IN THE LABOUR COURT OF LESOTHO **LC/REV/52/12**

HELD AT MASERU

In the matter between:

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY	**APPLICANT**
and	
TS`ELISO MACHELI	**1ST RESPONDENT**
DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION	**2ND RESPONDENT**

JUDGMENT

DATE: 24/03/14

Review of an arbitral award - Arbitrator refusing to grant a rescission application in a case in which a party had gotten the date of hearing wrong - Applicant complaining that the Arbitrator dismissed the rescission application solely on the basis of an unsatisfactory explanation and failed to consider all the essential elements of a rescission application including prospects of success, thereby committing a gross irregularity - DDPR award reviewed and set aside - Court further inspired in its ruling by the audi alteram partem rule and Section 228 C (1) of the Labour Code (Amendment) Act, 2000 on the duty to minimise legal formalities and rigidity in the determination of labour disputes.

BACKGROUND FACTS

1. The facts of this case are fairly straightforward. The applicant has approached this Court for the review, correction and setting aside of the award of the Directorate of Dispute Prevention and Resolution (DDPR) in AO117/2012 (A) & (B) in terms of which it refused to rescind an award granted by default against the applicant in an unfair dismissal claim.

2. The learned Arbitrator had rejected as unreasonable applicant's Counsel's reasoning that he had somehow took the date of hearing of ***12th March, 2012*** to be a ***Tuesday*** when it was in fact a ***Monday***. The learned Arbitrator interpreted this purported mistake to be actuated by recklessness or an undermining of

DDPR processes. In refusing to grant the rescission application, he reasoned as follows at paragraph 4 of his award:

> ***In my opinion, the explanation given is not reasonable as it only portrays either an act of negligence on the side of respondent or the lack of seriousness with which they approach this Tribunal or its processes. l am mostly led to the latter stance by the discovery l have made upon perusal of annexure 02 of Applicant's affidavits, in which Mr. Posholi referred to the 12th March, 2012 as being a Monday. As a result it cannot be accurate that he was mistaken."***

3. Having considered the date of hearing as Tuesday, 12th March, as he alleges, applicant's Counsel only proceeded to the DDPR on Tuesday to discover to his surprise that the matter had been heard the previous day. He was then told to await the issuance of the award. Upon receipt of the award, he filed an unsuccessful rescission application, whose ruling constitutes the bone of contention before this Court.

GROUNDS OF REVIEW

4. Applicant's grounds of review may be summarised as follows:

(i) That by concluding as inaccurate applicant's Counsel's explanation that he was mistaken about the date of hearing, the learned Arbitrator acted in an arbitrary, high-handed and unreasonable manner, thereby failing to exercise his discretion judicially. Applicant's Counsel submitted that the learned Arbitrator could have at least made an order of costs to cure any prejudice that the 1st respondent may have suffered due to their failure to attend the hearing;

(ii) that the learned Arbitrator failed to take material evidence into account culminating in him reaching a decision that no reasonable Court could arrive at;

(iii) that the learned Arbitrator acted outside the mandate conferred on him by ***Section 228 C (1) of the Labour Code (Amendment) Act, 2000*** which enjoins Arbitrators to not only determine disputes fairly but with a minimum of legal formalities. Counsel submitted that the learned Arbitrator thereby failed to apply his mind to the case that was before him; and

(iv) that it was irregular for the learned Arbitrator to have made a finding based solely on the explanation for the default to the exclusion of prospects of success having indicated that it was unnecessary for him to consider prospects of success. According to applicant's Counsel this was erroneous as he ought to have considered all the relevant factors in a rescission application.

1st respondent did not oppose the rescission application. Applicant's Counsel argued that this factor ought to have influenced the learned Arbitrator to have granted the rescission application.

5. In paragraph 4 of his award on the rescission application, the learned Arbitrator concluded that he found it inaccurate that Mr Posholi was mistaken as to the date of hearing of the case. Applicant's Counsel had tendered an e-mail as proof that he had indeed taken 12th March, 2012 to be a Tuesday. This was an e-mail in which applicant's Counsel had written to Advocate Sekake Malebanye and stated therein, ***inter alia,*** that he would be attending a hearing at the DDPR on Tuesday, 12th March, 2012.

