



IN THE INDUSTRIAL COURT OF SWAZILAND
JUDGEMENT

CASE NO. 373/2014

In the matter between:-

ITALIAN SCORPION SECURITY

APPLICANT

AND

SIPHO CYRIL NKONGWANE

1ST RESPONDENT

SILENCE GAMEDZE

2ND RESPONDENT

IN RE:

SIPHO CYRIL NKONGWANE

APPLICANT

ITALIAN SCORPION SECURITY

RESPONDENT

Neutral citation : *Italian Scorpion Security v Sipho Cyril Nkongwane & Another (373/2014) [2014] SZIC 53 (10 December 2014)*

CORAM : **DLAMINI J,**
*(Sitting with D. Nhlengetfwa & P. Mamba
Nominated Members of the Court)*

Heard : **12 SEPTEMBER 2014**

Delivered : **10 DECEMBER 2014**

Summary: Civil Procedure – rescission application – Applicant for rescission failing to show good cause for default but having a bona fide defence to one of the claims – Court using its discretion granting rescission in respect of one of the claims and refusing rescission on the other.

1. This matter is a rescission application. The Applicant for rescission is the Respondent in the main application before Court. It is a security company trading under the name Italian Scorpion Security. The company has run to Court seeking that, pending the finalization of this matter, the execution of the order granted by this Honourable Court on 06 August, 2014 be stayed. In the main, the security company seeks an order for the rescission of the order granted on 06 August 2014 and an order for costs. The application is opposed by the 1st Respondent, Siphon Cyril Nkongwane.
2. The common cause facts of this matter are as follows; In May 2013, the 1st Respondent employee reported a dispute with the Conciliation, Mediation and Arbitration Commission (CMAC) about underpayments of his salary and non-payment in respect of holidays worked. Conciliation was successful it would seem because it resulted in the parties endorsing a memorandum of agreement. In terms of the memorandum signed at CMAC, the parties agreed that the Employee would be paid an amount of E742.39 (Seven hundred and forty two emalangen and thirty nine cents) on the 15th June 2013, for the holidays worked. The agreement of the parties further provided

that the Employer was also to pay the Employee in respect of underpayments and that such amount to be paid was to be agreed upon between the parties. The payment in respect of underpayments was to be made in six equal installments from July 2013 to December 2013. This memorandum was made an order of this Court in February 2014.

3. It is also not in dispute that the Employee, more than a year later, has still not been paid the paltry amount of E742.39 in respect of the holidays worked. Further, it is not in dispute that the amount in respect of the underpayments has also not been paid by the Employer. The agreement of the parties was to the effect that they were to agree on the amount of under payments the Employee was to be paid. However, the parties never met to agree on the amount of underpayments he was owed, hence todate the Employer has still not made good of its undertaking at CMAC.
4. That the Employee was under paid is not in dispute and in fact it should not. That is even the main reason the parties settled their dispute at CMAC. However the parties as at August 2014, had still not met to decide on amount of the under payments, each is blaming the other for their failure to meet and agree on same. The Employer though contends that the Employee

absented himself for a period for a period of 34 days between the years 2012 and 2013. The Court has noted that in terms of Legal Notice No. 9 of 2013, the Employee was supposed to be paid E1,758.32. The Employer though between the months of September 2012 and February 2013 was only paying the Employee almost half of that amount – E900.00 a month. Then between the months of March 2013 to May of the same year, when the Applicant reported a dispute at CMAC, he was paid E1,000.00 a month.

5. The second part of the Employee's claim relates to unpaid salaries between June 2013 and June 2014, totaling E22, 811.62. He argues that he is available and willing to render his services to the Employer. The Employer on the other hand contends that the Employee disappeared from work in June 2013 and has not availed himself to render his services to the Employer to be entitled to be paid.
6. Seeing that the Employer was not making good of its undertaking in terms of their agreement at CMAC, the Employee then approached this Court on 06 August 2014 for orders that the Employer pays him E8, 135.05 in respect of underpayments and unpaid holidays and E22, 811.62 for unpaid salaries from June 2013 to June 2014. This Court granted the Employee the orders

as sought because the Employer was in default of attendance. It was upon being served with a Court order to satisfy the judgement debt that the Employer, in haste, approached this Court seeking to rescind the judgement granted against it.

7. The Human Resources Manager of the Employer, Lungile Nkabinde, states that the default in appearance was not intentional. She states as well that the Notice of Motion served on the Employer called on it to appear in Court on Friday the 01st August 2014. She also states that on the set Friday she attended Court but the matter was not on the roll of matters that were to appear on the day. She further states that the default in appearance of the Employer was not willful or out of disrespect to the Court but was because it (Employer) had not been made aware that the matter was to proceed on 06 August instead of the initial 01 August 2014.
8. However, Sisana Gama, the Messenger under the employ of the Employee's Attorneys disputes the allegation that the matter was to appear on the 01st August 2014. Instead, she points out and clarifies that she initially approached this Court's Registry department to register the main application on the 18th July 2014. She could not register same however on that day since

she was advised that such applications are not enrolled for Fridays. She states further that she then returned all the unregistered copies to the 1st Respondent's Attorneys, whereat an amendment was then effected on same by the Attorney seized with the matter to now reflect that the application was to be now heard on the 06th August 2014. The matter was eventually registered on 21 July 2014. The Messenger, Sisana Gama, denies that she gave the Deputy Sheriff copies which bore the 01st of August 2014, as the date of hearing. The Court though, notes that what was amended was only the first page of the Notice of Motion and not third and fourth pages of same. So that the dates on the third and fourth pages still appear as 01 August, 2014.

