



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1941/2011

In the matter between:

PHILLIP SHONGWE

Plaintiff

And

DIESEL SERVICES LIMITED

1st Defendant

THOMAS KIRK

2nd Defendant

Neutral citation: *Phillip Shongwe v Diesel Services Limited (1941/2011) [2013] SZHC 109 (11th June 2013)*

Coram: **M. Dlamini J.**

Heard: **20th June 2012**

Delivered: **11th June 2013**

*Application in terms of Rule 41(1)(a)
– other party objecting to withdrawal – calling upon court to
dismiss action – effect of withdrawal vis-à-vis dismissal- court to*

dismiss application for dismissal where there is no proof of abuse of court or ulterior motive by party withdrawing.

Summary: The plaintiff instituted action proceedings against the defendant. The defendant raised exception on a number of grounds, *inter alia*, that the plaintiff's cause of action lacked the necessary averments to sustain a cause of action; misjoinder of 2nd defendant and non-joinder of a financial institution which held a mortgage bond against the property in issue. On service of the exception, plaintiff served an amended summons remedying the defects alleged in the exception. Defendant objected to the amended summons. Although plaintiff initially opposed defendant's objection, on the hearing date, plaintiff applied to withdraw the amended summons and tendered costs. Defendants strenuously objected to plaintiff's withdrawal of the matter and tendered costs and called for the court to dismiss plaintiff's cause of action with costs.

[1] My task is to ascertain in the circumstances of the case whether to grant plaintiff's application of withdrawal with costs as tendered or to dismiss his cause of action with costs.

[2] It is apposite to briefly highlight the procedure to be followed when a party wishes to amend any pleadings except an affidavit, before I consider the merits of the issue before me for reasons that will become clear later in this Rule 28 (1) reads:

“28. (1) Any party desiring to amend any pleading or document other than an affidavit, filed in connection with any proceedings, may give notice to all other parties to the proceedings of his intention so to amend.”

[3] The rule proceeds to the effect that where objection is taken, upon set down, the court will adjudicate on the matter.

[4] What is notable in this rule is sub rule (7) which reads:

“(7) Any party giving notice of amendment shall, unless the court otherwise orders, be liable to pay the costs thereby occasioned to any other party.”

[5] In order to ascertain the issue herein, I will refer to the rules of procedure in regard to withdrawal.

[6] Rule 41 (1) (a) reads:

“41 (1) (a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the Taxing Master shall tax such costs on the request of the other party.”

[7] This rule has been interpreted to mean that once the matter is set down as in *casu*, the party wishing to withdraw should either get the consent of his opponent or be granted leave to withdraw as per **Protea Assurance Co. Ltd v Gamlase and Others 1971 (1) 460**.

[8] This rule is so interpreted, I guess, by virtue of the wording “*and thereafter*” after “*has been set down*”. Writing on the effect of withdrawal, the court held in **Germishuys v Douglas Besproeiingsraad 1973 (3) S.A. 299** as follows:

“The plaintiff or applicant who withdraws his action or application is in the same position as an unsuccessful litigant because, after all, his claim or application is futile and the defendant, or respondent is entitled to all costs with the withdrawing plaintiff or applicant institution of proceedings.”

[9] As already stated, *in casu*, the plaintiff has tendered costs.

[10] The rule does not compel the party withdrawing to give reasons nor am I aware of any authority to that effect.

[11] The defendant calls for the dismissal of the plaintiff’s proceedings.

[12] **Tindall J. in Ottens v Korf 1927 TPD 58** at 61 although interpreting a different Rule informs as follows:

“dismissal contemplated by the rule is an order made after hearing the application on its merits.”

[13] The learned Judge proceeded to highlight that this word “*dismissal*” renders the order granted to be final. I may add that once a matter is ruled to be “*dismissed*” it has the effect of throwing out root and branch the plaintiff’s action. The matter becomes *res judicata*. Should the aggrieved party wish to pursue it, his recourse lies in the higher court.

[14] Generally, I see no circumstance which may justify the court to shut out a litigant completely from accessing the court especially where the matter has not been fully adjudicated on merits. I am aware however of an exception which I will discuss later herein. It would result in gross injustice for a court to take this route.

[15] On the other hand, “*withdrawal*” leaves room for the party withdrawing to reinstate the matter or institute fresh pleadings should he be so inclined. It seems to me justice is best served in such circumstances (where a matter has not been litigated on merits) to allow a party who wishes to withdraw especially where costs are tendered than to dismiss the pleadings.

[16] **Wessels J. in *Whittaker v Roos & Another; Morant v Roos & Another* 1911 TPD 1092** at 1102-3 wisely noted;

“This court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the Court is to do justice between the parties. It is not a game we are playing, in which if some mistake is made, the forfeit is claimed. We are here for purposes of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts But we all know at the same time that mistakes are made in pleadings and it would be very grave injustice, if for a slip of a pen, or error of judgment, or the misreading of a paragraph in pleadings by Counsel, litigants were mulcted with heavy costs. That would be a gross scandal. Therefore the court will not look to technicalities, but will see what the real position is between the parties.”(my emphasis)

[17] Although the highly esteemed judge was commenting on amendments, I see no reason why such a *dictum* should not apply with equal force *in casu*. I may, follow **Wessels’ J.** notion above by adding my own words in a similar fashion as follows:

“It would result in total travesty of justice if “ by a slip of a pen”, or by counsel omission of certain averments or failure to follow a rule of procedure, litigants would be shut out completely from the courts more so in the absence of any prejudice on the other party as in casu by virtue of costs being tendered or awarded.”

[18] **Kumleben J. A.** in **Levy v Levy 1991 (3) S. A. 614** at 619 states:

“In fact, as one knows a claim may be withdrawn without any application to court There can therefore be no objection to the withdrawal of a claim or an application to do so.”(my emphasis)

[19] At page 620 the learned judge states:

“It is after all not ordinarily the function of the court to force a person to institute or proceed with an action against his or her will or to investigate the reason for abandoning or wishing to abandon one.”

[20] The learned judge continues to point at an exception as follows:

“An exception, though one difficult to visualize, would no doubt be where the withdrawal of an action amounts to an abuse of the court process”

[21] He cites from **Hudson v Hudson & Another 1927 A. D.** as follows:

“Where the court finds an attempt made to use ulterior purposes machinery devised for the better administration of justice it is the duty of the court to prevent such abuse. But it is a power to be exercised with great caution and only in a clear case.”

[22] *In casu*, the reason for the plaintiff to withdraw his action is very clear i.e. failure to comply with Rule 28.

[23] Plaintiff was well advised to apply for withdrawal under the circumstances.

[24] Defendant has not at all intimated to the court that the plaintiff was abusing the court’s process or had any ulterior motives. To be precisely not a single reason was advanced by defendant to object to the withdrawal by plaintiff nor did he submit any reasons for the court to have plaintiff’s action dismissed instead of granting the withdrawal.

[25] I therefore enter the following orders:

1. Plaintiff’s application for withdrawal is granted.
2. Plaintiff’s tendered cost granted to defendant except cost of hearing plaintiff’s application for withdrawal and noting of this judgment.

**M. DLAMINI
JUDGE**

For Plaintiff : Mr. V. Z. Dlamini
For Defendant : L. R. Mamba and Associates

A person who desires to bring or defend proceedings in forma pauperis, may apply to the registrar who, if it appears to him that he is a person such as is contemplated by sub-rule (2) (a), shall refer him to an attorney.”(P. WHERE DID U GET THIS)