

**MIN THE LABOUR COURT OF LESOTHO**

**HELD AT MASERU**

**LC/REV/29/2007**

**IN THE MATTER BETWEEN**

**GOODWILL AUTO CLINIC**

**APPLICANT**

**AND**

**SENG MASENKANE  
DDPR**

**1<sup>st</sup> RESPONDENT  
2<sup>nd</sup> RESPONDENT**

---

**JUDGMENT**

---

*Applicant for rescission of judgment granted by default. Applicant establishing a reasonable explanation but failing to demonstrate prospects of success on review. Court finding that a rescission is not due where there are no prospects of success and refusing same. Court further considering the prejudice of its decision on Applicant and finding none. No order as to costs being made.*

**BACKGROUND OF THE DISPUTE**

1. This is an application for review and rescission of judgment dismissing the review application for want of prosecution. This is a very old matter that emanates from events that occurred on 30<sup>th</sup> December 2006, when the 1<sup>st</sup> Respondent was dismissed from employment. Prior to termination, 1<sup>st</sup> Respondent was in the position of Manager.
2. Dissatisfied with the dismissal, 1<sup>st</sup> Respondent referred an unfair dismissal claim with the DDPR wherein he claimed payment of remainder of his fixed term contract. The DDPR found in his favour and awarded him the sum of M84,000-00, which was to be paid within 30 days of receipt of the award by Applicant. The award was issued on 31<sup>st</sup> January 2007, in default of Applicant.

3. Armed with the default award, Applicant lodged a rescission application against the default award. Sadly, the rescission application was refused and the initial award reinstated. This award was issued on 16<sup>th</sup> March 2007 and it is the very same award that led to the current review application in respect of which a rescission is sought.
4. The circumstances leading to the current application for rescission are that, sometime on or around the 27<sup>th</sup> January 2010, 1<sup>st</sup> Respondent made an application for the dismissal of the review application for non-prosecution. The application was not opposed and what followed was 1<sup>st</sup> Respondent applying for judgment by default. The matter was then set down for hearing on 8<sup>th</sup> November 2012. On this day Applicant did not attend and the dismissal application was granted in its default. In reaction to the default award, Applicant has initiated the current rescission application. The matter was set down for this day.
5. On the date of hearing, 1<sup>st</sup> Respondent was neither in attendance nor represented. Rather, one Advocate Mothibeli came before Court to seek a postponement of the matter on account of unavailability of Mr. Mosotho, 1<sup>st</sup> Respondent counsel of record from Mosotho Attorneys. He claimed that Mr. Mosotho came late last night from the United States of America and that he was resting after the long trip. The postponement was sought in chambers. We wish to note Advocate Mothibeli is not from Mosotho Chambers, but rather a legal officer at the Lesotho National Development Corporation (LNDC). He was just appearing at the instance of Mr. Mosotho to seek the postponement. The relevance of this will become clearer in due course.
6. When parties could not agree in the postponement, We directed them to formally address Us on the issue in an open Court. In Court, Adv. Mothibeli appraised Us of his new mandate, which was no longer to seek a postponement but to ask the Court to consider the affidavits of 1<sup>st</sup> Respondent together with the Applicant case and arguments. Having heard the addresses of both parties, Our judgment follows.

## **SUBMISSIONS AND ANALYSIS**

7. Applicant submitted that Advocate Mothibeli had no right to argue as he did that the Court consider the 1<sup>st</sup> Respondent affidavits. He argued that when authority to represent is filed on behalf of a party, from an office of Attorneys such as Mosotho Attorneys *in casu*, no other legal practitioner who is not from the authorised office has a right to come and present arguments or make submissions. He added therefore that Advocate Mothibeli's mandate terminated when the request for postponement was withdrawn and not beyond that. He prayed to the Court not to consider the submissions of Advocate Mothibeli, but to hear the matter in default and that the rescission be granted.
8. In addition, Applicant argued that they have raised a *point in limine* in their reply that the answer filed on behalf of 1<sup>st</sup> Respondent is out of time and that it is not accompanied by an application for condonation. It was added that in reply, it had been specifically pleaded in reply that Applicant would on the date of hearing seek the exclusion of the answer. It was argued that 1<sup>st</sup> Respondent having neither filed arguments nor the application for condonation, the answer should not be considered and that the matter be treated as if it has not been opposed.
9. On the rescission application, Applicant submitted that a reasonable explanation had been given that on the date of hearing one Advocate Mabula, who was seized with the matter, was due to sit for his final examinations in Bloemfontein. This he had communicated with 1<sup>st</sup> Respondent counsel at least 14 days before the date of hearing by a letter, wherein he had asked for the matter to be postponed. Proof that Advocate Mabula was due to take an exam on the date of hearing and a letter to 1<sup>st</sup> Respondent counsel have been annexed to the record in the form of annexures 1-4.
10. Regarding the prospects of success, it was argued that 1<sup>st</sup> Respondent's contract of employment was terminated after he failed his probation. It was claimed that 1<sup>st</sup> Respondent had credited the wrong supplier with an amount of M17,000-00 and the correct supplier demanded same from Applicant.

