

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:

COMPASS GROUP SOUTHERN AFRICA (PTY) LTD

APPLICANT

And

MAKHAHLISO PITSO

1ST RESPONDENT

DEPUTY SHERIFF OF THE HIGH COURT

2ND RESPONDENT

JUDGMENT

Coram : Hon. Guni J

Date of Hearing : 13/10/2011

Date of Judgment : 20/08/2012

SUMMARY

Stay of Execution and Rescission of default Judgment. An application by the party so affected .. by the default judgment. RULE 45 (1) HIGH COURT RULES NO.9 OF 1980

***Default judgment enter for the following claims:-
Claim..Payment of salary arrears..Payment of provident fund benefits ..
Payment of death benefits .. etc. ..Exclusion of THE HIGH from exercising
its civil jurisdiction in matters provided for under LABOUR CODE ...***

LIST OF STATUTES CITED

LABOUR CODE ORDER NO.24 OF 1992.

LABOUR CODE [Amendment] Act 2000.

HIGH COURT ACT No.5 of 1972 .. Section 2 thereof.

LIST OF CASES CITED

CGM v LECAWU and OTHERS LLR + LB 1999 – 2000

BP LESOTHO (PTY) LTD v MOLOI and ANOTHER LAC 2005–6 Para 8

THE COMMANDER LDF & ANOTHER v MATELA LLR v LB 1999 – 2000

GRANT v PLUMBER (PTY) LTD 1949 (3) SA

BOOKS :-

1 – HERBSTEIN & VAN WINSEN

THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA

FOURTH EDITION – Page 138, 661

SUMMARY OF FACTS:

- [1] The 1st Respondent's late husband was, during his lifetime, employed by the Applicant company – COMPASS GROUP SOUTHERN AFRICA (PTY) LTD. He was officially appointed by letter as a member of STANDARD KITCHEN STAFF on the 03-01-06.

- [2] On the 5th May 2008 the 1st Respondent's late husband applied for an early retirement. Calculating from his dated of appointment, he had been so employed for a period of approximately two years and four months. In his application for early retirement, he claimed he was entitled to apply if he so chooses because he had reached the age of fifty five (55) years. Did he or did he not so retire? that is the question to be determined, because according to the applicant, he was discharged due to long and unreasonable absence from work. In his application for an early retirement he indicated that he is doing so because of his ill-health. He wanted to retire so that he has an opportunity to undergo whatever treatment he was undergoing at the time without being bothered to report for duty.
- [3] In October 2009 he died. In 2010 his widow, - the 1st Respondent herein, sued her late husband's former employers – COMPASS SOUTHERN AFRICA (PTY) LTD, the applicant herein for payment of her late husband's salary arrears, Provident Fund benefits and Death benefits. The rights and entitlement to the claimed payments allegedly arise from the 1st Respondent's late husband's contract of employment with this Applicant Company.
- [4] According to the Human Resources Manager of the Applicant company, in his Founding Affidavit, the 1st Respondent's late husband's employment was terminated due to long and unreasonable absenteeism. This is denied by his widow. Therefore it is an issue which falls for determination. The

discharge of employees is a matter provided for in THE LABOUR CODE ORDER NO.24 OF 1992. The dispute which arose between him and his employer – the Applicant herein, was settled amicably by agreement between the parties through the intervention and assistance of THE LABOUR Commissioner. Payments of salary and Provident Fund benefits were made in terms of that agreement. This is denied by the widow. Therefore whether or not the parties reached an agreement is now at issue. Whether or not payments were made in terms of the said agreement is the question to be determined.

- [5] The default judgment whose rescission and setting aside is being sought here, granted the widow of the deceased employee of COMPASS GROUP SOUTHERN AFRICA (PTY) LTD payments of salary arrears, in the amount of Forty Nine Thousand Seven Hundred and Ten Maloti, Ninety Six Lisente (M49,710.96), death benefits in the amount of Seven Thousand, Five Hundred Maloti (M7,500.00) and Provident Fund benefits [unspecified amount] together with lump sum benefit three times the annual salary of her late husband.

