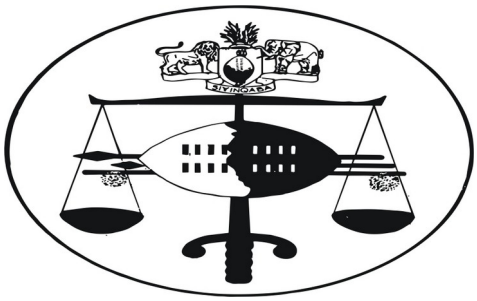

IN THE INDUSTRIAL COURT OF APPEAL

HELD AT MBABANE

Appeal Case No. 3/2013

In the matter between

AKANI SWAZILAND RETIREMENT FUND ADMINISTRATORS (PTY) LTD **APPELLANT**

AND

PATRICK MHLANGA **RESPONDENT**

Neutral citation: *Akani Swaziland Retirement Fund Administrators (Pty) Ltd and Patrick Mhlanga (3/13) [2013] SZICA 06 (19 September 2013)*

Coram: RAMODIBEDI JP, OTA AJA and ANNANDALE AJA

Heard: **10 September 2013**

Delivered: **19 September 2013**

SUMMARY

Appeal against dismissal of application for rescission of judgment as well as an order of costs on attorney and client scale – The appellant failing to establish good cause in terms of Rule 20 of the Industrial Court Rules 2007 as well as failing to establish a bona fide defence – The application for rescission obstructive and made solely for the purpose of delaying payment – Appeal dismissed with costs – The appellant also ordered to pay costs on attorney and client scale for abuse of the court process in having filed unnecessary transcript record of submissions by counsel, thus unduly overburdening the record on appeal.

JUDGMENT

THE COURT

[1] In the court below Nkonyane J, sitting with two Nominated Members in the Industrial Court, dismissed the appellant's application for rescission of that court's judgment delivered on 6 December 2012. The court also granted costs against the appellant on attorney and client scale. The appellant has appealed to this Court against the judgment *a quo* in both respects.

[2] The relevant facts giving rise to this appeal are the following. On 2 July 2008, the appellant employed the respondent as Marketing Consultant in terms of a written contract of employment. In terms of clause 7.1 of the agreement the appellant's salary was stated to be R 12,400.00 per month.

[3] By letter annexure "PM2" dated 14 October 2011, and evidently hit by the economic meltdown which was raging at the time, the appellant convened a meeting of its employees to be held on 17 October 2011. Surprisingly, that letter does not form part of the record. However, the appellant contends that the agenda as contained in the letter was "with a view to exploring ways to avert/or mitigate the situation."

[4] Subsequent to the meeting of 17 October 2011, but on the same date, the appellant addressed a letter annexure "PM3" to the respondent in these terms:-

"Dear Mr Patrick Mhlanga,

TERMINATION OF SERVICES FOR OPERATIONAL REQUIREMENTS.

It is with regret that the company has to inform you of the termination of your services due to the financial difficulties the company has been experiencing over the past year.

The company and you have been involved in consultation regarding the retrenchment (sic) pursuant thereto Management considered the economic position of the Company in particular the possibility that the economy will improve in the very near future but this does not seem to be [the] case and therefore, it is our view that no alternative to retrenchments could be implemented and in accordance with labour law principles in this whole process we have retained skills in key areas in the re-structuring process. You were identified as one of the employees to be retrenched.

Please note that the retrenchment will take immediate effect on the 17th October 2011. You shall not be required to serve your notice period in terms of which you shall be compensated for the month of your notice period and as such your terminal benefits shall be calculated as follows:

(a) Wages for the month of October 2011
(b) Notice pay equal to one month's wages/salary
(c) Severance pay
(d) Leave pay
(e) Termination benefit (Lukhotse Umbrella Provident Fund)

These payments will be effected on the last day of October 2011. However please note that the retrenchment is with immediate effect to afford you the opportunity to find alternative employment during the course of your notice period and as such this shall be your last working day in the Company.

Kindly hand over all company equipment e.g. cell phones and contract SIM cards, laptops, etc. You may collect all items of personal nature from your office/desk space leaving all company files and materials."

[5] Following his retrenchment by the appellant, and in August 2012, the respondent launched notice of motion proceedings. He sought the following relief:-

(1) an order directing the appellant to pay him "an aggregate amount of E 78, 422.56 as terminal benefits."

(2) costs on attorney and client scale.

