

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 2667/03

In the matter between

**THE SWAZILAND GOVERNMENT THE
ATTORNEY GENERAL**

**1st PLAINTIFF 2nd
PLAINTIFF**

VERSUS

NHLANHLA N. SIBANDZE

DEFENDANT

CORAM

SHABANGU AJ

FOR PLAINTIFF

MR DLAMINI

FOR DEFENDANT

MR GWEBU

**JUDGEMENT
11th March, 2004**

The Plaintiffs the Swaziland Government cited as the 1st Plaintiff and the Attorney-General cited as the second Plaintiff commenced proceedings by way of action on 17th October, 2003. In their particulars of claim the plaintiffs claim from the defendant an amount of E7806-24 which amount the plaintiffs claim is as a result of an overpayment by the said amount to the defendant, such payment having been made by the first plaintiff. The first plaintiff allegedly received an amount of E5, 685-34 from the Havelock Asbestos (Swaziland) Limited which was previously the defendants' employer for onward transmission to the defendant. The amount of E5685-34 allegedly accrued to

the defendant in accordance with the provisions of the Workmen's Compensation Act 1983. It is further alleged that on 31st May, 2002 the Plaintiff mistakenly issue a cheque of E13, 491-58 in favour of the defendant, thus overpaying him by the amount of E7806-24 claimed by the plaintiffs. There may be doubt as to what cause of action, if any, is made out in the plaintiff's particulars of claim. However I need not say more on this * aspect of the matter at this stage.

On 20th November, 2003 the defendant through its attorneys P.M. Shilubane & Associates delivered its notice of intention to defend the action. An affidavit of service filed by one Mduduzi Hlophe, who was apparently appointed an adhoc Deputy-Sheriff for the purpose of serving the summons, states that the defendant was served with the combined summons on Monday 20th October, 2003 by leaving a copy at the defendants' place of residence with one Bheki Fakudze a person described as apparently not less than sixteen years of age being apparently in charge of the premises at the time.

On 25th November, 2003 the defendant delivered a notice of application in terms of rule 30 which application was set down for Friday 28th November, 2003 at 0930 hours for an order in the following terms;

"1. That the Plaintiff's combined summons dated 17th October, 2003 annexed hereto marked A be and is hereby set aside as irregular on the following grounds:-

2. On the 19th December 2002 a full bench of this Honourable Court in the matter of Attorney-General V. Ray Gwebu & Another, High Court case No. 3699/02 issued an order stating inter alia that, 'no application in which the government as an applicant, Plaintiff or Petitioner shall be heard and no papers to be filed by the Government shall be accepted by the courts of Swaziland until a full bench of this court holds that the Government has purged its contempt. "

2.1. *The court order is still in force and has not been reversed or set aside.*

2.2. *In breach of the aforesaid court order the Swaziland Government has sought to institute proceedings against the defendant wherein the government is the plaintiff. "*

What I have before me therefore is an application in terms of rule 30 of the rules of this court. The rule requires that such an application be made within fourteen days after becoming aware of the irregular step. Without expressing any opinion on whether the issuing and service of summons (in other words, the institution of proceedings against

the defendant) amounts to an irregularity or not, it appears to me that the application must fail because of two reasons. The fourteen days from the date the defendant became aware of the alleged irregular step expired on 7th November, 2003. The date upon which the defendant is to be taken to have become aware of the alleged irregular step has to be the date upon which the summons were served on the defendant, namely, 20th October, 2003. The application filed on behalf of the defendant" purportedly in terms of rule 30 does not therefore comply with the requirements of rule 30 (1) which provides as follows;

"A party to a cause in which an irregular step or proceeding has been taken by any other party may, within fourteen days after becoming aware of the irregularity, apply to court to set aside the step or proceedings. " My emphasis.

It is clear therefore that the application has been made way outside the fourteen days prescribed by the rule, from the date of the alleged irregularity.

Secondly, it is also trite in relation to such applications that when the irregularity is established the court has a discretion whether or not to grant the application and the court will generally not be inclined to grant the order if no substantial prejudice is shown to be occasioned to the applicant. In this regard I need simply to refer to HERBSTEIN AND VAN WINSEN, THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA, 4th edition at page 560 wherein the principle is formulated as follows:

"It is clear that the court has a discretion whether or not to grant the application even if the irregularity is established. The attitude generally by the court is that it is entitled to overlook, in proper cases, any irregularity in procedure which does not work substantial prejudice to the other side. In fact, it has been held that prejudice is a prerequisite to success in an application in terms of rule 30. As was said by Schreiner J.A in TRANS-AFRICAN INSURANCE CO. LTD V. MALULEKA, 'technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their merits.' The application may be dismissed with costs if no prejudice was caused by the irregularity.
"

No prejudice has been shown at all which might be occasioned to the defendant as a result of the alleged irregular step taken by the Plaintiffs. Indeed it seems to me that it is not possible that any prejudice would be occasioned at all to the present defendant because of what the plaintiffs have done or failed to do in relation to a completely

unrelated matter. In fact it may well be that Plaintiffs' counsel is right in his submission that the provisions of rule 30 have no application to the situation which appears to bother the defendant. The rule 30 application is in my view misconceived and is dismissed with costs.

A handwritten signature in black ink, appearing to read 'A. Shabangu', with a long horizontal stroke extending to the right.

ALEX S. SHABANGU
ACTING JUDGE