CIV/T/450/87

IN THE HIGH COURT OF LESOTHO

In the matter between:

MAHLOMOLA KHABO	PLAINTIFF
AND	
LESOTHO BANK	DEFENDANT

REASONS FOR JUDGMENT

Delivered on 25th March, 1994 whose reasons are filed on the 11th April, 1994 by the Honourable Mr. Justice W.C.M. Maqutu, Acting Judge.

In this matter Plaintiff who issued Summons claimed:

(a) Payment of the sum M368,424.00 being damages for unlawful retirement on or about 18th March, 1987.

(b) Payment of interest on the aforesaid amount *a temporae morae*.

(c) Costs of suit.

Summons were issued on 24th July, 1987 and Appearance to Defend was entered on 21st August, 1987. Defendant pleaded on or about 11th December, 1987. There was also a counterclaim but the counter-claim was later withdrawn on

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19th May, 1988. On 18th February, 1987 Plaintiff served Defendant with a request for further particulars to Defendant's plea. Defendant did not challenge this late request for further particulars to his plea. Surprisingly the parties held a pre-trial conference on the 12th May, 1989 before the further particulars to the plea were supplied. At paragraph (e) of the Minutes of the pre-trial conference Defendant promised to supply the further particulars dated 17th February, 1989 in the near future.

The problem arose when Defendant failed to supply further particulars to its plea even despite promises made fifteen months later at a pre-trial conference. There was a change of attorneys in November 1989. In April 1990 the matter was set-down for hearing on the 11th February, 1991. The matter was removed from the roll in February 1991.

More than two and a half years later on 22nd November, 1993 Plaintiff applied for an order to compel Defendant to supply the old further particulars.

Plaintiff set-down the matter for the 29th November, 1993 with the aim of striking out Defendant's Plea. The matter was heard by the Chief Justice. Mr. Sello appeared for Plaintiff and Mr. Molete appeared for Defendant. The Chief Justice condoned the 5 years' delay in supplying further Particulars and ordered Defendant to supply the

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further particulars within 14 days and directed that there should be no order as to costs. Still the Further Particulars were not supplied.

The failure of Defendant to supply further particulars in the circumstances of the case was definitely asking for trouble. This particularly so because Plaintiff had vigorously opposed the granting of any further indulgence to Defendant. It did not help matters to find Defendant's Attorney making an affidavit that the application for an order compelling him to furnish further particulars was irregular. It did not ask for dismissal at that stage. I am puzzled by Plaintiff's application before Cullinan CJ opposing an order that Defendant should be compelled to supply further particulars. I am further puzzled by the submission that Defendant should make a formal application for condonation. In terms of the Notice of application Plaintiff was exercising the option to get an order directing applicant to supply further particulars. This is what he should have stuck to.

Faced with an application that was contrary tot he Notice of Application Cullinan CJ in the exercise of his discretion said:-

> "I do not see why application for particulars could not, with condonation

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> be made from the bar. In any event I would condone lack of formal application."

The Plaintiff had not asked that Defendant's plea be struck off. This option was open to Plaintiff although the court in its discretion was not likely to grant it without giving Defendant a final chance to comply. Defendant should have been warned that Plaintiff's patience was strained.

Cullinan C.J. correctly took the view that he had broad powers in the matter. He entertained what amounted to a fresh application denying Defendant an opportunity to supply the further particulars. He had broad powers which are normally sparingly exercised because the Court in terms of Rule 59 the High Court Rules 1980

> "shall always have discretion, if it considers it to be in the interests of justice, to condone any proceedings in which provisions of these rules are not followed."

This Rule is in line with general principles that govern pleadings which are succinctly summarised by De Villiers JA in Shill v Milner 1937 AD 101 at 105:

> "the importance of pleadings should not be unduly magnified. The object of pleading is to define issues; .... For

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> pleadings are made for the Court, not the Court for pleadings ..."

No doubt Cullinan CJ was actuated by this principle when he gave Defendant every facility to further place all facts before the trial Court. There can be no doubt that delay of over five years in supplying further particulars was prejudicial to the Plaintiff.

Defendant still did not supply the further particulars after the 14 days that the Court had given it, despite the previous 5 years 9 months delay. Plaintiff was obliged to set the matter down for the striking out of Defendant's Plea and for judgment. The matter was supposed to be heard on 28th December, 1993. Both parties seem to agree that Plaintiff was prevailed upon not to pursue the application on the 28th December, 1993 Plaintiff attorneys got a letter from Messrs. Webber and Newdigate the Defendant's Attorneys confirming their conversation to that effect. Doubts had been expressed about the availability of a judge during recess. The letter confirms that Mr. Sello Attorney for Plaintiff would postpone the matter. It was stated in the letter that Mr. Roberts would attend to the matter after the 17th January, 1994 when the Christmas vacation ended. In this letter annexed to Plaintiff's papers the parties agreed by telephone that the matter would proceed on the 7th February, 1994.

