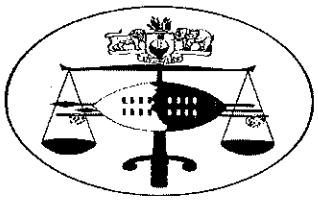


IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO: 1302/2016**

In the matter between:

JOSEPH WARING N.O **FIRST APPLICANT**

KAYALAMI TOWNSHIP **SECOND APPLICANT**

And

HUMAN SETTLEMENT AUTHORITY **FIRST RESPONDENT**

NHLANGANO MUNICIPAL COUNCIL **SECOND RESPONDENT**

MINISTRY OF HOUSING AND URBAN DEVELOPMENT **THIRD RESPONDENT**

REGISTRAR OF DEEDS OF ESWATINI **FOURTH RESPONDENT**

ATTORNEY GENERAL **FIFTH RESPONDENT**

KAYALAMI INVESTMENTS (PTY) LTD **SIXTH RESPONDENT**

Neutral citation : *Kayalami Township & Another v Human Settlements Authority & Others (1302/2016) [2022] SZHC 222 (14/10/2022)*

CORAM: **B.S DLAMINI J**

DATE HEARD: 07 October 2022

DATE DELIVERED 17 October 2022

Summary: *An application in terms of Rule 30 (1) of the High Court Rules of Eswatini. Applicant filing Replying Affidavit 7 days outside of the stipulated time in the Rules of Court. Respondents filing a Rule 30 notice and/or application to have the Replying Affidavit set aside with costs.*

Held; *In line with the decided cases in this jurisdiction, the Court exercises a discretion even when an irregularity has been established. The discretion vested with the Court must be exercised judiciously in accordance with justice and fairness where no prejudice has been occasioned by the other party*

raising the objection. The Court accordingly dismisses the Rule 30 Notice with an order that costs are to be costs in the main matter.

JUDGMENT

INTRODUCTION

[1] On or about the 25th November 2021, the Applicants instituted an application in the long form in terms of Rule 6 (1) of the High Court Rules of Eswatini.

[2] The application appears to have been served on the Respondents around the 29th November 2021. This is taken from the stamps affixed by the Respondents on the Court papers upon service of same to the various Respondents.

[3] The Attorney General filed and served a Notice of Intention to oppose the application and such notice bears the Registrar's stamp of the 10th December 2021. The Notice to Oppose was served upon the Applicants on the same date, namely, the 10th December 2021.

[4] An Answering Affidavit was received by the Registrar of the High Court on the 3rd January 2022 and was served upon the Applicants on the 10th January 2022.

[5] The Applicants filed their Replying Affidavit on the 1st February 2022.

[6] It is the filing and service of the Replying Affidavit on the 1st February 2022 that has prompted the Respondents to file the Rule 30 (1) Notice.

RULE 30 NOTICE-IRREGULAR PROCEEDINGS

[7] The Rule 30 (1) Notice by the Respondents is dated the 3rd February 2022 and is couched as follows;

"***TAKE NOTICE THAT*** **on a date and at a time to be arranged with the registrar, the 1st and 5th Respondent will apply for an order setting aside the Applicants' Replying Affidavit due to the following facts and circumstances:**

1. **In terms of rule 6 (3) [13] an Applicant has 7 days after service of the answering affidavit to file his or her replying affidavit.**
2. **In terms of Rule 27 (3) this Honourable Court may on good cause shown condone any none compliance with these rules.**

3. **The Applicant accepted service of the answering affidavits on the 11th January 2022.**

4. **The Applicant ought to have filed its replying affidavit by the 20th January 2022.**

5. **The Applicants filed their Replying Affidavit on the 1st February 2022, which is 7 days out of time without an application for condonation of the late filing.**

6. **The filing of the replying affidavit out of time without an application for condonation was an irregular step.**

***WHEREFORE THE* 1st and 5th Respondents pray for an order:**

1. **Setting aside the filing of the Replying Affidavit as an irregular step [sic].**

2. Cost of the Rule 30 application."

RESPONDENTS' SUBMISSIONS

[8] In motivating the application for the setting aside of the Replying Affidavit on the basis that it constitutes an irregular step, it was argued on behalf of the Respondents that it was imperative that the Rules of the High Court be strictly complied with by litigants.