9. When the Employer's Attorney, Mr. Ndwandwa, was advised by the Court to file from the Bar the original Notice of Motion that had been served on the Employer by the Deputy Sheriff, he confidently informed the Court that he had left it in another file of the Employer in his offices. He undertook though to file it before the close of business on the same day the matter was argued. This was after the Court had brought it to his attention that the copy he had attached as an annexure had not been certified as a true copy of the original. No such original was filed by Attorney Ndwamndwa until the next Monday

when a letter was served on the Registrar of this Court, in which the Employer's Attorneys were now saying the original had either been misplaced or misfiled by their client. This was now clearly in direct contrast with what Attorney Ndwandwa had informed the Court earlier. From the records though, it is clear that the main matter was only registered to be heard on the 06th August, 2014, and not the 01st August 2014, as alleged.

10. The test for rescission has been set out in numerous decisions in this Court and others. The principle relating to rescissions generally is that of good cause. The test for good cause in an application for rescission normally involves the consideration of at least two factors; firstly the explanation for the default, and secondly, whether the Applicant for rescission has a prima facie defence. [*See Shoprite Checkers v CCMA [2007] 10 BLLR 917 (LAC)*]

11. Nathan CJ (as he then was) in *Msibi v Mlawula Estates (PTY) Ltd, Msibi v GM Kalla and Co 1970 – 1976 SLR 345 (HC)*, noted that the Court that the Court has a discretion in the matter and that 'good cause' must be shown. In effect, good cause means that in addition to establishing a prima facie defence, an Applicant for rescission must furnish good reasons for his

default. Nugent J, in *MM Steel Construction CC v Steel & Engineering and Allied Workers Union of South Africa (1994) 15 ILJ 1310 (LAC) at 1311J to 1312A* stated thus;

“Those two essential elements are, nevertheless, not to be assessed mechanically and in isolation. While the absence of one of them would usually be fatal, where they are present they are to be weighed together with relevant factors in determining whether it should be fair and just to grant the indulgence.”

12. The Court has carefully considered this matter and has come to the conclusion that the Applicant to the rescission in this matter, the Employer – Italian Scorpion Security – has not shown good cause for its default on 06 August 2014. Over and above that, it is the view of the Court that the Employer does not have a *bona fide* defence to the Employee’s claims in respect of the holidays pay and the under payments. The Employer states that the Employee had absented himself for a number of days hence it needs to calculate the exact amount to be paid to him taking into consideration the days he was absent. But the Court is not convinced that this is the case. If indeed it was, the Court wonders why this is only raised now in the

rescission application, more than a year later. Why did the Employer not pay the undisputed amount in respect of the holidays worked in the meantime? Even the memorandum of agreement signed between the parties at CMAC does not indicate that the amount to be agreed between the parties will be less the number of days he was absent. The Court finds that it is improbable that such an important factor would not have been so recorded by the conciliating Commissioner had she been so made aware.

13. However, in respect of the second claim, the Court, reluctantly using its discretion, considers that even though the one element is absent, it is in the interest of equity, fairness and justice that the Employer be granted the indulgence. The Employer alleges that since June 2013, the Employee has not rendered any services to the Employer, hence the reason it has not honoured its obligation to pay him his salaries for these months. This, the Court considers to be a *bona fide* defence entitling the Employer the opportunity to be heard on this claim. The Court has come to this conclusion very mindful of the fact that good cause has not been shown for the default of 06 August 2014. But weighing all the intricate factors at play in this matter we consider that in respect of the second claim, the absence of one of the elements necessary for rescission is not fatal to the defence of the

Employer. The Employer though will be mulcted with an order for costs in respect of this rescission application.

14. The application for rescission therefore partially succeeds as follows;

- a) *The order of this Court granted on 06 August 2014 in respect of prayer 2 for the payment of the amount of **E22 811.62** for salaries between the period June 2013 and June 2014, together with the order for the payment of costs on the punitive scale are hereby rescinded and set aside.*
- b) *The application for rescission in respect of the order of this Court for the payment of the amount of **E8 135.05** in outstanding underpayments and holiday pay is hereby refused. Payment in respect of this amount is to be made within 7 days from date of this judgement.*
- c) *The Employer is ordered to pay the Employee's costs in respect of the rescission application on the ordinary scale.*

The members agree.

T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 10th DAY OF DECEMBER 2014.

For the Applicant : Attorney A. Ndwandwa (Lloyd Mzizi Attorneys)

For the Respondent : Attorney S. Dlamini (Magagula Hlophe Attorneys)