6. Applicant's Counsel had attached to his papers another e-mail on a different subject matter in which he had written that applicant's Engineer would be on leave until Monday, 12th March, 2012. The learned Arbitrator decided to dwell on this other e-mail to reflect that Counsel was aware that 12th March, 2012 was a Monday. Applicant's Counsel argued that by taking into consideration this e-mail the learned Arbitrator considered irrelevant facts that were not advanced by the parties. According to him, the learned Arbitrator ought to have confined himself to the e-mail that said ***"l'm attending the DDPR matters on Tuesday…"***

7. As aforesaid, the learned Arbitrator had concluded that applicant's Counsel's explanation of his failure to attend the hearing was not reasonable. Applicant's Counsel submitted that this conclusion was erroneous in light of his averments and proof that he committed a genuine mistake which was neither intentional nor wilful.

8. In reaction, 1st respondent's Counsel, Advocate Koto, argued that it was in order for the learned Arbitrator to have not gone any further upon having found the explanation for the default to have been unreasonable, and cited some authorities in support of his argument. It is worth noting for the record that 1st respondent's Counsel had raised a point ***in limine*** to the effect that the review

application had been filed out of time which he decided to abandon during the hearing. This was subsequent to an argument revolving on whether weekends counted as part of Court days in terms of the Rules of this Court.

THE LEGAL POSITION

9. The common law position on rescission applications as stated in Herbstein and Van Winsen, ***The Civil Practice of the Supreme Courts of South Africa,*** 4th ed., 1997 at p. 698 is:

> ***That the Court will normally exercise its discretion in favour of an applicant who, through no fault of his own, was not afforded an opportunity to oppose the order granted against him and who, having ascertained that such an order has been granted takes expeditious steps to have the position rectified.***

10. An applicant for rescission must show 'good' or 'sufficient' cause for his or her default - see ***MM Steel Construction CC v Steel Engineering & Allied Workers' Union of SA & Others (1994) 15 ILJ 1310 (LAC)***. The requirements for 'good' or 'sufficient cause' were restated by the Supreme Court of Appeal of South Africa in ***Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) [2003] 2 All SA 113 (SCA)*** at para. 11 in the following manner that:

> ***...Courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; and (c) by showing that he has a bona fide defence to the plaintiff's claim which prima facie has some prospects of success.***

These essential elements of 'sufficient cause' were echoed by the Lesotho Appeal Court in ***CGM Industrial (Pty) Ltd v Adelfang Computing (Pty) Ltd LAC (2007 - 2008) 463*** at ***p. 473***.

11. Principles regulating rescission are well established, hence a plethora of authorities on the issue. The principles were aptly captured in an earlier decision of ***Grant v Plumbers (Pty) Ltd 1949 (2) SA 470***, cited with approval by the High Court of Lesotho in ***Loti Brick (Pty) Ltd v Thabiso Mphofu & Others 1995 - 96 LLR & LB 446 at p. 450***. It was stated in both these decisions that in an application for rescission of judgment, the applicant must show three things, namely -

a) He or she must give a reasonable explanation of his default;
b) The application must be ***bona fide*** and not made with the intention of merely delaying the plaintiff's claim; and

c) He or she must show that he has a ***bona fide*** defence to the plaintiff's claim, it being sufficient if he sets out the 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.

12. In summary, in order to succeed in a rescission application, the applicant must satisfy the Court that, firstly, he or she was not deliberately or intentionally in default and secondly, that he has a ***bona fide*** defence against the claim which resulted in the default judgment. In addition, the applicant must show 'good cause' and prove that he or she at no time renounced his or her defence and further convince the Court that he has a serious intention to proceed with the matter if given an opportunity to defend it. Furthermore, in order to establish a ***bona fide*** defence, the applicant must set out averments which if established at the trial, would entitle him to the relief he asks for, but he need not deal with the merits.

