INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO.365/2010

In the matter between:

ANITA HAYES Applicant

And

VIP PROTECTION SERVICES (PTY) LTD

INCORPORATING SAS CONSULTANTS

(PTY) LTD Respondent

Neutral citation: Anita Hayes vs VIP Protection Services (Pty) Ltd Incorporating SAS Consultants (PTY) LTD (365/2010) [2018] SZIC 14

Coram: MAZIBUKO J,

(Sitting with A.Nkambule & M.Mtetwa

Nominated Members of the Court)

Last Heard: 12th February 2018

Delivered 28th February 2018

Summary (1) *Breach of Procedure: Applicant's attorneys of record withdrew their services and filed a Notice of Withdrawal. Applicant appointed new attorneys. Applicant's new attorneys filed defective Notice of Appointment. Notice served on the Respondent's attorneys but erroneously issued at High Court and not Industrial Court. Notice served on High Court Registrar instead of Industrial Court Registrar. Therefore there was no copy of the Notice of Appointment in the Industrial Court file.*

(2) *Respondent's attorneys applied for dismissal of the Applicant's claim purportedly - owing to failure by Applicant to appoint a new address of service within 10 (ten) Court days from date the Applicant received the Notice of Withdrawal from - its former attorneys. Respondent's attorney submitted before Court that the Applicant had failed to file new address of service and the time provided for in the rules- had elapsed. Court granted order on the strength of submission by the Respondent's counsel.*

(3) Applicant applied for rescission of order and submitted that its new attorney had filed Notice of Appointment in time.

Held: Notice of Appointment (albeit defective) was served, in time, on the Respondent's attorneys. Respondent's attorneys were not entitled to ignore Notice of Appointment (albeit defective). Respondent's attorney misled Court in failing to disclose the fact that they had been served with a defective Notice of Appointment especially when he applied for a dismissal of the Applicant's claim.

Held further: Respondent's counsel had a duty to apprise Court of all material facts known to him concerning the Notice of Appointment. Respondent's counsel acted irregularly and unprofessionally by concealing material facts before Court.

Held further: Rescission of the order is granted.

JUDGMENT

28TH February 2018

---

1. The Applicant is Anita Hayes (also known as Anita C Hayes –Roets), a businesswoman who is a former employee of the Respondent.

2. The Respondent is VIP Protection Services (Pty) Ltd, (incorporating) SAS Security (PTY) Ltd, a body corporate with power to sue and be sued- operating as such in Swaziland.

3. About the 24th June 2010 the Applicant filed in this Court an application for determination of an unresolved dispute. The Applicant claimed that she had been constructively and unfairly dismissed by the Respondent. The application was opposed. The Respondent filed a Reply dated 17th August 2010. About the 27th October 2010 the legal representatives of the parties met and held a Pre – Trial Conference. The Pre – Trial Conference minute was duly signed by both attorneys and subsequently filed with the Registrar of Court.

4. About the 18th March 2014 the Applicant's attorneys Messrs Madau Simelane and Mtshali withdrew as attorneys of record. They filed a Notice of withdrawal with the Court Registrar on the 19th March 2014. The Notice of Withdrawal of Attorney of Record is attached to the

founding affidavit and is marked AH4. Attached to this Notice is a copy of a certificate of posting issued by the Mbabane Post Office on the 19th March 2014. This certificate meant that the Notice of withdrawal had been sent to the Applicant by registered mail. The Notice of withdrawal reads thus.

> "*NOTICE OF WITHDRAWAL AS ATTORNEYS OF RECORD*
>
> *BE PLEASED TO TAKE NOTICE that MADAU SIMELANE MTSHALI ATTORNEYS hereby give notice of withdrawal as Attorneys of record for the applicant in this matter with immediate effect.*
>
> *The applicant is required to appoint a new address within 5 kilometres from the seal [sit]of the Honourable Court where she will receive service of all notices and documents in this matter and shall in writing, advise the Registrar of the Industrial Court and the respondent's Attorneys about the address within ten (10) days from date of receipt of this notice failing which the respondent may apply for dismissal of this action."*

(Record page 41)

5. About the 11th June 2014 the Respondent filed with the Registrar a Notice of Setdown. The notice reads as follows:

> *"Be pleased to take notice that the above matter has been set down for hearing on the dismissal of the action including costs on Tuesday the 17th June 2014 at 9 hrs 30 or so soon thereafter as Counsel may be heard."*

The notice had been addressed to the Registrar only.

