IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 84/99

In the matter between:

ATTORNEY GENERAL APPLICANT

And

ENOCK HLATSHWAYO RESPONDENT

In re:

ENOCK HLATSHWAYO APPLICANT

And

SWAZILAND GOVERNMENT RESPONDENT

CORAM:

NDERI NDUMA: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: MR. P. MSIBI

FOR RESPONDENT: MR. E. HLOPHE

RULING

17. 08. 2000

The Applicant has lodged an urgent application praying for an order in the following terms:

1. Having the usual requirements of the Rules regarding Notice and Service of the application and hearing the matter as one of urgency.

2. Rescinding and setting aside the judgement granted in favour of the Respondent who was applicant under the above stated Case No. 84/99 on the 24 July, 2000.

3. Staying the execution of the above stated judgement pending the hearing and re finalization of this matter.

4. That the orders sought in terms of paragraphs 1 and 2 hereof operate Immediately as an interim relief.

5. Such further and/or alternative relief which may appear fit and proper for the above Honourable Court.

Professor Khumbulani Msibi, a pupil crown counsel in the office of the 1st Applicant (The Attorney

General) deposed in the Founding Affidavit as follows:

That the matter was first set down for trial on the 4th May, 2000 but it could not proceed for the reason that his office was not ready to proceed and one of the court assessors was not available. The matter was then postponed to the 3rd July, 2000.

On the 3rd July there was no appearance from the Applicant's office because the deponent had erroneously diarised the trial date as 3rd August 2000 instead of 3rd July, 2000. The matter then proceeded exparte. Msibi states that this was a genuine mistake on his part.

Msibi further states in the Affidavit that the Applicant has a bona fide defence to the application since the Respondent was dismissed after a full inquiry was held against him, that found him guilty of drunkenness, misconduct and misuse of a government vehicle.

Msibi further states that the matter is urgent because in the default judgement entered against the Applicant on the 24th July 2000 , the court ruled that the Respondent must report to work on the 25th July 2000 which would greatly prejudice the department of statistics.

The Respondent replied to the applicant's application by way of a notice to raise points of law. Counsel for the Respondent submitted that it was not necessary to respond to the application on the merits since the notice of

motion was a nullity, firstly because the Applicant has not used the proper format provided for by the Rules of the High Court and has not sought condonation for the omission.

In the circumstances, the Respondent submitted that the Applicant has failed to comply with Rule 6(9) of the High Court Rules by using Form 2 instead of Form 3.

For this proposition, we were referred to the ruling on points in lirmne by Justice Masuku in the High Court of Swaziland Case No. 24/2000 Ben M Zwane and the Deputy Prime Minister and the Swaziland Government.

Form 2 of the High Court rules is specially designed for exparte application whereas in terms of Rule 6 (9):

"every application other than one brought exparte shall be brought on notice of application as near as may be in accordance with Form 3 of the first schedule and true copies of the notice, the supporting affidavits and all annexures thereto shall be served upon any party to whom notice thereof is to be given."

Justice Masuku relying on the judgement of Fleming DJP in Gallagher v Norman's Transport Lines (Pty) Ltd 1992 (2) SA 500 at page 502 E to 503E stated at page 9 of his judgement thus:

"The Form 2 (a) referred to above is in pari materia to our Form 3, in the circumstances, time has come for this court to refuse to allow the "illogical knee-jerk reaction " referred to above continue haunting litigants in this court. This can only be done if this court will refuse to entertain matters which are not exparte but where the use of Form 3 has been jettisoned less still those cases where no condonation for dispensing with forms is not prayed for. This will be so even if the matter is urgent. It is important to comply as far as practicable in the circumstances with the requirements of Form 3. The courts in the Republic of South Africa, which had Rules in pari materia with ours correctly rendered this practice unacceptable and it is obedience to our Rules that dictates that we should adopt a similar stance as the South African courts without further delays ".

While I cannot but agree with the reasoning of Justice Masuku, it is my view that, that ruling is applicable in matters before the High Court dealt with in terms of the relevant Rules thereof.

The Notice of Motion for rescission of judgement has been brought before the Industrial Court in terms of Rule 42 of the High Court Rules because the Industrial Court Rules do not specifically provide for rescission of judgement.

Where the Rules of the Industrial Court are silent, rule 10 (a) provides as follows:

"subject to the Act and these Rules:

a) where these rules do not make provision for the procedure to be followed in any matter before the court, the High Court Rules shall apply to proceedings before the court with such qualification, modifications and adaptations as the President may determine; and

b) where in the opinion of the President, the High Court Rules cannot be applied in the manner provided for in paragraph (9) the court may determine its own procedure.

