

IN THE HIGH COURT OF SWAZILAND

Constance Thwala (Born Dlamini)

Applicant

V

Tozi Liah Nkambule	1st Respondent
Khosi Maria Manyatsi	2nd Respondent
The Master of the High Court	3rd Respondent

Civ. Case No. 1240/98

Coram S.B. MAPHALALA – J

For Applicant MR. MABILA

For 1st and 2nd Respondent MR. MDLADLA

JUDGEMENT

(08/09/99)

Maphalala J:

The 1st and 2nd respondent filed an application in terms of Rule 30 of the High Court rules setting aside the applicant's notice of application in that same does not comply with Rule 6 (10) (11) (12) of the High Court in that it gives no time limits as required. Costs of this application and further and/or alternative relief.

The application which is sought to be set aside is for an order in the following terms:

1. That the first and second respondent be interdicted and restrained from dealing with the aspects of the estate of the late Benjamin Thwala Estate No. EH 43/98 in anyway whatsoever.
2. That the Master of the High Court be empowered to collect rentals from the flats belonging to the estate.

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3. That the Master of the High Court be ordered to convene a meeting of the next of kin in the estate, as soon as practicable.
4. That the first and second respondents deliver the motor vehicle a Toyota van registered SD 621 MH to the applicant.
5. Costs in the event that application is opposed
6. Further and/or alternative relief.

The application is supported by the founding affidavit of the applicant with annexures.

Mr. Mdladla for the respondent contended that the above mentioned application is defective in so far as it does not conform to Rule 6 (10) (11) and (12) of the High Court rules, viz the applicant has not appointed an attorney's office within a radius of 5km from the court at which applicant will accept notice and service of all process in these proceedings. Secondly, applicant has not given time limits to file notice of intention to oppose and to file answering affidavits, if any. Mr. Mdladla contends that the requirements in Rule 6 (10), (11) and (12) are peremptory and there would be substantial prejudice on the respondents if these are not complied with. He further directed the attention of the court to

Herbstein at al Civil Practice of the Supreme Court of South Africa (4th ED) at page 558 to support his submissions.

On the other hand Mr. Mabila for the applicant concede what Mr, Mdladla had submitted. However, holds the view that this particular case was not envisaged by Rule 30. This Rule was made to govern Rule 18 which is pleading in general. It was to cover matters of substance and not matters of procedure. According to Mr. Mabila there is no substantial prejudice which is to be suffered by the other side. They have filed notice to oppose before the date. They had an attorney who knew what to do. He submitted that the application in terms of Rule 30 be dismissed with costs.

On points of law Mr. Mdladla contends that applicant had all the opportunity to rectify the mistake after receiving the notice in terms of Rule 30. They have not even filed for condonation.

The irregular step contemplated by the rule must be a step which advances the proceedings one stage nearer completion. Herbstein (supra) at page 558 — 559 and Erasmus on Superior Court Practice at B1—190—B1-191 give lists of examples in which this rule found application. The learned authors at B1-191 states that the rule applies only to irregularities of form and not to matters of substance (see Singh v Vorkel 1947 (3) S.A. 400 © at 406; Odendaal v De Jager 1961 (4) S.A. 307 (o) at 310 f - g) Clearly, the weight of legal authority is against the assertion that this rule was made to cater for matters of substance and not of procedure (form). The applicant is to conform with the requirements in Rule 6 (10), (11) and (12) as they are peremptory. The mere giving of a notice of intention to defend under the rules would not, therefore, be taking such further step as to debar the application (see Beck Pleading in Civil Actions by I. Isaacs (3rd ED) at page 108). It is no excuse to say the other party has filed his opposition and is legally represented.

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In such matters the court has a discretion whether or not to set aside the proceedings which may not be technically perfect.

In the instant case I grant leave to the applicant to amend his papers to conform with the rules and he is to pay wasted costs.

S. B. MAPHALALA

JUDGE