



IN THE INDUSTRIAL COURT OF ESWATINI
JUDGMENT

Case No. 282/16

In the matter between:

**DUMSANE VILANE t/a MZILIKAZI
FILING STATION AND
LAMATIKWENI BAR AND RESTAURANT**

Applicant

And

MFANANJALO MDLULI

1st Respondent

MCINISELI BHEMBE

2nd Respondent

In re:

MFANANJALO MDLULI

Applicant

And

**DUMSANE VILANE
t/a MZILIKAZI FILING STATION AND
LAMATIKWENI BAR AND RESTAURANT**

Respondent

Neutral citation: Dumsane Vilane t/a Mzilikazi Filing Station and Lamatikweni Bar and Restaurant v Mfananjalo Mdluli and Another [2019] SZIC 77 (282/2016) (16 September 2019)

Coram: NSIBANDE S. JP

(Sitting with Nominated Members of the Court Mr. N. Manana and Mr. M. Dlamini)

Heard: 22 March 2019

Delivered: 16 September 2019

JUDGMENT

1. The Applicant approached the Court on a certificate of urgency seek of an order in the following items:

“1.1 That the usual forms and service relating to the institution of proceedings be dispensed with and that this matter be heard as a matter of urgency.

2. That the Applicant’s non-compliance with the Rules relating to the above said forms and service be condoned;

3. That a Rule Nisi do issue calling upon the Respondents to show cause, on a date to be determined by the above Honourable Court, why an order in the following terms should not be granted:

3.1 *That the execution of the writ of execution issued pursuant to the Court Order of the above Honourable Court dated 6th December 2018, be and hereby (sic) stayed pending the finalisation of these proceedings;*

3.2 *Rescissions of the order of the Industrial Court granted on 6th December 2018.*

4. *That pending the final determination of the relief sought above, prayer 3.1 above be granted as interim order (sic) operating with immediate effects.*

5. *Costs of suit if application is opposed.*

6. *Granting Applicant further and for alternative relief as the Court may deem fit.”*

[2] The rescission application arises out of this Court’s order of 6th December 2018 wherein the order he award issued on 12th October 2018 under CMAC Case No.5 K042/2016 in favour of the 1st Respondent was made an order of this Court. The 1st Respondent has since issued a writ in an effort to enforce the order and collect on its judgment.

[3] The Applicant (the Respondent in the main action) seeks a rescission of the judgment because it was entered in his absence and because he claims to be irregularly cited as **Dumsani Vilane t/a Mzilikazi Filling Station and**

Lamatikweni Bar and Restaurant. He alleges that judgment was entered against Lamatikweni Bar and Restaurant which is a different entity from himself and which is operated by a different person who had hired the 1st Respondent and was responsible for his dismissal.

[4] The Applicant avers that the order of 6th December 2018 was erroneously sought and granted in his absence. He states that on 6th December 2018 his attorneys served him with a notice of withdrawal as attorneys of record. He states that when he was served with the notice of withdrawal, he was not aware that the 1st Respondent had approached the Court for the registration of the CMAC award. He states further that it was always his intention to defend the matter and that the only reasons he did not do so was that the Court papers were served at his attorneys who did not bother to alert him of the application. Subsequently the attorneys did not bother to attend Court to oppose the matter and withdrew their services on the day of the application.

[5] I have considered that Applicant's submission and those of the 1st Respondent. The 1st Respondent's attorney, Mr Mdluli indicated to the Court on the 6th December 2018, when the order was granted that the Applicant's attorneys had served his offices with a notice of withdrawal as attorneys of record. He

insisted, however that he was entitled to move his clients application because the notice of withdrawal was defective in that there was no proof that the Applicant (respondent in convention) had been served with same.

[6] The **Industrial Court Rules 2007 Rules** do not make provision for the procedure to be followed upon for the withdrawal of an attorney from representing a litigant. **Rule 28 of the Rules** states that in such a situation the High Court Rules shall apply **Rule 16 (4) (a) of the High Court Rules** provides that “*when an attorney acting in a proceedings ceases so to act, he shall forthwith deliver notice thereof to such party, the Registrar and all other parties: provided that notice to the party for whom he acted may be given by registered post.*

(b) After, such notice, unless the party formerly represented within ten days after the notice, notifies all other parties of a new address for service as required under **Subrule (2)**, it shall not be necessary to serve any documents upon such party unless the Court otherwise orders:

Provided that any of the other parties may before receipt of his new address for service of documents, serve any documents, upon the party who was formerly represented.”

[7] It seems to me, on a reading of the Rule that the Applicant was at the very least entitled to the 10 day period within which he was to provide a new office at which he would accept service of documents. The Applicant could not have been in wilful default. His attorney had withdrawn and he was not aware that the matter was before the Court. In any event he was expected to appoint a new address ten days after the notice of withdrawal of the attorneys. We have no doubt that the Applicant was entitled to that time period to receive personally a notice of set down for new date of hearing, as envisaged by the Rule. That his erstwhile attorney is served their notice of withdrawal on the 1st Respondent's attorneys 1st before serving him does not in any view mean that he ought to have been visited with the order of 6th December 2018.

(See: Munnik v Focus Automotive Engineers (Pty) Ltd 1977 – 78 Swaziland Law Reports at page 152.

[8] In our view, it is accordance with fair practice and equity that a party be given the time set out in the High Court Rules.

[9] With regard to this matter we find that the failure to afford the application an opportunity to appoint a new office at which to accept service of process was erroneous. Consequently the order granted in favour of the 1st Respondent on 6th

December 2019 was erroneously granted as it was granted in the absence of the applicant. In such a case, the Applicant chooses not have to show that he has a *bona fide* defence to the application. He is entitled to rescission of the order granted erroneously in his absence.

[10] The following order is therefore made:

- (a) The order of court granted on 6th December 2018 in this matter is hereby rescinded and set aside;
- (b) The Applicant is directed to file his answering affidavit within 14 days
- (c) Each party is to party its own costs.

The members agree.



S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For the Applicant: Mr A. Fakudze

For the Respondent: Mr M.H Mdluli (1st Respondent's Attorneys)