CIV/T/194/99

IN THE HIGH COURT OF LESOTHO

In the matter between:

SEKHONYANA NTAOTE **Plaintiff**

and

PIUS MPHOLE MPHOLE **Defendant**

For Plaintiff : **Mr. K. Mohau**

For Defendant : **Mr. J Grundligh**

Judgment

Delivered by the Honourable Mr. Justice T. Monapathi
on the 18th day of October 2002

It is correct that in **Matšehla Khalapa v Compol** 1999-2000 LLR 35 the Court of Appeal had to consider whether "allowing condonation would leave defendants with a plea or deprive them of the special plea." Secondly whether the Court *a quo* had power to grant condonation sought after expiry of the prescribed period. And thirdly whether the reasons put forward for delay were good or not.

The Court found on all the legs that the Court *a quo* should have allowed condonation. It was because the Court endorsed the general principle that clause which have the effect of denying an aggrieved person's right to seek assistance from the Courts of law should be strictly considered. Secondly, that the explanation given for what was a considerable delay was that the appellant was an ordinary Mosotho woman who was ignorant of the requirements of the Police Act 1971 was a good reason. That in having disregarded the explanation in the context of "the proper approach to be adopted to the interpretation of the provisions" the Judge did not exercise his discretion judicially. As will be clear presently this dispute about the Defendant's special plea which is not about denying Plaintiff a right "to seek assistance of a court of law" can be distinguished.

I resolved that the special plea be argued together with the application for condonation the latter which was received on the morning of argument. I n the present application the Court is being asked to exercise its discretion by:

1. Condoning plaintiff's failure to apply for leave to bring the matter before the High Court.

2. Granting plaintiff leave to have the matter in CIV/T/194/99 heard before the High Court.

Alternatively

3. Directing the matter in CIV/T/194/99 be removed to the

magistrate court.

4. Directing that costs for this application be costs in the cause.

5. Granting plaintiff further and or alternative relief.

This was against the background that the summons was filed as long ago as the 6th May 1999 and when a special plea was filed on the 23rd September 1999. The plea reads:

> "Section 6 of the High Court Act No.5 of 1978 provides that:
> No civil case or action within the jurisdiction of a Subordinate Court (which expression includes a local or central court) shall be instituted in or removed into the High Court, save
>
> (a) by a judge of the High Court acting on his own motion or
>
> (b) with leave of a judge upon application made by him in Chambers and after notice to the other party"
>
> 2.
>
> In terms of the provisions of the Subordinate Courts (amendment) Act No.6 of 1998 which came into operation on the 12th May 1998 the jurisdiction for the magistrate's Court was set at M25,000.00.
>
> 3.
>
> 3.1 Plaintiff's claim against the Defendant is for payment of M17,530.00.
>
> 3.2 Plaintiff instituted action against the Defendant on the 11th May 1999, summons having been insued on the 6th May 1999 and accordingly Defendant plead that Plaintiff's claim is in terms of section 6 of the High Court Act as referred to herein above unenforceable against it and of no force and effect as plaintiff did not comply with section 6(b) referred to above."

I might as well observe that the application made by the Plaintiff is a clear concession that the action was filed in this Court irregularly hence the application for condonation because as Plaintiff said:

> I aver that it has come to my notice during the preparation for the main trial herein that the Defendant had taken a point that the action in CIV/T/194/99 was instituted without first seeking leave of Court and yet it is a matter with the jurisdiction of the Subordinate Court."

Before I point out further distinguishing marks of this case from **Matšehla Khalapa's** case (supra) I need to record the reasons put up by the Plaintiff for seeking condonation.

One reason put forward by Mr. Mohau from the bar was by pointing out what he thought should be taken judicial notice of. It was that gazettes were difficult to acquire from the Government Printer. He cited the experience of this Court itself.

Mr. Grundligh instantly replied that the Lesotho Government Gazette Extraordinary No. 29 of 12th May 1998 (raising the jurisdiction of the magistrates Court to M25,000.00) became law on the day it was published and that it could not be a valid excuse that Mr. Mohau and his legal colleagues could not have come by the gazette before instituting the proceedings.

I agreed that the excuse was unacceptable on any score and it would open floods for spurious defences. That anybody came across the problem Mr. Mohau pointed out was an indication of inefficiency. I did not exclude my own Court.

Mr. Mohau who deposed to the affidavit supporting the application for condonation said he believed that the institution of the action before the High Court was not done in flagrant disregard of the provision of the High Court Act. I thought the requirement did not require one not to be flagrant in his disregard of the Act. Having conceded that Plaintiff acted irregularly I d . id not understand what the condonation would amount to.

Mr. Mohau believed that his late colleague Mr. GG Nthethe, when instituting the action, he was unaware of the recently promulgated enhancement of the jurisdiction. I have already commented on how unfavourably I would view that kind of explanation. Legal practitioners and the Courts included have only themselves to blame if they are not availed of legal publications like Government Gazettes in time.

The deponent contended that in the circumstances of the case the matter would rather be referred to the magistrate court rather than be dismissed

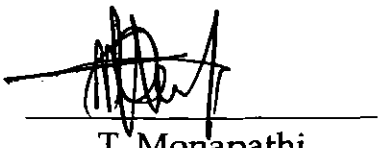
outright. I looked with awe at the long lists of cases which Mr. Grundligh cited for the proposition that a case filed irregularly in a Court that has no jurisdiction ought to be dismissed. The long line of cases included **Thabo Charles Maitin v Mary Barigye** 1992-1994 LLR, 270, **ABSA Bank Ltd v Naledi Khuele** CIV/APN/500/93, Monapathi J 6th June 1994, **Attorney General v Jeanet Malieketseng Makara** Kheola CJ 6th January 1995, **Setha Lehloenya v Tumo Lehloenya,** CIV/T/113/93, Guni J 19th June 1995.

Mr Mohau spoke further about the dictates of convenience and service of the ends of justice if the matter was sent to the magistrate. While I would acknowledge that delay is an element to consider in this case the Plaintiff is to blame when regard is had to the fact that it was only after three years after the filing of the special plea that the Plaintiff seeks for condonation. I considered that in the circumstances I could not have been acting judicially if I disregard this undue delay on the part of the Plaintiff by turning it in his favour. He created the inconducive condition. If I favoured the Plaintiff with the indulgence it would be a wrong exercise of discretion.

I believe that in **Matšehla Khalapa's** case the Court considered that the delay was not overly and the reasons were good and sufficient inasmuch as the facts were not traversed in the opposing affidavit. In the circumstances of this

case I would say it amounts to prejudice enough if having pleaded so long ago Plaintiff seeks for condonation at this late hour.

The application is dismissed and the plea therefore succeeds with costs.



T. Monapathi
Judge