[6] In paragraphs 11 and 12 of his founding affidavit the respondent calculated the figure of E 78,422.56 as follows:-

"11. As a basis for the calculation of these terminal benefits, I wish to state that at the time of the termination of my employment I was earning a salary of E16,100.00. My terminal benefits can be calculated as follows:

11.1 Salary for the month of October 2011

E 16,100.00

11.2 Notice pay – equivalent of 1 month's salary

E 16,100.00

11.3 Severance allowance

10 x 742.96 x 2 = E 14 859, 20.

12. In terms of paragraph 11.1, I was entitled to 21 days annual leave days which had to be negotiated with my supervisor at least one month in advance. At the time of the termination of my employment I had not taken any leave and hence the said leave days are outstanding and when converted in monetary terms it amounts to;

21 leave days x 764,96 = E 16,064,16

Further in terms of paragraph 11.2. I was entitled to vacation leave of 5 working days per annum and to an overall total of, at any given time of twenty five (25) working days. During my

employment I did not take vacation leave and at the time of the termination of my employment I was owed 15 days in vacation leave with a monetary value of;

15 days x 764,96 = 15 299,20

Total terminal benefits _____

78, 422,56."

[7] The parties are on common ground that the appellant was duly served with the respondent's notice of motion in the matter. In his return of service, the Deputy Sheriff stated that he did so "by leaving a copy with Ms Xolile Mtsetfwa (hereinafter referred to as "Xolile") who is the respondent's Secretary by [handing to her] the abovementioned copy thereof after exhibiting the original and explaining the nature and the exigency of the said process." The Deputy Sheriff further disclosed in the return of service that Xolile was "in charge of the premises at the time of delivery, ostensibl[y] responsible and not less than 16 years of age."

[8] Indeed, the appellant readily concedes that after it was served it "swiftly" instructed its attorneys S.V. Mdladla & Associates, to defend the matter. For the sake of completeness, we observe that although the Deputy Sheriff's return of service annexure "PM1" states that service was effected on 11 July 2012, the appellant, through its Chief Executive Officer Makhosi Khoza ("Khoza") who deposed to an affidavit to that effect, says that service was effected in May 2012. Surprisingly, in paragraph 7 of his founding affidavit Khoza says that he became aware of the default judgment on 6 December 2012 when the warrant of execution in the matter was served. On Khoza's own version, therefore, it means that the appellant took more than seven (7) months after the service of the notice of motion on it or after instructing its attorneys without so much as an inquiry from them about the progress of the case. Such conduct in our view lends support to the respondent's contention that the appellant was guilty of delaying tactics in the matter. In this regard see, for example, the cases of **Saloojee and Another v Minister of Community Development 1965 (2) SA 135 (A)** at 141; **Johannes Hlatshwayo v Swaziland Development and Savings Bank and Others, Civil Appeal No. 21/06; Zama Joseph Gama v Swaziland Building**

Society and Others, Civil Appeal No. 85/12; Siphamandla Ginindza v Mangaliso Clinton Msibi, Civil Case No. 6/2013; Japhet Msimuko v Sibongile Lydia Pefile N.O., Civil Appeal Case No. 14/2013.

[9] Meanwhile, on 27 September 2012, the appellant's attorneys served the respondent's attorneys with a notice of withdrawal as attorneys of record. They, however, did not file the notice with the court. To that extent, therefore, we consider that the purported notice of withdrawal was inconsequential and of no force and effect at that stage.

[10] Thereafter, the record of proceedings in this matter establishes that, despite due notice of set down, neither the appellant nor its attorneys appeared in court both on 7 September 2012 and 3 October 2012 respectively. On the latter date, the matter was postponed to 29 October 2012. On the respondent's uncontroverted version, which must be accepted as correct on the Plascon Evans Paints rule, the court issued the following directives:-

(1) That a notice of set down for the hearing on 29 October 2012 should be served on the appellant by the Deputy Sheriff on or before 10 October 2012.

(2) That the respondent's notice of motion as well as the notice of withdrawal by the appellant's attorneys should be attached to the notice of set down.

(3) That the appellant should be advised in the notice of set down that in the event it did not file its opposing papers the mater would proceed on a *ex parte* basis, ostensibly in terms of Rule 19 of the Industrial Court Rules 2007 which permits such a procedure where there is no reply, as was the case in the present matter.

[11] The return of service filed of record shows that on 11 October 2012, the Deputy Sheriff duly served the "Notice of set down [ex parte hearing]" on the appellant. The person who received the notice on behalf of the appellant is unmistakably reflected in the return of

service as "Mthethwa". As a matter of overwhelming probabilities we are satisfied that this could only have been Xolile herself.

[12] On 12 October 2012, the appellant's attorneys finally filed their notice of withdrawal as attorneys of record with the court.

