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 SIMELANE	**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 RESPONDENT:	**S. ZWANE**

J U D G E M E N T -22/08/07

1. In this matter the Applicant seeks an order (as amended) in the following terms:

> (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.
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> (b) discharging the writ of execution as against the Applicant issued pursuant to the Order referred to in (a) above; and or
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> (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.
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> The parties agreed to the President of the Court sitting alone to determine the matter.

2. The Applicant argues that it was not properly cited in the report of dispute, as a result of which it did not appear before the Conciliation, Mediation, and Arbitration Commission for conciliation. Due to the absence of the Applicant, the conciliation Commissioner referred the matter to arbitration and a default award was entered.

3. After considering the affidavit testimony and hearing oral evidence from the parties, I find the following facts to be established:

> 3.1. The Respondent reported a dispute against New York City Store only during early 2006. The Applicant attended conciliation through its representative Sibaliwe Masuku and denied that it was the employer of the workers who had filed the report of dispute. The Applicant claimed that one Lindiwe Malambe-Matsebula or her company MC Security (Pty) Ltd should have been cited as the employer.
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> 3.2. A memorandum of agreement was concluded on 10th March 2006 under the supervision of the Commission to the following effect:
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> > *"The parties agree that the Applicants withdraw this dispute from the commission. However the Applicants reserve their right to*

report another dispute similar to this one against the Respondent citing all the relevant parties."

3.3. A new report of dispute was issued the same day. On its face, the report cites "Lindiwe Malambe-Matsebula & Another" as Respondent. The address of the Respondent is cited as P.O. BOX 3551, Manzini and the telephone number as 505 3869. It is common cause that these are contact details of the Applicant.

3.4. Paragraph 5.5 of the report states that the employees "wrote a letter to the Respondent raising a grievance of rights" and the letter is attached. The letter is addressed to New York City Store.

3.5. The Respondent's representative sent the report of dispute by registered post addressed to The Human Resources, P.O. Box 3551, Manzini. Only one report was sent.

3.6. The report contained a handwritten attachment stating: *"Other Respondent. New York City Store next to Swazi-Bank- Manzini (branch) P.O. BOX 3551, Manzini, Tel 5053869."*

The Applicant's director denied that this attachment was annexed to the copy of the report of dispute served on her, but I find on the probabilities and the evidence that the form was annexed.

3.7. The Applicant's director believed that Lindiwe Malambe-Matsebula or her company were liable as employer for Respondent's claim because Lindiwe had recruited the employees acting as a labour broker and had been responsible for payment of their wages. The Applicant informed Lindiwe about the new report of dispute.

3.8. The Applicant received an invitation through the post to attend conciliation on 18th May 2006 but the invitation was addressed to Lindiwe Malambe-Matsebula and others. The Applicant informed Lindiwe, who was unable to attend because she was indisposed and in an advanced stage of pregnancy. The Applicant sent Sibaliwe Masuku to the Commission on the 19th May 2006 to inform the Commissioner that Lindiwe was unable to attend. The Commissioner recorded on his file on 19 May 2006:

"Both parties attend. Matter postponed to 02/06/06 at HhOO as one of the Respondent's reportedly ill."

3.8. The Commissioner assumed that Sibaliwe Masuku had represented the Applicant on 19th May 2006. He did not issue any further invitation to the parties.

3.9. On 2nd June 2006 neither the Applicant nor Lindiwe Malambe-Matsebula attended at conciliation. The Commissioner had nothing before him which proved that Lindiwe Malambe-Matsebula knew about the conciliation. Nevertheless the dispute was referred to arbitration in terms of section 81 (7) (b) of the Industrial Relations Act 2000 (as amended). The Commissioner seamlessly transformed himself from conciliator to arbitrator. No notice of the arbitration hearing was given to the Applicant or Lindiwe Malambe-Matsebula, although it is noted that the "invitation of parties to conciliation" notice warns that failure to attend without reasonable explanation may result in the dispute being referred to arbitration and default judgement being entered by the defaulting party.

3.10. The Commissioner noted that "Respondent (singular) did not attend". He did not appear to notice that there was more than one Respondent. He heard evidence and thereafter granted default judgement.

3.11. The Commissioner was aware that there was a dispute as to whether the Respondents were employed by New York City Store or Lindiwe Malambe-Matsebula. This issue was not directly canvassed in the evidence, nor did he make any finding. Instead he found that the employees were dismissed unfairly by the "Respondents" and they were underpaid by the "Respondents". He proceeded to grant default judgement for amounts totaling in excess of E125,000.00 against the "Respondents."

