IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/17/18**

In the Matter Between:-

MOLUOANE HENRY LEOMA	**APPLICANT**
AND	
O/C RCTS	**1ST RESPONDENT**
COMMISSIONER OF POLICE	**2ND RESPONDENT**
ATTORNEY GENERAL	**3RD RESPONDENT**

JUDGMENT

CORAM	**:**	**HON. M. MOKHESI AJ**
DATE OF HEARING	**:**	**26 JUNE 2018**
DATE OF JUDGMENT	**:**	**26 JUNE 2018**

CASE SUMMARY

Practice – Irregular proceedings – Respondent's counsel filing points of law in terms of Rules (10) (c) only to withdraw them and file opposing affidavits on the eleventh hour without the involvement of the court – such procedure declared irregular and the opposing affidavits struck off.

ANNOTATIONS:

STATUTES: *High Court Rules, No. 9 of 1980*

CASES:

Bader and Another v Weston and Another 1967 (1) SA 134 (c)

Randfontein Extension Ltd v South Randfontein Mines Ltd and Others 1936 WLD1

As per Mokhesi AJ

[1] This an interlocutory application in terms of which the applicant is seeking relief in the following terms:

> "1. Dispensing with the ordinary modes and periods of service provided for in the Rules of this Honourable Court on account of urgency hereof.
>
> 2. A Rule Nisi be issued returnable on the date and time to be determined by this Honourable Court, calling upon the Respondents to show cause why: PC Mokhosi
>
> a) The filed Answering Affidavit shall not be set aside, disregarded and disqualified from being admitted.
>
> b) The filed Affidavit of PC Mokhosi shall not be declared unprocedural and against the Ruled of pleadings and practice.
>
> c) The filed Answering Affidavit of PC Mokhosi shall not be declared an abuse of the court process.
>
> 3. Costs of suit at attorney and client scale."

[2] This application is in terms of Rule 30 of the Rules of this Court which provides that:

> "30(1) where a party to any cause takes an irregular or improper proceeding or improper step any other party to such cause may within fourteen days of the taking of such step or proceeding apply to court to have it set aside:
>
> Provided that no party who has taken any further step in the cause with knowledge of the irregularity or impropriety shall be entitled to make such application.
>
> (2) Application in terms of sub-rule (1) shall be on notice to all parties in the cause specifying particulars of the irregularity or impropriety involved.

(3) If at the hearing of such application the court is of the opinion that the proceeding or step is irregular or improper, 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 it deems fit, including any order as to costs."

[3] The facts of this application are very simple. In the main application, the applicant has applied for an order that he be restored possession of a certain motor vehicle which he alleges was despoiled of by the respondents. The respondents opposed the granting of the said order by invoking the provisions of Rule 8(10) (c)of the Rules of this Court, by filing notice to raise points of law.

The pleadings were closed on the 04th June 2018 and the matter was scheduled to be heard on the same day. On that day counsel for the respondent did not attend court, as per Advocate Potsane, Respondent's counsel had forgotten that the matter was proceeding. I then awarded the applicant wasted costs, and re-set the matter to 05 June 2018. On the 05 June 2018, respondent's counsel filed what was termed "Notice to withdraw points of law," and simultaneously filed an Answering Affidavit of P.C. Mokhosi purportedly answering to the allegations in founding affidavit of the applicant. It is against this procedure adopted by the respondent that the applicant launched this application to seek relief in terms outlined above. On 26th June 2018 after oral submissions were made by counsel, I made an *ex tempor*e judgment striking down the affidavit of P. C. Mokhosi with costs and directed that the main application shall proceed as initially was. I promised to provide written reasons, and these are the reasons:

[4] This matter is opposed. The answering affidavit of P.C. Mokhosi was filed again in opposition of particular importance is paragraph 5.1 of his opposing affidavit. What is contained in this paragraph probably symptomatic of the misguided understanding of the purport of Rule 8(10) (c). I wish to quote the said para. 5.1.

> "5.1 Contents therein denied. I am adviced that the points of law are not pleadings but preliminary points raised before getting into merits of the case. Furthermore, the points of law did not go to the merits of the case hence his reply. I am adviced he merely concentrated only on the points. Hence I do

not want to reply to the Answering Affidavit of the person who despoiled him."

It is clear that the deponent, adviced by his legal counsel, believes that the points of law raised in terms of Rule 8(10) (c) when raised can later be supplemented by an Answering affidavit if those points are not successful. Rule 8(10) (c) provides:

> "Any person opposing the grant of any order sought in the applicant's notice of motion shall:
>
> (a) Within the time stated in the said notice, give applicant notice in writing that he intends to oppose the application, and in such notice he must state an address within five kilometres of the office of the Registrar at which he will accept notice and service of all documents.
>
> (b) Within fourteen days of notifying the applicant of his intention to oppose the application deliver his answering affidavit (if any) together with any other documents he wishes to include; and
>
> (c) If he intends to raise any question of law without any answering affidavit, he shall deliver notice of his intention to do so, within the time aforesaid, setting forth such question."

