

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 254/99

In the matter between:

FREDERICK MAVUSO

APPLICANT

And

SITA SIVE GARAGE (PTY)

1ST RESPONDENT

C. BESTER

2nd RESPONDENT

CORAM

KENNETH NKAMBULE:

JUDGE

DAN MANGO:

MEMBER

GILBERT NDZINISA:

MEMBER

MS. K. DLAMINI:

FOR APPLICANT

MR. E. HLOPHE:

FOR RESPONDENT

RULING

15/12/00

This is an application brought as a matter of urgency to rescind-

(i) An order of this court dated 4th August, 2000 granted against the applicants under case no. 254/99

(ii) Staying the execution of the judgement of 4th August, 2000 granted against the applicants under case no. 254/99 by this court.

According to applicant the papers were wrongly served. He contends that they were served to one Philisiwe Sibandze who is employed by SITA SIVE TAKE AWAYS; and that they were supposed to be served at SITA SIVE Garage.

Respondent contends that Sita Sive Take Away and Sita Sive Garage are under one premises and they both belong to second respondent. The said

Philisiwe Sibandze at the lime was respondent's employee attached at the take away department of respondent business. This has not been disputed by the applicant.

I accept the evidence of the respondent and I find that proper notice of this application was given to the applicants.

The question to be considered is/has the court the power to rescind an order or judgement in the circumstances advanced by the applicant.

It has always been accepted that the court enjoys wide powers at common law to rescind any order or

judgement if it can be shown that some fraud had been committed by the opposite side or indeed by a party which had in some measure affected the decision of the court. Obviously from the papers filed by the applicant no fraud is imputed to anyone.

The court in addition to its common law powers is vested with wide jurisdiction in rescinding its orders or judgement by Rule 42 (1) of the High Court rules. This rule empowers the rescinding or varying of any order or judgement where there is an ambiguity or patent error or omission but only to the extent of such ambiguity, error or omission.

Besides this, it has also powers to act men motu, irrespective of what the litigating parties attitudes are.

The principles upon which the court acts in applications such as the present one were considered by Nathan C.J. in a survey of South Africa decisions on the matter in the case of MSIBI V MLAULA ESTATE (PTY) LTD 1976 SLR 345 See also SHONGWE V SIMELANE 1977/78 SLR 183. From these Cases it is clear that an applicant in a case such as the present must:

- a) give a reasonable explanation of his default and show that he was not in willful default.
- b) show that his application is bona fide and not made with the intention of merely delaying the plaintiff's claim.
- c) show that he has a bona fide defence to the plaintiff's claim.

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The applicant set out that he was not in willful default and attributed the default to the fact that the respondent served a wrong establishment, Sita Sive Take Aways instead of Sita Sive Garage. However, respondent has deposed in an affidavit that he knows the person who was served and that at the time she was employed at Sita Sive Take Aways which is at the same premises as Sita Sive Garage and these two businesses belong to applicant. The said Philisiwe Sibandze who received the application was applicant's servant at the time.

Looking at the application one cannot say applicant has a bona fide defence. Applicant failed to give respondent/applicant a hearing before dismissal. This only goes to show what chances applicant has if the application for rescission would be granted. For this reason this court believes that the applicant has no bona fide defence in the main claim.

On a careful consideration of the application, I have come to the conclusion that the applicant has not satisfied the requirements necessary to entitle him the relief sought.

Under circumstances the application fails. No order as to costs. Members concur.

KENNETH P. NKAMBULE

JUDGE (INDUSTRIAL COURT)

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