

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 39/08

In the matter between:

**SWAZILAND DEVELOPMENT
FINANCE CORPORATION**

APPLICANT

And

BONKHE LUKHELE

RESPONDENT

In re:

BONKHE LUKHELE

APPLICANT

**SWAZILAND DEVELOPMENT
FINANCE CORPORATION**

RESPONDENT

CORAM:

NKOSINATHINKONYANE: JUDGE

DAN MANGO: MEMBER

GILBERT NDZINISA: MEMBER

FOR APPLICANT/RESPONDENT: Z. D. JELE

FOR RESPONDENT/APPLICANT: S. MNISI

RULING 02.04.08

[1] This is an urgent application wherein the applicant/respondent is seeking a stay of execution of the judgement of this court made on 15th February 2008 pending the finalisation of a rescission application against that judgement.

[2] The application is opposed by the respondent/applicant.

[3] The court order sought to be rescinded dated 15th February 2008 was issued hi default. The applicant/respondent had filed its answering affidavit in opposition of the main application.

[4] On behalf of the applicamVrespondent it was argued that it has a *bona fide* defence to the respondent/applicant's claim in that the respondent/applicant resigned without having given it notice to which it was entitled in terms of the contract of employment between the parties.

[5] On behalf of the respondent/applicant it was argued that as the written contract of employment was not annexed to the applicant/respondent's papers, it cannot rely on that argument in court. The respondent/applicant however did not file an answering affidavit. The founding affidavit remains the only evidence before the court. Further, the applicant /respondent's answering affidavit in the main action remains unchallenged as the respondent/applicant did not file a replying affidavit. The respondent/applicant's argument therefore cannot stand.

[6] The applicant/respondent's attorney explained that he was not in court because he was held up at the High Court and that upon showing up in this court he found the matter having already been called and the order granted. This is not a totally satisfactory explanation. The attorney could simply have asked the respondent/applicant's attorney to apply that the matter be called at the end of the roll. Alternatively he could have asked one of the attorneys from his office to come to court and stand in for him.

[7] The court in such applications however has a discretion. It seems to us that the applicant/respondent does have a good defence in the main action. It follows that the court must exercise its discretion in favour of the

applicant/respondent.

[8] The court will accordingly make an order in terms of prayers 2.1 and 2.2 of the applicant/respondent's Notice of Motion. There is no order for costs.

The members agree.

NKOSINATHI NKONYANE
JUDGE - INDUSTRIAL COURT