IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE	**Case No. 923/2018**
In the matter between:	
THE ATTORNEY GENERAL	**Applicant**
And	
TIMOTHY TSABEDZE	**Respondent**
In Re:	
TIMOTHY TSABEDZE	**Applicant**
And	
JUSTICE B.N. MAGAGULA N.O.	**1st Respondent**
A. NTIWANE N.O.	**2nd Respondent**
D. MANGO N.O.	**3rd Respondent**
THE TEACHING SERVICE COMMISSION	**4th Respondent**
THE MINISTRY OF EDUCATION	**5th Respondent**
THE ATTORNEY GENERAL	**6th Respondent**
THE REGISTRAR OF INDUSTRIAL COURT OF ESWATINI	**7th Respondent**

Neutral citation: *The Attorney General v Timothy Tsabedze & Others (923/2018) SZHC188[2019] (07 October 2019).*

Coram : **Maphanga J**

Date heard : **14 March 2019**
Date delivered : **07 October 2019**

Summary : *Civil Procedure – Rule 42 – Application for Rescision of judgment – what constitutes an error in terms of Rule 42(i) (a) – error justifiable under Rule 42(i)(a) includes a legally held order or judgement erroneously granted if not legally competent sufficient ground for rescission of rule order or judgment. Whether competent for the High Court to grant relief on account of a party's defendant and appearance in a review and proceedings emanating from the special jurisdiction of the Industrial Court held judgment by default not competent upon review.*

Judgment

[1] The applicant has brought this motion for an order rescinding certain orders issued by this Court on the 1st February 2019 pursuant to an uncontested application for judicial review of a judgment of the Industrial Court of the 18th April, 2018. The applicant also presently seeks a stay in execution of the said orders pending the hearing of the review application in due course.

[2] The application itself and the matters giving rise to it have a vexed and drawn-out background. I propose to broadly sketch the material facts and circumstances as are necessary for locating the adjudication of this application.

[3] The origins of the matter are that in November 2017, the 1st Respondent, the said Timothy Tsabedze a former principal of Mzimnene Lutheran Primary School was dismissed from this post and discharged from the teaching corps by the 4th Respondent (The Teaching Service Commission) following the conduct of ta disciplinary process. Aggrieved by the termination Tsabedze declared a dispute under the statutory mechanisms for unfair dismissal remedies culminating in a suit before the Industrial Court in which Tsabedze sought relief under divers heads being claims for:-

a) reinstatement (to this pre-termination position); or alternatively in lieu thereof
b) payment of:-
    i) terminal benefits in the sum of E663,705.60
    ii) maximum compensation for unfair dismissal in the sum of E182,519.04
    iii) costs of suit;
c) further and/or alternative relief

[4] All these prayers for relief were predicted on the substantive cause of action being a finding of unfair dismissal as a ground for invoking the remedial jurisdiction of the Industrial Court in terms of Section 16 of the Industrial Relations Act 2001.

[5] In due course the matter came to be enrolled and heard by the Industrial Court, Justice B.W. Magagula presiding and the court on the 18th April 2018 delivered its judgment dismissing Tsabedze's claims.

On the 21st June 2018 the 1st Respondent brought an application before the High Court in terms of Rule 53 of the High Court Rules in which application he sought the following substantive relief; - being:-

1) "(An order reviewing, correcting and setting aside the judgment of the Industrial Court of 18th April 2018 in terms of which it dismissed all claims of the applicant as against the 2nd Respondent (sic) under case No.37/2016; (and)

2) Substituting the decision of the '*Court a quo'* dismissing Applicant's prayers in terms of the application to Court with costs)"

As regards, these prayers, I must highlight that clearly the 1st Respondent's allusion to a '*Court a quo*' was meant the Industrial Court – being an inferior court whose judgment was sought to be reviewed corrected and set aside and also in that context by reference to the "substitution" of that Court's judgment with grant of the applicants' prayers in terms of the application, he adverts to the specific heads of the itemised claims predicated on a finding of unfair dismissal.

[6] It is common cause that Tsabedze's Review application was duly served on the various cited respondents including the Teaching Service Commission represented by the applicant, presently, the office of the Attorney General. The latter filed proper notice opposing the application on the 13th July 2018.

[7] For some obscure reason probably to do with the procurement of the record or other administrative causes, the application seems to have lain fallow until 16th October 2018 when a record of the proceedings before the Industrial Court was eventually placed before the High Court.

[8] The filling of the record of proceedings did not elicit any amendments to the original application of further affidavits on the applicants part as catered for by the Rule for review applications.

[9] It is significant to note, and this is again a matter of common cause that by this time no opposing affidavit had been filed by the Respondents to context the application for review. Indeed no such affidavit would eventually be filed in the matter, with the Respondents contending themselves with filing a solitary notice in terms of Rule 30 raising certain technical objections to the certification of the Record of proceedings.

