IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 230/08

In the matter between:

M P FOOD PROCESSORS (PTY) LTD
Applicant

and

NONHLANHLA ZULU & 7 OTHERS **1st Respondent**

THE EXECUTIVE DIRECTOR OF CMAC **2nd Respondent**

CORAM:

P. R. DUNSEITH : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT : S. SIMELANE

FOR 1ST RESPONDENT: S. MSIMANGO

FOR 2nd RESPONDENT: A. LUKHELE

J U D G E M E N T - 02/09/2008

1. This matter was argued before the Industrial Court together with the matter of M P Food Processors (Pty) Ltd v SMAWU and Another (I.C. Case No. 232/08) because the factual background and the relief sought are somewhat similar in both matters. There are however certain important differences in the two matters which warrant two separate judgements.

2. On or about 2nd May 2007 the 1st Respondents reported a dispute to CMAC, complaining that they had been unfairly dismissed by the Applicant. After conciliation took place the parties entered into a memorandum of agreement dated 3rd August 2007 in terms of which the Applicant agreed to re-engage the 1st Respondents within one week.

3. The Applicant was represented at the conciliation by one Ephraim Dlamini, an industrial relations consultant, who signed the agreement on behalf of the Respondent.

4. In terms of the agreement, both parties agreed to the agreement being lodged with the Industrial Court by CMAC and made an order of court. Nevertheless CMAC did not then lodge the agreement.

5. On 27th August 2007 the 1st Respondent applied to the Industrial Court for the agreement to be made an order of court. After receiving notice of this application, the Applicant applied to CMAC to rescind the memorandum of agreement on the grounds that the Applicant had never authorized Ephraim Dlamini to appear at the conciliation meeting at CMAC Manzini on its behalf, let alone to sign an agreement binding the Applicant to re-engage the 1st Respondents.

6. Ephraim Dlamini made an affidavit in support of this rescission application, confirming that he had no authority to enter into the agreement. He said he signed the agreement "*under the impression that the terms thereof would be ratified by the company's management.*"

7. The Applicant's rescission application directed to CMAC was entirely misconceived. Neither CMAC nor the Commissioner who facilitated the conciliation has any power to "rescind" or set aside a memorandum of agreement. The appropriate remedy for a party that believes for lawful reason that it is not bound by an agreement reached at CMAC is to simply inform the other party to the agreement and CMAC that it repudiates the agreement, or - if a more pro-active response is called for - to oppose any attempt to enforce the agreement and/or to apply to a court of appropriate jurisdiction for an order declaring the purported agreement to be null and void.

8. CMAC wrote to the Applicant rejecting the rescission application and pointing out that the application was beyond its jurisdiction in that the Industrial Relations Act, 2000 (as amended) makes no provision for rescission of an agreement.

9. For some unfathomable reason the Applicant did not accept the rejection of its application, and insisted that the issue be addressed by the CMAC Commissioner. At the same time, the Applicant opposed the court application to have the agreement made an order of court, and on 11th September 2007 the application was postponed sine die.

10. On 29th January 2008 the 1st Respondent inexplicably instituted another application under Case No. 19/2008 for the agreement to be made an order of court. This application was also opposed by the Applicants and the matter was removed from the roll.

11. The matter was taken no further until early June 2008, when CMAC forwarded a batch of agreements to the Industrial Court to be registered and made orders of court. Included in this batch was the same agreement entered into on 3rd August 2007 between the 1st Respondents and Ephraim Dlamini purporting to act on behalf of the Applicant.

12. CMAC did not give notice to either party that it was lodging the agreement to have it made an order of court.

It was not obliged to give notice in terms of the agreement, but in view of the fact that the Applicant had unequivocally informed CMAC (by way of the rescission application) that it repudiated the agreement, the interests of fairness and justice clearly required that notice be given to the Applicant.

13. On 6th June 2008 the Industrial Court made the agreement an order of court. In so doing the court was unaware that:

13.1. the Applicant had repudiated the agreement, and

13.2. there were two earlier applications for the agreement to be made an order of the court still pending in the Industrial Court, and that both such applications were opposed by the Applicant.

14. We can say without hesitation that if the court had been made aware of the full circumstances of the matter we would not have made an order without giving the Applicant the opportunity to be heard in opposition. Not only had the Applicant unequivocally indicated its opposition to the order, but it had set out prima facie grounds why the agreement should
not be made an order of court: to wit, that the person who signed on behalf of the Applicant was not authorized to conclude a settlement agreement on behalf of the Applicant.

15. We are of the view that the Applicant is entitled to relief. The Applicant prays for rescission of the court order we granted on 6th June 2008, and leave to oppose the application to make the agreement an order of court. We shall couch our order in slightly different terms than those prayed for.

16. The court makes the following order:

(a) The order of court granted on the 6th June 2008 under Case No. 230/2008 is hereby rescinded and set aside.

(b) The applications in Case Nos. 19/2008 and 230/2008 are stayed pending determination of the application in Case No. 403/2007.

17. The Applicant states that it does not seek any costs order against CMAC or the 2nd Respondent, but asks for costs against the 1st Respondents. The 1st Respondents did not apply for the order that has now been rescinded. There is no basis to award costs against them. We make no order as to the costs of the application.

The members agree.

PETE R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT