CIV/APN/78/01

IN THE HIGH COURT OF LESOTHO

In the matter between:

'MAMPOLOKENG MOTJETJE — 1st Applicant
MOLAHLEHI MOTJETJE — 2nd Applicant

and

PITI MAFEREKA — 1st Defendant
'MATLI MAFEREKA — 2nd Defendant

RULING

For Applicants : **Mr. T. Hlaoli**

For Respondents: **Mr. T. Mahlakeng**

Delivered by the Honourable Mr. Justice T. Monapathi
on the 10th day of December 2001

Where on the day of argument, points-in-limine have been raised, I thought the principle remains that those points must be argued first. The approach that the judge should mero motu decide whether the points-in-limine should be argued at the same time with the merits is not a proper one. It has to be by consent and as a matter of convenience. It is because the judge would be interested as to how the objecting party's Counsel viewed the matter. The judges' attitude will be that if the points and the merits be argued together by consent, so be it.

By way of further clarification I would say that the party who has raised the points-in-limine has the right to insist that they be argued first. On that I do not see how a judge would

insist that the two matters be argued together unless he speaks of the convenience in a matter and where he has read the file. But most particularly he must hear the attitude of the objecting party's Counsel. So I did not find any reason why I should stand in the way of Mr. Mahlakeng when insisting that the points raised in paragraph 2 of the answering affidavit be argued first.

The points-in-limine were as follows:

Firstly, that there was no proper application before this High Court, because the present one which was filed on the 16th February 2001 was irregular and improperly before this Court in that it has not been brought on the Notice of Motion and contrary to the peremptory requirement of Rule 8(1) and Rule 8(7) of the High Court Rule 1980.

Secondly, that the application was irregular and improperly before Court in that it was not addressed to the Registrar contrary to the peremptory requirement of Rule (8) 2 of the High Court Rules 1980.

Thirdly, that the application was irregular and improperly before Court in that it had been brought on short notice and without dispensation or leave of Court. It thus offended against the peremptory authority of Rule 8(8) of the High Court Rules as submitted.

Fourthly, that the application was irregular and improperly before Court in that no address within 5 kilometres from the office of the Registrar had been appointed contrary to the peremptory requirement of Rule (8)8.

Fifthly, that there was a certain case CC 16/2001 before the Maseru Local Court in which one Piti Mohloene (also known as Piti Mafereka) was Plaintiff against a certain Mannoko Motjetje. The summons was annexed on page 19 of the proceedings. It showed that the case had been filed on the 14th February 2001. And as the Respondent said the case was already pending when this application before the High Court was filed. Thus as the Respondent contended, the circumstances show that a plea of *les pendens* would properly be taken and this would have the effect, as Mr. Mahlakeng contended, that if his objection succeeded the Court would have to

order that these proceedings before High Court be stayed pending the finalization of the Local Court matter. In my view the operative principle if to be found in **Guthmann Wittenaver Gmbh v Continental Jewellery Manufacturers** 1993(3) SA 76 where at 83B Selingson AJ said:

> "Where the defence of *lis alibi pendense* is raised the *onus* is on the plaintiff to satisfy the Court that the second proceedings are not vexations. The defendant however, has no right to stay of action. The Court has a discretion to stay the second proceedings or to allow them to continue. The exercise of this discretion will depend on grounds of convenience and fairness. See "**Osman v Hector** 1933 CPD 507 - at 507-8 and authorities there cited."

The Court had the following observations to make: Firstly, the Defendant before the Local Court was neither any of these Applicants before this Court. Secondly, I was not informed as to the stage at which the proceedings were. This was most unfortunate because the Applicants were saying they were not aware of this case nor did they know anything about it at the time the answering affidavit was settled. It was not even being said that the site involved in CC 16/2001 was the same as in the instant application. Nor was it being said that the Defendant therein had been served. Were the parties and other requisites of the alleged *lis pendens* the same? As reticent as all the parties were before me I did not find that I had enough information or facts with which to deal issuably with the matter.

In addition to above I would be unable to find that the requirements of a pending matter were satisfied in order to comply with the requirements of that objection *(lis pendens)* (see Van Winsen at al **The Practice of the Supreme Court of South Africa** 4th Edition pages 249-250). In any event *lis pendens* is not a complete bar. The objection is granted in the Court's discretion. (See **The Practice of the Supreme Court of South Africa** supra) at page 252. I consequently did not allow the objection.

I now come back to the first three objections raised by Mr. Mahlakeng: The Court made certain observations on the "notice of application. To start with, the title "Notice of Application"

is a wrong one in the circumstances where our rules dictate that an originating process should be a notice of motion and where an application was not an interlocutory one. The process must be on "Notice of Motion" and must either follow the Form "I" or Form "J" as prescribed in the rules of Court. (See **Legal Notice No. 9 of 1980** at pp 126-127). The first one is the notice of motion to the Registrar . The second one is the notice of motion to the Registrar and Respondents. These forms fully embrace all the requirements of the said Rule and are indeed peremptory. Only for exceptional reasons would the Court relax compliance with the prescribed forms. There were none herein.

There were a number of flaws in the notice of application as pointed out by Mr. Mahlakeng, in the said objections in limine. To these Mr. Hlaoli for the Applicants fairly and wisely conceded. This he did at the same time indicating that this form of the notice of application was of one intended for filing in the Magistrate's Court.

With regard to why Applicants thought there should be condonation and that the Court could safely move on and hear argument on merits Mr Hlaoli raised the following concerns: Firstly, that the matter had by its nature been urgent and was intended to be dealt with in a requisite manner bearing in mind that it concerned spoliation. As I saw it the Court would have had problems with this approach. One problem was that without a certificate of urgency and without a statement as to the manner in which the matter was an urgent the application could not by right be dealt with as an urgent matter. Mr. Mahlakeng even remarked that when it was heard the matter had in fact jumped the queue.

Secondly, that the Court, as Counsel contended, had to focus on the substance of the application itself not on the form. This again posed a lot of problems. One was that while any Court would in the interest of justice seek to resolve the main matter or matter of merits, the instant application was so riddled with irregularities of form that any in the circumstances any inclination to deal with the merits and condone matters of form would lead to absurdity and a serious disregard of the rules of Court which this Court would not countenance. This application if allowed would be a typical one in which that disregard had been taken to the extremes and consequently would form a dangerous precedent. I would not allow it. This will bring the point

home that "Rules of Court are not unimportant and cannot just be disregarded at will....." with the hope that "non compliance will not simply be over looked nor condonation granted as a matter of course or right." Ackerman J.A. in **Strong Thabo Makenete v Major General and Ors** 1991-1992 LLR & LB 126 at 127.

Still on the objection on the matters of form, I had more to say. Technical as the objectives were and valid as they were, I thought it would have been different if the attitude of the Applicants had been as follows: To admit in the Replying Affidavit that such irregularities had occurred and existed in the so called notice of application. At the same time to indicate that an application for condonation would be made or still more competently an application for amendment would be made before the hearing of the matter. That, consequently the Court's discretion would be asked for on the matters of orders sought and costs. Together with this would be raised the question of prejudice by contending that there would be no prejudice to the Respondents. Then if there was such condonation, which stood a better chance of being granted in those circumstances, the merits would consequently be argued.

My conclusion, based on the plethora of cases in which our Courts had been worried about disregard of use of the rules and proper forms, was that this was a matter which should be dismissed with costs on the basis of the objections raised.

For clarity the order for dismissal of claims was made with costs. It meant that the Applicants were free to file their claims afresh. It was not without some measure of soul searching based on the consideration that litigation is a costly business.

T. Monapathi
Judge