish to note that even on the date of hearing, the application for reinstatement of the review application still remained unopposed and in addition to that Respondents did not attend the hearing. As a result, the application proceeded both unopposed and in default of the Respondents. Our full judgment is therefore in the following.

SUBMISSIONS AND ANALYSIS

5. It was Applicants' case that this matter had been set down for hearing at 10:00am on the 20th June 2013. However, it was dismissed for want of prosecution at around 09:30am of the same day, on the ground that both counsel were not in attendance. It was submitted that it is clear from the averments made the dismissal of the matter was done

prematurely as the time scheduled for hearing had not yet come and therefore that Applicants were not in default at all.

6. It was further submitted that prior to the 20th June 2013, the matter had been postponed on two occasions owing the unavailability of the record of proceedings before the 4th Respondent. It was added that even on the 20th June 2013, the matter would not have proceeded as the record was unavailable and still is to this day. On this regard, Applicants requested the intervention of the Court in ensuring the that record of proceedings is availed so that the matter can proceed.
7. It was further submitted that Applicants have good prospects of success evident in the grounds of review, as reflected under paragraph 6 of the founding affidavit to the review application. It was added that there are possibly more grounds but that the Applicants have been disabled from amplifying the already canvassed grounds by the unavailability of the full record of proceedings. It was said that the provided certified manuscript version of the record does not reflect the entire proceedings, and these include some of the irregularities committed by the presiding officer.
8. The requirements in an application for reinstatement are similar to those in an application for rescission. The reason is not hard find as both are the result of the default in appearance on the side of a party or parties. These requirements were laid out in the case of *Loti Brick v Thabiso Mphofu & others 1995 -1996 LLR-LB 447*, 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).”*

9. Having laid the legal basis against which We will proceed to evaluate the submission and evidence of Applicants, We wish to highlight one very important issue that affects the matter materially. This matter is not opposed and that being the case, We are bound to proceed on the basis of the acceptance of the evidence of Applicants as being the only true and accurate narration of the events. Our conclusion finds support in the finding of the court in *Theko v Commissioner of Police and another (supra)*, where the Court had the following to say, “I must point out that no attempt was made by the respondents to reply to or challenge the correctness of the averments contained in the affidavit of the attorney, Mr Maqutu. The issues in our view must therefore be resolved on the basis of the acceptance of the unchallenged evidence of an officer of this court”.
10. From the unchallenged evidence given by Applicants, We are satisfied that their explanation for failure to attend is reasonable. We say this because in dismissing the review application for want of prosecution, the reviewing Court was clearly harbouring under a mistake that the matter had been scheduled to proceed at an earlier time than that which had been communicated to both parties. This in essence also explains why it was not only Applicants who were not present in the proceedings but also the Respondents. It is therefore clear that it was not the fault of both parties that they were not in attendance at the time that the matter was dismissed and they cannot therefore be penalised for it.
11. Regarding the prospect of success, We have been referred to paragraph 6 of the founding affidavit to the review application. This paragraph contains the grounds of review raised on behalf of the Applicants. Having perused them, We are convinced that they make out a *prima facie* case, which if properly substantiated may lead to the granting of the review application. These grounds demonstrate several occasions of failure to consider the evidence of the Applicants by the 4th Respondent, and for this reason We will not quote them in this record. We therefore find that Applicant has *bona fide* prospects of success.

12. It has been alleged that the certified record that has been supplied by the Registrar, from the DDPR, is incomplete by reason of the fact that it does not reflect all the irregularities that Applicants have and/or wish to raise. In this regard, We have been requested to intervene. We wish to note that there can only be one certified record of the proceedings before the DDPR. When an arbitrator certifies a record of proceedings, this essentially means it is the one and only official document that represents what took place in the hearing. As a result, We cannot order the provision of the record other than the one that has been submitted.

13. It is clear to Us that the Applicants are seized the certified record of proceedings before the 4th Respondent. All issues relating to the records of proceedings before the DDPR are governed by Regulation 30 of the *Labour Code (DDPR) Regulations of 2001*. In terms of this section, and in particular, Regulation 30(6), “*The transcript or the hand-written notes or the electronic record so certified as correct shall serve as proof of its correctness...*” In terms of the Rules of this Court, once seized with the certified record of proceedings, Applicants must proceed in line with Rule 16 of the *Labour Appeal Court Rules of 2002* and on the basis of the record that they have.

AWARD

We therefore make an award in the following terms:

- a) That the application for reinstatement is granted;
- b) Applicants are to proceed in terms of Rule 16 of the Labour Appeal Court Rules.
- c) This order must be complied with within 30 days of receipt herewith.
- d) That there is no order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 13th DAY OF DECEMBER 2013.

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

**Mrs. MOSEHLE
MEMBER**

I CONCUR

**Mrs. THAKALEKOALA
MEMBER**

I CONCUR

**FOR APPLICANT:
FOR RESPONDENT:**

**ADV. METSING
NO APPEARANCE**