

HELD AT MASERU

In the matter between:

LESOTHO BAKERY (PTY) LTD

APPLICANT

and

**REFILOE LOAPE
DIRECTORATE OF DISPUTE PREVENTION
AND RESOLUTION**

**1st RESPONDENT
2nd RESPONDENT**

JUDGMENT

DATE: 14/01/15

Review of an arbitral award - Rescission of judgment - What to consider - Review based on the ground that the Arbitrator solely based his decision on the unsatisfactory explanation for the default instead of considering all the other relevant factors such as prospects of success; that there was no rational basis for refusing the rescission application because it was not opposed and the 1st respondent had pleaded guilty to the charge of gross negligence - The applicant also felt that the explanation for the default was reasonable - The Court finds the Arbitrator to have failed to apply his mind to all the essential elements of a rescission application and therefore committed a mistake of law that materially affected his decision (Section 228F (3) of the Labour Code (Amendment) Act, 2000) - the DDPR award reviewed and set aside - Matter remitted to the DDPR to be heard afresh by a different Arbitrator.

BACKGROUND FACTS

1. This is a review application against the award of the Directorate of Dispute Prevention and Resolution (DDPR) in A 0227/12 (b) wherein applicant's rescission application was dismissed. It is common cause that the 1st respondent had been engaged by the applicant as a Salesman, a job which entailed delivery of applicant's products and collection of money realised from the sales. It is common cause that the applicant had a standing rule by virtue of which Salespersons were required to bank the money at the point of collection. It emerged that all Sales Personnel had been reminded of this rule following a

robbery that had occurred at Lithabaneng in the Maseru district which affected the 1st respondent and a driver of the concerned delivery truck.

2. Subsequent to this incident, the applicant and a driver left Qacha's Nek in possession of a sum of Seventy-Five Thousand Maloti (M75 000.00) contrary to the prescribed rule. There was an attempted robbery which was fortunately foiled. In terms of the set rule the 1st respondent was supposed to have banked the money at Qacha's Nek and not to have travelled with it to Maseru. He was subsequently charged with gross negligence to which he pleaded guilty, and was dismissed. He challenged this dismissal before the DDPR.

3. The applicant failed to attend the hearing and it proceeded by default. A rescission application was subsequently filed on its behalf and it was unsuccessful. It is common cause that the Notice of Set - down had been served on applicant's Clerk who it emerged had failed to transmit it to management. Applicant's Counsel felt this explanation was reasonable. Moreover, he submitted, the applicant had a bona fide defence against 1st respondent's claim of unfair dismissal. He contended that considering these factors, the learned Arbitrator ought to have granted the rescission application. He argued that evidence would be led to prove that the 1st respondent had been dismissed fairly both substantively and procedurally in that the Company stood to suffer a potential loss of Seventy - Five Thousand Maloti (M75 000.00).

4. He therefore submitted that the applicant would be highly prejudiced by the refusal to grant the rescission application, and above all, he pointed out, the application was not opposed. He further argued that the case would set a very bad precedent as other Salesmen would not be deterred from breaching the Company's well established rules.

GROUNDS OF REVIEW

5. Applicant's Counsel submitted that the DDPR award was flawed in the following respects:-

- i) That the learned Arbitrator was irrational in refusing to grant rescission when it was not opposed;
- ii) That it was irrational for him to have found that there were no supporting documents relating to the Clerk when there was no dispute

that the Clerk had received the Notice of Set-down. Counsel could not understand what documents the learned Arbitrator required;

- iii) That it was irregular for him to have merely dealt with the explanation advanced for the default to the exclusion of the bona fide defence and prejudice.

6. Applicant's Counsel submitted that had all these factors been considered they could have established that the applicant had a bona fide defence. In reaction, 1st respondent's union representative contended that the applicant had been properly served with the Notice of Set-down and the fact that the Clerk did not pass it on to management is its internal problem which should not be made other people's burden. He concluded that all in all the award of the DDPR in *A0227/12(b)* was in order. We will dwell on the third ground of review which is the most pertinent regard being had to the fact that the central issue in the review application is the dismissal of the rescission application by the learned Arbitrator.

ESSENTIAL ELEMENTS OF A RESCISSION APPLICATION

7. The grant or refusal of a rescission application is a discretion. 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 - See Herbstein & Van Winsen, *The Civil Practice of the Supreme Courts of South Africa*, 4th ed., 1997 at p. 698.