THE COURT'S EVALUATION

13. If we may refresh our minds, the explanation advanced by the applicant's Counsel for his default was that he had inadvertently thought 12th March, 2012 was a Tuesday when it was in fact a Monday. Recapping on the requirements in a rescission application, Moseneke J. remarked in ***Harris v Absa Bank Ltd t/a Volkskas 2006 (4) SA 527 (T)*** at p.528 that ***"the applicant, being the party which seeks relief bears the onus of establishing 'sufficient cause.' Whether or not 'sufficient cause' has been shown to exist depends upon whether:***

(a) the applicant has presented a reasonable and acceptable explanation of her default; and

(b) the applicant has shown the existence of a bona fide defence, that is, one that has some prospect or probability of success.

14. The learned Arbitrator clearly indicated in paragraph 3 of his award that the applicant had stated in his rescission application that he had prospects of success on the merits. He, however, decided not to consider them. He explicitly stated at para 5 of his award that ***"I find it unnecessary to consider the prospects of success. My view is premised on the fact that in law, once the explanation is not satisfactory, then it is no longer necessary to consider the prospects of success."*** This was wrong.

15. Explaining the rule on rescission applications, the Court pointed out in ***Chetty v Law Society Transvaal 1985 (2) 756 (A) at 764 J - 765 A-D*** per Muller JA., that:

> ***"it is not sufficient if only one of these two requirements is met, for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing, the explanation of his default. An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain for the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had a reasonable prospect of success on the merits."***

16. All in all, **all** the essentials of a rescission application have to be considered and weighed one against the other every time a rescission application is considered. As in condonation applications, these facts are all interrelated, and not individually decisive. A conspectus of all the factors is required. A weak explanation may be cancelled out by a bona fide defence which has good prospects of success ***- Melane v Santam Insurance 1962 (4) SA 532*** at ***p. 532 C - F*** per Holmes J. Conversely, it would also not be in order for him to have considered applicant's prospects of success to the exclusion of an explanation of the default. Illustrating this point the Court held in ***MM Steel Construction (supra)*** that the two essential elements ought not to be assessed ***"mechanistically and in isolation. While the absence of one of them will usually be fatal, where they are present they are to be weighed together with other relevant factors in determining whether it would be fair and just to grant the indulgence."***

REVIEWABILITY OF THE AWARD

17. Judicial review is concerned not with the decision but with the decision-making process. In refusing to grant the applicant the rescission it sought, the DDPR exercised a discretion. Naturally, there is no room for the exercise of a discretion in favour of an applicant who was in wilful default. In determining a review application against the refusal to rescind an award this Court cannot upset an award merely because it thinks it would have come to a different conclusion on the facts. A discretion must, however be exercised judicially. Wilful default or gross negligence on the part of an applicant for default will not

constitute an absolute bar to the grant of rescission, it is rather a factor - ***albeit*** a weighty one - to be taken into account, together with the merits of the defence raised to plaintiff's claim, in the determination whether good cause for rescission has been shown - See ***Herbstein supra*** at p. 692-3.

18. In exercising his discretion, the learned Arbitrator ought to have considered all the factors relating to rescission and made a determination on all the three aspects. He, however, confined himself to the explanation for the failure to attend the hearing of an otherwise scheduled hearing, and made a conclusion only on a single determining factor instead of applying the rescission test in its entirety. This constitutes a reviewable irregularity. Granted, he could have found the explanation for the default insufficient in his discretion, but he had a duty to also consider prospects of success as one of the essential ingredients in determining a rescission application. It is not proper to apply the test piece-meal.

19. It is trite that ***"[o]nce a reviewing Court is satisfied that the tribunal has applied its mind, it will not interfere with the result even if it would have come to a different conclusion"*** - see ***Coetzee Lebea v Lebea NO and Another (1999) 20 ILJ, 129 (LC) per Cheadle A.J.,*** (as he then was) cited with approval in a number of these Court's decisions on review including ***Pick `n Pay Hypermarket (Pty) Ltd v Mokone Mokone and DDPR LC/REV/97/10***.