[9] The Respondents' Attorney submitted that it is high time that the manner of dealing with procedural matters by the High Court must follow the exact pattern as that followed by the Supreme Court of Eswatini. The argument was that the Supreme Court is very strict on none compliance with the Rules of Procedure such that most matters dealt with by the Supreme Court are decided on condonation applications. The High Court was urged to follow suit as the Rules were promulgated for a reason and that it was the duty of the Court to strictly enforce them.

[10] The Respondents', through their legal representative, submitted that being out of time, the Applicants' options were limited to two options only namely;

(a) to seek the Respondent's consent in terms of filing the Replying Affidavit out of time and/or;

(b) to apply for condonation for the late filing of the Replying Affidavit in terms of Rule 27 (3) of the High Court Rules.

[11] In dealing with the contention made by the Applicants to the effect that the Rule 30 notice is improper in that there was no prior 'request' or prior 'notice' to correct the irregularity in terms of Rule 30 (5), it was submitted on behalf of the Respondents that this Rule is of no aid to the Applicants on the facts of the present matter. In their heads of argument, the Respondents state that;

"*24... Rule 30 (5) applies where a party fails to comply timeously with a request made or notice given by his or her opponent pursuant to the Rules e.g. a notice to make discovery and a request for further particulars. In the case at hand the respondents did not request or give notice [to] the applicants to file a replying*

affidavit. Textually Rule 30 (5) does not support the applicant's contention.

25. *In addition Rule 30 (5) applies where the relief sought is compliance or striking out of a claim or defence. Textually this sub-rule does not apply where the relief sought is setting aside a step or proceeding."*

[12] On the issue of approaching the Court with 'unclean hands' in that it is alleged the Respondents' Answering Affidavit was also filed out of time, the Respondents submitted that factually, this assertion is devoid of the truth. Respondents argue that the Answering Affidavit was filed timeously in Court on the 3rd January 2022. The Respondents argued that there was a valid and justifiable reason as to why the Answering Affidavit was served upon the Applicants on the 10th January 2022.

[13] The Respondents further submitted that since the Applicants proceeded to file their Replying Affidavit without objecting to the late filing of the Answering Affidavit (assuming that this was true), this meant the Applicants waived their right to object to the filing of the Answering Affidavit.

[14] It was further disputed by the Respondents' legal representative that the High Court has a discretion to condone a proven irregularity in the absence of a proper application for condonation in terms of Rule 27 (3) of the High Court Rules. The Respondents' representative urged the Court to carefully scrutinize the correctness of all the judgments which seem to confer the Court with such powers.

APPLICANTS' SUBMISSIONS

[15] The Applicants on the hand submitted that the Respondents' Rule 30 notice is defective and improper in that it was issued prematurely without following the dictates of Rule 30 (5) of the High Court Rules. It was contended for the Applicants that Rule 30 (5) requires that a 'request' or a 'notice' must have been issued by the Respondents to the Applicants with the aim of calling upon the defaulting party to correct the irregularity prior to issuing the Rule 30 notice. In this regard, the Applicants contend as follows in their heads of argument;

"*7.1 The Respondents failed to give the Applicants the seven (7) days' notice in terms of Rule 30 (5) of the High Court Rules. The Sub-rule obliges a party who alleges an irregular step*

ought to give 7 days' notice to the other party in order to grant [the] said party an opportunity to rectify the cause of complaint..."

7.3 *The Respondents' Rule 30 Application is irregular for want of compliance with sub-rule 5. In Henwood v Henwood and Others (1556/2010) [2012] SZHC 26 (09 February 2012) wherein Honourable Ota J cited with approval the case of MTN Swaziland v Accounting Professional Case No. 1390/2013 (Unreported) wherein the Honourable S.B Maphalala J when called upon to interpret 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 (7) days grace period in order to remove the cause of complaint. Clearly the period stipulated by sub rule 5 had not lapsed when the matter came for argument. Therefore in view of that 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."

[16] The Applicants further submitted that Respondents are approaching the Court with 'unclean hands' in that the Answering Affidavit was filed outside of the time period stipulated in the Rules of the High Court. The contention by the Applicants is that the Answering Affidavit was filed beyond the 14 days' period as stipulated in the Rules of Court and that there was no objection to such affidavit being filed mainly because as Applicants they wanted the matter to be finalized expeditiously.

[17] On the merits of the matter, the Applicants contend that the Rule 30 notice is misdirected in that the Rules of the High Court do not make it mandatory that a Replying Affidavit be filed. The Applicants rely on the decided case of **Mangaliso Stanley Mahlalela v Sarian Than'thini Mahlalela & 3 Others (544/2014) [2014] SZHC 217** wherein it was stated by the Court that;

"The failure by the applicant to comply with Rule 6 (13) does not constitute an irregularity on the basis that the said rule is not mandatory."

[18] The Applicants further rely on the principle which appears to have been endorsed and accepted by our Courts being that even if the irregularity is established, the High Court can, in appropriate circumstances use its discretion to ignore the irregularity in the absence of prejudice to the party raising the objection.

[19] **ANALYSIS AND CONCLUSION**

The first obstacle that the Court has noted from the pleadings insofar as the Rule 30 notice is concerned relates to the party raising this objection. The Notice of Intention to Oppose indicates that the Fifth Respondent is opposing the matter on behalf of the Third and Fourth Respondents. The Answering Affidavit has been filed on behalf of the Third Respondent only, namely the Ministry of Housing and Urban Development.

[20] The Rule 30 notice is said to be raised on behalf of the First Respondent, namely the Human Settlement Authority. The First Respondent has neither filed a notice to oppose nor an Answering Affidavit in the matter. This could be a genuine mistake on the part of

the Fifth Respondent. The argument made by the Fifth Respondent is that the Rules of Court must be enforced strictly. If one were to apply the high standards being advocated for by the Respondent's legal representative, the Rule 30 notice serving before Court is being raised by a wrong party. If this was a mistake on the part of the Fifth Respondent, then the Rule 30 notice needed to be amended to reflect that the objection is being raised on behalf of the Third Respondent. Technically, there is no proper Rule 30 notice serving before Court as the First Respondent is not entitled to raise such notice as it neither filed a Notice to Oppose nor an Answering Affidavit. This is the main problem with the rigid approach advocated by the Respondents' representative. It is simply not practical.

[21] The Court is called upon to make a determination on whether Rule 30 (5) is applicable as a defence to the Applicants against the Rule 30 Notice. The said sub-rule provides that;

> **"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."

[22] The High Court judgment of **Henwood v Henwood and Others (1556/2010) [2012] SZHC 26 (09 February 2012)** does not adequately address the circumstances under which Rule 30 (5) may be utilized by litigants. Quite clearly, it is not in all cases that this Rule may find application. In order to find application, there must be a separate rule requiring that a 'request' or a 'notice' be given to the defaulting party in terms of the rules. The question arising in this matter is whether or not a prior 'request' or 'notice' calling upon the Applicant to file a Replying Affidavit when the time has lapsed is provided for in our Rules. The answer is that there is no such requirement in our Rules. Accordingly, since Rule 30 (5) talks of a prior request or notice to have been issued to a defaulting party, this rule has no application to the facts of the present matter.