[10] It is further common cause that on the 11th December 2018 that Rule 30 Notice was eventually withdrawn by the Applicant (the office of the Attorney General) some six months after the launch of the Review application.

[11] What is of particular interest is that even at the time of the withdrawal of the Rule 30 Notice the application remained substantively unopposed for want of an affidavit by either the respondent in any way contesting or challenging the application for review.

[12] Thereafter the record indicates there were no few than a series of 3 Notices of set down issued by the 1st Respondent and at each turn the matter being inexplicably removed. In due course it would be eventually set down as an unopposed application in the non and unopposed motions of the 1st February 2019 when at the instance of the (1st Respondents)

applicant the order sought to be rescinded were entered in terms of prayers 1 and 2 of the notice of application for Review that I refer to in paragraph 5 of this judgement.

[13] It is those orders whose rescission is now sought by the applicant.

Rescission.

[14] As a general rule of our common law once a Court has granted an order or pronounced judgment on a matter becomes *functus officio* and subject to circumscribed exceptions it has no authority alter and supplement it. It is trite position that this rule does not affect interlocutory orders which are regarded by their nature as susceptible to amendment and or variation.

[15] I shall not eminerate or list the generally recognized exceptions to the above rule for the reasons that such a list is not exhaustive exceptional circumstances are not germane to these proceedings.

[16] It suffices to say for the purposes here that the Applicant asserts the common law and Rule 42 as the basis for the sought rescission of the orders in question.

Rule 42(1) sets out grounds for rescission on follows:-

> 42. Variation and Rescission of orders.
>
> i) The court may, in addition to any other power it may have, *mero motu* or upon application of any partly affected, rescind vary;
>
> a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
>
> b) an order or judgment in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;
>
> c) An order or judgment granted as the result of a mistake common to the parties.

[17] During the hearings of this application, Mr. Simelane who appeared on behalf of the applicant submitted that the rescission was being pursued on the basis of Rule 42 (1)(a) as a specific instance and alternatively on the common law.

However, paragraph 21 of the Applicants' founding affidavit explicitly sets out grounds akin to the provision of the rule as basis for the application and much of Mr. Simelane's submissions were dedicated to this argument.

[18] The central issue to be determined is whether the application evinces the jurisdictional circumstances for the proper application and the rule relied on. In other words has the Applicant demonstrated an underlying error to the orders sought to the rescinded of the kind referred to in the rule.

Error

[19] The question as to what constitutes an error justiciable in terms of the rule is a vexed one to which there is no judicial consensus. For that reason the true scope of the rule in that regard is not settled.

[20] There is thus a question whether the concept of an order or judgment erroneously granted is confined to the existence of a "fact" of which the judge was unaware but of which if he or she was apprised of at the time of issuing that order would have been impelled not to grant that order (see ***Nyingwa v Moolman*** **N.O.1993 (2) SA 508 (TKGD) at section10**).

[21] The judgment of ***Erasmus J. in Bakoven Ltd v GJ Howes (Pty) Ltd*** has provided support for the preposition that by reference to error in the granting of an order or judgment is that rule is intended to mean a mistake in a matter of law appearing on the proceedings of a court and record or to mean an error that can be readily ascertained "*ex facie*" the record of the proceedings (see Herbstem Van Winsen, 5th edition at page 32 and ***Tom v Minister of Safety and Security*** **[1998] I All SA 629 E** where the learned Erasmus had reaffirmed the view).

[22] Yet in ***President of the RSA v Eisenberg and Associates*** **[2005] (1) SA 245 (W) at 264, HJ Erasmus J,** took the view that the phrase erroneously sought or granted should not be confined to errors apparent in the record of the proceedings.

[23] In ***First National Bank of SA Ltd v Jurgens*** **[1993] (1) SA 245 (W) at 247 D-E**, Leveson J. construes the ambit of the rule narrowly apply only to circumstances where an applicant has sought and been granted an order different from that to which he was entitled under the cause of action as pleaded. Thus the learned judge rejected the motion that a court should be confined to the record is proceedings in deciding whether a judgment or order was erroneously granted (see also Stander and a ***N.O. v ABSD Bank*** **[1997] (4) SA 873 (E) at 882 C – G.**

[24] Now it is not in dispute that the orders issued by this Court were granted in the absence of the respondents on account;

a) of their failure or neglect to file opposing papers to the application; (default).
b) their non-appearance before the Court on the day the matter was set down for hearings.

[25] Now Mr. Simelane has been at pains to argue the case for the applicants seeking to explain and support the applicants default in relation to the common law (alternate) basis for the sought rescission.

