IN THE HIGH COURT OF SWAZILAND

Robert Mabila	Applicant
v	
Government of the Kingdom of Swaziland	Respondent
Case No. 2647/1996	
Coram:	S.W. Sapire, A C J
For Applicant:	PR. Dunseith
For Respondent	Attorney General

JUDGMENT

(19/06/97)

The applicant was the Plaintiff in an action he instituted against the Respondent. The action was instituted in July 1991 and pleadings were closed in 1992. There is a laconic statement in the founding affidavit that the possibility of a settlement was investigated by the parties without success and the matter was awaiting a pre-trial conference and the allocation of a trial date. This does not satisfactorily explain the inordinate lack of progress in the Applicant's pursuit of bis claim.

The applicant recites that on the 10th of July 1996 bis then attorney withdrew from representing him and he received a copy of a notice of withdrawal by registered post towards the end of July, 1996.

a : Mabila

The applicant immediately called at the offices of his former attorney and requested them to transfer the file relating to these proceedings to Mr. P.R. Dunseith an attorney who the applicant had appointed to replace his former attorney. The applicant also called on Mr. Dunseith and informed him that he would be receiving a full file from the previous attorney shortly Why Mr Dunseith did not inform the Attorney General that he had accepted the mandate to pursue Applicant's claim is not explained.

By early September 1996 the file had not been received by Mr. Dunseith and the applicant claims that he telephoned Maphalala his former attorney on at lease two occasions to remind him to deliver the file. He was told on each occasions that Mr. Maphalala was finalising the account and that he would only forward the file after the account had been prepared and paid. The applicant states that todate he has received neither an account nor his file. Maphalala should not have been allowed to retain the file without presenting his account.

The applicant says he was not particularly perturbed by the delay because the matter had been dormant for a period of more than one year and as far as he was aware the matter would come to trial.. This is an unconvincing statement. The action it will be remembered was instituted in 1991 and by September 1996 the matter had not yet been allocated a date for hearing. This should have been a cause for concern. The applicant has certainly not pursued his case with any degree of vigour.

The Attorney General who represents the Respondent in this application and also the defendant in the

action applied to this court on the 2nd of October, 1996 to apply for an order setting aside the Plaintiff's claim on the grounds that the Plaintiff had failed, neglected or refused to furnish the defendant with a new address for service, plaintiffs attorneys of record having withdrawn and given notice thereof.

This application came before me and as may be expected was unopposed as no notice had been given to the applicant. The outcome of the application was, that I ordered absolution from the instance with costs thus dismissing the applicant's claim.

Although there is nothing to prevent the plaintiff from commencing his action anew questions of prescription may arise and the new action may be time barred This application is for an order rescinding the dismissal of the applicant's claim. The basis of the application is that the order in terms of which absolution was granted was erroneously sought and granted. The point upon which the applicant relies is that in terms of Rule 16(4)(b) of the Rules of the Court, when an attorney withdraws and his client does not appoint a new address for service, it is not necessary to serve any documents upon such party unless the court otherwise orders.

a: Mabila

This the applicant says is the only sanction for not furnishing a new address for service. It is the applicant's case that the opponent of the party whose attorney has withdrawn who wishes to proceed with the action has to go through all the motions of setting the matter down for trial without it being necessary, however, for him to give notice to the other party of what he has done. This does not seem to me to be necessarily so.

I will rescind the order which I made not because the applicant's contentions are correct but because it does not seem to me fair and just that the applicant's who wishes to press his claim should be prevented from so doing only because he did not furnish an address for service. When making the order for absolution it seemed to me that the action had indeed been abandoned by the plaintiff This view is certainly supported by the length of time for which the case has remained .dormant. Despite the weakness of the plaintiffs explanations I am inclined to grant him the relief he seeks. That I do so is not to be read as an acceptance of the applicant's submissions on the effect of Rule 16(4).

I therefore order that the judgment for absolution from the instance with costs which was granted to the respondent be rescinded and set aside and that the costs of this application be costs on the cause.

S.W. SAPIRE.

ACTING CHIEF JUSTICE,