IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 114/2006**

In the matter between:

MAXI PREST TYRES (PTY) LTD **Applicant**

and

SANDRINO DU POINT **Respondent**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**W. MKHATSHWA**
FOR RESPONDENT	**:**	**C. MOTSA**

J U D G E M E N T – 1/12/06

1. On 15 November 2006 the court granted judgement against the present Applicant in favour of the present Respondent for payment of the sum of E73,429.04. This judgement was granted ex parte in the absence of the Applicant which had failed to attend court to oppose the matter or file any defence.

The Applicant has now applied under a certificate of urgency for rescission of the ex parte judgement and leave to defend the main application. An interim interdict was granted by consent, staying execution of the judgement pending finalization

of the rescission application.

2. Mr. Mkhatshwa, who appeared on behalf of the Applicant, argued that the judgement had been erroneously granted in the absence of the Applicant. As such, the court has the power to set it aside (see Rule 10 (a) of the Industrial Court Rules, 1984 as read with Rule 42 (1) (a) of the High Court Rules, 1954).

3. Mr. Mkhatshwa raised two issues in support of his submission that the judgement was erroneously granted:

4.1 service of the main application was defective because it was served at the Respondent's branch office and not at the Respondent's principal place of business within Swaziland;

4.2 the Respondent's claim is res judicata, having already been dismissed by the Industrial Court under Case No. 77/2005.

4. Service of the main application was effected by one Bonginkosi Sibusiso Mkhabela, a messenger employed by the Respondent's attorneys. In his affidavit of service, he attested that he served the application "to Bheki Mathabela a Manager at Maxi-Prest (Pty) Ltd who is more than 16 years, after explaining the nature and exigency of the said application."

5. In its founding affidavit in support of the rescission application, the Applicant's Regional Manager states that the main application was served at the Applicant's Matsapha branch on the Branch Manager,

Bheki Mathabela. Mathabela confirms in a supporting affidavit that he referred the messenger to the Applicant's head office. Mathabela did however sign the original application and it can be accepted that it was served upon him.

6. Rule 4 (2) (e) of the High Court rules provides that in the case of a corporation or a company service shall be effected at the registered office or the principal place of business within Swaziland of the corporation or company. In the absence of any provision for manner of service in the Industrial Court Rules, Rule 4 (2) of the High Court Rules has application.

7. In **Federated Insurance Company Limited v Malawana 1986 (1) SA 751 (A),** The South African Appellate Division stated in respect of sub rule 4 (2) (e) that "*if a company has more than one place of business within the court's jurisdiction, the summons would have to be served at the company's chief or principal place of business within that area……"*

8. In the result, service at the branch office was not good service on the Applicant in terms of the Rule.

9. This case is a good illustration of the principle behind requiring service on a company at its principal office. Corporate administration is normally conducted from the head office, and branch administration may have no mandate nor capacity to deal with court process. In this particular matter it transpires that an identical application was previously served on the Applicant, which vigorously opposed and filed a substantive defence on the merits. That application was dismissed on a technicality. It can be

accepted that the Applicant would have opposed the renewed application also, if it had come to the attention of senior management at head office. The inference can be drawn that Mathabela never properly briefed head office about the application served on him.

10. Although the Industrial Court may condone procedural irregularities and technically defective service, it cannot do so where a party has been prejudiced by the irregularity or defective service.

11. A judgement or order is erroneously granted if there was no proper service on the party in default.

See **Prahbudas Chandrakant v Victor Mashinini & Another (I.C. Case No. 528/2006) at page 4**.

12. The party in default does not have to go further and show that there is good cause for the rescission of the judgement (ibid).

13. Due to the defective service of the main application, the Applicant is entitled to a rescission of the exparte judgement granted in its absence.

14. On the issue of the Respondent's claim being res judicata, it is unnecessary for the court to make any finding in this regard in view of our decision on the issue of defective service. The Applicant may, if so advised, raise this defence in the main application. Suffice it to say that on the papers before court, including the pleadings and court records in Case No. 77/2005, it does not appear that any judgement was given which finally determined the

substantive rights of the parties. If the application under Case No. 77/2005 was dismissed on the technical ground that it should not have been issued under the same case number as a previously-withdrawn application, then the Respondent is certainly not precluded from re-instituting the proceedings based on the yet-unadjudicated cause of action.

15. The issue of costs requires careful consideration. Although the court has found that service of the main application was defective, it cannot be ignored that the Applicant's Branch Manager Mathabela was negligent in bringing the application to the attention of head office management. The fact that the trial proceeded exparte in the absence of the Applicant was due to a minor procedural error on the part of the Respondent, compounded by serious neglect of duty by the Applicant's Branch Manager.

An unnecessary ex parte trial could also have been avoided if the Respondent's attorney had alerted his colleague to the renewed application, as a matter of professional courtesy.

16. Taking account of all these factors, the court considers that each party should settle its own costs.

17. An order is granted in the following terms:

(a) **The exparte judgement entered against the Applicant on the 15th November 2006 under Case No. 114/2006 is hereby rescinded and set aside;**

(b) **The Applicant is granted leave to defend the main application under Case No. 114/2006, and is required to file its Reply within 14 days from the date of this order;**

(c) **Each party is to pay its own costs.**

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT