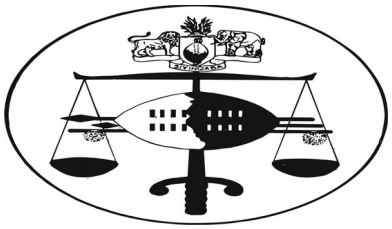

IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case No. 125/2011

In the matter between:

ROYAL SWAZILAND SUGAR CORPORATION **Applicant**

And

NORMAN GINA **Respondent**

IN RE:

NORMAN GINA **Applicant**

And

ROYAL SWAZILAND SUGAR CORPORATION **Respondent**

Neutral citation: *Royal Swaziland Sugar Corporation v Norman Gina (125/11 [2012]* SZIC 32 DECEMBER 2012**)**

Coram: NKONYANE J,
(Sitting with S. Mvubu & P. Thwala Nominated Members of the Court)

Heard: **02 NOVEMBER 2012**

Delivered: **30 NOVEMBER 2012**

Summary:
Applicant/Respondent brought an application for dismissal of the main application on the grounds of delayed prosecution. The application is dismissed by the Court.
Held : what is or is not inordinate delay depends on the facts of each particular case; it is a matter in the discretion of the Court. The Court also found that although there was a delay in the prosecution of the main application, such could not be said to be inordinate taking into account the circumstances of the case.

JUDGMENT 30.11.12

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[1] The Applicant/Respondent on 26th June 2012 instituted the present interlocutory proceedings for an order in the following terms:

"1) The Respondent/Applicant having launched interdict has pursued the proceedings in a tardy manner and accordingly the application for an interdict is dismissed.

2) Costs of the suit are awarded against Applicant in the main application.

3) Further and/ or alternative relief."

[2] The Respondent/Applicant opposed the application and duly filed an Answering Affidavit deposed thereto by his Attorney Mr. T. Bhembe.

[3] In his Answering Affidavit the Respondent/Applicant raised three points of law namely; that the Applicant/Respondent failed to follow rules laid down for service in particular **Rule 14(12) of the Industrial Court Rules, 2007;** two: the Applicant/Respondent has come to court with dirty hands; three: the Applicant/Respondent's attorney lacks *locus standi in judicio* to institute the present interlocutory proceedings.

[4] The Applicant/Respondent duly filed its Replying Affidavit and also responded to the points of law raised by the Respondent/Applicant.

[5] The court will address the points of law raised together with the merits and deliver a final judgment on the matter.

[6] **Failure to follow the Rules:-**

There is no doubt that the Rules of the court exist for a purpose and that they must be adhered to by litigants. Where it is alleged that the other party

has failed to follow the rules, the test that the court applies is that of prejudice. In the present application it has not been shown that the Respondent/Applicant has suffered any prejudice as the result of the short notice given by the Applicant/Respondent. The Respondent/Applicant was able to file his Answering Affidavit. The Respondent/Applicant having failed to demonstrate any prejudice suffered by him as the result of the short notice, the Court will condone the conduct of the Applicant/Respondent and accordingly dismiss the point of law.

[7] **Dirty hands:-**

On behalf of the Respondent/Applicant it was argued that the Applicant/Respondent has come to court with dirty hands because its application was motivated by inaccurate statements of fact. This was vehemently denied by the Applicant/Respondent. Indeed when one has regard to the contents of the court record, this point of law does not find any support. This point of law will also be dismissed by the court.

[8] **Lack of *Locus Standi in Judicio:-***

Mr. Bhembe argued on behalf of the Respondent/Applicant that Mr. Sibandze has not produced any authority to institute the present interlocutory proceedings. Mr. Sibandze has been representing the Applicant/Respondent from the start of the main application that was

instituted by the Respondent/Applicant on an urgent basis on 27th April 2011. The authority of Mr. Sibandze to represent the Applicant/Respondent was not challenged. There is a presumption in our law that an attorney briefed in a matter has the authority to handle the matter until it is finalized in court. The litigant who disputes the authority of the other attorney must state the reason or reasons why he believes that the other attorney does not have the mandate anymore. Mr. Bhembe has failed to state in the papers why he believes that Mr. Sibandze does not have the mandate to act as he did in the present application. This point of law is also dismissed.

[9] **The Merits:-**

On the merits the Applicant/Respondent's argument is that the main application ought to be dismissed because there has been unreasonable delay on the part of the Respondent/Application in the prosecution of the main application.

[10] *Prima facie,* the application brought by the Application/Respondent may be justified when one takes into account that the main application was brought before the court on an urgent basis as early as 27th April 2011. Indeed, public policy demands that the business of the courts should be conducted with expedition.

[11] Each case however must be determined in accordance with its own peculiar facts and circumstances. In the present matter, it is a notorious fact that the proceedings were at some point put on hold as there was a boycott of the courts by lawyers. Further, the record of the proceedings itself will show that the delay in the prosecution of the main application can be attributed to both attorneys. Sometimes one of them showed up, sometimes none of them showed up. Of course, more responsibility was on the Respondent/Applicant as the *dominis litis.*

[12] In another jurisdiction, the court dealing with a similar application in the case of **Ivita v. Kyumbu (1984) KLR 441** the court held as follows:

> **"The test applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the Plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court."**

[13] The delay in the present case may be long, but it cannot be said to be inordinate and inexcusable.

[14] In the present case the evidence shows that both parties contributed to the delay. Admittedly, there was added responsibility on the Respondent/Applicant who brought the main application under a certificate of urgency.

[15] In the case of **Frans Meintjies v. Bargaining Council & Two Others Case No. P137/07 (LC) P.E. Molahlehi J.** held as follows;

> **"… The courts in considering whether to uphold an application for the dismissal of a review on the ground of want of prosecution take into account the following:**
>
> **a) is the delay in the prosecution of the matter excessive;**
> **b) is there a reasonable explanation for the delay;**
> **c) what prejudice will the other party suffer if the dismissal is not granted; and**
> **d) are there prospects of success in the main case."**

[16] As already pointed out, in this case the delay can be attributed to both parties' conduct. The court therefore in exercising its discretion and also taking into account the factors referred to by **Molahlehi J** in paragraph 15 above, will come to the conclusion that the application ought to be dismissed.

[17] Taking into account all the above observations and also all the circumstances of this case, the court will make the following order;

a) The application is dismissed.

b) There is no order as to costs.

[18] The members agree.

N. NKONYANE
JUDGE: INDUSTRIAL COURT OF SWAZILAND

For Applicant/Respondent: Mr. M. Sibandze
(Musa M. Sibandze Attorneys)

For Respondent/Applicant: Mr. T. Bhembe
(Masina Ndlovu Mzizi Attorneys)