CIV/T/598/95

IN THE HIGH COURT OF LESOTHO

In the matter between

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY **Plaintiff**

and

MASUPHA EPHRAIM SOLE **Defendant**

REASONS ON RULE 30 APPLICATION

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
On 1st day of April 1997.

On the 14th day of November 1996 the Plaintiff filed a Notice of Motion in terms of Rule 30 of the High Court Rules 1980 seeking an order in the following terms:-

"1. That the defendant's purported notice in terms of Rule 34 (6) dated 12 November 1996 be and is hereby set aside as an irregular step in terms of Rule 30 (1) of the Rules of Court.

2. That the defendant pay the costs of this application such costs

to include the costs of two counsel."

The application was based on the following grounds:

1. That the trial having commenced it is no longer competent for the defendant to invoke the provisions of Rule 34 (6).

2. That from all the surrounding circumstances the notice amounts to an abuse of the process of the Court.

This application was argued before me on the 3rd February 1997. On the following day namely the 4th February 1997 I granted the application as prayed and set aside the Defendant's purported Rule 34 (6) notice dated 12th November 1996 as both irregular and improper in terms of Rule 30 (1) of the High Court Rules. I ordered the Defendant to pay costs of the application to the plaintiff including costs of two (2) counsel. I intimated that reasons would be filed later. These are the reasons.

In order to understand the ding dong affair in this matter it is necessary to give a little background to the case which started off with the plaintiff issuing summons against the Defendant for an amount of about M5 million in 1995. By February 1996 the pleadings had been closed and on 23rd day of April 1996 the parties mutually set down the matter for hearing on the dates of 4, 5, 6, 7, 8, 11, 12, 13, 14 and 15 November 1996 as well as 2, 3, 4, 5 and 6 December 1996.

On the 30th May 1996 the plaintiff furnished discovery of documents in response to Defendant's notice dated 17th April 1996.

The Defendant did not raise any complaint about the said discovery for about four months. It was only on 23rd September 1996 that the Defendant filed a notice in terms of Rule 34 (6) with only six (6) weeks remaining before the actual date of trial.

Then following some correspondence between the attorneys concerned the plaintiff furnished a supplementary Discovery Affidavit by Makase Marumo on the 25th October 1996.

It is significant that at the pre trial conference held by the parties on the 1st day of November 1996 the Defendant's legal representatives did not raise any complaint about plaintiff's discovery.

Then on the 1st day of the trial namely the 4th November 1996 and while the Court was already in session the Defendant filed a Notice of Motion seeking for an order "directing the plaintiff to make discovery as contemplated in terms of Rule 34 (3), as well as make available for inspection and copying, as contemplated in terms of Rule 34 (6) and (8) within 3 (three) days of the date of this order the following documents:-

"2.1 All board minutes and agendas for such board minutes from the 1st January 1988 to date hereof;

2.2 All memoranda, management accounts, budgets and reports emanating from the Plaintiff's finance department from 1st January 1988 to date hereof;

2.3 All memoranda, internal correspondence, budgets and minutes pertaining to the LHDA Home Ownership Scheme, in respect of Plot 12281-046, Arrival Centre, Maseru;

2.4 All memoranda, reports, budgets and correspondence in respect of the Lease Agreements referred to in Claim 1 of Plaintiff's Particulars of Claim'

2.5 All memoranda, internal and correspondence, opinions and reports from the consultants, arising from Contract 129B, minutes and reports of the Negotiating Committee in respect thereof, prior to July 1994 and furthermore all correspondence, memoranda and documentation relating to the calculation of both present and estimated costs in respect of Contract 129B.

2.6 All documentation, internal and external, relating to the renewal of the Lease in respect of 184 Cinez Road."

The said application was argued before me on the same day namely the 4th November 1996 and after having heard arguments from both sides I reserved my ruling in the matter.

I have since duly delivered the ruling on the 3rd February 1997 dismissing the application with costs on the ground that there is no need to go behind the plaintiff's discovery affidavit filed by Makase Marumo in the matter on 25th October 1996. Accordingly this judgment should be read in the context of my judgment of the 3rd February 1997 as well.

What is peculiar in this case is that on the 12th November 1996 and while a ruling on Defendant's Notice of discovery dated 4th November 1996 was pending, as aforesaid, the defendant filed yet another Notice of discovery in terms of Rule 34 (6) calling for the following documents:-

"1. Copies of all written housing leases entered into by the LHDA,

from January 1988 to December 1995, other than those referred to in Claim 1 of the Particulars of Claim.

2. A schedule reflecting occupancy levels in respect of each housing unit over the above mentioned period.

3. Details of all other leases of a written or informal nature, if any, covering the period mentioned in paragraph (1) above.

