

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 434/2006

In the matter between:

INTERPARK SWAZILAND (PTY) LTD

APPLICANT

and

THOBILE ZWANE

RESPONDENT

IN RE:

THOBILE ZWANE

APPLICANT

and

INTERPARK SWAZILAND (PTY) LTD

RESPONDENT

CORAM: S.

NSIBANDE A.

ACTING JUDGE

NKAMBULE P.

MEMBER

THWALA

MEMBER

MS. L. MNGOMETULU

FOR APPLICANT

MR. C. MOTSA

FOR RESPONDENT

JUDGEMENT OF RESCISSION APPLICATION

26th FEBRUARY 2009

[1] The Applicant, who was the Respondent in the main application has applied to Court on notice of motion for an order: "*1. Dispensing with the normal forms procedure and rules of the above Honourable Court and hearing this matter as one of urgency, 2. That a Rule Nisi be issued calling upon the Respondent to show cause why an Order in the following terms should not be made final:*

2.1 *Staying Execution of the writ in the above matter pending finalization of this application.*

2.2 *Granting the Applicant rescission of an ex parte judgement in the above matter.*

2.3 *Further and/or alternative relief.*

[2] *That the Order in prayer 2.1 and 2.2 above operate with immediate interim relief pending the outcome of this matter."*

[3] The Respondent is opposed to the Application and she accordingly filed an Answering Affidavit to which the Applicant replied.

[4] The brief history of this matter is that the Respondent applied to the Industrial Court for determination of her unresolved dispute. The Applicant filed a reply and the matter was allocated a trial date by the Registrar of the Court. The trial commenced on 26th March 2008 with both parties represented by their attorneys. Respondent gave her evidence and was subsequently cross-examined by the Applicants attorney. Her attorney closed the Respondent's case without any other witnesses being called.

[5] On 9th June 2008, when the Applicant was to start its case, there was no appearance on its behalf and the matter was postponed to 10th June 2008. On the 10th June 2008, Mr. Mabila appeared for the Applicant and indicated he was withdrawing as its attorney. He filed an notice of withdrawal and undertook to file an affidavit of in proof of service of the notice of withdrawal as attorneys of record. The said affidavit was subsequently filed.

[6] After two postponements the matter was set down for hearing on 29th July 2008. There was no appearance by or on behalf of the Applicant and the Court being satisfied with the affidavit of service allowed the Respondent to proceed. After considering the evidence of the Respondent the Court entered judgement in her favour for payment by Applicant of the sum of E15, 953.84 and costs. The Respondent issued a writ in execution of this judgement.

[7] The Applicant has now brought an urgent application for an order rescinding the judgement on the grounds that service of the notice of withdrawal as attorney of record was irregular.

[8] By consent of the parties, execution of the judgement was stayed pending determination of this application. The parties further agreed on the time frames for the filing of an answering affidavit by the Respondent and a replying affidavit by the Applicant.

[9] At the hearing of the matter the Respondent argued on the issue of urgency and submitted that the matter was not urgent. The Court finds that the issue of urgency was overtaken by events particularly in view of the fact that full sets of papers had been filed by the parties within the agreed period.

[10] On the merits, the Applicant states that although the notice of withdrawal as attorneys of record was served on its Manager, it was in a sealed envelope addressed to the Applicant's Johannesburg office. The nature and exigency there of was not explained to the Manager. As a result no importance was placed on the envelope so delivered nor was there any

explanation given to the recipient in Johannesburg a certain Mr. Hannes Botha, being Applicant's Regional Manager.

[11] The affidavit filed of record in proof of service of the notice of withdrawal as attorneys of record is made by one Zama Matsebula. He states simply that he served the notice of withdrawal on the Respondent "*at Interpark Swaziland (Pty) Ltd at Swazi Plaza Mbabane by leaving a copy with the Thomas Gamedze (Manager) after having explained the nature and exigency thereof.*"

[12] The Applicant however, states in its papers that the messenger delivered a sealed envelope to its Manager and that the said envelope was addressed to its Johannesburg office. The messenger in his confirmatory affidavit, filed in support of Respondent's opposing the rescission application admits having served a sealed envelope containing the notice of withdrawal on the Manager, Mr. Thomas Gamedze. He insists however that he explained the nature and exigency thereof to Mr. Gamedze. Mr. Gamedze's version of events appears more probable.

[13] It appears to the Court that the messenger's purpose in going to Interpark Swaziland (Pty) Ltd at the Swazi Plaza was not to serve the notice of withdrawal on the Applicant but to facilitate its delivery to the Johannesburg office. This is consistent with Mr. Mabila's assertion that he was at all relevant times taking instructions on this matter from the Johannesburg office. The office of the Applicant at Swazi Plaza was being used as a conduit to deliver the notice of withdrawal to Johannesburg. Applicant was not being served with the process, but it was being used as

a "*posting agent*" to deliver the notice to Johannesburg. That can not be proper service.

It appears to the Court that no proper service of the notice of withdrawal as attorneys of record was effected on the Applicant. **(See rule 4(2)(e) of the High Court Rules of Court)**

[16] The Court would not have allowed the matter to proceed had it been made aware of the manner in which the notice of withdrawal as attorneys of record was made.

[17] In view of the defective service of the notice of withdrawal, the Court shall rescind the judgement of 16th September 2008 in terms of **Rule 20 (1) (a) (i) of the Industrial Court Rules 2007**. It is not necessary in terms of that rule for the Applicant to establish it has a *bona fide* defense.

[18] The application is granted and the judgement of 16th September 2008 is hereby rescinded and set aside. We make no order as to costs.

The members agree.

ACTING JUDGE OF THE INDUSTRIAL COURT