[23] In **Norman & Co Ltd v Hansela Construction Co. Ltd 1968 (1) TPD 503** it was held by the Court (At page 504 A-D) that;

"...On the other hand Rule 30 (5) is of general application to cases where a party fails to comply with any request made or notice given pursuant to the Rules. The general rule therein laid down is that, before applying to Court, the other party must give seven days' notice of his intention to do so. In that respect it differs from Rule 21 (6). But being the general Rule, I do not think Rule 30 (5) was intended to over-ride or amend the special provision in Rule 21 (6), for the principle or presumption is that *generalia specialibus non derogant.* As Steyn on *Uitleg van Wette*, 3rd ed, at pp 175, 176, says, that principle applies not only as between different statutes but also as between different provisions in the same statute."

See also: ***Minister of Police v Nobesuthu Irene Bacela Case No.275/2019 (8 September 2020)***

[24] The argument made on behalf of the Respondents that Rule 30 (5) cannot assist the Applicants in resisting the Rule 30 (1) notice is therefore correct. The Court must, in the circumstances, proceed to

examine the other points raised on behalf of the Applicants in seeking to resist the Rule 30 application.

[25] The Applicants also raised the point that Respondents are pursuing the Rule 30 notice with 'unclean hands'. This is because, according to the Applicants, the Answering Affidavit filed by the Respondents was also filed out of time. By filing the Replying Affidavit, assuming this assertion of lateness of the Answering Affidavit is correct, the Applicants effectively waived their right to raise an objection to this document. In this regard, it is provided in Rule 30 (1) that;

"**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."

[26] On the basis of the *proviso* to Rule 30 (1), the point of unclean hands relied upon by the Applicants is misdirected and is similarly rejected.

In **Hebstein & Van Winsen, <u>The Civil Practice of the Supreme Court of South Africa</u> (5th Ed), Vol 1, at page 742,** it is stated by the authors that;

"An aggrieved party forfeits the right to have the offending step set aside if he has taken any further step in the cause with knowledge of the offending step. The question of what constitutes a 'step' in the proceedings has often been considered.

In *Pounasamy v Moonsamy (1934 NPD 180)* the full bench of the Natal Provincial Division held that the taking of an exception constituted a further step in the proceedings.

This was follows [followed] *in Pettersen v Burnside (1940 NPD 403 at 406)* where Broome J said:

"In my opinion a step in the proceedings is some act which advances the proceedings one stage nearer completion. Thus the entry of appearance would not be a step in that sense, but would be an act done with the object of qualifying the defendant to put forward his defence. Similarly an objection taken with the object of ensuring that the security required by law will be available to the objector is merely an act which places the objector in a position to resist the petition."

[27] The Applicants also rely on the judgment of the High Court in **Mangaliso Mahlalela v Sarian Thang'thini Mahlalela & 3 Others (544/2014) [2014] SZHC 217** in which the Court held that the wording or language used in Rule 6 (13) is not mandatory since the crafters of the Rule used the word 'may' in dealing with the issue of filing a Replying Affidavit. It is contended by the Applicants that the High Court held in that matter that failure by Applicant to comply with Rule 6 (13) does not constitute an irregularity since the language used in this rule for filing a Replying Affidavit is not mandatory.

[28] I respectfully disagree with the interpretation accorded to Rule 6 (13) of the Rules by the Applicants or the statement of law relied upon in the said judgment. The filing of a Replying Affidavit is a choice to an Applicant approaching the Court by way of motion proceedings. If an Applicant chooses not to file a Replying Affidavit, the rules permit such and there would be nothing wrong with that decision or choice. However, if an Applicant elects to file and serve a Replying Affidavit, such affidavit must be filed within the time limits set out in the Rule, otherwise there would be no point in stipulating the time frame within which such document has to be filed. I therefore fully agree with the

submission made on behalf of the Respondents that this point is misdirected and should be rejected.

