



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Civil Case No. 1578/2017

In the matter between

**NYONIKAYIPHUMULI SAVINGS AND CREDIT  
COOPERATIVE**

**PLAINTIFF**

And

**R N D ENTERPRISES (PTY) LTD**

**DEFENDANT**

**Neutral citation:** *Nyonikayiphumuli Savings and Credit Cooperative vs R N D Enterprises (1578/2017) [2018] SZHC 83 (03 May 2018)*

**Coram:** **MAMBA J**

**Heard:** **12 April 2018**

**Delivered:** **03 May 2018**

[1] *Civil Law & Procedure – Rule 18 as read together with rule 30 of the rules of court – Defendant objecting that Plaintiff has taken an irregular step or proceeding by failing to state in its declaration whether the contract sued upon is oral or written.*

[2] *Civil Law & Procedure – Rule 30 – allegation of an irregular step or proceeding in the nature of plaintiff’s declaration. Plaintiff alleging that Defendant in breach of a written contract between them. Plaintiff also stating when, where and by whom contract was entered into. Copy of contract attached to summons. Held, dismissing the objection that summons not an irregular step and complying with provisions of Rule 18 (6) of the Rules of Court.*

[1] This is an objection that has been filed by the Defendant in terms of Rule 30 as read with Rule 18 (12) of the Rules of this Court. The objection is that the Plaintiff has taken an irregular step as defined in Rule 30 of the Rules of Court. The objection is raised against the summons as amplified by the declaration thereto.

[2] A simple summons was first issued herein. In that summons the Plaintiff claims against the Defendant for:

‘(a) payment of the sum of E75,000-00 --- being a refund of a cancelled agreement for the construction of a temporal mobile office structure at Defendant’s instance.’ It is alleged that the said amount is now due, owing and payable. There is attached to the simple summons a document headed “Purchase Price Refund Plan Agreement”, together with a copy of a receipt for a sum of E75,000-00 issued by the Defendant. This receipt is dated 10 August 2015.

[3] Following the filing of the Notice of Intention to Defend by the defendant, the Plaintiff filed its declaration. In that declaration the Plaintiff states that:

3.1 An oral agreement was concluded between the parties whereby it was agreed that the Defendant would construct a mobile or temporary office structure for the Plaintiff on the Plaintiff's premises in Manzini.

3.2 The agreement was concluded during the month of July 2015.

3.3 The parties were represented by their duly authorised representatives. (Names of these representatives are stated).

3.4 The fee or charge for the said construction was agreed at E101 901.73 and the Plaintiff had to pay a sum of E75, 000-00 as a deposit before the actual construction of the mobile structure. This amount or deposit was paid by the Plaintiff on 10 August 2015.

3.5 On or about 26 November 2015, the Municipal Council of Manzini – where the structure was to be erected – refused to grant permission to the Plaintiff to erect the proposed or intended structure.

3.6 The decision by the Municipality was duly related by the Plaintiff to Defendant and both parties mutually agreed to cancel the oral

agreement to construct or erect the said structure. Consequent upon the said cancellation,

‘6.1 it was agreed that the Defendant pays back to the Plaintiff the E75,000-00 ---. The refund plan agreement was written. (A copy of same is annexed herein and marked “A”).’

Again the parties’ representatives in the written agreement are given or stated. The terms of the refund or repayment are also pleaded or stated in the declaration.

3.7 Finally, the Plaintiff avers that

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The Defendant breached the terms of the refund plan agreement in that [it] has failed to pay any of the agreed instalments’.

3.8 Demand is also averred by the Plaintiff and that the Defendant has, notwithstanding such demand failed or refused to make payment of the said refund which is due and owing by the latter. The Plaintiff has unambiguously prayed for, *inter alia*,

‘payment of the sum of E75,00000 ---

being the refund for the cancelled agreement for the construction of the temporal mobile office’.

[4] In a long-winded, rubbery and convoluted language or words, the Defendant has filed an objection to the summons. Defendant states that the summons constitutes an irregular step as defined or envisaged in Rule 30 as read together with Rule 18 (12) of the Rules of this Court. The objection, I think, although long and running into ten (10) paragraphs, may be captured in the following paragraphs:

‘2. The Plaintiff’s declaration read evinces that there was an initial verbal agreement to construct, a subsequent verbal agreement to refund and a written agreement to refund.

The summons does not distinguish which of the three agreements forms the basis of this litigation. Also, the declaration does not tally with the summons insofar as the founding statement is concerned.

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5. A true reading of Plaintiff’s founding statement evinces that Plaintiff is actually relying on a contract as the basis of the claim. Yet the declaration evinces that the claim is based on an oral agreement. Whilst the summons itself is silent as to whether the claim is based on an oral or written agreement.

Plaintiff's pleadings are not clear and concise enough and as such an irregular step in terms of Rule 18 (12) [of the Rules of Court]’.

[5] Clause J of the Purchase Price Refund Plan Agreement states that –

‘The above agreement is entered into by the parties purely on a humanitarian mutual understanding basis, without importing legal liability thereto, but (without prejudice to each other’s rights outside of this document) that each party may desire to have recourse to as it deems fit.’

What this clause means is beyond my ken. Counsel for the Defendant argues that it means that neither party to the agreement may sue based on the agreement; and, therefore the Plaintiff is disentitled to rely thereon. The consequence of this is that having sued on the strength of this document, the Plaintiff has taken an irregular step as defined in Rule 30 of the Rules of Court. I cannot agree. Accepting for the moment that the quoted clause means what Counsel says it means, it cannot in my judgment constitute an irregular step. It may constitute or afford a defence to the Defendant. That is an entirely different matter or issue.

