

THE HIGH COURT OF SWAZILAND

SWAZILAND NATIONAL PROVIDENT FUND BOARD

Plaintiff

And

IVY CARMICHAEL T/A W1C WHOLESALERS

Defendant

Civil Case No. 2388/2004

Coram: S.B. MAPHALALA-J

For the Plaintiff: MISS L. KUNENE

For the Defendant: MR. RODRIQUES

JUDGMENT

(04/03/2005)

[1] In the present case the Plaintiff sought leave to file a replying affidavit after the Defendant has filed an affidavit resisting summary judgment application wherein the Defendant's attorney contended that a more formal and substantive application ought to be filed for leave to file a reply as a matter of law.

[2] It is contended for the Plaintiff that the rules of court do not provide for any particular format in which the Plaintiff may apply for leave to file an affidavit in reply. In the circumstances such an affidavit may be made viva voce and the court may exercise its discretion on whether to grant same or not.

[3] It is further contended for the Plaintiff that the Defendant suffers no prejudice if the court would grant the Plaintiff leave to file a replying affidavit. In this regard the court was referred to the dicta by Schreiner JA in the case of Trans - African Insurance Company Limited vs Malulela 1986 (2) S.A. 273 at 278 F - G where the learned Judge stated the **following**:

"Technica objection (**lions** to less than perfect procedural steps should not be permitted, in the absence **of prejudice**, to interfere with the expeditions and if possible, inexpensive decision of cases on their real merits.

[4] The dictum by Schreiner JA was further upheld and amplified in the case of Bank of Credit 'and* Commerce International (Swaziland) Limited vs Tonkwane Sawmill Company Limited and others 1982 S.L.R. 501 at 507 A - Q

[5] Au contraire /arguments were advanced on behalf of the Defendant, the essence of which was that the Defendant will be greatly prejudiced if leave is granted before Plaintiff has furnished the said affidavit to the court and the Defendant for scrutiny. The thrust of Mr. Rodriques arguments was that it is imperative that such affidavit be furnished before leave is granted to illiminate the incident of allowing objectionable averments in the said affidavit, to the Defendant's prejudice.

[6] The relevant rule being Rule 32 (5) (a) provides that "a Defendant may show cause against an application

under sub-rule (1) by affidavit or otherwise to the satisfaction of the court and, with leave of the court, the Plaintiff may deliver an affidavit in reply"

[7] It appears that the rules do not provide for any particular format the Plaintiff may apply for leave to file an affidavit in reply and I would agree with Mr. Rodriques that it is good practice' to file the affidavit with the court and the opposing party prior to the application leave to file the said affidavit.

[8] On the facts of the present case I rule that Plaintiff is to file the said affidavit before the court and with the Defendant before leave is sought in terms of the rule. Costs to be costs in the cause.

S.B. MAPHALALA

JUDGE