SWAZILAND HIGH COURT

CIVIL CASE NO. 275/2008

BETWEEN

OXFORD LEASING PTY LTD **APPLICANT**

AND

THE EXECUTIVE DIRECTOR OF CMAC

SIPHEPHISO N.O... **1st DEFENDANT**

BRIAN HEALY ... **2nd DEFENDANT**

CORAM:	**FDR THE SECOND RESPONDENT:**
FDR THE APPLICANT:	**AGYEMANGJ**
FDR THE FIRST RESPONDENT:	**X. SHABANGO (MS) NO APPEARANCE C. MDTSA ESQ.**

JUDGMENT

In this application the applicant is making the following prayers; an order:

1. Reviewing and/or correcting and/or setting aside the first respondent's decision under CMAC dispute number MNZ 016/2007 dated the 27th November 2007;

2. That the respondents pay the costs of this application in the event they unsuccessfully oppose same;

3. Further or other relief as to the court may seem fit.

The facts giving rise to this case are these: the second respondent herein returned to work after a period of absence and found that his salary for the month of September 2006 had not been paid. He alleged that his absence was not without authority, as he had taken his annual leave duly approved by one Henry Kwame, Chief Financial Officer, and that it had been for a period of two weeks, that is from 23rd October - 7th November 2006. His employers however alleged that he had no such authority to absent himself and so he did vacate his post for close to one month.

When the second respondent made a request for his said unpaid salary, he found his employer uncooperative. After writing to his employer to make a formal demand, he made a complaint of this state of affairs to the Department, of Labour where he was advised to write a resignation letter to the applicant citing constructive dismissal. The second respondent did so. The second respondent then went to the first respondent and laid a complaint of constructive dismissal against the applicant herein. A conciliation was held on 7/3/07. It was attended by the second respondent and the Managing Director of the applicant one Ralston Smith. On that occasion the said gentleman applied for the dispute to be settled elsewhere as he had a long, presumably unpleasant history with the first respondent. On the next adjourned date: the 10/4/07, the said gentleman was absent and the applicant was not represented. Another meeting was scheduled for 27th April 2007. The applicant was once again not represented although it has been alleged that the notice of the conciliation was served on the applicant per its employee, one Maggie Forbes on 13/4/07. The first respondent thus determined the matter in the absence of the applicant. In consequence, a default judgment was entered for the second respondent. The applicant, upon being served with the notice of the default judgment, applied for a rescission of that decision alleging inter alia that the applicant never received the notice of the scheduled conciliation meeting of the 27th April 2007. The applicant, further alleged that it was its company policy that matters involving personnel of the managerial level should be handled by its Managing Director only

and that it was for this reason and also because the applicant had no notice of the scheduled proceeding that the said Managing Director who was based in South Africa had to travel to Swaziland to enquire about the next scheduled date for the conciliation. The said Managing Director allegedly had an accident while on his way and so could not get to the first respondent's office to make his enquiry. He was also allegedly admitted in hospital and was incommunicado. The deponent alleged that it was because the date of the conciliation was unknown to the applicant that no-one attended on its behalf even if to simply ask for a postponement.

Having heard the applicant and having also considered the depositions contained in the opposing affidavit of the second respondent, the first respondent refused the application, thus confirming the judgment in default entered against the applicant.

It is regarding this ruling of the first respondent that the present application has been brought.

This application which invokes the common law review jurisdiction of this court, alleges a number of irregularities including an allegation that the findings of the first respondent were not based on facts placed before it. The first respondent was also alleged to have taken irrelevant matters into consideration in arriving at his findings. The result the subject of the complaint before this court, was that the decision of the first respondent was allegedly unreasonable and so irregular as to warrant a review by this court.

