CIV/T/436/90

IN THE HIGH COURT OF LESOTHO

In the matter between:

LESOTHO LIQUOR DISTRIBUTORS (PTY) LIMITED PLAINTIFF

and

PITSO PHAKISA MAKHOZA DEFENDANT

J U D G M E N T

Delivered by the Honourable Mr. Justice G.N. Mofolo, Acting Judge, on the 18th day of October, 1995.

On the onset I wish to emphasise that this is an old matter in which summons was issued on 25th October, 1990 and a plea was lodged with this court on 11th February, 1991 and but for several notices thereafter the matter might have been determined.

Finally the matter was set-down by plaintiff's attorneys on 1st - 19th May, 1995 but when the matter was to proceed it appeared that defendant intended to brief senior counsel, did in fact brief such counsel but when the matter was about to proceed counsel protested shortage of time within which to take instructors and applied for extension of time. The application being opposed by the plaintiff I ruled that it was too early to decide whether, amongst other things, the postponement was motivated by delaying tactics and postponed my ruling as to costs to a period after the determination of the trial.

The matter was by consent of the parties postponed to 15th - 25th August, 1995 for hearing. In the meantime defendant's attorneys had served on plaintiff's attorneys notices of intention to amend dated 5th May, 1995 and 8th May, 1995 respectively. Before the postponement plaintiff's counsel had requested the court to give him time to consider the amendments adding that he reserved the right to oppose same. On the 11th May, 1995 plaintiff's attorneys replicated to defendant's amended pleas of 5th May and 8th May, 1995 respectively. On this score counsel for the defendant urged this court to find that this replication, in the absence of a notice opposing the amendments, that the amendments were not for the purposes of the law opposed and in any event, the plaintiff had waived his right to oppose the amendments.

Having, as I have said, reserved his right to oppose the amendments, plaintiff's counsel on 26th June, 1995 lodged a formal intention to oppose amendments of 5th May and 8th May, 1995.

In the said notice of intention to oppose proposed amendments dated 5 May and 8 May, 1995 the plaintiff raised the following objections, namely:-

(1) The amendments seemed to raise the defence of set-off and since the requirements for a proper plea of set-off are not present the amendments being therefore vague and embarrassing could not be allowed.

(2) The amendments related to transactions concluded in excess of a period of 6 years and the plaintiff was, accordingly, not obliged to keep records in excess of a period of six years.

(3) Because of the late period of the amendments the plaintiff was accordingly prejudiced.

In his Heads of Argument and before me Mr. Woker submitted that the amendments sought to introduce new defences and were not in the nature of amendments characterised by deletions and substitutions and that as they were vague and embarrassing they were therefore excipiable and could not be allowed. He also submitted that the records, going back a period of 10 years had been destroyed in ordinary course of business.

As for (1) above, I entirely agree that defendant's Notice to Amend alludes to and specifically raises set-off. It reads, inter alia:

> The Defendant avers that as at that date the Plaintiff was indebted to the Defendant in the sum of M158,696-91 being amounts over-paid by the Defendant to the Plaintiff in respect of the invoices set out in the annexure hereto.'

also

> 'In addition payments totalling M60,000-00 made by the Defendant during the period 22nd April, 1988 to the 30th May, 1988 have not been credited to Defendant's account with the Plaintiff.'

As far as this court is concerned, as this information is within the knowledge of the defendant, defendant should not have proceeded by way of amendment to his summons but should have

claimed in reconvention. In the event he should have counter-claimed and either I would have dealt with his counterclaim before delivering judgment in plaintiff's case or dealt with the issues simultaneously the defendant becoming plaintiff in reconvention. I also agree that this is an issue which should have been taken up timeously and that the delay in bringing it to the fore has accordingly prejudiced the plaintiff. It has prejudiced the plaintiff because as plaintiff has said, by reason of the inordinate delay in bringing the amendment, he has parted with documents which would enable him to meet defendant's intended amendment.

In several cases it has been held that the court will not allow an amendment which will make the pleading excipiable or objectionable in any way - see T.L.BROOK V. HIGGINS, 1932 W.L.D. 147; CROWTHER, 1947(2) S.A. 956(O). STUTTAFORD and Co. Ltd v. SCHER, 1931 C.P.D. 341; CROSS v. FERREIRA, 1950(3) S.A. 443(C).

Be this as it may, with regard to amendment of pleadings Rule 33 sub-rule (1) reads:

> 'Any party desiring to amend any pleading or document, other than an affidavit filed in connection with any proceeding, may give notice to all other parties to the proceeding of his intention to so amend.

sub-rule (2)

> 'such notice must state that unless objection in writing is made within fourteen days to the said amendments, the party giving the notice may amend the pleading or document in question accordingly. (I have underlined).

I have partly quoted defendant's intended amendment of 5 May, 1995 and have no intention of reproducing these amendments verbatim. Suffice it to say that both amendments do not contain sub-rule (2) above and I accordingly reach the conclusion that without provisions of the said sub-rule having been invoked defendant cannot be heard to say that his plea not being opposed is accordingly amended. If defendant had given plaintiff fourteen (14) days as is in law required and plaintiff had not opposed the application within fourteen (14) days, defendant's argument would, in the circumstances, hold good. I am saying this because sub-rule (2) of Rule 33 like in all pleadings operates as a notice of bar and if the defendant had taken advantage of it and barred plaintiff he would be entitled to the amendments sought.

Having lost his advantage and in the light of plaintiff's intention to oppose proposed amendments, it is my view that defendant should in the event have applied to court for leave to amend in terms of Rule 33 sub-rule (4) of the Rules of this court. There being no such application, I don't see how this court can come to the rescue of the defendant.

I now come to the second leg of Mr. Redelinghuy's argument, namely, that the defendant had waved his right to oppose the amendments.

It has been said that for there to be a waiver clear evidence is required - see HEPNER v. ROODEPOORT MARAISBURG TOWN COUNCIL, 1962(4) s.a 272(a); BORSTLAP v. SPANGENBERG, 1974(3) S.A. 695(A.); Moreover, it has been held that the onus is on the defendant - see also FEINSTEIN v. NIGGLI, 1981(2) S.A. 684(A.) and that the court will not consider it unless specifically pleaded - vide MONTESSE TOWNSHIP and INVESTMENT CORPORATION (Pty) Ltd v. GOUWS, N.O. 1965(4) S.A. 373(A.) DALE v. FUN FURS (PTY) LTD, 1968(3) S.A.264(O).

It has also been held that when the decision to abandon a right is relied upon the defendant must allege and prove the decision by plaintiff to abandon the right which is being asserted against him by the defendant and the decision must have been conveyed to the defendant - see TRAUB v. BARCLAYS NATIONAL BANK LTD., 1983(3) S.A. 619(A.) at p.634.

It has also been said that the decision to abandon can be proved in two way:-

(a) an express abandonment of the right

(b) an implied abandonment. The implied abandonment is proved by conduct plainly inconsistent with an intention to enforce the right now relied upon - see HEFNER v. ROODERPOORT - MARAISBURG TOWN COUNCIL above and BORSTLAP v. SPANGENBERG above.

In MONTESSE TOWNSHIP above it was also held at p.380H that

> 'There is no 'general proposition that a plaintiff who has two or more remedies at his disposal must elect at a given point of time which of them he intends to pursue, and that, having elected one, he is taken to have abandoned all others

nor, as was said in ZUURBEKOM LTD v. MNCON CORPORATION LTD. 1947(1) S.A. 514(A) and MATRABEER v. SHERMA, N.O., 1985(3) S.A. 729(A) does 'a delay to enforce a right amount per se to a waiver.'

It will also be noticed that in his replication of 9th May, 1995 plaintiff also took a point in limine as follows:-

> 'The plaintiff avers that the Defendant is precluded from relying on any suit based on the invoices referred to in the annexure to the Notice of Amendment dated 5th May, 1995 by reason of the fact that any suit based on the said invoices has prescribed. In this regard the Plaintiff relies on the Provisions of Section 4 of the Lesotho Prescription Act No.6 of 1861 in that a period in excess of eight years have passed since any cause of action based on the said invoices accrued.'

ALTERNATIVELY

> 'and in the event that the Plaintiff's special plea above fails the Plaintiff pleads over

I don't see how Plaintiff having reserved his right to oppose the amendments (a right open to him then), having replicated and in the replication having taken up a point of law and having followed up his reserved right to oppose the amendments by notice of intention to oppose the amendments can be said to have waived high right to oppose the amendments. The submission, like that before it that the amendments were not opposed, fails.