[6] Reading the Plaintiff's declaration as a whole, it is clearly stated that the Plaintiff is suing the Defendant based on the written agreement to refund the Plaintiff the sum of E75, 000-00 that was paid as a deposit to the Defendant. The written agreement stipulated or laid down as to when and how that sum was to be repaid and "the Defendant breached the terms of the refund plan agreement in that he has failed to pay any of the agreed instalments". (Per para 7 of the Declaration). That is the crux of nub of the claim. There is no ambiguity in this.

[7] Rule 18 (6) of the Rules of Court provides:

'(6) A party who in his pleading relies upon a contract, shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written, a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading'.

Rule 18 (12) states that noncompliance with Rule 18 constitutes an irregular step. The Plaintiff has complied with the terms of Rule 18 (6). In fact it has complied with all the provisions of Rule 18. Therefore, Rule 18 (12) or Rule 30 finds no application herein.

[8] In *Tilana Alida Louw v Dr. Stephen Paul Gobler and Another*, case 3074/2016 (FSHC) Bloemfontein delivered on 15 December 2016, the Court stated as follows, with reference to Rule 30:

‘[11] We know that Rule 30 delineates that an applicant who lodges a complaint by virtue of this particular rule must give notice to all the parties whereby the particulars of the alleged irregularity are specified. Such an application maybe made only if:

- (a) The applicant has not himself or herself or itself taken a further step in the proceedings with knowledge of the irregularity;
- (b) The applicant has, within 10 days of becoming aware of the irregular step by written notice afforded the opponent an opportunity of removing the cause of the complaint within 10 days and
- (c) The application to set aside is delivered within 15 days after the expiry of the 10 day period within which the opponent was supposed to have removed the cause of the complaint.

[12] The Rule applies to irregularities of form only and not to matters of substance. It is not practically possible to draw up an exhaustive list of what constitutes an irregular step.

However, the words “an irregular step’ would embrace, for instance: failure by qualified practitioners to sign particulars of claim renders the summons irregular: *Suliman vs Karodia* 1926 WLD 102.

[13] The provisions of Rule 18 are applicable. It delineates that a combined summons, and every other pleading except a summons shall be signed by both an advocate and an attorney or, in the case of and attorney who, under sec 4 (2) Right of Appearance Act, Act no. 62/1995, has a right of appearance in the Supreme Court, only by such attorney or, if a party sues or defends personally, by that party – *vide* sub rule (1). It further delineates that non-compliance with the provisions of the rule is deemed to be an irregular step and that the opposite party shall thereby be entitled to act in accordance with Rule 30 – *vide* sub rule (12).’

[9] Rule 30 stipulates that:

‘30. (1) 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.

(2) Application in terms of sub-rule (1) shall be on notice to all parties specifying particulars of the irregularity alleged.

(3) If the hearing of such application the court is of the opinion that the proceeding of step is irregular, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems fit.'

As can be seen, our Rule 30 is slightly different from the South African rule inasmuch as, *inter alia*, our rule does not oblige the party objecting to the irregular step to afford the other side the opportunity to remove the cause of the complaint. Rule 23 (1) of the rules, which is complementary to this rule, does. Sub rule (1) authorises or permits the objector, on notice to the other side, to apply to court to set aside the step or proceeding. Sub rule (5) is a bit confusing. It refers for instance to a request or notice given pursuant to these rules and to a defaulting party. This would appear to refer to a party who is in default of complying with a court order. This would again seem to be a reference to a party who has been ordered by the court to remove or correct an irregular step or

proceeding. This court has not been asked to make a ruling on this issue and nothing turns on this in this application. These observations are therefore purely obiter.

[10] The Plaintiff's declaration in this case was filed and served on 06 March 2018. The Defendant's notice of objection was filed and served on 21 March 2018. The Plaintiff did not respond to the objection but simply set down the matter for hearing on 06 April 2018. The notice of set-down was filed and served on 22 March 2018. Heads of argument were subsequently filed by both sides and the matter was argued on 12 April 2018. Therefore, strictly speaking, there was no application made to this court by the Defendant to order the Plaintiff to remove the perceived irregular step. In its objection, the Defendant "called upon the Plaintiff to rectify the above [irregularities] within 7 days henceforth, failing which Defendant shall apply to court for an order accordingly. (This was perhaps in terms of sub rule (5) of the rule). There was, however, no such application made.

[11] Whether at the end of the day there was an application or not to set aside the summons as an irregular step, appears to me to be a rather technical

issue under the particular circumstances of this case. These technicalities do not address the real issues of substance between the parties. Additionally, neither party to these proceedings has been disadvantaged or prejudiced by these technical glitches. In *Louw (supra)* at para 18, the court stated as follows regarding the purpose of the rules of court:

‘[18] The purpose of the Uniform Court 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 the 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 in themselves.’ (See also para 39-42 of the judgment).

This court has the discretion to condone non-compliance with any of these rules as per rule 27.

[12] For the foregoing reasons, I hold that there is no irregular step that has been taken by the Plaintiff in its summons. The objection is accordingly dismissed. Each party is ordered to bear its own costs consequent upon this objection.



MAMBA J

FOR THE PLAINTIFF: MR. M. SITHOLE

FOR THE DEFENDANT: MR. P.D. MSIBI