

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 109/07

In the matter between:

**THE ATTORNEY GENERAL** **1<sup>st</sup> APPLICANT**

**THE PRINCIPAL SECRETARY-MINISTRY  
OF PUBLIC SERVICE & INFORMATION**

**THE CIVIL SERVICE COMMISSION** **2<sup>nd</sup> APPLICANT**

**THE CIVIL SERVICE COMMISSION** **3<sup>rd</sup> APPLICANT**

And

**JOEL LUKHELE** **RESPONDENT**

In re:

**JOEL LUKHELE** **APPLICANT**

And

**THE CIVIL SERVICE COMMISSION** **1<sup>st</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY-MINISTRY  
OF PUBLIC SERVICE &  
INFORMATION** **2<sup>nd</sup> RESPONDENT**

**THE ATTORNEY GENERAL** **3<sup>rd</sup> RESPONDENT**

CORAM:

**NKOSINATHINKONYANE : JUDGE**  
**DAN MANGO : MEMBER**  
**GILBERT NDZINISA : MEMBER**

**FOR APPLICANT: MR. C.S. NTIWANE**

**FOR RESPONDENTS : MR. P. DLAMINI**

RULING 18.05.07

[1] This is an application for the stay of execution and rescission of a default judgement granted by this court on the 30<sup>th</sup> March 2007.

[2] The default judgement was granted by the court in favour of the applicant because on that day when the matter was called there was no appearance for the respondents and no answering affidavit(s) had been filed by the respondents.

[3] The court clearly had no good ground to refuse granting the order sought by the applicant in the circumstances that were prevailing.

[4] In an application for rescission the applicant must give a reasonable explanation for the non-appearance and must also show that on the merits that party has a bona fide defence which, prima facie, carries some prospect of success -

- SEE HERBSTEIN AND VAN WINSEN "THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA" (1997) 4<sup>th</sup> EDITION AT PAGE 691.

[5] The respondents' attorney told the court that he came to court late because he received the Notice of Re-instatement at about 09:45 a.m. and could not make it to court at 09:30 a.m. when the court session started.

[6] This explanation is totally unacceptable as there is evidence that the

Attorney General's office was served with the Notice on the previous day the 29<sup>th</sup> March 2007 at 09:01 a.m. If there are internal administrative problems in that office, these should not stand in the way of an innocent litigant who has no control on how the Attorney General's office should function.

[7] The respondents' attorney stated in paragraph 10 of the Founding affidavit that he "tried to intervene but apparently the court had already taken a stance that I was late".

[8] On that day when the matter was called there was another Government attorney in court. That attorney did not bother to apply that the matter stands down until the end of the roll. When Mr. Dlamini came inside the court Mr. Ntiwane was just concluding his address. Mr. Dlamini did not bother to let the court know that the respondents were still interested in the matter. He only sat down and thereafter went to speak to the clerk and then went out.

[9] It is not the duty of the court to ask an attorney what he or she has to court for. Everybody is entitled to come into the court room to listen to the proceedings. Had Mr. Dlamini informed the court that he was still interested in the matter that had just been called, there was no way that the court would not have entertained him.

[10] Although Mr. Dlamini's name was on record as the respondents' attorney, after the Notice to oppose no further papers were filed to indicate that the respondents were still interested in pursuing the matter. This was made worse by the fact that the Government attorney who was present when the matter was called did not respond or show any interest in the matter.

[11] When Mr. Dlamini eventually decided to show up, he did not take the opportunity to address the court.

[12] The explanation given why there was no appearance on behalf of the respondents is there fore rejected as it not reasonable.

[13] The second ground for the application for rescission will however be upheld by the court.

[14] The applicant's application is that he be paid a salary equivalent to that of an Under Secretary in the Ministry of Agriculture and Co-operatives with all the benefits of that office from the 1<sup>st</sup> July 2005.

[15] The applicant's application is not for the appointment or confirmation in that post.

[16] It seems therefore that, although the explanation for the none appearance is not reasonable, the respondents do have a bona fide defence on the merits.

[17] Taking into account all the aforegoing and all the circumstances of this case, the court will grant an order in terms of prayers 1, 2, and 3 of the Notice of application.

[17] No order for costs is made.

The members agree.

**NKOSIKATHI NKONYANE**

JUDGE - INDUSTRIAL COURT