

THE HIGH COURT OF SWAZILAND

MLAMULINSIBANDZE

And

COMMISSIONER OF POLICE

Civil Case No. 1793/2005

Coram: S.B. MAPHALALA - J

For the Applicant: MR. M. MABILA

For the Respondent: MABILA MR. DLAMINI (Attached to the Attorney General's Chambers)

JUDGMENT

(19th August 2005)

[1] Presently the Plaintiff has lodged a Notice of application in terms of Rule 30 of the High Court Rules, to set aside a Notice to Oppose for failure to comply with Rule 6 (10), (12) and (26) of the High Court Rules. The essence of the Rule 30 application is that the said Notice to Oppose has been filed out of time without leave of court as per the rules of the court.

[2] Mr. Mabila who appeared for the Plaintiff relied on a dicta by Masuku J in the case of Michael Mabundza vs

Vinah Mamba - Civil Case No. 1124/99 (unreported). He argued at great length that in casu Defendant has not followed the provisions of Rule 27 dealing with extension of time and removal of bar and condonation. Rule 27 thereof provides as follows:

27. (1) In the absence of agreement between the parties, the court may upon applications on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems fit.
- (2) Any such extension may be ordered although the application therefore is not made until after the expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems fit as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these rules.
- (3) The court may on good cause shown, condone any non-compliance with these rules.
- (4) After a rule nisi has been discharged by default of appearance by the Applicant, the court or a Judge may revive the rule and direct that the rule so revived need not be served again.

[3] The gravamen of Mr. Mabila's argument is that the Defendant has not filed an application on notice as required by Rule 27 (1) reproduced above.

[4] On the other hand it was argued for the Respondent that it is 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. To this end the court was referred to the textbook by Herbstein and Von Winsen, *The Civil Practice* of the Supreme Court of South Africa, 4th Edition at page 560 and the cases cited thereat. The court was also referred to the local decision in the case of the Swaziland Government and Attorney - General vs Nhlanhla N. Sibandze - Civil Case No. 2667/03 (unreported). In casu, Respondent submitted that no prejudice has been shown at all which might be occasioned to the Applicant as a result of the alleged irregular step taken by the Respondent. Further, the Respondent tendered wasted costs occasioned by the application and prayed to be granted leave to file their Answering affidavit within seven (7) days. Furthermore, it was contended for the

Respondent that there were not allowed to remove the cause of complainant in terms of Rule 30 (5) of the High Court Rules. Rule 30 (5) thereof provides as follows:

"Where a party fails to comply timeously with a request made or notice given pursuant to these rules, the party making the request or giving the notice may notify the defaulting party that he intends after the lapse of seven (7) days applying for an order that such notice or request be complied with, or that the claim or defence be struck out. Failing compliance within seven (7) days, application may be made to court and the court may make such order thereon as to it seems fit".

[5] The above are the issues for determination. After considering all these arguments I have come to the conclusion that on the facts of this matter the Respondent be granted the indulgence to file its Answering affidavit within seven (7) days from the issuance of this judgment. I am persuaded by the argument as enunciated in Herbstein et al (supra) that "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 adopted by the court is that it is entitled to overlook, in proper cases, any irregularity in procedure which does not work any substantial prejudice to the other side" (my emphasis).

[6] Furthermore I fully agree with the trenchant remarks by Schreiner JA in Trans - African Insurance Co. Ltd vs Maluleka 1956 (2) S.A. 273 (A) at 278 F - G as follows:

"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 real merits".

[7] In the present case I am of the view that I ought to proceed by way of Rule 30 (3) of the High Court Rules and grant the Respondent leave to file its Answering affidavit within seven (7) days from the issuance of this order. I further order that the Respondent pay wasted costs incurred so far.

S.B. MAPHALALA

JUDGE