

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 91/08

In the matter between:

MASTER GARMENTS (PTY) LIMITED

APPLICANT

And

PETROS MAVTMBELA

1st RESPONDENT

**THE COMMISSIONER OF CONCILIATION
MEDIATION & ARBITRATION
COMMISSION (N.O.)**

2nd RESPONDENT

In re:

PETROS MAVTMBELA

APPLICANT

And

MASTER GARMENTS (PTY) LIMITED

RESPONDENT

CORAM:

NKOSINATHI NKONYANE: JUDGE

DAN MANGO: MEMBER

GILBERT NDZINISA: MEMBER

FOR APPLICANT: G. MASUKU

FOR 1st RESPONDENT: S. DLAMINI

FOR 2nd RESPONDENT: NO APPEARANCE

JUDGEMENT ON RESCISSION APPLICATION

07.07.08

[1] The applicant who was respondent in the main application has applied to the court on Notice of Motion for an order;

"1. Staying/suspending Arbitration proceedings set to commence at CMAC on the 15th May 2008 pending the finalization of this matter.

2. Rescinding and/or setting aside the above Honourable Court's Order issued on the 31st March, 2008 referring the above matter to Arbitration.

3. Granting applicant leave to file its replies to respondent's application for unfair dismissal and have the matter dealt with in the Industrial Court's Litigation structures.

4. Costs of suit.

5. Granting applicant any further and/or alternative relief."

[2] The 1st respondent is opposed to the application and he accordingly filed an Answering Affidavit.

[3] The brief history of the matter is that the 1st respondent instituted legal proceedings before this court for determination of an unresolved dispute between him and the applicant. The applicant did not file its reply and the 1st respondent applied to the President of this court to have the matter referred to arbitration. On the day of the application for referral on 31.03.08 there was no appearance on behalf of the applicant and the order was granted.

[4] In paragraph 8 of the applicant's Founding Affidavit, the deponent states that the order was granted by mistake as there was short service. The applicant states that it was served with the application for referral on Thursday 27.03.08 to be heard on Monday 31.03.08. The applicant also avers in its papers that the service

on it of the main application was improper as it was served on a security guard at the premises of the applicant, and not on an employee of the applicant as required by the rules of this court. The applicant also stated that at the time of the service of the application, there was an industrial action which had become violent and the applicant had closed down its operations hence there was nobody to accept service of the court process until 18.03.08 when the applicant resumed its business operations.

[5] Service of documents on companies is governed by Rule 6 of this court's rules. Rule 6(e) states that;

"If the person is a company or other body corporate, by serving a copy of the document on a responsible employee of the company or body corporate at its registered office or principal place of business, and if-

- (i) there is no employee willing to accept service, by affixing a copy of the document to the main door of the premises; or*
- (ii) the entity has closed down, by affixing a copy on the main door of the premises;"*

It was not in dispute that the service of the application for determination of an unresolved dispute was effected by giving of the documents to a security guard by the name of Jabulani Makhanya, who was not an employee of the applicant but was an employee of VIP Security Services who was stationed at the applicant's premises. The service was therefore defective as it was not effected in accordance with the provisions of the rules of this court.

The applicant's argument in court therefore was that had the court known that

there was improper service on it, the court would not have dealt with the matter on the basis that it was an unopposed application.

[8] The court in the case of **PRAHBUDAS CHANDRAKAT v VICTOR MASHINTNI AND MENZI DLAMINI N.O. In re: VICTOR MASHININI v PRAHBUDAS CHANDRAKAT C/O CITY BOTTLE STORE case No.528/2008 (I.C)** pointed out in paragraph 10 of the ruling that;

"An order is erroneously granted if there was no proper service on the absent party. "

[9] It is clear therefore that had the court known that there was no proper service on the applicant it would not have allowed the matter to proceed *ex parte*.

[10] The court also pointed out in its judgement on 08.05.07 between the same parties *supra* that;

"The court held in its ruling of the 20th October 2006 that an order granted in the absence of a party is erroneously granted if there was no proper service on the absent party. In such a case, the Applicant does not have to show that he has a bona fide defence to the application. He is entitled to rescission of the order granted erroneously in his absence. "

[11] Taking into account all the above observations and all the circumstances of the case, the court will make the following order:

1. An order is granted in terms of prayers 1, 2 and 3 of the notice of motion.
2. The applicant is to file its Reply to the applicant's application within seven days after the delivery of this judgement.
3. There is no order as to costs.

The members agree.

**NKOSINATHI NKONYANE
JUDGE- INDUSTRIAL COURT**