

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 524/07

In the matter between:

NOLUNTU NTIWANE

Applicant

and

BETTER PLAN INVESTMENT

Respondent

CORAM:

P. R. DUNSEITH : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR APPLICANT : N. MZIZI

FOR RESPONDENT : B. MKOKO

J U D G E M E N T – 12/12/07

1. On the 3rd December 2007 the Industrial Court issued a rule nisi calling upon the Respondents to show cause why a final order should be granted .

1.1 Staying execution of the court order granted on
27th November 2007 under Case No.524/07

pending final determination of the rescission application lodged at CMAC, Manzini under CMAC Reference No. 557/07.

1.2 Setting aside the writ of execution issued on 29th November 2007 under Case No.524/07.

1.3 Cost of suit.

2. Pending determination of the rule nisi, the court granted an interim stay of eviction.

3. In our reasons for granting the interim stay of execution, we found that the writ of execution issued on the 29th November 2007 is prima facie invalid because it was not issued out and signed by the Registrar of the High Court, as required by the law. (See the judgment of Sapire ACJ in Manzini City Council v Workers Representative Council HC Case No.567/97). The Respondents have not adduced any evidence or cited any law to disturb this finding, and it follows that the writ must be set aside.

4. With regard to the stay of execution pending determination of the rescission application, we found that the Respondents had not at that stage shown the rescission application was made out of the two reasons:

4.1 The affidavit in proof of service of the default award was prima facie defective; and

4.2 The evidence of the Applicant's director that the Applicant company (as distinct from its employee Futhi Fakudze) only had actual knowledge of the award on 21 November 2007.

5. The 1st Respondent subsequently filed a further affidavit which remedies the defects contained in the affidavit in proof of service and establishes that service of the default award was indeed effected on Futhi Fakudze on 31st October 2007. This does not however mean that the 1st Respondent had knowledge of the default award on the 31st October 2007.
6. The knowledge of an employee can not be attributed to her employer the same way that the knowledge of a director is attributed to the company that he represents. An agent is an agent of the company with ostensible authority to act on its behalf. An employee is not in the position of an agent, unless given a special mandate.
7. There is no evidence that Futhi Fakudze was authorized to receive service of the default award on behalf of the Applicant, hence there is no basis for attributing her knowledge of the award to the Applicant. The allegation of the Applicant's director that he only became aware of the award on 21 November 2007, has been neither denied nor challenged. This allegation must be accepted, and it follows that the Applicant company only had knowledge of the award through its director on 21 November 2007. In the circumstances, the rescission application appears to have been

timeously made. In any event as we previously stated, this is an issue for final determination by the Executive Director of CMAC when he considers the application for rescission.

8. The rule nisi is confirmed, and a final order is granted:

8.1 Staying execution of the court order granted on 27th November 2007 pending final determination of the rescission application lodged at CMAC, Manzini under CMAC Reference No. 577/07.

8.2 The writ of execution issued on 29 November under Case No. 524/07 is set aside.

9. There is no order as to cost.

The members agree.

PETER R. DUNSEITH

PRESIDENT OF THE INDUSTRIAL COURT