In this application, the deponent has alleged that the said ruling was prejudicial to the applicant and erroneous because the first respondent failed to take into account, the following matters:

i. That the applicant was not afforded a fair hearing and that the finding that it willfully failed to participate in the proceedings was arrived at arbitrarily, unsupported by any evidence placed before the court.

ii. That the first respondent arrived at this finding to the prejudice of the applicant upon making assumptions not based on fact. Hi. That the legal requirements for a finding on constructive dismissal were not met by the second respondent and that the first respondent placed

weight, on matters that did not fully substantiate the claim of

constructive dismissal; iv.That the first respondent failed to show the prejudice the second

respondent would suffer if the application for rescission were granted. These said matters are referred to hereafter as the grounds upon which the review is ought.

In a twelve-paragraph founding affidavit deposed to by one Henry Kwame who described himself as the Chief Financial Officer of the applicant duly authorized by the applicant to bring the application and to depose to the founding affidavit by reason of his managerial and authoritative position as well as his personal knowledge of the matters therein contained, the deponent alleged a number of things.

With regard to the first ground of complaint set out before now, he alleged that the first respondent had stated in its ruling as a fact, a matter alleged by the second respondent but regarding which no evidence was ever placed before it. This was that the applicants had been duly notified of the scheduled date for the conciliation being the 27th April 2007 and that the said notification had been by way of service of the notice of the meeting on the 13th of April 2007on one Maggie Forbes, an employee of the applicant who signed for same.

He deposed also that the first respondent's assertion contained in the ruling that the applicant's explanation: that its Managing Director had been on his way to Swaziland to enquire of the next adjourned date for the conciliation proceeding when he met with an accident was "farfetched", was an assumption not based on fact. He alleged that this assertion which was prejudicial to the applicant, did not take into account the fact that the applicant's representative had attended the first conciliation and that the second which he failed to attend was a continuation; therefore, the failure could not have been willful.

He deposed further that although in his letter of resignation, the second respondent had relied on constructive dismissal as his ground for leaving, he had not adduced sufficient evidence to meet the legal burden of such. In consequence the first respondent erred in finding for him on that ground by relying on matters that did not fully substantiate the claim.

He deposed further that the first respondent failed to observe the *audi alteram partem* rule of natural justice by closing its door to the applicant which had sought to be permitted to state its side of the case; and furthermore, that the first respondent failed to show any prejudice the second respondent stood to suffer if rescission of the default judgment was ordered.

The first respondent did not defend this application. The second respondent however raised a legal point *in limine* while also arguing the merits of the application.

The main point *in limine* was that the deponent of the founding affidavit: the said Henry Kwame, was not authorized to bring this present application. Learned counsel argued that the said deponent had not in his founding affidavit, disclosed that he had such authority, nor had he exhibited any resolution of the applicant company to that effect or short of these, even deposed to facts from which such authorisation could be inferred. He contended that the fact of the deponent's managerial position did not automatically confer such power on him.

He submitted that the deponent had failed to demonstrate such authority to bring the application and to depose to an affidavit on behalf of the applicant company even though his alleged authority had been challenged by the second respondent when the matter was before the first respondent. Relying on the cases of ***Fairdeal Furnishers (Pty) Ltd v. Standard Bank of Swaziland Ltd and ors SLR (1979-1981) at 63; also Mall (Cape)(Pty) Ltd. v. Merino Ko-operasie Bpk 1957 (2) SA 347 (C) at 351*** in support of this assertion, and also on ***Mauerberger v. Mauerberger 1948 (3) SA 731 (C)*** regarding the fact that the said defect in the founding affidavit may not be cured in a replying affidavit, learned counsel for the second respondent urged the court to dismiss the said application.

Regarding the merits of the application, learned counsel raised another matter which should properly have been a point raised *in limine* as it was a legal argument. It is this: that the applicant's application for review was incompetent it having been brought with respect to the finding of fact made by the first respondent that the applicant was duly served on 27th of April 2007 with the notice of meeting per its employee, one Maggie Forbes.

