**IN THE INDUSTRIAL COURT OF SWAZILAND**
**HELD AT MBABANE**

**CASE NO. 271/05**

In the matter between:

**YKK SOUTHERN AFRICA [PTY] LTD**
**SWAZILAND PLANT** **APPLICANT**

and

**JABU MTHETHWA & 3 OTHERS** **RESPONDENT**

**IN RE:**

**JABU MTHETHWA & 3 OTHERS** **APPLICANT**

**AND**

**YKK SOUTHERN AFRICA [PTY] LTD**
**SWAZILAND PLANT** **RESPONDENT**

**CORAM:**

**NKOSINATHI NKONYANE: ACTING JUDGE**

**GILBERT NDZINISA: MEMBER**

**DAN MANGO: MEMBER**

**FOR APPLICANT/RESPONDENT Mr. M. SIBANDZE**

**FOR RESPONDENTS/APPLICANTS Mr. Z. DLAMINI**

**JUDGEMENT 12.05.06**

[1] This is an application that was brought before the Court on a certificate of

urgency by the applicant who was the respondent in the main application.

[2] The Court will mention that it is regrettable that the judgement had to be handed down so late. This was occasioned by the excessive workload presently being experienced by the Court.

[3] The present applicant is entreating the Court to make an order rescinding this Court's order granted on the 22nd November 2005.

[4] The application is opposed.

[5] The history of the matter is briefly as follows; the respondents who were the employees of the applicant were retrenched. The matter was reported to the Conciliation Mediation and Arbitration Commission, hereinafter referred to as CMAC. An agreement was reached at CMAC on the 5th July 2005, and the parties signed a memorandum of agreement regarding the terminal benefits. The terms of the agreement were that the respondents should be paid severance allowance; leave pay and additional notice.

[6] The agreement was in terms of Section 85(2) of the Industrial Relations Act No.l of 2000 registered and made an order of the Court.

[7] The respondents were also paid their pension benefits by the YKK Swaziland Pension Fund. The amounts making up the pension benefits were specifically narrated. For example, Jabu Mthethwa's appeared as follows:-

| | |
|---|---|
| *1. Members contribution with interest* | *E36,945:93* |
| *2. Employers contribution with interest* | *E10,556:10* |
| *3 Total benefit* | *£47,502:03* |
| *4. Less tax* | *E3,738:90* |
| *5. Net payable to the member* | *E43,763:93* |

[8] Jabu Mthethwa's cheque was accordingly showing the amount of E43,763:93 as her pension benefit.

[9] The applicant however deducted the sum of E10,556:10 from that amount as it claimed that it was entitled to a refund of its contributions to the Pension Fund. The applicant deducted the employer's contribution from each of the applicants' cheques. The applicants instituted proceedings before the Court seeking the recovery of the deducted amounts. The application came before the Court on the 8th November 2005. The matter was postponed until the 22nd November 2005. On that day there was no appearance on behalf of the present applicant, and the order was granted in default.

[10] The present rescission proceedings is against that order of the Court which was made on the 22nd November 2005. Regarding rescission applications, **HERBSTEIN AND VAN WINSEN IN THEIR BOOK "THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA" (1997) 4th EDITION AT PAGE 691** stated the following:-

> *"In terms of the common law the Court has power to rescind a judgment obtained on default of appearance provided that sufficient cause for rescission has been shown. The term 'sufficient cause'defies precise or comprehensive definition, but it is clear that in principle and in the long-standing practice of our courts two essential elements are:*
>
> *(1) that the party seeking relief must present a reasonable and acceptable explanation for his default, and (2) that on the merits that party has a bona fide defence which, prima facie, carries some prospects of success.*"

[11] The explanation that the applicant gave for the non-appearance was that there was a communication breakdown at its attorney's office. The attorney who was handling the matter filed a confirmatory affidavit in which he stated that indeed the default was due to the communication breakdown between him and the attorney who was in Court when the matter was before the Court prior to the granting of the judgement. That attorney also filed his confirmatory affidavit.

[12] The evidence showed that it was the applicant's intention to oppose the application. The question now is whether the applicant should be blamed for the shortcomings of its representative? The answer is no. This was the answer that was also given by Maphalala J, in the High Court case of **PIETER DE VILLIERS V. FEEDMASTERfA DIVISION OF NGWANE MILLS! IN RE: FEEDMASTER SWAZILANPfA DIVISION OF NGWANE MILLS) V. PRO-FEEDS AND PIETER DE VILLIERS CIVIL CASE NO.647/2005** (unreported) also dealing with rescission of judgement. At page 2 of the judgement the Learned Judge held as follows:

> "The judgment was granted solely as a result of the Applicant's attorney's shortcomings/or inattentiveness and not because of his default. No blame therefore can be apportioned to Applicant for the resultant award of the judgment against him."
>
> Similarly, in this case, no blame can be apportioned to the applicant for the non-appearance of its attorney.

