IN THE LABOUR COURT OF LESOTHO **LC 09/12**

HELD AT MASERU

In the matter between:

LESOTHO BOSTON HEALTH ALLIANCE **APPLICANT**

and

LISEBO TSUMANE **RESPONDENT**

JUDGMENT

DATE: 20/08/14

Practice and procedure - Rescission of a default judgment - Common law principles applicable to a rescission application revisited - Requirement of "sufficient cause" - Reasonable and acceptable explanation for the default, and a bona fide defence with good prospects of success - Applicant praying that the judgment be rescinded on the grounds:- (i) that its failure to attend the hearing was not wilful as it was attributable to its lawyer's negligence and (ii) that it had strong prospects of success - Court satisfied that applicant had reasonable prospects of succeeding in the main case considering its defence of res judicata; and that the respondent being a probationary employee did not have a right to bring an unfair dismissal claim - Rescission application therefore upheld.

INTRODUCTION

1. This dispute is a sequel to applicant's failure to confirm the respondent to permanent employment following a four months' probationary period on the ground that she failed to meet its performance standards. The respondent was consequently dismissed, and she challenged this dismissal. The applicant having failed to file opposing respondent's claim she approached this Court to have the matter disposed of by default. Judgment was granted in her favour on 3rd July, 2013. The applicant is herein seeking to have this judgment rescinded and set aside.

APPLICATION FOR RESCISSION

2. In terms of the common law, the Court has power to rescind a judgment obtained on default of the other party's appearance provided that sufficient cause for rescission is shown. What then constitutes a ***'sufficient cause'***? In

ascertaining a cause sufficient to set a judgment aside, the Court considers the explanation given by the applicant for the failure to attend the hearing; his or her bona fides and prospects of success. Hence, a party seeking relief to have a judgment granted by default rescinded must -

i) present a reasonable and acceptable explanation for his or her default;

ii) show that the application is bona fide and not made with the intention of merely delaying the plaintiff's claim; and

iii) show that on the merits he or she has a bona fide defence to applicant's claim, which ***prima facie*** carries some prospects of success.

For these prerequisites see ***Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O)***, a classic case on rescission. These principles have been restated in a number our decisions including ***Loti Brick (Pty) Ltd v Thabiso Mphofu and Others 1995 - 1996 LLRLB 446 at 450*** and ***CGM Industrial (Pty) Ltd v Adelfang Computing (Pty) Ltd LAC (2007 - 2008) 463***.

3. Motivating its rescission application, the applicant argued that its failure to react to respondent's papers was not wilful. Applicant's Country Director attributed their failure to attend to negligence on the part of their erstwhile legal representative. Applicant's Counsel prayed that his client should not be punished for its former Counsel's negligence. He contended that the applicant did not just sit back but took steps to resist the claim, only to be let down by its lawyer. He maintained that there was no indication that the applicant ever abandoned its defence to respondent's claim. He prayed that over and above everything else, the applicant had prospects of success in the main application. Respondent's Counsel vehemently opposed the grant of the rescission application arguing that the applicant neither had a bona fide defence nor prospects of success as alleged.

THE RESCISSION APPLICATION IN PERSPECTIVE

4. ***Essentials of rescission***

4.1 ***Explanation for the default - Reason for failure to appear before Court***

4.1.1 The explanation for the default must be reasonable. In her founding affidavit, applicant's Country Representative contended that upon receipt of respondent's papers she forwarded them to the Organisation's lawyer for assistance who she indicated failed to take action. She pointed out that the lawyer had been chosen following a meeting in which it was resolved that the

application be opposed. She averred that the lawyer told her that she should await his or her call, and she expected him or her to do the necessary formalities relating to the case and to handle the matter throughout until the trial date. Basically, she put the blame at the doorsteps of the Organisation's erstwhile Counsel. She therefore pleaded on behalf of the applicant that its failure to file papers or attend the hearing not be found to have been wilful. Respondent's Counsel argued that it was not correct to shift the blame on the lawyer who he contended was not even mentioned. He pointed out that besides serving the applicants with the originating papers; he further served them with the request for default judgment. Applicants indicated, however, that they only received the application for default after the default judgment had already been granted, and this was not refuted.

