

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 184/07

In the matter between:

MAHLANGATSHA COMMUNITY

FORESTRY DEVELOPMENT ASSOCIATION

Applicant

and

THOLAKELE NKHAMBULE

Respondent

In Re:

THOLAKELE NKHAMBULE

Applicant

and

MAHLANGATSHA COMMUNITY

FORESTRY DEVELOPMENT ASSOCIATION

Respondent

CORAM:

P. R. DUNSEITH : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR APPLICANT : S. MADZINANE

FOR RESPONDENT : Z. DLAMINI

J U D G E M E N T – 26/11/08

1. The Respondent applied to the Industrial Court for determination of her unresolved dispute. The application was initially struck off the

roll for non-appearance. The Respondent (who was the Applicant in the matter) reinstated the matter but there was still no appearance for the Applicant (which was the Respondent in the matter.) After a series of postponements, the Respondent filed an affidavit in proof of service of the notice of reinstatement on the Applicant. The matter was then referred to ex parte trial.

2. The ex parte trial proceeded on the 16th September 2008. Notice of set down was not served on the Applicant and the trial proceeded in its absence. After hearing the evidence of the Respondent the court entered judgment in her favour for payment by the Applicant of the sum of E13,453-12 and costs. The Respondent issued a writ in execution of this judgement.
3. The Applicant has now brought an urgent application for an order setting aside or rescinding the ex parte judgement granted in its absence on 16th September 2008, on the grounds that the Applicant was never served with the notice of reinstatement.
4. Execution of the judgement was stayed pending determination of this application for rescission of judgement.
5. The affidavit filed of record in proof of service of the notice of reinstatement is made by one Sandile Mbingo. He states:

“On Friday the 21st September 2007 I proceeded to Mahlangatsha to serve the Notice of Reinstatement upon Ncoyi Mkhonta (nee Dlamini) a person ostensibly in charge and not less than sixteen years at his place of residence at Kamcondza area in the district of Manzini by

handing over a copy after exhibiting the original and explaining the nature and exigency of the process.”

6. Although the affidavit of service does not say so, it is common cause that Ncoyi Mkhonta is Chief and a patron of the Applicant Association. It is also common cause that Ncoyi Mkhonta is a woman, notwithstanding the reference to “his place of residence” in the affidavit of service.
7. The Applicant is a cooperative society duly registered in terms of the Cooperatives Societies Act, 1964. In terms of section 8 of the Act it is a body corporate with power to institute and defend legal proceedings.
8. Service of court process upon a body corporate should be made upon a responsible person at its registered office or principal place of business within Swaziland, or if there is no such person willing to accept service, by affixing a copy to the door of such office or place of business.

See Rule 4 (2) (e) of the High Court Rules of Court as read with Rule 10 of the Industrial Court Rules, 1984 (which applied when service was effected on 21 September 2007).

9. The messenger Sandile Mbingo states in his affidavit opposing the rescission application that when he went to the Applicant’s office to effect service, he was directed by the secretary to serve on Ncoyi Mkhonta. That is why he proceeded to Mkhonta’s home to serve on her.

10. Assuming there was personal service on Mkhonta, the court might be prepared to condone the departure from the strict requirements of the rules regarding service. We are not however convinced that service was effected on Mkhonta. The affidavit of service is imprecise. It states that Mbingo proceeded to Mahlangatsha to serve on Mkhonta, but it does not state that she was actually served. The inclusion of the word "*a person ostensibly in charge and not less than sixteen years at his place of residence*" suggests that Mkhonta was not personally served but instead the process was left with someone at her place of residence.
11. In her affidavit, Mkhonta says she was told by Sandile Mbingo, when he came to serve the ex parte judgement, that he served the notice of reinstatement on her housemaid because she was not at home. Mbingo denies telling this to Mkhonta, but he does not deny that he served the notice on her housemaid.
12. Whilst the court might have been prepared to condone service on Mkhonta as a responsible officer of the Applicant, service on Mkhonta's house maid is one irregularity too many.
13. Ncoyi Mkhonta denies being served with the notice, and further states that the Applicant association has its own office and there is no reason why the court process could not be served there in compliance with the Rules of court.
14. The court is not satisfied that proper service of the notice of reinstatement was effected or that the reinstatement of the matter was properly brought to the notice of the Applicant association.

15. The Respondent argues that it was not obliged to serve the Applicant with the notice of re-instatement because it did not appear when the matter first came before the court. We disagree. The matter was struck off for non-appearance of both parties, and the Applicant was entitled to be given notice when the matter was re-instated. In any event, the purported service of the original application on Ncoyi Mkhonta at her residence was itself defective in terms of the rules.
16. In our view the court would not have referred the matter to ex parte trial, nor proceeded with the trial, if it had been made aware of the defective service of the notice of re-instatement. The ex parte judgment was erroneously sought and erroneously granted in the absence of the Applicant.
17. The court shall rescind the ex parte judgment in terms of Rule 20 (1) (a) (i) of the Industrial Court Rules, 2007. It is not necessary in terms of that rule for the Applicant to establish that it has a bona fide defence.

Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd 1977 (2) SA 576W at 578 F-G.

18. The application is granted and the ex parte judgement entered on the 16th September 2008 is hereby rescinded and set aside.

We make no order as to the costs.

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT