IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIVIL CASE NO: 61/2019**

In the matter between:

THE TEACHING SERVICE COMMISSION **1ST APPELLANT**

THE MINISTRY OF EDUCATION **2ND APPELLANT**

THE ATTORNEY GENERAL **3RD APPELLANT**

And

TIMOTHY TSABEDZE **RESPONDENT**

Neutral Citation: *The Teaching Service Commission and 2 others vs Timothy Tsabedze (61/2019) [2020] SZSC 11 (04 June 2020)*

CORAM: **DR. B.J. ODOKI JA**

S.P. DLAMINI JA

M.J. DLAMINI JA

DATE HEARD: 08 April 2020

DATE DELIVERD: 04 June 2020

SUMMARY: *Civil Procedure – Judgment granted on the basis of uncontested motion proceedings - Review of judgment of the Industrial Court granted by default and no other reason advanced - Application of rescission of the judgment Substitution of an order of the Industrial Court - Held that the appeal partially succeeds – Held that to that extent the judgment of the High Court is set aside – Held that he matter is referred back to the High Court for final adjudication and Held that no order as to costs is made.*

INTRODUCTION

[1] The matter emanated from the Industrial Court. The Industrial Court dismissed a claim for compensation for unfair dismissal by Respondent who was that Applicant before the Industrial Court and the High Court against Appellants who were Respondents before the Industrial Court and the High Court. The parties will be referred to as 1st, 2nd and 3rd Appellants and Respondent in this judgment.

PROCEEDINGS BEFORE THE INDUSTRIAL COURT

[2] Oral evidence was led before the Industrial Court and the impugned judgment per His Lordship B.W. Magagula AJ (sitting with assessors A. Nxumalo and D. Mango) was delivered on 18 April 2018.

[3] The Industrial Court at paragraph 4 and 5 stated that;

> "4. ***In conclusion we are satisfied that the 1st Respondent has sufficiently discharged its onus of proving that the dismissal of the Applicant was both substantially and procedurally fair in respect of the other charges.***
>
> 5. ***In the circumstances, the Court makes the following Orders:***
>
> a) ***The claims of the Applicant against the Respondents be and are hereby dismissed.***
>
> b) ***There is no order as to costs.***
>
> ***The members agree.***

PROCEEDINGS BEFORE THE HIGH COURT

[4] Respondent being dissatisfied with the said judgment, instituted proceedings before the High Court wherein Respondent sought to have the judgment of the Industrial Court reviewed, corrected and set aside. Neither the application nor the judgment in relation to the proceedings before the Industrial Court is before this Court.

[5] Respondent, by way of Notice of Motion dated 19 June 2018, sought the following relief at the High Court;

"1. Reviewing, correcting and setting aside the judgment of the Industrial Court of 18 April 2018 in terms of which it dismissed all claims of the Applicant as against the 2nd Respondent under Case No. 37/2016;

2. Substituting the decision of the Court a quo dismissing Applicant's claims with an Order granting Applicant's prayers in terms of the application to Court with costs;

3. Directing the 7th Respondent to dispatch within fourteen (14) days of receipt of this Notice of Motion to Registrar of the High Court, the transcribed record of proceedings sought to be reviewed and to notify the Applicant that he has done so.

4. Costs of this application if unsuccessfully opposed;

5. Further and/ or alternative relief as the Court may deem fit.

[6] Respondent deposed to the Founding Affidavit in support of the Notice of Motion.

6.1 Respondent at paragraphs 13 and 14 states that;

"13. I was employed by the 1st Respondent as a teacher on the 23rd May 1984 and continued to discharge my duties as such, where after I was appointed to the position of Headteacher at Mzimnene Lutheran Primary School on the 12th June 2008. I was in

continuous employment until November 2012 when my services were unfairly terminated.

"14. I was charged with six (6) counts of contravening regulations of the Teaching Service Commission Regulations of which charges 1-3 were based of absenteeism and I was acquitted and discharged on same ..."

The Respondent went on to give details of the evidence and his defences on the remaining charges namely charges 4 and 5 which is not relevant to the present proceedings.

6.2 The crux of the Respondent's case on which he challenged the judgment of the Industrial Court is set out in paragraphs 10,11and 12 of the Founding Affidavit wherein he states that;

"10. The purpose of the application is to review and set aside the Award of the 1st Respondent made in favour of the 4th Respondent on the 18th April 2018, which flies in the face of the evidence submitted before the Honourable Court and also taking into account the failure by the Respondents to establish reasons that are both substantively and procedurally fair to dismiss me when considering all the relevant facts of the matter. A copy of the judgment is annexed hereto marked "TT1"

11. The process and/or manner in which the 1st Respondent erred at his decision is grossly irregular, grossly unreasonable and/or irrational such that it is apparent that in arriving at the said decision, the First Respondent failed to properly apply his mind to the matter. The First Respondent failed to take into account

relevant considerations and took into account irrelevant ones. He committed a gross irregularity in handling the matter and failed to properly apply his mind to the facts and evidence before him, particularly in relation to the procedural fairness and substantive fairness enquiry, taking into account Section 42 of the Industrial Relations Act 2000. He further failed to take into consideration that the burden to prove both procedural and substantive fairness of a dismissal lies with the employer being the Fourth Respondent herein.

12. The irregularities resulted in the grave miscarriage of justice to the prejudice of myself."

6.3 The Respondent proceeded to state the following at paragraph 33;

"In light of the aforegoing and that the dispute between myself and the Second and the Third Respondent arose as way back as the year 2012, I humbly apply that the Court substitutes the Order of the Court a quo with an Order of this Honourable Court granting the prayers I made in the Court a quo as they appear in the initial application to Court. The initial application is attached hereto as "TT 5". It is my humble and respectful submission that the Court a quo exhibited bias alternatively incompetence when dealing with the matter such that it is justifiable that this Honourable Court substitutes the Order with an Order of this Honourable Court."

6.4 As per the amended Application on Determination of Unresolved dispute before the Industrial Court, Respondent had sought the following relief;

"a) Reinstatement;

Alternatively payment of;

b) Termination benefits in the sum of E 663 705, 60

c) Maximum compensation for unfair dismissal in the sum of E182 519.04

d) Costs of suit;

e) Further and/ alternative relief."

[7] On 13 July 2018 Appellant filed a Notice to Oppose Respondent's application. Further, Appellant filed a Notice in terms of Rule 30 of the High Court Rules pointing to some irregularities regarding the filing of the record of proceedings before the Industrial Court.

[8] It is common cause that Appellant did not file an Answering Affidavit and in fact subsequently withdrew the Notice in terms of Rule 30.

[9] After Respondent attempted to have the matter set down and could not succeed to do so for no clear reasons, the matter was eventually enrolled on the 1st February 2019 on the Uncontested Motion Roll.

[10] The High Court issued an order per His Lordship Maphanga J. in the following terms;

"1. The Judgment of the Industrial Court dated 18th April 2018, in terms of which it dismissed all claims of the Applicant as against the fifth Respondent under Case No.37/ 2016 is hereby reviewed, corrected and set aside.

2. The decision of the Court a quo dismissing Applicant's claim is hereby substituted with an Order granting Applicant's prayers in terms of the Application for determination of an unresolved dispute with costs. The claims are as follows:

a) Terminal benefits in the sum of E663, 705.00

b) Maximum compensation for unfair dismissal in the sum of E182, 519.04

3. Costs of suit."

[11] When Maphanga J. issued the above order there was no appearance on behalf of the Appellant. The issues of the non-appearance by the Appellant and the set down of the matter were dealt with at length in the papers before the High Court and this Court.

APPLICATION FOR RESCISSION AND STAY OF EXECUTION

[12] In the face of the aforesaid order and an alleged imminent Writ of Execution, 3rd Appellant ostensibly on behalf of all the Appellants

launched a Notice of Application in terms of Rule 6 (24) for relief in the following terms;

> ***"1. Staying the execution of the judgment in favour of the Respondent.***
>
> ***2. Rescinding the orders of the above Honourable Court made on the 1st day of February 2019 which reviewed and set aside the decision of the 1st Respondent in the main Application coupled the substitution of its own Order, with costs granted against the 4th Respondent.***
>
> ***3. Costs of suit.***
>
> ***4. Further and or alternative relief."***

[13] Mxolisi Magongo, an employee of the Attorney General's chambers, deposed to the Founding Affidavit in support of the Notice of Motion.

[14] Magongo in paragraphs 6, 7, 8, 9, 10 and 11 by way of background to the matter, stated the following;

> ***"6. On or about the 13th day of July 2018 the Respondent moved a review application before this Honourable Court. The relief sought was that the judgment of the Industrial Court dated the 18th April in terms of which it dismissed all prayers of the Applicant against the Fifth Respondent***

under case No.37/2016 be reviewed, corrected and set aside.

6.1. The office of the Attorney General served the Applicants with its notice of intention to oppose. It thereafter moved an application in terms of Rule 30 of the High Court Rules. The application for rule 30 was later withdrawn by the office of the Attorney General through the advice of the court on the 7th December 2018.

7. On the 16th day of January 2018 the Respondent served the Applicant's office with a notice of Set-down. However this set down was without a date of hearing. Find attached in reference hereto a copy of the Notice of Set down marked AG 1.

8. On the 28th day of January 2019 the Respondent is said to have served the office of the Attorney General with another Notice of Set down with a hearing date being the 1st of February 2019.

9. The motion Court Roll for the 1st day of February 2019 did not have the matter thus no one attended to same despite that officers from the Applicant's office were present. I have however obtained the roll of the said date and I note there was a matter of Timothy Tsabedze v Malinga & Malinga INC case 923/18 that was allocated number 16 before judge Maphanga but through sheer error I did not think that the matter involved the current matter.

I attach the roll marked AG2

10. It is common practice that has been observed for some time now that Attorneys from the private sector serve the office of the Attorney General with notice of Set – Down and decide not to enroll the matter on the motion Court. One of the reasons is that they approach the registrar of the High Court after the lapse of time for enrolling matters.

10.1 For an illustration of this fact may I refer this Court to set down in the form of a reinstatement that was served at the offices of the Attorney General and set down for hearing on the motion Court roll for the 15th day of February 2019. However this matter was not enrolled on the motion Court roll for the 15th day of February 2019. Find attached the copy of the set down and the motion Court Roll in reference hereto marked AG3 and AG4 respectively.

11. By virtue of the fact that the matter did not appear in the court roll I failed to attend the same. Maybe due to little experience I should have been vigilant and re read the Motion Roll and or called the opposite attorney."

[15] Magongo proceeds to add the following at paragraphs 12, 13, 14 and 15:

"12. On the 4th day of February 2019 the Applicant was served with a Court Order emanating from the review application that was served to the applicant on the 13th July 2018. In

terms of this Order all the prayers in the Notice of Motion in the review Application were granted. The Order came to my attention on the 10th day of February 2019.

13. ***I was clearly taken aback by this Court Order and I duly reported same to my principal Applicant who has ordered me to attend to this matter. I was not reporting to him as I should due to my lack of experience. I also found out that the Respondents had given the office instructions to defend the matter.***

14. ***I did not delay to apply for the rescission but I engaged the opposite attorney and asked him to recall the default judgment but he advised that he has escalated the matter to his boss hence despite pleading with him he refused to recall same.***

15. ***Infact I inherited the file from Senior Counsel Mr. Nhlanhla Dlamini who has been transferred to the Home Affairs as a legal advisor. Only got involved in the matter at around 14th December 2018 and I was of the view that the matter was opposed by the Rule 30 application."***

[16] Magongo at paragraphs 18,19,20,21 and 22, states the following as grounds for rescission;

"18. The basis for this Application is that Applicant demonstrated his intention to oppose the review application by serving the Respondent with a notice to

oppose. There was a further application in a form of Rule 30 Application to have the matter dismissed by our office. These actions are crystal clear with respect to our intentions and interests on the outcome of the matter. The Order was granted in the absence of the Applicant despite the demonstration of his intention to oppose the Application for review.

