CIV\APN\171\93

IN THE HIGH COURT OF LESOTHO

In the matter between:-

'MATHABISO MOSALA Applicant

and

THE LESOTHO AGRICULTURAL DEVELOPMENT BANK Respondent

RULING ON POINTS RAISED IN LIMINE

Delivered by the Honourable Chief Justice J.L. Kheola on the 23rd day of May, 1994.

This is an application for an order in the following terms:-

1. (a) Dispensing with the periods of time of service provided for by the Rules of Court.

(b) Directing the respondent forthwith to unfreeze and access to the trustees of Cooperative American Relief Everywhere (C.A.R.E) the following accounts held with the respondent bank:-

(i) Account No.102403-0140
(ii) Account No.101866-0820
(iii) Account No.101866-0819

(c) Directing the respondent to pay for the costs hereof.

(d) Granting applicant such further and\or alternative relief as this Honourable Court may deem fit.

Mr. Molete, attorney for the respondent, has raised a number of points in limine. The first one is that there is no certificate of urgency attached to the Notice of Application in terms of Rule 8 (22) (c) which reads as follows:

> "Every urgent application must be accompanied by a certificate of an advocate or attorney which sets out that he has considered the matter and that he bona fide believes it to a matter for urgent relief."

Mr. Phoofolo, attorney for the applicant, admitted that there is no certificate of urgency in terms of the Rule stated above. He submitted that although the application was brought on urgent basis the respondent was duly served. He submitted that for that reason he suffered no prejudice whatsoever because having filed his notice of intention to oppose

the matter on the 26th April, 1993, he had all the opportunity to prepare for and to file the opposing affidavits. He applied to the Court to condone such failure to file a certificate of urgency.

It seems to me that the provisions of Rule 8 (22) (c) are mandatory because the word "must" is used. It means that every applicant who brings an urgent application has no choice but to file a certificate of urgency with such an application. If he does not do so the application is fatally defective and might be dismissed on that ground alone. The purpose of the Rule is to discourage applicants from bringing on urgent basis an application which is not urgent at all. An advocate or attorney of this Court is expected to consider the matter very seriously before he can make a certificate of urgency.

Mr. Phoofolo has submitted that the respondent has suffered no prejudice. I do not agree with that submission. Rule (8) reads as follows:-

> "In such notice the applicant shall appoint an address within 5 kilometres of the office of the Registrar at which he will accept

> notice and service of all documents in such proceedings, and shall set forth a day not being less than five days after service thereof on the respondent on or before which such respondent is required to notify the applicant in writing whether he intends to oppose such application and shall further state that if no such notification is given the application will be set down for hearing on a stated day, not being less than seven days after service on the said respondent of the said notice."

It is quite clear that in any application which is not urgent the respondent is given not less than five days after the application has been served on him to file a notice of intention to oppose. In the present case the respondent was given a period less than five days. It was served with the notice of application on the 23rd April, 1993 and the application was to be heard on the 26th April, 1993.

In other words the respondent was expected to file its notice of intention to oppose and its answering affidavit within four days after service. That was contrary to the provisions of Rule 8 (8) and therefore prejudicial to the respondent.

In terms of Rule 8 (10) (b) the respondent was entitled to a period of fourteen days after notifying the applicant of its intention to oppose the application to file its opposing affidavit. The respondent was denied this opportunity because the applicant set down the application for hearing within only four days after service of the notice of application on the respondent.

The applicant obviously intended the application to be an urgent one. In prayer 1 (a) he prays that the Court should dispense with the periods of time of service provided for by the Rules of Court. However that prayer was never granted by the Court. As a result the respondent was entitled to the normal periods of service prescribed by the Rules.

The "Form" used by the applicant is also very confusing. As I have said it seems that the intention

of the applicant was that the application should be treated as an urgent one. In which case she had to use Form "1" which appears in the First Schedule to the High Court Rules 1980. The "Form" used differs from Form "1" in many ways. It is addressed to the Registrar and to the respondent. It has the address of the applicant's attorneys at which the applicant will accept notice and service in the present proceedings. It seems to me that the applicant's attorney used Form "J" which is intended for applications which are not urgent. Again there was no substantial compliance with Form "J" in that paragraph (b) does not appear anywhere.

The "Form" used by the applicant's attorney is altogether unacceptable. It is so confusing that one cannot say whether this is an urgent application or any ordinary application. I cannot condone a rather complete disregard of the Rules of the High Court 1980. Only minor omissions can be condoned in terms of Rule 59 of the High Court Rules 1980.

In **Noulded Components and Rotomoulding South Africa v. Coucourakis and another** 1979 (2) S.A. 457 (W.L.D>) it was held that -

> "The Court will not exercise its inherent power to regulate procedure as a matter of course. The Rules are there to regulate the practice and procedure of the Court in general terms and strong grounds would have to be advanced to persuade it to act outside the powers provided for specifically in the Rules. Its inherent power must be exercised sparingly. The Court will only come to the assistance of an applicant outside the provisions of the Rules when the Court can be satisfied that justice cannot be properly done unless relief is granted to the applicant."

In Western Bank Ltd v. Packery, 1977 (3) S.A. 137 (T.P.D.) it was held that -

> "Only in those areas where the Rules of Court are silent is there still scope for exercising by the Court of an inherent power to grant orders "which would help to further the administration of justice". Provisional sentence procedure, in so far as the filing of affidavits is concerned, it certainly no longer such an area. Rule 8(5) is perfectly clear. The defendant may deliver an affidavit setting forth the grounds upon which he disputes liability and in such event the plaintiff shall be afforded an opportunity of replying thereto. There is no counterpart to the discretion which the Court is given in applications by Rule 6 (5) (c) to permit the filing of further affidavits and unless the Court has power under Rule 27 to allow a further affidavit, there is no

> power to permit the filing of such affidavit, unless it has to do with prevention of an abuse of the procedural machinery."

In the present case the Rules of Court are not silent. They are very clear and there is no justification in condoning their breach.

In the result the points raised in limine are allowed. The application is dismissed with costs.

(J.L. KHEOLA)
CHIEF JUSTICE

23rd May, 1994.

For Applicant - Mr. Phoofolo
For Respondent - Mr. Molete.