CIV/T/588/95

IN THE HIGH COURT OF LESOTHO

In the matter between

R. CARLOS — **FIRST PLAINTIFF**
M.R. VAN GEMERT — **SECOND PLAINTIFF**

and

THE GOVERNMENT OF THE KINGDOM OF LESOTHO — **FIRST DEFENDANT**
THE ATTORNEY-GENERAL — **SECOND DEFENDANT**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
on the 13th day of December 2000.

This is an application for the extension of time within which to file Defendants' amended plea. The application is made in terms of Rule 26 (4) of the High Court Rules 1980 which reads as follows:

> **"Notwithstanding anything contained in these Rules the court may, upon application by any party and on notice delivered to other parties and on good cause shown make an order extending any time prescribed by these Rules for delivering any pleading or for taking any step in connection with the proceedings."**

It will also be convenient to have regard to the provisions of sub-rule 26 (5) which in turn provides as follows:-

> **"Any such extension may be ordered by the court although the application therefor is not made until after the expiry of the time prescribed or fixed."**

Before dealing with the merits of the application it is necessary to set out a brief historical background of the litigation between the parties thus far.

It all started on the 2nd day of November 1993 when a Royal Lesotho Defence Force helicopter carrying some equipment and the two plaintiffs crashed at Mohale Dam site allegedly causing severe injuries to the plaintiffs who subsequently issued summons against the Defendants for damages arising out of such injuries. The first plaintiff claimed the sum of M12,161,432-00 while the second plaintiff sued for M249,879-79.

At the close of plaintiffs' case at the trial this Court granted absolution from the instance on the ground that the plaintiffs' case was struck by the Carriage By Air Regulations 1978 read with the principal Act namely the Carriage By Air Act 1975. This decision was however reversed by the Court of Appeal in C of A (CIV) No. 31 of 1998.

In its judgment the Court of Appeal held that there was no express term in the agreement between the plaintiffs and Royal Lesotho Defence Force (embodied in the

written order by the former dated the 29th October 1993) to the effect that the hired helicopter was to carry persons. Defendants' reliance on "implied terms of agreement" to the effect that persons would necessarily be carried on the helicopter was rejected by the Court of Appeal on the ground that it was not pleaded and that "the pleading could not have conveyed either to appellants (the plaintiffs) or to the court what respondents' (Defendants') case was."

Apart from the pleadings the Court of Appeal held that even "on the evidence adduced at the trial it cannot be said that there was an implied term in the contract for the hire of the helicopter that was to include the carriage of persons" adding that such an implied term would in any event be at variance with the clear express terms of the order form. Accordingly the Court concluded that the plaintiffs were entitled to institute a common law delictual claim for damages.

Against the above mentioned background the Defendants subsequently served a Notice in terms of Rule 33 on the plaintiffs' attorneys on the 21st day of February 2000 in terms of which they proposed to amend their plea in the following respects:

> "1. **By the deletion of the existing paragraphs 5.1 and 5.2 of the Plea and by the substitution therefor of the following:**
>
> "5.1 **The Defendants admit that an oral agreement was reached between Rodio and the Royal Lesotho Defence Force after a written order was received by the Royal Lesotho Defence Force. The Defendants further admit**

that annexure "A" to the further particulars is a copy of the written order.

5.2 In terms of the oral agreement a helicopter was to be provided by the Royal Lesotho Defence Force for hire which hire was for the carriage of Rodio's equipment and personnel to *inter alia* bore sites on the western slope of the Senqunyane River, in Lesotho at the hourly rates provided for in annexure "A" to the further particulars."

2. By the addition of a further sub-paragraph to paragraph 5 as follows:

"5.4 The Defendants further aver that by virtue of paragraph 5.2 above the carriage of the Plaintiffs in the helicopter in question was a carriage for reward as contemplated by the Carriage By Air Regulations, 1978 and that by reason thereof the liability of the Royal Lesotho Defence Force is limited to Maluti 40 000 per Plaintiff and that the Plaintiffs have no common law claim."

3. By the addition of the following paragraph 5A as follows:

"5A **In the alternative and in the event of it being held that the written order, annexure "A" to the further particulars, constituted the agreement between the parties then the Defendants plead an implied term to the effect that the said carriage would also be for the conveyance of Rodio's personnel for reward as set out in paragraph 5.2 above."**

Mr. Penzhorn S.C. for the Defendants submits that the motivation behind the proposed amendment is to make it perfectly plain to the plaintiffs and the Court what exactly the Defendants' case is particularly in view of the above mentioned remarks by the Court of Appeal that the original pleading "could not have conveyed either to appellants (plaintiffs) or to the court what respondents (Defendants') case was."

Despite the fact that the plaintiffs' attorneys were admittedly duly served with the Defendants' notice of intention to amend their plea they did not file any objection in writing thereto within 14 days allowed by Rule 33 (2). Significantly the plaintiffs failed to file such objection up to the stage when the matter was argued 9 months later namely on 27th November 2000. Indeed as I deliver this judgment today no such objection has been served on the Defendants or filed of record. I shall accordingly take this factor into consideration in determining the matter.

It is common cause that the Defendants' Amended Plea was not filed within the time prescribed in Rule 33. The Amended Plea was only served on the Plaintiffs'

attorneys on 16 October 2000.

Instead of filing an objection to the proposed amendment as required by Rule 33 the Plaintiffs served the Defendants with a "Notice in terms of Rule 30" on the 14th November 2000 in which they proposed to strike out as an irregular step the delivery by the Defendants of the "Defendants' Amended Plea" on the ground that it was not filed within the time prescribed by Rule 33 and that consequently, so it was alleged, the Notice of Amendment lapsed. I shall revert to this aspect of the matter later.

It becomes necessary then to refer to Rule 33 in order to appreciate the pros and cons of the drama that has unfolded. Sub-rules 33 (1), (2), (3), (4) and (5) shall suffice for now and they read as follows:-

> "33 (1) **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 proceedings of his intention so to amend.**
>
> (2) **Such notice must state that unless objection in writing is made within fourteen days to the said amendment, the party giving the notice may amend the pleading or document in question accordingly.**
>
> (3) **If no objection in writing be so made, the party receiving such notice shall be deemed to have agreed to the amendment.**
>
> (4) (a) **If any objection be made within the said period,**

the party wishing to amend, shall within seven days of the receipt of such objection apply to court, on notice to all other parties that he will apply to court for leave to amend.

(b) such notice shall state the date when the application will be heard which date must be not less than ten days from the date on which the notice is given. The applicant shall at the same time set down the matter for hearing on such date.

(5) Whenever the court has ordered an amendment or no objection has been made within the time specified in sub-rule (2), the party amending shall deliver the pleading or document as amended within the time specified in the court's order or within seven days of the expiry of the time prescribed in sub-rule (2) as the case may be."

As I read sub-rule 33 (3) I am satisfied that by failing to serve the Defendants with a notice of objection in writing to the proposed amendment the plaintiffs are "deemed" to have agreed to the amendment and I so find. Accordingly I consider that this is a factor in favour of the Defendants in the determination of this matter.

I turn then to the Defendants' explanation as to why the notice of amendment to their plea and the resultant amended plea were not filed timeously as provided for by Rule 33. That explanation is contained in the affidavit of Defendants' attorney Mr. Daniel Gerhardus Roberts which doubles as a founding affidavit for condonation for the late filing of the amended plea as well as an opposing affidavit to Plaintiffs' Rule30 application.

In a nutshell Mr. Roberts' explanation which is uncontroverted and which I

accordingly accept as correct on the principle laid down in Plascon-Evans Paints (Pty) Ltd. v Van Riebeeck Paints (Pty) Ltd. 1984 (3) SA 623 AD at 634-635 is that he was unable to file the Notice of Amendment timeously because the Court file could not be found and as a result the High Court Registry "refused to accept" it as they feared the process "would simply get lost if not immediately lodged in the court file". It was only on the 13th April 2000 that the High Court registry agreed to "stamp" the Notice of Amendment without retaining it. The problem of the missing court file continued then as it continues to this day, a fact which I duly placed on record at the hearing of this application before me on 27th November 2000.

In paragraph 27 of his affidavit Mr. Roberts avers that he conveyed to plaintiffs' attorney Mr. Speier his problem in filing the amended plea in view of the missing court file. He avers that the latter "indicated that the amended plea could be filed when the file was found." This material averment is not denied in the affidavit of Mr. Speier and I accordingly accept it as correct.

What Mr. Speier does dispute in his affidavit though is Mr. Roberts' allegation that some time after service of the Notice of Amendment he had a telephonic discussion with Mr. Speier in which the latter "indicated that he had seen the proposed amendment and that he did not intend opposing it." It is strictly not necessary to determine who is being uncandid with the Court on this issue except to express dismay that this scenario should have developed at all. Attorneys are decidedly men of honour serving an honourable profession and should be able to rely on each other's word. It is a sad day when attorneys effectively call each other liars and this can only bring the Court and the whole administration of justice into disrepute.

Be that as it may I consider that the Plaintiffs' failure to object in writing to the proposed amendment by the Defendants is decisive. Probabilities and logic dictate that there was no objection because the Plaintiffs' attorneys did not intend opposing the proposed amendment.

What I think has happened, again on probabilities, is that after the plaintiffs' attorneys had decided not to object to the proposed amendment they received negative advice from Counsel who, according to Mr. Speier himself, felt that the amendment constituted a withdrawal of an admission which could not be done without an adequate explanation - a submission which was repeated in argument before me. The bottom line, however, is that Counsel's perceived objection to the proposed amendment was never formalised by following the procedure laid down in Rule 33 and that being the case the Defendants were fully entitled to approach the matter as one in which the Plaintiffs had agreed to the amendment in terms of sub-rule 33(3).

It follows from the aforegoing that, in my judgment, the Defendants' failure to file the amended plea as prescribed by Rule 33 is excusable and constitutes good cause within the meaning of Rule 26 (4).

Now my understanding of Rule 26 (4) as fully set out at the beginning of this judgment is that the Court is vested with a discretion whether or not to grant extension of time prescribed by the Rules for delivering any pleading or for taking any step in connection with the proceedings. That discretion is however not an arbitrary one but is a discretion that must be exercised judiciously and not capriciously or for wrong reasons taking into account all relevant factors. In this regard I should like to record

that I have duly considered all that has been said on behalf of both litigants. In particular I have taken into account the importance of the case to both litigants bearing in mind the substantial damages claimed namely M12,161,432-00 in respect of the first plaintiff and M249,879-79 in respect of the second plaintiff. Fairness dictates that both litigants on either side be given ample opportunity to ventilate their respective views before the Court draws down the curtain and pronounces on the ultimate fate of this huge litigation.

Other than the fact that the plaintiffs have not filed an objection to the proposed amendment within the meaning of Rule 33 I have taken into account the fact that no real prejudice has been shown to exist in the event of this application being granted. In his answering affidavit Mr. Speier merely alleges prejudice but does not indicate the nature of such perceived prejudice. The fact that the plaintiffs have never filed an objection to the amendment in terms of Rule 33 is itself indicative of the fact that there is no real prejudice that cannot be cured, for example, by costs or postponement as the case may be.

The Rule 30 Application

As I have indicated above the plaintiffs have filed an application in terms of Rule 30 seeking an order striking out as an irregular step the delivery by the Defendants of their amended plea on the ground that it was not filed within the time prescribed by Rule 33 and that accordingly the amendment lapsed. Mr. Selvan S.C. for the Plaintiffs persisted in this proposition before me and relied on the following authorities:-

Van Heerden v Van Heerden 1977 (3) SA 455.

Fiat SA (Pty) Ltd. v Bill Troskie Motors 1985 (1) SA 355

Minister Van Wet en Order v Jacobs 1999 (1) SA 944 (O) at 951.

With respect to Counsel those cases do not say what he attributes to them. None of them say that if an amendment is not delivered within the time prescribed by the Rule then it automatically lapses. As I see it that proposition was the position under the old Rule 36 of South Africa but it is certainly not so under the new Rule 28 which is substantially similar to our Rule 33.

In order to appreciate the contrast between the old South African Rule 36 and the new Rule 28 of that country which substantially corresponds to our Rule 33 it is convenient to quote that old Rule which provided as follows:-

> **"If a party who has obtained leave to amend his pleading does not amend the same within the time fixed by Order of the Court or Judge, or where no time has been fixed within eight days from the date of the Order, such Order shall, on the expiration of such fixed time, or of such eight days, become *ipso facto*, null and void, unless the time has been extended by the Court or a judge in chambers."**

It may also be useful to bear in mind that even under the old South African Rule 36 authorities were far from unanimous on the operation of the Rule. Two examples will suffice. In Johannesburg Municipality v Kerr 1915 WLD 35 at 37 the court expressed itself in the following terms when dealing with a situation whereby a party had failed to deliver an amendment in time:-

"The order allowing the amendment ceased to exist. It becomes a dead Order and it cannot be revived."

However in United Building Society v Barkhuizen 1959 (4) SA 295 (O) the court per Smit J took a different view in the following terms:-

> "The amended pleadings, filed of record, came into operation on the date leave to amend was granted. In these circumstances it cannot be said that the order granting leave to amend had lapsed. The Rule does not provide that where service is not effected within the time stipulated, the order also lapses for that reason. In my view, if service is not effected timeously the Court has the inherent jurisdiction to grant relief and give an extension of time within which to serve without having to grant leave to amend afresh."

In my view, these remarks of Smit J with which I respectfully associate myself are apposite to the instant matter notwithstanding the fact that they were based on the old South African Rule 36. This is so because similarly our Rule 33 does not provide that where the amended pleading is not delivered within the time prescribed by the Rule the order or amendment also lapses for that reason. In such a situation and upon proof of good cause the court retains its inherent jurisdiction to grant relief and give an extension of time within which to serve without having to grant leave to amend afresh.

Similarly an application under Rule 30 which is not made within the time allowed by the Rules may, in a fitting case, be condoned. It must be stressed however that condonation is not just there for the taking. It is not a mere formality and a full

explanation is required regarding the nature of the delay and non-compliance with the Rules that is being sought to be condoned.

See Pitso Makhoza v Lesotho Liquor Distributors LLR & LB 1995-1996 116 at p 121 and the authorities cited therein.

Where there is not even an application for condonation or extension of time as in the instant case the court has a discretion to dismiss the application on this ground alone. It follows from this approach which I accordingly adopt that the Rule 30 application cannot succeed and falls to be dismissed with costs.

Regarding the question of costs I should like to say that, generally speaking, an applicant for indulgence should pay costs of the application. In the instant matter however I have taken the conduct of the Plaintiffs into account to the extend that, while they have failed to object to the proposed amendment all along for more than nine months, they nevertheless opposed this application at the last hour in circumstances where they have ignored the provisions of Rule 33 and failed to offer any explanation for their non-compliance with the Rules of this Court.

All things being considered, I regard it as fair to order as follows:-

1. **The Defendants' application in terms of Rule 26 (4) is hereby granted.**

2. **The time for the delivery of the amending pages to the Defendants' plea which were delivered on 16 October 2000 is hereby extended and the late delivery thereof condoned.**

3. **The Plaintiffs shall pay costs of the application.**

4. **The Plaintiffs' application in terms of Rule 30 is hereby dismissed with costs.**

M.M. Ramodibedi
JUDGE
13th December 2000

For Defendants: Mr. Penzhorn S.C.
(With him Mr. Woker).

For Plaintiffs: Mr. Selvan S.C.