19. *I am now been advised that I was supposed to have filed an opposing affidavit to which omission I take full responsibility but humbly beg the Honourable Court not to punish the Respondents for this omission.*

20. *The Court will have taken into consideration the value of the money sought in the Order before granting the Order by default. The total amount claimed is around E1000 000-00 (One Million Emalangeni). The order was therefore granted erroneously.*

21. *The Order was granted erroneously in my absence as Counsel for the Respondents on the basis that in review applications the reviewing Court does not substitute the decision of the Court a quo but refers the matter back to that Court for it to make the necessary corrections. Henceforth there was an error on the side of the Court in granting the Order.*

22. *The Order was granted erroneously on the basis that the Court did not issue the reasons why it found that there*

were irregularities in the decision of the Industrial Court but most importantly the matter appeared wrongly on the Court Roll."

[17] Magongo at paragraphs 23, 23.1, 23.2, 23.3 further states the following with regards the prospects of success;

"23. His Lordship JUSTICE B.W. MAGAGULA reasonably applied his mind in reaching the decision to dismiss the application by the Applicant. The crux of the review application is that the Learned Judge committed gross irregularities in the admission of the evidence particularly with respect to the audit report. I would like of state that from the judgment of the case the Court did not consider the evidence that was led by both witnesses of the Applicant and the Respondent.

23.1. The Court took into account the evidence of the Applicant when he admitted in Court that he did not keep proper books of accounts. This admission was with respect to the charge that he was charged with, which is the contravention of the Regulations of the Respondents.

23.2. The Court took into account the evidence of one MS Mavuso who audited the books of accounts kept by the Applicant. In her evidence she stated that they established that the Applicant placed the cheques on top of the payment voucher with no supporting documents. In that the

scenario, the record of accounts that the Applicant is alleging to have been missing when the audit was conducted are not needed to justify the irregularity that was committed with respect to those books of accounts audited. The irregularity was just complete in those books contained in the audit report such that even if the other books that are said to have been missing were found they would not bring any justification for the irregularity.

23.3. This therefore means that the Applicant's allegation that he was dismissed based on an incomplete audit report is neither here nor there. With that said there is evidence that the grantee of the school did return the other books of account to the auditor before the audit was conducted. There are in my view no gross irregularities in the proceedings of the Court a quo so as to overturn its decision.

[18] The Application for rescission was opposed by Respondent and he deposed to the Answering Affidavit.

[19] The basis upon which Respondent opposed the application for rescission is summarized at paragraphs 6,7.1, 7.2, 7.3, 7.4, 7.5, 7.6,7.7, 7.8, 8, 8.1, 8.2 and 8.3 of the Answering Affidavit where he states the following;

"6. *As will be evidenced hereunder, the Application is without any merit and dismally fails to meet the requisite standard of necessary fact for the nature of the relief sought. The whole application is demonstration of the Applicant's strategy throughout the whole matter, from inception.*

7.1 *Notwithstanding the notices of set down, the Applicant was unaware of the matter through either error of the present attorney dealing with the matter or the erstwhile attorney. An Answering Affidavit to the main matter was also not filed on the same grounds or error;*

7.2 *The matter was inherited from the erstwhile attorney who has been transferred and no proper handover of the file was done;*

7.3 *The Respondent should not be punished for the Attorney's myriad of errors;*

7.4 *The Court should have considered that the money sought is around E1000 000.00 (One Million Emalangeni). This meant that the order was granted erroneously;*

7.5 *The Court should not have substituted the decision of the Review Court;*

7.6 *The matter appeared wrongly on the roll;*

7.7 *The Applicant has prospects of success in the main matter.*

8. *With respect to Counsel who is deponent for the Applicant, he has dismally failed to establish primary facts for the*

relief sought. The following facts which will be illuminated in the response are significant as a short answer to the relief sought.