Learned counsel contended that the applicant's complaint based on the said finding of fact ought to have been brought by way of an appeal and not a review. Even so, learned counsel went ahead to draw the court's attention to some inconsistencies contained in the founding affidavit regarding the participation of the deponent at the conciliation proceeding. These included the assertion of the deponent in one breath that he had been present the fact at the conciliation of 7th March 2007 and in another, that only Mr. Ralston the applicant's Managing Director could attend the conciliation as it

involved an employee of managerial status and that he failed to attend because he met with an accident on the day of the proceeding and in any case had not known of the scheduled day.

Counsel for the second respondent thus urged the court to dismiss the instant application.

First of all I cannot help but comment that the arguments of learned counsel for the second respondent on the merits were sadly deficient as they did not seem to have touched on matters contained in the second respondent's affidavit regarding matters of which the applicant has complained in this application. I must however proceed to examine whether or not the point raised in limine ought to succeed.

The question regarding what, a deponent to an affidavit in a case involving an artificial person such as a company must demonstrate, in order for the court to permit him to depose to matters on its behalf in a suit for or against it, is trite. The question which raged for a long time seemed to have been put to rest in a long line of cases showing that although desirable, it is not imperative that a company resolution be exhibited in court. See per ***Joubert's The Law of South Africa 3 Ed. Civil Procedure and Costs p.74 at pp138,*** "the annexing of a copy of the resolution itself is not always necessary but sufficient proof under the circumstances that the application was properly authorized should be laid before the court...", see also ***South West Africa National Union v. Tjonzongoro and ors*** citing with approval, *Dowson & Dobson Ltd v. Evans & Kerns (Pty) Ltd 1973 (4) SA 136; Thelma Courts Flats (Pty) Ltd v. McSwigin 1954 (3) SA 457.*

It has thus become almost customary for the courts to gloss over the absence of a company resolution and to content itself with an assertion by the deponent of such authority accompanied by a demonstration in the affidavit that such authority existed. Even so, as was held in ***J.K. Maseko & Co. (Pty) Ltd v. Lungile Dlamini and two ors Civil Case No. 3629/05 para. 7 (Unreported,)*** the duty of the deponent to demonstrate his authority is not to be glossed over where same has been challenged.

The antecedents of the instant case are somewhat difficult. After judgment was entered in default against the applicant, the deponent swore to an affidavit on behalf of the applicant in an application praying for a rescission of the default judgment. The authority of the

deponent to depose to the affidavit on behalf of the applicant was challenged in that forum. The deponent did not supply any matter to demonstrate the requisite authority. The first respondent however apparently accepted the capacity alleged by the deponent.

It is worth pointing out however, that the challenge of authorization by the applicant company regarding the affidavit was given integrity by the deponent's own assertion that only the Managing Director of the applicant had authority to deal with matters concerning an employee of managerial status such as the second respondent. In the affidavit he swore to in that application for rescission of the default judgment, the deponent stated this: "I personally did not participate or involved (sic) in this matter. The company policy provides that in matters and/or disputes involving a member of Management, only the Managing Director has power and authority to handle same by attending to conciliations and arbitrations". Indeed he deposed that it was by reason of this company policy that the Managing Director had started his journey from South Africa towards Swaziland but had met with an accident.

In the present application which follows the ruling delivered by the first respondent in that application, the deponent has asserted in the founding affidavit that his authority to depose to the founding affidavit and to bring this application was "by virtue of (his)... managerial and authoritative position..."

Clearly the challenge by the second respondent in his answering affidavit which had brought the question of the deponent's authority into issue, was not answered by the said deposition in face of the deponent's own assertion stated before now.

The question which arises from this circumstance is: at what point did the company policy of the sole and exclusive involvement of the Managing Director in a dispute concerning an employee in a managerial position end? It seems to me that since on his own showing, disputes involving such employees as the second respondent were the sole preserve of the Managing Director, a suit connected with such dispute would have to be specifically authorized by the applicant company if it was to be conducted by any person in a managerial position besides the Managing Director; and this had to be demonstrated either by the exhibiting of a company resolution or other evidence contained in the affidavit, especially where his authority had been challenged.

