IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 292/2014

In the matter between

SWAZI TRAC (PTY) LTD **Plaintiff**

And

BONGINKHOSI MAGAGULA **Defendant**

Neutral Citation: ***Swazi Trac (Pty) Ltd*** v ***Bonginkhosi Magagula (292/2014) [2015] SZSC 11 (4th February 2015)***

Coram: **Dlamini J**

Heard: **11th December 2014**

Delivered: **4th *February* 2015**

Rule 30 Notice –defendant alleging that Notice by plaintiff entitled " Notice to give defendant leave to file a plea" irregular by reason that it is not provided for by the Rules. Court to be guided by whether it can reasonably be inferred that defendant was likely to suffer prejudice by plaintiff's Notice.

Summary: Having abandoned its summary judgment application, the plaintiff served upon the defendant "*Notice to give defendant leave to file a plea*". In turn defendant filed a notice in terms of Rule 30 and now seeks for costs for filing this notice.

[1] The plaintiff sued out simple summons, followed by a declaration on 24th February 2014 and 2nd March 2014 respectively. Defendant reacted by filing a notice of intention to defend. Plaintiff filed a summary judgment application. Defendant opposed the same by filing an affidavit resisting summary judgment application. On the date of hearing, viz. 27th June 2014, plaintiff applied for leave to file a reply and duly filed the same on the same date. However, before the matter could be set down for arguments, plaintiff filed a notice entitled: '*Notice to give defendant leave to file a plea*'. Defendant contends that this notice by plaintiff is not provided for in our civil procedural Rules and therefore irregular. For this reason, defendant filed a notice in terms of Rule 30 and demands costs for having filed this notice.

Common cause

[2] During *viva voce* submissions, both parties were at *ad idem* that plaintiff, having withdrawn its summary judgment application ought to have tendered costs as per Rule 41. Plaintiff did tender costs.

Issue

[3] The question to be determined was whether the process reading "*Notice to give defendant leave to file a plea*" (the notice) was for all intent and

purpose an irregular step taken by plaintiff warranting its dismissal with costs.

Defendant's contention

[4] The defendant, in support of its Rule 30 application, has raised two grounds upon which it contends that the Notice is irregular *viz*. firstly that it is not provided for by the Rules of this Honourable Court and secondly that it is not for the plaintiff to grant leave to defendant to file a plea. The prerogative to grant leave lies solely with the court.

[5] Defendant highlights or lightens that plaintiff ought to have filed a notice in terms of Rule 41. It is upon that notice that the defendant would have set down the matter for purposes of applying for leave to file a plea.

Plaintiff's *au contraire*

[6] The plaintiff strenuously opposed the application by defendant. It urged the court to look at the body of the Notice and consider that the Notice was one in terms of Rule 41. Further, that by allowing plaintiff to file its plea, it was merely mitigating the cost of the proceedings.

Adjudication

Rule 41 postulates:

> "*41 (1) (a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody*

> *in such notice a consent to pay costs; and the Taxing Master shall tax such costs on the request of the other party."*

On the other hand the body of the Notices reads:

> "*The Plaintiff hereby abandons its Summary Judgment Application and grants the Defendant leave to file its PLEA within twenty one (21) days after receipt hereof."*

[7] The question at the back of my mind is whether this notice could be held as irregular to warrant dismissal with costs?

[8] Discussing the subject of irregularity **Herbstein and Van Winsen**, "**The Civil Practice of the Supreme Court of South Africa"** at page 559 outlines various instances where an application under Rule 30 was filed, one of this instance is:

> "*where an incorrect form of proceedings was alleged to have been used.*"

The learned authors however, point out as follows:

> *"The applications brought in these cases did not all succeed, for even where an irregularity is established, the court may refuse the application if no prejudice was caused to the objecting party.*"

At page 558, the distinguished authors state:

> "*where the irregular step causes no prejudice, it is best ignored or corrected by some non-litigious means, since an application to set it aside is likely to be dismissed*."

