IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case No. 170/12

In the matter between**:**

AKANI SWAZILAND RETIREMENT FUND ADMINISTRATORS [PTY] LTD **Applicant**

And

PATRICK MHLANGA **Respondent**

IN RE:

PATRICK MHLANGA **Applicant**

And

AKANI SWAZILAND RETIREMENT FUND ADMINISTRATORS [PTY] LTD **Respondent**

Neutral citation: *Akani Swaziland Retirement Fund Administrators [Pty] Ltd v Patrick Mhlanga (170/12) [2013]* SZIC 14 (MARCH 2013**)**

Coram: NKONYANE J,
(Sitting with G. Ndzinisa & S. Mvubu
Nominated Members of the Court)

Heard: **05 APRIL 2013**

Delivered: **24 APRIL 2013**

Summary:

The Applicant/respondent instituted an urgent application for the rescission of the court's order that was granted in its absence its attorneys having withdrawn their services.

Held: There was evidence before the court that the Applicant/Respondent was made aware in good time that its attorneys had withdrawn. The application dismissed accordingly.

JUDGMENT 24.04.13

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[1] This is an urgent application brought by the Applicant/Respondent against the Respondent/Applicant for an order in the following terms:

"1. That the Honourable Court dispenses with the normal forms and usual requirement of the Rules of the above Honourable Court relating to service of process and notices and that this matter be heard as a matter of urgency.

2. That pending the final determination the warrant of execution be hereby stayed.

3. Rescinding and/or setting aside the judgment of this court issued on the 06th December 2012.

4. Granting applicant leave to defend the main application in this matter.

5. Costs of suit in the event this matter is opposed.

6. Further and/or alternative relief."

[2] The application is opposed by the Respondent/Applicant who duly filed an Answering Affidavit on 12.12.12. The Applicant/Respondent thereafter filed its Replying Affidavit dated 21.02.13. The matter was finally argued in court on 05.04.13 after both parties have filed their Heads of Argument.

[3] For convenience and ease of reference the court shall refer to the parties in terms of the appearance in the original application.

[4] **Brief History:-**

The Applicant is an adult Swazi male former employee of the Respondent company. He filed the main application and was seeking an order directing the Respondent to pay to him the sum of E78,422.56 being his terminal benefits, costs at attorney and client scale and further and/or alternative relief. The Respondent filed a Notice to oppose but did not file its Answering Affidavit. The Applicant accordingly obtained an order in default against the Respondent on 06.12.12. It is this court order that the Respondent is now applying that it be rescinded or set aside.

[5] In its papers the Respondent stated in paragraph 8 that;

"8. I state that the judgment was erroneously granted in the circumstances for the following reasons;

8.1 Applicant was never served with the Notice of withdrawal by its attorneys. Applicant all along was under the impression that it was represented.

8.2 Applicant was never served with the Notice of set down for hearing at the date the judgment was granted.

> *8.3 The dispute between the parties has not been declared unresolved by CMAC. The above Honourable court did not have jurisdiction over the matter."*

[6] **<u>Jurisdiction:-</u>**

The Applicant in its application stated clearly in paragraph 4 of the Founding Affidavit that;

"*This application I brought under the auspices of* ***Section 14 of the Industrial Court Rules, 2007*** *and I submit that this application concerns the determination of a question of law."*

Further, in paragraph 9 of the Founding Affidavit, the Applicant stated that;

"Further, I submit that there was no commercial rationale for my retrenchment hence my retrenchment was both procedurally and substantively unfair. At any rate this is not the issue before court as I intend to report it CMAC (sic) and claim maximum compensation for unfair dismissal. <u>The claims before court concern the terminal benefits which the Respondent rightly</u>

undertook to pay and any other claim that is easily ascertainable in my contract of employment."

[7] The argument that this court did not have jurisdiction to entertain the main application is therefore dismissed because of the following reasons;

7.1 Where a material dispute of fact is not reasonably foreseen, a party may institute an application in terms of Rule 14 of this Court's Rules. In the application the Applicant stated that the claims concerned the terminal benefits which the Respondent rightly undertook to pay and any other claim that is easily ascertainable in his contract of employment.

7.2 Annexure "PM3" of the Applicant's Founding Affidavit indeed shows that the Respondent undertook in writing to pay to the Applicants the monies that he is now claiming. In these circumstances, the Applicant was entitled to institute the proceedings under Rule 14 of this court's Rules as there was no dispute that these amounts were payable to the Applicant.

7.3 Even in its Founding Affidavit in the rescission application, the Respondent has not denied that it made the undertaking to pay to the Applicant the amount that he is now claiming in terms of Annexure "PM3"

7.4 The Respondent wants to create the impression that there is a dispute because the employment contract states that the salary of the Applicant will be E12,400.00 per month yet he calculated his terminal benefits based on the figure of E16,100.00 per month. The Applicant stated in paragraph 11 of the Founding Affidavit that at the time of his termination his salary was then E16,100.00 per month. This was not denied by the Respondent in its Founding Affidavit in the present rescission application.

7.5 The Applicant in his application was merely effecting or enforcing the undertaking made by the Respondent company in terms of Annexure "PM3" that it would pay the terminal benefits to the Applicant on the last day of October 2011. There was therefore no need for the Applicant to report a dispute at CMAC.

[8] **Notice of withdrawal:-**

It was argued on behalf of the Respondent that the Respondent was never served with a Notice of withdrawal by its erstwhile attorneys. From the papers before the court it seems that the Respondent's main complaint is that it was never served with the Notice of withdrawal by its attorneys, and not that it was never served with the Notice at all. There is evidence before the court that the Respondent was made aware that its attorneys have withdrawn. In terms of the Notice of set down for Monday 29th October 2012 it is clearly stated therein that;

"Be pleased to take Notice that the Respondent's attorneys having withdrawn as attorneys of record in accordance with the Notice of withdrawal which is annexed hereto, this matter has been set down for Monday the 29th day of October 2012 at 0930 hours or so soon thereafter as the matter may be heard for an exparte hearing.

Please further Notice that in the event the Respondent has not filed its opposing papers on/or before the 29th October 2012, application shall be made for orders in accordance with the notice of application, a copy of which is annexed hereto."

[9] This Notice of set down for *exparte* hearing was served on the Respondent on 11th October 2012. The Respondent was therefore made

aware on 11th October 2012 that it was no longer represented. It is therefore not correct that the Respondent did not know that its attorneys have withdrawn. The Respondent had more than ten days to appoint new attorneys or to appear in court on 29th October 2012 by any other member of the management.

[10] The directive by the Presiding Officer who was hearing the matter in court 1, directed that the service of the Notice of set down together with the Notice of Withdrawal should be effected on the Respondent by 10th October 2012. The service of these documents was however effected on 11th October 2012. It is not the Respondent's case before the court that the service was defective because it was effected on 11th October 2012, one day later. There was also no evidence before the court that the Respondent was prejudiced in any way by the effecting of the service on the 11th October 2012 and not on 10th October 2012 as directed by the court.

[11] The Respondent stated in paragraph 15 of its Replying Affidavit that the return of services does not state that the Notice of withdrawal was also served on it. The Notice of set down which was received by the Respondent on 11th October 2012 clearly informs the Respondent that its attorneys of record have withdrawn as such and that The Notice of

withdrawal was annexed thereto. The purpose of service of the Notice of withdrawal is to make the other party aware that it is no longer represented in court. It is the view of the court that the Respondent was sufficiently notified that its attorneys of record had withdrawn by the Notice of set down served on it by the Applicant on 11th October 2012.

[12] **Notice of Set Down for Hearing for the date the Judgment was Granted:-**

It was also argued on behalf of the Respondent that the judgment should be rescinded because the Respondent was not served with the Notice of set down for the date that the judgment was granted. It was argued that because of the non-service the order was granted erroneously. It was further argued that once the court finds that the order was granted erroneously, the court is obliged, without further enquiry, to rescind the order and that the Applicant need not show good cause.

[13] Indeed, **Rule 20 (1) (i)** provides that the court may rescind or vary any order or judgment erroneously sought or erroneously granted in the absence of any party affected by it. An order is erroneously granted if it was not legally competent for the court to have made such an order.

