IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 395/2003**

In the matter between:

SWAZI MAWELELA **APPLICANT**

And

SWAZILAND RANCHES T/A TABANKULU ESTATES **RESPONDENT**

In re;

SWAZI MAWELELA **APPLICANT**

And

SWAZILAND RANCHES T/A TABANKULU ESTATES **RESPONDENT**

Neutral citation : *Swazi Mawelela v Swaziland Ranches t/a Tabankulu Estates (395/2003) [2017] SZIC 116*

CORAM:

XOLISA HLATSHWAYO	**:**	**ACTING JUDGE**
MUSA P. DLAMINI	**:**	**MEMBER**
NICHOLAS R. MANANA	**:**	**MEMBER**

DATE HEARD	:	19 OCTOBER 2017
DATE DELIVERED	:	27 OCTOBER 2017

JUDGEMENT

Background

1. The present application is subsequent to an order granted by this Court on the 4th December 2007, dismissing the application for unfair dismissal.

2. The application was properly lodged, pleadings filed and closed. Both parties' evidence was led through witnesses.

3. The matter was allocated the dates, 3rd and 4th December 2007 for continuation of the trial, which was at Respondent's case stage.

4. In March 2009, the Applicant filed the present rescission application seeking;

"1. Condoning the Applicant for late institution of these proceedings;

2. Rescinding and setting aside the order granted on the 4th of December 2007;

3. Subject to prayer (supra) referring the matter to the Registrar for re-allocation of another trial dates for continuation of trial;

4. Costs of suit only in the event of opposition;

5. Granting the Applicant further and or alternatively relief" (sic)

5. The application for rescission is opposed and all pleadings in relation to the process closed. The rescission application was argued.

Applicant's Argument

6. The Applicant, in both the main and rescission applications, argued that it seeks rescission of the order of the 4th December 2007 because the Court erred in dismissing the main application. It argued that in the trial of the main application, it had made its case in terms of s35 of the Employment Act 1980 (as amended) and led all its witnesses, and had proven its case on a balance of probabilities that the dismissal of Applicant was both substantively and procedurally unfair. It was argued on behalf of Applicant that, when the matter was adjourned, before the application for the dismissal of the main application, the Respondent had also led its main witnesses in evidence. Further argument was that the Applicant's attorneys had withdrawn their services during the adjournment, which

event saw the Applicant not receiving the posted Notice of Withdrawal of Attorneys of Record because he had changed his postal address.

7. The Applicant argues that the court's error was in not considering the case in total, when dismissing the application. The gravamen of the argument is that the court should have chosen either of two open options to it i.e.;

(i) to let the matter proceed *ex parte* whilst Respondent finishes its case

(ii) make a ruling based on the evidence already placed before it by both Applicant and Respondent

8. The Applicant argued that the dismissal of the application by the court was a decision reached on the technicality of the Applicant having failed to appoint another attorney of record after the former attorney withdrew his services. The rescission application was submitted to be in terms of Rule 42(1)(a) of the High Court Rules. The Applicant argued an assertion that the court made an error and can correct itself by such rescission, as it sits as a Court of Appeal.

9. The Applicant's argument was that the court having heard the evidence of Applicant, should have let the Respondent to lead its evidence to ascertain whether the dismissal was for a lawful reason, stated in the law.

Respondent's Argument

10. The Respondent opposed the rescission application and argued that the Applicant's reliance on the stated error by the court, i.e. that the dismissal of the application was due to failure to appoint new attorneys, was based on a "mistaken point of view". The "mistaken point of view" was submitted to be the fact that, on the 4th December 2007, when the application was dismissed, the ten (10) days since the withdrawal of the attorney of record on the 28th November 2007, had not lapsed. It was Respondent's argument that it is on the strength of that which leads to its assertion that the premise on which the R42 (1)(a) rescission application is based is wrong and must fall away.

11. Respondent further argued that, on the days on which the matter was heard, the question of appointment of new attorneys never arose however the Respondent raised only an irregularity in the last minute withdrawal by the attorney.

12. The Respondent submitted that it is common cause that pleadings were closed, both parties had presented their respective evidence by leading witnesses and submitting all documentary evidence relied on, before the Court which dismissed the application. The Respondent thus argued that same means that the Court heard the matter on its merits and dismissed the application. The Respondent concludes that that renders the matter as not being one for rescission but for appeal or review.

13. The argument is, further, that once the Court has heard a matter on its merits, it becomes *functus officio*. It was argued that, *in casu*, the Court is not shown to have disregarded the evidence lain before it when dismissing the application. The Respondent finds it inconceivable that the same Court which had heard the evidence would turn around and not consider it.

14. The final submission on behalf of the Respondent is that the explanation for default should not be considered by the Court because it illustrates a lackadaisical attitude by the Applicant, in that he stayed out of communication with his attorney for unreasonably long periods, showing lack of diligence.

Rescission Application

15. One of the questions the Court is to determine is whether the rescission is properly sought, i.e. if a case for rescission exists in this matter.