[13] Perhaps not surprisingly, judging from the appellant's track record of indifference since May 2012 on its own version, and on 29 October 2012, the appellant once again failed to make any appearance in court. The matter was postponed to 31 October 2012. On that day the presiding Judge recused himself from the matter.

[14] Thereafter, the respondent's attorneys set the matter down for hearing on 6 December 2012 when it was finally heard *ex parte*. The court *a quo* granted the respondent the sum of E78, 422.56 as claimed in the notice of motion plus costs.

[15] For the sake of completeness, we observe that the appellant was served with a warrant of execution in the matter on the same date, namely, 6 December 2012. To its credit for once, it acted promptly to address

the situation. The very next day, on 7 December 2012, it filed an application for rescission of the default judgment in question.

[16] After meticulously going through the background history of the matter, as well as weighing up all the issues for determination, the court *a quo* dismissed the appellant's application for rescission with costs on attorney and client scale. Hence the present appeal.

[17] Now, applications for rescission of default judgments in the Industrial Court in this country are governed by Rule 20 of the Industrial Court Rules 2007 in these terms:-

> *"20. (1) The court may, in addition to any powers that it may have-*
>
> *(a) in the motion of the court or on application of any affected party, rescind or vary any order or judgment -*
>
> *(i) erroneously sought or erroneously granted in the absence of any party affected by it;*

(ii) in which there is ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or

(iii) granted as the result of a mistake common to the parties; or

(b) on application of any party affected, and on good cause shown, rescind, vary or set aside any order or judgment granted in the absence of that party.

(2) A party who desires relief under –

(a) sub-rule 1 (a) shall apply for the relief on notice to all parties whose interests may be affected by the relief sought; or

(b) sub-rule 1 (b) may within twenty one (21) days after the party acquires knowledge of an order or judgment granted in the absence of that party, apply on notice to all interested parties to set aside the order or judgment and the court may, upon good cause shown, rescind, vary or set aside the order or judgment on such terms as it deems fit."

[18] As is plainly evident from Rule 20, the court seized with an application for rescission has a discretion to grant or dismiss the application. It is, however, not an arbitrary discretion. It is a judicial discretion which must be exercised upon a consideration of all the relevant factors. An appellate court will not ordinarily interfere with a proper exercise of a discretion in the absence of a material misdirection resulting in a failure or miscarriage of justice.

[19] In the present matter the appellant relies heavily on the admitted fact that it was not served with a notice of set down for the hearing on 6 December 2012 when judgment was delivered by default. It was submitted on the appellant's behalf that the default judgment was granted in error by reason of this factor alone. We observe, however, that the court *a quo* was fully aware of this factor. Nevertheless, the court correctly, in our view, considered the other relevant factor, namely, that the notice of set down for the "ex parte" hearing on 29 October 2012 had properly been served on the appellant's attorneys on 11 October 2012. As will be remembered, this was before they filed a notice of withdrawal as attorneys of record for the appellant. As stated earlier, neither the appellant nor its attorneys appeared in

court on 29 October 2012. No explanation was furnished by the appellant at all for such conduct. This, in circumstances where the notice of withdrawal by the appellant's attorneys was itself attached to the notice of set down for the 29th instant.

[20] In light of the foregoing considerations, the Court *a quo* came to the conclusion that the appellant was fully aware on 11 October 2012 when it was served that it was no longer represented. Similarly, the appellant was fully aware that henceforth the matter would proceed on an *ex parte* basis, more especially since it never filed any answering affidavit. This much is clear from paragraph [9] above. Hence, there would be no need to serve the appellant with a further notice of set down. Indeed, the respondent had no obligation to do so. It follows that the appellant's point on error must fail. We reject as untenable the submission made on the appellant's behalf that as soon as the Judge recused himself on 29 October 2012 as indicated above "the *ex parte* trend was broken." No such thing happened. Indeed, the recusal of the Judge had nothing to do with the *ex parte* nature of the proceedings as indicated in terms of the notice of set down. We are accordingly unable to find fault with the Court *a quo*'s approach in the

special circumstances of this case. No misdirection on the part of the court has been shown to exist.

[21] Faced with these difficulties, the appellant disowned Xolile altogether. It claimed that it had no receptionist by that name and that, therefore, no service of set down for the *ex parte* hearing on 29 October 2012 was effected as claimed by the Deputy Sheriff in paragraph [11] above. We are satisfied that this contention is without merit. It is disingenuous in the extreme for at least two (2) reasons, namely:-

(1) As indicated in paragraph [7] above, it is common cause that the appellant was duly served with the respondent's notice of motion in the matter through Xolile herself. Again, as mentioned in paragraph [11] above this was the same person who received the notice of set down on the appellant's behalf for the *ex parte* hearing on 29 October 2012.