8.1 *The Applicant has dismally failed to establish a reasonable explanation for failing to file an Answering Affidavit in the main application, which is a fatal flaw for the relief sought. Further, Applicants failed to appear in Court despite 3 notices of set down having been served prior to granting of this Order. The notices of set down are annexed hereto in sequence as "Annexure A, B, C;"*

8.2 *There is no Confirmatory Affidavit of the erstwhile attorney confirming his transfer or any instrument supporting that assertion. This would in any event not assist because the aforesaid notices of the set down were served when the present attorney of record was well aware of the matter, inexperience should not be sufficient to assist the Applicant who is the Attorney General and with a staff compliment, I am advised, of at least 20 experienced attorneys;*

8.3 *Substitution of an Order by Review Court is a natural Order where there are gross- irregularities which show failure of the Court sitting a quo to apply its mind to the matter. The gross irregularities established in the Founding Affidavit of my application were not opposed and/or disputed by manner of Answering Affidavit serving before the Court. It therefore cannot be said that it is the Court that committed*

an error. I am advised that the ground of review in terms of Rule 42(1) of the High Court Rules is dealt a fatal blow by this submission alone."

[20] Regarding Appellant's prayer for the stay of execution of the impugned Order of the High Court, Respondent at paragraphs 29, 30 and 31 states that;

> ***"29. The Applicant has made a prayer for the Stay of Execution of the Order. I am advised that where a party makes such prayer, they must make the necessary averments which are requirements to cause the Court to apply its discretion.***
>
> ***30. The Applicant has not advanced a reason why it wants a stay. What is more, the Applicant represents the Government and no Writs of Execution may be issued against the Government.***
>
> ***31. Having failed to establish the requirement for a Stay, it follows that an Order for Stay cannot be granted."***

[21] 3rd Appellant filed a Replying Affidavit of which Magongo was again the deponent. Magongo in the Replying Affidavit does no more than to repeat what was already covered in the Founding Affidavit.

[22] However, a Confirmatory Affidavit is attached to the Replying Affidavit deposed to by Nhlanhla Dlamini which confirms that the said Nhlanhla

Dlamini was in September transferred from the Attorney General's chambers to the Ministry of Home Affairs as a legal advisor. Dlamini further states that the matter was opposed since its inception.

JUDGMENT OF THE HIGH COURT VIS-A-VIS THE RECISSION APPLICATION

[23] Maphanga J. after hearing the matter delivered the impugned judgment on 07 October 2019.

[24] Regarding the sequence of developments leading to the hearing and the judgment, Maphanga J. at paragraphs 9,10,11,12 and 13 of the judgment states the following;

> *"[9] It is significant to note, and this is again a matter of common cause that by this time no opposing affidavit had been filed by the Respondent to contest the application for review. Indeed no such affidavit would eventually be filed in the matter, with the Respondents contending themselves with filing a solitary notice in terms of Rule 30 raising certain technical objections to the certification of the Record of proceedings.*
>
> *[10] It is further common cause that on the 11th December 2018 that Rule 30 Notice was eventually withdrawn by the Applicant (the office of the Attorney General) some six months after the launch of the Review application.*

[11] What is of particular interest is that even at the time of the withdrawal of the Rule 30 Notice the application remained substantively unopposed for want of an affidavit by either the respondent in any way contesting or challenging the application for review.

[12] Thereafter the record indicates there were no fewer than a series of 3 Notices of set down issued by the 1st Respondent and at each turn the matter being inexplicably removed. In due course it would be eventually set down as unopposed application in the non and unopposed motions of the 1st February 2019 when at the instance of the (1st Respondent) applicant the order sought to be rescinded were entered in terms of prayers 1 and 2 of the notice of application for Review that I refer to in paragraph 5 of the judgment.

[13] It is those orders whose rescission is now sought by the applicant."

