IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 366/2005**

In the matter between:

P. RAMUNTU FREIGHT SERVICES (PTY) LTD **Applicant**

and

FORTUNATE HLATSHWAYO

Respondent

In Re:

FORTUNATE HLATSHWAYO **Applicant**

and

P. RAMUNTU FREIGHT SERVICES **Respondent**

CORAM:

P. R. DUNSEITH	**PRESIDENT**
JOSIAH YENDE	**MEMBER**
NICHOLAS MANANA	**MEMBER**

FOR APPLICANT	**P. MSIBI**
FOR RESPONDENT	**T. NDLOVU**

J U D G E M E N T-7/12/06

1. The Respondent instituted legal proceedings against the Applicant in September 2005 claiming payment of E11,200-00 in respect of outstanding wages. The application was supported by a certificate of unresolved dispute issued by the Conciliation, Mediation and Arbitration Commission.

2. The Applicant opposed the proceedings, and filed a Reply setting out its defence. In its Reply, the Applicant appointed B. S. Dlarnini & Associates *do* Mandla Z.

Mkhwanazi & Associates, Ground Floor Lilunga House, Gillfillan Street Mbabane as the address at which it would accept notice and service of all documents and process in the matter.

3. The Respondent filed its discovery affidavit and thereafter on 20th April 2006 the Respondent served notice to make discovery upon the Applicant at its appointed address.

4. Since the rules of the Industrial Court make no direct provision for a discovery procedure, the relevant discovery rules of the High Court may be invoked and applied, in terms of Industrial Court Rule (10) (a).

5. The Applicant did not file its discovery affidavit within the prescribed time, and the Respondent wrote to the Applicant's attorneys of record requesting that the discovery affidavit be delivered with 7 days. After two months had lapsed, a further letter of reminder was sent. When this still provoked no response, the Respondent served notice of an application to compel discovery. Fourteen days notice was given, and the notice was served at the Applicant's appointed address for service.

6. On 30 August 2006 the application to compel came before the court. There was no appearance by or on behalf of the Applicant, which was ordered to file its discovery affidavit within 7 days after service of the order. This order of court was duly served at the Applicant's appointed address on 31st August 2006.

7. On 23rd October 2006 the Respondent applied to court for an order striking out the Applicant's defence and entering judgement by default, on grounds that the Applicant had failed to make discovery notwithstanding due service of the court order. Service of notice of this application was duly effected, but the Applicant failed to attend court or file any opposing papers.

8. The court duly struck out the Applicant's defence and entered judgement by default in favour of the Respondent. In its ex tempore ruling, the court noted that

8.1. service of the application had been duly effected at the Applicant's appointed address for service;

8.2. the Applicant had failed to comply with the order to make discovery;

8.3. it was proper in the circumstances to strike out the Applicant's defence;

8.4. the Respondent's claim was for a liquidated amount in respect of unpaid wages;

8.5. the Applicant's Reply did not disclose a valid defence to the claim for unpaid wages;

8.6. default judgement could be granted as prayed.

9. The court granted judgement for payment of:

9.1. E11200.00 for outstanding wages;

9.2. interest at 9% p.a. from 7 June 2005 to date of payment;

9.3. costs of suit.

10. The Deputy-Sheriff duly attached a motor vehicle in the possession of the Applicant in execution of the Respondent's judgement. This prompted the Applicant to launch an urgent application seeking rescission of the default judgement granted on 23 October 2006 and an interim stay of execution. No interim stay was granted, but the application was set down for arguments on the 28 November 2006.

POINT IN LIMINE (PEREMPTION)

11. At the outset of the hearing, Mr. Ndlovu raised as a point of law in limine that the Applicant has acquiesced in the default judgement rendering the rescission application preempted. Notwithstanding, Mr. Ndlovu's erudite exposition and forceful argument on the law of preemption, the court dismissed the point in limine and undertook to give reasons in the main judgement. The reasons now follow.

12. The right of an unsuccessful litigant to appeal (or rescind) an adverse

judgement or order is said to be preempted if he, by unequivocal conduct inconsistent with an intention to appeal, shows that he acquiesces in the judgement or order -

See **Dabner v SA Railways & Harbours 1920 AD 583 at 594.**

Genturuco AG v Firestone SA 1972 (1) SA 589 (A) at 600 A.

13. The Respondent's counsel argues that the Applicant unequivocally acquiesced in the judgement, and impliedly agreed not to prosecute any appeal or application for review, when its attorney requested to enter into settlement negotiations, and proposed a date when the parties could meet" for purposes of settlement negotiations."

