CIV\APN\382\95

IN THE HIGH COURT OF LESOTHO

In the Application of :

BULARE RANGOPE **Applicant**

vs

SECURITY LESOTHO(PTY)LTD **Respondent**

JUDGMENT

Delivered by the Hon. Mr Justice M.L. Lehohla on the 22nd Day of September, 1997

This Court this morning heard argument based on the application moved on behalf of the applicant *Mr Moeletsi* briefed by the attorneys Mphalane & Co. This application is based on a document styled "notice in terms of Rule 30".

The application is in response to another application made by the respondent in terms of Rule 32(7) and the grounds on which the applicant is relying are that the respondent's step, or application is irregular and improper for reasons set out in (a),

(b) and © :

(I) First , that respondent has not set out in detail the points of law in order for the court to determine them before the main application could be heard and that this amounts to taking the applicant by surprise at the hearing;

(ii) Further that there is no application before court to have the main application stayed pending the determination of the so-called points of law which are not properly disclosed and,

(iii) finally that there is no affidavit in support of the application stating the facts upon which the respondent is relying or stating the deficiency in the applicant's application and for that the application wanted the defences of the respondent to be dismissed with costs or the application by the respondent in terms of Rule 32(7) be dismissed with costs.

It will be fruitful, I think, to refer to the rules in order to put the matter in perspective. Regarding the application in terms of Rule 30, the rule relied on by the applicant is Rule 30(1) reading

> "Where a party to any cause takes an irregular or improper proceeding or improper step, any other party to such cause may within 14 days of the taking of such step or proceeding apply to court to have it set aside.
>
> Provided that no party who has taken any further step in the cause with knowledge of irregularity or impropriety shall be

entitled to make such application.

> Rule 32(7) which is relied on by the respondent is to the effect that if it appears to the court *mero motu* on the application of any party is that there is in any pending action a question of law or fact which it would be convenient to decide either before any evidence is led or separately from any other question, the court may make an order directing the trial of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question is disposed of".

Miss Thabane for the respondent brought to the court's attention in her argument and her submissions that the applicant should have brought his application within fourteen (14) days of the improper step occurring and that applicant nonetheless brought this application a year or so after he had envisaged the irregularity.

The court has seen for itself that in fact the applicant, having been acquainted with the irregularity complained of, took steps which in fact tended to condone the so-called improper step by the respondent or irregularity in that the applicant himself approached the Registrar with notice to the respondent that an application be made before the Registrar for allocation of a date on which the substantive matter was to be heard on the 25th of March, 1996. Not only that, but he proceeded to cause two notices of set down to be filed with notice to the other party each time. These were filed on respective dates for hearing on the 18th of September, 1996 and 3rd of

October, 1996. In fact this step that was taken by the applicant stands in the way of the applicant's own interest in terms of the rule that I have just referred to. In short then this being the case it would appear that the applicant was wrong in maintaining that the respondent committed any irregularity or improper step.

Another point of interest I think relates to the papers that were filed by the applicant insofar as in them or their heads of argument including their arguments advanced by *Mr Moeletsi*, that there was no affidavit stating facts upon which the respondent is relying. Reference to the case of ***Lehlohonolo Khoboko vs Ntlhoko Khoboko & 2 Ors*** CIV\APN\402\96 at page 5 (unreported) at page 5, reads :

> (This is in reference to something of a parallel nature, not the same as this matter but something of a parallel nature to what we have in the instant matter). There this court said :
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> "Furthermore with respect to what form of notice is required in order to bring an application within the provisions of rule 8 (5) or (8) (21) it appears that consideration of Munnik J's dictum in ***Yorkshire Insurance Company Ltd vs Rubben*** 1967(2) SA 265 would be of benefit". (It should be noted that our rule 8(21) is similar to South African Rule 6(ii).)

The learned Judge had this to say with regard to forms of notice in interlocutory matters :

> "There is to my mind a substantial difference between an application being brought on notice and an application on notice of motion. It could never have been intended when parties are already engaged in litigation and have complied with such formalities as appointing attorneys and giving addresses for the service of documents in the proceedings that the parties would be required to go through all the same formalities again with all the concomitant and unnecessary expense".

I am quoting this particular passage because I want to bring into relief the question as to whether it would be necessary in terms of Rule 32(7) which talks about an application having to be made by a party which is to make an application, to prepare and file a further affidavit to support an application of that sort. I doubt that; and I don't think that would be the requirement because the application had been filed, the main application had been filed and all that are being raised are either points of law or points of facts which don't require any affidavits.

I am buttressed in this view by provisions of Rule 32(9) which says :

> "If any question in dispute is that of law only and the parties are agreed upon all the facts the facts may be admitted and recorded at a trial and the court may give judgment without hearing any evidence".

Evidence is the same thing as affidavits. So in this matter even though there was no agreement on the facts nonetheless these facts were really common cause, i.e. the facts here reveal that these notices of set down came one after the other even long after the perceived irregularity had been brought to the attention of the party who

seeks now to find something faulty with that.

On these grounds, therefore, I uphold application based on Rule 32(7) with costs and by token of that rule reject the application based in terms of Rule 30.

The court earlier or a moment ago indicated that it was upholding an application in terms of Rule 32(7) : that was jumping the gun; the Court merely meant that it is rejecting the notice in terms of Rule 30. The Court is here to treat of the application moved in terms of Rule 32(7). In any event the question of costs is as ordered earlier, namely that the application in terms of Rule 30 by the applicant Bulara Rangope is dismissed with costs.

JUDGE
22nd September, 1997

For Applicant : Mr Moeletsi
For Respondent : Miss Thabane