IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

Case No. 29/22

In the matter between:

JOHN ANDREW WEATHERSON Applicant

And

THE LUKE COMMISSION Respondent

Neutral citation: John Andrew Weatherson v The Luke Commission [2022] [29/22] SZICA 04 (21 February 2024)

Coram: **S. NSIBANDE J.P. N. NKONYANE JA AND A.M. LUKHELE JA**

Date Heard: 16 February 2023

Date Delivered: 21 February 2024

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Summary: *Rescission of judgment – Requirements restated – An order or judgement is erroneously granted when the Court commits an error.*

Held: *Where litigant is not present and the date of hearing is not communicated it is an error of the Court to grant judgement where there is no notice of set down alerting litigant of date of hearing.*

Held: *Question whether matter should start de novo to be determined regard being heard to Section 35 and 42 of the Employment Act 1980.*

JUDGMENT

[1] On 22nd February 2022, the Industrial Court dismissed the appellant's application for the determination of an unresolved dispute on the basis that the appellant (the employee) had failed to prosecute the same and had further failed to appear before the Court on the 1st and 22nd February when directed to do so to motivate before the court how he intended to continue with the matter in the face of a series of challenges raised by the court, ex *mero motu*.

[2] Being aggrieved by the default judgment granted against him, the appellant launched an application for the rescission of the judgment of 22nd February 2022. The application for rescission was dismissed on

3rd November 2022. Being dissatisfied with the judgement of the industrial Court of 3rd November 2022 the appellant noted the appeal that is the subject matter of this judgement.

[3] The short background to this matter is as follows – The appellant herein is the executor of the Estate of the Late Phindile Weatherson who was a former employee of the respondent. The late Phindile Weatherson brought an application for the determination of her unresolved dispute against the respondent following her dismissal by the respondent which she considered to have been unfair. In terms of that application, she sought reinstatement and back pay from the date of dismissal alternatively compensation for unfair dismissal, notice pay, leave pay and costs of suit.

[4] Phindile Weatherson gave evidence in support of her claim in the Industrial Court and upon finalising the same, closed her case. The respondent opened its case and had its first witness on the stand when Phindile Weatherson passed away.

[5] Following the unfortunate demise of Phindile Weatherson the appellant applied for and was granted an order substituting the name of Phindile Weatherson for his own (as executor of her estate) to enable him to continue with the litigation. That order was granted on 9th June 2021 and the matter was eventually enrolled for roll call on 28th January 2022. When the matter was called the presiding judge raised several issues ie – whether it was still possible for the matter to proceed any further given that the initial presiding judge was no longer available to hear the matter and a new judge who had not taken the applicant's evidence had been allocated the matter. The Court also sought copies of the original applicant's death certificate as well as the appellant's letters of administration. The matter was then postponed to 1st February 2022 to enable the parties to address the Court on the issues it had raised. On the 1st February 2022, the appellant's attorney did not appear in Court and the matter was postponed, in their absence, to 22nd February 2022. On the 22nd of February 2022, the appellant's attorneys did not appear once again. The respondent applied that the appellant's (applicant in the *Court a quo*) case be dismissed for non-appearance and for failure to prosecute. The application was granted and the applicant's case was dismissed in its entirety.

[6] The appellant, upon learning of the default judgement launched an application for the rescission of the 22nd February judgement, further seeking that he be granted leave to pursue the main application. He also sought costs in the event of an unsuccessful opposition. By judgement of 3rd November 2022, the application for rescission was dismissed.

[7] The appellant being dissatisfied with that judgement filed this appeal against the judgement on the following grounds –

"7.1 The Court a quo erred in law by adding a third requirement of good cause viz "showing that the application is made bona fide" on its interpretation of Rule 20 of the Industrial Court Rules of 2007, which is not provided for in terms of our law and the same requirement had not been pleaded in the papers that were filed on record.

7.2 The Court a quo erred in law and misdirected itself in holding that at times, the unavoidable effect of lawyers' negligence in delay

with client's matters end up being shared by their clients for the purposes of a rescission application.