The Application for all these claims was filed with THE HIGH COURT on the 26th APRIL 2010. The Default Judgment on the ground of non-appearance of the then respondent – COMPASS SOUTHERN AFRICA (PTY) LTD was applied for.

It was entered on the application by the counsel of the then applicant – MAKHAHLISO PITSO on the 17th May 2010. This being a matter of an Application in Motion Proceedings, the respondent then, had failed to file timeously its Notice of Intention to oppose that application and other papers. The application proceeded unopposed. Therefore on the 17th May 2010 the default judgment was erroneously sought and granted in the absence of the party so affected by it. The default judgment was entered against the then respondent in terms of THE HIGH COURT RULE 27 (5) 1980.

On the 30th July 2010 an urgent application for stay of Execution and Rescission of default judgment was filed with THE HIGH COURT. In this application COMPASS GROUP SOUTHERN AFRICA (PTY) LTD sought and obtained a rule nisi in the following terms:-

“ IT IS ORDERED THAT :-

- 1. A RULE NISI be issued calling upon the Respondents to show cause on the 16th of August 2010 at 9:30 am in the forenoon or as soon thereafter as the matter may be heard, why the following order should not be granted and made final:-***
 - (a) The normal period of service prescribed by the Rules of Court should not be dispensed with on the grounds of urgency;***
 - (b) The Writ of Execution issued out of the office of the Registrar of the High Court on 1st June 2010 should not be stayed;***

- (c) The 2nd Respondent shall not be interdicted from acting on the strength of the above mentioned Writ of Execution, pending finalization of the Application for Rescission;*
- (d) The Default Judgment obtained against the Applicant herein on the 17th May 2010 should not be rescinded and set aside;*
- (e) The Applicant herein shall not be allowed to defend the main Application in CIV/APN/241/2010;*
- (f) The Respondent herein shall not be ordered to pay costs herein in the event of opposition;*
- (g) Applicant shall not be granted further and/or alternative relief.”*

Held:-

- (1) Where THE HIGH COURT is specifically excluded by law from exercising its civil jurisdiction, THE HIGH COURT is obliged in terms of RULE 45 (1) (a) to rescind and set aside “mero motu” its own default judgment which it entered in the absence of the party so affected by it.*

Held:-

- (2) THE HIGH COURT is specifically excluded by law from exercising its civil jurisdiction in matters provided for under THE LABOUR CODE ORDER NO. 24 of 1992 as amended.*

Held:-

(3) The dispute regarding payment of salary arrears, Provident Fund benefits and Death benefit, falls for determination under the provision of THE LABOUR CODE 1992 as Amended.

[6] This application for stay of Execution and Rescission and Setting Aside of the default judgment, is opposed. This is an extended return date for the final determination of the Rule Nisi issued out of this court on the 30th July 2010. The opposition to the confirmation of the rule nisi obtained by the applicant is without merit. The points of law raised by the 1st Respondent in order to resist the confirmation of the rule Nisi are not only irrelevant but are also totally without merit. The allegation that there was no urgency in the matter and therefore it was an abuse of the process for the applicant to approach this court by way of an urgent Application makes one wonder if the reasons set out briefly on the certificate of urgency were in fact read by the deponent who raised this point of law.

[7] Adv. Malebanye K.C has pointed out on the certificate of urgency that the deputy sheriff has already attached the property of this applicant. The deputy sheriff is threatening or has threatened to take and remove anytime out of possession of this Applicant the property he has already attached. THE COMMANDER LDF & ANOTHER v MATELA LLR & LB 1979 - 2000. The reason which prompted the applicant to approach the HIGH COURT urgently is set out on the face of the certificate of urgency.

