IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 41/01

In the matter between:

MOSES SHONGWE **APPLICANT**

And

SWAZILAND BUILDING SOCIETY **RESPONDENT**

CORAM:

NKOSINATHI NKONYANE: JUDGE

DAN MANGO: MEMBER

GILBERT NDZINISA: MEMBER

FOR APPLICANT: M.C. SIMELANE

FOR RESPONDENT: T. SIMELANE

REASONS FOR JUDGEMENT

05/12/08

[1] On 13.11.08 the court made a decision ex-ternpore and advised the parties to request a written judgement if they so wished. The respondent has now made the request.

[2] The applicant instituted proceedings against the respondent in March 2001. The matter was set down for hearing. On the date of the hearing on 19.07.06, the applicant's attorney Mr. M. Mkhwanazi applied for the withdrawal of the application for two reasons. One, he said he was not ready to proceed with the trial because the matter was handled by another practitioner who had since left the firm. Two, that he had not been able to locate the client. Costs were tendered accordingly.

[3] The respondent was represented in court on that day by Mr. S. Shongwe. He indicated that he had no objection. The application was accordingly granted by the court.

[4] The applicant then filed an application for re-instatement in July 2008. This application is opposed by the respondent. In his founding affidavit the applicant stated that he did not give Mr. Mkhwanazi the instruction to withdraw the application and was therefore not aware that the application had been withdrawn.

[5] On behalf of the applicant it was argued that the applicant would suffer immense prejudice if the matter is not re-instated. On behalf of the respondent it was argued that;

5.1. The applicant has failed to show that the withdrawal of the matter was without his consent.

5.2. It was unreasonable for the applicant to withdraw the action when the matter was ready for trial.

5.3. The applicant is coming to court with dirty hands as he has failed to pay the costs tendered for withdrawing the action.

5.4. The respondent will suffer great prejudice if the matter is re-instated.

[6] There was clearly no merit on the argument that the applicant was coming to court with dirty hands because he has not paid the costs. The respondent's attorney himself admitted that the respondent has not yet taxed the bill of costs and served it on the applicant. There is no way that the applicant can know how much the costs are until a taxed bill of costs is served on him. On the issue of prejudice to be suffered by the respondent, it was not stated what prejudice would the respondent suffer

if the matter were to be re-instated. It is not enough to just state a bald allegation that a party would suffer prejudice. The nature or form of prejudice must be stated to assist the court in making its decision. The respondent could, for example, (and assuming this to be true) have stated that it would suffer prejudice if the matter were to be re-instated because the main witnesses are no longer available because they have since died or relocated to other countries from which it would not be possible for it to bring to Swaziland, or state any other substantive reason.

[7] It was also argued on behalf of the respondent that the applicant has failed to show that the matter was withdrawn without his consent. We do not agree with the respondent. The applicant did state in the founding affidavit that the attorney withdrew the application without his instructions to do so. Furthermore, on 19.07.06 when the matter was withdrawn, Mr. Mkhwanazi stated that one of the reasons why he was withdrawing the application was that he had not been able to locate the client.

[8] The respondent's attorney further argued that there was no notice of withdrawal filed before the application to withdraw the application was made in court. Granted that there was no notice filed in court, the respondent on that day was however present in court being represented by Mr. S. Shongwe. There was no objection raised by Mr. S. Shongwe that the respondent would be prejudiced by the lack of notice before the moving of the application to withdraw the application.

[9] It was also argued that it was unreasonable for the applicant to withdraw the action when the matter was ready for trial. Again, we do not agree with this submission. The applicant stated clearly in his papers that he did not give his erstwhile attorney the instruction to withdraw the application. Further, costs were tendered on behalf of the applicant to compensate for the inconvenience on the part of the respondent who was at that time ready for trial.

[10] Taking into account all the foregoing factors and the respondent having failed to establish how it will be prejudiced by the applicant's application, the court will accordingly make an order that the application be re-instated on the court's roll. No order for costs is made.

The members agree.

NKOSINATHI NKONYANE
JUDGE OF THE INDUSTRIAL COURT