



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No. 353/2022

In the matter between:

JONATHAN SUSSMAN

Applicant

And

ALBERTO NZUCULA

Respondent

In re:

ALBERTO NZUCULA

Applicant

And

JONATHAN SUSSMAN

Respondent

Neutral Citation: Jonathan Sussman vs. Alberto Nzucula *in re:* Alberto Nzucula vs. Jonathan Sussman (353/2022) [2023] SZIC 21 (04 April 2023)

Coram: V.Z. DLAMINI – JUDGE
*(Sitting with Mr. D. Mncina and Mr. D.P.M. Mmango –
Nominated Members of the Court)*

LAST HEARD: 13 March 2023

DELIVERED: 04 April 2023

Summary: The Applicant filed an application in terms of Rule 14 for registration of a default judgment issued by CMAC. The Respondent only filed a Notice of Intention to Oppose and in the meantime pursued negotiations to have the matter settled amicably. The matter was subsequently postponed in the absence of Respondent's attorney with a directive that Applicant's attorney should notify the other side of the next date of hearing.

Following Respondent's non-appearance on the next date of hearing, Applicant's attorney applies for an order by default assuring the Court that he notified the other side and further filed a letter purporting to be that notice. Respondent subsequently applies for rescission on the basis that his attorney was unaware of the next date of hearing as he was not notified of it. Further grounds of rescission were alleged.

Held: Rescission in terms of Rule 20 (1) (a) distinguished from one in terms of Rule 20 (1) (b). For the former, Applicant only needs to show that the Court committed an error on the record, there is no need to show good cause; present case falls under the first sub rule.

Held: Further, that Applicant's attorney misled the Court that the Respondent's attorney was aware of the next date of hearing when in reality there was no formal notification. On that reason alone, Order granted in the absence of Respondent unsustainable, therefore rescinded.

RULING

INTRODUCTION

[1] The Applicant in the rescission application is the Respondent in the main application and Respondent is the Applicant in the main cause. For the sake of convenience, we shall continue to refer to the parties as they appear in the main application.

BACKGROUND

[2] On the 7th November 2022, the Applicant filed in Court an application for registration of a default judgment issued by a commissioner under the auspices of the Conciliation Mediation and Arbitration Commission (CMAC) in terms of **Section 81 (7) of the Industrial Relations Act, 2000 (as amended)**. The Respondent filed a Notice of Intention to Oppose the application on the 29th November 2022, which was the first day of enrolment of the matter. On that day, by consent the matter was postponed to the 12th December 2022 for a call.

- [3] On the next date, the matter was postponed to the 16th December 2022 to allow the parties to pursue negotiations to settle it amicably. On that day, only the Applicant's counsel rose when the matter was called; there was no appearance for the Respondent. The matter was postponed to the 21st January 2023 at the instance of Applicant's counsel. On the latter date, the Respondent's counsel was in default of appearance again and the Applicant's attorney applied and was granted by this Court an order in terms of prayer 1 of the Notice of Motion together with costs.
- [4] On the 14th February 2023, the Respondent filed an application for rescission of the order granted by default by this Court on the 21st January 2023. The rescission application was filed in terms of **Rule 20 (1) (a)** of the Court Rules [though erroneously referred to as **Section 21 (1)** in the Notice of Application]. The Applicant opposes the rescission.

GROUNDS FOR RESCISSION

- [5] The Respondent's main ground for rescission is that, as per the advice of his attorney, which was confirmed on affidavit, the order was granted by this Court on a date his attorneys were not aware the matter was set down for hearing because the Applicant's attorney did not notify them of the next date of hearing; it was further alleged that Applicant's attorney wrote to his attorneys calling upon them to file an answering affidavit, but omitted to mention the next date of hearing. He submitted that the Court should not have granted the order in the absence of proof that his attorneys were notified of the 21st January 2023 as the next date of hearing.

- [6] The Respondent also averred additional grounds for rescission, which appear to be superfluous on account of the Rule of Court that forms the basis of the application. This will be apparent later in the ruling.

REASONS FOR OPPOSITION

- [7] As per the advice of his attorney, which was confirmed on affidavit, the Applicant alleged that the Respondent's attorney arrived late on the 16th December 2022 and was not dressed appropriately to address the Court, but perused the file after the Court had adjourned and ascertained that the matter was postponed to the 21st January 2023. The Respondent's attorney was therefore aware of the next date of hearing.
- [8] Moreover, the Applicant stated that this Court never directed that the Respondent should be notified of the next date of hearing, but ordered that his attorney should remind the Respondent to file an answering affidavit.

ANALYSIS

- [9] Having examined both sets of papers, Heads of Argument and the Court file, it is the Court's view that the matter turns on one point, which is whether the Court committed an 'error' of law by granting an order in the absence of the Respondent or his attorney when on the face of the record of proceedings it should not have done so.
- [10] According to the record of proceedings (Court file), on the 16th December 2022, the matter was postponed to the 21st January 2023 and the Applicant's counsel was directed to advise the Respondent of that date. Before applying for the order on the 21st January 2023, the Applicant's attorney informed the

Court that he had advised the Respondent's attorney to peruse the record and further informed him of the return date. He further handed from the bar a letter purporting to be the notification.

[11] After hearing the Applicant's counsel, this Court granted the order. An examination of annexure "JON 1"; the letter from Applicant's attorney directed to Respondent's attorneys dated 16th December 2022 juxtaposed with the entry of that date on the Court file, these reveal that notwithstanding his submission in Court on the 21st January 2023, the Applicant's counsel never formally notified the Respondent's attorney that the matter was postponed from the 16th December 2022 to the 21st January 2023.

[12] This Court granted the order relying on the fact that the Applicant's attorney was an officer of the Court, but it turns out that it was misinformed. On this ground alone, the order we granted is not sustainable. It is immaterial that the Respondent's attorney arrived late and found the Applicant's counsel still addressing the Court. The fact of the matter is that the Court directed that the Applicant's attorney should notify the other side of the next date and he assured the Court on the 21st January 2023 that he had done so.

[13] In the case of **Anita Hayes v VIP Protection Services (Pty) Ltd Incorporating SAS Consultants (Pty) Ltd (365/2010) SZIC 14 [2018]** at paragraphs 23 and 24, *MAZIBUKO J.* said following:

"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... .. 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."

[14] The case of **Jika Ndlangamandla v Zeiss Investments (Pty) Ltd t/a Zeiss Bearings and Another Civil Case No:3289/08 SZHC** on rescission, is relevant to the point we make in paragraph 6 above. At paragraph 16 of the **Jika Ndlangamandla (above)**, *MASUKU J.* opined as follows:

"One of the leading cases on this Rule in South Africa is Bakoven v G.J. Howes (Pty) Ltd 1992 (S.A.) 466 at 471 E-G, where Erasmus J. said of the relevant Rule:

"Rule 42 (1) (a) [similar to Rule 20 (1) (a)], it seems to me, is a procedural step designed to correct expeditiously an obviously wrong judgment or order. An order or judgment is 'erroneously granted' when the Court commits an 'error' in the sense of a mistake in a matter of law appearing on the proceedings of the Court record. . . It follows that a Court, in deciding whether a judgment was 'erroneously granted' is, like a Court of appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31 (2) (b) or under the common law, the applicant need not show 'good cause' in the sense of an explanation for his default and a bona fide defence. . . Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission." [Emphasis added].

CONCLUSION

[15] Based on the above reasons, the Court has no hesitation in rescinding the order it granted on the 21st January 2023.

[16] In the result, the Court orders as follows:

[a] The Order granted against the Respondent on the 21st January 2023 is hereby rescinded.

[b] No order as to costs.

The Members agree



V.Z. DLAMINI

JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT : Mr. D. Hleta
(DEMHleta Legal)

FOR RESPONDENT : Mr. V. Dlamini
(Boxshall-Smith Attorneys)