In the Industrial Court urgent applications by way of Notice of Motion are brought in terms of Rule 9 (1) ©. The rules do not provide a proforma for exparte and non exparte applications as is the case with the High Court Rules.

In terms of Rule 10 aforementioned, resort will be had to the High Court rules subject firstly to the Industrial Relations Act and secondly to the Industrial Court rules.

Section 8 (1) of the Act reads:

"The court shall not be bound by the rules of evidence or procedure which apply in civil proceedings and may disregard any technical irregularity which does not or is not likely to result in a miscarriage of justice ".

Whereas it is desirable that in non exparte applications details that are contained in Form 3 regarding address of service, manner of service and period within which to respond to the notice if there is intention to oppose, are observed, whether or not strict adherence has been had to a particular form is in my view a technical matter that this court may disregard and such proforma as are found in the rules of the High Court cannot bind this court unless such omission is likely to result in a miscarriage of justice.

The Applicant herein seeks interim relief "pending the re-hearing and re-fmalization of this matter." The application was served upon the Respondent's Attorneys on the 25th July 2000 and they have appended their signature in acknowledgement of receipt thereof.

The notice of motion called upon the respondent to appear in court on the 25th July 2000 at 2.30p.m. when the interim relief would be sought.

The respondent filed a notice of intention to raise points of law on the 27th July 2000 and in his submissions, Mr. Hlophe for the respondent submitted that he saw no useful purpose of responding to the application on the merits.

Clearly the form in which the Application was brought placed no prejudicial obstacles to the respondent that may give credence to the objection raised regarding the format of the application. This being a mere technicality in terms of Section 8 (1) of the Act, I disregard the same and the objection must accordingly fail.

The second legal objection raised by the Respondent to the application is to the effect that on the papers

as they stand the applicant has failed to make the necessary and sufficient averments to sustain a cause of action in terms of the relief sought in his application and in particular as regards rescission of the judgement of this court and the stay of execution.

There being no specific rule of the court dealing with the matter, the application is brought in terms of rule 42 (1) of the High Court Rules.

The Applicant does not aver that the judgement of Justice Nkambule delivered on the 24th July 2000 was delivered in error according to Mr. Hlophe for the respondent. Mr. Hlophe submitted that the Applicant ought to have moved for the rescission of the order by the learned judge to proceed exparte, which order was made on the 3rd July, 2000.

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Mr. Hlophe further argued that the Applicant's counsel became aware of the order of the court to proceed exparte on the same date. Indeed, it is common cause that Mr. Msibi appeared in court on the date the matter proceeded exparte but was late.

Having become aware that the matter had proceeded exparte, the Applicant should have moved to have that order rescinded for the reason now advanced in the Founding Affidavit that Mr, Msibi had erroneously diarised the hearing of the matter as the 3rd August 2000 instead of the 3rd July 2000.

Rule 42 (1) (a) of the High Court rales reads thus :

"42(1) the court may, in addition to any other powers it may have, meromotu or upon the application of any party affected, rescind or vary;

(a) an order or judgement erroneously granted in the absence of any party affected thereby".

In terms of the aforesaid rule, the order or the judgement may be rescinded or varied if the same was granted by the judge in error.

The error sought to be rectified should be by the presiding officer in relation to a particular order or judgement. The error allegedly made should be discemable on the face of the papers.

In terms of the papers filed or record, there is no assertion that the judgement of 24th July 2000 was granted in error. The learned judge has outlined briefly the reason why the court proceeded to hear the application exparte. The Application was on the 20th May 1999 in the absence of the present applicant set for trial on the 4th May 2000. On the 4th May 2000 there was no appearance for the Applicants. The court merumotu stood down the matter for 30 minutes for the office of the registrar to phone the Attorney General's office, Mr. P. Msibi arrived and the matter was set for 3rd July 2000 for trial. Mr. Msibi did not turn up and the matter proceeded at 10.45 a.m. after Mr. E. Hlophe for the applicant made an application that the matter proceed exparte which application was granted in terms of Rule 7 (a) of the rales of the Industrial Court, 1934.

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This is the order the Applicant ought to have moved to be rescinded on an urgent basis but it did not.

There is no explanation whatsoever on the Applicant's papers as to why this application was brought so many days after the order was made and worse still, why the Applicant had to wait for the learned judge to deliver the judgement on the merits on the 24th July 2000. No reason has been advanced by the Applicant as to why the judgement of the 24th July 2000 should be rescinded. The same was not made in error but after considering the evidence of the Respondent in the absence of the Applicant.

This conduct on the part of the Applicant is frivolous and this court will not condone it.

For the aforesaid reasons, the application will accordingly be dismissed with costs.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT