

IN THE HIGH COURT OF SWAZILAND

CASE NO. 629/06

MAX ENTERPRISES (PTY) LTD t/a

SWAZILAND SECURITY ACADEMY

PLAINTIFF

and

FAST TOWING SERVICES (PTY) LTD

DEFENDANT

Coram:

Q.M. MABUZA -AJ

FOR THE PLAINTIFF:

MR. SHABANGU

FOR THE DEFENDANT: MRS. DLAMINI

RULING 23/6/06

[1] This is an application in terms of Rule 30 for an order

a) Setting aside the Plaintiff Summary Judgment Application dated the 21st March 2006 it being filed prior to the Filing of Plaintiffs declaration.

b) Cost of this Application to be granted against the Plaintiff.

[2] It is apparent from the submission made by both counsel that the issue is common cause namely that the Plaintiffs attorney filed the application for judgment before the declaration.

[3] What is required of the court is whether to set this obviously irregular step aside or to condone the irregular step and make an appropriate order as to costs.

[4] In the case of **Foster v Carlis and Houthakker** 1924 TPD 247 a Full Court construed Rule 37 (now Rule 30: Uniform Rules and our Rule 30) and also dealt with the courts inherent jurisdiction to condone irregularities in procedure. At page 251 Mason J.P. says

"The application is made under Rule 37 which provides that when any proceeding on the part of one of the parties is irregular or improper, the other party may move to set aside or cancel it, and that the Court shall thereupon make such order thereon as shall seem meet. It seems to me impossible to construe the Rule otherwise than as conferring upon the Court the power to condone any such irregularity or impropriety, because the contrary view would covert the latter part of the Rule into an instruction to the Court to set aside the irregular or improper proceedings. And if the Court has no discretion in the matter, it would be its duty to decline to hear any proceeding in which there had been a similar failure to comply exactly with the Rules, whatever might be the attitude of the parties. The very fact that it is left to the parties to move suggests that such an irregularity does not necessarily render the proceedings void. This Rule 37 is the only one which appears to give any general discretion to the Court in connection with matters of required to obviate the delay and expense which these apparently inevitable irregularities would otherwise entail in matters where no party's interest is adversely affected in any question of substance."

[5] In the case of **Trans-African Insurance Co. Ltd v Maluleka 1956 (2) SA 273** it was said.

"No doubt parties and their legal advisors should not be encouraged to become slack in the observance of the Rules of Court which are an important element in the machinery for the administration of justice. But on the other hand 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."

[6] It is apparent from the above that the court has power to condone irregularities in procedure or to allow supplementary action to remedy defects in the procedural steps taken. **(Herbstein and Van Winsen p 440, 4th edition: the civil practice of the Supreme Court of South Africa)**. In doing so the court has to consider whether or not the complaining party has suffered any prejudice as a pre-requisite to success in an application in terms of Rule 30.

The authorities that I have perused reveal that it is financial prejudice that has to be shown and not "emotional shock" as the defendant seems to have suffered.

[7] It is my considered view that a simple telephone call between colleagues would have rectified this obvious error and would have cost considerably less than the present application. In many instances under Rule 30 attorneys should first appeal to their common senses before rushing to the courts to have irregular steps set aside thus burdening their clients with unnecessary litigation and costs.

[8] In the even I order as follows:

- a) The application to have the summary judgment application dated 21st March 2006 as an irregular step is dismissed.
- b) The irregular step is hereby condoned.
- c) The defendant is hereby granted leave to file its affidavit resisting summary judgment within ten days hereof.
- d) Costs shall be costs in the cause

Q.M. MABUZA

JUDGE