It is for these reasons that it did not suffice in the face of the second respondent's challenge, for the deponent to allege authorisation "to bring this application" and "to depose to (the) affidavit by virtue of his managerial and authoritative position" as well as his alleged personal knowledge of the facts. Indeed, such delegated authority to bring an application or depose to a founding affidavit on behalf of a company may not be assumed from the mere fact of managerial status. In *Fairdeal Furnisher's case (supra), at 63,* Cohen ACJ expressed the view that even a Managing Director's authority to institute proceedings could not be presumed from his position; it had to be delegated or authorized.

It is .my view that the deponent: Henry Kwame, Chief Financial Officer of the applicant did not demonstrate his authority to bring this application or depose to the founding affidavit on behalf of the applicant, a company.

On this ground alone, the present application stands to be dismissed.

But it will be remiss of me not to have regard to the arguments made on the merits of the case.

Contrary to the assertion of learned counsel for the second respondent, the applicant is properly before this court in this case where an allegation is made of a breach of the *audi alteram partem* rule. This is because such a complaint concerns the mode in which the judicial task is carried out; thus a finding of fact allegedly unsupported by the evidence that had the resulted in the shutting of the door against a party may be complained of as an irregularity and be questioned in an application for review. Of the review jurisdiction, the dicta of Innes CJ in ***Johannesburg Consolidated Investment Co. v. Johannesburg Town Council 1903 TS 111 at 114-116*** regarding practice in South Africa, analogous to our practice here, are apposite: "...In its first and most usual signification it denotes the process by which apart from appeal, the proceedings of inferior Courts of Justice... are brought before this court in respect of grave irregularities or illegalities occurring during the course of such proceedings..." "...Whenever a public body has a duty imposed upon it by statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, the court may be asked to review the proceedings complained of and set aside or correct them...".

In the present instance, the first respondent on an application for review of a default judgment entered for the second respondent in the circumstances I have already recounted, after having regard to all the arguments placed before him, refused same after making the following findings of fact:

"a. It is not in dispute that Maggie Forbes is an employee of the applicant;

b. The applicant was aware of the conciliation session for the 27/04/07 as the invitation to this session was actually served at the applicant's place of business on the 13/04/07 and received by Maggie Forbes who signed for it

c. The claim by the applicant that they were not aware of the conciliation date and Mr. Smith was solely coming to Swaziland to enquire at the CMAC about progress in the matter sounds very unconvincing and appears farfetched. Mr. Ralston did not need to come to Swaziland to know about the status of the case as his office had long received the invitation to the conciliation;

d. Applicant was granted the opportunity to state his side or defense, however despite numerous efforts by the Commission he opted to waive his right to be heard which may not in turn be expensed to the respondent."

I have before now, set out the grounds of complaint.

Regarding the first ground which is that the applicant was not given a fair hearing, I find that indeed the assertion by the Executive Director of the first respondent that the notice of the conciliation was served on Maggie Forbes on the 13th of April 2007, for the 27th of April 2007 was unsupported by any evidence laid before the court besides the allegation of the second respondent. The documents exhibited before the first respondent to which recourse have been had in this court merely showed that both parties had their names on the invitation forms. There was no endorsement of service on them, nor was any document showing the signature of any employee of the applicant receiving such service exhibited.

The Executive Director's positive finding of the fact of service on the said Maggie Forbes on 27th April 2007 and the matter that she signed for same, in the face of her confirmatory

affidavit alleging that she had not been served as alleged was thus unsupported by the evidence.

Regarding the second ground, however, the applicant's complaint that the first respondent's decision that the failure to attend was willful was based upon an assumption not supported by facts, is not tenable. This is because the Executive Director of the first respondent did what he was entitled to do, which was to examine the evidence proffered of the reason for the applicant's representative's failure to attend and to satisfy himself as to whether or not it was willful. To do this, he had regard to the deposition in the affidavit and considered the plausibility of the explanation proffered therein, as well as other surrounding factors such as the failure of the applicant to attend the scheduled meeting of the 10/4/04 and from these, made an inference. Opining that the story of the Managing Director's trip to Swaziland, his alleged accident and hospitalization which were said to have made him incommunicado was "unconvincing" and "appeared farfetched", he drew an inference and made a deduction that the absence of the Managing Director was willful. It must be rioted that the said story was unsubstantiated by any evidence of the accident or a medical report on the Managing Director.