16. Rule 42(1)(a) in terms of which the application is said to have been made reads;

> *" Variation and Rescission of Orders.*
>
> *42. (1) The Court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:*

(a) an order or judgment erroneously granted in the absence of any party affected thereby;

17. *In casu,* there is an application for rescission, there is an order granted by the Court in the absence of one party. It is also common cause that the Applicant is a party affected by the order granted.

Error

18. The question to begging an answer is whether there was an error in granting the order.

19. In determining the same, the Court has to revisit the record. The record shows and the parties are agreed that Applicant's case was closed and the Respondent had resumed with the testimony of its witnesses when the matter was adjourned.

20. The matter was then allocated 3rd and 4th December 2007, for resumption, and the Applicant failed to make appearance on both those date.

21. The Court entry of the 3rd December 2007 was captured as follows;-

For Applicant No appearance

For Respondent JN Hlophe

"R/C;- on the 28.11.07 we were served with a Notice of Withdrawal. An attorney is not allowed at this stage to withdraw

without leave of Court. We ask that the notice be regarded as irregular and be set aside. We want the matter to come to finality. This is meant to be dilatory. May the application be set aside and dismissed.

Court;- matter p/p until 04.12.07 for continuation"

22. The Court entry of the 4th December 2007 was captured as follows;-

For Applicant No appearance

For Respondent JN Hlophe

R/C: the Court asked me to furnish it with some authorities. I managed to get only the S.A. authorities. They refer to the withdrawal of the application. I submit that the same principle applies

…1967 (1) SA 356

…1967 (3) SA 591

…1953(4) SA 474

…1971(1) SA 460

Court;- The matter was set down for two days being the 3rd and 4th December 2007. There was no appearance by the Applicant yesterday the 3rd December 2007. There is still no appearance by the Applicant even today. There is no evidence in the court record

that the matter was set down at all by the Applicant. In the circumstances, the Court will grant the Respondent application made yesterday that the application be dismissed."

23. The application made by the Respondent on the 3rd December 2007 was for "application be set aside and dismissed" and the reason advanced by the Respondent was that a Notice of Withdrawal of an attorney was not allowed at that stage, which made it irregular. The filing of such notice was submitted to be dilatory.

24. The Court's entry does not show that the dismissal was as a result of failure to appoint new attorneys, as argued by the Applicant. On the other hand, it also does not show any conclusion of the dismissal based on the merit consideration of the matter as a whole.

25. However, it appears from the entry of the day that the court was dismissing the application on the strength of the application made by the Respondent on the 3rd December 2007.

26. The Court committed an error in dismissing the application because of the circumstances motivating the application made on the 3rd December 2007. This is especially because there was no express withdrawal of the application by the Applicant. Secondly, there was an "almost complete" matter before it, on which it could decide same, even in Applicant's absence, i.e. whether the Applicant had made a case for unfair dismissal and/or the Respondent had made a case for dismissal for reasons within

the Employment Act. Thirdly, the Court erred in accepting that the Applicant's conduct was equivalent to withdrawal of the application when Applicant was still within the stipulated 10 days of appointing a new representative.

27. Hlophe J. in **Allen Mango v Edward Alexander Hamilton Case 1784/2004** at page 6

> *"the position of the law is settled that for an Applicant to succeed on a rescission sought on the basis of error of R42, there has to be established only such error. Once such error has been established, the rescission ought to be granted without any further enquiry…"*

28. Still on the question of error, Masuku J., in **Hans Weinhard v Michelle Sheilla Case 3032/2000** at page 4 and again in **Innovation (Pty) Ltd & Another v RMS Tibiyo Case 1944/2002** at page 6, quoted *Bakoven v GJ Howes (Pty) Ltd 1992 (2) SA 466 (WLD) at 471E-G* as follows;

> *"Rule 42(1)(a), it seems to me, is a procedural step designed to correct expeditiously an obviously wrong judgement or order. An order or judgement is "erroneously granted" when the court commits an "error" in the sense of a mistake in a matter of law appearing on the proceedings of a court of record…it follows that a Court in deciding whether a judgment was "erroneously granted" is like a Court of Appeal, confined to the record of*

proceedings… Once the applicant can point to an error in the proceedings, he is without further do entitled to rescission"

29. The Court is not *functus officio, in casu,* for the reason that, despite having heard the evidence in the matter, the dismissal was not on consideration of the merits of the case but on other circumstances. Therefore, the matter is still not determined on its merits.

30. Wherefore the rescission application is granted.

31. Costs to be in the course.

The Members agree.

XOLISA HLATSHWAYO
ACTING JUDGE OF THE INDUSTRIAL COURT

FOR THE APPLICANT	:	MR. L. SIBIYA (MTSHALI SIMELANE ATTORNEYS)
FOR THE RESPONDENT	:	MR. Z. SHABANGU (MAGAGULA HLOPHE ATTORNEYS)