(2) As a matter of fundamental principle the Deputy Sheriff's return of service is *prima facie* conclusive. Accordingly,

> "the clearest and most satisfactory evidence must be adduced if it is to be disputed." See, for example, **Deputy Sheriff Witwatersrand v Goldberg 1905 T.S. 680** at p 684.

[22] As it was perfectly entitled to do so, in dismissing the appellant's application for rescission of default judgment the court *a quo* also took into consideration the fact that the appellant had no *bona fide* defence in the matter. The court's finding in that regard is not challenged on appeal. Once again we are unable to find any misdirection in this approach.

[23] It follows from these considerations that the appellant's appeal against the dismissal of its application for rescission of default judgment cannot succeed.

[24] We turn then to a consideration of the appellant's appeal against an order of costs on attorney and client scale. The appeal in this respect is founded on a single ground in the notice of amended plea, namely:-

> *"The court a quo erred in law in granting costs at a punitive scale when the application was dismissed on a technical point."*

[25] In its heads of argument the appellant attacks the award of costs in two short sentences only as follows:-

> *"The appellant was never given an opportunity to argue or submit on the issue of costs. We submit that the Judge a quo was harsh and did not exercise his discretion judiciously."*

It is clear, however, as it seems to us, that the appellant has sought, without leave of this Court, to argue a completely different point from the one raised in its solitary ground of appeal as fully reproduced in the preceding paragraph. The appellant is precluded from doing so by Rule 7 of the Industrial Court of Appeal Rules. The Rule provides as follows:-

> *"7. The appellant shall not, without the leave of the Industrial Court of Appeal, urge or be heard in support of any ground of appeal not stated in his notice of appeal, but the Industrial Court of Appeal in deciding the appeal shall not be confined to the grounds so stated."*

[26] In any event, the appellant's complaint in its heads of argument is not borne out by the record of proceedings. On the contrary, page 24 of the record shows that the respondent concluded his answering affidavit in the matter with the following prayer:-

> *"WHEREFORE the [Respondent] prays that the application be dismissed with costs at attorney – and – client scale."*

It follows that the appellant was given proper notice to argue the point.

[27] It is evident from the facts as fully highlighted above that the court *a quo* was faced with a serious case of dilatoriness and delaying tactics on the appellant's part. The court was thus within its discretion to award punitive costs as it did in order to mark its displeasure in the circumstances. In this regard, we note that in dismissing the appellant's application for rescission of default judgment the court *a quo* made the following crucial finding which is not challenged on appeal and which must accordingly be accepted as correct:-

> *"The Respondent merely moved the present application as an obstructive measure to delay 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."*

[28] Finally, we turn now to consider the respondent's prayer in this Court that the appellant be ordered to pay costs on attorney and client scale for unnecessarily overburdening the court with a transcribed record of submissions by counsel in the court below. Such record comprises some 36 pages altogether.

[29] Rule 2 of the Industrial Court of Appeal Rules defines the word "record" as "the aggregate of papers relating to an appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before the Industrial Court of Appeal on the hearing of the appeal." (Emphasis added.) We have underlined the word "proper" to indicate our view that it is not every piece of paper that is thrown into the record. The key word is "proper" as determined by the issues raised in the appeal. Such issues will in turn be found in the grounds of appeal.

[30] We have been put to the inconvenience of reading the impugned transcript record of submissions by counsel. Likewise, counsel for the respondent also had to read and scrutinise the transcript of legal argument and prepare himself to deal with it if called upon to do so. We are satisfied that the record was completely unnecessary. In point of fact, nothing turned on it in this appeal. It simply had no bearing on the appeal itself except to unduly overburden the record on appeal. In the exercise of our judicial discretion, therefore, and as a mark of the Court's displeasure at the appellant's abuse of the court process we accept that this is a fit case for an award of costs on attorney and client scale as prayed.

[31] In the result the following order is made:-

(1) The appeal is dismissed in its entirety with costs.

(2) The appellant shall pay the costs occasioned by the unnecessary inclusion of the transcript record referred to in paragraph [28] above on attorney and client scale.

M.M. RAMODIBEDI
JUDGE PRESIDENT

E.A. OTA
ACTING JUDGE OF THE INDUSTRIAL COURT OF APPEAL

J.P. ANNANDALE
ACTING JUDGE OF THE INDUSTRIAL COURT OF APPEAL

For Appellant : Mr S.P. Mamba

For Respondent : Mr N. Mthethwa