8. In order to succeed in an application for rescission, an applicant must show "good" or "sufficient cause" for his or her default - See *MM Steel Construction CC v Steel Engineering & Allied Workers' Union of South Africa and Others (1994) 15 ILJ, 1310 (LAC)*. Courts generally expect an applicant to show "good" or "sufficient cause" by:-

- i) giving a reasonable explanation of his or her default;
- ii) showing that the application is made bona fide; and

iii) showing that he or she has a bona fide defence to the plaintiff's claim which *prima facie* has some prospects of success.

9. Principles regulating rescission applications have been restated in a number of decisions including *Grant v Plumbers (Pty) Ltd 1949 (2) SA 470*; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) [2003] 2 All SA 113 (SCA)*; *Loti Brick (Pty) Ltd v Thabiso Mphofu and Others 1995 - 96 LLR & LB 446*; *CGM Industrial (Pty) Ltd v Adelfang Computing (Pty) Ltd LAC (2007 - 2008) 463*; *Lesotho Highlands Development Authority v Ts'eliso Macheli and Another LC/REV/52/12*; *Pick 'n Pay Hypermarket (Pty) Ltd v Mokone Mokone and Another LC/REV/ 97/10*.

10. The aforementioned discretion must be exercised after a proper consideration of all the relevant factors. The learned Arbitrator had a duty when faced with a rescission application to have traversed all the three essential elements that needed to be satisfied in such an application. He instead made a determination having only explored the explanation for the delay. He stated in his award at paragraph 7 that:-

I find that the explanation for the delay is unsatisfactory and unconvincing. In the light of my finding, 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.

11. This approach is wrong in law and is reviewable in terms of **Section 228 F (3)** of the **Labour Code (Amendment) Act, 2000** which provides that this Court may set aside an award on any grounds permissible in law and any mistake of law that materially affects the decision. This statutory position is reinforced by the common law. It was held in *Johannesburg Stock Exchange and Another v Witwatersrand Nigel and Another 1988 (3) SA 132 (A)* at *p. 152 A-E* that in order to establish review grounds, a party must show that:-

the decision was arrived at arbitrarily, or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the tribunal misconceived the nature of the discretion conferred upon it or took into account irrelevant considerations or ignored relevant ones; or that the decision... was so grossly unreasonable as to warrant the inference that [the presiding officer] had failed to apply his mind to the matter in the manner aforestated."

12. It is trite that in review applications a reviewing Court is concerned with the process that was followed in the Court *a quo*. In *Thabo Mohlobo and Others v Lesotho Highlands Development Authority and Another LAC/CIV/A/05/10* the Labour Appeal Court set out legal principles applicable to reviews of awards of the DDPR. It held that generally the reviewing Court's concern is ***“to ensure that the process was in accordance with the law.”*** It is not so much concerned with whether the decision of the Arbitrator is right or wrong ***“but rather on the process and on the way in which the decision maker came to the challenged conclusion.”***

13. The Court cited with approval the South African Supreme Court of Appeal's decision in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration 2007 (1) SA 576 (SCA)* where Cameron JA., pointed out that in a review the question is not whether the decision is capable of being justified but whether the decision-maker properly exercised the powers entrusted to him or her. In *Tao Ying Metal Industry (Pty) Ltd v Pooe N.O and Others 2007 (5) SA 146 (SCA)* the Court of Appeal indicated that an award is reviewable if it is found not to be in accordance with the law. The law in question in relation to the case before us would be the law regulating rescission applications.

14. In our opinion, the learned Arbitrator misconceived the nature of the discretion that was bestowed upon him. The said discretion enjoined him to consider all the three prerequisites in a rescission application before he could make a conclusion, and he failed to do so. Illustrating this point, the Court held in *MM Steel Construction (supra)* that the three elements in a rescission application ought not to be assessed ***“mechanistically and in isolation.”*** It went further to caution that ***“while the absence of one of them will 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.”***

15. In the circumstances, we come to the following conclusion that:-

- a) The review application succeeds;
- b) The decision of the DDPR in *AO 227/12 (b)* is reviewed and set aside;

c) The matter is remitted to the DDPR to be heard afresh before another Arbitrator;

d) There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 14TH DAY OF JANUARY, 2015.

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

M. THAKALEKOALA
ASSESSOR

I CONCUR

L. RAMASHAMOLE
ASSESSOR

I CONCUR

FOR THE APPLICANT: N.T. NTAOTE – EMPLOYERS’ FORUM

FOR THE 1st RESPONDENT: M. MASOEBE - LESOTHO WORKERS’ ASSOCIATION