

THE HIGH COURT OF SWAZILAND

EMELYN GININDZA

Applicant

And

THOMAS BOAHEN T/A INSTITUTE OF PROFESSIONAL STUDIES HIGH SCHOOL

Civil Case No 3453/2004

Coram: S.B. MAPHALALA-J

For the Applicant :MR. Z. MAGAGULA

For the Respondent: MR. M. SIMELANE

JUDGMENT

(11th November 2005)

[1] The Applicant/Defendant in the main action filed a special plea of non-joinder in the main action

stating that she had been wrongly cited and that Respondent/ Plaintiff in the main action should have been joined in the proceedings an entity called "Institute of Professional Studies (Pty) Ltd". For purposes of this judgment, and for convenience, the Applicant/Defendant will simply be referred to hereinunder as the "Applicant" and the Respondent/Plaintiff simply as the "Respondent". The special plea was set down for hearing, postponed and later removed by consent of both parties. Respondent then filed a Notice to compel Applicant to make discovery.

[2] The issue which concerns the court presently is the contention made by Applicant that the Notice to Compel Discovery is an irregular step since pleadings have not been closed and that a party is required to make discovery only when pleadings have been closed. This complaint has been set down in terms of Rule 30 of the Rules of this court.

[3] The gravamen of the Applicant's case in support of the application in terms of Rule 30 is that since Compelling Discovery is a step which seeks to advance the proceedings one stage nearer completion, it is an irregular step under the rule if it is done before the close of pleadings, and no leave has been granted by a Judge that discovery be made before the close of pleadings as stated in Rule 35.

[4] Rule 35 (1) thereof provides that "any party to any action may require the other party thereto by notice in writing to make discovery on oath ... and such notice shall not, save with the leave of a Judge, be given before the close of pleadings" (my emphasis).

[5] Since Defendant filed a declaratory plea and has not yet pleaded over on the merits, pleadings have not been closed and Defendant cannot therefore be compelled to make discovery under Rule 35. In this

regard the court was referred to the case of Schuddinch vs Uitenhage Municipality and that of Gorge vs Lewe and another 1935 CPD at 406 to the proposition that where the Defendant raises a special plea involving the introduction of a new matter, he may do so without pleading over. If such plea is not successful, the court will give the Defendant an opportunity to file a plea on the merit.

[6] The court was further referred to the cases of Brian Ferris Grogor 1984 (1) S.A. 152 (W) at 153 (c) and that of Monumental Art Co. vs Kenston Pharmacy (Pty) Ltd 1974 (2) S.A. 376 (1) at 379 F in support of the principle that the sub-rule does not apply when the irregular step complained of amounts to a nullity.

[7] On the other hand Mr. Simelane for the Plaintiff has taken the position that the Applicant cannot set down the special plea as a point of law but has to exhaust all procedures in action proceedings like discovering document in his possession. A special plea is different from an exception which is a point of law. Further, that the Rule 30 application has no merit as the Applicant has failed to even reset down their special plea, albeit it would be irregular. Furthermore, the Applicant has not alleged any prejudice she will suffer if she is compelled to discover. For this latter submission the court was referred to the textbook by Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition at 560 - 2. The final argument is that Rule 30 is out of time as Applicant was supposed to move the same within 14 days after being served with the Notice to make discovery on the 10th February 2005. The dies lapsed on the 2nd March 2005 and the Applicant has not applied for an extension. In fact, Applicant prepared a Book of Pleadings which incorporated the notice to make discovery.

[8] Having considered the pros and cons of the arguments in this matter I have come to the considered view that the position taken by Mr. Magagula is the correct one because the Applicant has filed a special plea being a declaratory plea in the matter which special plea is still pending. Applicant has not pleaded over on the merits and pleadings have therefore not been closed. I further agree that since compelling discovery is a step which seeks to advance the proceedings one stage nearer the completion, it is an irregular step under Rule 30 if it is done before the close of pleadings and no leave has been granted by a Judge that discovery is to be made before the close of pleadings as stated in Rule 35.

[9] If Applicant were to be compelled to make discovery, Applicant would be prejudiced in his defence because discovery by Applicant would mean that Pleadings have been closed and Applicant would not be able to plead on the merits. In this regard I agree with the Applicant's contention that the special plea should be finalized first if Respondent is interested in the matter proceedings. According to Jourbert, The Law of South Africa, First Re-issue 3 Part 1 whether a party has to plead over, (plead to the merits) when he delivers a special plea is the subject of conflicting judgments. The Rule does literally require a plea as to the merits but that is not always practical.

[10] In the result, for the afore-going reasons Respondent's Notice to Compel Discovery is set aside as an irregular step in terms of Rule 30. Costs to follow the event.

S.B. MAPHALALA

JUDGE