IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE	**CASE NO. 1556/10**
In the matter between:	
LLOYD CRAIG HENWOOD	**APPLICANT**
AND	
GARTH GREGORY HENWOOD	**1ST RESPONDENT**
GENE ALLISTER HENWOOD	**2ND RESPONDENT**
TENNYSON HENWOOD	**3RD RESPONDENT**
THE COMMISSIONER OF POLICE	**4TH RESPONDENT**
THE MASTER OF THE HIGH COURT	**5TH RESPONDENT**
THE ATTORNEY GENERAL	**6TH RESPONDENT**
CORAM	**OTA J**
FOR THE APPLICANT	**M.E. SIMELANE**
FOR 1ST, 2ND & 3RD RESPONDENTS	**HLOPHE**

JUDGMENT

OTA J.

This is a notice in terms of Rule 30 of our rules, wherein the Respondent contends for the following reliefs:-

1. That the Amended Notice of Motion dated 13th May, 201,1 be and is hereby set aside as an irregular step in that Applicant has failed and / or neglected to follow the procedure prescribed in Rule 28 of the Rules of Court relating to amendment of pleadings or documents.

2. Costs of this Application.

When this matter served before me for argument on the 9th of December 2011, the Applicant was represented by **Mr M.E**. **Simelane,** whilst the 1st, 2nd and 3rd Respondents (hereinafter called Respondents) were represented by **Mr**

Hlophe. It is on record that the 4th, 5th and 6th Respondents did not participate in this application.

It was argued for the Respondent's in their heads of argument and oral submissions in Court, that they are entitled to the orders sought because the amended notice of motion fell short of the statutorily prescribed procedure for such an amendment, pursuant to Rule 28 (1) and (2) of the Rules of the High Court.

The Respondents contend that the Applicant simply amended the Notice of Motion without first giving Notice to the Respondents of his intention to amend, in clear violation of Rule 28 (1). It is also for the Respondents position, that the Amended Notice of motion was also not served on it as is required by the Rules of Court, but was rather hidden in the book of pleadings by the Applicant, and the Respondents only became aware of it upon service on them of the notice of set down dated 29th November 2011. Therefore, the purported amendment is non existent for want of service,

pursuant to the Rules of Court and the application instant should be upheld in the circumstances.

It was argued Replicando for the Applicant in his heads of argument, as well as oral submissions in Court, that this application is premature by reason of none compliance with Rule 30 (5) of the Rules of this Court, in the face of the fact that no notice has been afforded the Applicant to remove the cause of complainant, before the application was moved.

The Applicant further contends that the application also offends Rule 30 (1) of the Rules of this Court, in that it was filed 7 months after the Respondents became aware of the irregularity, as opposed to the 14 days time limit statutorily provided by Rule 30 (1).

It is also the Applicant's position, that the Respondent's have suffered no prejudice by reason of the amended notice of motion, save the prayers sought therein are the same sought in the original notice of motion, same for their

renumembering. Applicant called upon the Court to dismiss the application with costs on the punitive scale.

Now, there is no doubt that the Rule 30 application affords a party to a cause in which an irregular step has been taken by another party, an opportunity to apply to Court to set aside the step or proceeding within 14 days after becoming aware of the irregularity. The Applicant has posited that the application instant is fatally defective, in that the Respondent failed to give the Applicant the statutorily prescribed 7 days notice to remove the cause of complaint pursuant to Rule 30 (5) of our Rules.

Now rule 30 (5) 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 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 days,*

application may be made to Court that the Court may make such order thereon as it seems fit''.

Implicit from the legislation detailed ante, is that a party wishing to challenge an irregular procedure by way of the Rule 30 application, is statutorily required to give his opponent seven days notice to remove the cause of Complaint, prior to the commencement of the application. Failure to comply with this requirement of notice is fatal to the application. This is the position of the law in this jurisdiction as is aptly demonstrated by case law. A case in point is the case of **MTN Swaziland V Accounting Professional Case No. 1390/2003** (unreported) wherein my learned brother **S.B Maphalala J,** was called upon to interprete the legislation ante. His Lordship declared as follows:-

'' It would appear to me that ----- the Rule 30 application has been brought prematurely as Rule 30 (5) provides that the party who has taken an irregular step should be afforded seven days grace period in order to remove a cause of Complaint. In casu,

the notice in terms of Rule 30 (1) issued before the Court on the 22nd August 2003, where it was postponed to the 29th August 2003. Clearly the period stipulated by sub-rule 5 had not elapsed when the matter came for argument. Therefore, in vien of that the application was premature the Applicants should have been afforded a grace period in order to remove the cause of complaint-------- In the result, the application in terms of Rule 30 is without merit''

In casu, this application it appears to me violently offends Rule 30 (5) of our Rules of Court, as the Applicant was afforded the statutorily prescribed grace period of seven days to remove the cause of complaint. On this ground alone this application stands to fail.

