

**IN THE HIGH COURT OF ESWATINI**

**HELD AT MBABANE**

**CASE NO: 1175/2021**

In the matter between:

**COSMOS INVESTMENTS (PTY) LTD**

**APPLICANT**

And

**SWAZILAND PROPERTY MARKET (PTY) LTD**

**RESPONDENT**

**In re;**

**SWAZILAND PROPERTY MARKET (PTY) LTD**

**APPLICANT**

**AND**

**COSMOS INVESTMENTS (PTY) LTD**

**RESPONDENT**

Neutral citation : *Cosmos Investments (Pty) Ltd v Swaziland Property Market (Pty) Ltd (1175/2021) SZHC 56 [2023]*  
(20/03/2023)

**CORAM:** B.S DLAMINI J

**DATE HEARD:** 03 March 2023

**DATE DELIVERED** 20 March 2023

**Summary:** *Civil Procedure- Rule 30 notice raised against the filing of a Notice of Intention to Oppose approximately 43 days out of time as opposed to the stipulated 5 days in the Rules of Court.*

**Issues to be decided;** *Whether Respondent entitled to file Notice to Oppose without applying for condonation and without leave of Court.*

**Held;** *The Respondent's Notice of Intention to Oppose is irregular and contrary to Rule 6 (10) of the Rules of Court. Inasmuch as the Court exercises discretion in such matters and may, on its own, condone non-compliance with the Rules, the time taken by the Respondents to file the Notice to*

*Oppose in this matter is unreasonable and  
prejudicial to the Applicant.*

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## **JUDGMENT**

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### **INTRODUCTION**

[1] The Applicant, Cosmos Investments (Pty) Ltd, instituted an application for rescission against an order granted by this Court on the 19<sup>th</sup> September 2021. The order which had been obtained by the Respondent was for perfection of the landlord's hypothec and payment of arrear rentals in the sum of **E 446,164.57 (Four Hundred and Forty Six Thousand One Hundred and Sixty Four Emalangeni and Fifty Seven Cents).**

[2] The application for rescission was filed and served on the Respondent's attorneys on the 12<sup>th</sup> December 2022. The Notice of Intention to Oppose which is being challenged was filed and served on the 8<sup>th</sup> February 2023.

[3] On the 9<sup>th</sup> February 2023 the Applicant issued a Rule 30 notice with the following relief being sought;

**“1. That the Respondent’s notice to oppose be set aside as an irregular step, in that it has been filed out of time and no application for the condonation thereof has be [been] made.**

**2. That the Respondent pays the costs of the application.**

**3. Further and/or alternative relief.”**

#### **APPLICANT’S SUBMISSIONS**

[4] It was submitted on behalf of the Applicant in paragraph [3] of its written submissions that;

**“(b) The respondent, and with just hardly a day preceding the hearing, and approximately 43 (Forty Three) days after which the respondents were in terms of the rules of the High Court (and the application served upon it) expected to file their Notice to Oppose chose to thereafter file such Notice to Oppose.**

(c) This they (respondents) have done in flagrant disregard of the Rules of the above Honourable Court and with little or no regard at all to the prejudice the same was occasioning to the applicant.

(d) The same has occasioned grave prejudice to the applicant herein who is now further being forcibly expected to legitimize respondent's irregular late filing and unnecessary delay to the hearing of its main rescission application."

[5] The Applicant has also referred the Court to, amongst other cases, the case of **De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co. Ltd 1994 (4) SA 705 at 713 (F-G)** in which it was held that;

"There is a limit beyond which a litigant cannot escape the results of his Attorney's lack of diligence...To hold otherwise might have disastrous effect upon the observance of the rules of this court. Considerations *ad mesiricordiam* should not be allowed to become an invitation to laxity. In fact this court has lately been burdened with an undue and increasing number of applications for condonation in which

failure to comply with rules of this court was due to neglect on the part of the Attorney. The Attorney, after all, is the representative whom the litigant has chosen for himself and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such relationship, no matter what the circumstances of the failure are...if as here, a stage is reached where it must be obvious also to a layman that there is a protracted delay, he cannot sit passively, without so much as directing a reminder or enquiry to his attorney and expect to be exonerated of all blame and...he cannot be heard to claim that the inefficiency should be overlooked merely because he has left the matter entirely in the hands of his Attorney.”

#### **RESPONDENT’S SUBMISSIONS**

[6] It was submitted on behalf of the Respondent that;

“6. This Honourable Court has a discretion whether to allow or refuse an application in terms of Rule 30.

The learned authors, *Herbstein and Van Winsen*, after given [giving] the list of instances in which Rule 30 may be invoked, states at pages 739 to 740 of their work ‘The Civil Practice of the High Courts of South Africa, 5<sup>th</sup> Edition, Vol 1;

“The applications brought in these cases did not all succeed for even where an irregularity is established, the Court 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 any application in terms of Rule 30.”

