IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 544/2014

In the matter between:

MANGALISO STANLEY MAHLALELA **APPLICANT**

AND

SARIAN THANG'THINI MAHLALELA **1ST RESPONDENT**

ZANDILE MAHLALELA **2ND RESPONDENT**

THOMAS MAHLALELA **3RD RESPONDENT**

MR. RAFIK **4TH RESPONDENT**

Neutral citation: *Mangaliso Stanley Mahlalela v. Sarian Thang'thini Mahlalela and 3 Others (544/2014) [2014] SZHC217 (22nd September 2014)*

Coram **M.C.B. MAPHALALA, J**

Summary

Civil Procedure – Rule 30 application – first and second respondents lodged an application to set aside a replying affidavit filed out of time – principles governing Rule 30 applications considered – held that the application cannot succeed in the absence of substantial prejudice – application accordingly dismissed – costs shall be costs in the cause.

JUDGMENT
22nd SEPTEMBER 2014

---

[1] This is an interlocutory application in terms of Rule 30 of the High Court Rules. The respondents seek an order setting aside the applicant's replying affidavit as an irregular proceeding; they further seek an order for costs of suit.

[2] The first and second respondents argue that the applicant was served with their answering affidavits on the 26th May 2014; and, that he did not file any replying affidavit within seven days as prescribed by Rule 6 (13) of the High Court Rules. They further contend that there was an inordinate delay in the hearing of the matter, and, that they had taken upon themselves to compile a Book of Pleadings and to apply to the Registrar of the High Court for the allocation of a date of hearing; to that extent they argued that the applicant has failed to comply with Rule 6 (14) (b) of the High Court Rules.

[3] Rule 6 (14) of the High Court Rules provides the following:

> **"6. (14) Where:**
>
> > ***(a)*** **no answering affidavit, or notice, in terms of sub-rule (12) (*b*) is delivered within the period referred to in that sub-rule, the applicant may within four days of the expiry thereof apply to the Registrar to allocate a date for the hearing of the application;**

(*b*) an answering affidavit or notice is delivered, the applicant may apply for such allocation within four days of the delivery of his replying affidavit or if no replying affidavit is delivered, within four days of the expiry of the period referred to in sub-rule 13."

Rule 6 (15) and (16) provides the following:

"6. (15) If the applicant fails to apply within the appropriate period specified in sub-rule (14), the respondent may do so immediately upon the expiry of such period.

(16) Notice in writing of the date allocated by the Registrar shall forthwith be given by applicant or respondent, as the case may be, to the opposite party."

[4] The first and second respondents further contend that on the 4th July 2014, they were served with a replying affidavit; and, they argue that the filing of the replying affidavit is an irregular step and contrary to rule 6 (13) and rule 6 (14) (b) in the absence of an application seeking leave for condonation for the late filing. They further contend that they have suffered prejudice as a result of the irregularity on the basis that they have taken a further step in the proceedings and placed the matter before the Registrar for allocation of a date of hearing, pleadings having been closed.

[5] Rule 6 (13) provides that, "Within seven days of the service upon him of the affidavit and documents referred to in sub-rule (12)(*b*) the applicant may deliver a replying affidavit but the court may in its discretion permit the filing of further affidavits".

The failure by the applicant to comply with Rule 6 (14) does not constitute an irregularity on the basis that the said rule is not mandatory. The applicant may apply for the allocation of a date of hearing within four days of the expiry of the period allowed for filing a replying affidavit in accordance with Rule 6 (13) which provides that the court may in its discretion permit for the filing of further affidavits.

[6] It is common cause that the applicant filed the replying affidavit way after the expiry of the period allowed by Rule 6 (13); and, the applicant has not sought leave to file an affidavit out of time or for condonation for the late filing of the affidavit. Accordingly, this constitutes an irregularity within the meaning of Rule 30 of the High Court Rules. This rule provides the following:

> **"30. (1) A party to a cause in which an irregular step or proceeding has been taken by any other party may, within fourteen days after becoming aware of the irregularity, apply to court to set aside the step or proceeding:**

Provided that no party who has taken any further step in the cause with knowledge of the irregularity shall be entitled to make such application.

(2) Application in terms of sub-rule (1) shall be on notice to all parties specifying particulars of the irregularity alleged.

(3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems fit.

(4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.

(5) 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 to apply for an order that such notice or request be complied with, or that the claim or defence be struck out. Failing compliance within the seven days, application may be made to court and the court may make such order thereon as to it seems fit."

[7] It is a trite principle of our law that the court has a discretion whether or not to grant the Rule 30 application even if the irregularity is established. It is well-settled that a court should ignore any irregularity in procedure which

does not work any substantial prejudice to the other side. See the case of *Trans-African Insurance Co. Ltd v. Malukele* 1956 (2) 273 (A) at p. 278.

His Lordship Justice *Shreiner JA* at p. 278 F had this to say:

> **"No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, 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 decision of cases on their real merits."**

[8] It is apparent from the evidence that no substantial prejudice will be suffered by the first and second respondents if the Rule 30 application is not granted. The respondents have already applied for the allocation of a date of hearing and consequently filed the Book of Pleadings; and, the matter awaits allocation of a date of hearing by the Registrar of the High Court. A refusal to grant the Rule 30 application will not adversely affect the respondents in anyway whatsoever.

[9] Accordingly, the following order is made:

(a) The failure by the applicant to file the replying affidavit timeously is hereby condoned.

(b) The application in terms of Rule 30 of the High Court Rules is hereby dismissed.

(c) Costs shall be costs in the cause.

_____

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For applicant: Attorney Ian Du Pont
For respondent: Attorney Thabiso Mavuso