CIV/APN/472/99
CIV/APN/473/99

IN THE HIGH COURT OF LESOTHO

In the matter between:

BOFIHLA TIKOE MATSOSO	APPLICANT
JEREMIAH SEFATSA MAKHENE	APPLICANT

and

LESOTHO TOURIST BOARD (LTB)	1ST RESPONDENT
BOARD OF DIRECTORS (LTB)	2ND RESPONDENT

For Applicants : Mr. K.T. Khauoe

For Respondents : Mr. T. Makeka

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 15th day of December 2000

I made my ruling on the 11th September 2000. My reasons therefor follow.

What I had before me was an application for amendment of the Applicant's prayer in notices of motion in the two matters which were consolidated. A prayer can be amended in terms of Rule 33. The application was opposed.

The original notices of motion contained the following prayers:

1. That the purported dismissal of the Applicant by the Respondent be declared null and void.
2. That the Respondent be ordered to pay emoluments, service pay from the date of the purported dismissal till the applicant attains retiring age of sixty years.
3. That the Respondent be ordered to pay the costs of this application "at" attorney and client scale.
4. That the Applicant be granted such further and alternative relief.

It was this prayers which were sought to be amended by substitution of the following:

"1 (a) That the Honourable Court should review and set aside the purported decision of the First Respondents disciplinary committee to dismiss Applicant from employment.

(b) To add another prayer as follows:

That the Honourable Court should dispense with Rule 50(c) (b) as the record is clearly part of the proceedings.

(c) Condoning non compliance of Rule 33 (4) (b) in the event that this Honourable Court should hold that there is an objection to the Notice of Amendment."

There were a lot of intervening periods as between the last day of argument over the two points-in-limine and the last occasion when there was argument in the main application when Counsel were asked to address the Court later on this case of SIMON PHAMOTSE MOSEHLE v LESOTHO BANK CIV/APN/226/94 Mofolo J, of 16th March 1998. In this case a point had been taken that the High Court had no jurisdiction to hear labour disputes. Counsel for Applicant had replied to say that the matter had come by way of review and that in terms of section 24 of the Labour Code Order 1992, the Labour Court had no power of review and matters entertained by the Labour Court could only come by way of appeal. Mofolo J. in a well discussed judgment when dismissing the point-in-limine said on pages 4-5:

> "According to the judgment in Vereeniging Van Bo-grondse Mynamptenare van Suid Africa v President of Industrial Court 1983(1) SA 1143(T) 1146-51 it does appear the inherent power to review administrative action has also been distinguished from the once inherent but now statutory power to review the proceedings of inferior Courts.
>
> Since the matter has come to this Court by way of review than appeal

and since the Labour Court has no statutory right of reviews, this application is properly before Court."

Then on the day appointed for address on the latter case and on which day I would make any ruling on the points-in-limine then the two Counsel (by mistake) seemed to have prepared argument on the case LESOTHO ELECTRICITY CORPORATION v MAFOSO 1995-1996 LLR-LB 415. Although Miss Mandisa Mashologu confirms both Counsel's impression on affidavit I was always prepared to say that it was a mistaken impression. Indeed this case had nothing to do with any of the points then raised by Mr. Makeka. The reading of the MOSEHLE case on the other hand says all that is relevant in it to the present case.

It was on the appointed day when Mr. Khauoe intimated that he intended to make an amendment of the main prayer. The Court urged that it had to be on a written application in terms of Rule 33(4). Another day was appointed. It was then that it was discovered that Mr. Khauoe had merely drawn, served and filed a Notice of Intention to amend in terms of Rule 33. The notice had set out the two prayers which have been referred to earlier on. In addition the Applicants' notice even required the Respondent to lodge a written objection to the proposed amendment within 14 days from the date of delivery of the notice failing which the amendment would be effected on the basis that there had been no opposition to the intended amendment.

A second period intervened. It was after this period when Counsel appeared before Court Mr. Makeka had already filed and served his notice of intention to oppose the application for amendment when Counsel appeared before Court. It was then pointed out by Respondents that Applicants' notice of intention to amend was not accompanied by a motivating affidavit hence Respondents were not able to argue the matter. It was pointed out by Applicants that Respondents have not filed an accompanying affidavit to the notice of intention to oppose in order to enable Applicants to fairly anticipate any objection to the application for amendment. Meaning that the mere intention to oppose could not just be sufficient. According to JACOBSZ v FALL 1981(4) 871 at least the notice of objection to a proposed amendment should set out the grounds thereof. There was yet another postponement because Mr. Khauoe had indicated that when both sides have filed affidavits in support of their attitudes the ground will truly have been levelled. There was yet another postponement. On the next day of hearing both sides had duly filed those supporting affidavits.

Perhaps there is a proper way of interpreting the said Rule 33 in order to avoid the delays. That Rule 33 does not prescribe whether a notice to amend will be accompanied by ground/reasons for intention to amend more especially if objection is actually received. That application for leave to amend will be supported by an affidavit setting out grounds/reasons thereof. This seems to be the

interpretation given by the learned authors of THE CIVIL PROCEDURE OF THE SUPREME COURT OF SOUTH AFRICA 4th Edition at page 514 in that

> "If an objection is raised the party wishing to amend, may within ten days lodge an application for leave to amend."

Indeed the case of JACOBSZ v FALL (supra) speaks of filing of a sets of affidavits in support of the application and the opposition.

Following on above inquiry could it be that the objection to a proposed amendment in terms of Rule 33(4) should be accompanied by reasons/grounds setting out why there is objection? If so was it not in contemplation of the Rule that this could only be done after and in response to the motivation set out in the application itself? It looks like the application for amendment proper comes after an objection has in fact been received. Again in JACOBSZ v FALL (supra)King AJ when speaking of a similar South African rule says:

> "Rule 28 does not require that a notice of an objection to a proposed amendment set out grounds of such objection in view of the fact that objections of this nature are almost invariably based upon averments that pleadings objected to would, if amended in the manner sought, be excipiable. It would seem to be desirable to bring this Rule in line with Rule governing exceptions and require that notice of an objection to a proposed amendment set out the grounds thereat."

In my mind, in answer to another aspect it seems desirable that the notice of application to amend need to indicate on its face the grounds upon which the amendment will be made. Only the application proper will develop those grounds on affidavit. I would find it difficult to understand why grounds for an amendment were not indicated on the original notice. I would see no danger in repetition if the first step makes the other party aware of the grounds on which the application is made from the onset. As I have said the issue was resolved in the instant matter by agreement all along until in the end we saw a set of affidavits filed to the satisfaction of the parties. I also found the case of MAHLOMOLA KHABO V LESOTHO BANK1991-1996(1) LLR 241 very helpful on all the principles including the Courts exercise of its discretion on application for condonation and on application for amendment.

The principle on amendment of pleading can be generalized as follows. The count's discretion must be exercised judicially in the light of the facts before it. Secondly amendments should be allowed even where there is *mala fide* or injustice or prejudice to the other side which cannot be compensated by means of an award of costs. Amendment should be refused where there is a real doubt whether or not prejudice or injustice will be caused to the other party. Amendment should not be refused in order to punish the other side for neglect. Even in the event of carelessness or neglect amendment can still be granted if the necessity has arisen.

Refusal of an amendment should not have the effect to prejudicing a party from ventilating his complaint the Court or some other Court. See ATTORNEY GENERAL v LEROTHOLI 1995-6 LLR 155 at page 157 about the prejudicial effect of not allowing condonation of late filing of a claim where the refusal of condonation would have a complete effect of prejudicing a party from ventilating his claim. A question will be whether refusing the amendment sought in this case will have that effect. The Respondent said the Labour Court was available. For general principles on amendments see COMMERCIAL UNION ASSURANCE LTD v WAYMARK NO 1995(2) SA (TK).

The present application for amendment had the hallmark or character of introduction of a new case of action which was by substitution of a prayer for a declaration by that one for review. This was in the circumstances where a full fledged argument on the point-in-limine had already taken place and the Applicant just ran short of virtually conceding that such a point or defence would succeed, which was put beyond doubt by the application for amendment where the defence by the Respondent would have been effectively been jettisoned. See KATZEN AND OTHERS v HALL AND CO. 1947(2) PH.F 110(T). Furthermore where the point taken had been to the effect that this Court would have had no jurisdiction because an other court had such jurisdiction.

The learned authors of THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA (supra) at pages 521-522 discuss the issue of introduction of new cause of action and new claim. They conclude that introduction of new action of cause action is not "per se" a ground for refusing such an amendment. They advocate for a general test of whether such prejudice to the opposition party could be remedied by an appropriate order as to costs or otherwise. They then state most usefully:

> "In fact a careful scrutiny of some of the decisions in which amendments involving the introduction of a new cause of action were refused show that to have allowed the amendment would have occasioned prejudice to the other side."

I could not see more prejudice to the other side than where the effect of its properly taken objection, which would have succeeded, was that the Court had had no jurisdiction. See COMMERCIAL UNIONS v WAYMARK NO. 1995(2) SA 73 (Tk) at 80 D-E. And where furthermore an amendment was sought at that stage of the proceedings and in the circumstances where no explanation was made as to why it was not sought earlier the amendment ought to be refused although this is not a ground per se for refusal of an amendment. See INTERNATIONAL TOBACCO CO. (SA) LTD v UTC (SOUTH) LTD(5) 1955(2) SA 421(W).

This Court learned that where a point such as the present (by Respondent)

which indeed was well taken, and where it would be defeated by seeking a belated amendment, then it would have to be on exceptional circumstances, such as where the effect of refusing the amendment would not be in the interest of justice. One example would be where the need for a party to ventilate his claim would be completely blocked or frustrated. The present was not such a case. The present case was said to be one of forum shopping. It meant that a proper Court remains open and available to the Applicants.

When application to amend was made at a late stage of the proceedings the effect would have been similar "to directing the attention of the other party to one issue and then at trial, attempt to canvass another". Such effect would be prejudicial. See KALI v INCORPORATED GENERAL INSURANCE (T) 1976(2) SA 179 (D) 181N-182. Respondents had been dealing with the question of a prayer for a declaration which was originally being sought. Their defence had been based on or in response to that. It was another thing to get involved in a review application as the amendment sought.

The application for amendment was refused with costs.

T. MONAPATHI
JUDGE