CIV/APN/226/02

IN THE HIGH COURT OF LESOTHO

In the matter between:-

'MATABETA MOSHOESHOE (nee Makume)	APPLICANT

and

MAKHABANE MAJOROBELA MOSHOESHOE	1ST RESPONDENT
MATHE MOSHOESHOE	2ND RESPONDENT
MALUKE MOSHOESHOE	3RD RESPONDENT
LITŠOANELO MOSHOESHOE	4TH RESPONDENT
MASTER OF THE HIGH COURT	5TH RESPONDENT

RULING

Delivered by the Honourable Mrs Acting Justice A.M. Hlajoane
on the 16th August, 2002

Application by the Applicant's counsel is for an order of striking out certain paragraphs in the first Respondent's opposing affidavit as being scandalous, vexatious, argumentative and irrelevant. The Application is made in terms of Rule 29

(5) of the High Court Rules 1980.

Rule 29 (5) of High Court Rules

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

(b) ***Such an application may be set down on not less than seven days notice to the opposing party as an opposed application before the motion court.***

(c) ***The Court may dismiss the application if it is not satisfied that the applicant will be prejudiced in the conduct of his claim or defence if it be not granted."***

Paragraph 2

2.1 Applicant's purported marriage to deceased is *null and void ab initio* on the ground that it was entered into during the existence of another customary marriage contrary to section 29 (1) of the marriage Act No.10 of 1974.

2.2 In 1998 when applicant entered into an invalid marriage applicant was already married per annexure "LTM" to 'MATLI MAHLELEHLELE. The said marriage still exists and has not been dissolved.

Paragraph 5. 2 (a)

Applicant has failed to disclose the material fact that she had initially instituted CIV/AN/474/2000 in which she sought to eject 2nd, 3rd and 4th Respondents from their home where applicant is now staying. A copy of CIV/AN/474/2000 is attached and marked "A".

5. 2(b) Applicant has failed to disclose that her application in CIV/AN/474/2000 was dismissed.

2(c) Applicant has failed to disclose the material fact that she is legally married to 'MATLI MAHLELEHLELE's family and has two children. Applicant has not disclosed that she is now staying with her youngest son while her eldest daughter is staying with her in-laws at Ha Ratšiu.

As can be seen from the reading of this section 29, reference is made to 'pleadings' and we can only speak of pleadings in a trial action not in an application. According to the Concise Oxford Dictionary, pleading 'is a formal statement of the cause of action' (my emphasis); and Blacks Legal Dictionary has pleadings as '*individual*

allegations to an action' or '*Process performed by the parties to an action which sets allegations of fact to an action.*'

Our Rules before this court made provisions for two forms of proceedings, namely proceedings by way of motion, Applications, and those by way of summons. As was said by **Jerold Taitz** (1979) 96 SAL5 476, that "the difference between a remedy and the procedure necessary to obtain that remedy should not be overlooked." See also **Zimmermann and Visser** on Civil law and Common law in South African at 147-149. That is why we have different Rules for the two sets of proceedings. Rule 8 deals with Applications and Rule 18 with summons. We have different terminology for parties in both proceedings and also for sets of papers filed in each. In an action both sides will be filing their pleadings which is their defence and end up by leading *viva voce* evidence when pleadings are closed. But with an Application proceedings each party gives his evidence on paper by way of affidavits.

Though we usually cite South African cases, our position is different because in their case provision is made in the rules that inadmissible evidence of any kind contained in affidavits may be struck out, Rule 6 (15). But in our case, striking out applies in pleadings which are in trial actions.

For that reason the application for striking out is misconceived and therefore fails.

Even if I were to allow the Application to strike out, according to **Sherphard v Tuckers Land and Development Corporation (Pty) Ltd** 1978 (1) SA 173 Application to strike out must be made when the matter is before court on its merits

and if made prior thereto the application is premature. The matter is yet not before me on its merits.

A.M. HLAJOANE
ACTING JUDGE

For Applicant	:	Mr Lichaba
For Respondent	:	Mr Makholela