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On the 29th December, 1993 Defendant lodged for leave to amend his plea. He also filed an application for condonation of late filing of further particulars. He filed the further particulars that Plaintiff had asked for almost six years ago. As already stated Plaintiff's case for the striking of Defendant's Plea and for judgment had been postponed the previous day at Defendant's request and parties had agreed that the postponed application for striking out the plea would be heard on 7th February, 1994. The crisp question for determination is whether having regard to the history of the case Defendant was free to amend his plea and to assume that the court would condone the late filing of the further particulars.

In Whittaker v Roos 1911 TPD 1092 at 1102 Wessels J. said:

> "This Court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts."

I associate myself with Wessels J's remarks.

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Nevertheless Courts come to the rescue of parties that *bona fide* find themselves to have made mistakes in pleading either through "a slip of the pen, or an error of judgment, or misreading a paragraph", Whittaker v Roos at page 1103. Where a party avoids putting its cards on the table and becomes even obstructive the Court is not obliged to come to his aid. In Mahlomola Khabo v Lesotho National Bank CIV/APN/325/93 where the same parties were involved, Defendant refused to supply the very particulars that have been sought since February 1988. At paragraphs 8 and 11 Defendant said he was not obliged to furnish any reasons for the retirement and concluded:-

> "Once again I respectfully submit that Respondent is under no duty to furnish the information."

Plaintiff in CIV/APN/325/93 had even applied for an order of costs on an attorney and client scale. Defendant was in failing to supply further particulars between the 22nd November 1993 and the 28th December, 1993 aware that Plaintiff regards the refusal to supply particulars as *mala fide* and obstructive.

In his affidavit in support of the application for condonation Defendant did not frankly deal with the cause of the delay or refusal to supply further particulars

timeously. The affidavits of Defendant's Attorneys showed they did all they could to get further particulars. They tried to make excuses for Defendant, but Defendant itself offered no explanation.

Like all matters in which an indulgence of the Court is craved for, it is very unwise to take it for granted that an application for amendment or for condonation will be granted. the history of this case and the case itself invited the questions whether or not Defendant in

> "applying for amendment or for condonation was not acting *mala fide*, or that by his blunder, he has done some injury which could not be compensated for by costs or otherwise."

Vide Trans-drakensberg Bank Ltd v Combined Engineering 1967(3) SA 628 at 638 quoting from Tildesley v Harper 10 Ch D 393 at 396, Caney J in Trans-drakensberg Bank (supra) at page 639 C added:

> "Where there is real doubt whether or not prejudice or injustice will be caused to the defendant if the amendment is allowed, it should be refused, but it should not be refused merely to punish the plaintiff for his neglect."

Defendant did not seem to be aware in making an

application for amendment and for condonation of the late filing of further particulars that he had caused a great deal of inconvenience and that his behaviour ought to have caused an injustice and a great deal of prejudice. Henochsberg J. in Zarug v Parvarthie No 1962 (3) SA 872 at 876 CD said:

> "An amendment cannot however be had for the mere asking. Some explanation must be offered as to why an amendment is required and if the application for amendment is not timeously made some reasonable satisfactory account must be given for the delay."

These conditions precedent to the making of the applications of this type Defendant was oblivious of. Very recently the Court of Appeal in the case of Molapo Mothuntsane and Others v Kopano Selomo and Another (C of A (CIV) No.16 of 1992 (unreported) warned litigants per Steyn J.A that:-

> "The authorities are clear that the Court will not grant a litigant the right to pursue his cause if he flagrantly disregards the provisions of the rules. After all the rules have been framed with the clear purpose of ordering litigation and of ensuring that disputes are brought to an end as expeditiously as possible."

If the Defendant was abandoning the imputation that the early retirement was a disciplinary measure he should have

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said so timeously however embarrassing that might have been. it is this evasion and lack of explanation that has caused Defendant's problems. It may be irritating for Defendant to explain what he was up to. What was said in Zarug v Parvarthie 1962 (3) SA 872 at 876 remains nevertheless true of the application for amendment Defendant was obliged to make. Henochsberg J put what the courts should never lose sight of in dealing with amendments in the following words:

> "No matter how negligent or careless ... and no matter how late ... the application can be granted if the necessity for amendment has arisen."

It is therefore unfortunate that Defendant unnecessarily had cold feet. He should simply have disclosed whatever blunders he had made to the Court and waited to see what the Court would do for him. Defendant's shilly-shallying has put Defendant in the uncomfortable position of being accused of contempt of court by Plaintiff. There are very many conflicting principles that the Court has to balance in exercising its discretion. Not all prejudice can be compensated by an order of costs. Even if prejudice cannot be compensated by an appropriate order as to costs it does not mean the Court is obliged to refuse an amendment. The modern practice is in favour of granting applications for amendment whenever the amendment facilitates the ventilation of the dispute between the

parties: Zarug v Parvathie (supra) at 877.