7.2.1 *This runs contrary to the spirit of the objectives which are set out in Section 4 (1) (b) of the Industrial Relations Act 2000 (as amended), and for the purposes of this matter a notice of set down for 22nd February 2022 had not been served to the Appellant's attorneys by the Respondent's attorneys notwithstanding that there had been no appearance on behalf of the appellant when the matter was last before Court on 1st February 2022.*

7.3 *The Court a quo erred in law and misdirected itself by not holding that the death of the former Applicant in the matter a quo could prove as an exceptional circumstance to the principle that a Judicial Officer who takes over a matter from another, which is a part heard trial, should commence the trial* de novo.

7.3.1. *This finding of the Court a quo on the position of the law, including that where there is no agreement of the parties the trial should start* de novo *is in direct conflict with Rule 15 of the High Court Rules, 1954 read together with Rule 28 of the Industrial Court*

Rules 2007 which govern the procedure which should be adopted by the Courts of law on occasions whereby one of the parties have (sic) died while the trial still on-going.

7.4. The Court a quo erred in law, on its finding that the non-appearance of the Appellant's Attorneys on the 22nd February 2022, who had not been served with a notice of set down for the same dates amounted to failure by the Appellant to prosecute the matter therein.

7.4.1 This goes against the principles of fairness and equity, as well as the established principles which govern the dismissal of an action for want of prosecution which are inter alia, that these must firstly be a delay in prosecution; secondly the delay must be inexcusable and thirdly, the Respondent must be seriously prejudiced thereby."

[8] The appellant (applicant in the *Court a quo*) explained that his attorneys did not attend Court on 22nd February 2022 for the following reasons as set out in paragraphs 12.1 to 12.3 of his founding affidavit;

"12.1 My attorneys had allocated the matter to one Fisokuhle Mhlanga, who unceremoniously resigned on the 31st January 2022 without indicating on what was the progress of the matter in Court.

12.2 As a result there was no appearance on my behalf on 1st February 2022 when the matter was on the Court's roll with the result that the matter was postponed to 22nd February without the knowledge of my attorneys.

12.3. My attorneys were not indulged with a notice of set down for trial, which would have alerted them about the return date of the matter."

[9] The circumstances under which the appellant's attorneys did not appear before the Court on the 1st February 2022 are amplified in the respondent's answering affidavit. At paragraph 21 of the answering affidavit, the Respondent says the following:

"9.1 On the 1st of February 2022, notwithstanding that the Applicant and/or his attorneys were aware of the return date failed and/or neglected to appear in Court. On the 1st February 2022, I am advised by my attorney that Mr Fiso Mhlanga who had appeared on behalf of the applicant on the 28th of January 2022, had called the clerk of Court, before the matter was heard and advised them that

he would not be coming to Court as he had left the offices of B.S. Dlamini & Associates.

9.2. "22. He then advised further that the office of B.S. Dlamini and Associates would be filing the necessary documentation and asked that the matter be postponed for [a] period of two weeks to enable them to do so.

The matter was then subsequently postponed to the 22nd of February 2022. On this date, the applicant nor his representatives did not show up [sic]. This was not notwithstanding the fact the matter on the 1st February 2022 the matter [sic] had been postponed on the applicant's account, particularly for them to show cause on how the matter was to proceed in view that it had been allocated to a new judicial officer."

[10] At paragraph 38 of the answering affidavit, the respondent states that Mr Mhlanga had contacted its attorney on 1st February when the matter was before Court and that it was at his behest that the matter was thereafter postponed to 22nd February 2022.

[11] I will come back to the significance of these paragraphs later on in this judgement.

[12] The appellant stated, in argument that the application was made in terms of **Rule 20** of the **Rules of the Industrial Court of 2007**. He submitted that the Court at paragraph 9 of the judgement confirms that the application was governed by **Rule 20** of **the Rules**, in particular **Rule 20 (1) (a) (1)**. **The Rule** reads:

"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 judgement –

(i) erroneously sought or erroneously granted in the absence of any party, affected by it:

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

[13] The appellant argued that the *Court a quo* added the requirements that the rescission application should be made with a *bona fide* intention contrary to the authorities that state that once an applicant establishes cause for the default in appearance and good prospects of success then the application should succeed. The Court was referred to the matter of

Italian Scorpion Security v Sipho Cyril Nkonyane and Another (373/2014) [2014] SZIC 53 (10 December 2014).

[14] At paragraph 10 of that judgement, the Court states that –

"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 had a prima facie defence."