That falls miserably short of a reasonable explanation for the default. The other reason the common law cause cannot succeed is that no case for a bona fide defence has even been exempted in the Applicant's papers.

[26] Instead the entire application appears predicated squarely on the provisions of rule 42 in that when it comes to the cause for rescission this has been framed in terms of the rule solely on the ground that this court was led into error in so far as it is alleged.

> "The order was granted erroneously in my absence as Counsel for the Respondents on their basis that review applications the review court does not substitute the decision of the Court a quo but refers the matter to that Court for it to make the necessary corrections".

[27] Mr. Simelane who appeared for the applicant devoted much of his submissions towards advancing the central tenet to his case as an error tuning on the want of legal competence on the part of the Court to grant the substitution order. To this end, he urged that in so far as the substitution order granted in default, the Court was led into error and that for that reason the order was erroneously granted in the sense contemplated by Rule 42(1)(a). This is a different premis to the ground of an "error in the proceedings or a patent error in the making of the order such as for an example an arithmetic calculation or an unintended order repugnant to the substance of the Courts judgement".(see ***The Motor Vehicle Accidents Fund*** v ***Senzo Gondwe (Civil Appeal No.66/2009)[2010] SZSC 21 (30 November 2010)*** and the cases considered therein).

[28] In ***Athmaram v Singh*** **1989 (3) SA 953 (D) at 954 E, Nienaber J.** dealing with an application for a rescission of an order striking out judgement before him held that if the order had been "legally incompetent" for purposes of Rule 42(1)(a) of the uniform Rules of Court (In reference to the South African High Court rules in *pari materia* with our Rule 42(1)(a), that constitutes an error as envisaged by the rule.

[29] This leads to the next question whether the order complained of (the Substitution order) was legally incompetent as suggested by the Applicant's Counsel. The enquiry must be determined with due regard to the context and legal circumstances within which it was made.

[30] Thus the vital question to be answered here is firstly:-

a) whether the point raised by the applicant regarding the alleged error constitutes proper cause to ground a rescission and or variation of the order sought to be unpinned in regard to the substitution relief and;[1]

b) whether in fact the proposition that this Court lacks the institutional competence to substitute its own for substantive relief order of the Industrial Court on the merits in the context of its tensional jurisdiction.

[31] These questions although starkly and severally stated are in fact intrinsically intertwined. As specifically regard the record aspect of the matter it is necessary to examine the principles concerning substitution orders in the context of a review.

[32] It is a general principle of our common law that a Court should be reluctant to arrogate to itself and assume the decision-making power entrusted to another functionary upon review of that entity's decision. I understand this to be a truism in the field of judicial review of administrative bodies 'decisions and has been expressed as a facet of the separation of powers doctrine. (see ***Johannesburg City Council v Administrator, Transvaal & Ano.*** **1969 (2) SA 72 (T)** ***(or "the JCC case); Premier, Mpumalanga and Another v Executive Committee of Association of State aided schools 1999 (2) SA 91 CC)).***

[33] It is important to note that here the power of substitution in these authorities is treated as an aspect of judicial review discretion as opposed to the Applicants argument in case contending for its exclusion as an incompetent order.

The pointed question should then be is the power of substation over decisions of the Industrial Court precluded from the discretion of the High Court upon review of decisions of that Court? That is the central tenet of the Applicant's case.

[34] Mr. Simelane intends the Industrial Court is not legally qualified to substitute its own order for the judgment of the Industrial Court or to enter upon an enquiry in the substantive aspects of the matter at all.

[35] The traditional approach to the question of substitution as a feature of the Court's discretion upon judicial review is to incline towards almost always remitting a matter of the decision-maker for reconsideration (see ***Gauteng Gambling Board v Silverstar Development Ltd & Others*** **2005 ZASCA 19; 2005 (4) SA 67 (SCA)** at para 1).

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[1] Y1990(2) SA 446

[36] I must stress that Mr. Simelane's arguments for purposes of the rescission or variation presently is confined to the substitution order so that in the final analysis the default judgment or grant of the prayer for review setting aside of the IC stands the Applicants seeks the remittal of the remedial aspects of the orders to the Industrial Court as the only competent Court to deal with the same.

[37] That is another way of saying the proper course regarding the remedy was to refer the matter to the Industrial Court with directions for reconsideration of the Respondents claim for compensation.

[38] Traditionally as a matter of practice at common law there are four considerations or criteria that the Courts have applied in deciding whether substitution is appropriate, - namely; –

i) where the end result is a foregone conclusion and thus remittal would be futile and a perfunctory act or formality given the inevitable outcome:-

ii) a delay causing unjustifiable prejudice to the aggrieved party;

iii) a finding of bias or incompetence on the part of the decision-maker so that it would be manifestly unfair to subject the applicant to the same jurisdiction again; and or

iv) where the Court finds itself in as good a position as the administrator to take the decision itself.