See: **Nyingwa v. Moolman N.O. 1993 (2) S.A. 508 (TK).**

Cletta's Uniform v. Big Bend High School case No. 314/2007 (H.C)

[14] It was argued on behalf of the Applicant that the Respondent having failed to appear in court on 29th October 2012, there was no obligation on the Applicant to serve the Respondent with the Notice of set down for 06th December 2012 when the judgment was finally granted. The court record indeed shows that despite the Respondent having been served with the Notice to appear on 29th October 2012, there was no appearance by the Respondent in court on that day. The matter was postponed until 31st October 2012. On this day the Presiding Officer did not grant the order as he recused himself from the case.

[15] From the court record, the appearances on 31st October 2012 are not recorded. It is not the Respondent's case before court that it was present on this day. There being no evidence that the Respondent ever appeared before the court after 29th October 2012, there was no obligation on the part of the Applicant to serve the Respondent with further notices of set down. The court order granted on 06th December 2012 could have been granted on 29th October 2012, had it not been that on that day the court

found that the employment contract, Annexure “PM1” was ineligible and thereby postponed the matter until 31st October 2012. The Respondent having failed to file its Answering Affidavit in opposition, and the Respondent having been made aware that the application was going to proceed on an *ex parte* basis on 29th October 2012, the Applicant was entitled to proceed with the application and obtain the judgment in the absence of the Respondent. There being evidence before the court that the Respondent was properly notified that the matter was going to proceed on an *ex parte* basis on 29th October 2012, and there being evidence from the Notice of set down for 29th October 2012 that the Respondent was advised that its attorneys of record have withdrawn, the Respondent having failed to instruct another attorney or to appear in court through its management, it cannot be said that the default judgment was erroneously granted on 06th December 2012. As on 29th October 2012, or any date thereafter, the Applicant was entitled to proceed on an *ex parte* basis.

[16] **<u>Bona fide Defence/Good cause:-</u>**

The court agrees with the Respondent’s counsel that once the court finds that the order was granted erroneously, it must without further enquiry, rescind the order and that the Applicant need not show good cause in order to succeed. However, in this case, and for the sake of completeness,

the court comes to the conclusion that the Respondent has also failed to establish good cause or that it has a bona fide defence. The Respondent briefly stated its defence in its paragraph 12 of the Founding Affidavit, namely, that in terms of the employment contract under clause 7.1 the Applicant's salary was agreed to be E12,400.00 per month. By this, the Respondent was trying to show that there was a dispute on the figures as the Applicant calculated his terminal benefits on the basis that he was earning E16,100.00 per month. This argument has no merit at all because:

16.1 The Respondent did not deny that at the time of the termination of the Applicant's service in October 2011, the Applicant's salary had risen from E12,400.00 to E16,100.00 per month.

16.2 The Respondent undertook in writing to pay the Applicant his terminal benefits on the last day of October 2011. (See: Annexure "PM3"). This document was never disputed by the Respondent.

16.3 Clause 7.4 of the contract of employment (Annexure "PM1") states clearly that "the employee shall receive

> *an annual* <u>*salary increase*</u> *subject to their performance rating." There was no evidence by the Respondent nor was it suggested during the submissions in court that the Applicant never received an annual salary increase, and that his salary remained at E12,400.00 from July 2008 when he was employed, until October 2011 when he was terminated.*

[17] In the light of the written contract of employment, Annexure "PM1" and the undertaking by the Respondent to pay the Applicant his terminal benefits, Annexure "PM3", there is no doubt to the court that the Respondent has no valid defence to the Applicant's claim. The Respondent merely moved the present application as an obstructive measure to delay the payment. This conduct by the Respondent no doubt calls for the court's censure. The court will accordingly make an order for costs on the punitive scale as asked for by the Applicant.

[18] Taking into account all the evidence before the court and also taking into account all the circumstances of the case, the court will make the following order;

a) The application is dismissed with costs on the attorney-client scale.

[19] The members agree.

<u>N. NKONYANE</u>
JUDGE: INDUSTRIAL COURT OF SWAZILAND

For Applicant/Respondent: Mr. P.S. Mamba
(S P Mamba Attorneys)

For Respondent/Applicant: Mr. N. Mthethwa
(Magagula Hlophe Attorneys)