



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

**Civil Case No.2060/10**

**In the matter between:**

**RAYMOND E. CARMICHAEL**

**Applicant**

**and**

**ROSEMARY M. CARMICHAEL**

**1<sup>st</sup> Respondent**

**THE REGISTRAR OF THE HIGH COURT**

**2<sup>ND</sup> Respondent**

**THE ATTORNEY GENERAL**

**3<sup>RD</sup> Respondent**

**IN RE:**

**ROSEMARY M. CARMICHAEL**

**Applicant**

**and**

**RAYMOND E. CARMICHAEL**

**1<sup>st</sup> Respondent**

**STANDARD BANK SWAZILAND**

**2<sup>nd</sup> Respondent**

**Neutral Citation:** *Raymond E. Carmichael vs Rosemary M. Carmichael & 2 Others In re: Rosemary M. Carmichael and Raymond E. Carmichael & Another (2060/10) SZHC 43 [20 FEBRUARY 2013]*

**Coram:** **MAPHALALA PJ**

**Heard:** **21 DECEMBER 2012**

**Delivered:** **21 FEBRUARY 2013**

**Summary:**

- (i) An application under a Certificate of Urgency to set aside a Bill of Costs by the Taxing Master under case No.2060/10 dated the 26 October 2012.
- (ii) The 1<sup>st</sup> Respondent raised two points *in limine* that firstly that Applicant has failed to comply with a court order and is thus approaching this court with “dirty hands” contravening the doctrine of clean hands.
- (iii) Secondly, that the Advocate appearing for the Applicant does not have a valid brief from the instructing attorney in accordance with the law.
- (iv) This court finds in favour of the Respondents on these points *in limine* and the Application is dismissed forthwith.

### **The Application.**

[1] On the 29 November, 2012 the Applicant Raymond Carmichael filed an Application against one Rosemary Carmichael for an order in the long form as follows:

- “1. That the Rules of Court insofar as they relate to forms, time limits and service be dispensed with and that the matter be heard as one of urgency;
2. That the Applicant’s non-compliance with the Rules of Court be condoned;
3. That a *rule nisi* be hereby issued calling upon the Respondents to show cause why an order in the following terms should not be made final:
  - 3.1 That the ‘Bill of Costs’ taxed by the Taxing Master under case number 2060/2010, dated the 26<sup>th</sup> day of October 2012 be set aside;
    - 3.1.1 That the Bill of Costs presented for taxation by the 1<sup>st</sup> Respondent’s attorneys be referred back to the Taxing Master, to be set down and taxed on a date to be determined by this Honourable Court;
  - 3.2 That any warrant of execution issued pursuant to the ‘Bill of Costs’, taxed by the Taxing Master under case number 2060/2010, dated the 26<sup>th</sup> October, 2012, be set aside;
    - 3.2.1 That the interim order operates with interim and immediate effect pending finalization of these proceedings;
4. Alternatively, that the taxation conducted by the Taxing Master, in respect of the ‘Bill of Costs’ taxed under case number 2060/2010, dated the 26<sup>th</sup> day of October 2012, be reviewed and that the Taxing Master be ordered to state a case for the decision of a judge in chambers;

- 4.1 That pending review of the taxed 'Bill of Costs' by a Judge of this Honourable Court, that any warrant of execution issued pursuant to the Bill of Costs being taxed, be set aside;
5. That the first Respondent be ordered to pay the costs of this Application, these costs to be on the scale as between attorney and client, and to include the costs consequent upon the employment of counsel;
6. Further and/or alternative relief.”

[2] The Applicant has filed a Founding Affidavit outlining the background of the matter with pertinent annexures.

[3] The 1<sup>st</sup> Respondent opposes the Application and has filed an Answering Affidavit to all the averments of the Applicant in the Founding Affidavit. I must state for the record that the two parties are married to each other, out of community of property and subject to an ante nuptial contract. The present dispute between the parties arose as a result of a Rule 42 application instituted by the 1<sup>st</sup> Respondent in which she sought payment of maintenance *pendent lite*.

[4] The Applicant has not filed a Replying Affidavit in terms of the Rules of this Court and the matter then appeared before me for arguments.

[5] In arguments before me points *in limine* by the Respondent were raised and argued and the court then reserved its ruling on this aspect of the matter.

[6] The points *in limine* raised by the 1<sup>st</sup> Respondent are in three fold. Firstly, that the Applicant has approached the court with “dirty hands” and that on this basis alone this Application should not be heard by this court. Secondly, that the Applicant’s attorney was untruthful regarding the averments made in his Confirmatory Affidavit. Thirdly, that Counsel appearing on behalf of the Applicant was guilty of unethical behavior.