[15] Secondly, the appellant submitted that the *Court a quo* erred by making a bold assertion that *"at times the unavoidable effect of lawyer's negligence in delay with the client's matters end up being shared by their clients"*. It was the appellant's submission that such a principle does not apply to rescission applications. Further, it was submitted that on principles of fairness as espoused in **Section 4 (1)** of the **Industrial Relations Act 2000 as amended**, the respondent ought to have served the appellant with a notice of set down for the 22nd February 2022 before seeking such an adverse order against him in his absence. The appellant's attorney submitted further that when the matter was postponed to 22nd February 2022 at Mr Mhlanga's request, it was clear

that Mr Mhlanga had not been instructed by the appellant as he indicated to the respondent's attorney that he had left the employ of the Firm of Attorneys that represented the appellant. It was submitted that the High Court had rescinded an order on the basis that the attorney's action had not been in line with his client's instructions. In this regard, the Court was referred to the case of **Eswatini Royal Insurance Corporation v Trevor Shongwe and 2 others [2302/20] [2021] SZHC 30 (15 March 2021)**.

[16] Finally, the appellant submitted that the *Court a quo* failed to take into account **Rule 15** of the **High Court Rules**, read together with **Rule 28** of the **Industrial Court Rules of 2007**. **Rule 15 (1)** reads as follows:-

> *15 (1) No proceedings shall terminate solely by reason of the death, marriage or other change of any party thereto unless the cause of such proceedings is thereby extinguished.*

The appellant submitted that the proceedings in the Court a quo were not extinguished by the death of the applicant therein and that the appellant had a vested right to prosecute the claim to finality.

[17] On his last ground of appeal the appellant submitted that the requirement for dismissal of an action for want of prosecution had not been met therefore the *Court a quo* erred in law in dismissing the application. It was submitted that the requirements are three-fold –

(i) there must be a delay in the prosecution;

(ii) the delay must be inexcusable; and

(iii) the respondent must be seriously prejudiced by the delay.

In casu, it was argued there was no delay. The appellant missed two dates which were 21 days apart. The appellant was not aware that the matter would be before the Court on those two days being the 1st to 22nd February 2023 and while the respondent may have been inconvenienced by the non-appearance of the appellant, it could not point to any serious prejudice, the appellant submitted. The matter of **Mohammed Cassimjee v Minister of Finance (455/11) [2012] ZASCA 10** was cited as authority for the proposition made regarding the three-fold test for dismissal of a matter for non-prosecution. The case of **Usuthu Pulp Company (Pty) Ltd v Jacob Seyama and 4 Others ICA Case No. 1 of 2004** was also cited.

The Respondent's Case

[18] The third respondent's submission herein was that the *Court a quo* had been correct in dismissing the matter because it could not be explained how the main application could proceed in the absence of an agreement between the parties on the way forward with the trial given the demise of the applicant. There was no prospect of success in the main application because in the absence of an agreement to the contrary then the matter would have to start *de novo.* The matter could not start *de novo* due to the demise of the original applicant.

It was submitted that the Court had exercised its discretion correctly because the trial could not start *de novo* and granting the application would have served no purpose.

[19] It was the respondent's further submission that the appellant had brought the application in terms of **Rule 20(1) (b),** on the ground that there was good cause to rescind the order of 22nd February 2022. The respondent cited the case of **Samketi Dlamini v Xipanda Food (Pty) Ltd High Court case No. 633/2017** and submitted that not only must the applicant for rescission satisfy the good cause requirement but he must also show that the grant of the rescission would serve a purpose.

[20] It was the respondent's further submission that the appellant had premised his application for rescission on **Rule 20 (1) (b)** in terms of which he had to who good cause which involves at least two factors; the explanation for the default in appearance and whether the applicant has a *prima facie* defence.

[21] It was the respondent's submission that the grounds of appeal were without merit in that the authorities stated that one of the factors taken into consideration in determining that an applicant for rescission had shown good cause was that the application should have been made *bona fide*. In this regard, we were referred to

1. **President Street Properties and Another v Maxwell Uchechukwa and Authority (1926/2012)[2014] SZHC 75 (9 April 2014);**
2. **Swaziland National Youth Council v Swazi Jive Entertainment (Pty) Ltd and Another (1244/18) [2019] SZHC 05.**

21.1 That the Court a quo correctly found that the appellant had not put forth a reasonable explanation for his failure to appear when the order sought to be rescinded was made;

that the fact that the attorney who was handling the matter had left the office was not a reasonable explanation for the failure to appear in Court; that in terms of **Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) at 345 and Mafucula v Thembi Khanyisile Maziya (Bhiya) SZHC No. 258/2015** the applicant and his lawyers were complicit in the non-appearance when then order was granted.

