CIV/APN/153/95

IN THE HIGH COURT OF LESOTHO

In the Application of:

GEORGE KOU .... Applicant

and

PRESIDENT OF LABOUR COURT.... 1st Respondent
LABOUR COMMISSIONER .... 2nd Respondent

JUDGMENT

Delivered by the Hon. Mr. Justice B.K. Molai
on the 10th day of August, 1995.

The applicant herein seeks an order directing, inter alia, that the decision of the court of the 1st Respondent, in which the court declined to rescind its own default judgment be reviewed, corrected and set aside.

Only the 2nd Respondent has intimated intention to oppose. The 1st Respondent has not. It can safely be assumed, therefore, that he is prepared to abide by whatever decision will be arrived at by this court.

It may, perhaps be necessary to mention at this stage, that the proceedings purported to be an urgent application, presumably under the provisions of rule

8(22) of the High Court Rules, 1980. That being so, paragraph (c) of subrule (22) of rule 8 of the High Court Rules, supra, clearly provides:

> "(c) Every urgent application must be accompanied by a cerificate of an Advocate or Attorney which sets out that he has considered the matter and that he bona fide believes it to be a matter for urgent relief." (my underlining)

I have underscored the word "must" in the above cited paragraph (c) of subrule (22) of rule 8 of the High Court Rules, 1980 to indicate my view that the provisions thereof are mandatory. In the present case there was, however, no certificate of urgency accompanying the application, as required by the provisions of paragraph (c) of subrule (22) of rule 8 of the High Court Rules, supra. The purported urgent application was, for that reasons, irregular.

Notwithstanding the irregularity, the record shows that on 8th May, 1995 Mr. Mathe, for the applicant, moved, ex parte, the application in terms of prayer 3, viz. stay of execution, which was granted as an interim order operating with immediate effect. The return day was fixed as 22nd May, 1995. There is, however, no indication, in the record, that on the return day the matter was brought before a judge to have the interim order extended. The order accordingly lapsed and was, to date, never revived.

On 23rd May, 1995 the matter was placed before me for hearing. It is common cause from the record of proceedings, in the court of the 1st Respondent, that originating applications numbers LC 8/94 and LC 13/94 were instituted on 17th November, 1994 and 18th November, 1994, respectively, agaisnt the applicant by the 2nd Respondent acting on behalf of Boliba Mabuse and Lehlohonolo Motlomelo, presumably employees of the applicant. The applications were instituted pursuant to the provisions of the Labour Code Order, 1992 of which section 16(b) reads:

"(16) For the purpose of enforcing or administering the provisions of the code, a labour officer may -

(a) ....

(b) institute and carry on civil proceedings on behalf of an employee, or the employee's family or representative, against any employer in respect of any matter or thing or cause of action arising in connection with the employment of such employee or the termination of such employment."

In application LC.8/94, the 2nd Respondent moved the court for an order directing the applicant, a businessman trading as Kou transport, to pay R1216-30 being overtime money due to Boliba Mabuse; M148-71 being wages owing to Boliba Mabuse; M300-00 being the total amount of money which the applicant had unlawfully deducted from the wages of Boliba Mabuse

and costs of suit.

In application LC.13/94, the 2nd respondent moved the court for an order directing the applicant, trading as Kou Transport, to pay M500-00 in lieu of notice which the latter had failed to give to Motlomelo upon termination of his contract of employment; M875-00 being seven weeks' wages which the applicant had unlawfully not paid to Motlomelo; and costs of suit.

The two applications, L.C. 8/94 and LC.13/94, were sent to the applicant by registered mail number 19303-10 under cover of the Registrar of the Labour Court's letter, dated 22nd November, 1994, which read, in part:

"G. Kou Transport,
P.O. Box 1651
Tsautse Workshop
MASERU

Dear Sirs/s

re: Labour Commissioner vs George Kou

Kindly take notice that applicant in the above referenced matter has initiated proceedings against you before us as per the enclosed originating application.

