IN THE LABOUR COURT OF LESOTHO **LC/16/03**

HELD AT MASERU

IN THE MATTER BETWEEN

THEBE NTHO **APPLICANT**

AND

C & Y GARMENTS **RESPONDENT**

JUDGMENT

Date 06/07/06
Settlement – applicant denying attorney was authorized to settle – applicant alleges non-consultation – Evidence – authority and consultation occurred – Rescission only proper where decision was made in the absence of another party – Application dismissed.

This case arises out of the dismissal of the applicant and sixteen others on the 23rd August 2002 for allegedly embarking on a go slow. The applicant filed the present application on the 19th May 2003 challenging the propriety of his dismissal on the ground that evidence led did not support the finding that he participated in a go slow. The respondents answered in accordance with the rules and the pleadings closed. The matter was set down for the 26th August 2003. On the 18th July, Counsels were advised that the matter would not proceed and they were invited to approach the Registrar for allocation of a new date.

The matter was rescheduled to be heard on the 7th October 2003. By consent of Counsels for both sides the matter was postponed to 28th October 2003. On that date i.e. 28th October, Messrs Matooane for the applicant and Kao for the respondent appeared before the President and reported that they had

reached a settlement which was to the effect that applicant be paid severance pay and one month's notice in full and final settlement of the dispute. They requested that the agreement be made an order of Court which was done. This understandably closed the matter. Surprisingly however, on the 5th November 2003 Mr. Matooane purported to file a notice of withdrawal as applicant's attorney of record. In a similarly bizarre turn of events on the 28th January 2004, Messrs Ntlhoki & Co. were appointed as applicant's new attorneys of record.

On the 12th February 2004, the then Registrar wrote a letter to Mr. Ntlhoki alerting him to the settlement agreement which was reached and made an order of Court on the 28/10/03. There is no evidence of any response, suffice it to say on the 22nd October 2004 the new attorneys of the applicant filed a Notice of Application seeking an order condoning the late filing of the application and an order rescinding the settlement agreement that was made an order of Court on the 28th October 2003. On the 19th October 2005 the Court granted an order condoning the late filing of the rescission application and directed that the respondent in reconvention should file its answer if any to the Notice of Application for rescission in accordance with the rules of the court.

The respondent in reconvention duly answered and the applicant in reconvention filed a Reply. Pleadings closed and the rescission application was heard on the 6th July 2006. The thrust of the applicant's case is that the Court should rescind the settlement agreement because his then attorney of record did not consult him and that he had infact not instructed him to enter into any settlement on his behalf. The gravement of the respondent's Answer is contained in the supporting affidavit of Mr. Matooane who avers that having considered all facts and circumstances of the case he advised applicant and his colleagues to settle and that he then proceeded to negotiate with their mandate.

He averred that it was only when he advised them to go and collect their payments that the applicant complained that the amounts were too small. He averred further that when he told him that that was the best he could do in the circumstances he then said he would go it alone. He specifically denied that applicant and his colleagues were not consulted. He stated that applicant consented to the settlement in the presence of his father.

In his reply applicant repeated his denial that he was consulted on the settlement or that he authorized Mr. Matooane to negotiate a settlement on his behalf. At the hearing, Counsel for the applicant applied to lead oral evidence and applicant took the witness stand in order to prove that he was not consulted. His testimony in a way confirmed the supporting affidavit of Mr. Matooane. He said that when the matter was about to proceed in Court Mr. Matooane told him that the respondents wanted to negotiate a settlement. He stated further that while he awaited the negotiations he was presented with a settlement agreement. He goes further to say that he told Mr. Matooane that he wanted to meet face to face with respondent's negotiators. Instead of doing that Mr. Matooane made him a cheque in the amount of two thousand Maluti (M2,000.00) which represented the settlement. Under cross-examination Ms Thabane for the respondent asked applicant if he agreed when Mr. Matooane told him that the respondent wanted to negotiate. He said he agreed to talk with them. It was put to him that he sought the assistance of a lawyer so that he could with his expertise get him his dues, he agreed. He was then asked, why do you refuse to accept what he presented to you as being what he was able to get on your behalf? His answer was that he should have been present. Applicant's evidence does not show someone who was not consulted. On the contrary it shows that he was consulted and he duly authorized Mr. Matooane to go ahead with the negotiations.

Applicant's major concern from his evidence is that he was not personally involved in the negotiations. Indeed Mr. Matooane does not pretend that applicant was present. However, not being personally present does not mean that the attorney was not authorized or that he did not consult. Infact when he was asked why he refused to accept the cheque for the money which he authorized the attorney to get from his employer as is stated in paragraph 6(c) of the Originating Application, applicant could only say Mr. Matooane did not explain to him clearly that the money was what he had authorized him to obtain from the respondent on his behalf. We entirely agree with the applicant that this is simply a case of misunderstanding not lack of authority or non-consultation. Evidence of applicant shows clearly that authority existed and consultation occurred. That applicant felt he had to be personally present is again a misunderstanding because he has appointed an attorney precisely to represent him in such matters. His personal presence was therefore not necessary.

Quite clearly this application cannot succeed on the grounds of; lack of authority and consultation. There is however, another grounder on which this applicant was bound to fail. The applicant approached this Court by way of rescission. In terms of section 24(2)(c) of the Labour Code (Amendment) Act 2000 the Court is empowered to:

> *"rescind any decision made in the absence of a party to the litigation."*

It is common cause that the applicant was duly represented on the 28th October 2003 when the settlement was recorded and made an order of Court. Once so recorded the settlement represented a final judgment which can be appealed against. To seek to reopen it by way of a rescission application was clearly irregular in as much as both applicant and the respondent were represented. For this reason the application was again bound to be dismissed. It is accordingly dismissed with costs.

THUS DONE AT MASERU THIS 14TH DAY OF JULY 2006

L. A. LETHOBANE
PRESIDENT

R. MOTHEPU **I CONCUR**
MEMBER

J. M. TAU **I CONCUR**
MEMBER

FOR APPLICANT: **MS LEKALAKALA WITH MS NKOE**
FOR RESPONDENT: **MS THABANE**