CIV/APN/13/94

IN THE HIGH COURT OF LESOTHO

In the matter between:

THABA HOOHLO	APPLICANT
V	
CALTEX OIL (S.A.) (PTY) LTD.	RESPONDENT

REASONS FOR JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 28th November, 1994.

On the 28th November, 1994 this application was argued. Mr. Geldenhuys, Counsel for the Respondent, had to begin as he had raised certain points in *limine*. Mr. Nathane for Applicant answered.

After hearing both parties, I dismissed the application with costs and promised to file reasons later.

In this matter Applicant applied for an order in the following terms:

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"1. Declaring Applicant's purported dismissal as wrongful and unlawful.

2. Directing Respondent to pay Applicant's salary and other benefits from the date of the dismissal to date.

3. Directing Respondent to pay interest thereon at he rate of 18.25%.

4. Directing Respondent to pay the costs hereof.

5. Granting Applicant such further and/or alternative relief as this Honourable Court may deem fit."

This application was brought by Notice of Motion dated 15th December, 1993. It was filed on record on 17th January, 1994. All affidavits and papers had been filed by the 26th May, 1994. The matter was set-down by Respondent on the 11th August, 1994. The matter was crowded out and had to be postponed to the 14th November, 1994.

This Court has not gone into the merits of this application. Consequently nothing that I say in this

application should be construed as in any way determining the merits of Applicant's case.

Mr. Geldenhuys for Respondent first took the point that this matter is pending before the Magistrate's Court, Maseru, as CC.953/90. This is admitted. Mr. Nathane for Applicant says although the parties are the same in CC.953/90 and this application and the cause of action the same, the relief claimed is different.

In his founding affidavit in this matter, Applicant says his employment was unlawfully terminated around the 26th March, 1990. In the particulars of claim of CC.953/90 of the Magistrate's Court, Applicant says his employment was terminated on or about the 21st March, 1990. Both parties agree this is the termination of employment that is the subject of both applications.

In CC.953/90 Applicant claims:

(a) M2010.00 salary for March 1990.

(b) M6030.00 salary in lieu of three months' notice.

(c) Costs on Attorney and Client scale.

In this application (CIV/APN/13/94) Applicant wants his dismissal to be declared unlawful and his salary and other benefits to continue as if he was never dismissed.

The first problem I have with Applicant is that nowhere in his founding papers does he refer to CC.953/90. It is essential that all facts that might affect the outcome of Applicant's application should be disclosed in the founding affidavit. Applicant is not allowed to supplement his case in Applicant's Replying Affidavit.

Dealing with CC.953/90 (although he does not specifically identify it) Applicant in his Replying Affidavit says:-

> "I admit the contents hereof; save to say that the cause of action in the case of 18th September 1990 and the present one is different."

Mr. Nathane, Counsel for Applicant, conceded that the cause of action is the same, what differs is the relief claimed.

What worries me is the fact that applicant does not seem to be aware that (when he brought this application) he was obliged to disclose that he had already instituted

CC.953/90 before the Magistrate's Court, Maseru. The reason being that this is a fact which could have a bearing on the outcome of this application. Because of this non-disclosure of CC.953/90 this Court is entitled to take the view that Applicant has not shown good faith. Good faith is not expected to be displayed only in *ex parte* application. Herbstein and Van Winsen *civil Practice of the Superior Courts of South African Courts* 3rd Edition at page 80 speaks of utmost good faith that is expected in *ex parte* applications. In my view that does not mean in ordinary applications good faith is not required. What the learned authors imply is that the degree of good faith between *ex parte* applications and applications on notice differs in degree, but it is there in all applications. Jones and Buckle *Civil Practice of the Magistrate Courts of South Africa* 8th Edition Volume II page 400 succinctly puts the position as follows:

> "Good faith is a *sine qua* of all applications, whether *ex parte* or on motion."

The reaction of a Court to non-disclosure of a material fact will depend on the circumstances of a particular case.

It goes without saying that a disputed matter should be

brought by way of action. In the Magistrate's Court matters for which an application is appropriate are limited by the *Subordinate Courts Order* of 1988 while in the High Court the scope of application proceedings has been extended over the years. Nevertheless in this case summons had already been issued in the Magistrate's Court to deal with the facts of this case which on the face of the pleadings are disputed. To expect the Court to allow (what appears to be disputed matter such as this one) to be determined by way of application when an action is already pending in another court is to ask it to take a retrograde step. In application proceedings the Court only sees type-written affidavits and decides the matter. The Court (so to speak) chooses which type-writer to believe while in action proceeding the court determines issues of credibility and the merits generally after seeing and hearing witnesses themselves.

Mr. Nathane says the Special Plea of *lis alibi pendens* cannot be pleaded where although parties are the same and the cause of action the same, the remedy sought is different.

Mr. Geldenhuys referred the Court to the case *Williams v Shub* 1976 (4) SA 567 for the proposition that *lis pendens*

ought to be upheld because the subject matter of the claim is the same but relief differs. At first glance that case and this one are similar, but they have a substantial difference.

In this case we are dealing with a claim of unlawful dismissal in which all the reliefs claimed in CC.953/90 of the Magistrate's Court, Maseru and this application (CIV/APN/13/94) could have been claimed in the alternative to the claim in this application. In *Williams v Shub* (supra) the claim was one of maintenance which had to be varied as years go by, therefore the relief never changed. CC.953/90 and this case have one constant factor in common namely, the determination of unlawful dismissal and the type of remedies available did not have to change with time. In *William v Shub* the cause of action in proceedings before the court and previous ones in which *lis pendens* was pleaded was paternity, in future all that had to be adjusted was the quantum of maintenance.