[25] After considering the merits of the Application for rescission, Maphanga J. at paragraphs 51 and 52 of the judgment ordered that;

"[51] In the result the order granted in default stands, save in so far as the substitution order is hereby varied to this effect-that the matter is remitted to the Industrial Court for re-consideration of the Respondents claim.

[52] I make no order as to costs."

PROCEEDINGS BEFORE THIS COURT

[26] Appellants were dissatisfied with the judgment of the High Court dismissing the application and launched their appeal before this Court.

[27] Appellants' Notice of appeal dated 16 October 2019 lists four grounds of appeal namely that;

"1. The court a quo erred in fact and in law by refusing to rescind the default review judgment granted on the 1st of February 2019.

2. The Court a quo erred in law and fact by amending the default review judgment and ordering the parties to submit themselves to the Industrial Court for reconsideration of the Respondents claim when it was functus officio as it had determined the quantum on the 1st February 2019.

3. Alternatively the court a quo sat on its own judgment as a court of appeal yet there was no prayer to vary the default judgment and as such had no appellant or revisionary powers.

4. The court a quo erred in law and fact by ignoring the Notice of Abandonment of part of the Respondents terminal benefits claim by virtue of the latter filing a Notice in terms of Rule 41 (2) before delivery of the judgment which was

reason enough that the default judgment to 1st February 2019 was erroneously sought and granted.

[28] The appeal is opposed by Respondent. The parties have filed sets of Heads of Argument and Bundles of Authorities in support of their respective arguments.

APPELLANTS' ARGUMENTS

[29] Appellants case is primarily that the High Court ought to have granted the relief sought in the application for rescission either in terms of Rule 42 (1) (a) or Rule 42 (1) (b) or common law. In support of their arguments on this point Appellants relied on the case of **Nyingwa v. Moolman NO 1993 (2) S.A. 508 (Tk G.D)**

[30] It was further submitted for Appellants that the judge a *quo* granted relief that was never sought nor argued by the parties. Appellants further submitted that the only room open to the Court was to rescind the judgment. Otherwise the Court was *functus officio*. Appellants relied on the case of **Dlamini vs Swaziland Electricity Company (05/19) [2019] SZICA 16 (16 October 2019).**

[31] It is also argued on behalf of Appellants that the matter was prematurely set down for hearing.

[32] Finally, it is argued on behalf of Appellants that it did not lie with the High Court to determine damages. To the contrary, it was the Industrial Court that was better suited to determine damages.

RESPONDENT'S CASE BEFORE THIS COURT

[33] The thrust of Respondent's case is, firstly, that the judgment granted on default for failure to file an Answering Affidavit and non-appearance by the Appellants was properly granted; and secondly, that Appellants failed to make a case for the rescission of that judgment. Respondent relied on the case of **Rainbow Farms (Pty) Ltd v Crockery Gladstone Farm (HCA15/2017) [2017] ZALMPPHC 35 (7 November 2017), Naidoo and Another v Ferreiras (Pty) Limited (69094/2014) [2016] ZAGPPHC 897 (9 September 2016) and Trakman NO v Livshitz and others 1995 (1) SA 282 (A).**

[34] It was further argued for Respondent that Appellants' appeal is ill-conceived and misguided because, firstly according to Respondent the matter is suited for a review as opposed to an appeal; and secondly, the grounds of appeal are against procedure and not a decision and /or for finding of the Court a *quo*. I am totally lost as to what is being meant by this argument.

[35] Finally, it was contended for Respondent that the order referring the matter to the Industrial Court is in favour of Appellants and they

actively made a prayer for it in the application for the rescission of the default judgment.

LAW, ANALYSIS AND FINDINGS OF THIS COURT

[36] The law relating to rescission is now settled in our jurisdiction. The salient features of rescission are comprehensively dealt with in the judgment of Maphanga J. and Heads of arguments before this Court. Maphanga J. is of the view that the application by Appellants for rescission was brought under the wrong rule and that it falls short of the legal requirements entitling Appellants to the relief sought.