4.1.2 A litigant chooses his or her legal representative and has a duty to maintain contact with his or her lawyer. Thus, generally parties have to take the blame for negligence or lack of diligence on the part of their legal representative - See ***Saloojee and Another v Minister of Community Development 1965 (2) SA 135 (AD)*** at ***141***. Reliance on the negligence of a legal representative is therefore, generally, not a very persuasive consideration. Each case, however, has to be determined on its own merits. Circumstances that prompt a default differ. In ***CGM Industrial (Pty) Ltd (supra)*** a default judgment had been granted due to the non-appearance of its legal representative. The Court held that since the negligence of the lawyer could not seriously be disputed, the applicant for rescission was entitled to rely upon his attorney to appear, and the latter's failure to do so was not attributable it. Applicant's Country Representative being a layperson and having averred that she had been told by her lawyer that she would hear from him or her could be excused for having put all her trust in their chosen legal representative.

4.1.3 The three factors for consideration in rescission applications are not to be considered in isolation or piecemeal, a good defence may compensate for a poor explanation or vice versa - see the decision of the Court of Appeal in ***Napo Thamae and Another v Agnes Kotelo and Another C of A (CIV) No. 16 /2005***. This position had earlier been expounded in ***MM Steel Construction CC v Steel Engineering & Allied Workers' Union of South Africa and Others (1994) 15 ILJ 1310 (LAC)*** where the Court held that these essential elements are not to be considered ***"mechanistically and in isolation."*** In the Court's view whilst ***"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."*** Thus we will proceed at this juncture to assess prospects of applicant's case in order to determine whether or not we will be persuaded to condone the default.

4.2 ***Prospects of Success***

4.2.1 In respect of prospects of success the applicant must show that he or she has a bona fide defence to applicant's claim. We therefore have to ascertain whether the applicant has a bona fide defence in the main. The applicant argued that it had prospects of success on the merits on the basis that this Court lacked jurisdiction to entertain respondent's claim for the following reasons: firstly, that the claim she brought before this Court was ***res judicata***; secondly, that she was precluded by law from instituting a claim of unfair dismissal by virtue of having been on probation at the time of the termination of her employment; and lastly that there was no indication on the facts that the applicant had ever abandoned its defence against respondent's claim, hence according to its Counsel, it acted swiftly to lodge the present rescission application upon being aware of the default judgment.

4.2.2 ***The plea of res judicata - unlawful termination of employment v unfair dismissal***

The applicant raised the special plea of ***res judicata*** because it contended that the Directorate of Dispute Prevention and Resolution (DDPR) had already determined the issue that the respondent has brought before this Court in ***AO 670/11***. For a plea of ***res judicata*** to succeed, the cause of action in the later case has to be the same as the cause of action in the earlier case. According to the eminent authors, Herbstein & Van Winsen in ***The Civil Practice of the Supreme Court of South Africa, 1997, Juta & Co Ltd at p. 249,*** for a plea of ***res judicata*** to succeed, the two actions must have been between the same parties or their successors in title, concerning the same subject matter and founded upon the same cause of complaint. What is declared on the face of the pleadings is not important. What is essential is the substantial identity of the parties and the causes of action. The Court will not bother itself with technical points of difference when in substance the controversy bears on the same event.

4.2.3 As aforesaid, respondent's Counsel insisted that the award of the DDPR did not deal with the issue on which the current application turned, namely, the unlawful termination of applicant's contract of employment as opposed to an unfair dismissal claim. In assessing whether we have jurisdiction to determine the matter we are enjoined to establish whether a claim of unlawful termination of employment is different from one of unfair dismissal.

4.2.4 As a starting point, the Court held in ***Moru v The Attorney General and Another C of A (CIV) No. 12/2001*** that one cannot sue the same person on the same facts. The ratio underlying this rule was explained by Van Winsen AJA., in ***Custom Trade Corporation (Pty) Ltd v Shembe 1972 (3) SA 462 (A) at p. 472 A-E*** that the law requires a party to claim in one and the same action whatever

remedies the law accords him upon such cause. The ratio is that if a cause of action has previously been finally litigated between the parties, then a subsequent attempt by the one to proceed against the other on the same cause for the same relief should not be permitted - ***exceptio rei judicatae vel litis finitae***. The reason for this rule is given in ***Voet 44.2.1*** (***Gane's translation, vol. 6 at p. 553***) as 'being to prevent inextricable difficulties arising from discordant or perhaps mutually contradictory decisions due to the same suit being aired more than once in different judicial proceedings.' The rule has its origin in considerations of public policy which require that there should be a term set to litigation (need for finality in litigation) and that an accused or a defendant should not be twice harassed upon the same cause.