In this case I had problems as to how to assess damages in entering judgment in favour of Plaintiff. I perused the contract of service for "permanent staff" on which this action is based. I was puzzled by the word "permanent", it certainly raised very high expectations on the side of the staff. Clause 13 of that contract seemed to have negated the permanence of that contract. It provides:-

"13 NOTICE

Service with the Bank shall be subject to one month's notice on either side."

If employment can be terminated on one month's notice on either side, where is the "permanence". If Defendant had terminated Plaintiff's employment by retiring him after giving him one month's notice would Defendant have not complied with Clause 13? In Seloadi & Others v Sun International 1993 (2) SA 174 it was held that everything depends on the contract. If Plaintiff relied on a legitimate expectation that Plaintiff would be heard (before his contract was terminated in terms of the one month notice requirement such as Clause 13) the onus was on Plaintiff to prove such an expectation. The Court could not read it into the contract by implication. The Court felt it needed much

more than was on the papers in order to dispense justice. In other words this dispute could not be properly ventilated without in some way granting the Defendant's application, although the court does not however accept the manner in which they are brought.

The words of Corbett J.A in South Cape Corp v Engineering Management Services 1977 (3) SA 534 at 547 G are apposite where he said:

> "An approach, which started as a rational common sense exercise of the court's discretion, in time hardened into an accepted rule, which as stated in some later decisions, conveys a suggestion of inflexibility which, in my view, ... only contrary to the concept of the wide discretion which the Court undoubtedly enjoys in such applications ...."

In this case the Court found it was also in need of the amendment. I was obliged therefore to accommodate Defendant as I would not grant Plaintiff judgment with papers as they stood. Plaintiff argued that the amendment would be excipiable and the Court ought not to grant an excipiable amendment. See Curtis v Meyer 1973 (1) 1973(1) SA 363. Mr. Sello for Plaintiff was unable to persuade the Court that the amendment would render the Plea excipiable. Indeed in my view he could not say in what way the plea would be excipiable.

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The Defendant caused the Court considerable problems. It assumed that the amendment was in order and removed a page in the Plea and substituted a new one. Proceeding to amend in this way is permissible (where an amendment is not opposed in terms of Rule 28(9) of the Uniform Rules of the Supreme Court of South Africa. In Lesotho the Rules (though identical to South African Rules at places) are different. Rule 33(5) of the High Court Rules 1980 provides:-

> "Whenever the court has ordered an amendment or no objection has been made .... the party amending shall deliver the pleading or document as amended within the time specified ...".

In Lesotho a party is not allowed to disturb the original pleading by changing its pages. A new pleading has to be filed of record.

It is always wise for legal practitioners to check the Lesotho Rules lest they overlook the differences that occasionally occur between South African and Lesotho Courts Rules.

After a vigorous opposition of Defendant's applications, Plaintiff's counsel suddenly dropped his oppostiion to both of them. He had ventilated his client's grievances. This appears to have had a therapeutic effect. Nevertheless it was already clear that the court intended to

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grant them in some form.

Defendant wrongly assumed he was still entitled to give notice of amendment in the ordinary way. The doors had been firmly shut in his face when he failed to file further particulars within the extended period thereby causing Plaintiff to apply for the striking off of Defendant's Plea and for judgment. Until that application had been disposed of he could not file a notice of amendment at will. Defendant's problems were compounded by the fact that he himself had written a letter dated 28/11/93 in which he asked to be accommodated during the Christmas Vacation and proposing that the application for the striking off of Defendant's Plea be postponed to 7th February, 1994.

The view I took of Defendant's failure to comply with the Court's Order dated 29th November, 1993 directing Defendant to supply the further particulars is that all documents filed on the 29th December, 1993 are irregular steps. Plaintiff never condoned the filing of these documents. In terms of Rule 30 of the High Court Rules I direct that they should be set aside. In so doing I follow the judgment of Kheola J. (as he then was) in Morakeng v Ellis Morakeng CIV/T/739/88 (unreported).

Plaintiff did suffer prejudice and the Court rules were ignored in a manner I have not seen before. The Court has

no option but to order costs on an attorney and client scale. Both Counsel addressed the Court on this matter before the order was made.

In the light of the aforegoing it was ordered that:-

"(a) All papers filed on record from 29th December 1993 as Notice of Amendment, Further Particulars and withdrawals of portions of the plea are deemed irregular pleadings in terms of Rule 30 of the High Court Rules.

(b) Application for condonation of failure to supply further particulars is granted. Defendant is given 14 days to supply Further Particulars without prejudice to Defendant's right to seek to amend pleadings in the ordinary way.

(c) Defendant is ordered to pay costs on an attorney and client scale."

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W.C.M. MAQUTU
ACTING JUDGE

For the Plaintiff: K. Sello
For the Defendant: L. Molete