CIV/T/193/2010

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:-

CHINA GEO ENGINEERING CORP (Pty) Ltd	Plaintiff
And	
T. N. MOKHOSOA	1st Defendant
THABANG RANYAMA	2nd Defendant

JUDGEMENT

Coram	:	Hon. T. E. Monapathi
Date of hearing	:	8th February 2013
Date of judgment	:	8th February 2013

SUMMARY

It is irregular in application proceedings for a Respondent to appear without a notice of intention to oppose (Rule 8 (9) (10) and without answering affidavit (Rule 8 (10) (b)) or notice of intention to raise points of law (8) (10) (c). Application was dismissed for failure to apply for leave to file counter-claim out of time [Rule 23 (c)].

CITED CASES

Panner Seed (LESOTHO) PTY LTD v Malefilone GeneralDealer CIV/T/110/07
Natinal University of Lesotho and Another vs Thabane C of A (CIV) no. 3/2008
Mahamo v Mahamo C of A (CIV) no. 1/1980

[1] This application is about striking-off of an allegedly irregular process. The process complained of by the Plaintiff, being a counter-claim that was filed admittedly after two(2)years of filing of the plea. This application is precisely within what is envisaged by ***Rule 30*** of the High court Rules prescribe. The complaint being in terms of ***Rule 23***.

[2] The circumstances or the grounds by the Plaintiff can comprehensively be found in ***Rule 23***(a), (b) and (c). ***Rule23 (a)*** speaks about a requirements of when a counter-claim is to be filed. Firstly it is to be filed together with the plea. The alternative is to be found in ***Rule23(b).***It is that a counter-claim may be filed before pleadings are closed. In that sub-rule, there are exceptions to be found in Rule 22(5), that those which however the defendant is not relying on.

[3] The last sub-rule of ***Rule 23***prescribes that if the intended counter-claim is not filed in terms of ***Rule23***(a) or (b) above, unless the court grants leave, a counter-claim will not be allowed. The Plaintiff contends that none of above favour Defendant.

[4] We record that as a matter of fact having filed a counter-claim after closure of pleadings there was no application for leave to court to file counter-claim after time. This in my view becomes disastrous.

[5] Again there is this scenario which is in itself strange in terms of Rules and practice. The Defendant having received notice to strike out, did not file a notice of intention to oppose nor any supporting process. This one is distinctly against our Rulesand will not favour an opposing Defendant as we will show later.

[6] In addition to absence of intention to oppose, the Defendant has not stated the grounds on which he opposes the application. Whether it was in terms of **Rule** 8 (10)(c) or on affidavit nor were those grounds are stated in the notice of intention to oppose which although (the latter) not strictly regular the Court would have condoned even if that notice of intention to oppose was doctored in that fashion. It surely would indicate the basis for opposition where it would be otherwise lacking.

[7] In my view the effect of Defendant's Counsel articulating almost every ground from the bar, indicates an ambush of the first order and it begs as to why was the Defendant allowed to appear before court and oppose, when he otherwise did not have *locus* or basis. Did the Defendant have standing to oppose this application? The answer is "No". If he had not indicated intention to oppose.

[8] I otherwise confined myself to **Rule 23**. I wouldnot speak about the other issues of whether there was prejudice, further step, interpreting the Rules strictly or other issues raised by the Defendant except the issue of non-compliance with the rules.

[9] Defendant says on his non-compliance with the Rules that is Rule 59 ought to be involved and that the court should condone such irregularity when justified or convincing. The court was referred to the judgement of Her Ladyship Chaka-Makhooane J, in ***Panner Seed (LESOTHO) PTY LTD v Malefilone GeneralDealer CIV/T/110/07*** where Smallberger JA was quoted in the ***Natinal University of Lesotho and Another vs Thabane C of A (CIV) no. 3/2008***.

> " 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 at 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 the 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 the 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."

[10] This however is a situation where Defendant himself has trampled on the Rules. It called for no symphathy for Defedant. I was also referred to ***Mahamo v Mahamo C of A(CIV) no. 1/1980***.

[11] This application for striking-out of the counter-claim should succeed and I add that, most reluctantly costs will be costs on the ordinary scale.

_____

T. E. MONAPATHI
JUDGE

For Plaintiff	:	Mr. Grundlingh
For Defendant	:	Adv. Taaso