

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

LC/36/2013

IN THE MATTER BETWEEN

MABOKANG MOHAFA

APPLICANT

AND

GOOD TRADING SUPERMARKET

(PTY) LTD

1st

RESPONDENT

DDPR

2nd

RESPONDENT

JUDGMENT

Claim for unfair dismissal for operational reasons. 1st Respondent raising a point in limine that the matter has been improperly referred. Applicant failing to seek the condonation of the irregularity. Court finding that it has no power to grant the remedy not sought. Court finding in favour of 1st Respondent that the matter has been improperly referred and dismissing same. Applicant given the liberty to reinstitute the

matter properly if he so wished, with specific terms. No order as to costs being made.

BACKGROUND OF THE DISPUTE

1. This is a claim for unfair dismissal for operational reasons. The brief background is that Applicant was an employee of 1st Respondent until she was dismissed. Unhappy with her dismissal, she referred a claim for unfair dismissal with the Directorate of Dispute Prevention and Resolution (DDPR) for conciliation. However, conciliation failed to resolve the matter and it was referred to this Court for adjudication.
2. It was then heard unopposed and in default of the 1st Respondent on the 14th November 2013. In terms of the default judgment, 1st Respondent was to reinstate Applicant to her former position without loss of remuneration and other entitlements, if it was not for the dismissal. The said judgment was thereafter rescinded, hence the current proceedings.
3. In its answer to the main claim, 1st Respondent raised a *point in limine* that Applicant had adopted an irregular procedure in initiating these proceedings. Specifically 1st Respondent claimed Applicant had acted in breach of Rule 3 of the Rules of this Court, in that she had approached the Court by way of Notice of Motion as opposed to by way of an Originating Application. 1st Respondent prayed that the matter be dismissed as being improperly referred.

4. We wish to note that the same argument was *mero motu* raised by this Court when it heard the matter in default of 1st Respondent. Then, Applicant had prayed for condonation of the breach of the Rules, which was granted. With the rescission of that judgment 1st Respondent's attitude was that that point had now become an issue again. Both parties were heard and having heard them, Our judgment follows.

SUBMISSIONS AND ANALYSIS

5. 1st Respondent's case was that Applicant had acted in breach of Rule 3 of the Rules of this Court. Further that although the breach was earlier condoned, the rescission of that judgment has meant that the condonation has been rescinded as well. It was submitted in addition that Applicant ought to have sought amendment of its motion to comply with Rule 3. It was said that Applicant had ample opportunity to do so, when the issue first became apparent and after 1st Respondent had filed its answer, wherein this issue was raised.

6. It was submitted that without the amendment or any other steps to cure the irregularity, the base of the matter is wrong and that this Court cannot and should not proceed with the matter under the circumstances. It was argued that this matter warrants dismissal.

7. Applicant answered that had this issue been raised before the default judgment, they would have addressed it. It was added that given the steps that took place in the default judgment process, the issue is nothing but academic. Applicant was asked if he sought the condonation for breach of the Rules, should the court uphold 1st Respondent's argument. Applicant did not address the issue. Applicant further argued that the answer filed on behalf of 1st Respondent was out of time in that it was filed long after the Notice of Motion had been served upon Respondents.

8. 1st Respondent replied that the issue of an irregular step is not academic as the judgment condoning same was set aside. Further that the answer is not out of time as it was filed immediately after the rescission of the default judgment was granted, which period was within 14 days of issuance of that order. It was however conceded that it was over 14 days from service of the Notice of Motion.

9. We wish to confirm that in terms of Rule 3:

“Proceedings for determination of any matter by the court shall be instituted by any interested person or persons presenting or delivering by registered post, to the Registrar an originating application which shall be in writing in or substantially in accordance with Form LC1 contained in Part A of the schedule....”

10. Clearly, the matter before Us is not by way of an Originating Application but a Notice of Motion. It is therefore undoubtedly in breach of the Rule in question. However, the Rules of this Court provide that a party may apply for condonation of the breach of the Rules of this Court. This is clear from Rule 27 (2) which is captured as follows:

“Notwithstanding anything contained in these Rules, the court may in its discretion, in the interest of justice, upon written application, or oral application at any hearing, or of its own motion, condone any failure to observe the provisions of these Rules.”

11. *In casu*, Applicant claims that the issue of an improper procedure or breach has been finalised. We disagree in that this issue was finalised in the initial judgment which was rescinded. With the rescission, the issue resurfaced and had to be addressed again, more so because initially there was no presentation made on behalf of 1st Respondent. It is then inaccurate for Applicant to have suggested that the issue is now academic. We therefore, find in favour of 1st Respondent that applicant has acted irregularly.

12. We asked Applicant if she wished to have the procedure condoned in the event We agreed and/or found in favour of 1st Respondent. Despite this opportunity, Applicant failed to address the issue. That being the case, We cannot grant what was not sought particularly where We availed an opportunity for the condonation request to be made.

Supportive of Our conclusion is the view of the Court in *Phetang Mpota v Standard Bank LAC/CIV/A/06/2008*.

13. At paragraph 22 of the typed judgment, the learned Dr. K. E. Mosito made the following remarks,

“The Court of Appeal and this court have on several occasions deprecated the practice in terms of which the courts grant order that nobody has asked for. In several of its decisions the Court of Appeal has deprecated the practice of granting orders which are not sought for by the litigants.”

14. This being the case the procedure adopted remains improper and We cannot proceed to determine this matter on that wrong base. Our attitude finds support in the case of *Lepolesa and others v Sun International of Lesotho (Pty) Ltd t/a Maseru Sun and Lesotho Sun (Pty) Ltd [2011] LSLAC 4*. In deprecating the idea of proceeding to hear a matter in ignorance of an apparent irregularity, the Court held that,
“... the result would be the decision premised on an incorrect application of the law. That would infringe the principle of legality.”

AWARD

We therefore make the following award:

- 1) That the matter is dismissed as being improperly instituted;
- 2) Applicant is at liberty to reinstitute the matter in terms of the Rules of this Court;
- 3) That this order be complied with within 30 days of issuance of this judgment.
- 4) No order as to cost.

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

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

MISS LEBITSA

I CONCUR

MRS. MOSEHLE

I CONCUR

FOR APPLICANT:

LETSIE

FOR 1st RESPONDENT:

ADV.

LEPHUTING