[5] Clearly, once the procedure envisioned in Rule 8(10) (c) is invoked, that on its own foreclosed the possibility of the respondent ever filing the opposing affidavits, The respondent, by invoking this procedure takes a huge risk that, should the points of law he raises fail, that is the end of the matter. He cannot thereafter file an answering affidavit because the points of law did not succeed. The practice in motion proceedings has been stated as follows in the oft-quoted decision of **Corbett J**. in **Bader and Another v Weston and Another 1967 (1) SA 134 (c) at 136**.

> "It seems to me that, generally speaking, our application procedure requires a respondent, who wishes to oppose an application on the merits, to place

his case on the merits before the court by way of affidavit within the normal time limits and in accordance with the normal procedures prescribed by the Rules of court. Having done so, it is also open to him to take the preliminary point that (in this case) the petition fails to disclose a cause of action and this will often be a convenient procedure where material disputes of fact have arisen which cannot be resolved without recourse to the hearing of oral evidence. On the other hand, I do not think that normally it is proper for such a respondent not to file opposing affidavits but merely to take preliminary point. I say "normally" because situations may arise where this procedure is unexceptionable. For example, a respondent who is suddenly and without much notice confronted with a complex application and who would normally be entitled to a substantial postponement to enable him to frame opposing affidavits, might well be permitted there and then to take such a preliminary point. Generally speaking, however, where a respondent has had adequate time to prepare his affidavits, he should not omit to prepare and file his opposing affidavits and merely take preliminary objection. The reason for this is fairly obvious. If his objection fails, then the court is faced with two unsatisfactory alternatives. The first is to hear the case without giving the respondent an opportunity to file opposing affidavits: This the court would be most reluctant to do. The second is to grant a postponement to enable the respondent to prepare and file his affidavits. This gives rise to an undue protraction of the proceedings, which cannot always be compensated for by an appropriate order as to costs and results in a piece meal handling of the matter which is contrary to the very concept of the application procedure. In this connection interesting to note that Rule 6(5) (d) of the Uniform Rules of Court appears to contemplate a respondent in motion proceeding, who wishes to oppose the application, giving notice of his intention to do so and then delivering his answering affidavits within 14 days. It is only where he intends to raise a question of law **only** that he is directed within the same time limit to deliver a notice of his intention setting forth the question of law."

In **Randfontein Extension Ltd v South Randfontein Mines Ltd and Others 1936 WLD** 1 at 5 the court said:

> "….(A)nd I do not think the court would countenance a procedure which would enable a respondent to delay the case and get a postponement by raising unsuccessful preliminary points. One cannot ask the respondent to assume that his point will be successful, he must be prepared for the possibility of his point failing."

What is clear from the above-quoted authorities is that, once the respondent has chosen to invoke Rule 8(10) (c) procedure the fate of his opposition turns squarely on it. If the points so raised are unsuccessful, he cannot thereafter seek to file his answering affidavit to deal with the merits of the case.

[6] It is without question that the procedure which was followed by the respondent – which on the eleventh hour the respondent withdrew the points of law raised and substituting in its stead the answering affidavit – was highly irregular. In terms of Rule 30(3) this court is given a discretion in the face of an irregularity to set aside the irregularity in whole or in part either as against all the parties or as against some of the parties, and grant leave to amend or make any such order it deems meet.

[7] The court may overlook the irregularity in appropriate cases – provided such an irregularity has not occasioned prejudice on the applicant. The prejudice which this move by the respondents visited upon the applicant is that the applicant approached this court on an urgent basis to be restored possession of the vehicle which was taken away by the police. On the eleventh hour this matter was to proceed, the respondent withdrew the points of law raised in terms of rule 8(10) (c). In my considered view the prejudice to the applicant is obvious, in the sense of the case being protracted while necessary papers are exchanged before the pleadings will have been closed. Given the urgency of this matter this court will not countenances this. My considered view, further is that a cost order will not be able to compensate the applicant for the prejudice he will suffer with the prolonged absence of the vehicle in his possession. All these considerations formed the basis of my decision to grant the application.

[8] In the result the following order was made:

a) Application is granted with costs.

b) Respondents are directed to argue this matter as it originally was in terms of the points of law raised.

_____

M. MOKHESI (MR)

ACTING JUDGE

FOR APPLICANT	**:**	**ADV. POTSANE**
FOR RESPOMDENTS	**:**	**ADV. TŠEUOA**
DELIVERED JUDGMENT	**:**	