6. The Respondent's intention in filing the said Notice was to apply for the dismissal of the Applicant's claim on the basis that the Applicant had failed to appoint a new address of service within 10 (ten) Court days after the withdrawal of her attorneys. The application was based on rule 16 of the High Court rules as read with rule 28(a) of the Industrial Court rules. The Court treated this application as interlocutory and therefore dispensed with the need for a detailed Notice of Motion plus affidavit.

7. The matter was before Court on the 17th June 2014. Mr George Langa appeared as counsel (Legal representative) for the Respondent. There was no appearance by or for the Applicant. The Applicant had not been notified of the date. The Respondent submitted that the application that the Applicant had filed (in the main matter) should be dismissed as the Applicant had failed to appoint a new address of service within 10 (ten) Court days after Messrs Madau Simelane and Mtshali had withdrawn their services. The Respondent's submission was based on the assumption that the Notice of withdrawal of Messrs Madau, Simelane and Mtshali had been properly executed. The Court noted that there was no evidence to confirm that the Applicant had been made aware of the fact that her previous attorneys had withdrawn their services. The 'Certificate of Posting' aforementioned did not serve as confirmation that the Notice of Withdrawal of the learned attorneys had been brought to the Applicant's attention. The Court directed the Respondent's counsel to ensure that the Applicant was served personally with the Notice of Withdrawal and particularly by a deputy sheriff.

8. About the 19th November 2014 the Respondent filed with the Registrar another Notice of Setdown. This Notice was accompanied by a Return of Service which had been signed by a Deputy Sheriff who is Mr Thokozani Dlamini. The Deputy Sheriff stated that he had served the notice on the 4th August 2014 personally on the Applicant at her workplace and had left the Applicant a copy of the said notice.

9. The matter was before Court again on the 1st October 2014. The Court was assured that personal service of the Notice of Withdrawal had been effected on the Applicant by the Deputy Sheriff. The Court had further been assured by the Respondent's counsel that the Applicant had failed to appoint a new address of service after receipt of the Notice of Withdrawal and that the time allotted had lapsed. The Court granted the order as sought by the Respondent. The Court order provided as follows:

1. The application in the main action was dismissed.
2. The Respondent was awarded restricted costs as follows:

2.1 Costs specifically for filing the Reply

2.2 E131-00 for Deputy Sheriff's fee.

10. About the 20th September 2017 the Applicant filed with the Registrar an application for rescission of the order of Court which the Court issued on the 1st October 2014. An extract of the Applicant's prayer reads thus:

> *"1 That the Court Order that was granted in the respondent's favour on the 1st October 2014 effectively dismissing the applicant's application for determination of an unresolved dispute be and is hereby rescinded and/or set aside."*

11. The gravamen of the rescission application is that the order of the 1st October 2014 was based on incorrect and incomplete information. The Court had been told that the Applicant had failed to file a new address of service after Messrs Madau Simelane and Mtshali had withdrawn their services. That information was incorrect. The Applicant did file the requisite address of service within the time limit that was allowed in the rules.

12. The Applicant referred the Court to her annexure AH5. This annexure is a Notice of Appointment dated 2nd April 2014. The notice was issued by a law firm known as Nkosi Attorneys C/o Dunseith Attorneys, 1st Floor Lansdowne House, Dabede Street, Mbabane. The

notice was served on the Respondent's attorneys Messrs MS Sibandze Attorneys on the 4th April 2014. Annexure AH 5 confirms that it was received by the Respondent's attorneys on the 4th April 2014.

13. The Respondent's answering affidavit was deposed to by its director named Ms Sarah Jane Thompson. The Respondent has not denied receipt of the Notice of Appointment. The Respondent's argument is that, the notice was filed at the High Court of Swaziland yet the matter in question was before the Industrial Court: the Respondent treated the Notice of Appointment as an irregular document and ignored it.

