IN THE LABOUR COURT OF LESOTHO **LC/REV/91/11**

HELD AT MASERU

In the matter between:

MERAKA LESOTHO ABATTOIR & FEEDLOT (PTY) LTD **APPLICANT**

and

HLALELE HLALELE **1ST RESPONDENT**
DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION **2ND RESPONDENT**

JUDGMENT

DATE: 22/04/15

Practice and procedure - Default judgments/Rescission applications - Review of an arbitral award dismissing a rescission application - Employer arguing that he/she had prospects of success because the employee was still on probation and his right to bring an unfair dismissal claim was limited - Employee insisting his case fell within the exceptional circumstances stipulated in Section 66 (3) (c) of the Labour Code Order, 1992 entitling him to bring an unlawful dismissal claim - Court finds no evidence to support this contention and concludes that the Arbitrator's finding was not sustained by evidence - Amount relating to compensation for unfair dismissal is therefore set aside.

1. This dispute revolves around an award which was issued in favour of the 1st respondent by the Directorate of Dispute Prevention and Resolution (DDPR) in ***A 1005/10 (b)*** wherein a judgment was granted by default due to applicant's failure to attend an otherwise scheduled hearing. The applicant subsequently filed an application to have the award rescinded but failed to attend a hearing relating to this rescission application, and it was dismissed. It is now challenging this dismissal and has filed this application to have the award of the DDPR reviewed and set aside.

GROUNDS OF REVIEW

2. The applicant contends that the learned Arbitrator erred in dismissing its application and seeks to have this decision reviewed on the following grounds:-

i) That applicant's failure to attend the hearing was not wilful;

ii) That by applying for rescission and condonation, it was clear that the applicant had an interest in the matter and the 2nd respondent ought to have postponed the hearing; and

iii) That the applicant had prospects of success on the merits and would bring evidence to show that the 1st respondent had not been dismissed in terms of ***Section 66 of the Labour Code Order, 1992*** but under ***Section 71 (1)*** and ***(2)*** thereof as he was on probationary terms.

3. It is common cause that the rescission application had been scheduled to be heard by the DDPR on 29th March, 2011 and only the 1st respondent attended. The hearing was postponed on grounds that there was no proof that the applicant had been properly served. It was later rescheduled to 22nd August, 2011. Neither the applicant nor its Counsel attended the hearing on this date and the rescission application was dismissed. Applicant's explanation for its failure to appear for this particular hearing is that the Human Resource Manager who had been assigned to attend the hearing only arrived around half past ten (10:30) when the hearing was supposed to have started at half past eight (08:30), a delay of about two hours. By this time the matter had been heard and finalised. Applicant's General Manager attested that upon enquiry, the Human Resource Manager indicated that he had forgotten about the hearing. He intimated to the Court that they have since dismissed him for negligence. It is also common cause that when the 1st respondent was dismissed on 2nd November, 2010 he was on probation which had started on 5th October, 2010.

THE COURT'S EVALUATION

4. It is settled law that in an application for rescission, the applicant is required to show good cause by:-

a) giving a reasonable explanation of his or her default; and

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

These principles were well traversed in ***Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O)*** at ***476***, ***Chetty v Law Society of Transvaal 1985 (2) SA 756 (A)*** at ***764 I - 765 F*** and ***Loti Brick v Thabiso Mphofu and Others 1995 - 96 LLRLB 446*** at ***450***. The question of whether to rescind a judgment or not is a discretion which must be exercised on considerations of fairness and justice having due regard to all the facts and circumstances of a particular case. Because the applicant failed to attend the hearing relating to its rescission application these elements were never traversed.

5. The rescission application was dismissed in terms of ***Section 227 (8) (c) of the Labour Code (Amendment) Act, 2000*** which provides that:-

> ***If a party to a dispute contemplated in subsection (4) fails to attend the conciliation or hearing of an arbitration, the arbitrator may -***
>
> ***a) postpone the hearing;***
>
> ***b) dismiss the referral; or***
>
> ***c) grant an award by default.***

The award was granted by default in terms of ***Subsection (c)***. The learned Arbitrator could only rely on 1st respondent's version in his decision because the applicant was not there to give its side of the story.

6. As aforementioned, following the handing down of the award granted by default, the applicant sought to have the award rescinded but because of its failure to attend the hearing, the application was dismissed. It subsequently lodged this review application. 1st respondent's Counsel, ***inter alia,*** raised an objection to the effect that the review application had been filed out of time. As it is, ***Section 228F of the Labour Code (Amendment) Act, 2000*** as amended in 2006 provides that an application for the review of an arbitration award shall be filed with this Court within thirty (30) days of the issuance of an award. Applicant's reaction was that it could not file the review application on time because upon receipt of the DDPR award, it forwarded it to its lawyer only for him to file review proceedings out of time. Indeed, the review application was filed beyond the period prescribed by law. It was only filed after enforcement proceedings had been instituted before this Court in ***LC/ENF/16/11***. Applicant's Counsel sought to have the delay condoned on the basis that when the papers were forwarded to his office, he had been on leave as he had some family matters to attend to.