- [7] The Respondent has also referred the Court to the case of **Tilana Alida v Dr Stephen Paul Grobblers & Another**, Civil Case No. 3074/2016 in which the Court held as follows;

“[18] The purpose of the Uniform Rules is to regulate the litigation process, procedures and exchange of pleadings.

The entire process of litigation has to be driven according to the rules. The rules set the parameters within the course of litigation has to proceed.

**The rules of engagement, must therefore, be obeyed by litigants. However, dogmatically rigid adherence to the Uniform Court Rules is as distasteful as their flagrant disregard or violation.**

**Dogmatic adherence, just like flagrant violation defeats the purpose for which the Court Rules were made. The prime purpose of the Court Rules is to oil the wheels of justice in order to expedite the resolution of disputes.**

**Quibbling about trivial deviations from the Court Rules retards instead of enhancing the civil justice system. The Court Rules are not an end to themselves.”**

### **ANALYSIS AND CONCLUSION**

**[8] In the case of Kayalami Township & Another v Human Settlement Authority & Others (1302/2016) [2022] SZHC 222 (14/10/2022), it was held that;**

**“[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...”**



[9] In the *Kayalami Township case*, the Applicant had delayed in filing a Replying Affidavit by some 7 days. No doubt the Court, in such matters, exercise a discretion which must be consistent with the principles of fairness, justice and consistency. In **Trans-African Insurance Co. Ltd v Maluleke 1956 (2) 273 (A)** at page 278, it was held by the Appellate Division of the Supreme Court of South Africa 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.”**

[10] On the facts of the present matter, the Respondent itself contends that the Notice to Oppose was due to be filed on the 20<sup>th</sup> December 2022. The Respondent further argues that it was not possible to file the Notice to Oppose owing to the fact that the High Court had closed for

business in December 2022. The Respondent also disputes that it was late by 43 days to file the Notice to Oppose as alleged by the Applicant.

[11] Other than Rule 26 of the High Court Rules which seeks to suspend the filing of pleadings in action proceedings during the Court's break in December, there is no rule that suspends the *dies* for the filing of pleadings in motion proceedings. This effectively means from the 20<sup>th</sup> December 2022, the entire month of January 2023 and at least a week into February 2023, the Respondent had still not filed a one page or at most two-page document indicating its intention to oppose the rescission application. This cannot be taken lightly.

[12] In the Court's view, the Applicant was entitled to hold the view that its application for rescission was not being opposed by the Respondent. Indeed had it not been for the Court's break taken annually in mid-December, it would not be far-fetched to conclude that the Applicant would have long obtained relief on the rescission application.

[13] Having not filed and served a Notice to Oppose to the rescission application till February 2023, it was incumbent upon the Respondent to enquire from the Applicant's Attorneys if there would be no objection if they were to file a Notice to Oppose at that stage. If the response from the Applicant's Attorneys was in the negative, the Respondent was required to utilize Rule 27 of the High Court Rules in which it is provided that;

**“(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems fit.**

**(2) Any such extension may be ordered although the application therefore is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems fit as to the recalling, varying or cancelling of the results of the expiry of**

**any time so prescribed or fixed, whether such results flow from the terms of any order or from these rules.**

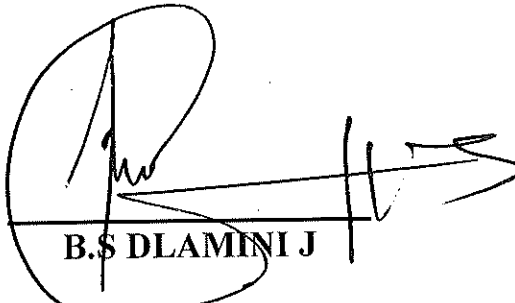
**(3) The Court may, on good cause shown, condone any non-compliance with these rules.”**

[14] In the Court’s view, the Respondent in this matter was too relaxed, being well aware that a number of legal authorities in this jurisdiction and the common law supposedly allow for automatic condonation for failure to comply with the Rules of Court. Legal Practitioners’ should not allow themselves to fall into this trap. The danger is that the trap might be bottomless and the one jumping into it may never know where it will take him or her to. In conclusion, the Rule 30 Notice taken on behalf of the Applicant is well taken and is upheld.

[15] The Court accordingly grants orders as follows;

**(a) The Notice of Intention to Oppose filed against the rescission application is set aside.**

**(b) The Respondent is ordered to pay costs of the Rule 30 Notice.**



**B.S DLAMINI J**  
**THE HIGH COURT OF ESWATINI**

*For the Applicant:*        *Mr. M. Ndlovu (MTM Ndlovu Attorneys)*

*For Respondent:*        *Miss M. Hillary (Marcia Hillary Chambers)*