14. It is not in dispute that the Notice of Appointment was addressed to the High Court and not the Industrial Court. The ink –stamp on the notice indicates that it was received by the High Court Registrar on the 4th April 2014. This notice (annexure AH5) should have been filed at the Industrial Court and not the High Court. There was an element of carelessness in the manner the notice was filed. The Applicant has called this incident a mistake on the part of her attorney. If there is one point that the Court has repeatedly stressed is that: every legal representative has a duty to proof-read his work, and where applicable

correct the mistakes that appear therein before he files same in Court. This directive is very often ignored by legal representatives – to the detriment of their clients.

15. The Court granted the order of the 1st October 2014 solely on the submission by the Respondent's counsel. The Respondent's counsel did not disclose to the Court the fact that a Notice of Appointment had been served on them. Alternatively – counsel did not mention that a defective or irregular Notice of Appointment had been served. The conduct of the Respondent's counsel was not a mistake. This fact is supported by the answering affidavit. According to the Respondent, their counsel had no duty to disclose before Court the truth – that the Notice of Appointment (albeit defective) had been served on them. The conduct of the Respondent's counsel was deliberate and the purpose was to get an order which he would not have obtained had he disclosed the truth. The Court would not have granted the order without hearing submission from both parties on the effect of the defect – in the Notice of Appointment.

16. The Court was entitled to know the truth about the existence of the Notice of Appointment and the fact that it had been served on the Respondent's attorneys as aforementioned. That information would have enabled the Court to make a determination whether to condone the irregular filing and thereafter admit the document as part of the pleadings or to set aside the notice as an irregular document or make such order as the Court would deem appropriate in the circumstances. As aforestated, the Court would have made that determination after both parties had been given a chance to make submission.

17. What the Respondent's counsel did on the 1st October 2014 – was to make its own determination that the Notice of Appointment was defective, and he proceeded to set it aside on his own initiative. Thereafter counsel decided to conceal from the Court the fact that the Respondent's attorneys (of which he was a member) had been served with the Notice of Appointment - particularly on the 4th April 2014. It is the function of the Court to determine whether or not any pleading is defective and if so, whether the defect is fatal (to the litigant's case or defence), or is rectifiable. A litigant or his counsel has the right to

apply before Court for an order that would set aside the pleading of his opponent on the basis that it is improper and/or irregular. Instead of moving that application before Court the Respondent's counsel usurped the function of the Court in the manner he treated the Notice of Appointment (exhibit A5). The manner the Respondent's counsel conducted himself was reprehensible, irregular and unprofessional.

18. The Court granted the Order of the 1st October 2014 in total ignorance of the fact that the Respondent's attorneys had already received a Notice of Appointment. The Court could not investigate the extent of the defect (on the Notice of Appointment) because that fact had not been brought to its attention.

19. The Applicant correctly stated the position when she mentioned the following in her founding affidavit.

> "*16.1 At the time when the Court granted the Order, His Lordship was not aware that I did have an Attorney who had filed a Notice of Appointment albeit in a wrong Court but had served such notice to the correct respondent;"*

(Record page 11)

20. The Respondent's counsel has not filed an affidavit to explain the manner he conducted himself before Court especially on the 1st October 2014. It is wrong for counsel or a witness to misrepresent facts before Court. The Court cannot ignore or tolerate such irregular conduct.

21. From the explanation given in the founding affidavit the Court is satisfied that the Applicant was not in wilful default of filing a Notice of Appointment. The Applicant had taken reasonable steps to comply with the rules of Court by engaging new attorneys to represent her. The Applicant's attorneys took the necessary legal step in compliance with the rules – but forwarded their notice to the High Court instead of the Industrial Court. There was genuine intention on the Applicant and her attorneys to comply with the Court rules. The Court accepts that the Applicant's attorneys made a mistake in the manner they handled the Notice of Appointment.

