

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

CASE NO: 643/2014

In the matter between:

YISEHLELI EDWARD NYANISO

Applicant

And

**HEAD OF DEPARTMENT OF SPORTS,
RECREATION, ARTS AND CULTURE
EASTERN CAPE PROVINCE**

First Respondent

**MEC FOR THE DEPARTMENTS OF SPORT
RECREATION, ARTS AND CULTURE
EASTERN CAPE PROVINCE**

Second Respondent

JUDGMENT

MBENENGE J:

Background

[1] Does the remedy concerning an applicant's failure to set out facts in an affidavit upon which the applicant relies for relief and to annex a document to an affidavit to which reference is made in the affidavit lie in proceeding with a rule 30 application?

[2] The questions posed above have arisen in the context of an interlocutory application incidental to an application launched on 21 November 2014 and in which the applicant, an erstwhile employee of the Department of Sports, Recreation, Arts and Culture in the Eastern Cape Provincial Government (the Department), seeks, as against the respondents, an order “[c]ondoning the late filing of [the] application” and compelling the respondents “to pay monies due to the [a]pplicant in the sum of R68 137.85 for overtime [performed] during the period between years 2003 to 2008” (the main application).

The main application

[3] The affidavit filed in support of the relief sought in the main application is not a model of clarity. In that affidavit the applicant has alleged:

“4.1 First and foremost this is, in the main, an application to order the [Department] to pay my outstanding overtime monies which amounts to R68 137.85. The interlocutory application for condonation for the late filing of this application is also sought.

4.2 The amount claimed is the overtime money that I worked for which I was at the employ of the [Department] for the period between years 2003 to 2008. I was under persal number, 52[...] (a copy of the outstanding overtime schedule is attached herein marked YEN ‘1’)

4.3 In 2004 I was transferred from the Department of Transport to join [the Department]. During our transfer it transpired that there was an outstanding amount due to me for overtime that I was supposed to receive. That has never happened. (Attached herein a memorandum of agreement dated 05th October 2004 YEN ‘2’)

4.4 In 2010 I requested the office of Financial Administration to investigate as to what ever happened to my overtime money as I lodged a claim for the said money against [the Department]. An investigation was conducted and it

was proven that I never received the said money. I attach herein a copy of a letter dated 08th June 2010 marked 'YEN3.'

4.5 There have been numerous efforts on my part to be paid what is due to me. In 2012 I received an acknowledgement letter from the Office of the MEC promising to investigate the matter. This again has never materialised or produced results. I attached herein a copy of the letter dated 12th June 2012.

4.6 In 2013 I was also invited to attend an Annual Financial Statements Project by [the Department] to discuss outstanding overtime issues which I attended. Resolutions were taken to pay my overtime money but the same was never effected (I attach herein an Expenditure Approval Form and overtime policy marked 'YEN .)

4.7 Despite the commitment by the Department's Officials who are responsible for the payment of its employees for work done, I retired in June 2013 without receiving my overtime money to date.

Wherefore I pray for an order as prefixed to the Notice of Motion." Sic.

Rule 30 proceedings (the interlocutory application)

[4] Three matters became of concern to the respondents, resulting from the manner in which the applicant's case, the upshot of which is quoted above, has been presented namely-

(a) the fact that there was paucity of information from the applicant's founding affidavit as to why condonation for the late launch of the main application is being sought; and

(b) the failure by the applicant-

(i) to annex to the founding affidavit the alleged letter of 12 June 2012 referred to in paragraph 4.5 of the affidavit; and

(ii) to provide pages 6 and 7 of annexure “YEN4” to the founding affidavit.

[5] The respondents thereupon invoked rule 30(2)(b) of the Uniform Rules of Court (the Rules) pointing to the shortcomings adumbrated in paragraph [4] above and calling upon the applicant to remove those causes of complaint on pain of the applicant’s notice of motion in the main application being “*set aside as an irregular proceeding.*”

[6] When the respondents’ rule 30(2)(b) notice did not yield the intended result, the respondents launched the instant interlocutory application seeking, in the main, an order declaring –

(a) that the applicant’s notice of motion (in the main application) be set aside; and

(b) the main application a nullity.

[7] The affidavit filed in support of the interlocutory application raises the following contentions:

“10. It is evident from the irregularities as set out ... that the respondents’ opposition to the main **application will be prejudiced**¹ to a substantial degree.

11. Should [the] applicant’s notice of motion be set aside as an irregular proceeding, the applicant will be obliged to institute application proceedings afresh. Such proceedings will have to be served on the relevant respondents in the normal course.” Sic.

¹ My emphasis.

[8] At the opportune stage notice to oppose the interlocutory application was delivered. On the hearing date counsel appearing for the parties informed me, from the Bar, that the applicant's causes of complaint had since been removed, resulting in the parties pursuing a contest on the issue of costs.

Legal position – costs

[9] It is trite law that a judgment for costs involves a decision on the merits, and that a claim for costs cannot stand alone.² In its simplified form, the question for consideration translates to whether it is the applicant or the respondents who would have been successful had the interlocutory application been pursued to its logical conclusion. That is what I turn to deal with.

Was rule 30 the appropriate remedy?

[10] Rule 30, which is at the heart of these proceedings, affords a party to a cause to which an irregular step has been taken by any other party the right to apply to court to set the irregular step aside.

[11] Much as rule 30 was intended as a procedure whereby a hindrance to the future conducting of the litigation, whether created by non-observance of what the Rules intended or otherwise, is removed,³ the rule applies to irregularities of form and not those of substance.⁴ Also, the rule does not apply to omissions, but to positive steps or proceedings. The irregular step contemplated by rule 30 must be a step that advances the proceedings one step nearer completion.⁵

² *Nxumalo v Mavundla* 2000 (4) SA 349 (D) at 352F.

³ *SA Metropolitan Iewensversekeringsmaatskappy Bpk v Louw NO* 1981 (4) SA 329 (O) at 333G-H.

⁴ Van Loggerenberg, *Erasmus Superior Court Practice*, JUTA Vol 2 at D1 – 351; *Singh v Vorkel* 1947 (3) SA 400 (C) at 406; *Odendaal v De Jager* 1961 (4) SA 307 (O) at 310F-G; *Nel and Others NNO v McArthurs and Others* 2003 (4) SA 142 (T) at 149; and *Cochrane v City of Johannesburg* 2011 (1) SA 553 (GSJ).

⁵ *Cyril Smiedt (Pty) Ltd v Lourens* 1966 (1) SA 150 (O) at 152E; *Korapi v Moeti* 1993 (4) SA 184 (BGD).

[12] One of the requisites for the grant of an order pursuant to the invocation of rule 30 is the presence of prejudice. Besides the factors mentioned in rule 30(2),⁶ the applicant must satisfy the court that she/he will suffer prejudice relating to the continuation of the litigation if the irregularity is not removed.⁷

[13] In my review, the respondents' attack to the applicant's notice of motion and the affidavit filed in support of the relief sought in the notice relates to a matter of substance. The failure by a party to make allegations in the party's founding affidavit constitutes a shortcoming of substance than an irregularity of form. After all, it was available to the respondents to raise an obligation *in limine* that the founding affidavit does not make out a case for the relief claimed. In that event, the court would be empowered, in the exercise of its discretion, to direct that the preliminary point be disposed of first.⁸ Such an order will be made when the issue is one of substance disposing of the case in whole or in part.⁹ In *Kahn* the court held that:

"It brooks of no doubt that a court is empowered, in the exercise of its discretion, to direct that a preliminary point be disposed of first in motion proceedings. It will be ordered when the issue is one of substance that may dispose of the matters as a whole, or at least of a substantial portion thereof."¹⁰

[14] Therefore, the respondents should, in pursuit of their complaint that no allegations were made in the affidavit in support of the prayer for "*condonation of [the] late filing of the application*", have delivered an answering affidavit, *inter alia*,

⁶ Namely, (i) that the applicant has not himself taken a further step in the cause with the knowledge of the irregularity; (ii) the applicant has within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days; and (iii) the application is delivered within fifteen days of the expiry of the second period mentioned in paragraph (b) of sub-rule (2).

⁷ *De Klerk v De Klerk* 1986 (4) SA 424 (W) at 426i; *Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others* 1999 (2) SA 599 (T) at 611.

⁸ *Reymond v Adbulnabi* 1985 (3) SA 348 (W) at 349E.

⁹ *Brian Kahn v Samsudin* 2012 (3) SA 310 (GSJ) at 313B-C.

¹⁰ *Ibid* at para [4]. Footnotes omitted.

raising a preliminary issue that, contrary to the provision of rule 6(1) of the Rules,¹¹ the applicant's founding affidavit does not make out a case for the relief claimed.

[15] This brings me to the next issue – whether the mere failure by a litigant to annex a document to an affidavit to which reference is made in the affidavit constitutes an irregular step or procedure. That shortcoming is, in my view, an omission, and does not constitute a positive step or procedure in the manner contemplated in rule 30. Annexing a document to an affidavit is, in any event, a matter of evidence, and not a procedural matter. The respondents could, if they sought to avoid the more cumbersome¹² but more appropriate rule 35(12),¹³ have achieved what they sought by the mere stroke of a pen by writing a letter to the applicant's camp pointing to the inadvertence and requesting them to furnish the outstanding documents.

[16] There is a further reason why rule 30 should not have been invoked. The respondents have not demonstrated how and why the failure to furnish them with the outstanding documents caused prejudice relating to the continuation of the litigation, had the causes of complaint not been removed. In the affidavit filed in support of the rule 30 application the respondents concluded that the irregularities would result in them suffering prejudice *"to a substantial degree"*. No particularity was however given in regard to that.

[17] I have already pointed out above as to what should befall an application wherein allegations in support of the relief claimed have not been made. As Mr *Nabela*, counsel for the respondents argued, the failure on the part of the applicant to make allegations supportive of a particular prayer instead placed the respondents at an advantage. They should simply have raised a preliminary issue

¹¹ The rule provides that "[s]ave where proceedings by way of petition are prescribed by law every application must be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief."

¹² The cumbersomeness stems from the fact that rule 35 regulating discovery of document is applicable to application proceedings insofar as the court may direct (see rule 35(12)).

¹³ Rule 35(12), in relevant part, provides:

"Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose ... affidavits reference is made to any document ... to produce such document ... for his inspection and to permit him to make a copy ... thereof."

dispositive of the particular prayer (relating to condonation) in their answering affidavit. It has always been a cardinal rule of practice that 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 the merits.¹⁴

Conclusion

[18] In all these circumstances, the rule 30 application was not the appropriate procedure for the respondents' causes of complaint and should thus have not seen the light of day. The respondents would thus have not been the successful litigants had the application been determined on the merits.

[19] For these reasons, the respondents are directed to pay the costs of the rule 30 application.

S M MBENENGE
JUDGE OF THE HIGH COURT

Counsel for the Applicant:	Mr N Nabela
Instructed by:	Messrs Mquqo Attorneys East London C/O Messrs Bacela Bukula Attorneys King Williams Town

Counsel for the Respondents:	Mr D T Young
Instructed by :	The Bhisho State Attorney East London C/O King Williams Town

Date heard:	22 September 2016
Judgement delivered:	27 September 2016

¹⁴ LAWSA III paragraph 7 and the authorities referred to therein.