[37] The dicta in many cases in our jurisdiction postulates that rescission of a judgment may be grounded on one or more of the following;

a) The Common law;
b) Rule 31 (3) (b)
c) Rule 32 (ii), and/or;
d) Rule 42.

(In this regard, see **Leonard Dlamini vs Lucky Dlamini Civil case No: 1644/97, Hans C. Weinard vs a Michelle Sheila Civil case No: 3032/ 00, Eugene Rochat vs. Fernando Julius Manjela (1734/16) [2018] SZHC 184 (10th August 2018), Nhlanhla Phakathi v Swaziland Televison Authority [745/2015]** ***[2016] SZHC 17)***.

[38] In all the above-mentioned cases it was accepted that it is helpful for litigants to show under which of the available heads is an application for rescission grounded on, but the failure to do so alone is not fatal to the application. Maphanga J. agrees with the soundness of this approach, so do I.

[39] When the Court is faced with an application for rescission of its judgment, the Court may rescind or vary the judgment. Rule 42 (1) of High Court Rules provides that;

> "1. ***The court may, in addition to any other powers it may have, mero motu or upon application of any party affected, rescind or vary an order or judgment in which there is ambiguity, or a patent error or omission, but to the extent of such ambiguity, error or omission.***" (my underlining)

In **Shiselweni Investments (PTY) Ltd vs Swaziland Development and Savings Bank Case No: 50/99** per His Lordship Tebbutt J.A, the Court instead of ordering the rescission of the judgment ordered that the proven amount of indebtedness be paid.

[40] It appears to me that the conclusion of Maphanga J. was that a case had not been made out for the rescission of the judgment but Appellant was successful in demonstrating that an incompetent order had been made. As a result, Maphanga J. varied the judgment by removing the incompetent order. Furthermore, the learned judge ordered that the

matter be referred to the Industrial Court for final adjudication of Respondent's claim.

[41] I agree with Maphanga J in amending the incompetent order but disagree with him in so far as he went on to refer the matter to the Industrial Court. What was the Industrial Court expected to do? It cannot be said that the judgment of the Industrial Court was reviewed and/ or set aside in the absence of reasons to do so; it must be shown that there was a misdirection on the part of the Learned Judge of the Industrial Court Magagula AJA. in order to assist that court to reconsider the matter particularly because evidence was led. The issue of damages can only arise after crossing this hurdle first.

[42] The learned judge states that there was an error in the judgment caused by Respondent who took the court in the wrong path.

[43] Mr. Simelane for Appellants during his submission accepted that had the High Court confined itself to removing the incompetent order, the Appellants would not have launched the appeal before this Court. It was submitted by Mr. Simelane that because of the manner in which Maphanga J. handled the matter it showed that he had not read the papers. I reject this submission on the basis that it is both unfair and unreasonable. I wish to repeat what this Court stated in the case of **Fidelity Security Services** case (supra) at paragraph 39;

> ***"[39] This is by no means to call into question whether the learned Judge would do justice in the matter. I have no doubt whatsoever the courts endeavour at all times to uphold justice in every matter and that where there is a misdirection it is only because judges are human and therefore also make mistakes."***

[44] I agree with Maphanga J. that many of the explanations and arguments advanced by Appellants in seeking rescission of the judgment dismally fail to meet muster. However, per the judgment of the High Court an error occurred in making the order awarding damages as evidenced by the Court to correct same. Therefore, the question to be answered is whether on that basis alone the Court was compelled to grant the rescission of the judgment.

[45] The matter is complicated by the fact that the Court proceeded to excise from its judgment the erroneous order and then added a new order referring the matter to the Industrial Court for determination of damages without hearing the parties. The Court did not provide any legal basis to do so. The Court in doing so made a distinction between an order and a judgment. Similarly, the court did not demonstrate any legal basis for the distinction it made. I respectfully disagree with Maphanga J. in this regard.

[46] Notwithstanding the default on the part of the Appellants, it behoved the High Court to firstly satisfy itself that the jurisdictional requirements for bringing the matter within its review authority were met and secondly that a case had been made justifying the reviewing and setting aside of the judgment of the Industrial Court. None of this took place. Therefore, there is no legal basis in the circumstances to refer this matter to the Industrial Court to determine damages in the absence of legal authority demonstrating that the Industrial Court judgment is wrong and calling to be reviewed and set aside.