[13] The other requirement in such applications is that the applicant must show that on the merits, it has a bona fide defence, which *prima facie,* carries some prospects of success.

[14] It was argued on behalf of the applicant that the cheques issued to the respondents included both the employer and the employee's contributions to the pension fund. The applicant argued that it was entitled in terms of Section 34 (3) of the Employment Act No.5 of 1980 to deduct from any pension payable to the employee an equivalent of any severance payable to the employee, or the equivalent of the contributions made by the employer to the pension fund on behalf of the employee, whichever amount is the lesser.

[15] In paragraphs 20-21 of the applicants' Founding Affidavit, it was averred that the applicant was entitled to make deductions of its contributions to the

pension fund. It was further argued that the applicant was entitled at common law to set off any amounts owed to it in respect of its contributions to the pension fund pay-out.

[16] Section 34 (3) states that:-

"***If any employer operates or participates in, and makes any contribution to, any gratuity, pension or provident fund (other than the Swaziland National Provident Fund established by the Swaziland National Provident Order, 1974) which is operated for the benefit of his employees, the employer on termination of employment of an employee, shall be entitled to repayment from the gratuity pension or provident fund equal to the employer's total contributions to that gratuity, pension or provident fund in respect of the employee to whom a severance allowance is to be paid under this section.***"

[17] Section 34(4) states that:

"The amount of the repayment under subsection (3) shall not exceed the total amount of the severance allowance paid by the employer under subsection (1)."

[18] In terms of Section 34 (3) therefore, it is clear that the applicant is entitled to repayment from the pension fund an amount equal to the employer's contribution to the pension fund as it had paid severance allowances to the respondents.

[19] Taking the example of Jabu Mthethwa again, the evidence showed that she was paid an amount of E45,600:00 as severance allowance. The employer was therefore entitled to repayment from the pension fund of its total contributions, as it had paid severance allowance to her. That repayment however is not to exceed the amount of E45,600:00 in terms of Section 34 (4). The evidence showed that the employer's contributions with interest as regards Jabu Mthethwa was E10,556:10. That amount clearly does not exceed

the sum of E45,600:00 which was the amount of severance allowance paid to her.

[20] The evidence by the applicant that the YKK Southern Africa Pension Fund's procedure was to release a cheque to the employee and not to the employer was not disputed by the respondents. Furthermore, the evidence that the cheque included both the employer and the employee's contributions to the pension fund was not disputed.

[21] It was therefore not clear to the Court why the respondents had any problems with the conduct of the employer of deducting its contributions to the fund from the cheques issued to them, as it was the procedure that the fund issued one cheque in the name of the employee, and that such cheque included both the employer and the employee's contributions.

It is clear to the Court therefore that in the light of this evidence, the applicant has more than enough prospects of success on appeal.

Mr. Dlamini argued that the applicant having failed to deduct its contributions before the agreement was entered into, it waived its right to later claim the amounts.

Dealing with the question of waiver, **CHRISTIE R. H. IN HIS BOOK "THE LAW OF CONTRACT IN SOUTH AFRICA" (2001) 4th EDITION AT PAGES 511-512** stated the following:-

"*Having gone to all the trouble to acquire contractual rights people are, in general unlikely to give them up. There is therefore a presumption, even in some cases a strong one, against waiver. That means not only that the onus is upon the party asserting waiver to prove it, but that although, as in all civil cases, the onus may be discharged on a balance of probability, it is not easily*

*discharged.*"

[25] The learned author further stated at page 512 that:-

"*To this it is only necessary to add that it has repeatedly been held that clear proof is required, especially of a tacit as opposed to an express waiver.*"

[26] In this case the respondents' attorney failed to show why the Court must find that the applicant waived its right to deduct the monies due to it. Accordingly the submission was without any merit and will be dismissed by the Court.

[27] In the light of the above-mentioned observations, the application should succeed.

[28] The Court will accordingly make an order that the order of the Court granted on the 22nd November 2005 is hereby rescinded and set aside.

No order for costs is made.

The members agree.

**NKOSINATHI NKONYANE A.J**
**INDUSTRIAL COURT**