

IN THE HIGH COURT OF SWAZILAND

WAN LI CHANG

Applicant

.And

MARTIN AKKER N.O.

1st Respondent

RICKY HUANG

2nd Respondent

YUI FANG TING

3rd Respondent

In Re:

RICKY HUANG

Applicant

DIAMOND GARMENTS (PTY) LOOTED

Respondent

Civil Case 2050/2005

Coram: **S.B. MAPHALALA -J**

For the Applicant : **MR. G. MASUKU**

For the Respondent: **MR. M. SIMELANE**

JUDGMENT

16th February 2007

[1] The application before court is in terms of Rule 30 of the High Coim Rules for an order in the following terms:

1. Granting Applicant an extension of time or condonation in terms of the common Isw for belatedly

instituting Rule 30 application;

2. That the Notice of withdrawal of 2nd Respondent's affidavits be set aside as an irregular step for not tendering wasted costs incidental to such withdrawal;
3. That the Notice of Abandonment of Court order dated 18th September 2006 by 5th Respondent; attorneys be set aside as an irregular step at common law for not tendering wasted costs to Applicant and for failure to seek same on Notice with an affidavit explaining why such is sought especially because such order is central to the main application and further for not having served Applicant with *same* as an interested party;
4. That 3rd Respondent's Notice of Oppose dated 23rd August 2006 be set aside as an irregular step at common law as the Deputy Registrar had issued a Rule 47 (3) order setting security for costs at £20,000.00 which should have been complied with before a review of same is sought should 2nd Respondent be aggrieved by the quantum thereto: No valid work or residence permit had been produced by 2nd Respondent exempting him from compliance, with legal requirement for security for costs attaching to a peregrine;
5. That 2nd Respondent's affidavit dated 31st August 2006 be set aside as an irregular step at common law as the Deputy Registrar had already issued a Rule 47 (3) order setting security for costs at £20,000.00 which should have been complied with before a review of same is sought by an aggrieved party; No valid work/residence permit had been produced by 1st Respondent
6. That 2nd Respondent's Notice of Withdrawal of affidavits filed dated 3rd October 2006 be set aside as an irregular step as the Deputy Registrar had issued an Order in terms of Rule 47 (3) which Order's compliance is peremptory before a peregrine can file any court process having an effect of addressing the merits and demerits of the matter;
7. That 1st and 2nd Respondents pay costs of suit on attorney-client scale;
8. Further and/or alternative relief.

[2] The background of this matter is that on the 7th June 2005, Applicant paid £173,235.00 to 1st Respondent in keeping with a "mareva injunction" obtained by 2nd Respondent with the court directing 2nd Respondent to institute proceedings within 14 days of the grant of such injunction. However, such Rule was discharged on the 21st April 2006 by the 1st Respondent's attorneys.

[3] As a result of such discharge of the Rule, Applicant applied for the release of its £173,235.00 which application was opposed by both 2nd and 3rd Respondents. Whilst opposing the release of such funds, Applicant moved a Rule 47 application for security for costs against 2nd and 3rd Respondents.

[4] The office of the Registrar of the High Court ordered and directed that such security be raised

by 2nd and 3rd Respondents and set it at E20, 00C-II0, however, the 2nd and 3rd Respondents did not comply with such order hence the present Rule 30 application.

[5] In argument before me it was contended for the Applicant that the 2nd Respondent's Notice of Withdrawal be set aside as irregular for failure to tender wasted costs to Applicant contrary to rules of court and procedure 3rd Respondent's Notice of Abandonment be set aside as an irregular step for the following reasons:

1. Not tendering wasted costs to Applicant;
2. Failure to seek same on Notice with an affidavit in keeping with principles of natural justice centred around fairness;
3. Failure to serve Applicant with same though 3rd Respondent knew that Applicant was an interested and affected party.

[6] Further that the pleadings and affidavits filed by 2nd and 3rd Respondents after Registrar's Rule 47 (2) Order demanding E20, 000-O) security for costs had been issued as an irregular step as such order is peremptory to filing any pleadings. In this regard the court was referred to *Herbstein and Van Winsen, The Civil practice of the Supreme Court of South Africa, 1997*.

[7] The Respondent on the other hand argued *au contraire* and attacked paragraph 1 of the relief sought that there are no allegations in the Founding affidavit to support this prayer on condonation. The argument in this regard is that no facts for the relief set out in paragraph 1 have been adduced. It was contended that it is unforgivable to omit such allegations which are central and material to the application. For that reason the Respondent contends that the application be dismissed with punitive costs as the Applicant seeks costs on that scale also. The Respondent has cited the South African case of *L'itenhage Municipality v Vys 1974 (3) S.A. 800* to the proposition that the period of fourteen (14) days referred to in Rule 30 (i) is to be strictly adhered to. *In casu*, especially prayers 3, 4 and 5 are clearly outside the 14 days period as they date from 18th September 2006 (prayer 3); 23rd August 2006 (prayer 4); 31st August 2006 (prayer 5) for a Rule 30 application instituted on the 19th October 2006.

[8] Lastly, on this point it was contended for the Respondent that assuming that the court awards the Applicant, the prayers sought, that will not dispose off the issues in the case, but will just increase costs. In this regard the court was referred to the South African case of *Garner vs Survey Engineering (Pty) Ltd 1993 (3) S.A. 549*.

[9] The second argument advanced by the Respondent is that the Applicant has prematurely brought the application as he needed to comply with rule 47 (3). There is not court order issued by the Judge of this court The Registrar is not in a similar position to that of a Judge. Therefore, the application for irregular proceedings is ill-conceived.

[10] The argument on the issue of the Notice of Abandonment is that a Notice of Abandonment was filed in terms of Rule 41 (2) of the High Coim Rules. The argument in this regard is that the said Rule does not require that an abandonment of a court order be sought on motion supported by an affidavit. In the present case a Notice was filed and served upon the parties to whom the order concerned and Applicant duly got notice, though not served.

[11] I shall proceed to determine the issues raised *ad seriatim* starting with the first issue that there are no allegations in the Founding affidavit :to support the prayer on condonation.

[12] According to Rule 6 (1) the High Court Rules, which provides as follows:

"Save where proceedings by way of petition are prescribed by law, every application shall be brought on Notice of Motion supported by an affidavit as to the facts upon which the Applicant relies for reliefP.

[13] According to the learned authors, *Herbstein and Van Winsen, Toe Chil Practice of the Supreme Court of South Africa, 4th Edition* at page i3 while the particular facts deposed to will naturally depend on tie circumstances of each case, the affidavits must contain essential avennens in support of the relief claimed.

[14] In the present case the affidavit being the Founding affidavit contains no such facts for the

relief set out in paragraph 1 and in this regard I am in agreement with *Mr. Simelane* for the Respondent that it is unforgivable to omit such allegations which are central and material to the application. The arguments advanced by *Mr. Masuku* for the Applicant could not answer the obvious absence of vital averments. It is on this basis that I have come to the considered view that the application stands to be dismissed.

[15] In view of the above reasons in paragraph [14] *supra* I find that it would not be proper for the court to examine the other questions referred in paragraph [11] *supra*.

[16] In the result, for the afore-going reasons the application is dismissed with costs on the ordinary scale.

S.B. MAPHALALA

JUDGE