4.2.5 Reiterating respondent's defence, her Counsel submitted that she was not seeking the same relief before this Court that she had sought before the DDPR. This begs the question: what is the difference between unlawful termination of employment and unfair dismissal? Conceptually, unlawful termination of employment and an unfair dismissal are two distinct issues. Some people do use the two concepts interchangeably but being a Court not bothered by formalities we do proceed with a matter even if it is styled unlawful termination of employment and just concentrate on the issue at hand and underlying principles as opposed to the jargon used. We usually ascribe the use of the terminology to semantics. But here we are faced with the use of the two concepts now raised as a defence to the special plea of ***res judicata***. The concept of unfair dismissal was only ushered in for the first time in Lesotho Labour Law jurisprudence through the ***Labour Code Order, 1992*** (hereinafter referred to as the Code).

4.2.6 Prior to the ushering in of this concept, Lesotho embraced the common law position as reflected in the ***Employment Act, 1967,*** the precursor to the ***Code***. The law was more concerned with the lawfulness or otherwise of the dismissal than with considerations of fairness. An unfair dismissal happens when an employee's dismissal from employment is harsh, unjust or unreasonable as opposed to a dismissal that contravenes certain provisions of the law. Strictly speaking, unlawful termination of employment only refers to an infringement of certain provisions of the law. A dismissal can be unfair without necessarily fitting within a certain legal provision. ***Section 15 of the Employment Act*** (***supra***) made reference to ***"termination of contracts for lawful cause."*** Thus, as long as the termination fell within the framework of the Section, and the employer complied, for instance, with the legal requirement regarding notice he or she would lawfully dismiss an employee. A dismissal had to be for a lawful cause as envisaged by ***Section 15***.

4.2.7 With considerations of lawfulness a misdemeanour is a misdemeanour irrespective of circumstances that led to it or an employee's past clean record,

which are considerations in unfair dismissal proceedings. This was the master and servant regime. There was also no statutory obligation to afford an employee a hearing before deciding to dismiss him or her. However, with the ushering in of the unfair dismissal principle, the employer is now bound by statute to justify an employee's dismissal by giving a valid reason for a dismissal and to have followed a fair procedure prior to effecting the dismissal. This is trite. The concept of unfair dismissal has now brought within the Labour law realm such elements as the right to be heard prior to a dismissal in line with the ***audi alterum partem rule - Section 66 (4) of the Code***. Prior to the promulgation of the Labour Code Order, 1992, Courts used to resort to Administrative Law to bring in an element of fairness in dismissals. The case in point is ***Koatsa v National University of Lesotho LLRLB 1991-1992, 163***, the Court of Appeal held that the applicant was entitled to a fair opportunity of being heard before being dismissed basing itself on the laws of natural justice.

4.2.8 Countries such as Australia do provide for the two concepts in their statutes. These countries draw a distinction between an unfair and an unlawful termination of employment. Normally, the law would define what constitutes an unlawful dismissal and or unfair dismissal. For Lesotho, we now talk of unfair dismissals. As it were, ***Section 15 of the Employment Act*** (***supra***) defined what constituted a lawful cause of a termination of an employment contract. This is now history for Lesotho; we now embrace the concept of unfair dismissal to encompass both unlawful and unfair terminations of the employment contract. Thus the concept of unlawful dismissal is archaic for Lesotho.

4.2.9 As it were, the action that was brought by the respondent to the DDPR was an unfair dismissal claim, and as far as we are concerned, even the action that is before this Court is an unfair dismissal claim despite having been styled an unlawful termination of employment. The cause of action is the same and between the same parties, much as the relief is styled unlawful termination of employment. As far as we are concerned the underlying issue was the same in both applications before this Court and the DDPR. Respondent's Counsel was at pains not to mention the word 'dismissal' during the proceedings and was very cautious with the use of his words.

4.2.10 The ***Labour Code (Codes of Good Practice) Notice, 2003*** also proved to be very helpful in the determination of this issue. ***Clause 8 (12)*** thereof provides that if a probationary employee is dismissed for any other reason, the normal rules of fair dismissal apply. The Code refers to a ***"fair dismissal"*** and not to an unlawful termination of employment. The respondent was therefore well within her rights to have approached the DDPR when aggrieved by the dismissal. This claim having been dismissed by the DDPR she ought to have come before this Court by way of review proceedings and not with a fresh application. This is in

fact an abuse of the Court process. Courts are too overwhelmed to have to be preoccupied with issues which are otherwise academic as they deal with real disputes.