[47] The Supreme Court may not pronounce itself on any of these matters without the High Court having first dealt with them. The Supreme Court in terms of the Constitution is not a Court of first instance but exercises appellate jurisdiction.

[48] I am mindful of what this Court stated in the **Fidelity Security Services** case (supra) at paragraph 32 namely that;

> ***"[32] I am persuaded by the minority judgment of the Constitutional Court of the Republic of South Africa in so far as it recognizes that there may well be, limited as they are, circumstances whereby the High Court has jurisdiction over the Industrial Court. In my view, the High Court may have jurisdiction over the Industrial Court in matters where there is a Constitutional element to be considered and not in purely labour matters. However, this should not serve to***

supplant or emasculate the Employment / Industrial Act's regime that is properly located in the Industrial Court in favour of any duality between the High Court and Industrial Court over purely labour disputes.

[33] It is my considered opinion that the legislation touching on these matters needs to be revised in order that a proper legislative re-alignment is done. It is an undeniable fact that legal framework has resulted in lack of clarity, duplication and jurisdictional problems. To this end, the Registrar of the Supreme Court is directed to deliver a copy of this judgment to the office of the Attorney General."

[49] However, in the absence of the parties being heard on the referral of the matter to the Industrial Court and the reasons for reviewing and setting aside the judgment of the Industrial Court, the hands of the Court are tied against pursuing this point. The elephant in the room is what is to become of the matter in the circumstances?

[50] There is no final and definitive judgment of the High Court in that no reasons were advanced and/or requested for the judgment other than that it was granted in default. The impugned judgment does not shed any light on this issue. Instead there is referral of the matter to the Industrial Court. Therefore, the only open legal avenue is to refer the matter back to the High Court to be dealt with in terms of the Rules of the High Court.

[51] The argument that the *dies* had not run is without merit. Once Appellants elected to file a Rule 30 Notice as their opposition without filing an Answering Affidavit dealing with the merits, they had made their election. Further that the Rule 30 Notice was subsequently withdrawn without filing the Answering Affidavit makes the argument a nullity. In any event, even if there was some belief that Appellants were still within time to file opposing papers when Respondent set the matter down, they didn't challenge the set downs on being irregular on the basis of being premature.

[52] In view of the issues addressed above, namely; that the parties were not heard pursuant to the refusal of the application for rescission of the judgment by default; that the Court did not render reasons for reviewing and setting aside the Industrial Court judgment; and that the Court referred the matter to the Industrial Court, the matter must be referred back to the High Court for final adjudication on these issues.

COSTS

[53] Costs as a norm follow the cause. I see no reason to make any order for cost in view of how this matter has been badly prosecuted before the High Court and that Labour Courts are generally averse to awarding costs (see **Fletcher Electrical (PTY) Ltd vs Elias Mabuza and another (22/19) [2020] SZSC 13 (25 May 2020).**

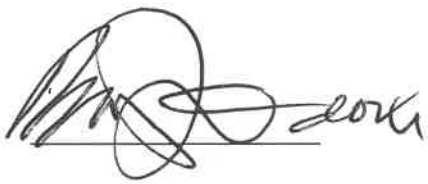
COURT ORDER

[54] Accordingly, the Court makes the following order;

1. That the appeal partially succeeds in that the order of the High Court referring the matter to the Industrial Court is set aside.
2. That the matter is referred back to the High Court for final adjudication.
3. That no order as to costs is made.

S.P. DLAMINI JA

I agree



DR. B.J. ODOKI JA

I agree

M.J. DLAMINI JA

FOR THE APPELLANT: **MR. M. SIMELANE**

(THE ATTORNEY GENERAL)

FOR THE RESPONDENT: **MR. Z. HLOPHE**

(MAGAGULA & HLOPHE ATTORNEYS)