3.12. The Respondents applied to the Industrial Court to have the default award made an order of court. The Respondent's representative Patrick Mamba replaced the handwritten annexure to the original report of dispute recording New Your City Store as a Respondent to the dispute with the official CMAC form. I accept that this was done for the sake of neatness and not with any intention to mislead the court.

3.13. The court entered the default award as an order of court, and a writ of execution was then issued. This prompted the Applicant to bring the present application to court. The Applicant also applied to the Executive Director of the

Commission to rescind the default award, but as we held in our previous judgement dated 16 May 2007, the rescission application is time barred.

4. I find that the report of dispute cited the Applicant as a party, but the citation was so obscure that the Applicant could not easily identify itself as a party. Bearing in mind that the Applicant is operated by Chinese-speaking nationals, and that the only direct citation was contained in an unofficial - looking attachment amongst other annexures, I accept that the Applicant would have been in some doubt whether the report was directed to itself or Lindiwe Malambe-Matsebula. The default would have been compounded by the report being posted to "The Human Resources", and the name of Lindiwe Malambe-Matsebula appearing prominently on the front page.

5. The Applicant's confusion would have been increased when the invitation to conciliation did not mention the Applicant's name and was addressed to Lindiwe using the Applicant's postal address.

6. In my view, Sibaliwe Masuku attended the conciliation meeting to postpone the matter until Lindiwe could attend and confirm that she was the employer. To that extent, Sibaliwe may be regarded as having represented Lindiwe at the meeting, although she was also looking after the interests of the Applicant.

7. Section 81 (7) of the Industrial Relations Act (as amended) is a draconian enactment in so far as it allows for conciliation to be automatically converted into default arbitration in the absence of a party. Effectively, it punishes non-attendance at a conciliation meeting by allowing default judgement to be entered by arbitration, without any further warning or notice. In these circumstances, it is incumbent on the Commissioner to scrupulously ensure that proper service has been effected and that all affected parties have been properly notified of:

- the date, time and venue of the conciliation meeting;
- the consequences should the party fail to attend without reasonable execuse.

8. In my view the form of the standard report of dispute used by the Commission is

deficient in that it does not allow the names and address of all Respondents to appear on its face.

9. In this case it is common cause that, although New York City Store and Lindiwe Malambe-Matsebula were separate legal persons and the Applicant's claim (that it is not the employer) was adverse to the interests of Lindiwe:

9.1. the Respondents only sent the report of dispute to the Applicant's box number;

9.2. the Commissioner sent an invitation which did not mention the name of the Applicant;

9.3. there was never any service of any single report or invitation on Lindiwe, and the Commissioner never even noticed this;

9.4. the Commissioner failed to appreciate that he was dealing with two separate legal persons. He failed to keep an attendance register at the meeting of 19 May 2006. He failed to ascertain who was being represented by Sibaliwe Masuku. He made no effort whatsoever to check whether proper notification had been given to all affected parties;

9.5. the Cornrnissiorier entered default judgment against two different parties without considering or deciding which of them was liable as the employer.

10. I have no jurisdiction to review and set aside the decision of the CMAC Commissioner. I do however consider that allowing the default award to be enforced as an order of the Industrial Court will give rise to an injustice. The court would not have made the award an order of court if it had been aware of all the procedural defects and anomalies relating to citation and service. In the circumstances, I shall grant rescission of the order of this court issued on 27th November 2006.

11. The Applicant has a bona fide and triable defence to the Respondents' claim. It should be given the opportunity to ventilate its defence. An astute employer who was familiar with the dispute procedures under the Industrial Relations Act and fluent in the English language might have avoided the default award being granted in the first place, but I am satisfied that the confusion that gave rise to the Applicant's default was predominantly due to unclear citation and improper notification. The blame for this lies with the Commission, not the parties.

12. If the Respondents wish to pursue their claim - and there is no reason why they should not - then they may agree with the Applicant and Lindiwe Malambe-Matsebula to

abandon the default award and return to conciliation. Alternatively, they are free to enforce their award as provided under section 17 (2) of the Act, without the assistance of the court. In the latter event, the Applicant may consider applying to the High Court for the review of the default award.

13. I make the following order:

(a) The order of the Industrial Court dated 27 November 2006 is rescinded and set aside.

(b) The writ of execution issued pursuant to such order is discharged.

(c) There shall be no order as to the costs of the application

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT