C OF A (CIV) 34/95

**IN THE LESOTHO COURT OF APPEAL**

In the matter between:

**PITSO PHAKISI MAKHOZA** **APPELLANT**

**AND**

**LESOTHO LIQUOR DISTRIBUTORS** **RESPONDENT**

HELD AT: MASERU

**CORAM:**
**BROWDE JA**
**KOTZE JA**
**LEON JA**

**J U D G M E N T**

**BROWDE JA**

On the 11th October 1990 the respondent, a liquor distributor, issued summons against the appellant hotelier claiming the price of goods sold and delivered during the period 21 November 1986 to 30 June 1989. It is a sad commentary on the way in which the suit has been conducted that the matter has not yet come to trial and this appeal is concerned with technicalities relating to amendments, particulars for trial, discovery and awards of costs in the court a quo. A resume' of the proceedings thus far is as follows:-

(i) In the declaration dated 11 September 1990 the respondent set out details of a series of invoices showing the date, the invoice amount, payments made in respect of each invoice, credits for "empties" and the balance due on each invoice.

(ii) After being served with a notice of Bar on 6 February 1991 the respondent's plea was served on 11 February. The defence raised in the plea was not much more than a bare denial. The best the pleader could apparently do was to deny that the annexure setting out the invoices "correctly reflects the payments", that "(respondent) failed to deliver all the liquor ordered" and "No liquor which was delivered remains unpaid".

(iii) A request for further particular to the plea followed asking, inter alia, for details of the liquor which the appellant alleged was not delivered. This request was served on 25 February 1991.

(iv) Having received no response to the request the respondent, on 15 April, served a notice in terms of Rule 30(5) of the Rules of Court, that it intended making an application to court to compel the appellant to furnish the particulars sought. On 6 May 1991 some particulars were furnished but were so vague and inadequate that ultimately, and on 2 December 1991 the application in terms of Rules 30(5) culminated in an order of Court compelling the appellant to furnish the particulars sought.

(v) On 14 February 1992 the appellant furnished particulars including details of the invoices which he admitted and also the debits which he denied. At that stage he was not able to "identify the allegedly incorrect payments" and stated that when he could identify them he would make application to amend his plea.

I pause to say that one would have thought that the pleadings were then sufficiently detailed to enable the parties to air their differences in Court. That was in February 1992 and it is quite appalling that technicalities could be exploited for the next four years thus avoiding the trial court's pronouncement on the merits to this

day.

(vi) On 31 March 1992 by order of Kheola J. (as he then was) the appellant's failure to file supplementary further particulars was condoned and the appellant was ordered to pay the costs.

(vii) The trial was set down to be heard on 23 August and ten days thereafter. However for reasons which do not appear from the record the matter was removed from the roll and set down again a number of times until, on 10 February 1995, it was set down for trial over the period 1 to 19 May 1995.

There can of course be no doubt that the appellant by that time had had more than sufficient time in which to do all the research he needed to say exactly what he admitted and what he denied receiving and paying for during the period covered by the claim which was, as referred to above, 1986 to 1989.

(viii) A pre-trial conference was held on 21 April 1995 at which the respondent asked the appellant to admit that he was a hotelier trading as Hotel Malunga as pleaded in the declaration. The appellant said he "would revert". It was agreed between the parties that the respondent would compile a bundle of the documents it intended using at the trial and would serve the bundle on the appellant's attorneys while the defendant undertook to do the same and to effect service of his bundle on the respondent by 29 April 1995. It was also recorded that the matter would proceed on 1 May and that should the appellant decide to ask for an adjournment he would immediately notify the respondent's attorneys thereof. No reason was given nor, it seems, was there any suggestion at that stage as to what could arise which might cause the appellant to ask for "an adjournment."

(ix) The matter did not proceed on 1 and 2 May 1995 because those days were public holidays and on 3 May 1995 the appellant did indeed seek an adjournment to obtain the services of counsel and to accommodate the appellant, it was agreed to commence the trial on 9 May 1995.

(x) On Friday 5 May 1995 the first of two notices of amendment was served on the respondent and on Tuesday 9 May (the date on which the hearing was to start) the second notice of amendment was served on the respondent .

It is quite inexplicable why the appellant should have come to court without counsel and then, after having had three years in which to consider the case, should have, at the doors of the court so to speak, then have sought to amend his plea on two separate occasions.

(xi) The respondent, having been given 158 cheques which the appellant now alleged had not been taken into account by the respondent, required time to consider them and asked for an adjournment for two days i.e. until 11 May. On the 9th however, the respondent filed a formal replication joining issue on the plea with the amendments sought. In the judgment of Mofolo J, against which this appeal has been brought, it is recorded that when the amendments were to be considered by the respondent, counsel stated that respondent reserved its right to oppose them. Despite this reservation of rights the appellant now contends that by filing the replication the respondent waived its right to oppose the amendments. I shall return to the submission made by Mr. Wessels on behalf of the appellant later in this judgment.

(xii) The period between 9 May and 11 May proved to be insufficient to enable the respondent to investigate the new allegations properly, and the matter was postponed by consent to 15 August 1995. On 26 June 1995 the respondent gave notice of its intention to oppose the amendments.

One of the grounds for opposition was that as the amendments related to transactions "in excess of a period of 6 years ago" the respondent would be prejudiced if the amendments were allowed since the respondent was not obliged to keep records for that long a period. It seems to me, that although it is not expressly stated, it was clearly implied that the respondent had destroyed the documents which were necessary to contest the new ground sought to be covered by the appellant.

(xiii) On 17 July respondent filed its discovery affidavit with details of the documents which appear to be relevant to the claim which, as pointed out by Mr Woker for the respondent, consisted of a series of sales each with its individual price, each invoiced separately and in respect of each of which delivery was alleged to have been made.

Although Mr Wessels submitted before us that the affidavit of discovery did not strictly conform to Form O in the schedule to the Rules of Court the only response which seems to have emanated from the appellant at the time was, on 1 August 1995, to call for production of the documents referred to in the affidavit.

(xiv) The matter came before Mr Justice Mofolo on 15 August 1995 and it was then that the questions arose which led to the findings of the court a quo and the present appeal against those findings with particular reference to the refusal of the learned judge to allow the amendments to the plea and the findings that the filing of the replication in the circumstances did not amount to a waiver by the respondent of its right to oppose the amendments.

The refusal to allow the amendments

**In G.M.F. Kontrakteurs (Edms) Bpk vs Pretoria City Council 1978 (2) SA 219**

Franklin J. considered how a court should exercise its discretion in deciding upon an application to amend a plea. He first approved of the judgment in **Zarug v. Parvathie** N.O 1962 (3) SA 872 in which it was stated by the court that

> "No matter how negligent or careless the mistake or omission may have been and no matter how late the application for amendment may be made, the application can be granted if the necessity for the amendment has arisen through some reasonable cause, even though it be only a **bona fide** mistake.

> An amendment cannot however be had for the mere asking. Some explanation must be offered as to why the amendment is required and if the application for amendment is not timeously made some reasonably satisfactory account must be given for the delay. Of course, if the application to amend is **mala fide** or if the amendment causes an injustice to the other side which cannot be compensated by costs, or in other words, if the parties cannot be put back for the purposes of justice into the same position as they were in when the pleading it is sought to amend was filed, the application will not be granted."

The learned judge then went on to consider the authorities dealing with "prejudice" and came to the following conclusion

> "Overall, therefore, is the vital consideration that no amendment will be allowed in circumstances which will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement. Where there is a real doubt as to whether or not prejudice or injustice will be caused to the other party if the amendment is allowed, it should be refused, but not merely to punish the party seeking the amendment for his neglect. See **Trans-Drakensberg Bank Ltd v Combined Engineering** 1967 (3) SA 632 (D) at 638-639.."

In the present case not only has there been no explanation for the years of delay in bringing the application for the amendments but in my judgment there is a real doubt as to whether or not prejudice or injustice will be caused to the respondent. Mr. Wessels urged us to find that there was no evidence on record that the documents needed by the respondent to meet the new matter raised in the amendments were destroyed by the respondent nor that such destruction was reasonable in the circumstances.

Mr. Woker, however, informed us that on the day of the hearing there was in court a witness who was available to give evidence on behalf of the respondent that its records, which were essential for the respondent to meet the new defence raised, were destroyed "in the ordinary course of business" in 1994. Counsel referred us to his heads of argument in the court a quo in which, in regard to the evidence in question, it is stated, "If the defendant disputes this (viz the destruction of the documents) I have a witness that I wish to call to prove it." Mr. Woker went on to say that there was no dispute raised. In fairness to Mr. Wessels it should be said that he did not appear in the court below.

In the light of the foregoing, and particularly in view of the onus being on the appellant to prove his entitlement to the amendments sought, I am of the opinion that had they been permitted the amendments may well have prejudiced the respondent. That being so, in my judgment Mofolo J. correctly refused the application relating to the amendments.

I now turn to consider the question as to whether or not, in the circumstances, the filing of the replication constituted a waiver of the respondent's right to oppose the amendments.

In **Collen v Reitfontein Engineering Works** 1948 (1)SA 413 (AD), Centlivres JA (as he then was) said at p 436:-

> "Apart from the fact that it would be too late, in the absence of pleadings alleging

> waiver and in the absence of any contention of waiver before the trial Court, to raise the defence of waiver before an appellate tribunal, it should be pointed out, as INNES, C.J., stated in **Laws v. Rutherford,** 1921 A.D.261, that the **onus** of proving waiver is strictly on the party alleging it and he must show that the other party with full knowledge of his right decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it."

see too, **MONTESSE TOWNSHIP AND INVESTMENT CORP. V. GOUWS AND ANOR. 1965 (4) SA 373 (AD)**

Mr Wessels submitted that once the respondent filed the replication which he said was "on face value unconditionally", such step clearly indicates an explicit or, at least, a tacit concession of a lack of opposition to the amendments. He urged that had the trial gone on on the 11th May the pleadings would have been considered closed and the replication would have been the instrument of their closure. It seems to me that that approach begs the question. The trial did not proceed on the 11th May and when the adjournment was sought by the respondent in order to consider the proposed amendments counsel specifically placed on record that it the respodnent reserved the right to oppose the amendments should it decide to do so. In the face of that reservation, which would not have been necessary if all that the respondent wanted was to preserve its rights during the two days of the adjournment. I do not think that the filing of the replication (even though Mr. Woker candidly stated that it was filed so that the trial could continue) in the circumstances of this case and by itself shows that a decision was taken by the respondent to abandon its right to oppose the amendments in the

event of the trial not commencing in August 1995. There were several other points argued before us namely

(a) Whether it is necessary to file a counterclaim if one wishes to take advantage of an alleged set-off and

(b) Whether the learned judge a quo was correct in holding that the defendant was not entitled to particulars that it sought "for the purposes of trial" and

(c) Whether the learned judge misdirected himself when he decided that the appellant was not entitled to require the respondent to make further discovery of documents.

As I read the judgment point a) above is academic once the learned judge is found to have correctly refused the amendments on other grounds. Prima facie, however, I think Mr Wessels' submission to the effect that set-off occurs automatically and that a counterclaim is unnecessary is supported by authority and is well-founded.

As to (b) this is a matter strictly for the exercise of his discretion by the learned judge and, assuming without deciding that it is appealable, nothing that has been said before us has persuaded me that this court should interfere.

With regard to (c) - the submission that the court a quo erred in not ordering the respondent to file a further discovery affidavit - I am of the view that the rules of court make no provision for such an order. Rule 34(6) makes provision for the situation where a party has reason to believe that the other party has not made full discovery. That sub-section was not invoked by the appellant in this case. Mr. Wessels referred to Rule 34(14) and submitted that that indicates that a party which has made discovery can be called upon to discover again. In my view that is fallacious. As I read the Rule, sub-section 34(14) provides a mechanism wheereby a party can be called upon to make discovery during the course of an action if such party has not already made discovery pursuant to Rule 34(1), (2) and (3). As respondent made discovery on 17 July 1995 i.e. a month before the trial was to start the complaint raised at the trial that the affidavit of discovery was defective for the reason set out above can only be regarded as one of many examples of the appellant's efforts to take every technical point in order to prolong the matter.

As far as costs are concerned I can see no reason to interfere with the order of the judge a quo. In fact I agree with his approach and his order. I can also see no reason why the appellant should be mulcted in the costs involved in its preparation of the additional documents which should properly have been included in the record by the appellant.

Mr. Woker has asked that the appeal should be dismissed and that costs be awarded on the attorney and client scale. As indicated in this judgment some of the points raised by Mr Wessels required serious consideration and I have therefore decided, hesitantly I may say, not to accede to the submission regarding the scale of costs.

The appeal is dismissed with costs such costs to include the costs involved in preparing the volume of additional documents. I would recommend to the Registrar that the trial in this matter be given preference on the trial roll in an effort to avoid any further delaying tactics which the appellant may have in mind. I think I should point out once again that I do not intend to criticise Mr. Wessels whose sole role, as far as I am aware, has been to argue the appeal which he did with candour and ability.

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**J. BROWDE**
**JUDGE OF APPEAL.**

**I agree** .....
**G.P.C. KOTZE**

**I agree** .....
**R.N. LEON**

**Delivered at Maseru on .....day of June, 1996.**

**For Appellant -**
**For Respondent -**