IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 43/06

In the matter between:

RAPHAEL L. DLAMINI   **APPLICANT**

And

**PROPSHAFT REBUILDERS AND
MANUFACTURING CENTRE [PTY] LTD**   **RESPONDENT**

In re:

RAPHAEL L. DLAMINI   **APPLICANT**

AND

**PROPSHAFT REBUILDERS AND MANUFACTURING
CENTRE [PTY] LTD**   **RESPONDENT**

CORAM:

NKOSINATHI NKONYANE: **ACTING JUDGE**

DAN MANGO: **MEMBER**

GILBERT NDZINISA: **MEMBER**

FOR APPLICANT: **MR. S. MADZINANE**

FOR RESPONDENT: **MR. T. MAGAGULA**

RULING 15.09.06

[1] This is an application for rescission of this court's order granted on 30.03.06 dismissing the applicant's application.

[2] The applicant had instituted proceedings for unfair dismissal against the respondent. The respondent in its reply raised a point *in limine*

arguing that the matter was settled at CMAC by the parties and that therefore it was improperly before the court.

[3] The parties agreed to have the point *in limine* raised argued on 30.03.06. The respondent's representative did not show up on that day. Judgement by default was accordingly granted which had the effect of the application being dismissed with costs.

[4] In this application the applicant did not file any affidavit. The application is founded upon the affidavit of his attorney, Mr. Madzinane.

[5] Mr. Madzinane told the court that he did not appear in court on 30.03.06 because he made a wrong entry in his diary and made an entry for 31.03.06. He said on 31.03.06 an articled clerk from his office came to court and found that the matter was not on the roll. The articled clerk did not check with the Registrar's office why the matter was not on the roll on that day. Mr. Madzinane said he eventually learnt on 03.05.06 that the application was dismissed with costs.

(6) It was further argued that the applicant has a defence on the merits. Mr. Madzinane argued that it was not correct that the matter was settled between the parties. He argued that the matter was partially settled by the applicant being paid his terminal benefits and that therefore he was entitled to pursue a further claim for compensation for unfair dismissal.

[7] The court will deal with this latter argument first. This argument has no merit at all. If the applicant thought that the settlement related only to terminal benefits excluding compensation for unfair dismissal, why then did he report that the issues in dispute included severance pay, notice pay, additional notice, leave pay and bonus as it appears on the certificate of unresolved dispute marked "RD3"? Why did he not just report that the issue in dispute was compensation for unfair dismissal?

[8] Furthermore, in the memorandum of agreement, annexure "A" of the

respondent's reply, it is recorded that the parties have settled the dispute and that the parties accept the settlement.

[9] There was no allegation that the applicant did not understand the contents of the agreement.

[10] The applicant further relied for its argument on annexure "B" of the respondent's reply. Annexure "B" is a document indicating the payment of the settlement amount to the applicant at CMAC offices. The applicant argued that the use of the words "payment of terminal benefits" on that document meant that the payment was only for benefits and not compensation.

[11] This argument does not take the applicant's case any further. Annexure "B" is merely a receipt that was issued at CMAC. The terms of the settlement are contained in annexure "A". It is not clear how the receipt could possibly change the contents of the agreement already entered into by the parties.

If the applicant's attorney learnt about the court order on 03.05.06, it is not clear why it took him two months and one week to file the rescission application on 18.07.06.

There was infact no explanation in court as to the cause of the delay. Mr. Madzinane only explained his non-appearance on 30.03.06.

Further, Mr. Madzinane knew, though wrongly, that the matter was going to be in court on 31.03.06. He did not appear personally before the court, but he sent an articled clerk. The articled clerk said he forgot to find out from the Registrar's office why the matter was not on the roll. The clerk relayed the information to him that the matter was not on the roll, but did not do anything about it.

The position of the common law is that the court has power to rescind a

judgement obtained on default of appearance provided that sufficient cause for the default has been shown.

(SEE: HERBSTEIN AND VAN WINSEN 1977 4™ EDITION "THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA" AT PAGE 691.)

[16] The applicant must satisfy two requirements namely that; (1) he must present a reasonable and acceptable explanation for his default, and (2) that on the merits, he has a bona fide defence which *prima facie*, carries some prospect of success.

[17] The applicant in this application has clearly failed to satisfy these two requirements.

[18] Mr. Madzinane also argued that the client must not be made to suffer because of the mistakes of his attorney. Mr. Madzinane's client, the applicant herein, did not file any affidavit. The court does not have his explanation as to what led to the default judgement being granted against him.

[20] From the papers filed before the court however, it is clear to the court that he did not bother to follow up the matter with his attorneys. If the applicant checked on the progress of the matter, he would have been in a position to give instructions to his attorneys to do something quickly about the default judgement that had been obtained against him.

[21] If Mr. Madzinane became aware of the court order on 03.05.06, it means that for the whole month of April 2006, the applicant did not make a follow up on his matter.

[22] The inescapable conclusion from these facts is that the applicant himself was also remiss.

[23] The court having carefully considered the facts of the application and

the submissions made before it will come to the conclusion that the applicant's application must fail.

[24] The court will accordingly make the following order:

(a) THE APPLICATION IS DISMISSED.

(b) THE APPLICANT IS ORDERED TO PAY

       THE COSTS.

<u>NKOSINATHI NKONYANE AJ.</u>
INDUSTRIAL COURT