Lis pendens and *res judicata* are pleaded on the grounds that bringing the same matter between the same parties in different courts is *prima facie* vexatious. As already stated the claims for relief in CC.953/90 and this application are claims that ought to be brought in the same

proceedings, the set of claims in CC.953/90 being an alternative of the claims in this application. Isaac's Beck's *Theory and Principles of Pleadings in civil Actions* 4th Editions Para. 75 at page 138 shows that the point mr. Nathane has taken about differences in relief does not have to prevail. He puts the issue as follows:

> "Where the above essentials exist the mere difference of form between the pending suit and that which is sought to stay is not material."

The further difficulty I have with this application is that (at the time it was brought) application proceedings were already inappropriate because pleadings in CC.953/90 which were already in Applicant's possession show the matter is disputed. Applicant was therefore obliged not to proceed by way of application. That being the case the balance of convenience is against staying this application as one would normally do where the special plea of *lis pendens* is taken. It is no good to stay this application when in my view it stands to be dismissed later.

This Court finds no problem with the continuance of Applicant's action in CC.953/90. If Applicant should feel the question of reinstatement is one of specific performance which in terms of *Section 29(d)* of the *Subordinate Courts*

Order, 1988 could well be beyond the Subordinate Courts jurisdiction I say that is not necessarily so. He can (by applying for leave of court) amend his pleadings in that court and make reinstatement his main prayer and the existing prayers his alternative. If Applicant does this, then reinstatement would fall within the Magistrate's jurisdiction. There is also *Section 32* of the *Subordinate Court's Order* of 1988 which makes it possible for actions to be removed to the High Court on application to the High Court. This transfer of the case to the High Court would be embarked upon if Applicant wants the court reinstatement to be granted without without necessarily having to give Respondent the alternative of paying damages. Such a reinstatement order would be entirely a matter at the High Court's discretion. There are therefore no real grounds for having brought this application. Continuing proceedings in CC.953/90 for which pleadings were closed was always the best way forward subject to an application for amendment with leave of court.

I do not think the question of waiver ought to affect the outcome of this application although applicant initially elected to claim damages. The delay in taking advantage of the claim for reinstatement is a problem for the Court that will deal with this issue. Three years have elapsed since

CC.953/90 was instituted, this issue of reinstatement is being raised for the first time after such a long time. Because of the attitude I have taken I see no point in going into the potential merits of the point of waiver that Mr. Geldenhuys has raised.

An attempt was made to blame the attorney who instituted CC.953/90 for failing to take proper instructions from Applicant. Mr. Nathane says in 1990 Applicant wanted reinstatement. The papers before me including his own affidavit (when he claimed pension contribution) exonerate Applicant's former attorney. It seems Applicant accepted the advice tendered by his former attorney. Applicant cannot be allowed to approbate and reprobate and in the process blame his attorney who gave what advice he could on which CC.953/90 came to be instituted.

The case CC. 1018/90 according to Mr. Nathane went against applicant for lack of prosecution. I note with concern that this application was set-down by the Respondent. I do not believe CC.1018/90 necessarily has much to do with this application and CC. 953/90. Applicant in CC. 953/90 was merely claiming his pension contribution. Consequently I do not agree that previous costs that have not been paid are costs in a later action brought for the

same, or substantially the same cause of action,. In CC. 1018/90 Applicant is asking the Respondent to send his pension contribution to Maseru as he was not prepared to go and fetch it in Bloemfontein as Respondent wanted him to do. That being the case this portion, of Respondent's objection cannot be sustained.

Mr. Nathane basing himself on the principles of *Room Hire Co. (Pty) Ltd. v Jeppe Street Mansions (Pty) Ltd.* 1949 (3) SA 1155 at 1165 felt the Respondent's denials were meant to manufacture a dispute. Although the Court never went into the merits, I should emphasise that in the High Court the scope of applications was extended to matters suitable for trial to speed up proceeding as a matter of convenience. This is the reason the use of application procedure is a risky business. The reason being that the Court has a discretion to dismiss the application if the matter is disputed and the balance of convenience favours the use of some other procedure. In this case Applicant's manoeuvre of introducing application proceedings while an action is already pending in CC. 953/90 cannot be seen as promoting the speedy resolution of this matter.

Dilatoriness in action proceedings can be tolerated (up to a point) because that procedure is meant to provide for

a full ventilation of the grievance between the parties. Application proceedings in the High Court being only allowed, in the circumstances, for a speedy resolution of claims, any dilatoriness in them is regarded as a catastrophe. Judges are therefore armed with extensive powers to prevent such delays. Among these powers is that of dismissing applications straight away if they are likely to cause delays without giving the parties a speedy remedy that extension of the application procedure was meant to provide.

In a matter where applicant knew the matter was disputed when he brought the application, his application has to be dismissed unless some redeeming features exist. CC. 953/90 discloses a dispute in its pleadings. The quality of the dispute will be determined at the trial and an appropriate order as to costs made if indeed Respondent was clutching at straws as Applicant believes.

Entertaining this application before this Court can only cause more problems than it would solve. I am therefore not prepared to stay these proceedings to await the determination of proceedings before the Magistrate's Court. This will not prejudice Applicant in any way having regard to what I have already said above.

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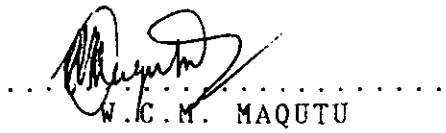
The cumulative effect of the facts surrounding this application left me only one course open to me, that is of dismissing this application.

Applicant's application is dismissed with costs.



W.C.M. MAQUTU
JUDGE

For Applicant : Mr. Geldenhuys
For Respondent : Mr. Nathane