

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**CASE NO. 524/07**

In the matter between:

**BETTER PLAN INVESTMENT**

**Applicant**

and

**NOLUNTU NTIWANE**

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

**BHEKI MAVUSO (DEPUTY SHERIFF-MANZINI DISTRICT)** **2<sup>nd</sup> Respondent**

In Re:

**NOLUNTU NTIWANE**

**Applicant**

and

**BETTER PLAN INVESTMENTS**

**Respondent**

**CORAM:**

<b>P. R. DUNSEITH</b>	<b>PRESIDENT</b>
<b>JOSIAH YENDE</b>	<b>MEMBER</b>
<b>NICHOLAS MANANA</b>	<b>MEMBER</b>

**FOR APPLICANT**  
**FOR RESPONDENT**

**N. MZIZI**  
**B. MKOKO**

**J U D G E M E N T - 3/12/2007**

1. The 1 Respondent reported a dispute to the Conciliation, Mediation and Arbitration Commission, claiming that the Applicant had underpaid her wages and failed to pay her accrued leave after she resigned.
2. The Applicant failed to attend a Conciliation meeting convened by the Commissioner on 19<sup>th</sup> October 2007, and the dispute was referred to default arbitration hearing without further notice to the Applicant.
3. The arbitrator granted default judgement against the Applicant on the 19<sup>th</sup> October 2007 for payment of the total sum of E6,819-00 to the 1<sup>st</sup> Respondent.
4. On the 27<sup>th</sup> November 2007 the 1<sup>st</sup> Respondent applied to the Industrial Court for the default arbitration award to be made an order of court. The 1<sup>st</sup> Respondent filed an affidavit attesting that the default award had been served on one Futhi Fakudze, an employee of the Applicant above the age of 16 years.
5. The Applicant did not appear to oppose the application, and the default award was entered as an order of court. On 29<sup>th</sup> November 2007 the 1<sup>st</sup> Respondent's representative issued a writ of execution.
6. The Applicant has now applied to the court for an order:

6.1 *Dispensing with the usual forms and procedures relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.*

6.1 *Condoning any non-compliance with the rules of Court.*

6.2 *Pending finalization of the application for rescission of default judgement for the above matter lodged at the CMAC Manzini under CMAC ref. 577/07 execution of the Warrant of execution pursuant to the default be stayed.*

6.3.1 *That a rule nisi do hereby issue calling upon the Respondents to show cause on such date or time as may be determined by the above Honourable Court, why prayers 6.3 should not be made final:*

6.4 *The Deputy Sheriff be hereby ordered to return Applicant's goods in the event attachment and removal has been effected.*

6.4 *Costs of suit only in the event the application is opposed.*

6.5 *Further and/or alternative relief.*

7. In his founding affidavit, the Applicant's director states that he only became aware of the default arbitration award on the 21<sup>st</sup> November 2007. After he was served with the application to make the award an order of court, he enquired from his staff and was told that the award had been received and placed on his desk. He then searched his desk and found the award. He immediately instructed his lawyers to apply for rescission of the default award, and such application was served on the

Commission on the 27<sup>th</sup> November 2007. His lawyers however neglected to attend at court to oppose the award being made an order of court.

8. The Applicant asks the court to stay execution pending determination of the rescission application by the Executive Director of the Commission.
9. The 1<sup>st</sup> Respondent's counsel Mr. Mkoko opposes the application and argues forcefully that the rescission application was filed out of time, since it was delivered on 27<sup>\*</sup> November 2007, more than 14 days after the default award was served on the Applicant. Since the Executive Director of the Commission has no power to condone a late rescission application, no valid rescission application is pending. Mr. Mkoko referred to the judgement of the Industrial Court in the case of : **VIP Protection Services v Nkosinathi Dlamini (IC case No. 694/2006)**

in support of his argument, and he asked that the application be dismissed.

10. In considering its ruling, the court has had occasion to closely peruse the documents filed of record in the court file. Two important issues came to our notice:

10.1 The Writ of Execution dated 29<sup>th</sup> November was issued out by the 1<sup>st</sup> Respondent's representative and addressed to the Registrar of the Industrial Court. It was not issued out and signed by the Registrar of the High Court, as required by law. Prima facie, the writ is a complete nullity.

10.2 The affidavit filed by the 1<sup>st</sup> Respondent as proof of service of the default award is also prima facie defective. The affidavit does not state that service was effected on the Applicant or at the Applicant's premises. It does not state that Futhi Fakudze, the

employee of the Respondent upon whom service was effected, was apparently in charge of the premises at the time. It does not state that the original award was exhibited, or that the nature and exigency thereof was explained to Futhi Fakudze.

11. The upshot of these defects is that there is no proper proof before the court as to when precisely the default award was served on the Applicant.
12. Section 81(9) of the Industrial Relations Act 2000 (as amended) states that any party against whom a default arbitration award has been entered in terms of section 81 (7) may, "*within 14 days from the date on which he had knowledge of such decision*", apply for the award to be rescinded.
13. Due to the prima facie defective nature of the 1<sup>st</sup> Respondent's affidavit of service, and the assertion of the Applicant's director that the Applicant company (as distinct from its employee, Futhi Fakudze) only had actual knowledge of the award on the 21<sup>st</sup> November 2007, we are not persuaded at this stage that it has been established that the rescission application was made out of time. This is an issue that will have to be determined by the Executive Director of the Commission in due course when he considers the application for rescission.
14. We are satisfied that the Applicant has made out a prima facie case for a rule nisi with interim relief.
15. A rule nisi issues, returnable on Thursday 13<sup>th</sup> December 2007 at 9.30 a.m., calling upon the Respondents to show cause why a final order should not be granted:

15.1 Staying execution of the court order granted on 27<sup>th</sup> November 2007 under Case No. 524/07 pending final

determination of the rescission application lodged at CMAC Manzini under CMAC reference No. 577/07.

15.2 Setting aside the writ of execution issued on 29 November 2007 under Case no. 524/07.

15.1 Costs of suit.

16. Paragraph 15.1 shall operate as an interim order with immediate effect pending determination of the rule nisi.
17. The Deputy Sheriff Bheki Mavuso is directed and ordered to restore all the goods which he attached and removed under the writ of execution issued on the 29 November 2007 under case No. 524/07 to the possession of the Applicant forthwith.

The members agree.

PETER R. DUNSEITH

President of the Industrial Cort