21.2 With regard to the third and fourth grounds of appeal it was argued that the **Rule 15** argument had not been raised in the *Court a quo* and could not be raised in this Court for the first time. Secondly that, even if the *Court a quo* agreed that there were exceptional circumstances in the matter, the fact that there was no agreement between the parties on how the main matter should proceed meant that it had to start *de novo* and that was impossible following the demise of the applicant. The Court was referred to the case of **Mhlanga v Mtenengari and Another 1993(4) SA 119 SZ** for the authority that in the absence of any agreement a part-heard matter ought to start *de novo.*

[22] Rule **20** of **the Industrial Court Rules of 2007** is similar in wording to **Rule 42** of **the High Court Rules**. Effectively the Industrial Court may rescind a judgement erroneously sought or erroneously granted in the absence of any party affected by it, on the application of any party affected, and on good cause shown rescind, vary or set aside any order or judgement granted in the absence of that party.

[23] My perusal of the pleadings indicates that the appellant did not specifically indicate that the application was in terms of **Rule 20** of the **Industrial Court Rules**. He, however, makes allegations that his attorneys were not indulged with a notice of set down for trial, which would have alerted them about the return date. It appears to me that while this is part of the appellant's explanation for non-appearance, it is also an allegation that the judgement ought not to have been granted in the absence of a notice of set down advising the appellant's attorneys of the date of appearance.

[24] In the matter of **Eugene Rochat v Fernando Julius Manjena in re: Fernando Julius Manjena v Eugene Rochat (1734/16) [2018] SZHC (184) 10th August 2018,** the High Court stated that *"...as a matter of*

fact our case law is replete with judgements wherein the Court was prepared to test the Applicant's averments in respect of the different rules of Court and the Common law, to see if a case for rescission was made under one or the other of them."

In casu, the *Court a quo* concluded that the appellant had not given a reasonable explanation for the failure to appear and that good cause had not been shown because of the failure to give a reasonable explanation for the default in appearance.

[25] The *Court a quo* did not consider the appellant's complaint that the matter had not been set down and that as a result thereof the attorneys were not aware of the date hence the default in appearance. It did not consider whether there was an error of law which the Court made and which appears *ex facie* the record that would entitle the applicant (in the *Court a quo*) to the rescission application sought in terms of **Rule 20 (1) (a) (i)**.

[26] From the appellant's affidavit, the error he alleges is that his attorneys were not served with a notice of set down in circumstances where the date of hearing had been arranged with an attorney who was no longer

representing him due to the fact that he had resigned from the firm of attorneys that represented him.

[27] On a reading of the pleadings it is common cause that:

(i) When the matter was called on 28th January 2022, Mr Fisokuhle Mhlanga appeared on behalf of the appellant:

(ii) On that day, 28th January 2022, the matter was postponed to 1st February 2022;

(iii) Mr Mhlanga who had been representing the appellant on 28th January 2023, called the Clerk of Court and advised that he would not be coming to Court because he had left the offices of B.S. Dlamini & Associates, the appellant's attorneys.

(iv) Mr Mhlanga further advised that the office of B.S. Dlamini & Associates would file the necessary papers, going forward. In this regard, he asked for the matter to be postponed for two weeks to enable them to do so. The matter was subsequently postponed for three weeks.

(v) There was no notice of set down for hearing of the matter on 22nd February 2022.

[28] Quite clearly at the time that Mr Mhlanga sought a postponement of the appellant's matter on 1st February 2022 he no longer had the mandate to represent the appellant following that he had left the employ of the Firm of Attorneys acting on behalf of the appellant. Whether the appellant or his attorneys of record knew of the postponement is not known. The appellant's attorneys of record allege that Mr Mhlanga did not inform them what had been the progress of the matter in Court at the time that he resigned.

