

THE HIGH COURT OF SWAZILAND

WINNIE MUIR

Applicant

And

SIBONISO C. DLAMINI N.O. et al

Respondents

Civil case No 1531/2004

Coram :S.B. MAPHALALA - J

For the Applicant :MR. P. SHILUBANE

For the Respondents: MR. B. StGWANE

JUDGMENT

(On application in terms of Rule 30) (15th July 2005)

[1] The Respondents have filed a Notice in terms of Rule 30 of the Rules of Court objecting to the Applicant filing her replying affidavit dated 1st October 2004 out of time. The Notice is formulated in the following terms:

"1. That the Applicant's Replying affidavit be declared an irregular proceeding and that it should not be placed before the above Honourable court.

2. Ordering the Applicant to pay the costs of this application on the sale (sic) as

between attorney and own client. Take notice further that the 1st Respondent contends that Applicant's Replying affidavit is irregular by virtue of the following:

1. The Replying affidavit was not served timeously pursuant to the provisions of Rule 6 (5) (e) of the High Court Rules

2. The Replying affidavit was supposed to be served not later than 26th July 2004. It was served on the 4th October 2004"

[2] The Notices in respect of 3rd, 4th, 5th and 6th Respondents are worded in a similar fashion as that of the 1st Respondent outlined above. The latter notice is dated the 12th October 2004 and the former in respect of the rest of the Respondents is dated the 15th October 2004.

[3] On the 18th October 2004, the Applicant filed an application for condoning the late filing of her Replying affidavit dated 4th October 2004 supported by the requisite Founding affidavit. The said affidavit is supported by the affidavit of one George Mlambo who is the filing Clerk employed by P.M. Shilubane & Associates the Applicant's attorneys of record.

[4] In a notice dated the 20th October 2004, the 3rd, 4th, 5th and 6th Respondents filed their intention to oppose the application for condonation dated the 18th October 2004.

[5] On the 21st October 2004, the 1st Respondent filed its second notice in terms of the provisions of Rule 30 for an order in the following terms:

"1. That the Applicant's application for the condonation of tier late tiling of the Replying affidavit be declared an irregular proceeding;

3. Setting aside the aforesaid condonation application;
4. Ordering the Applicant to pay the costs of this application on the sale (sic) as between attorney and own client.

Take notice further that the 1st Respondent contends that Applicant's application for the condonation of her late filing of the Replying affidavit is irregular by virtue of the following:

1. It cannot properly be launched whilst the Rule 30 application is still pending.
2. It does not comply with Rule 6 (a) and 6 (10) of the High Court Rules".

[6] On the 21st October 2004, third to sixth Respondents filed an Answering affidavit to Applicant's Founding affidavit in support of the application for condonation where in limine it is averred, inter alia, that the said affidavit by the Applicant constitutes hearsay evidence and hence is not admissible. Further averments are made in paragraphs 4 and 5 of this affidavit in answer to the Supporting affidavit of George Mlambo.

[7] On the 26th October 2004, the Applicant filed a Replying affidavit and Supporting affidavit.

[8] In argument before me Mr. Sigwane for the 1st Respondent argued with all the force in his command that the contents of the Applicant's Replying affidavit are prejudicial to the 1st respondent in a number of respects. Firstly, that it raises new facts and issues not arising from the 1st Respondent's Answering affidavit. Secondly, that it seeks to unlawfully amend and/or contradict the contents of the Applicant's Founding affidavit. Thirdly, that it unethically and immorally imports inadmissible documentary evidence that was unlawfully procured. Fourthly that it scandalously and vexatiously accuses the 1st Respondent of professionally misconduct as an attorney, much to his prejudice. Lastly, that it prejudicially presumes that 1st Respondent keeps a single Trust Account and then misguidedly draws false conclusions therefrom.

[9] The court was referred to the cases of Van Loggerensberg vs Lydenburg Municipal Council 1939 T.P.D. 180

at 183 and Brenclenkamp vs Dart 1960 (3) S.A. 106.

[10] Mr. Shilubane for the Applicant on the other hand contended that in the present case there is no prejudice suffered by the Respondents nor have they alleged any prejudice in accordance with Rule 30. In casu, the Respondents also filed their Answering affidavits out of time. In any event, Applicant has filed an application for condonation for filing her Replying affidavit out of time. In this regard the court was referred to the case of Uitenhage Municipality vs Uys 1974 (3) S.A. 80 where condonation was granted to the Applicant for failing to file a Replying affidavit within the time limits prescribed by Rule 6 (b) (e) of the Rules of court.

[11] I have considered (he provisions of the operative rule vis a vis the submissions advanced by Counsel and it is clear from the reading of sub-rule (3) that the court has a discretion whether to grant the application or not, and it will not do so where any irregularity in procedure does not work any substantial prejudice (see Herbstein and Van Winsen, The Civil Practice of the Supreme Court, 4th Edition at page 56 and the cases cited thereat). It would appear to me that there is no prejudice suffered by the Respondents nor have they alleged any prejudice. I also find that the dicta in the case of Uitenhage Municipality (op cit) applies to the facts of the present case as the case is at are all fours with the case in casu. In the former case condonation was granted to the Applicant for failing to file a Replying affidavit within the time limits prescribed by Rule 6 (5) (e) of the Rules of court.

[12] In the result, condonation is granted as prayed for. Costs to be costs in the course.

S.B. MAPHALALA

JUDGE