### **The arguments of the parties.**

#### **For the Respondent**

[7] Mr. Nkosi who appeared for the Respondent filed Heads of Arguments on the merits of the case and later on filed supplementary Heads of Arguments with the Registrar’s stamp of the 11 January, 2013. I shall summarize in brief the arguments in the Supplementary Heads of Arguments on the points *in limine* raised from the bar.

[8] The first argument raised therein is that the Applicant seeks to equate Rule 6 with Rule 25 of the High Court Rules. That this in essence revolves around the

notion that if a Plaintiff does not replicate to a Defendant's plea then all that is taken to be denied if the filing of a Replication would be a mere joinder of issue or a bare denial. That there is no similar Rule which deals with Application proceedings further that Rule 25 merely seeks to avoid the filing of a replication where such would amount to a mis-joinder of issue or a denial. Furthermore that in Application proceedings, it is trite that:

“it is in the interest of justice that the well-known and well established rules regarding the numbers of sets and proper sequence of affidavits in notion proceedings should be ordinarily observed” per *Olgivie Thomson JA* in the case of *James Brown and Hamer (Pty) Ltd vs Simmons NO 1963(4) SA 63* at page 65 paragraph A.”

[9] The Respondent therefore contends that it is clear that the Applicant and his attorney failed to file Replying Affidavits to refute the allegation of being untruthful in light of the Opposing Affidavit. They had ample of time to do so but chose to ignore the well established rules to their own detriment.

[10] The Respondent contends that Counsel for the Applicant indicated very clearly that he was one who asked the instructing attorney Mr. Simelane what he had to say to the allegations that he was being untruthful. That by his own account the reply was “I deny it”. However, no affidavit was filed in this regard. Further, Mr.

Simelane, as an instructing attorney was not present in court to at least give the court his side of the story.

[11] On the doctrine of clean hands the attorney for the 1<sup>st</sup> Respondent advanced arguments at paragraph 5, 6, 7, 8, 9, 10 & 11 of the Heads of Arguments stating in paragraph 5 that the breaches committed by the Applicant is that he has once again come to court not having respected the ruling of this court to pay maintenance to the Respondent. That he is undisputably in arrears for the months of September to December in arrears amounting to E40,000.00.

[12] In the final paragraph of the Heads of Arguments at paragraph 11 the attorney for the 1<sup>st</sup> Respondent contends that Advocate Carmichael's behavior is tantamount to a breach of ethics of the profession. In this regard Mr. Nkosi cited what is stated by the learned authors *Herbstein and van Winsen, The Civil Practice of Superior Courts in South Africa, 1996* pages 367 to 368 to the following legal proposition:

“material non-disclosure, *mala fides*, dishonesty and the like in motion proceedings may, and in most instance should be dealt with by the making of an adverse or punitive order as to costs.”

**The Applicant's arguments.**

[13] Advocate Carmichael who appears for the Applicant also filed two sets of Heads of Arguments being the main Heads of Arguments on the merits of the case and on the 21 December, 2012 filed Supplementary Heads of Arguments. In the latter Heads of Arguments dealt with the three points *in limine* mentioned in paragraph [11] of this judgment.

[14] In the Supplementary Heads of Arguments he dealt with the doctrine of clean hands and secondly, the issue of hearsay of the statements made by the Respondent's attorney regarding the details of the telephone conversation between the Taxing Master and Mr. Simelane; thirdly, dealt with the issue of necessity to file a Replying Affidavit and fourthly, dealt with the unethical behavior of counsel.

[15] I shall outline in brief each of these Heads of Arguments in the following paragraphs.

[16] On the first set of Heads of Arguments on the doctrine of clean hands it is submitted by the Applicant that the "doctrine of clean hands" applies to the actions of the litigant only when such litigants stands in defiance or contempt of



an order of court. In the present circumstances no court order is being defied therefore it cannot be said that the Applicant is approaching the court with dirty hands.

[17] To support the arguments outlined above in paragraph [16] the learned Advocate for the Applicant advanced arguments in paragraphs 7, 8, 9, 10, 11, 12, 13 & 14 to the arguments in paragraph [14] thereof. In the present circumstances the court finds that the Applicant is approaching the court with dirty hands, there is no court order to which the Applicant can comply with and thus purge himself of his 'unclean hands'.

[18] Further arguments on this point are advanced in paragraph 15 & 16 of the Applicant's Heads of Arguments and I shall refer to these contentions later on my judgment.

