

**IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE**

CASE NO. 181/2007

In the matter between:

DONG SHENG (PTY) LTD T/A

NEW YORK CITY STORE

APPLICANT

and

KHULIZONKE DLAMINI

1st RESPONDENT

NONDUMISO MBHAMALI

2nd RESPONDENT

THANDI SIMELAN E

3rd RESPONDENT

NOMSA MASEKO

4th RESPONDENT

THANDEKA SIMELANE

5th RESPONDENT

BETHUSILE DLAMINI

6th RESPONDENT

M. C. SECURITY GUARDS (PTY) LTD

7th RESPONDENT

LINDIWE MALAMBE- MATSEBULA

8th RESPONDENT

MARTIN AKKER (DEPUTY SHERIFF)

9th RESPONDENT

CORAM:

P. R. DUNSEITH : PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT : M. NKOMONDE

FOR RESPONDENTS: S. ZWANE

J U D G E M E N T - 16/05/07

1. The 1st - 6^m Respondents reported a dispute to CMAC on the 27^m March 2006, alleging that they had been underpaid and unfairly dismissed by their employer. The report of dispute does not indicate the identity of their employer. On the face of the report, the Respondents to the dispute are recorded as "Lindiwe Malambe -Matsebula & Another".

2. On the 19^m July, 2006, the CMAC Commissioner referred the dispute to arbitration as per Section 81 (7) (b) of the Industrial Relations Act 2000 (as amended), and granted a default award in favour of the 1st--6th Respondents. The total of the award amounts to E127,025-30. The Commissioner does not state against whom the default award is granted, save to refer to 'the Respondents'. He makes no finding as to whether Lindiwe Malambe - Matsebula or the "other" Respondent is the responsible employer.

3. In September 2006 the 1st - 6th Respondents applied to court for the default award to be made an order of court. The heading to the notice of motion records the 1st Respondent as Lindiwe Malambe- Matsebula and the 2nd Respondent as New York City Store. Attached to the notice of motion were copies of the default award and the report of dispute. Amongst the annexures to the report of dispute is a CMAC form headed RESPONDENTS. The name NEW YORK CITY STORE is entered as 2nd Respondent on this form in blue pen. Whilst the other pages of the report of dispute and its annexures are photocopies, this form with its blue pen entry is an original. The importance of this form is that it purports to be a part of the report of dispute citing the 2 Respondent to the dispute as New York City Store, thus identifying the other party against which the default award was granted.

4. On the basis of this linkage, the court granted an order on 27th September 2006 making the default award an order of court as against Lindiwe Malambe- Matsebula and New York City Store.

5. The 1st - 6th Respondents issued a writ of execution against New York

City Store, which was visited by the Deputy-Sheriff. The present Applicant Dong Sheng (Pty) Ltd has now applied to court for a stay of execution, pending finalization of an application for rescission of the CMAC default award, alleging as follows:

5.1. The Applicant is the proprietor of New York City Store;

5.2. The 1st - 6th Respondents were never employed by the Applicant. They were employed by Lindiwe Malambe-Matsebula's company MC Security Guards and deployed at New York City Store;

5.3. The report of dispute was received by the Applicant by post, but it did not cite the Applicant as a Respondent. It only cited "Lindiwe Malambe- Matsebula & Another". The Applicant gave the report to Lindiwe for her attention. Later, an invitation to conciliation addressed to "Lindiwe Malambe and Another was served, but since the Applicant was not cited the invitation was again referred to Lindiwe.

5.4 In June 2006 the Applicant was served with the default award, which again make no reference to the Applicant.

5.5. In December 2006 when the Applicant was confronted with a court order and writ of execution bearing its trade name, it became aware for the first time that it was somehow involved with the dispute, the default award and the court order.

5.6. The Applicant applied to the CMAC Executive Director for rescission of the default award on 24 April 2007. This application is still pending.

5.7. The Applicant's attorney conducted a search at CMAC offices. He ascertained that the original report of dispute does not cite the Applicant as a Respondent to the dispute. The form with the blue pen entry, which was produced in court to provide a link between the report of dispute and the default award, is not part of the original report of dispute.

5.8. The Applicant alleges that the blue pen form was fraudulently filed in court to induce the court to make an order against New York City Store, yet New York City Store was never cited as a party to the

dispute before CMAC.

6. The 1st - 6th Respondents oppose the application to stay execution of the writ, and argue that there is no rescission application pending before the CMAC Executive Director because the Applicant's application was filed more than three months out of time and the CMAC Director has no power to extend the time limits prescribed by section 81 (9) of the Industrial Relations Act 2000, nor may he condone the late filing.

7. Confronted by this difficulty, counsel for the Applicant wisely sought further cover by applying to amend the Applicant's notice of motion to include alternate prayers as follows:

(a) setting aside the order, as against the Applicant, registering the Default Judgement granted under the auspices of CMAC which order was issued by this Honourable Court on the 27th November 2006 which appears as "Annex DS 1" to the Founding Affidavit.

(b) discharging the writ of execution as against the Applicant issued pursuant to the Order referred to in (a) above; and or

(c) granting a stay of execution of the writ issued in terms hereof as against the Applicant pending the filing of an application, at the High Court, for review of the proceedings which led to the granting of the Default Judgement granted at CMAC in respect of the parties hereto; and or, failing prayers (a) and (b) above.

8. Counsel for the Respondents did not oppose the application for amendment. The court considers that the interests of justice and fairness warrant the granting of the amendment, particularly in view of the serious allegations of fraud that have been made against the Respondents and the representative who appeared on their behalf in court. The Applicant's notice of motion is accordingly amended as prayed.

9. With regard to the application to stay execution pending the application for rescission, the court agrees with the Respondents that no rescission application is pending because the application was filed out of time, and the Executive Director of CMAC has no power to extend \ (the time or condone the delay - see our judgement in the case of **VIP Protection Services v Nkosinathi S. Dlamini (IC Case No. 694/2006)**). The application for a stay of execution pending finalization of the rescission application is accordingly dismissed.

10. With regard to the amended relief sought by the Applicant, this depends upon a finding that the Applicant was not properly cited in the report of dispute. The 1st - 6th Respondents insist in their answering affidavit that the Applicant was properly cited and default award was properly entered against it. The Respondents allege that the citation of the Applicant was contained in the CMAC form headed RESPONDENTS which form was attached to the original report of dispute.

11. The Applicant denies inclusion of such form in the report of dispute. This material dispute of fact cannot be resolved on the papers before the court. It is necessary to hear oral evidence on the issue.

12. The court orders as follows:

(a) The matter is referred to oral evidence on 1st June 2007 on the issue whether the Applicant was properly cited in the report of dispute.

(b) The Executive Director of CIVIAC is ordered to keep safe the original report of dispute (including all annexures thereto) under CMAC Reference No. MNZ 269/2006 and to cause same to be produced in court by an authorized CMAC officer on 1st June 2007 at 9. 30 a.m.

(c) The Applicant is ordered to serve this order upon the Executive Director of CMAC forthwith.

(d) Execution of the writ is stayed pending final determination of this application.

The members agree.

PETER R. DUNSEITH

PRESIDENT OF THE INDUSTRIAL COURT