

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

Not Reportable

Heard: 15 October 2020

Delivered: 20 October 2020

In the matter between:

Case No: 74/2020

RENO IOANNIDES N.O.

First Applicant

RENO IOANNIDES

Second Applicant

AND

MASTER OF THE HIGH COURT

First Respondent

MAWABO KMLE N.O.

Second Respondent

DONNA VAN DER WESTHUIZEN

Third Respondent

JUDGMENT

Lindoor AJ

[1] This is an application in terms of the provisions of Uniform Rule 30 wherein the applicants seek an order that the third respondent's

answering affidavit dated 11 June 2020 served and filed on the 12th June 2020 be set aside and costs of the application.

[2] The first applicant, Reno Ioannides is the executor in the estate of his late father ("the deceased") acting under letters of Executorship issued by the first respondent, the Master of the High Court on the 18th May 2016, under estate number 2411/2016.

[3] The second respondent is a functionary in the office of the first respondent. Both the first and second respondents have filed a notice to abide by the decision of the court.

[4] The third respondent is the mother and natural guardian of the minor child G[...] v[...] d[...] W[...], who was born out of a relationship between the third respondent and the deceased.

Chronology of Events

[5] In this matter, the main application was issued in January 2020 and enrolled for the 11th February 2020. For the purpose of the application before court, I am not required to deal with the merits of the main application.

[6] The third respondent filed a notice to oppose on the 30th January 2020, and accordingly, the matter was removed from the roll for the 11th February 2020.

[7] In the absence of answering papers being filed by the third respondent, the applicants' attorney applied to the Registrar for the matter to be enrolled on the "Uncontested-Opposed Roll", which it was and set down for the 24th March 2020.

[8] The third respondent was duly given notice of the set down for the 24th March 2020 on the 17th March 2020.

[9] When the matter was heard in motion court on the 24th March 2020, it was stood down by Pakati J, for consideration in chambers. On the 25th March 2020 a chamberbook entry recorded the matter as "not granted, matter became opposed".

[10] The third respondent eventually filed its answering affidavit on the 12th June 2020, which the applicants seek to set aside.

[11] An application for condonation for the late filing of the third respondent's answering affidavit was filed on the 7th October 2020 by her attorneys of record.

[12] It is contended on behalf of the applicants that the third respondent has failed to comply with the provisions of Uniform Rule 6(5)(d)(ii) by only filing its answering affidavit on the 12th June 2020, when it was due on the 20th February 2020. It was further submitted on behalf of the applicants that the third respondent has also failed to file a substantive application for condonation for the late filing of its answering affidavit.

[13] Counsel for the third respondent, whilst conceding that the answering affidavit of the third respondent was filed out of time, submitted that as no order was granted by the court on the 24th March 2020, the third respondent was not barred from pleading, and in any event, paragraph 3 of its answering affidavit contains substantive submissions in support of its application for condonation.

Condonation

[14] Although the application for condonation is not before me for determination, I am in agreement with the submissions by the third respondent's counsel that there is an application for condonation before court, which is to be heard simultaneously by the court hearing the main application.

[15] Since I have already found that there is indeed an application for condonation before the court, the only remaining issue to be determined is the Rule 30 application.

[16] Counsel for the third respondent submitted that there can never be an irregular step in application proceedings, but could advance no authority to support this submission. I cannot agree with this submission. In ***Olgar v Minister of Safety and Security and Another***¹ Pickering J (as he then was) with reference to the meaning of the words “a cause” in Uniform Rule 30(1)² stated as follows; with reference to ***Participation Bond Nominees (Pty) Ltd v Mouton (3)***³ where the court stated as follows as 515D-E:

“In my view the words any cause are used in the widest possible sense and refer to any judicial proceeding of whatsoever nature”

The learned judge stated further:

“The submission is made in Erasmus supra at B1 – 189, that the phrase ‘a cause’ in the present subrule has a similar-wide meaning. This submission is, in my view, with respect to the learned authors, clearly correct.”

[17] I deal now with the question of prejudice to be suffered by the applicant, should the answering affidavit not be set aside. Erasmus,

¹ 2012 (4) SA 127 at 134A-B

² “(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.”

³ 1978 (4) SA 508 (W)

Superior Court Practice at D1 – 354 states, with reference to the judgment in ***Gardiner v Survey Engineering Pty Ltd***⁴:

“Proof of prejudice is a prerequisite to the success of an application in terms of Rule 30.”

[18] It is therefore important for the applicant to clearly set out in its affidavit and submissions the prejudice to be suffered should the irregular step not be set aside. I am not persuaded that the applicant has proven any prejudice should the third respondent’s answering affidavit not be struck out. In any event, the main application as well as the application for condonation must still be argued and adjudicated at a future date. If condonation is not granted, then the applicant’s affidavit will be before the court hearing the matter uncontested.

[19] Our courts have on numerous occasions expressed its disapproval of merely technical objections in the course of litigation. Both counsel for the applicants and the third respondent referred the court to the judgment of Schreiner JA in ***Trans-African Insurance Co Ltd v Maluleka***⁵:

“No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules of Court, which are an important element in the machinery for the administration of justice.

⁴ 1993 (3) SA 549 (SE) at 551 C

⁵ 1956 (2) SA 273 at 278F-G

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 and, if possible, inexpensive decision of cases on their real merits.”

[20] It is also trite that in applications of this nature, the court has a discretion, to be exercised judicially, and after considering all the facts, whether to strike out a particular pleading or not. Prejudice to either party is a strong consideration to be taken into account.

[21] It is for this reason that I am not in agreement that by granting this application, it will be in the interest of either party in the ventilation of the proper issues between them in the main application. What compounds matters further for the applicants is that a judge of this court has previously made an order that the relief sought in the main application could not be granted as the matter had become opposed. The fact of the matter is that the matter is opposed and answering papers have been filed and are before court. Whether the late filing of the answering papers should be condoned or not, falls to be determined by the court hearing the main application.

[22] I accordingly make the following order:

1. The application is dismissed.
2. There shall be no order as to costs.

J. LINDOOR

ACTING JUDGE OF THE HIGH COURT

*Obo the Applicants: Mrs B. Olowookorun, Bukky Olowookorun
Attorneys, 7 Bird Street, Central, Port
Elizabeth*

Tel: 041 582 2752

*Obo the Third Respondent: Mr V. Naidu, Legal Aid Centre, Port Elizabeth
North End, Port Elizabeth*

Tel: 041 484 28 00