22. The Applicant's claim against the Respondent in the main matter is also not frivolous. The law does recognise a claim for constructive

dismissal. The Employment Act No. 5/1980 (as amended) provides the following authority regarding a claim for constructive dismissal:

> *"37 When the conduct of an employer towards an employee is proved by that employee to have been such that the employee can no longer reasonably be expected to continue in his employment and accordingly leaves his employment, whether with or without notice, then the services of the employee shall be deemed to have been unfairly terminated by this employer."*

Whether or not the Applicant has sufficient evidence to prove her claim – will be determined at the trial. It may not be fair at this stage for the Court to give an opinion on a matter that is yet to be decided.

23. Counsel has a duty to disclose before Court facts that are within his knowledge and are material to the matter before Court – including those that are adverse to his client's case. Failure to disclose such facts may result in a miscarriage of justice and may provide a good ground for rescission of an order granted under those circumstances. This principle has ample support from legal authorities.

23.1 In the matter of SCHOEMAN VS THOMPSON 1927 WLD 282, his Lordship Berry J said:

"Now it is the duty of counsel to inform the Court of any matter which is material to the granting of the application, and of which counsel is aware.

…

The fact that it was known at the time of the application that the Respondent was an unrehabilitated insolvent and that such knowledge was not disclosed is a good ground for the Court to discharge the provisional order because there has not been a proper disclosure of facts."

(Underlining added)

(At pages 283-284)

23.2 *"The duty probably arises out of the fact that counsel and attorneys are officers of the court, and is consistant with Voet's description of the profession as an honourable one.*

The court will always accept and act on the assurance of counsel in any matter heard in court, and in order to deserve

this trust, counsel must act with the utmost good faith towards the Court."

(Underlining added)

MORRIS E: TECHNIQUE IN LITIGATION: 6th edition, 2010, Juta, ISBN 978 0 7021 8458 1 at page 27.

23.3 In the matter of TOTO vs SPECIAL INVESTIGATING UNIT AND OTHERS 2001 (1) SA 673, his Lordship Leach J re-iterated the point as follows:

"It is trite that it is the duty of the litigating party's legal representative to inform the Court of any matter which is material to the issues before Court and of which he is aware.

…

A legal representative who appears in Court is not a mere agent for his client, but has a duty towards the Judiciary to ensure the efficient and fair administration."

(Underlining added)

(At page 683)

24. The Respondent's counsel knew about the existence of the Notice of Appointment but decided not to mention it before Court in order to

conceal the truth and thereby mislead the Court. The Respondent's counsel failed to carry out his duty as an officer of Court and his misconduct resulted in the Court issuing an order based on incomplete facts. The Court cannot allow such an order to stand.

25. The Respondent has raised a point of law in opposition to the Applicant's application. Inter alia, the Respondent argued that the application does not comply with rule 20 of the Industrial Court rules. This rule provide as follows:

> *"20 (1) The court may, in addition to any powers that it may have –*
>
> *(a) in the motion of the court or on application of any affected party, rescind or vary any order or judgment –*
>
> *(i) erroneously sought or erroneously granted in the absence of any party affected by it;*
>
> *(ii) in which there is ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or*
>
> *(iii) granted as the result of a mistake common to the parties; or*

(b) on application of any party affected, and on good cause shown, rescind, vary or set aside any order or judgment granted in the absence of that party.

(2) A party who desires relief under –

(a) sub-rule 1(a) shall apply for the relief on notice to all parties whose interests may be affected by the relief sought; or

(b) sub – rule (b) may within twenty one (21) days after the party acquires knowledge of an order or judgment granted in the absence of that party, apply on notice to all interested parties to set aside the order or judgement and the court may, upon good cause shown, rescind, vary or set aside the order or judgment on such terms as it deems fit."

26. The Respondent has referred the Court to the provision of rule 20(2) (b) only. The argument is that the application is time – barred in that the Applicant failed to file her application with the Court within the 21 (twenty one) days from the date she became aware of the order of the 1st October 2014. According to the Respondent - the rescission

application was instituted by the Applicant on the 20th September 2017 – and by then - the time period provided for in the rules for a rescission application had lapsed.

