

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MALILLO NONYA

PLAINTIFF

AND

**LESOTHO NATIONAL GENERAL
INSURANCE COMPANY PTY LTD**

DEFENDANT

JUDGEMENT

**Delivered on the 22nd day of March, 2002 by the
Honourable Mr. Justice G. N. Mofolo**

This is a matter in which the plaintiff issued summons claiming:-

1. Payment of M25,000.00 (Twenty-five thousand Maloti) for loss of earnings;
2. Payment of M25,000.00 (Twenty-five thousand Maloti) for estimated future earnings;
3. Payment of M30,000.00 (Thirty thousand Maloti), general damages;
4. Costs of suit;
5. Further and/or alternative relief;

The summons was lodged with the Registrar of this court on 3rd May, 1996 and appearance to defend was lodged on 13th May, 1996. Request for further particulars is dated 14th October, 1996 while further particulars reached Registrars office on 6th November, 1997 being almost 18 months after the summons was issued and just over a year since the notice for further particulars. The plea is dated 11th November, 1997. While minutes of pre-trial conference are dated 13th October, 1998 and then follows plaintiff's replication dated 19th October, 2000. Of significance is the fact that the replication was lodged almost 3 years after the plea was lodged. In objection to the irregular step or proceeding defendant had lodged an application to set aside the irregular step or proceeding on 20th October, 2000 the date being gleaned from applicant/defendant's notice of application.

Rule 30(1) of the High Court Rules, 1980 is to the effect that:

'Where a party to any cause takes an irregular or improper proceeding or improper step any other party to such cause may within fourteen days of the taking of such step or proceeding apply to court to have it set aside.'

and the proviso reads:

'Provided that no party who has taken any further step in the cause with knowledge of the irregularity or impropriety shall be entitled to make such application.'

Sub-section (2) is to the effect that the application shall be on notice to all parties in the cause specifying particulars of the irregularity or impropriety involved. The applicant has complied with the sub-section for the application is on notice with service to respondent/plaintiff attorney. Applicant/defendant has also specified particulars of the irregularity or impropriety by mentioning, *inter alia*, that respondent/plaintiff has failed to comply with provisions of Rule 24 (1) of the Rules of Court. Now Rule 24 (1) reads;

‘Within (14) fourteen days of the service upon line of a plea the plaintiff may deliver a Replication to the plea’.

It is to be understood that there is no application before this Court for condonation of the late filing of the replication. Mr. Mohau for the respondent/plaintiff has confined himself to saying a party contending the step has to show substantive prejudice and in any event the absence of replication did not mean that facts in the plea were admitted. Moreover, according to Mr. Mohau, Rule 30(1) did not show that there was requirement for condonation.

In answer to Mr. Mohau with regard to Rule 30(1) that there is no

requirement for condonation, suffice it to say that there is a huge body of decided cases showing there is such a requirement.

As to the present application emanating from Rule 30(1) of the Rules of Court, I am satisfied that the application satisfies requirements of an irregular step or proceeding for in this court's view an irregular step is to be understood as a proceeding which is not sanctioned by rules of court or operates outside the rules. The application is properly before this court.

As for the proviso to rule 30(1) above, it would seem a party which has taken further steps by filing further process with knowledge of the irregularity is not entitled and is precluded from applying for the setting aside of the irregularity. In so far as the applicant/defendant is concerned, has to be understood that the application was lodged after the plea and I do not think it can be said that applicant/defendant condoned the irregularity.

I have already said that the applicant/defendant has established an irregularity though, it would seem, according to authorities, the court may

refuse or overlook an irregularity or proceeding which works no substantial prejudice to the objecting party - see **Instrumentation (Pty) Ltd. vs. Sanithehem (Pty) Ltd, 1977 (3) SA 703(D)** dealing with ‘substantive prejudice.’ In this case the court exercised its discretion to set aside service of summons because the plaintiff’s claim had prescribed on the day after the purported service, a factor which would severely prejudice the defendant if the irregular service was allowed to stand. But in **Minister of Prisons and another vs. Songilanga, 1983(3) SA 47(E) at 57A-E** irregular summonses were condoned despite the fact that the claim in each case would have become prescribed had the summons been set aside.