[9] It appears to me that from the above principle that one of the main characteristic feature of an irregular proceeding is prejudice. The question therefore, that begs for an answer is, whether the Notice was prejudicial to the defendant? How does one ascertain whether a process is prejudicial to the objecting party?

[10] **His Lordship Schreiner JA** in **Trans-African Insurance Co. Ltd. v Maluleke 1956 (2) SA 273** outlined the approach on the question of prejudice very succinctly. The learned judge was faced with an application to have summons dismissed for want of cause of action. His Lordship analysed the particulars of claim and concluded:

> "*It is clearly possible to find flaws in the summons; it would have been preferable, no doubt, to give a clear indication that the appellant was being sued as the insurer of a motor vehicle the driver of which had negligently caused the death of Dick Maluleka. But the name of the appellant shows that it is an insurance company and, apart from the rather remote possibility that Dick Maluleka met his death through the actions of a servant or agent of the applicant the implication would seem to be fairly clear that it was under Act 29 of 1947 that the respondent was seeking to make the appellant liable*."

The learned judge proceeded:

> "*There is no introduction of a fresh cause of action but only a clarification of a step in the proceedings ……..*"

He then summed up:

> *"In the present case the appellant was fully informed in the petition served on it ….of every material feature of the case that was being brought against it and in actual fact could not have been in doubt from the time the summons was served as to the nature of the action.*"

Applying this same analytical approach to the present case, the question still remains, “What of the notice *in casu*?”

[11] The notice does not read; Notice in terms of Rule 41 or Notice of abandonment. It must be born in mind that there is no rule of thump that the Notice should read so. It is sufficient as can be deduced from **Maluleka’s** case *supra*, that the other party is reasonably informed by the court process. Its body however succinctly and without any ambiguity, informs the defendant that plaintiff is abandoning its application for summary judgment. This was clearly conveyed to the defendant. To demonstrate that the defendant understood the purpose of the Notice, on the hearing date defendant first demanded costs for abandonment. In fact defendant accepted that plaintiff had abandoned its summary judgment application from this very notice that he seeks the court to have it set aside. The application to have plaintiff meted out with cost for the abandonment was based on this very notice. It is startling therefore for the defendant to move an application to have the very same notice set aside just because it has the heading: “*Notice to give defendant leave to plea*” It is well settled that courts of law frown upon litigants who approbate and reprobate at the same time.

[12] Defendant seems to take an issue on the second part of the notice, mainly that it grants defendant leave to file its plea. I must highlight from the onset that on the day of hearing the defendant’s Rule 30 application, defendant’s Counsel stood up to apply for leave to file its plea. It is therefore not clear how defendant could have taken an objection on something that he wanted himself. In other words, when plaintiff proceeded to inscribe “*and grants the defendant leave to file its PLEA within twenty one (21) days after receipt hereof* …”, all it was saying, was that “*I, as plaintiff, do not object*

to you filing a plea.Please go ahead and file it within the stipulated period". It is not clear why defendant refused to accept its right to file a plea given to it on a silver platter but preferred to come to court for the same right thereby incurring unnecessary costs. There is nothing amiss in our law by litigants settling matters out of court. This happens almost on daily basis. It appears to me that a good litigant would curtail proceedings and thereby mitigate legal costs as was done by plaintiff *in casu*. These circumstances of the case clearly point out to me that there is not an iota of prejudice that can reasonably be inferred that the defendant was likely to suffer as a result of plaintiff filing the "*Notice to give defendant leave to file a plea*".

[13] For the foregoing, the application filed by defendant under Rule 30 is without merit and I therefore enter the following orders:

1. Defendant's application under Rule 30 is hereby dismissed.
2. Defendant is ordered to pay costs for the said Rule 30 application.

M. DLAMINI
JUDGE

For the Plaintiff : K. Simelane of Cloete / Henwood - Associated

For the Defendant : B. W. Magagula of Magagula Attorneys