CIV/APN/186/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

NTSUKUNYANE MPHANYA — **Applicant**

and

MOHALEROE, SELLO & CO. — **1st Respondent**
THE CHIEF MAGISTRATE — **2nd Respondent**
THE ATTORNEY GENERAL — **3rd Respondent**

JUDGMENT

Delivered by the Honourable Chief Justice, Mr. Justice J.L. Kheola on the 16th day of September, 1996

This is an application for a review of the proceedings of the Chief Magistrate's Court in CC 1495/92. This matter has had a very long history in the court **a quo**. It started in 1992 when the summons was issued by the present first respondent. The affidavits of the parties have clearly set out the events leading to the present application for review. It will not be necessary for me to repeat those events.

On the 6th October, 1994 the attorney of record of the applicant received a letter from the Secretary of the Chief Magistrate in which she informed the attorney in question that the Chief Magistrate was giving notice that the case (1495/92) would be heard on the 14th October, 1994 at 9.00 a.m. This letter was copied to the first respondent. (See Annexure "C" to

the supporting affidavit). This letter was received by the attorney on the 6th October 1994.

On the 11th October, 1994 the applicant's attorney replied to the letter of the Clerk of the Chief Magistrate. For the sake of convenience the full text of the letter is reproduced.

"The Clerk of the Chief Magistrate
Chief Magistrate's Office,
P.O. Box 354,
MASERU

MR. T. MAHLAKENG/nm/M.270B 11th/10/94

Madam,

re:- CC. 1495/92 - Mohaleroe, Sello & CO. vs N. Mphanya

We acknowledge with thanks receipt of your letter of the 6th instant.

We humbly request you to convey our deepest apologies to his worship the Chief Magistrate, as we may not be able to appear on the suggested date for the following reasons:-

(a) on the 14th October, 1994 we are already engaged in another Court in a matter that was properly set down for that date.

(b) Madam. you will also notice that there is no notice of set down for the date stipulated in your letter. Perhaps it would be healthy if neither party is given the impression that your office is having a special interest in this matter, to the extend that your office is seen to be handling the matter contrary to the Rules of Court.

Thank you.

Yours sincerely,

.....
T. MAHLAKENG & CO.

c.c. Mohaleroe, Sello & Co."

It is very clear from this letter that **Mr. Mahlakeng,** applicant's attorney, was under the impression that the clerk of Court and the court itself had a special interest in the case and were handling the matter contrary to the Rules of Court. He obviously believed that the clerk of Court and the Court had bias towards him. Once an attorney becomes convinced that the court has bias towards him, he becomes emotional and ceases to advise his client in a professional and objective way.

Mr. Mahlakeng holds a strong belief that the court (Chief Magistrate) has no power to tell the parties in a case that because they cannot agree on any particular date for the hearing of their case, it (the court) has selected a date on which it will hear the case. He objects to this procedure on the ground that there was no notice of set down as envisaged by the Rules of Court. Notice of set down is a document used by the parties to inform each other of the date on which the matter shall be heard. It is not a document intended to be used by the court.

Order No.XVIII of the Subordinate Court Rules provides that 'the trial of an action shall be subject to the delivery by the plaintiff after the pleadings have been closed of notice of trial for a day or days approved by the clerk of the court; Provided that if the plaintiff does not within fourteen days after the pleadings have been closed deliver notice of trial the defendant may do so.'

As I have indicated above the parties could not agree on a

suitable date. The court intervened and suggested several dates but **Mr. Mahlakeng** said that they were not suitable to him. The last day given by the court was the 14th October, 1994. This last day was rejected by **Mr. Mahlakeng** on the excuse that he was already engaged in another court in a matter that was properly set down. He did not have the courtesy to tell the Chief Magistrate in which court he was already engaged. I cannot blame the learned Chief Magistrate for having concluded that **Mr. Mahlakeng** was practising delaying tactics in order to frustrate the plaintiff in his claim. If he was engaged in another magistrate's court, why could he not postpone that other case because the present case had already been postponed several times and the plaintiff was starting to feel that he was being deliberately frustrated in his claim?

It seems to me that because the court was already seized with this matter and was aware that the attorneys involved were unable to agree on any particular day as suitable to both of them, the court had a right to give them a date and ask the clerk of court to inform them accordingly. The attorneys were given notice of the day on which the case would be heard. It was the duty of both of them to appear on that day to argue the matter or apply for postponement. **Mr. Mahlakeng** cannot just tell the court that the day was unsuitable to him by letter without appearing either personally or through one of his colleagues to formally apply for a postponement. It was very impolite of him to write a letter. His insistence that there ought to have been a notice of set-down is wrong. The court was already seized with

the matter and had been postponed **sine die** once or twice because the days selected were unsuitable to **Mr. Mahlakeng**. It seems to me that in a case like this the court has a right to choose a date and to inform the parties/attorneys accordingly.

Order No.XXXIII (2) of the Subordinate Court Rules provides that 'where any provision of these rules or any request made in pursuance of any such provision has not been fully complied with, the court may on application order compliance therewith within a stated time.'

It seems to me that if the defendant's attorney was of the view that there had been no compliance with Order No.XVIII (1) of the Subordinate Court Rules, he was under an obligation to make an application to compel compliance with the Rule because it has a proviso that if the plaintiff does not within fourteen days after the pleadings have been closed deliver notice of trial the defendant may do so. Or he could have brought an interdict against the clerk of court.

In **D' Anos v. Heylon Court (Pty) Ltd.** 1950 (2) S.A.40 (C.P.D.) the facts were that after the parties' attorneys had failed to obtain a date of set down for the hearing of an exception, the Registrar informed the respondent's (excipient's) attorneys that a date had fallen vacant. The respondent's attorneys set the matter down for such vacant date and communicated that fact to the appellant's attorneys. The appellant did not raise any object to any irregularity but merely

stated that the date was unsuitable as appellant's counsel would not be available. At page 43 the learned Acting Judge President said:

> "The appellant stressed the importance of his having counsel who had drafted the plea, and, as I have said, that is certainly a matter which we would expect the Registrar to take into consideration. But there were other considerations in this case which outweighed that consideration, and that was that the matter had already been hanging fire for a long time, and would have had to stand over indefinitely as far as could be seen at the moment, unless the open date was taken. Consequently, as I have already said, there was nothing unreasonable in the Registrar's action; nor can the Court see why the learned Judge should have postponed the date."

In the present case the matter has already been hanging fire for a long time and the court **a quo** concluded that the defendant's attorney was playing delaying tactics in order to frustrate the plaintiff in his claim.

In the result the application for review is dismissed with costs.

J.L. KHEOLA
CHIEF JUSTICE

16TH SEPTEMBER, 1996

For Applicant - Mr. Mahlakeng
For Respondent - Mr. Sello.