[29] The final point raised on behalf of the Applicants in seeking to resist the Rule 30 notice is that it is now an accepted principle in our jurisdiction that even if an irregularity is established, the Court has a discretion to ignore the irregularity and allow the pleadings to stand as they are or to make any order it deems fit if no prejudice will be occasioned by the party raising the objection.

[30] It was contended on behalf of the Respondents that this principle has been wrongly applied by the Courts. The assertion made on behalf of the Respondents is that it would be pointless and meaningless to stipulate time frames in the Rules of Court if such time frames will be ignored by litigants. According to the Respondents, Rule 27 (3) empowers the Court in appropriate circumstances to consider an application for condonation and that the Court may, in such circumstances, use its discretion to allow or reject a court process filed out of time. As such, the Court may, according to Respondents, only exercise its discretion when there is a proper application for condonation before it, stating proper grounds for such default.

[31] The Respondents place reliance on the South African High Court case of **University of North-West Staff Association & Others v The Campus Rector for the North-West University, Civil Case No. 471/2007** in which it was held by the Court that;

"Their filing of their answering papers out of time and without even seeking condonation for the late filing of their papers was indeed an irregular step in terms of Rule 30. The application must, therefore, succeed."

[32] The Court in the *North West University case* did not address the seemingly accepted principle of the Court's discretion in situations where the irregularity is established and where no prejudice will be occasioned by the other party.

[33] The Applicants referred the Court to a decision of the High Court of Eswatini in **Swaziland Government v Nhlanhla Sibandze (2667/2003) [2004] SZHC 31 (11 March 2004)** where the Court cited with approval the authoritative writing of **Hebstein and Van Winsen,**

The Civil Practice of the Supreme Court of South Africa in which the authors state that;

"It is clear that the court has a discretion whether or not to grant the application even if the irregularity is established. The attitude generally by the court is that it is entitled to overlook, in proper cases, any irregularity in procedure which does not work 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 Shreiner J.A in Trans-African Insurance Co. Ltd v Maluleka, technical objection to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with expeditious, and, if possible, inexpensive decision of cases on their merits. The application may be dismissed with costs if no prejudice was caused by the irregularity."

[34] In the *Mahlalela v Mahlalela case* (supra-at paragraph 7 thereof), the Court referred to another case of **Trans-African Insurance Co. Ltd v Maluleke 1956 (2) 273 (A) at p.278**, in which His Lordship Justice Shreiner JA held that;

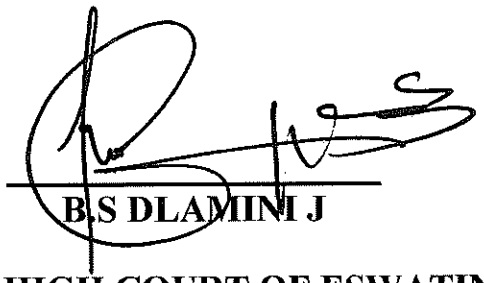
"No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery of the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious decision of cases on their real merits."

[35] The principle allowing a Court to exercise its discretion in proper circumstances to condone a proven irregularity if no prejudice will be occasioned by the other party is a fair and just principle. On the facts of the present matter, there is no prejudice which will be suffered by the Respondents if the Replying Affidavit is allowed to stand. Mr. Vilakati for the Respondents may be correct in saying that the proper way should have been the filing of an application for condonation by the Applicants. The Court however is of the view that this procedure will cause unnecessary delay and costs towards the finalization of the matter. The lateness of the Replying Affidavit by 7 days could not have affected the finalization or substance of the matter in any significant way.

[36] In the circumstances, the Court grants orders as follows;

(a) The Rule 30 (1) Notice filed on behalf of the Respondents is dismissed.

(b) Costs are to be costs in the main cause.



B.S DLAMINI J

THE HIGH COURT OF ESWATINI

For the Respondents: *Mr. M. Vilakati (Attorney General's Chambers.)*

For Applicants: *Mr. J. Waring (Waring Attorneys)*