14. Mr. Ndlovu argues that since the only thing to be settled was the judgement debt, a request to negotiate settlement must be construed as a request for time to liquidate the judgement debt. Such request is inconsistent with an intention to appeal or rescind the judgement.

15. In support of this argument, Mr. Ndlovu referred to the dictum of the Appellate Division in the case of **Hlatshwayo v Mare & Deas 1912 AD 242,** as follows:

"... when once a party to an action has done an act from which the only reasonable inference that can be drawn by the other party is that he accepts and abides by the judgement, and so intimates that he has no intention of challenging it, he is taken to have acquiesced in it" - per Solomon JA at 253.

> *"If therefore an unsuccessful litigant asked for time for payment of the amount of the judgement, the only conclusion to be drawn from his request is that he thereby communicates to his opponent his intention not to prosecute the appeal." - per Lord De Villiers CJ at 248.*

48. Whilst the law quoted is undoubtedly sound, the court dismissed the point in limine because it was not convinced that the conduct of the Applicant's counsel, in requesting a meeting for settlement negotiations, points *"indubitably and necessarily to the conclusion that he does not intend to attack the judgement"* (Dabner's case at 594).

49. The term "settlement negotiation" may refer to a discussion regarding a

payment arrangement, but it also means to bargain on the terms by which a dispute may be resolved. Whilst asking for time to pay a judgement debt necessarily implies acquiescence in the judgement, a request to engage in settlement negotiations does not. The proposed settlement may consist of no more than an agreement to pay wasted costs against the abandonment of the judgement, for instance. It is by no means uncommon for an unsuccessful litigant to try and negotiate a compromise to avoid the costs of an appeal, but this does not imply that he abandons his right of appeal should the negotiations be unsuccessful.

50. Courts take cognizance of the fact that parties do not as a rule lightly abandon their rights (see **Alfred McAlpine & Son v TP A 1977 (40 SA 310 (T) AT 324A - 325A).** This court was not satisfied that the only reasonable inference to be drawn from the Applicant's request to meet for the purpose of settlement negotiations is that it accepted and abided by the judgment and had no intention of challenging it should the negotiations be unsuccessful.

19. It was for these reasons that the court dismissed the Respondent's point in limine on the question of peremption.

MERITS OF THE APPLICATION

20. The rescission application was not brought under the rules of court since the Applicant was not in default of delivery of its Reply. A juggement granted by default may however in the discretion of the court be set aside at common law for sufficient cause -

See **De Wet & Others v Western Bank Ltd 1979 (2) SA 1031 (A).**

21. In principle and in the longstanding practice of our courts two essential elements of "sufficient cause" for rescission of a default judgement are:

51. that the Applicant must present a reasonable and acceptable explanation for his default; and

52. that on the merits the Applicant has a bona fide defence which prima-facie carries some prospects of success.

See **Chetty v Law Society Transvaal 1985 (2) SA 756 (A) AT 765 A-C.**

REASONABLE AND ACCEPTABLE EXPLANATION

22. Mr. Msibi for the Applicant candidly accepted that the default judgement was granted due to the negligence of the Applicant's erstwhile attorneys. In his own affidavit, he explains that he was personally handling the matter whilst he was a professional assistant at the firm of B. S. Dlamini and Associates in Nhlangano. When he left that firm, the matter was awaiting allocation of a trial date by the Registrar of the Industrial Court, and the file remained with B. S. Dlamini and Associates.

Msibi speculates that there may have been a breakdown in communication between the office of B. S. Dlamini and Associates, and its correspondent firm in Mbabane, resulting in the notice to discover, correspondence, order compelling discovery and the application to strike out Applicant's defence not being timeously received by the firm in Nhlangano.

This speculation was conclusively quashed by an affidavit made by a clerk from the firm of correspondent attorneys who confirms that all documents and process for B. S. Dlamini and Associates was brought to their attention and timeously collected.

Mr. Msibi and the director of the Applicant both assert that the discovery documentation was never brought to their attention. Msibi states that *"all I had expected was* a *trial date from the Registrar* as *this matter was ready for the same."* He goes to state that *"had / been aware of this process within time I would have called the director of the company authorized to prepare the discovery affidavit and the same would have been prepared as Applicants have nothing to hide in this matter....."*

The court is left with the impression that the attorney-client relationship between Mr. Msibi and the Applicant continued after the former left the employ of B. S. Dlamini & Associates, but Mr. Msibi omitted to appoint his new firm as attorneys of record. Hence the discovery process fell into a professional no-man's land between the

attorneys of record who had no interest, and the attorneys of choice who had no knowledge.