That his assessment of the evidence was adverse to the applicant, did not necessarily mean that it was unfairly prejudicial, amounting to an irregularity, and thus a candidate for an application for review. The applicant's assertion: that the Executive Director did not avert his mind to the fact that the conciliation of the 27th April was a continuation which fact should have informed him that the absence of the Managing Director was not willful, is a substitution of the applicant's assessment of the facts for that of the first respondent. It seems to me that if the charge was that the decision of the first respondent was against the weight of evidence, the proper forum to redress same was by way an appeal and not a review for the subject of the complaint, was not an irregularity in the method by which that decision was arrived at.

On the third ground, it is also my view that the second respondent, an employee of ten years whose evidence before the first respondent included the contents of his resignation letter which alleged unfair treatment and fact of his salary having been withheld although he had not vacated his post, in the absence of cogent evidence to the contrary, met the burden

of establishing constructive dismissal which he alleged in the one-sided proceeding. The applicant alleged inter alia, that the first respondent erroneously held that the second respondent was automatically unfairly dismissed and that such was not supported by the facts. But I have said before now that in a complaint that the wrongful evaluation of the evidence adduced by the second respondent led to an erroneous finding of fact and a misapplication of the law, the proper process for correction was by way of an appeal and not the review sought by this application. This court on a review, is empowered to examine the validity of the decision of the first respondent having regard to its method of adjudication of the matter placed before it, and not its correctness, see ***Herbstein v. Van Winsen*** ***The Civil Practice of the Supreme Court of South Africa 4 ED. 932 at para D.***

In any case, for a default judgment to be entered, it was enough that the tribunal satisfied itself that the respondent deliberately or without reasonable cause, absented himself from the forum where redress was sought.

It was also enough for the first respondent in an application for rescission of the default judgment, to be satisfied that the failure to attend could not be excused, and the decision based thereon, not unfairly prejudicial, to refuse same. For this purpose, the tribunal could have regard to any prejudice or the lack of it that would be occasioned to the second respondent if the judgment were to be set aside. It was however not bound to be swayed by such a circumstance if in its view the justice of the case dictated such.

It must be emphasised that the jurisdiction of the first respondent to set aside a default judgment is a discretionary one. It is trite that at common law, such discretion ought not to be tampered with on appeal or review, unless it was shown to have been exercised on wrong principles of law, under a mistake of fact, or that it was arrived at by recourse to irrelevant evidence or the wrongful

rejection or misapplication of relevant evidence. I have had regard to the arguments of learned counsel for the applicant and also, the matters that gave rise to the ruling complained of and the ruling also, and I find that although the finding of the fact of service of the notice of the conciliation was not supported by the evidence, the decision the first respondent arrived at, took other pertinent matters including the conduct of the applicant in the entire transaction, into consideration. In the circumstance, I am not persuaded that the exercise of the discretion was altogether wrongly done by the first respondent.

Moreover, beyond the complaint that the judgment debt, the sum of E105 196.38 is colossal, the applicant has not alleged any circumstance of prejudice that the applicant stood to suffer if the default judgment were not set aside such as should move the hand of this court, every pertinent matter considered, to set aside the ruling of the first respondent against the rescission of the judgment.

In consequence even if I considered the application competent, which I have held it is not - as the founding affidavit was not sworn to by one so authorized, I still would be slow to grant the prayers sought herein.The application is hereby dismissed with costs.

DATED THE 12th DAY OF FEBRUARY 2009

MABEL AGYEMANG (MRS JUSTICE)
HIGH COURT JUDGE