It has also been held that prejudice is a prerequisite to success in an application in terms of Rule 30 (Our Rule 30 (1)) see **Consain Engineering (Pty) Ltd vs Anton Steinecker Maschinenfabrik Gmbtt, 1991 (1) SA 823(1) at 824 G-I** citing **SA Metropolitan Lewensversekeringsmaatskappy Bpk v Leuw N.O. 1981(4) SA 329(0)** and **De Klerk, 1986(4) SA 424(W)** coupled with what was said by Schreiner JA in **Trans-African Insurance Co. Ltd. vs**

Maluleka, 1956(2) SA 273(A) at 278 F-G., that ‘technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.’

But it was also said condonation should not unfairly prejudice the party who applied for the irregular proceeding to be set aside. As shown above though, where a procedure complained of is a nullity it cannot be condoned as, for example, a fatally defective summons (see **Jagger & Co. Ltd. vs. Dasoo & Sons (Pty) Ltd and others, 1962(3) SA 586(T)**). But then again as I have said above, an aggrieved party forfeits his right to have the offending step or proceeding set aside if he has taken any further step in the cause, with knowledge of the irregularity (see Proviso to rule 30 (1)) above. **In Petersen vs Buruside, 1940 NPD 403 and 406** it was said ‘a step in the proceedings is some act which advances the proceedings one stage nearer completion.’

I have already said the application does not fall into class of cases where

an applicant has taken a further step in the cause well aware of the irregularity and in my view several notices of set-down after plea by the applicant/defendant cannot amount to taking 'any further step in the cause.....'

In Standard General Insurance Co. Ltd v. Eversafe (Pty) Ltd and Others, 2000 (3) SA 87(W) it was said applicant's explanation of late delivery, particularly after inordinate delay occasioned by inaction of *dominus litis* plaintiff, should dispel any impression of reluctance to achieve expeditious hearing of true dispute between parties. It was also said applicant's failure to file replication for more than three years after filing of the plea and in face of defendant's repeated expression of desire to bring matter to finality not justifying grant of condonation. It was also found plaintiff's failure to react with appropriate diligence to a notice of set-down by a defendant which repeatedly manifested the desire to bring the matter to finality could not be deemed justified having regard to the fact that the grant of relief now sought would further frustrate the first defendant in the achievement of its objective as it would entail a denial of the proper function of the court. It was held further

as to the contention that condonation would not prejudice the first defendant, that it was not sufficient for the plaintiff to show that there would be no such prejudice for an applicant under the rule had to show good cause and the question of prejudice did not arise if the plaintiff was unable to do so.

In the instant application there is no application for condonation of the late filing of replication for as I have shown Mr. Mohau for the respondent/plaintiff has confined himself to questions of prejudice. Above I have already shown that the replication was delivered well nigh three years after the delivery of the plea and this court finds that the delay was inordinate occasioned, as it were, by the inaction of the *dominus litis* plaintiff. The respondent/plaintiff has done nothing to dispel the impression of reluctance on his part to achieve expeditious hearing of the dispute. Respondent/plaintiff has for nearly three years after the filing of the plea and in face of repeated defendant's expression of desire to bring matters to finality failed to respond to defendants' overtures and the court finds itself unable to come to respondent/ plaintiff's rescue. Respondent/plaintiff has also failed to react with appropriate diligence to applicant/defendant several notices of set down

manifesting a desire to bring matter to finality and I find the non-granting of relief would further frustrate applicant/defendant in the achievement of its objective and in my view would amount to denial of justice. As it was incumbent on respondent/plaintiff to show good cause and it has failed to do so, I find that question of prejudice does not arise.

This application has to do with non-compliance with Rules of court and late filing of replication. It was held in **Strong Makenete vs. Major-General Lekhanya & Others** that where non-compliance with Rules of court and late filing of record is in issue, 'substantive application for condonation is required' and that non-compliance with the rules will not simply be overlooked by the court nor will condonation be granted as a matter of cause and right

I have already said that there is no substantive application for condonation as is in law required.

In view of the fact that respondent/plaintiff has failed to comply with

Rules of court and filed his replication well out of time and considering that there is no explanation, plausible or otherwise of the failure to file replication within the period specified by rules of this court and considering further that not granting this application the applicant/defendant would be frustrated in his objective, this court on these grounds alone has decided to grant the application and it is so granted. As for costs of this application, they are reserved pending the result of the trial.



G. N. MOFOLO
JUDGE

For the applicant/defendant Mr. Grundlingh

For the respondent/plaintiff Mr. Mohau