



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT
MBABANE

Case No: 05/2017

In the matter between:-

STANLEY MSWELI

APPLICANT

And

OK BAZAARS SWAZILAND (PTY) LTD

RESPONDENT

Neutral citation: Stanley Msweli v Ok Bazaars Swaziland (Pty) Ltd (05/17)
[2021] SZIC 85 (24 November 2021)

Coram: **MSIMANGO, ACTING JUDGE**
(Sitting with Mr S. Mvubu and Ms N. Dlamini nominated
Members of the Court).

Date Heard:
2nd NOVEMBER 2021

Delivered:
24 NOVEMBER 2021

Summary: This is an application in terms of Rule 30 of the High Court Rules, read together with Rule 28 of the Rules of this Honourable comi, to set aside applicant's affidavit in response to the Respondent's notice in terms of Rule 35(4) as irregular.

JUDGEMENT

1. Applicant is Stanley Msweli a Swazi male adult of Manzini, in the Manzini Region.
2. The Respondent is O.K. Bazaars Swaziland (Pty) Ltd, a company duly registered and incorporated in accordance with the company laws of Eswatini, with its place of business and offices at Manzini in the Manzini Region.
3. The Applicant was employed by the Respondent on the 02nd February 2004. He remained in continuous employ of the Respondent until the 24th September 2016, the date on which he was dismissed.
4. The Applicant reported a dispute to the Conciliation Mediation and Arbitration Commission (CMAC) and same was certified as unresolved. The Applicant then made an application to the comi for the determination of the unresolved issues.
5. In terms of an order of this Honourable court dated 1st October 2020, the Applicant was ordered to produce documents required by the Respondent in terms of **Rule 35 (4) of the High Court Rules**. The rule reads as follows:-

" If any party believes that there are, in addition to documents or tape recordings disclosed as requiredother documents (including copies thereof) or tape recordings which may be relevant to any matter in question in the possession of any party thereto, the former may give notice to the latter requiring him to make the same available for inspectionor to state on Oath within fourteen (/4) days of the notice that such documents or tape recordings are not in his possession, in which event he shall state their whereabouts, if known to him".

6. The Applicant was to produce the required documents within seven (7) days of the grant of the order failing which his claim be dismissed with costs. No documents were filed by the Applicant within the stipulated time.
7. An Application in terms of **Rule 30 of the High Court Rules** read together with **Rule 28** of the rules of this honourable court, was filed by the Respondent setting aside the Applicant's affidavit as irregular on the following grounds:-
 - (i) It was filed outside the period stipulated by the order of this Honourable court of the 15th October 2020.
 - (ii) The failure to comply with the order within the stipulated period rendered the Applicant's claim dismissed with costs.
8. The Applicant argued that the **Rule 30** application is premature by reason of non-compliance with **Rule 30 (5) of the Rules of the High court**; in that no notice has been afforded the Applicant to remove the cause of complaint before the application was moved. Furthermore, even though there is an irregularity, the Respondent has not suffered any prejudice, for the reason that the objection does

not go to the merits of the case, and that the court may condone the irregularity or allow the party in default an opportunity to cure the defect.

9. It is trite law that a court lacks jurisdiction to determine and pronounce itself upon a matter that is *res judicata*, the basis of the principle is that the court which pronounces on the matter becomes *functus officio*. **TROLLIP JA IN FIRESTONE SOUTH AFRICA (PTY) LTD V GENTICURO AG 1977 (4) S.A 298 AD** at page 306, dealt with the principle of *res judicata*, and he had this to say:-

"The general principle, now well established in our law, is that, once a court has duly pronounced a final judgement or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes functus officio, its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased".

10. There are, however, exceptions to this general principle. These were also stated by the court on page 307 as follows:-

- (i) The court may clarify its judgement or order if on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "**sense and substance**" of the judgement or order.....
- (ii) The court may correct a clerical, arithmetical or other error in its judgement or order so as to give effect to its true intention.....

11. Dealing with the subject, the comi in the case of **S V WELLS 1990 (1) S.A 816 (A)** referred to the two completely opposed views on the principle *offimctus officio*, namely the strict approach and the enlightened approach. JOUBERT JA stated that:-

"according to the strict approach, a judicial officer is functus officio upon having pronounced his judgement according to strict interpretation of the law, and as such incapable of alteration, correction, amendment or addition by him in any manner at all The more enlightened approach, however, permits a judicial officer to change, amend or supplement his pronounced judgement, provided that the sense or substance of his judgement is not affected thereby".

12. However, each case must be determined in terms of its own peculiar facts and circumstance. In the present case the couli granted an order which reads as follows:-

"The Applicant is to produce the documents required by the Respondent in terms of its Rule 35 (4) notice dated 14th August 2020 within seven (7) days of the grant of this order, failing which his claim be dismissed with costs".

13. It is common cause that no documents were filed by the Applicant by the 26th October 2020, the date on which the period of seven (7) days from the date of issue of the court order expired. An attempt to comply with the aforementioned order came on the 11th November 2020, by which time the application had already been dismissed with costs, rendering this Honourable court *finctus officio*.

14. The court is of the view that the Applicant disregarded its obligation to file the discovery affidavit within the stipulated time. Furthermore, the Respondent served the Applicant to no avail with the following documents:-

(i) Notice in terms of **Rule 35 (4)** on the 14th August 2020.

(ii) Notice in terms of **Rule 35 (11)** on the 9th October 2020.

17. The attitude displayed by the Applicant is that the Rules of the court are not important and can be disregarded with impunity. It is incumbent on every litigant to comply with Rules of the court in view of the fact that Rules of the court serve a specific purpose. In **MOLEBATSI V FEDERATED TIMBERS (Pty) Ltd 1996 (3) S.A 92**, the court held that:-

"The Rules of court must be observed to facilitate strict compliance with them, to ensure the efficient administration of justice for all concerned. Non-compliance with the said Rules would encourage casual, easy going and slipshod practice, which would reduce the high standard of practice which the courts are entitled to in administering justice. The provisions of the Rules are specific and must be complied with".

18. Taking into account all the foregoing observations and all the circumstances of the case, the court makes the following order:-

(i) The discovery affidavit filed by the Applicant in response to the notice in terms of **Rule 35 (4)** dated 10th November 2020 is set aside.

- (ii) The dismissal of Applicant's application with costs is confirmed.
- (iii) No order as to costs.

The Members Agree.

L. MSIMANGO

ACTING JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicant : Mr T.Motsamai. (Zonke Magagula & Company)

For Respondent : Mr S.K. Dlamini. (Magagula & Hlophe Attorneys)