IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/T/110/07**

In the matter between:

PANNAR SEED (LESOTHO) (PTY) LTD **PLAINTIFF**

And

MALEFILOANE GENERAL DEALER **DEFENDANT**

SUMMARY

Point in limine raised- Lack of authority to depose to an affidavit- Point dismissed- Civil Procedure- Declaration filed out of time- Failure to regularize the procedure- Order as to costs granted against the Plaintiff.

JUDGMENT

Delivered by the Honourable Madam Justice L. Chaka-Makhooane on this 17th day of August 2010.

[1] The civil summons were issued by the Plaintiff against the Defendant claiming payment in the sum of seventy-nine thousand four hundred and eighty-eight Maloti (M79, 488.00), in respect of goods sold and delivered by Plaintiff at the Defendant special instance.

[2] The Plaintiff and the Defendant entered into an oral agreement in terms of which the Plaintiff, from time to time sold and delivered seed products, on order by the Defendant. The court was informed that the Defendant had ordered seed products from the Plaintiff on or about November, 2003, which he refused or failed to pay.

[3] The Defendant raised a point of law namely that the Deponent to the founding affidavit was not authorized to institute a

defence and to depose to the affidavit on behalf of the Plaintiff, as there was no resolution to that effect. According to Counsel for the Defendant **Mr. Ndebele,** the Deponent **Ms**. **Tohlang**, a practicing attorney, lacks a mandate to depose to the affidavit on Plaintiff's behalf, moreso when there is no of evidence in the form of a resolution, which should have been submitted to prove her mandate. See *inter alia* **Pretoria City Council v Meerlust Investments 1962 (1) SA (AD) 231** at **325** and **Num v Freegold Consolidated Mines [1998] BLLR 712** at **716**.

[4] On the merits, the Defendant applied that the Plaintiff's declaration be struck out as an irregular step pursuant to **Rule 30** of the **High Court Rules 1980** (the Rules). The Defendant contended that the Plaintiff instituted a claim against the Defendant in 2007 but failed to file the declaration until one and half years later, in contravention of **Rule 21 (1)** of the Rules.

[5] The Defendant further averred that the Plaintiff was served with a notice in terms of **Rule 26 (2)** on the 3rd July, 2008 to deliver the declaration within three (3) days. However, service was only effected on the 15th September, 2008. It was submitted that the position of the law as per **Rule 26 (3)** was that the Defendants were automatically barred from pleading and ought to have formally filed a notice for the removal of the Bar in terms of **Rule 26 (4)**. It was therefore submitted that the filing of the declaration after the lapse of that period constituted an irregular step, as a result it must be struck out.

[6] In response, **Mr**. **Loubser** for the Plaintiff argued that since this matter involves an interlocutory application, the authority to depose, that was given in the summons, was sufficient and no other fresh one had to be filed.

[7] On the question of the late filing of the declaration, the Plaintiff's Counsel informed the court that the Plaintiff set

down the matter for hearing on the 15th September, 2008 and on that date, **Mofolo J** ordered the Plaintiff to file a declaration on or before the 22nd September, 2008, which declaration was accordingly filed. It was argued that the issue of the filing of the declaration was taken out of the hands of the respective parties and became controlled by the court. It was submitted further that since the court had ordered one week within which the declaration should have been filed, it could not be argued that the Plaintiff was out of time.

[8] I will now deal with the point raised *in limine* relating to the lack of authorization to depose to an affidavit. In the **National University of Lesotho and Another v Motlatsi Thabane C** of **A (CIV) 03/08** (unreported), **Smalberger JA** held as follows:

> "*This court has more than once expressed a view on the matter. In Lesotho Revenue Authority and Others v Olympic off sales C of A (CIV) No. 13 of 2006) (unreported) the following was said in para [14]…*
>
> *'This court has also considered the question whether a resolution to institute or oppose an application on behalf of a legal person should*

always be filed. Mohamed JA held as follows in the case of Central Bank of Lesotho v Phoofolo 1985-1989 253 at 258J-259B:

'The respondent had contended in the Court a quo that there were two technical grounds on which the appellant's opposition should fail. The first technical ground was that no resolution, evidencing the authority of the Governor to depose to an affidavit on behalf of the appellant, or to represent the appellant in the proceedings, was filed…

There is no invariable rule which requires a juristic person to file a formal resolution, manifesting the authority of a particular person to represent it in any legal proceedings, if the existence of such authority appears from other facts."

[9] Proof of authority to depose to an affidavit by way of a formal resolution is not a strict requirement in law, especially where the facts point to the existence of the authority, see **NUL v Thabane** (supra). In the present matter, **Ms. Tohlang** for the Plaintiff deposed to an affidavit in an interlocutory application. It is significant to note that **Ms**. **Tohlang** deposed to facts known to her pertaining to the issue of the late filing of the declaration and also in relation to the appearance before the court in that matter. A resolution was filed authorizing the

Plaintiff to depose in the main, even if it had not been filed, according to the authorities, it would still suffice when such authority was evident from the other facts.

[10] I am of the view that the Defendant's point of law holds no water, regard being had to the fact that the deponent deposed to facts which transpired in court: facts that she had knowledge of and were directly linked to the matter at hand. The point in *limine* is dismissed.

[11] It was alleged on the merits that the Plaintiff's declaration was filed out of time. According to **Ms**. **Tohlang**'s affidavit, summons was issued on the 27th February, 2007 and was served on the Defendant on the 17th April, 2007 who accordingly entered an appearance to defend. The notice was served upon the Plaintiff on the 24th April, 2007. In terms of **Rule 21 (1)**, the notice of appearance to defend is followed by the service of a declaration within 14 days. That means

procedurally the Plaintiff ought to have served a declaration some time in mid May.

[12] **Ms**. **Tohlang** tries to justify the default by showing that the Defendant's attorneys were in the interim substituted and the notice of substitution was served on the 3rd June, 2008. This, however, does not account for the lapse of more than thirty (30) days in the month of May. The Plaintiff was *ipso facto* barred in terms of the Rules.

[13] The Defendant, by the notice in terms of **Rule 26 (2)** called the Plaintiff to plead within three (3) days of the receipt thereof. Apparently **Ms**. **Tohlang**, who was left to take up the matter was trying to obtain instructions then. The Defendant having set the matter down for the 15th September, 2008, the Plaintiff accordingly appeared before the Judge who made an order. See minute in Judge's file:

"Crt: Ppd to 22/09/08 for regularization."

[14] The Plaintiff were already barred from delivering a declaration and the next step would have been an application to move the court to remove the Bar, shown on good cause and to serve the parties concerned as per **Rule 26 (4)**. I find that the step that was taken was irregular.

[15] The question to be asked is whether such a procedural (technical) irregularity warrants the striking out of the filed declaration. It would not cure any breach to order the Plaintiff to regularize the proceedings before filing a declaration, in the present situation where it has already been filed. This would unjustifiably delay the matter that has already dragged on for so long.

[16] Faced with the circumstances such as this one, the court may order costs against the defaulting party, in accordance with

Rule 26 (8). I share **Smalberger JA**'s sentiments in the **National University of Lesotho and Another v Thabane** (supra) where he said:

> *"They (the Rules) are primarily designed to regulate proceedings in this Court and to ensure as far as possible the orderly, inexpensive and expeditious disposal of appeal. Consequently, the Rules must be interpreted and applied in a spirit which will facilitate the work of this Court. It is incumbent upon practitioners to know, understand and follow the Rules, most if not all of which are cast in mandatory terms. A failure to abide by the Rules could have serious consequences for parties and practitioners alike- and practitioners ignore them at their peril. At the same time formalism in the application of the Rules should not be encouraged…*
>
> *Thus what amount to purely technical objections should not be permitted, in the absence of prejudice, to impede the hearing of an appeal on the merits. The Rules are not cast in stone…*
>
> *Thus it has been said that rules exist for the court, not the court for rules. The discretionary power of this court must, however not be seen as an encouragement to laxity in the observance of the Rules in the hope that the court will ultimately be sympathetic."*

I agree.

[14] For the foregoing reasons, the application for striking out the declaration as prayed for in the notice of motion fails. The Plaintiff is to pay the costs of the application.

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L.CHAKA-MAKHOOANE
JUDGE

For Plaintiff : **Mr Loubser**

For Defendant : **Mr. Ndebele**