53. Mr. Msibi seems to accept responsibility for this state of affairs, submitting that *"the reason for the non-filing of the discovery affidavit are not as a result of the Director of the Applicant's negligence but has been caused by our own disorganization, the practitioners, in this matter."*

54. Mr. Ndlovu for the Respondent correctly describes the conduct of the Applicant's attorneys as extremely lax constituting a willful default. He submits that the Applicant cannot rely on the ineptitude or remissness of its own attorneys, citing the oft-quoted statement of Steyn CJ in **Saloojee & Another v Minister of Community Development 1965 (2) SA135 (A) at 140:**

"There is limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this court. Considerations ad misehcordiam should not be allowed to become an invitation to laxity..... if, as here, the stage is reached where it must be obvious that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney and expect to be exonerated of all blame.... If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself."

29. Intrinsic in Steyn CJ's dictum and other relevant decided cases is that the court's are reluctant to penalize a litigant on account of the misconduct of his case by his own attorney, and will only do so where a degree of negligence can also be laid at the door of the litigant.

See **R V Chetty 1943 AD 321.**

Regal v African Superstate 1962 (3) SA18 (A) AT 23

De Witts Auto Body Repairs v Fedgen Insurance Co. 1944 (4) SA 705 E at 714.

55. In the present matter, pleadings were closed and the matter referred to the Registrar for allocation of trial dates. Due to the congested hearing list in the Industrial Court, it is not unusual for three years or more to elapse before trial dates are set. In most cases, there will be no further pleadings filed or procedural developments in the period whilst allocation is awaited. Discovery of documents is the exception rather than the rule.

56. In these circumstances, once informed that his matter is awaiting allocation and that he will be informed in due course when trial dates are notified by the Registrar, the Applicant cannot be accused of neglect because he failed to make further enquiries. This is not the kind of case where it had or should have became obvious to the Applicant that his matter was being neglected by his attorneys. Since he could not have anticipated as a layman that an unusual demand for discovery would be made, he cannot be faulted for not making enquiries. It would have been different if there was evidence that the Applicant was aware of the notice to discover and the consequences of a failure to file the discovery affidavit. In the words of Jones J in **De Witts case (supra at 714 B),** the Applicant *"would then not be able to stand passively by. [It] would instead be expected to maintain close contact with [its] attorneys and to exercise a measure of supervision to ensure no further mismanagement."*

32. The court is satisfied that the Applicant was not to blame for the striking out of its defence and consequent entry of judgement by default. The gross disorganization of its attorneys is accepted as a reasonable (albeit lamentable) explanation for its default.

BONA FIDE DEFENCE

33. This brings me to the question whether the Applicant has shown that it has a bona fide defence to the Respondent's claim. It is sufficient if the Applicant makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle it to a dismissal of the claim. It need not deal fully with the merits of the case and produce evidence that the probabilities are actually in its favour.

See **Grant v Plumbers 1949 (2) SA 470 (O) at 476 -7**

34. The Respondent was employed on about 9th November 2004. In her particulars of claim she avers that her agreed monthly salary was E2800-00. She received payment for November and December 2004, but in January and February 2005 she received no salary at all. In March and April 2005 she only received part-payment of her salary. She received nothing in May 2005. She resigned on 7th June 2005. At the date of her resignation, she was owed E11200.00 in unpaid wages by the Applicant.

35. The defence relied upon by the Applicant is set out in its Reply. The defence may be summarized as follows:

35.1. The Applicant had enough money in its bank account to cover the Respondent's wages for the months in question;

35.2. The Respondent in collusion with a fellow employee Thembumenzi Mavimbela misappropriated the money in the Applicant's bank account as well as other business collections.

35.3. The money misappropriated by the Respondent in collusion with her co-workers is in excess of E 13,000-00 and this exceeds the amount of her claim.

35.4. The Applicant is not to blame for the Respondent's salary underpayments. Since the shortages arose as a result of Respondent's own conduct, the maxim volenti non fit injuria applies.