4.2.11 The applicant further accused the respondent of not having been honest with the Court in that she failed to disclose in her pleadings that she had already lost a case of unfair dismissal before the DDPR. Indeed, when this Court disposed of the matter by default it was not aware that any matter involving the parties had been before the DDPR. The issue came up for the first time during the hearing of the rescission application. The Respondent had a duty to put all relevant factors before Court. The action before the DDPR was a material fact that ought to have been disclosed in respondent's pleadings before the judgment for default could be granted. It is a fundamental principle of pleadings that parties disclose material factors to enable Courts to make informed decisions.

4.2.12 Having established that the parties before the DDPR were the same and that the cause of action was essentially the same as the one brought before this Court and that the former had pronounced itself on the merits of respondent's case, the matter is found to be ***res judicata*** and the Court therefore declines jurisdiction. Applicant's special plea is therefore upheld.

4.2.13 ***The respondent being a probationary employee***

Applicant's Counsel contended further that they were well within their powers in terms of ***Section 75 of the Code*** not to confirm the respondent if they were not satisfied with her performance. The Section reads in part that:

> ***An employee may initially be employed for a probationary period not exceeding four months. At any time during the continuance of the probationary period or immediately at its end, the employee may be dismissed with one week's notice.***

4.2.14. The applicant appears to have exercised its prerogative in terms of this Section. There being no allegation that it violated this provision. They also argued that probationary employees are excluded from bringing unfair dismissal claims in terms of ***Section 71 (1) (a) of the Labour Code Order, 1992***. The Section provides that:

> ***Subject to subsection (2), the following categories of employees shall not have the right to bring a claim for unfair dismissal.***
>
> ***(a) employees who have been employed for a probationary period, as provided under Section 75;***

b) employees over the normal age of retirement for the type of employment involved.

Subsection (2) thereof provides that***:***

> ***an employee in a category covered by subsection (1) shall none the less be entitled to bring a claim of unfair dismissal alleging that the dismissal was for any of the reasons specified in subsection (3) of section 66 or section 68 (c) above.***

There is no allegation that the action was brought in terms of either ***Sections 66 (3) or 68 (c)*** as envisaged by the above Section. The respondent therefore has no prospects of success in light of ***Sections 71 (1) and 75*** of the Code (***supra***).

DETERMINATION

5. The Court finds the disregard of its Rules not to have been flagrant that is in terms of failure to file opposing papers and to appear before Court, although it considers the explanation given by the applicant rather poor, it is compelled to grant the rescission application because prospects of success are greater. It therefore comes to the conclusion that the applicant has a bona defence which as already demonstrated above carries prospects of success. Because of the strong prospects of success, the Court feels inclined to grant the rescission of its default judgment granted on 3rd July, 2013. In our view, the applicant has raised a ***prima facie*** defence.

6. In arriving at this decision, the Court was further persuaded by the ***audi alterum partem*** rule, noting that default judgments are not intended to be a denial of the rule. In ***George Nts`eke Molapo v Makhutumane Mphuthing and Others 1995 LLRLB 516,*** Maqutu J., (as he then was) reminded Courts that default judgments are not intended to prevent defaulting parties from putting their cases across.

7. Applicant's Counsel implored this Court to also take into consideration that as soon as the applicants were alerted to a judgment by default issued against them they changed Counsel and swiftly approached this Court with a rescission application. Indeed, this fact also played in their favour. According to Herbstein & Van Winsen (***supra***) at p. 698,

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

ORDER

i) That applicant's default was not wilful;

ii) That a bona fide defence against respondent's claim has been established with good prospects of success;

iii) In the circumstances, the rescission application is granted as prayed and the judgment granted by default against the applicant on 3rd July, 2013 is rescinded; and

vi) There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 20TH DAY OF AUGUST, 2014.

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

L. MATELA **I CONCUR**
ASSESSOR

M. MOSEHLE **I CONCUR**
ASSESSOR

FOR THE APPLICANT: **ADV., L.A MOLATI**

FOR THE RESPONDENT: **ADV., P.A `NONO**