4. All Board papers, attendance registers of all Board meetings from January 1988 to date."

It is clear to me that item 4 above is a repetition of Defendant's Notice of discovery dated 23rd September 1996 as aforesaid. It appears as item 1 in that notice which has already been dealt with by this court.

It is significant that in the said Defendant's discovery notice of 23rd September 1996 there is no request for the documents presently sought in the Notice of the 12th November 1996. Nor was there such a request at the pre trial conference. Accordingly the Defendant's bona fides is clearly in question.

It is my considered view that a party should not be allowed to make piece meal applications for discovery as that will in inevitably lead to delaying the proceedings. I can find no justification for the fact that the Defendant has filed two notices to discover in terms of Rule 34 (6) in this matter namely one filed on 23rd September 1996 and the other one dated 12th November 1996. There is certainly

no provision in Rule 34 (6) allowing a party to file two different notices of discovery in the same matter. I find therefore that the second Rule 34 (6) notice filed on 12th November 1996 is irregular.

I should also state that the Rules of Court are designed to expedite proceedings rather than to delay them as Defendant's tactics herein clearly indicate.

See Viljoen v Federated Trust Ltd. 1971 (1) S.A. 750 at 756.

See also Muller v Paulsen 1977 (3) S.A. 206 at 208 in which Stewart J in dealing with the Uniform Rules of the Supreme Court of the Republic of South Africa which are substantially similar to ours had this to say:-

> "It has been said that the Uniform Rules of Court must be interpreted so as to provide for the expeditious disposition of litigation. I agree."

Nor can this court ignore the fact that in its written reasons on discovery delivered on the 3rd February 1997 it stated as follows:

> "Having heard Mr. Harley's evidence, PW1 Dereck Andrew Davey's evidence in chief, having also listened to counsel's submissions as well as having perused the pleadings and the Board Minutes in question I remain unpersuaded that there is any need to go behind the Plaintiff's discovery affidavit filed by Makase Marumo in the matter on 25th October 1996."

Accordingly it seems to me that Mr. Penzhorn is correct in his submission that the present Rule 34 (6) Notice is designed to force the Court to embark afresh the whole debate regarding the relevance of the documents sought and that this amounts

to delaying tactics and abuse of court process.

That the court has power to prevent an abuse of court process admits of no doubt.

See Hudson v Hudson and Another 1927 A.D. 259.
See also Janit and Another v Motor Industry Fund Administrators (Pty) Ltd 1995 (4) S.A. 293 at 308 A.D.

There is another factor to consider and it is whether the procedure provided for in Rule 34 (6) being a pre trial procedure should have been invoked in the notice filed on the 12th November 1996 or whether Rule 34 (14) should have been resorted to. The latter sub Rule provides as follows:-

> "(14) The Court may during the course of any action or proceeding, order the production by any party thereto under oath of such documents in his power or control relating to any matter in question in such action or proceeding as the court may think just, and the court may deal with such documents, when produced, as it thinks fit."

Eric Morris: Technique in Litigation: 2nd Edition states as follows at p 139:

> "The trial, then, commences usually with an opening address by the advocate for the plaintiff." I respectfully agree.

See also Standard Bank of S.A. v Minister of Bantu Education 1966 (1) S.A. 229B.

I have come to the conclusion therefore that the trial in this matter effectively

began on the 8th November 1996 when Mr. Penzhorn commenced his opening address.

Accordingly I find that once the trial had commenced as it did on 8th November 1996 it was irregular for the Defendant to make a discovery notice under Rule 34 (6) and not Rule 34 (14) on the 12th November 1996. After all resort to the former would inevitably lead to further delays since there are time limits prescribed in the sub Rule.

See Kakuva en 'n ander v Minister van Polisie en 'n ander NNO 1983 (4) S.A. 787 at 790 D - F. Although this decision is in Afrikaanse the head note thereof significantly states as follows:-

> "Held, further, that the wording of sub rule (11) (our sub rule (14)) indicated that it was a procedure which dispensed with the usual requirements under sub rules (1) - (10), so that the court was empowered to exercise its discretion without any further procedural requirements."

I respectfully agree.

See also Msimang v Durban City Council and Others 1972 (4) S.A. 333 at 336 C - H in which Muller J interpreted Rule 35 (11) (our Rule 34(14) in the following words:-

> "Now, it seems to me to confer on the court the clear power, during the course of a trial, to order the production of documents if the court

thinks it meet."

I respectfully share the learned Judge's view.

In all the circumstances of the case therefore I granted the Plaintiff's application as prayed with costs including costs of two (2) Counsel.

MM Ramodibedi

JUDGE

1st. April 1997

For Applicant/Plaintiff :	Mr. Penzhorn S.C. Assisted by Mr. Woker
For Respondent/Defendant:	Mr. Hoffmann S.C. Assisted by Mr. Fischer