CIV/APN/400/99

IN THE HIGH COURT OF LESOTHO

In the matter between:

NCHAKHA MPHALANE	1ST APPLICANT
ELENA DUROW	2ND APPLICANT

and

LEHLOHONOLO PHORI	1ST RESPONDENT
THE DEPUTY SHERIFF	2ND RESPONDENT

RULING

Delivered by the Honourable Mr. Justice T. Monapathi on the 13th day of January 2000

Rule 29(5) requires that:

(a) Where any pleading contains averments which are scandalous, vexatious, argumentative, irrelevant or superfluous the opposite party may within the period allowed for delivering of any subsequent pleading, apply for the striking out of the matter, aforesaid, setting out the grounds upon which the application

is made."

The Applicant in the instant matter, which was an application for leave to stay execution pending appeal, has applied for striking out of portions of the Respondents' opposing affidavit as being argumentative, scandalous, vexatious or irrelevant. I would only grant the application if I was satisfied that the Applicant would be prejudiced in his case if it was not granted.

I accepted the description of the nature of offending statements which would deserve to be struck out in appropriate circumstances as stated in BOSMAN v VAN VUUREN 1911 TPD 825 at 832 and in MEINTJIES v WALLACH LTD 1918 TPD 278 AD at 285 - 286 as submitted by Mr. Mphalane. Indeed in terms of the Rule 29(5) (c) this seemed to be the requirement. The six (6) portions in the same number of paragraphs were singled out from the Respondent's answering affidavit. When I asked Mr. Mphalane in what manner he would be prejudiced in his claim he replied that he would be unable to reply to alleged offending portions since they were of such a nature that no reasonable reply could be expected.

I thought Mr. Mphalane's answer that he would be unable to respond was correct insofar as it concerned matters of argument and credibility which ought to have had no place in the Respondents' affidavit. See MORGENDAL v FERREIRA 1956(4) SA 625(T) at page 268 as approved in JONES v JOHN BARR & CO PTY LTD AND ANOTHER 1967(3) SA 292 (WLD). But the question would still be how the offending portion affected "the conduct of his claim or defence."

These challenged portions of the Respondents' affidavit made

interesting reading. Paragraph 6 of the opposing affidavit contained the following statement which was branded as scandalous, argumentative and superfluous and insulting:

> "1st Applicant holds that the Court *a quo* and the Court of Appeal was stupid in this finding." (My underlining)

Yet there had been no way in the paragraph 7 of the founding affidavit (to which the above was a response) where there was a suggestion that this Court and the Court of Appeal were said to have been stupid. The Applicant said he was therefore offended by the paragraph and it should accordingly be struck out.

I certainly could not say the Respondent intended to attack the dignity of the Court or show of disrespect. But to the extent to which the statement sought to attribute such discourteous expression was most unbecoming of the Attorney who drew the affidavit. Indeed it was objectionable in that it sought to say indirectly that Mr. Mphalane had imputed stupidity on the decisions of the Courts. He had not.

The second statement was again to be found in paragraph 7 of the opposing affidavit, the part of it which said:

> "..... but gives directive to the Court *a quo* as to what it should do, which is our humble submission he has no such right of demand unless the Honourable Court is his and the Honourable Court is absolutely under his unfettered directives. (My underlining)

The suggestion by the Respondent in the other part of the paragraph was that the Applicant should have complied with the provisions of Rule 6 and that he had not. By not having done so as it was submitted, he was said to be doing what is contended above. The matter of whether he had complied with Rule 6 was still for argument in the main application. Then there was no need for the rude manner in which the Respondent put what otherwise ought to have been a factual statement as to what the requirements of Rule 6 were and the way in which the Applicant had failed to comply therewith. This was clearly vexatious and in every way objectionable under Rule 29(5). Because there was no way in which a suggestion could be gathered that the Applicant was giving the Court any directives.

Then to another statement. In paragraph 8 the following averment was to be found and it said:

> "I do not understand the criticism or rhetoric of the 1st Applicant as to what one might understand to mean the Honourable Judge of the Court *a quo* does not understand English Language and therefore did not understand and appreciate what he was saying,"

I looked at the Applicant's papers. I could find no suggestion nor insinuation in any remote sense that the Judge did not understand English language. That this was irrelevant, argumentative, superfluous, scandalous and vexatious was beyond question.

The following statement in paragraph 10 of opposing affidavit also came under attack. It had been said that:

> " I further humbly submit this is an outright defiance of not only the judgment of Monapathi J but even trial of the Court of Appeal. Does he have the right to do so."

In this one I admitted in favour of the First Respondent, a doubt that there was merely unnecessary superfluity in that statement. Indeed what was sought to be argued was a point that there had been deliberate non-compliance by the Applicant. Except that the word 'defiance' is the kind of stuff that practitioners would loosely fire from the bar. Not much or anything could be said to be uncivil about it. Nevertheless this was unnecessary to put in that statement which was in a form of argument. That is precisely what the Rule 29(5) goes against.

I would advance an opinion similar to above with regard to what was found in paragraph 10 of the opposing affidavit. It was therein stated that:

> " I further humbly submit 1st Applicant is making himself a judge and interpreter of Court judgment. He is in outright defiance of the process of the High Court and Court of Appeal."

If there is an explanation which negatives *mala fide* and the Court can be satisfied that there is no prejudice which cannot be remedied by an award of costs a court should to my mind incline towards assisting a party to put his case before court. This comment was certainly not directed at what was said in paragraph 13 of the founding affidavit. There had been no suggestion of anything calling for the above comment. It should accordingly have had no place in an affidavit.

The last of what was alleged to have been offensive and against Rule 29(5) was in paragraph 12 in which it was said:

> "I humbly submit Applicant should not be allowed to defy Court's judgments if they go against him, or he should be made a Judge of the High Court and of the Court of Appeal."

This certainly bordered on being insolent. Most objectively it was rude. Mr. Mphalane told me he had no ambition of being a judge and that this unfounded turgid talk made him unhappy most of the time.

I have used the word "objectively" above to indicate my observation that once Mr. Monyako was called to account, that is in his reply to almost all aspects of the application. I sensed no malice nor intention to injure nor anger. The recurrence of ranting and uncontrolled statements was nevertheless a cause for concern on my part. As confirmation of a trend or a state of mind of Respondent's Counsel I thought it should not go unpunished. The statements used by Mr. Monyako for Respondent were most of the time of a turgid kind. This means they were unnecessarily:

> "Swollen, inflated, enlarged, pompous bombastic" Concise Oxford Dictionary.

That is in a way that has no place in an affidavit. I felt however that this was a case may be a borderline one where a striking out ought not to be ordered for the reason that there was no prejudice.

I said I agreed that Mr. Mphalane would not be able to reply to the

objectionable statements. They called for no reply. They did not refer to any factual situation nor to set legal principles or positions. It meant that Mr. Mphalane was not able to show prejudice. In this regard to rule 29(5)prejudice would mean whether or not he was disabled to promote his claim or defend a claim against him. He was not able to demonstrate any prejudice but what was found in the offending paragraphs ended up being serious mischief or abuse of process.

When speaking about an almost similar set of circumstances in JONES v JOHN BARR & CO. (supra) Margo J said at page 296 F-G

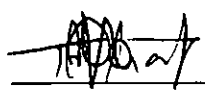
> " ..... However, here again no prejudice has been shown and the application to strike out therefore fails.
>
> This approach does not mean that a party may introduce scandalous, or vexatious or irrelevant or otherwise inadmissible allegations with impunity, or that Rule 6(15) encourages laxity in that regard. Depending on the circumstances the Court may make an appropriate order as to costs against a party who offends in this way, even though no prejudice is caused to the other party by such allegations." See also PAROW MUNICIPALITY v JOYCE AND MACGREGOR LTD 1971(3) SA 937 (CPD) at 939 C - D. See also THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA 4 ed M Dendy on pages 500 - 501 (prejudice).

Such is the robust approach. For application for striking out of irrelevant material see FREE PRESS OF NAMIBIA (PTY) LTD vs CABINET,

INTERIM GOVERNMENT, SWA 1987(1) 614 at 621 F-G. I respectfully agreed most entirely with the remarks in above authorities. They have guided me in my conclusion.

Mr. Monyako's only arguable point had been that the Applicant should have gone to the extent of showing in each statement, and statement by statement, whether it was either of those offences contained in Rule 29(5). I thought that was not necessary. It was enough if in the end a statement was met by anyone of the offences. That was all about Mr. Monyako's response . It showed a distinct lack of conviction which could only have been evidence of carelessness in his attitude rather than hostility.

I considered that in all the circumstances this was an instance where I would not strike out the offending passages but that the First Respondent must pay the costs of this application.



T. Monapathi
Judge

13th January, 2000

For Applicants : Mr. N. Mphalane

For Respondents : Mr. A.T. Monyako