Now, assuming without conceding that I were to condone the none compliance with Rule 30 (5) and just for arguments sakes, proceed to countenance this application. I see another insuperable obstacle in the path of the application as is urged by the Applicant, The obstacle is presented by

it's none compliance with Rule 30 (1) That legislation provides as follows.

> '' *A party to a cause in which an irregular step or proceedings has been taken by any other party may, with fourteen (14) days after becoming aware of the irregularity apply to Court to set aside the step or proceedings''.*

In the case of **Lima Agripep (Pty) Limited V Maphobeni Farmers Association Case No. 907/2009, My learned Sister Sey J,** had occasion to interprete the phrase '' *after becoming aware of the irregularity''* as appears in Rule 30 (1) ante, and she declared as follows, in paragraphs 7,8,9 and 11:-

> '' *[7] Now in the case of* ***Minister of Law and Order V Taylor NO*** *(supra) the Court of the Eastern Cape Division, per* ***Kannermeyer JP****, had occasion to interpret the phrase ''after becoming aware of the irregularity'' as appears in Rule 30 (1) of the Uniform Rules of Court in South Africa, a legislation which is in pari materia with our own Rule 30 (1).*

[8] *The facts of that case briefly stated is that the Plaintiff's particulars of claim in an action for damages failed to particularize the damages as required by Rule 18 (10) of the Uniform Rules of Court. The combined summons had been sued out on the 5th January 1988, but Applicant became aware of the irregularity of the summons only after being advised thereof by counsel on 10th February 1988. Applicant sought by notice of motion served on Respondent on 22nd February 1988, to have the proceedings set aside in terms of Rule 30 (1) of the Uniform Rules of Court as being irregular. The application would have been brought within the 15 days period specified on the relevant Rule, if it were to be calculated from the date on which the Defendant had become aware that the step taken by the Plaintiff was irregular, but not if it were calculated from the date on which the Defendant had become aware of the step without appreciating its irregularity.*

[9] *The Court held that the word irregularity used in Rule 30 (1) was merely a reference to a '' step or proceeding'' which was irregular and once a party had become aware that a step or proceeding had been taken, and not when the party appreciated the irregularity of the step, the 15 day period started to run against that party:- That accordingly the application was out of*

time and, in the absence of an application for condonation, fell to be dismissed.

[11] It is inexorably apparent from the authorities paraded ante that the phrase '' after becoming aware of the irregularity'' simply refers to after becoming aware that an irregular step or proceedings has been taken, whether or not the party appreciated the irregularity in the proceedings. I am persuaded by these authorities. It follows therefore that the 14 days time limit to raise an objection to an irregular proceedings pursuant to Rule 30 (1) of our rules, begins to run when the party becomes aware that a step or proceeding which is irregular has been taken, whether or not he is at that time aware of the irregularity. It is also beyond dispute from the case law (supra) that an application brought outside the 14 days period statutorily prescribed, and in the absence of an application for condonation of the late filing of the application, is liable to be dismissed''.

In casu, **Mr Hlophe** has argued that the Amended Notice of Motion was not served on the Respondents but remained concealed in the book of pleadings dated 13th May 2011. That the Respondents only became aware of the amended

notice of motion upon service on it of the notice of set down dated 29th November 2011, therefore, so goes the argument, the Respondents are still within the fourteen days time limit statutorily prescribed to approach the Court for the remedy afforded by Rule 30.

I do not think I can agree with **Mr Hlophe** on this proposition. I say this because the record of these proceedings is replete with facts which show that the Respondents became aware of the Amended Notice of Motion prior to the 29th of November 2011. In the first instance, the Amended Notice of Motion clearly resides in the book of pleadings, which it is not disputed was served on the Respondents Attorney's on the 13th day of May 2011. Thereafter, the Applicant served the Respondents with Applicant's long heads of Argument on the 21st of September 2011. It is worthy of note that at paragraph 20 of the said heads of argument, the Applicant prayed that the application per the Amended Notice of Motion dated 13th May 2011, be upheld with costs. It is also on record that the matter was

subsequently set down for hearing on the 27th of September 2011, and 25th of November 2011 and two notices of set down dated the 14th of September 2011 and 14th of November 2011 respectively, were duly served on the Respondents with respect thereto. The record further demonstrates, that a roll call was held in relation to this matter on the 29th of November 2011 and the matter enrolled for argument on the 1st of December 2011. The last notice of set down was served on the 29th of November 2011 upon the Respondents.

