

**IN THE INDUSTRIAL COURT OF SWAZILAND**

HELD AT MBABANE

CASE NO. 528/2006

In the matter between:

**PRAHBUDAS CHANDRAKANT**

**Applicant**

and

**VICTOR MASHININI**

**1<sup>st</sup> Respondent**

**MENZI DLAMINI N.O.**

**2<sup>nd</sup> Respondent**

In re:

**VICTOR MASHININI**

**Applicant**

and

**PRAHBUDAS CHANDRAKAT**

**C/O CITY BOTTLE STORE**

**Respondent**

**CORAM:**

**P. R. DUNSEITH : PRESIDENT**

**JOSIAH YENDE : MEMBER**

**NICHOLAS MANANA : MEMBER**

**FOR APPLICANT : DIRU PRAVINCHANDRA**

**FOR RESPONDENT : SELBY DLAMINI**

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**R U L I N G - 20/10/2006**

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1. On the 9<sup>th</sup> August 2006 in Case No. 31/2005 the Industrial Court granted a final judgement in favour of the Respondent Victor

Mashinini against the Applicant for payment of the sum of E14,798-65.

2. This judgement was granted at the conclusion of an ex parte trial which took place in the absence of the Applicant. In its judgement, the court stated as follows:

“The application was served on the Respondent [the present Applicant] personally on the 2<sup>nd</sup> February 2005, and service was duly proved by affidavit of service. Nevertheless the Respondent did not attend at court on the date notified nor on the postponed date, and the matter was referred to exparte trial.”

3. The Applicant has now applied to court for rescission of the said judgement on grounds that it was erroneously granted in the absence of the Applicant. In particular, the Applicant makes out a case in his founding affidavit that the application was never served upon him and the matter proceeded without his knowledge.
4. The Applicant specifically alleges that *“no summons or application was ever served upon me”* (para 4.4) and *“I am advised by my attorneys that non-service ..... vitiates proceedings.”* (para 4.6). He refers to an affidavit of service filed of record in the ex parte proceedings, in which Selby Dlamini *“deposed to the fact that he did personally serve me with the application on the 2<sup>nd</sup> February 2005”* (para 6.1) and states that *“I find the above statement surprising and devoid of truth, and do not recollect ever being served with such an application”* (para 6.2). He goes on to allege that *“I can only assume that Selby Dlamini either served*

*another person under the mistaken belief that it was me, or that the said Selby Dlamini did not at all serve the papers” (para 6.5).*

5. These specific averments amount to an unequivocal assertion that the application was not served upon the Applicant personally.
6. In answer to this assertion, the Respondent has filed an affidavit by his Labour Consultant, Selby Dlamini, who deposes that he effected personal service of the application papers on the Applicant on the 2<sup>nd</sup> February 2005 at City Bottle Store at about 16:30 hours. He states that the Applicant refused to acknowledge receipt. He also states that he attended numerous prior meetings with the Applicant, the implication being that he could not have served another person under the mistaken belief that it was the Applicant.
7. Where the Rules of the Industrial Court do not make provision for the procedure to be followed in any matter before the court, the High Court Rules shall apply (with such qualifications, modifications and adaptations as the President may determine).

(see Rule 10 of the Industrial Court Rules, 1984.)

8. The Rules of the Industrial Court do not make provision for the procedure to be followed in applications for rescission of judgements of the court, and the relevant High Court Rule(s) may be applied.
9. In terms of Rule 42 (1) (a) of the High Court Rules, the court may rescind or vary an order or judgement erroneously granted in the absence of any party affected thereby.

10. An order is erroneously granted if there was no proper service on the absent party.

**Theron NO v UDF (Western Cape Region) and Others 1984 (2) SA 532;**

**Topal v LS Group Management Services (Pty) Ltd 1988 (1) SA 639 (w) at;**

**Van der Merwe v Bonaero Park 1998 (1) SA 697 (T);**

**Harms : Civil Procedure in the Supreme Court 07 page 421.**

11. If a party proves that his absence was due to non-service, and that the judgement would not have been entered if the court was aware of the non-service, then he does not have to go further and establish good cause for rescission of the judgement.

**De Wet & Others v Western Bank Limited 1977 (4) SA 770 at 777 F.**

In particular, such party does not have to show that he has a bona fide defence to the application.

**Promedia Drukkers en Uitgewers v Kaimowitz & Others 1996 (4) SA 411 (c) at 416 J – 417 I.**

12. Whilst the onus rests on the Applicant in this rescission application to prove that the ex parte judgement was granted in error, this does not mean that the Applicant bears the onus of proving that he was

not served with the original application papers. In the view of the court, the evidentiary burden of proving proper service upon the Applicant continues to rest on the Respondent, as it did at the ex parte hearing.

13. The Respondent's representative urged the Court to resolve the conflicting versions of the parties regarding service on the basis of credibility. He pointed to certain features of the Applicant's testimony on affidavit which he said indicated that the Applicant was not truthful. The Court is loathe to make findings of credibility from evidence on affidavit, particularly where the credibility issues raised by the Respondent's counsel are by no means clearcut.
14. There is only one issue for determination in this application: either the Applicant was personally served, or he was not. In our view, this issue may appropriately be referred to oral evidence, since there is a clear dispute of fact which cannot be resolved on the papers.
15. The court makes the following order:
  - 15.1 **The question whether the Applicant was personally served with the application for determination of an unresolved dispute in Case No. 31/2005 is referred to oral evidence on a date to be fixed by the Court immediately after delivery of this judgement;**
  - 15.2 **The parties shall notify each other and the Court by close of business on 25<sup>th</sup> October**

**2006 of the names of the witnesses (if any)  
they intend to call to give oral evidence;**

15.3 **The Respondent shall commence leading  
evidence at the hearing;**

15.4 **The interim order for stay of execution is  
extended pending final determination of the  
matter.**

The members agree.

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**PETER R. DUNSEITH  
PRESIDENT OF THE INDUSTRIAL COURT**