On 23 May, 1995 defendant lodged his 'Request for Further Particulars for Purposes of Trial' and required Plaintiff to supply an exhaustive and comprehensive list of sales, payments, transactions relating to empties, defendant's dishonoured cheques, other cheques issued by the defendant to the plaintiff specifying amounts and supported by invoices. At the same time defendant Lodged Notice to Discover in Terms of Rule 34(1) AND (10) in it defendant required the plaintiff to:

> 'herein to make discovery on oath within 21 (twenty-one) days of delivery of this notice, of all documents relating to any matter in question in this action, which are or have at any time been in possession or control of the Plaintiff.'

further

> "that defendant hereby requires Plaintiff to specify in writing not less than 14 days before the date of the above trial, particulars of dates or to any document intended to be used at the trial of the above action on behalf of the Plaintiff.'

also

> 'that any document not so disclosed may not be used for any purpose at the trial of the matter by the Plaintiff, unless the court order otherwise, provided that the Defendant may use such document.'

In his Heads of Argument and before me Mr. Woker for the plaintiff submitted that the applications were improper, mala fides and intended to delay the action. That the entire exercise was a delaying tactic in that the plaintiff had, for instance, discovered in terms of Rule 34(6). He submitted that if it was the intention of the defendant to ask for discovery a notice should have been filed to say defendant is not satisfied

with the discovery. This should have been done timeously and not on the day of the trial. The application could not be said to be genuine as it was brought the last minute. He referred to the Pre-Trial Conference Minutes of the 21st April, 1995 attended, amongst others, by himself and Attorney for the Defendant Mr. Redelinghuys and especially at p.2 of paragraph 2 which reads:-

> 2.
> 'The question of a bundle of documents was discussed. The plaintiff undertook to serve on the defendant a bundle of those documents the plaintiff intends using at the trial by close of business Wednesday 26 April, 1995. With regard to service of this bundle it was agreed that the plaintiff could serve the bundle on defendant's attorney at the defendant's attorney's office in Bloemfontein. The defendant undertook to serve on the plaintiff all those documents that the defendant intends using at the trial by close of business Wednesday 26 April, 1995.'
>
> 3.
> 'It was recorded that as at the date of the pre-trial conference the matter would proceed on 1 May, 1995. The defendant recorded that should he decide to apply for an adjournment he would immediately notify the plaintiff's attorneys thereof.'
>
> 4.
> 'It was agreed that the plaintiff would begin.'

From the foregoing, it is clear that apart from defendant's attorney reserving the right to apply for postponement if needs be, and plaintiff undertaking to serve 'a bundle of documents, on defendant which the plaintiff intends using at the trial there was no intimation by defendant's attorney that if he should find 'The bundle of documents aforesaid' insufficient or

unsatisfactory for purposes of trial he reserved the right to make such an application. From the minutes of the Pre-Trial Conference, it was not taken for granted, it was by both counsel for the plaintiff and defendant concluded that the trial would proceed on 1 May, 1995 unless defendant's counsel should apply for adjournment which he did and I allowed as I was not satisfied then that the adjournment was a delaying tactic.

I find it incomprehensible that having agreed in the Pre-Trial Conference that 'a bundle of documents' which 'the plaintiff intends using at the trial' there should thereafter, have been another request to discover. At the Pre-Trial Conference defendant's attorney having been satisfied with the delivery of the documents, which ones is he asking for now?

Mr. Woker further submitted that even if the application were properly made plaintiff had no documents to discover as, according to his Heads of Argument paragraphs:

> 17.
> plaintiff no longer has records relating to transactions that go back approximately 10 years. These have been destroyed in the ordinary cause of business. The only way that the plaintiff can address the amendments and show the court that there is no substance in the defence raised by amendments is by reverting to its records. If the records have been destroyed in the ordinary cause of business then the plaintiff can't deal with the defences. And the only reason why the plaintiff can't deal with the defences is because of the late stage at which they have been raised.'

18.

'My instructions are that the plaintiff records relating to 1985 and 1986 were destroyed in the ordinary cause of business in 1994. If the defendant disputes this I have a witness that I wish to call to prove it. If the defendant had raised the defence at the proper time then the plaintiff, would have been able to deal with them.'

19.

There is nothing unusual about a business destroying records in the ordinary cause of business after a long time. Even attorneys destroy closed files after a certain number of years.

(see: Wigmore on Evidence Vol. 4 paragraph 1199 p.354 and 355).'

20.

'The upshot of all the above is that if the amendment is allowed the plaintiff will be seriously prejudiced in that the plaintiff will not be able to deal with the new defence. The prejudice arises because of the lateness of the amendment and the defendant has only himself to blame for raising the defence so late.'

Significantly, although plaintiff's counsel offered evidence to show that records were destroyed, defendant's counsel did not insist on such evidence being called. Also, elsewhere in this judgment I have dealt with questions of prejudice and belatedness in making amendments and don't intend to repeat the same.

Concerning rules as to discovery of documents and their production there is a huge body of authority in this regard. It appears to me that where a plaintiff, as in this case, has discovered documents and is required to supply further documents, their supply will defend on whether the documents sought in the subsequent notice flow directly from the first set of documents.

It is as it should be because in supplying the first bundle the plaintiff may have omitted some documents of importance though, as Mr. Woker submitted, the documents must be specified and identified. Indeed this was the ruling in JONES v. MONTE VIDEO GAS cO.., 5 Q.B.D that the case is limited to a specific document which can be specifically described.

The ratio of the case above is that documents sought to be discovered subsequently to those already discovered must bear relevance and resemblance to those already discovered. No such documents are described or specified nor is there evidence that they bear relevance and resemblance concerning defendant's notices under review.

In BRITISH ASSOCIATION OF GLASS MANUFACTURES, LTD, 1912(1) K.B.., 369 the head-note reads:

> 'An admission by party required to make an affidavit of documents, that he has in his power or possession other documents relevant to the matters in issue, wherever the admission is found and in whatever shape it is made, may be a ground for requiring a further and better affidavit.'

and in BRITISH ASSONATION OF GLASS above Farwell, J. went on at p.377"

> 'The whole point of the rule is this: there must not be a conflict of affidavits as to the truth of an affidavit of documents. But if you can get an admission, there is no question of conflict; you have the truth out of the man's mouth and you can obtain a further order on his admission.'

There is also authority as expounded in BRITISH ASSOCIATION OF GLASS BOTTLE MANUFACTURES LTD v. NETTLEFORD, 1912 A.C. 709 to the effect that although as a general rule an affidavit of documents is conclusive against the party seeking discovery, in the absence of any admission in that or some other document by the party making the affidavit that he has in his possession or power other documents material and relevant to the issue, yet, where the affidavit is based upon a misconception of his by the party making the affidavit, and the court is practically certain that he has in his possession or power other relevant documents which ought to have been disclosed, and which he would have disclosed if he had rightly conceived his case, the court will order a further and better affidavit. The problem, as I have said, is that in his notices for further particulars for purposes of trial and Notice to discover plaintiff has neither specified nor identified documents sought to be furnished or discovered.

CRAFFORD v. LE ROUX, (1906) 23 S.C. 659 is an extreme case for, despite the general rule, where the respondent having admitted that certain documents might be in existence, but that, if so, that they were not in his possession the court refused an order for further discovery the court holding that an affidavit of discovery must be regarded as conclusive. In GAIN v. COLONIAL ORPHAN CHAMBER, 1927, C.P.D. 462 Sutton J.A. was of the

view that courts would not grant an application for further discovery except in very special circumstances.

On non-relevancy and non-possession Curlewis J. in BILBOROUGH v. MUTUAL LIFE INSURANCE Co. OF NEW YORK, 1906 T.H. 53 said:

> 'The conclusive character of the affidavit of documents generally, and in particular as to non-possession and non-relevancy No order for production can be made against a party unless he has directly or indirectly admitted possession and relevancy.'

But apparently as was decided in JAIT v. BOTHWELL, 1912 C.P.D. 60. the conclusiveness of an affidavit of discovery can always be challenged where mala fides can be shown; BILBOROUGH v. MUTUAL LIFE INSURANCE co. OF NEW YORK 1906 T.H. 53 at p.56 is a case in point where Curlewis J. said:

> 'It will not be sufficient for a company to produce a letter book, leaving applicant to grope through it. It is the company's duty to indicate specific letters relevant to the matters at issue.'

nor, as was said in WALLIS v. WALLIS v. CORPORATION OF LONDON ASSURANCE, 1917 W.L.D. 116 at p.120

> 'It is not sufficient to say generally 'correspondence' or a 'bundle of documents'. The documents must be identified

In FEDERAL WINE AND BRANDY Co. LTD v. KANTOR, 1958(4) S.A. 735 (E.C.D.) Wynne J. at p.752A warned:

> 'It seems almost supererogatory to state that between exhibits in a criminal case there is a 'nexus' which is absent from documents juxtaposed and described as 'a bundle of letters' or letters in a company's letter book where no reference is made to the subject-matter dealt with in such correspondence.'

Mr. Woker has submitted that concerning particulars required for purposes of trial it is such further particulars as are strictly necessary to enable a party to prepare for trial and that the particulars sought by the defendant are not strictly such as are required for purposes of the trial but are the kind 'as may be strictly necessary to plead' in terms of Rule 25(1) of the Rules of Court.

He has further submitted that a party is not obliged to supply those which are strictly necessary to make the other party to prepare for trial and has quoted The Wanson Co. of S.A. (Pty) Ltd. v. Establishments Wanson Construction de Material. Thermieqne Societe Anonyme, 1976(1) S.A. 275(T) as authority.

He has also submitted that the Request for Further Particulars for Purposes of Trial and further particulars supplied do not form part of the pleadings - vide TWEEFONTEIN UNITED COLLIERIES Ltd v. LOCKERS ENGINEERS, S.A. (Pty) Ltd, 1964(1) S.A. 186 (W.) though I would add that where particulars are furnished to a pleading, they become portion of the pleading - see AGINSKY v. JOHNSTONE, 1927 O.P.D. 280 and that conversely,

where no such particulars are furnished, they do not become part of the pleadings.

For reasons already stated the application for amendment is refused, as is the Notice to Discover and also the Request for Further Particulars for Purposes of the Trial.

On costs a couple of days before this trial was to proceed attorneys for both the plaintiff and defendant approached me in chambers to say although counsel for the defendant would be having applications to make there was the intention by the latter to have the matter postponed. After the applications were argued attorney for the defendant Mr. Redelinghuys moved that the matter be postponed and briefly his reasons were as follows:-

(1) That in view of the fact that the weekly roll of cases before the High Court had disclosed that this court would be seized with a criminal trial he had decided to stop Mr. Lapidos counsel for the defendant from attending the trial.

(2) The matter though set down had not proceeded in the past and there were times where it was removed from the roll for failure to proceed and applicant/defendant couldn't alone take the blame. Mr. Redelinghuys further submitted that allegations that defendant was responsible for delay in the prosecution of the trial could not be sustained.

I agree that whenever a criminal case features alongside a civil trial the tendency has been to proceed with a criminal trial, but this is a rule of practice than of law. If Mr. Redelinghuys had exercised his discretion properly he should have consulted his opposite number and come to court to ascertain what the attitude of the court was with regard to the civil trial.

As happened, it is not that the criminal trial did not proceed, but that there was no appearance at all and the court was left with biting its nails for boredom as there were no cases to proceed with.

Mr. Woker also submitted that the attorney for the defendant had not taken the court into his confidence and that the application coming late as it did and its lodgment unexplained, this amounted to mala fides and in the circumstances the court had to use a big stick to punish the defendant in the form of costs on an attorney-and-client scale. Several cases were quoted in support of the imposition of attorney-and-client costs.

But it appears that even in the absence of dishonesty, reprehensible conduct or grave misconduct, or when there is some defect relating to proceedings the court may award attorney-and-client costs. The list also includes gross failure to inform the court a fact which it was essential that the court should know or blameworthy conduct where the rules of court have been disregarded plus unreasonableness in the conduct of the litigation - see VAN DYK v. CONRADIE AND ANOTHER, 1963(2) S.A. 412(C) at p.418 TARRY & Co. LTD V. MATATIELE MUNICIPALITY, 1965(3) S.A. 131(E) ENGINEERING MANAGEMENT SERVICES (PTY) LTD v. SOUTH CAPE CORP. (PTY) ltd, 1979(3)S.A. 1341(w)1345: JAMES v. JOCKEY CLUB OF S.A. 1954(2) S.A. 44(W) 46

In MYBURGH TRANSPORT v. BOTHA t/a S.A. TRUCK BODIES, 1991(3)S.A. 310 at p.311, the Namibian Supreme Court held that in its discretion the court might allow the postponement but direct that applicant in a suitable case pay wasted costs of the respondent occasioned by such a respondent on the scale of attorney and client,.

> where the applicant for a postponement has not made his application timeously, or is otherwise to blame with respect to the procedure which he has followed, but justice nevertheless justifies a postponement in the particular circumstance of the case.

This case is on all fours with both the conduct of the application under review, the failure by defendant to lodge his application timeously and the wrong procedure which the defendant adopted.

Despite all this, while I find that there was gross unreasonableness by defendant to bring applications which could have been addressed earlier and timeously, I nevertheless do find that as to postponement there was no mala fides nor wanton disregard of court rules or procedures by the defendant's attorney but that his was an error of judgment on his part.

Accordingly plaintiff is awarded costs of the application on an attorney-and-client scale and costs of the postponement on party and party scale.

In conclusion, I must state in no uncertain terms that the court's patience is wearing thin as there does appear to be an effort to delay the determination of this trial which, in any event, must proceed as scheduled today on 18th October, 1995.

G.N. MOFOLO
Acting Judge
17th October, 1995

For the Applicant: Mr. Woker
For the Defendant: Mr. Redelinghuys