You are required in terms of rule 5 of the Labour Court Rules to have lodged an answer

within fourteen (14) days of receipt hereof. Your answer should be in accordance with LC.2 contained in Part A of schedule to the Rules and should be forwarded to the Registrar of this court with a copy to the applicant.

Your attention is drawn to rule 14 according to which judgment by default may be entered against you upon failure to answer within the stipulated fourteen (14) days.

Sincerely yours,

F. KHABO (Mrs)
Registrar of the Labour Court"

According to the 2nd Respondent, on 7th December, 1994, the applicant did receive, at Maseru Post Office, the registered mail containing the above cited Registrar of the Labour Court's letter, together with its enclosures viz. applications numbers LC.8/94 and LC.13/94, a fact which was, however, denied by the applicant.

It is worth noting that although the applicant denied that he ever received the registered mail containing the originating applications LC.8/94 and LC.13/94, together with the above cited letter from the Registrar of the Labour Court, in the contention of the 2nd Respondent he did receive the registered mail. As proof of his contention the 2nd Respondent annexed duplicate receipt slips numbers 27573 and 27577 clearly bearing the rubber stamp impression of

the applicant's business "Kou's Transport" and signed, at Maseru Post Office on 7th December; 1994, by a certain Seabata, presumably an employee of the applicant. In my view, the 2nd Respondent has, on a balance of probabilities, proved his contention that the applicant did, indeed, receive the registered mail and was, therefore, duly notified of the originating application L.C. 8/94 and LC.13/94.

It is common cause from the proceedings of the court of the 1st Respondent, that the applicant failed to file an answer to the 2nd Respondent's originating applications LC.8/94 and LC.13/94. On 3rd January, 1995 the 2nd Respodnent filed, with the Registrar of the Court of the 1st Respondent, application for judgment by default which judgment was, on 9th January, 1995, granted pursuant to the provisions of the Labour Court Rules, 1994 of which rule 14 reads:

> "14. whenever a respondent fails to file an answer to an originating application, the court may, upon application in writing by the applicant, being satisfied as to receipt of the originating application by the Respondent, enter judgment for the applicant, or make such other order or determination as it considers just."

On 16th February, 1995, the applicant filed, with the Registrar of the Court of the 1st Respondent a

notice of motion in which he moved the court for an order, inter alia, rescinding the default judgment and stay of execution pending the finalisation of the application for rescission of the judgment. The application for rescission was opposed by the 2nd Respondent. The court of the 1st Respondent heard the application and, on 29th March, 1995, dismissed it, on the ground that it (the court) had no jurisdiction to entertain the matter.

On 24th April, 1995 the applicant instituted, before the High Court, the present proceedings viz. application for review. The founding and answering affidavits were duly filed on behalf of the applicant and the 2nd Respondent, respectively. No replying affidavit was, however, filed. It is clear from the affidavits that the ground upon which the applicant seeks an order for review is that the court of the 1st Respondent did have jurisdiction to rescind its own judgments and in dismissing, as it did, the application for rescission on the ground that it had no jurisdiction to entertain the matter, the court, therefore, acted irregularly, a fact which is, however, disputed by the 2nd Respondent.

It is significant to observe that the court of the 1st Respondent is established by the Labour Code Order, 1992 of which subsection (1) of section 22

reads:

> "(1) There is hereby established the Labour Court, hereinafter referred to as "the Court"."

The Labour Court is, therefore, a creature of statute. As such it cannot do things for which it is not empowered by the enabling legislation or statute. Section 24 of the Labour Code Order, 1992 clearly sets out the powers of the Court. Nowhere in the section is the court empowered to rescind its own judgments. If it did so, in the present case, the court would have acted, in my opinion, ultra vires, and, therefore, unlawfully.

From the foregoing, it is obvious that the view that I take is that the decision of the court of the 1st Respondent, dismissing the application for rescission on the ground that it had no jurisdiction to entertain the matter, cannot be faulted. Consequently, the application to review, correct and set aside the decision ought not to succeed. It is accordingly dismissed with costs.

B.K. MOLAI

JUDGE

10th August, 1995.

For Applicant :Mr. Mathe

For 2nd Respondent: Mr. Mohapi.