

IN THE HIGH COURT OF LESOTHO

In the matter between:-

ELLIS MORAKENG

Applicant

and

MATSELISO MORAKENG

Respondent

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 22nd day of November, 1990

This is an application for an order in terms of Rule 30 of the High Court Rules 1980 setting aside plaintiff's notice of set down on the grounds that the Notice of set down dated the 5th November, 1990 is an irregular and improper proceedings or improper step because it was drawn and served before a pre-trial conference had taken place contrary to the provisions of Rule 36 (1) of the High Court Rules. Secondly, that Rule 36 (4) has not been followed when the Notice of set down was drawn or when the request for a date of hearing was made. Thirdly, that in the light of the Registrar's rejection of the plaintiff's notice of set down by the Assistant Registrar, the matter ought not to appear on the roll.

It is common cause that on the 31st October, 1990 the respondent's attorneys wrote a Notice in terms of Rule 39 (2) informing applicant's attorneys that on the 2nd November, 1990 at 2.15 p.m. application would be made to the Registrar for a trial date. This notice was served on the applicant's attorneys on the 31st October, 1990.

A date of trial was obtained and on the 5th November, 1990 a Notice of set down was drawn up and served on the applicant's attorneys on the same day. The matter was set down for hearing on the 15th November, 1990.

On the 5th November, 1990 which was the day on which the notice of set down was drawn up and served, the respondent's attorneys prepared a Notice of a pre-trial conference and informed the applicant's attorneys that a pre-trial conference would be held on the 12th November, 1990 at 2.30 p.m. at the offices of the respondent's attorneys. A pre-trial conference was duly held and attended by Mr. K. Sello, respondent's attorney and Mrs. V. Kotelo, applicant's attorney.

There is no doubt that the Notice of set down dated the 5th November, 1990 was an irregular and improper proceeding and an improper step because Rule 36 (1) provides that before an action may be set down for trial the attorney acting for one of the parties shall invite the attorneys acting for the other parties to attend a pre-trial conference at a specified place and time with the object of reaching agreement as to possible ways of

curtailing the duration of the trial. It was an improper step to issue a Notice of set down before a pre-trial conference was held. Rule 36 (4) states in no uncertain terms that 'when an attorney sets a case down for trial or makes a written request for a date for the hearing thereof, as the case may be, he must state in writing that a pre-trial conference has been held or has been excused by order of a Judge given under sub-rule (2) herein.' The respondent's attorney did not comply with the above sub-rule.

I was referred to two conflicting South African cases but I do not wish to say anything about them because Rule 36 (4) is very clear and is not capable of any two meanings.

This is not the end of the matter because Rule 30 (1) under which this application is brought reads as follows:-

"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."

It is the proviso to Rule 30 (1) that creates problems for the applicant. On the 5th November, 1990 when the applicant's attorneys received the notice of set down they were aware or had

knowledge that it (notice of set down) was irregular and improper. They not only accepted that irregular proceeding but took a further step by attending a pre-trial conference on the 12th November, 1990, long after the matter was set down for trial. It seems to me that the proviso regards the taking of a further step with the knowledge of the irregularity or impropriety as an act of condoning such irregularity or impropriety. The applicant was therefore not entitled to make this application.

In the result the application is dismissed with costs.

J.L. KHEOLA
JUDGE

22nd November, 1990.

For Applicant - Mr. Maqutu
For Respondent - Mr. Sello.