CIV/T/414/83

IN THE HIGH COURT OF LESOTHO

In the matter of:

LEHLOHONOLO PHEKO - Applicant

v

SOLICITOR GENERAL - 1st Respondent
MINISTRY OF DEFENCE AND INTERNAL SECURITY - 2nd "
BRIGADIER RAMOTSEKHOANE - 3rd "

J U D G M E N T

Delivered by the Hon. Mr. Justice M. P. Mofokeng on the 5th day of December, 1983

This is an application to strike paragraphs 2,3,4 and 5 from the plea filed by the Respondent/Defendant on the grounds that the said paragraphs are either vague and embarrassing or inconsistent and contradictory and as such are prejudicial to the Applicant/Plaintiff.

On the 29th September 1983 Applicant's/Plaintiff's attorneys were served with Respondents'/Defendants' plea. In terms of Rule 29(2)(a) a notice was filed requesting the Respondent/Defendant to remove a complaint and was filed of record on the 5th October 1983 requiring the Respondent/Defendant to remove the "vagueness and embarrassment contained in Respondent'/Defendants' plea."

/This ...

This notice was served on the Respondent/Defendant on the same day i.e. 5th October 1983. The said sub-rule requires that the doing of the required act be within a period of seven (7) days. In terms of section 49(c) of the Interpretation Act 1977 where an act is directed to be done or taken within any time not exceeding six days, Sundays and Public holidays shall not be recknoned in the computation of time. In this particular matter the period within which the act required was to have been done is more than six days. Sundays therefore must be included. The seventh day fell on the 12th day of October 1983. However, the Defendant's reply to the Applicant's/Plaintiff's notice in terms of Sec. 29(2)(a) was served on the latter and filed of record on the 14th October 1983, that is a day after the expiry date. In the Court's view, this delay is insignificant. Certainly it cannot be relied upon in terms of Rule 30(5) of the Rules. In any event this would be a proper case in which the Court would be entitled to apply the provisions of Rule 59 and condone such a delay. Moreover, it is not intended that every breach of the Rules should necessarily be visited with a nullity (Northern Assurance Co. Ltd. vs. Somdaka, 1960(1) S.A. 588 (A.D.) at 395B)

In any event Rule 30(5) requires that the defaulting party should be notified that after the lapse of seven days the other party will apply to Court for an order that such "a request or notice be complied with or that the claim or defence be struck out." This has not simply been done. The salient requirements of the sub-rule have been totally ignored by the applicant/plaintiff.

/It is ...

It is true that in the case of Mahase v Solicitor General & Others, 1981(1) L.L.R. 159 at 161 it was stated that it is sometimes difficult to draw a distinction between an exception and an application to strike out. However, it is now trite law that if an exception is taken the aim of such a move is to destroy the whole defence but where a paragraph is to be attacked then the proper procedure to be adopted is an application to strike out such a paragraph or paragraphs. This distinction was made clear as early as 1914 in the matter of Salzmann v Homes, 1914 A.D. at p. 156 which case was followed in Stephens v De Wet, 1920 A.D. 279 at 282 where Innes, C.J. stated "The former (exception) goes to the root of the entire claim or defence; the latter (striking out) attacks individual sections which do not comprise an entire claim or defence." In present matter the paragraphs the Court is requested to strike out comprise the whole defence. Should not therefore the application have been one of exception? Surely the effect of the application is to put an end to the action and if that is the invention it was the applicant's duty to except. However, this is not to say that if indifidual paragraphs are struck out and in the process of so doing no plea is left the procedure to except should invariably be adopted. The intention of the procedure adopted in the present case is quite clear. It goes to the root of the matter and not just mere strking out.

It is not stated how the said paragraphs the applicant/plaintiff requests to have struck out of the respondents'/defendants' plea, are either vague and embarrassing or contradictory and inconsistent and as

/such ...

such prejudicial to the applicant/plaintiff. The applicant's/plaintiff's notice for "Removal of Vagueness and Embarrassment of Defendants' plea" laid his complaint in terms of Rule 29(2)(a) by means of asking a series of questions in respect of each paragraph of the respondents'/defendants' plea. He could have easily requested to be furnished with further particulars in terms of Rule 25 but he chose a procedure akin to it by the manner he adopted. However, what is of importance is that his questions were answered and consequently the complaint. The applicant/plaintiff now says that the plea, as amplified by the answers given is either vague and embarrassing or inconsistent and contradictory without substantiating these serious allegations. It is now left to the Court to decide how these allegations are justifiable in the present circumstances. It is for the applicant/plaintiff surely to say to the Court how and in what manner and to what degree the alleged paragraphs are either vague and embarrassing or in consistent and contradictory and hence prejudicial to him. (See Geyser and Another v Geyser, 1926 T.P.D. 590) It is not sufficient merely to state these allegations and rest.

