IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

In the matter between:

CASE NO. 46/2005

ASIKHUTULISANE SAVINGS & CREDIT

CO-OPERATIVE SOCIETY LIMITED **APPLICANT**

And

LAWRENCE HERMANSON **RESPONDENT**

CORAM

NKOSINATH1NKONYAE: ACTING JUDE

GILBERT NDZINISA: MEMBER

DAN MANGO: MEMBER

FOR THE APPLICANT MR. A. LUKHELE

DUNSEITH ATTORNEYS

FOR THE RESPONDENT ADV. J.M. VAN DER WALT

INSTRUCTED BY ROBINSON BERTRAM

JUDGEMENT - 15.11.2005

This application came before the court on 17.02.05 on a certificate of urgency. From the record it appears that on that day the parties agreed that execution in case No. 247/04 be stayed, and the matter was removed from the roll.

It was thereafter set down for argument on 07th and 08th November 2005. It was argued on the 7th November 2005.

The present applicant was the respondent and the present respondent was the applicant in the main action under case No. 247/04.
The present application is for rescission of the judgement of the court made on 17.12.2004 under case No. 247/04.

The application under case 247/04 was brought by the present respondent against the present applicant under a certificate of unresolved dispute. The application was not opposed, and the matter proceeded on an *exparte* basis. The court accordingly gave judgement in favour of the applicant after he had led evidence in court. He was awarded six months compensation for unfair dismissal amounting to E76,128:00, and severance allowance amounting to E8,458:80.

It is against that judgement that the present applicant is seeking an order for rescission.

The applicant is approaching the court on the basis of common law principles of rescission and not in terms of Rule 42 of the High Court Rules.

There are therefore two requirements that the applicant must satisfy in order to succeed. One, the applicant trust present a reasonable and acceptable explanation for its default; two, that on the merits it has a bona fide defence which *prima facie* carries prospect of success. (See HERB STEIN AND VAN WINSEN: "THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA" (1977) 4th edition p.691, CM ETTY V. LAW SOCIETY, TRANSVAAL 1985 (2) S.A. 756 (A) at 765 A-C).

Before the court proceeds to address the submissions made before it, we should record our appreciation to both legal representatives for preparing the heads of argument. These have made the work of the court in summarizing the facts and legal issues involved much easier.

The common thread that runs through the applicants' evidence is that they did not appear and or accept the service of the application because they were not the employer of the respondent, and hence their defence that the respondent obtained a judgement against the wrong party.

On behalf of the respondent t was argued that the applicant was the correct party to be cited and served, as it was the applicant that entered into a contract of employment with the respon dant.

It was argued on behalf of the applicant that although it entered into a contract of employment with the respondent, it did so on behalf of a company yet to be formed, namely Asikhutulisane Investments (Pty) Limited.

The copy of the employment contract appears as annexure "HI" and is attached to the opposing affidavit. Paragraph one of the contract states that,

"Further to your recent inter dew I have pleasure in offering you the post Manager (sic) of our supermarket in Malkerns on the following terms and conditions."

The applicant was unable to deny the evidence that it employed the respondent to be the Manager of its supermarket at Malkerns. Its defence was that the supermarket was incorporated as a separate entity from the Co-operative Society and that the Society was therefore not liable.

The applicant's submission will be dismissed by the court on the following grounds;

One, on the form of the contract of employment, there is no ambiguity as to who was the employer respondent. The applicant employed the respondent to be the Manager of its supermarket at Malkerns. We therefore find no basis for the applicant's argument that it was not the employer of the respondent.

Two, assuming in favour of the applicant that the contract of employment was being entered into in favour of a company yet to be formed, there was no mention of such in the contract. Further, again assuming that this was a pre-incorporation contract, there was no indication or evidence that after its incorporation, the company did ratify the contract of employment. The applicant failed to show the court any contract of employment as between the respondent and Asikhutulisane Investments (PTY) Limited.

The applicant at all material times was the employer of the respondent.

It is therefore clear form the above observations that on the merits, the applicant has no bona fide defence. There will therefore be no basis for the court to rescind the judgement.

Consequently there will be no need for the court to traverse the other ground relied upon by the applicant.

The application is accordingly dismissed with costs. The costs to include costs of counsel.
The members agree.

INDUSTRIAL COURT

NKOSINATHI NKONYANE A-J