27. From the papers filed of record there is no indication that the Court Order of the 1st October 2014 was served on the Applicant or the Applicant's new attorneys namely Nkosi SA & Company. By letter dated 6th May 2015 the Applicant's new attorneys wrote to the Respondent's attorneys and inter alia, requested that the order of the 1st October 2014 be abandoned as it was obtained erroneously. That letter is marked annexure AH7 to the founding affidavit. An extract of annexure AH7 provides as follows:

> "*3. In the interim client had given full instructions on the above matter and notice of appointment was duly served at your offices and duly filed at the court accordingly on the 4th April 2014.*
>
> *4. We confirm that a notice was filed and however to our surprise we learnt that an order was taken dismissing our client's claim. We learnt that a*

clerical mistake had been made by our secretary in drafting the notice which was filed at the High court instead of the Industrial court. Annexed herewith is the copy of the Notice of Appointment marked "A"

5. *We surely expected to have been alerted on the mistake since the notice had been accordingly served. We had received numerous files from client and were surely confident that we had filed representation in all the files."*

(Record pages 48-49)

28. The contents of annexure AH7 indicate that as at the 6th May 2015 the Applicant's new attorneys became aware of the existence of the Court Order – hence they took steps to try and negotiate its abandonment. The Respondent is correct in saying that the present application was filed after 21 (twenty one) Court days had elapsed from the date the Applicant had acquired knowledge of the Court Order. This observation does not however bring the matter to an end. It would appear that the Respondent has not read rule 20 in its entirety and as a result the Respondent has missed an important provision in that rule.

29. There are 2 (two) avenues that are provided for in rule 20 in terms of which a litigant may apply for a rescission of an order or judgment. The litigant can approach the Court either by way of sub-rule 20 (1) (a) or 20(1) (b) – and each sub- rule has provision for rescission that is different from the other. The word '*or*' at the end of sub – rule 20 (1), (a), (iii) serves as a conjunction that presents 2 (two) options to obtain a rescission order.

29.1 The first option provides that:

"*A party who desires relief under –*

a) sub-rule 1(a) shall apply for the relief on notice to all parties whose interests may be affected by the relief sought; or …"

29.2 The second option provides that:

"*A party who desires relief under –*

b) *sub – rule (b) may within twenty one (21) days after the party acquires knowledge of an order or judgment granted in the absence of that party, apply on notice to all interested parties to set aside*

the order or judgement and the court may, upon good cause shown, rescind, vary or set aside the order or judgment on such terms as it deems fit."

29.3 The 21 (twenty one) day requirement applies only in a case where the litigant has approached the Court by way of sub-rule 20(1) (b). The Applicant has approached the Court in terms of sub – rule 20 (1) (a) (i) on the basis that the application is for a rescission of an order that was –

"*erroneously sought or erroneously granted in the absence of any party affected by it;"*

29.4 The order of the 1st October 2014 was erroneously granted. The 21 (twenty one) day requirement in sub- rule 20 (1), (b) does not apply. The point *in limine* is accordingly dismissed.

30 Even if the application before Court was determinable in terms of rule 20,(1),(b) (which is not the case) the Court would have granted the Applicant condonation for late filing based on the peculiar facts of this matter.

30.1 Section 8 of the Industrial Relations Act No.1/2000 (as amended) provides as follows:

"(3) In the discharge of its functions under this Act, the Court shall have all the powers of the High Court including the power to grant injunctive relief.

(4) In deciding a matter, the Court shall make any other order it deems reasonable which will promote the purpose and objects of this Act."

30.2 Rule 28 of the Industrial Court rules provides as follows:

(a) *where these rules do not make provision for the procedure to be followed in any matter before Court, the High Court Rules shall apply to proceedings before the Court with such qualifications, modifications, and adaptations as the presiding judge may determine; …"*

30.3 In circumstances that it deems appropriate the High Court has the power to condone late filing of Court documents. The Industrial Court exercises similar powers as enjoyed by the High Court in matters that are properly before it.

