

IN THE HIGH COURT OF SWAZILAND

a:Tibiyo

1

Paul Siba Simelane

v

Tibiyo Taka Ngwane

Case No 3061/97

Coram S W Sapire A C J

For Applicant A Shabangu

Respondent T Masuku

Judgment

This was an application to rescind a judgement entered by the applicant against the respondent. I will continue to refer to Simelane as the Applicant and Tibiyo Taka Ngwane as the respondent as was done in the original application notwithstanding that their positions were reversed in the application for rescission

The applicant served notice of intention to apply for an order compelling the Respondent to pay to the Applicant an amount of E29 700,00, said to be unpaid wages for the months of January to September 1997 and for a further order that the respondent continue to pay the Applicant his salary as and when it became due for payment whilst an employment contract alleged by the Applicant to be current and operative between the parties continued to subsist. The applicant also sought an order for interest and costs.

I doubt that it was competent as applicant has done in the second claim to sue for money which was not due and owing at the time of institution of the proceedings.

The Notice of Motion was delivered to the Respondent at its head office at Lozitha but the identity of the individual to whom the documents were handed and his or her position in the Respondent has not been stated by either of the parties. In view of the allegations now made by the Respondent, and the reasons advanced as to why timeous notice of intention to oppose was not given, this information is most relevant In cases such a this one, especially where a corporation is the defendant it is difficult to determine whether a party is in wilful default, if it is not apparent that the relevant document came to the knowledge of the executive in whom the conduct of the business

TIBIYO.

2

a:Tibiyo

is vested

Notice of intention to oppose the application was not given timeously and on 31st October 1997, the matter having been enrolled for that date without further notice to the Respondent an order was made in the absence of any representative of the Respondent. The order made was incompetent in at least two respects. Firstly as I have indicated the court should not have ordered payment of monies not yet due and owing as claimed in prayer 2. of the notice of motion. Secondly it made an order requiring the Respondent to pay certain monies to a third party, namely the Swaziland Building Society when such relief was not mentioned in the Notice of Motion

The Respondent in applying for rescission of the judgment has raised a number of points. The first relates to the notice of motion itself. The applicant has not followed the form for notices of motion prescribed by the rules. The rules require that the notice should inform the Respondent that if the application is to be opposed the respondent is to deliver a notice of intention to oppose within a specified number of days and within a further period to deliver the replying affidavits. The rule states that the Respondent is to be further informed that if notice of intention to oppose is not filed the matter will be set down on a particular date, being a day not less than seven days after the time for giving notice to oppose has expired. The applicant has not in the notice of motion specified such a date and has merely stated that in the event of notice to oppose not being given the matter would be set down without further notice to the Respondent.

The purpose of the rule requiring the Applicant to inform a Respondent who does not intend to oppose the matter, in the notice of motion, when the matter, will be set down, is not apparent. It may be that the Respondent has some residual right, notwithstanding not having given timeous notice of intention to oppose, to appear on the date which should have been specified in the notice and offer objection to the granting of the order. This would mean that if the applicant did not set the matter down for the day mentioned in the Notice of Motion, it could not be set down on some other day and the respondent would have to be given fresh notice. This is not what I understand the practice to be. I do not intend to answer this conundrum. Nor do I intend to make any finding on the jurisdictional question raised by the Respondent

I am sufficiently satisfied that the Respondent never intended to allow the matter to be decided on an unopposed basis or that it intended to abandon the defence that it claims it has, namely that the contract was terminated on the grounds of the applicant's protracted absence. I am not impressed with the provisions Respondent has made for accepting and dealing with court process, but Respondents failure to deal timeously with the notice of motion is a result of inefficiency not willfulness. There are issues between the parties which the interests of justice require to be fully canvassed. I accordingly order that

TIBIYO.

3

a:Tibiyo

1. The order granted by this court in the absence of the Respondent on 31st October 1997 be set aside
2. The Respondent is given leave to give notice of intention to oppose the application
3. The Respondent is to file its Replying Affidavits within seven days
4. The Respondent is to pay the costs of this application

S W Sapire

A C J TIBIYO.