Looking at the questions and answers on the record pertaining to the application in terms of Rule 29(2)(a) it would seem to the Court that the applicant/plaintiff was asking the respondent/defendant to supply him with not only his defence but also the evidence he was going to rely upon. For an example the respondent/defendant was asked: 2(j): It is not clear what the policemen did as the plaintiff fought them as alleged" Surely this is a

/matter ...

matter of evidence. Again 3(h) "It is not clear over what period the alleged violence and belligerency of the plaintiff lasted to justify the period of detention" This again is a matter of evidence.

In the case of Ramakoro v Peete, 1981(2) L.L.R. 559 (C.A.) it was held that the purpose of a pleading is to define the issues. The party who receives the pleading should be able to understand it in order to decide whether the reply is an admission, denial or confession and avoidance. In the particular matter before Court the applicant/plaintiff availed himself of the provisions of Rule 29(2)(a) and in addition made clear what was not or what he conceived was not clear from the respondent's/defendant's plea. He now says that that plea as amplified or, ot be more correct, with the further particulars requested having been replied to, it is either vargue and embarrassing or contradictory and inconsistent. In Ramakoro v Peete (supra) it was held that the term "vargue" means that the pleading of the other side is either meaningless or capable of more than one meaning, and by the expression "embarrassing" is meant that it cannot be gathered from the plea what ground is relied upon by the pleader. These phrases or expressions are thrown at the respondent/defendant consequently the onus is placed on him. But one may ask: on what principle? He has asserted nothing? However, this is not the time nor the premise to raise the question of onus. (See Thabo Sekhesa v Solicitor General & Others, CIV/T/435/83 dated 21st November 1983)

/It should ....

It should perhaps be mentioned, in passing, for the sake of clarity that the present proceedings are not seperate but part of the main action. The taking of action such as the present application is taking a step further or an act advancing the proceedings one step nearer completion (Killarney of Durban (Pty) Ltd v Lomax, 1961(4) S.A. 93(N) at 96). The Rule requires that an applicant shall approach the Court by means of a notice. Surely it is not expected that the respondent shall file a document indicating his intention to defend the said application. It is of the essence of the Rule that the applicant shall proceed by way of notice so that adequate notification is given to the other party. In the Court's view the non-filing of an intention to oppose the said application does not give rise to the applicant being granted the application per se as prayed. However, such an inference may be drawn where on the appointed day for hearing of the application the other party is, for no cogent reasons, absent.

Sometimes applications for striking out have been made to delay the proceedings even though they may be of temporary nature. In the present case, it is the view of the Court that that is precisely what has happened. Moreover, if the purpose of the application was simply one of striking out then the proper Rule to have been invoked is Rule 29(5)(a) which reads·

/"(5)(a) ...

" (5)(a) Where any pleading contains averments which are scandalous, vexatious, argumentative, irrelevant or superfluous the opposite party may, within the period allowed for delivering any subsequent pleading, apply for the striking out of the matter, aforesaid, setting out the grounds upon which the application is made."

This rule was not invoked precisely because it required the applicant/plaintiff to set out "the grounds upon which the application is made" and not merely set out principles upon which such an application may be granted or refused. The Rule stated what matters may be struck. However, where a paragraph is bad in law it must therefore be regarded as "irrelevant" or if it is vague and embarrassing as "vexatious". Again the provisions of Rule 29(5)(a) were not invoked because the sole purpose of the applicant was to take an exception to the whole of the defendant s plea. In which case the provisions of Rule 29(2)(b) should have been applied. A wrong procedure has been followed.

There are, in the Court's view sufficient facts which warrant this matter to come before Court for adjucation and the sooner a finality is reached, the better for everybody concerned.

This application, which has not been shown to have any basis and as no grounds have been advanced, is hereby refused with costs.

J U D G E
5th December, 1983

For the Applicant : Mr. Pheko
" " Respondents : Mr. Tampi