It cannot be gainsaid from the foregoing, that the Respondents became aware of the irregular step taken prior to the 29th of November 2011 when the Notice of Set down was served on the Respondents. I hold the firm view that the Respondents became aware of the irregular step on the 13th day of May 2011, when the book of pleadings, which embodies the Amended Notice of Motion in pages 01 – 03 thereof, was served on Respondents counsel. To my mind it is immaterial for the purposes of the Rule 30 application, whether the Amended Notice of Motion was served alone or

it was embodied in the book of pleadings when the service took place. The Respondents are deemed to have become aware of the irregularity on the date the book of pleadings was served on their counsel.

To back up my posture on this subject matter, I lean for support on the case of **KLEIN V KLEIN 1993(2) SA 648 (BG),** at page 651, wherein **Comrie J**, in dealing with the word ‘‘*knowledge*’’ which is equivalent to being aware, in a provision which is in pari materia with ours, held thus:-

> *‘‘ First of all, according to the definition in Rule I, a ‘‘party’’ includes that party’s attorney. The knowledge of the plaintiff’s attorney was therefore the knowledge of the plaintiff. Secondly, if the proviso is to work in practice, it seems to me that ‘‘knowledge’’ must be distinguished from appreciation. The ‘‘ knowledge’’ referred to in the proviso is in my view knowledge that a step has been taken, whether or not coupled with an appreciation that the step was irregular or improper. See the observations of* ***Kannemeyer JP in Minister of Law and***

Order V Taylor No. 1990 (1) SA 165 E*, with regard to Rule 30 (1) as amended in South Africa. The fact that in the present case the Plaintiff and her attorney failed to appreciate that defendant's notice of set down was out of time accordingly affords no escape from the operation of the proviso. I would assume, in the absence of evidence to the contrary, that the Plaintiff's attorney had knowledge of the set down on 13 May, being the day when it was received. Thereafter, on 15 May, discovery was furnished and demanded. In any event the Plaintiff's attorney at least knew of the set down by 21 May when he wrote the first of his two letters seeking a postponement. Thereafter, the Plaintiff took further steps in the cause, she requested trial particulars, served a notice to produce, and convened and attended the pre-trial conference. In my opinion, therefore, the Plaintiff is precluded by the proviso in Rule 30 (1) from having the set down set aside as an irregular or improper step''*

It is thus apparent to me that the Respondents became aware of the irregular step on the 13th May 2011, when the book of pleadings was served on Respondents counsel. Time thus began to run for the Respondents on the 13th of May

2011, and they were required by the Rules to register their protest against the irregular step within 14 days from the date thereof, about 7 months ago. Besides, it appears to me that the Respondents were basically approbating and reprobating, as to the time they became aware of the Amended Notice of Motion. Whilst on the one had they complain that the Amended Notice of Motion was not individually served on them but hidden in the book of pleadings, on the other hand they suddenly found it convenient to propose that they became aware of the irregularity only upon the service of the notice of set down on the 29th of November 2011, still in the absence of lack of individual service of the said Amended Notice of Motion. The Respondents cannot be allowed to shift goal posts in the bid to choose a date most suited to their cause, especially in view of the fact that there were two other notices of set down served in these proceedings prior to the 29th of November 2011, as I have hereinbefore detailed in this judgment. The relevant date to my mind remains the 13th of May 2011, and I so hold.

It is in my view thus beyond dispute, that this application has fallen short of the 14 days time limit statutorily prescribed for same. We must not loose sight of the fact that the spirit of the time limit set by Rule 30 (1), and the interpretation given to it by case law, to my mind is to prevent a party who becomes aware of an irregular step or proceedings, from falling into a sleeping slumber thereafter, only to wake up some months or years later, to shout ‘‘Foul’’ thereby taking undue advantage of his opponent. Strict compliance with the provisions of this Rule is thus a paramountcy , to discourage dilatory tactics by litigants, which invariably clogs the wheel of justice, and has the ill consequence of bringing the administration of justice into disrepute amongst right thinking members of the society. None compliance with the provisions of Rule 30 (1) therefore, renders such an application fatally defective, especially in the absence of an application for condonation.

I apprehend that it was a recognition of the foregoing factors, that compelled the Court to declare as follows in the case of **Uitenhage Municipality V Uys 1974 (3) SA 800 E at 802 D**

> *‘‘ where in motion proceedings a respondent delivers a notice of objection in limine in terms of Rule 30 (1) of the Uniform Rules of Court, such Respondent having chosen to give notice of objection, is required to give notice according to the Rule of Court which is applicable namely Rule 30 (1), and he is not entitled simply to ignore the provision of the Rule and, by not referring to it, to seek to take his procedure outside the ambits of its requirements. The Respondent cannot conceive and apply his own procedure where there is an appropriate Rule which governs the position. The procedure in giving notice must be governed by the appropriate Rule 30 (1). Having elected to bring his application in this form, he must stand or fall by the Rules of Court which govern it. Accordingly where such notice of objection in limine is delivered after the expiry of the 14 days laid down by Rule 30 (1), the Court is on that ground alone justified in dismissing the objection in limine’’.*

More to the foregoing, is that I see no prejudice occasioned to the Respondents by reason of the impugned Amended Notice of Motion, to warrant a grant of this application.