- [8] There is no doubt that should the Execution of that erroneously sought and erroneously granted default judgment by the court which had no power to grant such judgment, would cause the Applicant an irreparable harm. The judgment debtor has the clear right to its property which the deputy sheriff attaches to enforce the judgment against it. It was necessary and urgent to interdict the deputy sheriff in those circumstances.
- [9] The attachment and the threat to **Remove** the Applicant's attached property **anytime , should** and in fact **did** prompt it to take immediate action to stop that removal from happening.
- [10] In determination of this Application, this court must be satisfied that the Applicant herein – COMPASS GROUP SOUTHERN AFRICA (PTY) LTD was not deliberately in default and that it has a bona fide defence against the claims made against it. **HEBSTEIN AND VAN WINSEN, FOURTH EDITION.**
- [11] It is not necessary at this stage to require the applicant in the matter of an Application for Rescission and Setting Aside of Default Judgment, to establish even on the balance of probabilities his defence. It is sufficient merely to allege the bona fide defence which can properly be pleaded before a trial court. **GRANT v PLUMBERS (PTY) LTD 1949 (2) SA.**

[12] It is this Applicant's argument that it has a serious and Genuine intention to proceed with this case. It intends to present and prosecute its defence to a finality, should it please this court to rescind and set aside the default judgment and reopen the case and allow it to present its defence. **VAH ASWEGEN v MAC DONALD FORMAN & CO. LTD 1963 (3) SA 197 (0).**

[13] To show that it has the defence, in the Founding Affidavit by The Human Resources Manager – one LUCKY MANDLAZI, it is attached documentary evidence raising questions of credibility regarding the question of payment of the moneys claimed. There are documents evidencing agreements reached with the intervention and assistance of THE LABOUR COMMISSIONER. The 1st Respondent – MAKHAHLISO disputes the averments that the parties reached an amicable and final settlement of their disputes with the intervention and assistance of THE LABOUR COMMISSIONER. There are copies of cheque payments made to the 1st respondent's late husband. There are other documents showing payments made to the 1st Respondent's late husband.

[14] It is in fact the contention of Applicant, that this matter is not the matter where THE HIGH COURT CAN PROPERLY EXERCISE its civil jurisdiction. This is the main objection by this Applicant. In a matter which is as contentions as this one and the party who is applying for Rescission and

Setting Aside of The Default Judgment has a defence such as the objection to the jurisdiction of the court to entertain and determine the matter, the court is entitled to rescind and set aside such default judgment entered against the party in its absence.

- [15] Where the law specifically exclude the court from exercising its civil jurisdiction if the court inadvertently exercised it civil jurisdiction it breached the law and therefore what it did was unlawful. The court when it entered a wrong judgment or illegal judgment, in terms of **RULE 45 (4) (a) HIGH COURT RULES 1980**, this court has power on its own motion to rescind and set aside its own judgment which was erroneously sought and granted in the absence of the party so affected by it. It was irregular and improper for THE HIGH COURT to entertain and determine the matter where it is specifically excluded from exercising its civil jurisdiction. **[LABOUR CODE ORDER NO.24 OF 1992 as amended]**.

- [16] The persistent argument by Legal Practitioners who bring Labour matters to THE HIGH COURT on the ground that THE HIGH COURT has unlimited civil jurisdiction was once and for all put to rest when LABOUR CODE [AMENDMENT] ACT 2000 was promulgated. It provided as follows:-

“EXCLUSIVE civil jurisdiction

- (1) The jurisdiction of the LABOUR court is exclusive and no court shall exercise its civil jurisdiction in respect of any matter provided for under the code”.***

[17] All the benefits which the 1st Respondent claim, arise from her late husband's contract of employment. The 1st Respondent's late husband approached LABOUR COMMISSIONER who assisted the parties to reach the settlement. Whether or not the employee received all the arear salary and other benefits is the matter which fall for determination by a proper forum – LABOUR COURT or DDPR. This court has no jurisdiction. LABOUR CODE [Amendment] Act 2000. The 1st Respondent sounds very unhappy with the decision of the LABOUR COMMISSIONER, the proper way forward should have been an appeal against that decision, not to institute a new action before a different and wrong forum.

[18] For all these reasons the rule nisi is confirmed with costs as prayed.

K.J. GUNI
JUDGE

For Applicant: S. Malebanye K.C.
For Respondents: Adv. R.A Sepiriti