35.5. The Applicant does not owe the Respondent anything. On the contrary, it is the Respondent that owes the Applicant.

36. In essence, the Applicant has raised the legal defences of:

36.1. set-off; and
36.2. volenti non fit injuria

SET - OFF

37. In terms of the common law, an employer's claim against his employee may be set off against an employee's remuneration provided that the

common law rules relating to set-off are satisfied-

See **Schierhout v Union Government 1926 AD 286 at 290.**
R v Frame 1940 (2) PH K 65 (T).

38. Where the common law rules do not permit set-off to apply, the employer may not make deductions from an employee's remuneration without his consent

McLeon v Risch 1914 CPD 731

39. In terms of the common law, an unliquidated claim cannot be set-off against a liquid debt. Thus a counter-claim for unliquidated damages based on fraud or misappropriation cannot be set-off against a liquid claim for unpaid wages.

Treasurer General v Van Vuuren 1905 TS 582 at 589.

Adjust Investments v Wiia 1968 (3) SA 29 (0) Christie:

The Law of Contract (4th Ed) 554-555.

40. A defendant whose claim against the plaintiff cannot be set-off because it is not liquidated has a remedy in terms of Sub-rules 22 (4) and (5) of the High Court rules of court. Together with his plea he may file a counterclaim, then apply that judgement in convention be postponed pending judgement in reconvention.

Christie (op.cit) at 555.

41. The present Applicant cannot rely on a defence of set-off. The Respondent's claim for wages is a liquidated debt, whereas the Applicant's claim for unliquidated damages is but a claim yet to be determined. The Applicant did not file any counterclaim, and the question of postponement of judgement does not arise.

42. Even if the Applicant's defence of set-off were sustainable at common law, it cannot stand due to the provisions of our statutory law:

42.1. Section 56 of the Employment Act 1980 (as amended) lists the circumstances under which the law authorizes an employer to make deductions from the wages of

an employee.

42.2. Section 57 (1) prohibits any deductions in respect of alleged bad or negligent work by the employee, even where the employee consents to the deductions.

42.3. Section 57(2) allows deductions from wages in respect of loss or damage to employer's property issued to the employee, but only with the written consent of the employee and where such loss or damage has been caused by the default or neglect of the employee concerned.

42.4. Section 64 provides that any employer who makes any deductions from the wages of an employee contrary to the provisions of the Act commits an offence.

43. Commenting on a statutory prohibition against unauthorized deductions, Rose Innes J explained the purpose of such protection as follows:

"Clearly the object of the Clause read as a whole was to save the employee from himself, and to protect him against his employer and others with whom he might be induced to have dealings, by ensuring that money earned by him should (subject to specific exceptions) pass directly and without deduction into his own hands."

New Rietfontein Gold Mines v Misnum 1912 AD 704 at 709.

44. The effect of prohibiting an employer from making unauthorized deductions from the wages of an employee is to limit the common law right of set-off to only such claims as may lawfully be deducted in terms of Section 56 and 57 of the Employment Act.

See **Small & Others v Noella Creations (1986) 7 ILJ 614 (IC).**

(c.f. Ringrose: The Law & practice of Employment (2nd Ed) at 76.)

45. The Employment Act prohibits the Applicant from deducting a loss it alleges it has suffered as a result of theft or misappropriation, from the Respondent's salary. The Applicant may go to court and seek to prove and recover its loss from the Respondent, but in the meantime it must pay the Respondent's salary as and when it falls due.

46. The defence of set-off has no merit both at common law and in terms of the statutory provisions contained in the Employment Act 1980 (as amended).

VOLENTI NON FIT INJURIA

47. One who causes damage is not liable therefor if the injured party consented to the harm or consented to the risk of harm. "Consent to the injury excludes the wrong."

(Volenti non fit injuria)
Malherbe v Eskom 2002 (4) SA 497 (O).

48. The defence of volenti non fit injuria is raised in response to a delictual claim involving the breach of a duty of care, where it is alleged that the claimant consented to the breach of duty, or voluntarily incurred the attendant risk. It has no application whatsoever as a defence to a contractual claim for unpaid wages.

49. In the premises, the defences raised by the Applicant in its Reply are devoid of merit and have no prospect of success. For this reason, the Applicant has failed to show sufficient cause entitling it to an order rescinding the default judgement granted on the 23 October 2006.

The application is dismissed with costs. Since the Application was argued simultaneously with the application in case No. 365/ 2006, the Applicant is only entitled to recover half of the costs in respect of the hearing of the matter.

The members agree.

PETER R. DUNSEITH

PRESIDENT OF THE INDUSTRIAL COURT