[19] The Applicant's attorney further dealt with the issues of hearsay in paragraph 17, 18 & 19 of his Heads of Arguments. Furthermore in paragraph 20 to 21 made submission with the necessity to file a Replying Affidavit and also argued at paragraph [22] on the unethical behavior of counsel. In the latest Heads of

Argument cited the legal authority titled “Uniform Rules of Professional Conduct, Society of Advocates” (WLD) EU.5.4.

[20] The final arguments advanced for the Applicant is outlined in paragraphs 24, 25 & 26 of the Heads of Arguments ending with paragraph 27 with the submission that in conclusion the Application should succeed on the basis that the Applicant has shown on the evidence placed before court that the Respondent failed to comply with the provisions of Rule 68, alternatively Rule 48 of the Rules of Court and that as such the Applicant’s prayers as contained in the Notice of Application should be granted.

**The court’s analysis and conclusions thereon.**

[21] The above are the able arguments of the attorneys of the parties. I shall proceed to address the issues in the following paragraphs.

[22] The main issue for decision in my view is the first point *in limine* raised by the Respondent’s attorney from the bar concerning the doctrine of “clean hands”.

[23] In my assessment of the arguments of the parties I have come to the considered view that indeed the Applicant has infringed the “doctrine of clean hands”. I say so because the Applicant has failed to abide by the ruling of this court to pay maintenance to the Respondent. It is also clear on the record that the Applicant is undisputably in arrears for the months of September to December in arrears amounting to E40,000.00.

[24] The Applicant now pleads poverty yet he owns five motor vehicles, a fact which is on the record. He has been able to pay into court a sum of E250,000.00 in the past. Further this court has found that he has the capacity to pay the E10,000.00 per month as ordered by *Sey J.*

[25] It is without question on the facts of the matter that coming to court whilst having failed to observe and adhere to the provisions of an order of this court does amount to a breach of the doctrine of clean hands.

[26] Now coming to the question of the ethical conduct pertaining to Advocate Carmichael I am in agreement with the submissions of the Respondent. It appears on the papers filed that allegations to the fact that Counsel does not have a brief from attorney Simelane were not refuted by Advocate Carmichael

who merely stated that his uncle had insisted that he is briefed by attorneys Masina, Ndlovu and Mzizi. As to whether there was such a brief and whether Mr. Simelane did actually brief Advocate Carmichael, the latter has dismally failed to disclose to the court such a nexus.

[27] In my view Advocate Carmichael's behavior is tantamount to a breach of the ethics of the profession. In this regard I find the legal authority of *Herbstein (supra)* at page 267 apposite where the following legal formation is stated:

“Material now disclosure, *mala fides*, dishonesty and the like in motion proceedings may, in most instances should be dealt with the making of an adverse or punitive order as to costs”.

[28] On the other two questions raised *in limine* having considered all the arguments of the parties I again agree with the 1<sup>st</sup> Respondent's arguments.

[29] On the issue of the lack of a Replying Affidavit it appears to me that the Applicant seeks to equate Rule 6 with Rule 25 of the Rules of this Court. This in essence revolves around the notion that if a Plaintiff does not replicate to a Defendant's plea then all is taken to be denied if the filing of a replication would be a mere joinder of issue or bare denial.

[30] It is my considered view that there is no similar rule which deals with an Application where such replication would amount to a mere joinder of issue or denial. The legal principle was clearly stated by *Olgivie Thomson JA* in the case of *James Brown and Hamer (Pty) vs Simons (supra)* where the following is stated:

“It is in the interest of justice that the well-known and well established general rules regarding the number of sets and proper sequence of affidavits in motion proceedings should ordinarily be observed.”

[31] From the above it is therefore clear that the Applicant and its attorney failed to file Replying Affidavit to refute the allegation of being untruthful in light of the Opposing Affidavit and had ample time to do so but chose to ignore *the well established rules* to their own detriment.

[22] I must also mention in this regard that in the present case due notice was given and such was acknowledged by the Applicant's attorney to the Taxing Master. The Applicant and his attorney have failed dismally to file any Replying Affidavit to allay the damaging allegations contained in the Opposing Affidavit and that of the Taxing Master, Mrs. Mbatha. This failure means that the allegations

contained in those affidavits have not been denied and therefore construed as true.

[23] In the result, for the foregoing reasons the Application is dismissed with costs.

**STANLEY B. MAPHALALA**  
**PRINCIPAL JUDGE**

**FOR APPLICANT : MR. R. CARMICHAEL**

**FOR RESPONDENT : MR. S. NKOSI**