IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 57/2001

In the matter between:

PARSONS TRANSPORT (PTY) LTD — **APPLICANT**

And

DANIEL MANTIMAKHULU — **RESPONDENT**

In **re;**

DANIEL MANTIMAKHULU — **APPLICANT**

And

PARSONS TRANSPORT (PTY) LTD — **RESPONDENT**

CORAM:

NKOSINATHI NKONYANE: ACTING JUDGE

GILBERT NDZINISA: MEMBER

DAN MANGO: MEMBER

FOR APPLICANT/RESPONDENT: MR. C. MOTSA

FOR RESPONDENT/APPLICANT: MR. N. MTHETHWA

JUDGEMENT 28.06.06

[1] This is an application for rescission of this court's judgement granted on the 7th June 2005.

[2] For purposes of convenience the parties will be referred to as applicant and respondent respectively.

[3] From the papers it was not clear under what law was the application based. In court Mr. Motsa stated that the application was being brought in terms of the common law, High Court Rule 42 (1)(a) and Rule 10 of this court's rules. It was clear to the court however, that the application could not properly be brought in terms of Rule 42(1)(a) of the High Court rules. Rule 42(1)(a) may be invoked only if the court order sought to be rescinded was erroneously granted in the absence of any party affected thereby.

[4] The judgement of the court was not erroneously granted. It was simply granted in default of appearance by the respondent. The correct head therefore under which this application could properly be brought was in terms of the common law.

[5] In terms of the Common law a judgement obtained in default of appearance can be rescinded on sufficient cause being shown. (See **HERSTEIN AND VAN WINSEN: <u>THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA</u> [1977]** 4TH **EDITION AT PAGE 691.)** For the applicant to establish sufficient cause, there are two essential elements that must be satisfied, namely, (1) a reasonable and acceptable explanation for the default, and (2) that on the merits the applicant has *a bona fide* defence which, *prima facie,* carries some prospect of success.

When addressing the aspect of the default, the applicant argued that it was not in willful default when the judgement was granted against it on the 7* June 2005. The applicant stated in its papers that it was having a problem in locating the main witness in the case, a certain Mr. Gert Botha who was the Depot Manager at the Ngwenya premises of the respondent.

The applicant said it instructed its attorney who at that time was Mr. J. Hlophe to apply for a postponement. The postponement was indeed granted by the court. The applicant said that when the matter was called again in court on the 7th June 2005, it was not aware that it was no longer represented and had no reason to think so as no notice of withdrawal was served on it by its former attorney.

The applicant's explanation of the default was no doubt a plausible one. The applicant had the right to believe that it was still represented by the attorney as the attorney never informed it that he was withdrawing from the case. Not only was the attorney unfair to the applicant but he was also discourteous to the court.

It is important to note that when the applicant's former attorney applied for postponement on the 23rd May 2005, he stated before the court that he was not getting the necessary co-operation from his client and therefore wanted to file a notice of withdrawal. He did not however do that. At this point the court will refer to the judgement of Didcott J. in the case of **MACDONALD t/a HAPPY DAYS CAFE V. NEETHLING 1990(4) S.A. 30 (N)** at 31, where he quoted with approval the judgement in the case of **S.V. NDIMA1977 (3) S.A.1095 (N)** as follows:-

"It is quite plain that an attorney must, if he is going to withdraw from a case, withdraw from it timeously and inform his client that he is withdrawing so that the client can make other arrangements or, if there are none whichhe can make and if he wishes to do so, so ***that he may appear in person to argue his appeal.........."***

[10] The court must now enquire whether the applicant has established that on the merits it has a bona, fide defence which *prima facie,* carries some prospect of success. In its papers and in court the applicant did not say much on this ground of rescission. In paragraph 8 of its Founding Affidavit the applicant only stated that it has a bona *fide* defence in that the respondent abandoned work for a period of three days as per the Employment Act No.5 of 1980.

[11] Assuming in favour of the applicant that the respondent absconded from work for three days, the applicant was not however entitled to dismiss the respondent without first holding a disciplinary hearing wherein the applicant would be charged and have a chance to give his side of the story.

[12] The evidence by the respondent revealed that he was absent from work because he was involved in an axident whilst driving the applicant's truck and was hospitalized for the number of days that he was unable to report for work. In its replies the applicant did not deny that the respondent was indeed involved in the accident. Its defence was that the respondent was on a frolic of his own.

[13] Again, assuming in favour of the applicant that the respondent was on a frolic of his own when he met the accident whilst driving the applicant's truck, that clearly cannot carry the applicant's case any further on the merits. The application before the court by the respondent was not a civil suit against the applicant whereby the question whether the respondent was acting within the scope of his employment when the accident occurred could arise. The issue that the court had to concern itself with was the reason why the respondent

was not at work. The respondent was able to produce documentary proof that he had been hospitalised during the period that he was not at work.

[14] Furthermore, the reasons for the two postponements in the main application were that the applicant was unable to locate the main witness. There was no averment in the applicant's papers that they have since located Mr. Gert Botha, the main witness. There will clearly be no good reason for this court to resuscitate the case only to have the respondent again applying for numerous postponements because it is still searching for Mr. Gert Botha.

[15] We therefore come to the conclusion that the applicant has failed to show that on the merits it has a bona fide defence, which carries some prospect of success.

[16] The application is accordingly dismissed with cost.

The members agree.

NKOSINATHI NKONYANE AJ

INDUSTRIAL COURT