CIV/T/54/93

IN THE HIGH COURT OF LESOTHO

In the matter of :

AFRICA PLANT SERVICES — Plaintiff

vs

RAINBOW CONSTRUCTION (PROPRIETY) LIMITED — Defendant

RULING

Delivered by the Honourable Mr. Justice T. Monapathi
on the 14th day of September, 1994

On the 15th August, 1994 during unopposed motions roll the parties' Counsels Mr. Mare for the Plaintiff and Mr. Sooknanan for Defendant wanted to argue about what appeared to be a fairly simple matter. I asked them to appear before me on the 17th August 1994, to let me hear their arguments.

Plaintiff's claim is for:

"(a) Payment of the sum of M11,250.00 being the amount due, owing and payable by Defendant to Plaintiff in respect of a cheque payable on the 30th September, 1993, drawn

by Defendant on the Lesotho Bank in favour of Plaintiff, of which Plaintiff is the legal holder for value, and which cheque was duly presented for payment but was dishonoured by non-payment.

Notice of dishonour has been excused.

(b) Payment of interest at the rate of 18.25% per annum from 30th September, 1993 to date of payment;

(c) Costs of suit;

(d) Further and/or alternative relief."

(My underlining)

Having been duly served Defendant entered his appearance to defend on the 23rd November 1993. It was on the 2nd December 1993 that the Defendant was served with a Notice of Application for summary judgment giving notice that "in terms of Rule 26 of the High Court Rules that application will be made on behalf of the Plaintiff on the 6th December 1993....." (my underlining) It ought to be in terms of Rule 28. No papers were filed by the Defendant until on the 15th August 1994. The Court file, however, shows five (5) postponements all to which Defendant gives significance. They are shown as follows in the Court file:

(a) Before Monapathi A.J., 6th December 1993, Mr. Mare for plaintiff - summary judgment postponed to 13th December 1993.

(b) Before Maqutu A.J., 13th December 1993, Mr. Buys for Applicant, Mr. Sekake for Respondent - parties trying to settle. Matter postponed to 7th February, 1994.

(c) Before Lehohla J., 7th February 1994 Mr. Buys for Plaintiff, Mr. Sooknanan for Defendant, postponed to 21st February, 1994 to conclude negotiations.

(d) Before Monapathi A.J. 21st February, 1994, Mr. Mare for Plaintiff matter removed from the roll.

(e) Before Maqutu J on 8th August 1994, Mr. Mare asks for final postponement to 15th August 1994.

On the 15th August 1994 the Defendant sought to file its opposing affidavit apparently in terms of Rule 28 (3)(b). It is to this process that Mr. Mare for Plaintiff objected citing the

reasons, firstly, that defendant had delayed to file affidavit and then fell foul of the proviso to Rule 28 (3)(b) which reads "such affidavit shall be delivered before noon not less than two court days before the hearing of the application." This the defendant failed to do since the month of December 1993 until when the matter was enrolled on 15th August, 1994. Secondly, in the alternative the defendant fell foul of the said proviso in that the affidavit should have been filed before noon on the Thursday, the 11th August 1994.

One cannot be so naive as to have not found as significant the fact that up to the date of hearing of argument the parties' Counsel continued to speak of "imminent breakthrough", "a small detail to be ironed out and negotiations have not fallen through": a clear language suggesting that this has been the attitude (to negotiate) all along. There has always been a willingness to settle by both parties. This is even amply born out by the annexure A to the defendant's opposing affidavit, being a letter dated the 15th February, 1994 from the plaintiff's Attorneys to defendant's attorneys. Indeed these negotiations have taken a long time. This is obviously to the prejudice of the plaintiff (supposing it will get its judgment) and to the defendant (supposing its defence will succeed). I refuse however to find fault with the parties' optimism or attempts to settle. But then if the plaintiff wanted to insist on its rights it

should have given defendant enough notice that it would do so.

My original understanding had been that I am supposed to deal with the matter as to whether the opposing affidavit should be admitted, and whether the summary judgment is allowed and the defendant is allowed to defend. So that I must consider whether there is or there is no sufficient cause for the delay, by the defendant, to have filed his said opposing affidavit. I would find it most unwise to separate the two issues, namely, a finding whether the opposing affidavit should be admitted on the first part and whether to allow the application for summary judgment in the event that I admit the opposing affidavit, on the other hand. The inconvenience of the other or different approach is clear for all to see. It means the question whether or not to grant a summary judgment would stand over for decision by another Court or another Judge. Even if it were to be same Court, why separate them? It means therefore that should I accept Mr. Sooknanan's submission that there is sufficient cause for the delay, I must also decide the question whether the Defendant has a *bona fide* defence.

I have been asked to reject the submission that the opposing affidavit is out of time and that the defendant should have filed a full motivated application, on affidavit, for condonation. In support of his submission Mr. Sooknanan also relies on Rule 26(2)

which reads :

> "If any party fails to deliver any pleading, save as stated in sub-rule (1) within the time laid down in these rules or within extended time allowed in terms thereof or allowed by agreement between the parties, any other party may by notice served upon the party in default, require him to deliver such pleading within three days after the day the notice is served upon him." (my underlining).

Mr. Sooknanan submits that the circumstances of the intention of the parties to negotiate suggests that it can unavoidably be implied that there was tacit agreement not to file the opposing affidavit. That may be another way of looking at it, but the correct way of looking at it is whether by all appearances the plaintiff appears to have condoned the failure of defendant to file his papers in time. The Courts have frequently held that delay in filing a pleading due to the fact that negotiations for a settlement were in progress at the time the particular pleading should have been filed is a "sufficient cause" to warrant the granting of the indulgence (see Civil Practice of Superior Court in South Africa 3rd Edition van Winsen at page 386. Perhaps one would feel that there was no need for a definate written notice from the plaintiff to indicate that negotiations have fallen

through. That may be so but I need not make a definate decision on the need or the requirement. But negotiation seem to have been going on. I would accept that there was sufficient cause.

Mr. Sooknanan has gone on to suggest that the need for a bona fide defence has been demonstrated in his papers. I have already referred to the plaintiff's claim. The defendant says in his affidavit that he has "got *bona fide* defence to the action as it is apparent from the contents of paragraphs three and four above that plaintiff cannot expect payment for a useless machine whose defects should be repaired by the plaintiff." By analogy with what an applicant for rescission of a judgment: "The applicant must show that he has a *bona fide* defence to the plaintiff's claim, it being sufficient if he sets out averments which, if satisfied at trial, would entitle him to the relief asked for, he need not deal with the merits of the case or produce evidence that the probabilities are actually in his favour." Mr. Sooknanan submitted that the *bona fide* defence offered by the defendant needs only to be arguable. It need not be a defence most likely to be proved or probably valid. Unless it is inherently improbable. I agree with him.

On the other hand I am not entirely happy with the fact that the defendant delayed to file his opposing affidavit whether or

not negotiations were going on. The granting of leave to admit the opposing affidavit is an indulgence. It is in the discretion of the Court. So are the costs. I have admitted the opposing affidavit. I refuse to grant the application for summary judgment. I give the costs to the plaintiff. Defendant is ordered to file his plea or exception or objection within seven (7) days. Even in the event that the defendant chooses to except, still, it must plead over.

T. MONAPATHI
JUDGE