IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU **LC/REV/142/2013**

IN THE MATTER BETWEEN

WENG RONG ENTERPRISES (PTY) LTD **APPLICANT**

AND

DDPR MASERU **1st RESPONDENT**
'MAMOSEBI 'MATLI **2nd RESPONDENT**

JUDGMENT

Application for rescission of an order of this court. Court not finding the explanation given reasonable. Applicant failing to allege prospects of success. Court finding no merit in the rescission application and dismissing same. No order as to costs being made.

BACKGROUND OF THE DISPUTE

1. This is an application for the rescission of an order dismissing the Applicant's review application for non-prosecution. The brief background of the matter is that 2nd Respondent was Applicant's employees until his dismissal from employment. Dissatisfied with her dismissal, she initiated an unfair dismissal claim with the DDPR. She then successfully obtained judgment in default of Applicant.

2. Armed with the default award, and dissatisfied with same Applicant initiated rescission proceedings. The said application was filed out of time together with an application for condonation. Having considered the applications, the learned Arbitrator refused them and reinstated his initial decision.

3. Similarly dissatisfied with the rescission award, Applicant initiated the current review proceedings. As with the

Respondent primary claim, the review application was heard and dismissed in default of Applicant. It is this order that Applicant wishes to have rescinded. Having heard parties' submissions, Our judgment follows.

SUBMISSIONS AND ANALYSIS

4. Applicant's case was that after filing the main review application, they were served with a copy of compact disc, allegedly claimed to contain the record of proceedings in the matter subject of review. Upon transcription they found that the disc was empty. They then wrote to the Registrar of this Court to bring this discovery to Her attention. They claim that the Registrar advised them to write a letter to demand another disc, which they did.

5. Applicant further submitted that it was during the above process that 2nd Respondent filed an application for dismissal for want of prosecution. They added that in receipt of same, they met with Respondent and agreed to do away with the dismissal application and to only argue the merits of the matter. They added that in view of the agreement and pending the availability of the compact disc, they set the matter down for this day.

6. Applicant submitted further more that they were later shocked to learn that Respondent had obtained an order for dismissal for want of prosecution. It was stated that failure to prosecute the matter was not intentional but occasioned by the initial compact discs, which did not contain the record of proceedings and also by an agreement that was reached that Respondent would abandon the dismissal application and concentrate on the merits of the main claims.

7. Respondent argued that they were never informed about the problems with the recordings and that they only learned through these pleadings. Regarding the agreement to abandon the dismissal application, Respondent categorically denied ever making same. While they conceded that today was supposed to be the date of hearing the Respondent stated that it was changed by agreement of parties hence the notice of hearing for the 3rd July 2014, which is the day on which the matter was

dismissed. Respondent prayed that the matter be dismissed particularly since there are no prospects of success as none have been pleaded.

8. In an application for rescission, there are two major requirements for consideration. These are the explanation for the default and the prospects of success *(see Moshoeshoe v Seisa & Others CIV/T/596/2004)*. We will now proceed to deal with the submissions of parties against these requirements.

9. Applicant's main reason for failure to attend is that they had agreed with Respondent to do away with the dismissal application hence the set down for 9th October 2014. That notwithstanding, Applicant does not deny that the date of hearing was rescheduled to the 3rd July 2014, which is the date on which it was heard and dismissed for want of prosecution. They also do not deny that the 3rd July 2014 date was chosen after the initial date of 09/10/2014, to bring the matter forward, by both parties.

10. What Applicant is attempting to suggest to Us is that, assuming that there was an agreement to abandon the dismissal application and to argue the merits on the 9th October 2014, they did not both need to appear before Us to seek that indulgence to stay the matter till the agreed upon date. This suggestion is inaccurate. An application to postpone is not a right but an indulgence given to parties on good cause show (see in *Real Estate Services (Pty) Ltd v Smith (1999) 20 ILJ 196)*.

11. We are therefore of the view that given the circumstances, Applicant had no satisfactory reason for its default. While We understand that at some stage, as illustrated by the letter annexed to its founding affidavit, that the compact disc alleged to have contained the record had problems, no sufficient explanation has been given to explain its failure to attend on 3rd July 2014, even just to seek the indulgence of the Court to postpone on the agreed terms. What makes the Applicant case worse is that it does not even attempt to suggest that they had both agreed that Respondent would seek that indulgence on

their behalf on the said day. Consequently, there is no reasonable explanation for the default.

12. About the prospects of success, We note that they have not been pleaded. There is a rule in motion proceedings that parties stand and fall by their pleadings. In relation to the rule, the Court in *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau No & Another (supra).* At paragraph 25, the Court had the following to say,
"... on my understanding the rule that in motion proceedings the applicant must make his case in his founding affidavit and that you stand or fall by your papers has not been abolished and still applied."

13. Further supporting Our view, is the authority of *Thabo Phoso v Metropolitan Lesotho LAC/CIV/A/10/2008*, where the Court had the following to say,
"In several of its decisions the Court of Appeal of Lesotho has more than once deprecated the practice of relying on issues which are not raised or pleaded by the parties to litigation.

14. As a result, and in view of the above principles, We are inclined to agree with Respondent that Applicant has no prospects of success in the matter hence why they are not pleaded. In view of the absence of prospects of success and in view of the lack of a reasonable explanation for the default, this application cannot sustain.

15. Our view finds support in the High Court of Lesotho case in *Moshoeshoe v Seisa & Others (supra)*, where the Court relying on an extract from the case of *Jerome Ramoriting & Another vs Lesotho Bank-National Development Bank (CIV/APN/136/87*, had the following to say,
"It is not sufficient if only one of this(sic) two requirements is met, for obvious reasons a perty 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 perty 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".

AWARD

We therefore make an award as follows:

1) The application for rescission is refused.
2) The judgment of this court made on the 3rd July 2014 remains in force.
3) No order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 11th DAY OF FEBRUARY, 2015.

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

MR. MOTHEPU	**I CONCUR**
MRS. THAKALEKOALA	**I CONCUR**
FOR APPLICANTS:	**ADV. MOJELA**
FOR RESPONDENT:	**MR. LETSIE**