31 The Respondent has not denied the assertion that the Notice of Appointment was served on their attorneys as aforementioned. Their argument is that they had no obligation to highlight the defect that existed on the Notice of Appointment. The Respondent's director stated as follows:

> *"The Notice of appointment served upon the Respondent's Attorneys was defective and it is unsound to impose an obligation on the Respondent's attorneys to highlight defects that are in the Applicant's Court papers."*
>
> (Record pages 63-64)

32 The Respondent's submission is erroneous. The Respondent's counsel owed a duty to the Court to make full disclosure of material facts that were known to him concerning the Notice of Appointment – more especially because the Applicant was neither in attendance nor represented in Court on the 1st October 2014. When counsel knows material factors about a matter in respect of which he appears before Court and decides not to disclose those facts to the Court, that counsel had deceived the Court by his silence.

33 The Respondent's director made another statement in her affidavit which is clearly incorrect, viz:

> *"The Respondent denies that this Honourable Court granted the order erroneously. The Respondent submits there was no Notice of Appointment filed in the Industrial Court. It follows, therefore that the Respondent did not erroneously seek the order. <u>The Court was privy to all pertinent facts pertaining to the case at hand."</u>*
>
> (Underlining added)
>
> (Record page 64)

This statement is incorrect. The existence of a defective Notice of Appointment was a pertinent fact which counsel for the Respondent purposely refrained from disclosing to the Court. The order of the 1st October 2014 was based on incomplete and therefore incorrect information that counsel had presented before Court.

34 The Respondent's counsel argued in the alternative that: the Applicant has unreasonably delayed filing his rescission – application in Court even if the matter were to be considered on common law principles. The Court should therefore dismiss the application for failure by

Applicant to take immediate action to file same in Court – when by exercise of diligence she could have filed within time.

34.1 It is a fact that in an application for rescission of judgment or an order, the Court will take into consideration, inter alia, the speed or delay at which the Applicant filed the application in Court. It is also a fact that the present application could have been filed earlier than September 2017.

34.2 However the overriding factor in this application is the fact that the order that is under consideration was obtained as a result of a misrepresentation of fact by the Respondent's counsel. The Court should not overlook or condone deception or misrepresentation of fact by counsel, witness or litigant. The Court should not send a wrong signal that people can come to Court and obtain orders through deception or misrepresentation of fact. The law should encourage and protect those who conduct their cases honestly and ethically, and discourage and also penalise those who do the opposite. It is for that reason that the Court yields in favour of granting the rescission.

34.3 Inconvenience (if any) that the Respondent may suffer as a result of the rescission of the order is a result of the conduct of the Respondent's counsel who acted on behalf of his client. The Court has noted that the Respondent did not dissociate themselves from the conduct of their counsel. Instead the Respondent supported the manner their counsel obtained the order of the 1st October 2014.

35 Justice as well as fairness require that the Applicant be allowed a chance to prosecute his claim before Court. The Applicant's counsel was careless in the manner he filed the Notice of Appointment. The Respondent's counsel acted improperly and in breach of his legal duty in the manner he obtained the order of the 1st October 2014. The legal representatives on each side are to blame for this legal saga and should therefore carry the responsibility to pay the attendant costs.

36 Wherefore the Court grants an order as follows:

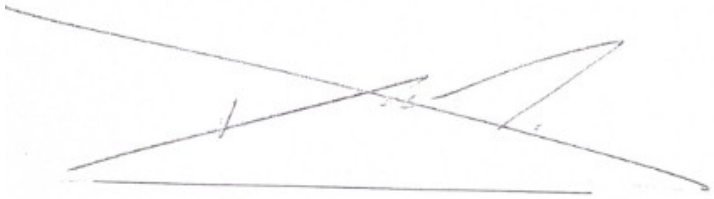
36.1 The order of Court dated 1st October 2014 is hereby rescinded.

36.2 The Applicant's main action shall proceed to trial.

36.3 The Applicant's costs shall be paid by her attorneys.

36.4 The Respondent's costs shall be paid by their attorneys

Members agreed



D.MAZIBUKO

INDUSTRIAL COURT – JUDGE

Applicant's Attorney Mr. S. Simelane

Of Madau Simelane Attorneys

Respondent's Attorney Mr S. Dlamini

Of M. S. Sibandze Attorneys