20. However, in ***casu,*** the learned Arbitrator failed to consider whether or not the applicant had prospects of success on the merits of its defence to 1st respondent's claim. Had the learned Arbitrator considered applicant's prospects of success as well, made a determination thereon, reached whatever decision he deemed fit in the circumstances, including refusing to rescind his award; we would not have reason to interfere with his award. With him having failed to consider prospects of success, we have no alternative but to disturb his award. We therefore come to the conclusion that by not considering applicant's prospects of success, he failed to apply his mind to the case that was before him.

21. Applicant's Counsel argued, ***inter alia***, that by refusing to rescind his award in circumstances in which he felt he made a genuine mistake, the learned Arbitrator took too rigid a stance thereby militating against ***Section 228 C (1) of the Labour Code (Amendment) Act, 2000***. Annoying and perhaps irritating as applicant's explanation of the default might have been, Courts are cautioned

against denying litigants the right to a hearing in line with one of the fundamental rule of natural justice, the ***audi alteram partem*** rule.

22. This Court decided in ***Lesotho Highlands Development Authority v Phole Ntene, and DDPR LC/REV/36/10*** that denying the applicant a postponement in a case in which its Counsel had intimated that he had forgotten that he had a case before the DDPR on the date in question was no justification for shutting the doors of the Court on the applicant, who in good faith was expecting that he was going to be represented by Counsel. Counsel had indicated that he had fallen ill on the day preceding the set date of the hearing and left early for home in Bloemfontein. Having not taken his diary along, he attended to other engagements in Bloemfontein, only to be called by one of his colleagues informing him of the hearing. Unfortunately, it was already late for him to rush to Lesotho. The colleague rushed to the DDPR to present their predicament but a postponement was refused. This Court overturned the DDPR in the matter and held that the Arbitrator could have at most made an appropriate order of costs to compensate the respondent for the inconvenience suffered, an approach earlier adopted by this Court in ***Cashbuild (Pty) Ltd v DDPR & Others LC 19/10*** (***Lesotholii***).

23. The right to be heard is fundamental to our law. Maqutu J., (as he then was) stated in ***George Nts`eke Molapo v Makhutumane Mphuthing & Others 1995 - 1996 LLR & LB*** at ***pp. 520 - 521*** that default judgments are intended to avoid delays and to put pressure on litigants to speed up finalisation of cases, and not to prevent defaulting parties from putting their cases before Courts. These sentiments expressed by the Court in ***MM Steel Construction CC (Supra)*** when it stated that the principle underlying these decisions is that a Court will generally not close the door to a litigant who can show that he or she has a defence of some merit which he or she genuinely wishes to pursue. Of course circumstances differ. There are cases in which the Court has to be strict in order to guard against the erosion of its dignity and to ensure adherence to its Rules.

24. It also emerged that in reaching his decision the learned Arbitrator did not justify why he decided to consider the e-mail in which applicant's Counsel had made reference to applicant's Engineer taking leave on ***Monday, 12th March, 2012*** and disregard the one in which he had alluded to having a case before the DDPR on ***Tuesday***, ***12th March, 2012***. As it is, Annexure PP 4 to the present application comprised two e-mails which had been tendered by applicant's

Counsel before the DDPR as evidence that he genuinely considered the 12th March, 2012 to be a Tuesday.

25. The learned Arbitrator had merely concluded that by virtue of having referred to the Engineer's leave as being on Monday, 12th March, 2012, it cannot be accurate that he had been mistaken in considering the 12th to have been a Tuesday when it came to the DDPR hearing. He just made a bare statement without any justification. The wisdom to include the e-mail about the Engineer could have been questionable because it appeared to serve no purpose. Be that it may, the learned Arbitrator still had a duty to justify his conclusion.

In light of the above analysis, the following order is made:

(i) The DDPR award in A 0117/2012 (A) & (B) is reviewed and set aside;

(ii) The matter is remitted to the DDPR to be heard on the merits before a different Arbitrator; and

(iii) There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 24th DAY OF MARCH, 2014.

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

P. LEBITSA **I CONCUR**
ASSESSOR

R. MOTHEPU **I CONCUR**
ASSESSOR

For the applicant: **Adv., P. Posholi**

For the 1st respondent: **Adv., P.M. Koto**