

IN THE HIGH COURT OF LESOTHO

In the matter between:

MAMOKHAKALA R. KENTE

PLAINTIFF

and

METROPOLITAN LIFE LIMITED

DEFENDANT

R U L I N G

Delivered by the Honourable Mr. Justice G.N. Mofolo
on the 8th day of December, 1995.

This is a matter in which the Plaintiff is claiming from the
Defendant:

- (a) Payment of M53,931-46 (Fifty-Three Thousand, Nine Hundred and Thirty-One Maloti and Forty-Six Cents) being commission reserve that accrued to the Plaintiff;
- (b) Payment of M4,993-23 (Four Thousand, Nine Hundred and Ninety-Three Maloti and Twenty-Three Cents) being commission in respect of 23 policies of insurance;
- (c) M446-21 (Four Hundred and forty-six Maloti and twenty-one cents) being sponsorship account;
- (d) M10,188-53 (Ten Thousand, One Hundred and Eighty-Eight Maloti and fifty three cents) being deductions made from commission entitlements;
- (e) The sum of M166-42 (One Hundred and Sixty-Six Maloti and forty-two cents) being plaintiff's contribution towards Metropolitan Homes Trust Life Group Life Assurance Scheme;
- (g) Costs of suit;
- (h) Further and/or alternative relief.

A number of amendments were made to plaintiff's declaration: thus claim (a) above was altered to read M3,616-58 and M759-59 of paragraph 8 of the declaration was deleted as settled.

The Plaintiff 'Mamokhakala Rebecca Kente gave evidence in course of which it appeared that she was referring to certain documents which should have formed part of these proceedings. In the course of his examination-in-chief, MR. MAFANTIRI for the plaintiff kept on referring to a number of documents held by the plaintiff and yet the plaintiff was led to the end and cross-examined by MR. MARE counsel for the defendant to the end without the documents being handed in.

It was after MR. MARE had completed his cross-examination that MR. MAFANTIRI moved to have the documents handed in. He applied that commission statements, pay slips, a document reflecting that a sum of M1,500 would be credited to plaintiff's account plus a document showing how a sponsorship account was to be charged be handed in. He said that the documents had not been covered by the pleadings and the reason for not tendering them timeously was not plaintiff's fault but the fault of the lawyer who handled the documents. He had himself been a replacement and had to study the documents before handing them in.

It is difficult to comprehend what was happening in plaintiff's counsel's office for in reply to defendant's request

for further particulars plaintiff in his further particulars had submitted annexures "MRK1", "MRK2", "MRK3", "MRK4", "MRK5" and "MRK6".

If these documents did not form part of annexures much the same way as other annexures above because, as Mr. Mafantiri submitted, of change of counsel seized with this matter, I fail to comprehend why, as Mr. Mafantiri was in course of leading the plaintiff in evidence-in-chief, did not apply to have these documents handed in but waited until the plaintiff had been cross-examined.

It must be borne in mind though that when Mr. Mafantiri applied for the handing in of the documents it was during plaintiff's case and in course of evidence by the plaintiff herself. Mr. Mare seemed to be emphatic though that the plaintiff having lost her opportunity during evidence, not having annexed the documents to her declaration or when asked for them in request for further particulars or notice to discover, that it was too late to have the documents handed in.

I have referred to the Rules of this Court and have found paucity of authority or guidance in the rules as to what happens where, as in this case, new issues arise in the plaintiff's case necessitating the plaintiff to hand in evidence that did not form part of the pleadings. This, notwithstanding, it appears that

ordinarily a plaintiff is expected to have documents which form the basis of the claim to be annexed to the declaration as I have said. Where this is not done at least such documents must be specifically referred to in the pleadings and unless they form part of the pleadings, as Mr. Maree for the defendant has contended, they are excluded.

More appropriately, in *ESTATE GREEN & OTHERS v. UNION GOVERNMENT* (Min. of Lands), 1915 C.P.D. 377 Kotze' J. said:

The rule no doubt is that, if a right of action is founded on a document, either a copy of the document must be annexed, or the portion thereof on which the plaintiff relies must be set out in the declaration.

And in *SOUTH AFRICAN INDEPENDENT ORDER OF MECHANICS AND FIDELITY BENEFIT LODGE v. GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION LTD.*, 1916 C.P.D. 457 Gardiner J. quoting *Estate Green* above said at p.462:

The plaintiff is not bound, when he relies upon a written document, to annex the whole of it: it is sufficient if he sets forth the portion upon which he relies.

If this matter of handing in of documents is so far shrouded in obscurity, *FERREIRA DEEP, LTD v. OLVER*, 1903 T.S. 86 elucidates the darker side where Innes C.J. (as he then was) replying to Gregorowski for the respondent (defendant) who had submitted that the present practice was to regard such a document, if referred to in the pleadings, as embodied therein, and therefore a document in the cause, said on p.88:

No hard and fast rule has been laid down on the subject . Where a plaintiff, for instance, claimed as a cessionary of an original contracting party through a series of cessions, it could hardly be necessary to annex all the deeds. In such cases it would be sufficient only to refer to the document in the pleading.

But then such documents would not be before court until put in at the trial of course when a document is material it should either be annexed or the material part cited in the pleadings.

The documents the plaintiff wished to hand in are, unquestionably, material, they have not been annexed to the pleadings nor has their material portions or parts been cited in the pleadings.

As I have said, I found nothing in the Rules of this court either to guide or authorise this court in this behalf. The closest is Rule 33 whose sub-rule (9) reads:

Nothing in this Rule shall be deemed to prevent any party applying to the trial court during the trial for an amendment of any pleading or document, at any time before judgment and the court on such application may grant or refuse the amendment and if granting it may make such order as to costs or adjournment or both, or otherwise as it thinks fit.

The applicant as I have said has made her application in course of her evidence and before judgment, although the applicant has not followed the accepted practice having relied on her attorneys of whom she informed me she handed the documents

to them concerning this action. I am not inclined in this particular case to punish the plaintiff because of the faults of her counsel.

The application to hand in documents as requested by the plaintiff is granted.

However, I find that this application was totally unnecessary and needlessly encroached on the time of this court and time of the defendant. Consequently, as plaintiff's application was without merit and the granting of it was dependent on the indulgence of the court, the plaintiff is ordered to pay costs of this application.

~~G.N.~~ MOFOLO

JUDGE

6th December, 1995.

For the applicant: Mr. Mafantiri

For the Defendant: Mr. Maree