I entirely agree with **Mr Simelane,** in paragraphs 36 and 37 of the Applicants heads of argument, wherein he submitted as follows

> *‘‘ 36 it is clear that the Court has 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. In fact, it has been held that prejudice is a prerequisite to success in an application in terms of Rule 30, as was said by* ***Schreiner JA in Trans – African Insurance Co Ltd V Maluleka 1956 (2) 273 A at 278F-G***
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> *‘‘ technical objections to less that 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’’****------***
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> *37 In* ***Soundprops 1160 CC V Karishavan Farm Partnership 1996 (3) SA 1026 (N) at 1033****,* ***Page J****, said that the prejudice*

must be sought by comparing the situation arising arising from the irregular proceeding with that which would have come into being had the correct procedure been followed, and not with that which would have obtained had no steps been taken at all''

I myself have had occasion to visit this universal trend towards substantial justice in my decision in the Case of **Swaziland Building Society V One Stop (Pty) Limited and Others Case No. 1262/2010** at paragraph 12, wherein I stated as follows

'' 12 I have however notwithstanding chosen to ignore this irregularity in the interest of substantial justice and proceed to determine this application on the merits. This is in line with the admonishments to this Court in the recent past, not to allow less than perfect procedural irregularities defeat an entire process, in order to avoid the ill consequence of unnecessary delays, with the attendant waste of time and resources. In the Case of ***Shell Oil Swaziland (PTY) Ltd V Motor World (Pty) Ltd t/a Sir Motors Appeal Case No. 23/2006,*** *page 23, paragraph 39,* ***Tebutt JA****, sounded this warning in unequivocal language as follows:-*

‘‘ 39 The learned Judge a quo with respect, also appears to have overlooked the current tend in matters of this sort, which is now well – recognized and firmly established, VIZ not to allow technical aspects to interfere in the expeditions and if possible inexpensive decision of cases on their real merits (see e.g ***Nelson Mandela Metropolitan Municipality and Others V Greyvenouw CC and others 2004 (2) SA 81 (SE).*** *In the latter case the Court held that (at 95F-96A, paragraph 40)*

‘‘ The Court should eschew technical defects and turn its back on inflexible formalism in order to secure the expeditious decisions of matters on their real merits, so avoiding the incurrence of unnecessary delays and costs’’.

The Respondents have failed to urge any prejudice they have suffered by reason of the Amended notice of motion. To my mind the reason for the silence of the Respondents on this issue is not farfetched. I say this because I have taken the liberty of scrutinizing the Amended notice of motion vis a vis the original notice of motion, and I must agree with **Mr Simelane,** as per paragraph 38 of the Applicant’s heads,

that the Amended notice of motion did not introduce any new prayers save to renumber and rearrange the original prayers, which though couched is a different language, the substance however remains the same. In the absence of any substantial prejudice suffered by the Respondents, this point taken in limine cannot succeed.

I now turn to the question of costs, which **Mr Simelane** proposes should be granted to the Applicant on the punitive scale of Attorney and own client. His position is that the conduct of the Respondents is dilatory and an abuse of the legal process coupled with harassment. This he premised on the fact that the Respondent's waited for the last minute to urge this application, inspite of two previous notices of set down duly served on them. He further urged the fact that the Respondents also failed to comply with the Court's orders to file their heads of argument on the 6th of December 2011, rather prevaricating on the said filing until the 7th of

December 2011, thereby putting the Applicant out with little time to prepare.

The foregoing submissions by **Mr Simelane** not withstanding, I am of the firm view that the circumstances of this case do not warrant the punitive costs sought. There is no doubt that the Respondents failed to timeously launch this application in honour to laid down Rules of Court. There is also no doubt that the Respondents filed their heads of argument, a day later than ordered by Court for same. These facts do not in my view tantamount to an abuse of the process of the Court or harassment to warrant the costs sought on a punitive scale. In coming to these conclusions, I am mindful of the fact that an award of attorney and clients costs will not be granted lightly, as the Court looks upon such orders with disfavour and is loath to penalize a person who has exercised his right to obtain a judicial decision on any complaint he may have. **See The Civil Practice of the Supreme Court of South Africa**, **by Herbstein and Van Winsen at page 717.**

In the light of the totality of the foregoing, I find that the Rule 30 application lacks merits. It fails. On these premises I make the following orders

(1) That the Rule 30 application be and is hereby dismissed.

(2) Costs to follow the event on the ordinary scale.