11. We wish to note that We agree with Applicant that the mandate given to a specific office of attorneys does not extend to another unless the previous mandate is withdrawn and a new one made in its place. However, a legal practitioner can stand in for another only to relate a message and not to argue or make submissions in the matter. As We have already stated, Advocate Mothibeli is not from Mosotho Chambers, who are the duly instructed office. Consequently, We exclude the submissions made by advocate Mothibeli as they went beyond his mandate to seek a postponement.
12. Regarding the late filing of an answer, We have noted that a *point in limine* has been taken against the late filing of an answer with specific intentions of Applicant against same. We agree that 1<sup>st</sup> Respondent having failed to either file an application for condonation, when given the opportunity to do so, and again having failed to file heads of argument in reaction to the points raised and/or the matter as a whole, it is proper to treat the matter as being unopposed. In view of this said above, We exclude the answer filed on behalf of 1<sup>st</sup> Respondent.
13. On the rescission application, there are two major requirements for consideration. These are the explanation for the default and the prospects of success. We wish to add that in law, while these elements must be considered together, the weak or absence of prospects of success may warrant the dismissal of an application for rescission no matter how good the explanation for default is. Bearing in mind this principle, We wish to state that We are satisfied with the explanation for the default.
14. However, on the second major element, We find that the Applicant has no prospects of success on review. We say this because Applicant has merely canvassed the prospects of success in the main hearing before the DDPR, which is not the case before Us. The prospects of success must relate the matter in respect of which the rescission is sought, which matter must also be within the jurisdiction of the court granting the rescission. Consequently, Applicant has not stated prospects of success on review and We find that it has

none. Without the prospects of success, there is no reason to open the matter for a re-hearing as that would amount to no more than a waste of time and an undue prejudice to another.

15. Our attitude finds support in the Case of *Moshoeshoe v Seisa & others CIV/T/596/2004*, where in dealing with the requirements for a rescission application, the Court made the following remark,

*“In this regard, Respondent’s Counsel’s correctly referred the court to Jerome Ramoriting & Another vs Lesotho Bank-National Development Bank (CIV/APN/136/87 (unreported) at page 6, where the court had the following to say;*

*“It is not sufficient if only one of this(sic) two requirements is met, for obvious reasons a party (sic) showing no prospects of success on the merits will fail in an application for rescission of judgement no matter how reasonable and convincing the explanation of his default. Moreover, a party (sic) which simply disregards the court’s procedural rules with no explanation cannot be permitted to have a judgement against him rescinded merely because he had reasonable prospects of success on the merits”.*

16. We find confidence in Our finding due to the fact Applicant is and will not be prejudiced by same. We say this because in submission, there is only one ground of review. In terms of this ground Applicant representative by the names of Advocate Thabo Makeka was excluded from the proceedings on account of him being a legal practitioner. The matter was then heard in default of Applicant on whose behalf he had appeared. Thereafter, an application for rescission was filed wherein it had been explained that Applicant had defaulted due to exclusion of Advocate Thabo Makeka from the proceedings.

17. On review, it is argued that the learned Arbitrator erred in dismissing the explanation given as it was reasonable. In Our view, this challenge is placed on the decision to dismiss the rescission without highlighting any procedural irregularity. The law is clear that mere unhappiness with the decision is a ground for appeal, which this Court has no jurisdiction over. For a review to succeed, an applicant party must demonstrate an irregularity in the method of trial.

18. Our conclusion finds support in the authority of *JDG Trading (Pty) Ltd t/a Supreme Furnishers v M. Monoko & others LAC/REV/39/2004*, where the learned Judge Dr. Mosito K had the following to say,

*“Where the reason for wanting to have the judgment set aside is that the court came to the wrong conclusion on the facts or the law, the appropriate remedy is by way of appeal. Where, on the other hand, the real grievance is against the method of the trial, it is proper to bring a case on review. An appeal is thus in reality a re-evaluation of the record of proceedings in the court a quo.”*

It is thus Our view that even if We were to determine the matter on the basis of arguments on review, it would not succeed.

### **AWARD**

We therefore make an award as follows:

- 1) The rescission application is refused.
- 2) The judgment of this court dated 8<sup>th</sup> November 2012 is reinstated.
- 3) No order as to costs is made.

**THUS DONE AND DATED AT MASERU ON THIS 3<sup>rd</sup> DAY OF DECEMBER, 2014.**

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

**MR. MATELA  
MR TŠEUOA**

**I CONCUR  
I CONCUR**

**FOR APPLICANT:  
FOR 1<sup>st</sup> RESPONDENT:**

**ADV. RAFONEKE  
NO APPEARANCE**