THE AWARD

7. The learned Arbitrator declared 1st respondent's dismissal unfair and ordered payment of a sum of Twenty-Four Thousand, Three Hundred and Eight Maloti, Ninety-Seven Cents (M24, 308.97) to the 1st respondent. This amount comprised:- Twenty Thousand Maloti (M20,000.00) as compensation for unfair dismissal; Two Hundred and Seventy-Six Maloti, Ninety-Two Cents (M276.92) for unpaid wages and Thirty-Two Maloti, and Five Cents (M32. 05) for overtime.

8. The Court notes that the 1st respondent was still on probation when he was dismissed, having served only about a month. According to Section ***71 (1) of***

the Labour Code Order, 1992 probationary employees have been excluded from bringing claims for unfair dismissal unless the dismissal relates to reasons specified in ***Section 66(3) or Section 68 (c)*** of the Code. 1st respondent insisted before the DDPR that his case fell within this category of exceptional cases envisaged by these Sections in that he had been dismissed following a complaint to his employers about late payment of salaries. ***Section 66 (3) (c) of the Labour Code Order, 1992*** provides that:-

> ***The following shall not constitute valid reasons for termination of employment -***
>
> > ***the filing in good faith of a complaint or grievance, or the participation in a proceeding against an employer involving the alleged violation of the Code, other laws or regulations, or the terms of a collective agreement or award.***

9. The learned Arbitrator addressed this issue at paragraph 5 of his award. The gist of applicant's Counsel's argument was that there was no evidence that the 1st respondent had been dismissed on account of lodging a grievance. He contended that this issue was very critical. Respondent's Counsel did not address this issue, and as far as we are concerned this was the central issue in the dispute. Although we are concerned about the sloppy manner with which the applicant handled this matter, we are not to compromise prevailing laws. Applicant's incessant failures to attend hearings were indeed a cause for concern, but they are not to be considered in isolation. The explanation for delay and prospects of success are interrelated and not individually decisive. Both factors have to be weighed. A weak explanation may be compensated by strong prospects.

10. A wilful default or negligence on the part of the applicant for rescission will not be an absolute bar to the grant of a rescission, it is but a factor to be taken into consideration together with the merits in the determination of whether ***'good cause'*** has been shown - ***Saraiva Construction (Pty) Ltd v Zululand Electrical engineering Wholesalers (Pty) Ltd 1975 (1) SA 612 (D)*** at ***p. 615***. It is a discretion that must be exercised judicially. We feel the amount of compensation awarded also had to take into consideration the length of time the 1st respondent had been in applicant's employ. It had only been from 5th October, 2010 to 2nd November, 2010.

11. It is one of the cardinal principles of the law of evidence that the outcome of an award or a judgment must be justified by the facts found, the law applied and the evidence tendered. The issue of whether the 1st respondent fell within exceptional cases was at the centre of this dispute and evidence ought to have

been tendered to prove that the 1st respondent indeed filed a grievance with his employer, and it is likely that he was dismissed for filing such a grievance. The Labour Court will always interfere where the factual findings are not supported by evidence - See ***Vita Foam SA v CCMA [1999] 12 BLLR 1375 (LC)***. The Section talks of ***"filing of a grievance"*** and seems to envisage a formal process. ***"Filing"*** means in both the South African and English practice ***"a personal delivery of a document at the office where the document is proposed to be filed"***- per Mason J., in ***Cliffe and Bekker v Registrar of Supreme Court 1914 TPD 359***. The lack of evidence on the part of the 1st respondent to prove that the 1st respondent had actually lodged a grievance with the applicant worked against him. It was erroneous for the learned Arbitrator to have found for him when there was no evidence to sustain his case, despite the fact that the matter was unopposed. It is our considered opinion that the applicant had prospects of success on the merits if the learned Arbitrator would have applied his mind properly to the case that was before him.

DETERMINATION

12. In view of the above findings, we come to the following conclusion:-

a) That there was no evidence to prove that the 1st respondent was entitled to bring a claim for unfair dismissal;

b) In the circumstances, the learned Arbitrator's award in respect of the amount of compensation for unfair dismissal is reviewed and set aside;

c) The award is however sustained in respect of unpaid wages and overtime pay due to the 1st respondent;

d) The monies are payable within thirty (30) days of the handing down of this judgment; and

e) There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 22nd DAY OF APRIL, 2015.

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

L. MATELA **I CONCUR**
ASSESSOR

L. RAMASHAMOLE **I CONCUR**
ASSESSOR

FOR THE APPLICANT: **ADV., A.M. CHOBOKOANE - CHOBOKOANE CHAMBERS**

FOR THE 1ST RESPONDENT: **ADV., N. HATASI - DA SILVA MANYOKOLE ATTORNEYS**