In any event, it is clear that the appellant and his attorneys were not aware of the hearing of 1st February 2022 when the matter was postponed to the 22nd February 2022. I say so because Mr Mhlanga who was no longer representing appellant or working for his attorneys, found it necessary to advise the respondent and the Court (through the Clerk of Court) that he would not be appearing and that the matter ought to be postponed to enable the appellant and his attorneys to attend to the matter.

It appears to me that it was incumbent upon the respondent to ensure that the appellant's attorneys of record were aware of the date to which the matter was postponed (being the 22nd February) regard being had to the fact that the case had not been set down in the

presence of the appellant or his attorneys, for hearing on that date. In my view and in the circumstances of the matter it was necessary for the respondent to serve a notice of set down on the appellant's attorneys of record in connection with the new date of hearing. In the absence of a notice of set down for the 22nd February 2022 the respondent's Counsel was not entitled to apply for an order for the dismissal of the appellant's case for failure to prosecute and non-appearance. The failure to cause the matter to be set down for hearing on 22nd February 2022 amounts to a mistake in the proceedings. Had the Court taken cognisance of the fact that;

(i) the matter had been postponed to a date unknown by the appellant and at the request of an attorney who no longer acted for the appellant, and

(ii) neither the appellant nor his attorneys had been appraised of the date to which the matter had been postponed;

the Court would not have granted the order that it did.

In the case of **Paul Ivan Groening v Sipho Matse (1579/12) [2013] SZHC 35** the Court was satisfied that the requirements of error were met and **Maphalala J. (MCB)** (as he then was) stated that: *"This application should succeed in terms of Rule 42 on the basis that the*

Court would not have granted judgement if it was aware that there was a dispute whether applicant was served with summons..."

As indicated above, **Rule 20** of **the Industrial Court Rules** is similar in working to **Rule 42** of **the High Court Rules**, I have absolutely no doubt that the appellant's application ought to have succeeded in the *Court a quo* on the same basis as in the **Groening** judgement.

[29] In the **Groening** judgement, the Court quoted the following from **Erasmus J (in Bakoven Ltd v G.V. Holmes (Pty) Ltd 1992 (2) SA 446 –**

"Rule 42(1) (a) ... is a procedural step designed to correct expeditiously an obviously wrong judgement. In contra-distinction to relief in terms of Rule 31 (3)(b) or under the common law, the applicant need not show "good cause" in the sense of an explanation for the default and a bona fide defence. Once the applicant can point an error in the proceedings he is without further ado entitled to rescission..."

The failure to set the matter down in the circumstances of this case, amounts to an error in the proceedings and the appellant was entitled on that basis, to a rescission of that judgement.

[30] Having concluded that the appellant succeeded in pointing out an error in the proceedings and in line with the authorities as set out above, I am obliged to hold that the appellant's application at the *Court a quo* ought to have succeeded on that point alone.

[31] Did the appellant have a *bona fide* defence to the respondent's application? The *Court a quo* held that there was very little or no prospect of success should the Court rescind the default judgement because it would in all likelihood have to order that the trial start *de novo.* This would be on the basis that there was no agreement between the parties on how the matter would proceed which was compounded by the fact that the accused is deceased.

[32] While the authorities may point out that the attitude of the parties before the Court is of paramount importance, the Industrial Court is different from the normal Civil Courts in that the applicant in the Industrial Court is expected to prove only that he/she is an employee to whom **section 35** of the **Employment Act 1980 applies**. It is the respondent that must prove that the dismissal was fair and that in all the circumstances of the matter, it was reasonable to dismiss the applicant. (See **Section**

42 of the **Employment Act 1980)**. That being the case, it is my view that the question of how the main application brought by the appellant in the *Court a quo* is to proceed in the absence of an agreement between the parties ought to be determined as it remains a live legal question, regard being had to the provisions of the aforementioned provisions of the **Employment Act**.

[33] Having regard to the foregoing and in the result, I make the following order

33.1 The appeal is allowed and the following is substituted for the Court a quo's order of 3rd November 2022 – The application for rescission of judgement is granted.

33.2 The matter is remitted to the Court a quo to be heard by a differently constituted bench.

33.3 Each party is to pay its own costs.

S. NSIBANDE JP

I agree

A.M. LUKHELE JA

I agree

N. NKONYANE JA

For Applicant: Mr A. Dlamini
(B.S. Dlamini & Associates)

For Respondent: Mr. E. Shabangu
(Robinson Bertram)