CIV/APN/45/95

IN THE HIGH COURT OF LESOTHO

In the matter between

PITSO MAKHOZA MALUNGA Applicant

and

LESOTHO BREWING COMPANY (PTY) LIMITED First Respondent

THE ATTORNEY-GENERAL Second Respondent

CIV/APN/75/96

In the matter between

LESOTHO BREWING COMPANY (PTY) LIMITED Applicant

and

PITSO MAKHOZA MALUNGA **First Respondent**

SENIOR RESIDENT MAGISTRATE **Second Respondent**

THE ATTORNEY-GENERAL **Third Respondent**

REASONS FOR JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi, Acting Judge, on 10th day of September, 1996.

In both the above mentioned applications Pitso Makhoza Malunga (hereinafter referred to as the Applicant) applied for postponement on 9th September 1996. After hearing submissions from both sides I duly granted the postponement albeit reluctantly. I ordered the Applicant to pay all the wasted costs of Lesotho Brewing Company (Pty) Limited

(hereinafter referred to as the Respondent) occasioned by the Respondent on attorney and client scale in each of the above mentioned applications.

I intimated that reasons would follow today. These are the reasons.

In order to understand the full circumstances and motives behind the applications before me for postponement of the above mentioned applications it is necessary to recount briefly CIV/T/436/90 which has also been set down for hearing before me from the 9th September 1996 to the 13th September 1996. The Applicant features as the Defendant in that case.

It appears that in the said case No. CIV/T/436/90 the Respondent's subsidiary company Lesotho Liquor Distributors (Pty) Ltd. sued the Applicant for goods sold and delivered between the 21st November, 1986 and 30th June, 1989. The summons was issued on 11th October, 1990.

What then followed is best summed up by the Court of Appeal in the appeal thereof in Pitso Phakisi Makhoza v Lesotho Liquor Distributors C of A (Civ) No. 34 of 1995 (unreported) in which Browde JA delivering the judgment of the Court had this to say:-

> "It is a sad commentary on the way in which the suit has been conducted that the matter has not yet come to trial and this appeal

> is concerned with technicalities relating to amendments, portions for trial, discovery and awards of costs in the court a quo."

The Learned Judge of Appeal went through a resume of the proceedings thus far and stated in part:

> "I pause to say that one would have thought that the pleadings were then sufficiently detailed to enable the parties to air their differences in court. That was in February 1992 and, it is quite appalling that technicalities could be exploited for the next four years thus avoiding the trial court's *pronouncement on the merits to this day.*"

The Learned Judge of Appeal continues on page 3 of the judgment:

> "The trial was set down to be heard on 23 August and ten days thereafter. However for reasons which do not appear from the record the matter was removed from the roll and set down again a number of times until, on 10 February 1995, it was set down for trial over the period 1 to 19 May 1995.
>
> There can of course be no doubt that the appellant by that time had had more than sufficient time in which to do all the research he needed to say exactly what he admitted and what he denied receiving and paying for during the period covered by the claim which was, as referred to above, 1986 to 1989."

Later in the judgment the Learned Judge of Appeal observes:-

> "The matter did not proceed on 1 and 2 May 1995 because those days were public holidays and on 3 May 1995 the appellant did indeed seek an adjournment to obtain the services of counsel and to accommodate the appellant, it was agreed to commence the trial on 9 May 1995."

In dismissing the appellant's appeal on technicalities as aforesaid the Learned Judge of Appeal concluded with the following reasons which I consider to serve as a guide in the matter:-

> "I would recommend to the Registrar that the trial in this matter be given preference on the trial roll in an effort to avoid any further delaying tactics which the appellant may have in mind."

It was against the above mentioned background that when the above mentioned applications were due to proceed before me on 9th September 1996 which incidentally was the same trial date as the aforesaid CIV/T/436/90 Mr. Redelinghuys for the Applicant applied for postponement on the ground that his client wished to engage the services of another legal representative namely Mr. Phafane as far as the two applications were concerned. Mr. Redelinghuys made it clear that his services were being retained in so far as the main trial CIV/T/436/90 was concerned.

I pause here to observe that the aforesaid applications are indeed very short and simple applications dealing with contempt of court and rescission of default judgment respectively. On the other hand CIV/T/436/90 is more complicated

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and involves a huge sum of M388,557-58. No reasons were advanced why Mr. Redelinghuys who is a very experienced attorney would be good enough for the more complicated and undoubtedly bigger case and not good enough for the short and simple applications before me. The court was left with the impression that this was a delaying tactic by the Applicant. In fact Mr. Redelinghuys argued that Civ/T/436/90 should not be proceeded with before the Respondent had purged his alleged contempt in CIV/APN/45/95. It seems to me therefore that the Applicant obviously hoped that if CIV/APN/45/95 was postponed then CIV/T/436/90 would also be automatically postponed.

The Court however gave Mr. Redelinghuys 20 minutes within which to contact Mr. Phafane and arrange for his presence before the court as he was reported to be in one of the court rooms of this Honourable Court awaiting his turn to move a bail application.

At the end of the 20 minutes adjnournment Mr. Redelinghuys then informed the court that he had explained the position to Mr. Phafane adding "unfortunately it doesn't seem that he is here." Mr. Redelinghuys then asked for "further indulgence" to have the matter adjourned further. Consequently the matter was stood down for a further 20 minutes. It was then that Mr. Phafane appeared in court and promptly proceeded to make an application for postponements of the two applications on the ground that his instructions were incomplete and that he was only approached by the Applicant to represent him in the

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two applications on Friday the 6th September, 1996. Consequently he was not prepared to argue the applications.

Although Mr. Fisher for the Respondent initially opposed the application for postponement he ultimately backed down in view of Mr. Phafane's none-preparedness but insisted that the Applicant must be ordered to pay costs on attorney and client scale in as much as the Applicant was clearly abusing the court's process and indulgence. He submitted that the Applicant was mala fide and that the notice of set down was filed on 3rd June 1996 when Applicant knew fully well that these applications would proceed on 9th September 1996 yet he did nothing until the very last day. I find that there is merit in Mr. Fisher's submission.

As to the law Mr. Fisher referred the court to the case of Myburgh Transport v Botha t/a S.A. Truck Bodies 1991 S.A. 310. It is a Namibia Supreme Court case in which Mohamed AJA (as he then was) succinctly stated the legal principles applicable in an application for postponement.

I am mainly attracted by three of the said principles which the learned Judge of Appeal stated as follows:

"1. The trial judge has a discretion as to whether an application for a postponement should be granted or refused (R v Zackey 1945 A.D. 505).

> 2. That discretion must be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons." and

> "where the applicant for a postponement has not made his application timeously, or is otherwise to blame with respect to the procedure which he has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the court in its discretion might allow the postponement but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a respondent on the scale of attorney and client. Such applicant might even be directed to pay the costs of his adversary before he is allowed to proceed with his action or defence in the action, as the case may be."

With respect I entirely agree with the legal principles enunciated by the learned Judge of Appeal and I adopt the said principles in the matter before me.

Applying these principles to the present application before me I have come to the conclusion that fundamental justice requires that there should be postponement as prayed to enable Applicant to present his case in a reasonably fair manner.

Regarding costs on attorney and client scale I have taken into account the following factors:

(a) the fact that the application for postponement was not timeously made but

inexcusably made at the eleventh hour without prior warning to all concerned with the resultant inconvenience to the Court and the Respondent. The court was treated in a cavalier fashion and that this alone is in my view sufficient to award costs on attorney and client scale to mark the court's displeasure or its disapproval of the conduct of the Applicant;

(b) that this was not even a substantive application made on notice;

(c) that the applicant's whole conduct amounted to delaying tactics in the view of the court particularly as there was absolutely no reason suggested why Mr. Redelinghuys could not argue the applications himself;

(d) that consequently the application for postponement was not bona fide;

(e) that applicant should have known better in as much as the highest court in the country namely the Court of Appeal commented adversely on applicant's previous conduct of the same nature amounting to delaying tactics in a case involving almost the same parties Pitso Phakisi Makhoza v Lesotho Liquor Distributors (supra) in which Browde JA said of the Applicant at p4:-

"It is quite inexplicable why the Appellant should have come to court without Counsel and then, after having had three years in which to consider the case, should have, at the doors of the court so to speak, then have sought to amend his plea on two separate occasions."

It seems to me that the Applicant has repeated the same deplorable tactic here.

In the result therefore I have reluctantly come to the conclusion that the application for postponement in both applications be granted with the following appropriate order as to costs which I deem to be just in the circumstances of the case. The order of the court therefore is as follows:

(a) that the contempt application CIV/APN/45/95 be postponed sine die;

(b) that the applicant in contempt application CIV/APN/45/95 pay all the wasted costs of the Respondent occassioned by the post-ponement, on attorney and client scale;

(c) that Applicant shall be precluded from pursuing his claim in the said contempt application CIV/APN/45/95 until and unless he has paid the costs of the Respondent referred to in para. (b) above;

(d) that rescission application CIV/APN/75/96 be postponed to 29th November, 1996; and the Rule extended accordingly;

(e) that the Applicant pay all the wasted costs of the Respondent in CIV/APN/75/96 occas-sioned by the postponement, on attorney and client scale.

M.M. RAMODIBEDI
ACTING JUDGE

For Applicant in CIV/APN/45/95: Adv. Phafane
For Respondent in CIV/APN/45/95: Mr. Fisher
For Applicant in CIV/APN/75/96 : Mr. Fisher
For Respondent in CIV/APN/75/96: Adv. Phafane