[39] In ***Swaziland Television Authority v Judge Nkonyane N.O. & Others*** **(4372/09) [2012] SZHC,** His Lordship Hlophe J dealt with a prayer for a substitution relief and in deciding whether having determined to review and set aside a decision of the Industrial Court considered factor (iii) above as an instance in support of the proposition that there may be instances where upon review the High Court may substitute its decision for that; and the Industrial Court.

In that case the learned Judge referred **to *Traube & Others v Administrator Transvaal 396 (CT) 1989 (2) SA 408 A;Yates v University of Bophuthatswana & Others* 1994 (3) SA 815 (BGD).**

[40] Mr. Hlophe who appeared for the Respondent relied on the authority of the Swaziland Television case as supporting a rebuttal of the proposition that it was not competent for the Court to grant the substitution order or that the order was "erroneously" sought.

[41] Whilst the soundness of the Courts' reasoning in the Swaziland Television case cannot be doubted given the peculiar facts and that case whether if invariably holds true is another

matter. In that case there is no question that the Court (High Court) was in good a position to itself decide the issue that was before the Industrial Court as a Court of first instance;

Namely whether the recommendation of the Chairman of the d.c. should be set aside and that the d.c. hearing should be heard *de novo.*

[42] Unlike the ***Swaziland Television*** case the nature of the order for whom substitution was sought is of a different nature and magnitude. It concerns the special remedial powers as a matter of the institutional competence of the Industrial Court distinct from that of the High Court.

[43] The specialist province and function of the Industrial Court derives from statute; the court being a creature of statutory law; the initial provisions defining its jurisdiction and remedial competence lying in sections 8 and 16 as read with the constitution.

[44] The specialist judicial function of the Industrial Court is entrenched in section 139(1) (b) of the Constitution. Its primary source however derives from section 8(1) of the Industrial Relations Act 1 of 2000 which confess exclusive jurisdiction on the Court for the adjudication of applications, claims, complaints on fringement of any statutory rights or matters "which may arise at common law between an employer and an employee in the course of employment.

[45] Specifically the Court is conferred with exclusive remedial powers in terms of section 16(1) which provides as follows:-

> ***"16. (1) If the Court finds that a dismissal is unfair, the Court may:-***
>
> ***(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal; or***
>
> ***(b) order the employer to re-engage the employee;***
>
> ***(c) order the employer to pay compensation to the employee".***

[46] These provisions underscore and leave no doubt as to the exclusive and specialist remedial powers of the Industrial Court. The obverse position is that the High Court is not "in a good position" and therefore hamstrung by jurisdictional limitations to grant remedial relief upon review; which precludes the court from entering upon the substance of a claim or matter to substitute its decision.

[47] In ***Gauteng Gambling Board v Silverstar Development Ltd and others*** **[2005] ZASCA** 19; **2005 (4) SA 67 (SCA)** the court recognized the principle that a court might be limited on account of expertise, experience and other factors from substituting a decision of an administrative authority. ***Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape, and Another*** **[2007] ZAECHC 149, 2007 (6) SA 442 (Ck),[2008] 1 All SA**

142 (Ck) (Intertrade case") the Court adopted a similar approach suggesting that the institutional competence or to be in a good position' was a threshold or prerequisite condition to substitution.

In that case, Plasket J. held that: ***"(t)he availability of proper and adequate information and the institutional competence of the Court to take a decision. One necessary prerequisites .....for substitution".***

[48] Applying this principle to the situation where the exclusive competence of the Industrial Court is by Statutory imperative, it seems to me to be a plausible proposition that the High Court is precluded from itself granting remedial relief in context of determining review applications.

Similarly, I think the Court's only option upon setting aside of the decision of the Industrial Court in a matter involving the adjudication of a claim for compensation which is a matter outside its competence would be to remit the matter for re-consideration.

[49] In the circumstances of this case I am persuaded that although there was no error in the proceedings or the substitution order was in the circumstances erroneously sought and as such the court led into error in granting the same as the relief was outside of the competence of the Court.

[50] This is not to say a substitution order in lieu of a renewable judgment of the Industrial Court is legally incompetent but simply that in instances where the substitution order would entail a remedial outcome involving the revisional court entering into assessment and award of compensation, as contemplated by section 16 (c) such an order would offend against the principle that the Court must be in a good position to itself make the award.

[51] In the result the order granted in default stands, save in so far as the substitution order is hereby varied to this effect-that the matter is remitted to the Industrial Court for re-consideration of the respondents claim.

[52] I make no order as to costs.

MAPHANGA J
Judge of the High Court

Appearances :
For the Applicant : Mr. M. Simelane
For the Respondent : M. Hlophe