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IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CIV.CASE NO.95/92**

In the matter between:

SWAZILAND CHARCOAL (PTY) LTD	**Applicant**
and	
THE PRESIDENT OF THE INDUSTRIAL COURT OF SWAZILAND	**1st Respondent**
RAYMOND DLAMINI	**2nd Respondent**

C O R A M : **DUNN J.**
FOR APPLICANT : **MR SHILUBANE**
FOR THE 2ND RESPONDENT : **MR NDZIMANDZE**

RULING ON APPLICATION FOR REVIEW

12 March 1993

This is an application to review and/or set aside a decision of the Industrial Court given in favour of the second respondent on the 26th November 1991. I made a ruling on the 18th September 1992 remitting the matter back to the Industrial Court for purposes of enabling preparation of the record relating to what transpired on the 26th November prior to the delivery of the Industrial Court's decision. I believe that the distribution of my ruling of the 18th September was limited. As such ruling has to be read together with the present ruling it will be convenient for purposes of completeness to reproduce what is set out in the earlier ruling at this stage. The ruling was as follows-

" The second respondent (as applicant) instituted an action against the applicant (as respondent) in the Industrial Court, claiming compensation for injuries he

/sustained...

sustained in the course of his employment with the applicant. The applicant opposed the action and filed the necessary papers setting out its defence. The matter was set down for hearing and it appears from the judgment of the learned president of the court that some evidence was led on behalf of the second respondent and that Mr Shilubane appeared for the applicant. In the course of this evidence it became necessary that two further parties be joined as respondents in the action. There was an adjournment of the proceedings to the 16th August 1991 to enable the joinder of the parties. The matter could not be proceeded with on the 16th August and was post-poned to the 17th September. On the latter date Mr Shilubane was not available but had a professional assistant standing in to request a further post-ponement. The matter was thereupon post-poned to the 26th September and from then to the 12th of November.

It is set out in the judgment, that none of the respondents were present on the 12th November and that the court "decided to proceed with the hearing pursuant to Rule 7(14) of the Industrial Court Rules". The rule in question reads -

> 7(14) where the respondent fails to appear, the court may -
>
> (a) proceed with or adjourn the hearing; or
>
> (b) after hearing the case for the applicant make a decision.

The court proceeded with the case and ordered that the second respondent "be paid a sum of E11,232.00 by way of compensation by the three respondents." The learned president dealt with the question of the post-ponements that

had been made in the course of the trial and concluded, "The respondents have acted with deliberate delay in defending these proceedings then falling out completely. They are condemned in costs. The applicant is awarded the costs of the proceedings pursuant to Section 11(1) of the Industrial Relations Act."

It is set out in the papers filed on behalf of the applicant that the applicant's default on the 12th November was due to an error by Mr Shilubane who had inadvertantly diarised the matter for the 12th December 1991. It is set out and confirmed by Mr Shilubane that the Industrial Court was approached on the day (26th November) when judgment was to be handed down, with a request that the matter be re-opened to enable the applicant to cross-examine the 2nd respondent's witnesses and to present its own case. This request, it is stated, was refused by the court.

The gist of the grounds upon which the present application is concerned is that the Industrial Court erred in proceeding with the matter on the basis that it was an uncontested matter in the light of the defence filed and the applicant's appearance and participation in the proceedings to the stage when the order for joinder was made. The submissions in support of the applicant's case call for a consideration and the proper application of Rule 7(14). The Rule confers a discretion on the Industrial Court in cases where a respondent fails to appear. Such discretion must, however, be judiciously exercised to ensure fairness and the harmony in industrial relations which the dispute procedures under the Industrial Relations Act seek to facilitate. The court was not functus officio at the stage when the application to re-open the case was made. The court was in the circumstances obliged to consider the application and give a reasoned ruling thereon. The application before me

/does no...

does not, however, contain any record of the proceedings on the 26th November. All that I have is the statement by Mr Shilubane that he applied to have the case re-opened before judgment was given. There is no record of what reasons were advanced in support of the application and no indication as to the reasons given by the court for refusing the application. There is the suggestion in the judgment that the respondents were deliberately delaying the proceedings. It would, however, not be correct to conclude that that was the reason for refusing the application for the simple reason that the learned President was, at that stage of the judgment, dealing with the question of costs. It is essential in my view, that a record of the proceedings of the 26th November be made available setting out the application that was made together with the court's ruling and reasons therefore. It would then be open to the applicant to seek appropriate relief on review, to this court.

The matter is in the circumstances remitted to the Industrial Court for purposes of preparing, if one does not exist, a record of the proceedings of the 26th November reflecting the applicant's application, the court's ruling and its reasons therefore.

Leave is granted to the applicant to renew the present application on the same papers, supplemented as may be necessary, in the light of the record of proceedings."

The record kept by the President has now been filed and the matter has been argued before me. The record reflects that on the 26th November Mr Shilubane applied to lead the evidence of the second respondent (present applicant). Mr Motsa who appeared on behalf of the present respondent is recorded as having objected to the application on the grounds that there was no explanation in support of the application.

The question of an error in diarising the matter for the 12th December 1991 was not raised on the 26th November. There was, in the circumstances, no explanation given for the applicant's default on the 12th November. The Industrial Court was not at any stage called upon to address its mind to the reason/s for the applicant's default. The applicant was, in my view, under a duty to show, at the very least, that it was not in wilful default, along the lines of applications for the removal of a bar or rescission of a default judgment under the High Court Rules. The matter ought to have been raised and decided before the Industrial Court and not raised as a new issue before this court on review.

The applicant cannot in the circumstances of this case be heard to complain that it was not given an opportunity of being heard. An opportunity was granted but the applicant defaulted. There is in the circumstances no ground upon which the decision of the Industrial Court can be brought on review before this court.

The application is dismissed with costs.

B. DUNN

JUDGE