CIV/APN/409/06

IN THE HIGH COURT OF LESOTHO

In the Matter Between:-

PHILLIP TOHLANG MONONGOAHA **PLAINTIFF**

And

LESOTHO NATIONAL INSURANCE CO. LTD **DEFENDANT**

RULING

Coram : Hon. N. Majara J

Date of hearing : 31st March 2014

Date of judgment : 27th May 2014

Summary

Application for condonation for late filing of amendment to the summons – whether applicant has established sufficient grounds for the granting of the application – applicant having been granted the application numerous times but failing to so amend – application abuse of court process and dismissed with costs.

ANNOTATIONS

STATUTES

1. Motor Vehicle Insurance order of 1992

CASES

1. Commercial Union v Makhabane Letsie 1997 – 98 LLR/LB 339
2. Commercial Union Assurance Company Ltd v Waymark N.O. 1996 (2) SA 73 (TK)

[1] This is an application for condonation for the late filing of an amendment to the plaintiff's summons. The application is opposed.

[2] In his oral submissions, **Mr. M. Ntlhoki** who represents the plaintiff in this matter, stated that at the time the pleadings in this matter were drawn he had recently lost his office secretary and as a result of the emotional anguish over her death, the pleadings in the original summons were drawn by students from the National University (presumably on attachment).

[3] He added that the summons was instituted sometime in 2006 and some errors were discovered later as things progressed. Further that at the material time, he was undergoing medical check-ups and had to be assisted by other legal practitioners. He also conceded that there were delays as a result of which the plaintiff is now before the Court to seek condonation.

[4] He added that all along he was harbouring under the impression that everything had been done hence his instructions to his clerks to prepare the index

as he thought the matter was ripe for hearing. Further that the claim in the main case concerns a minor child against whom the special plea of prescription does not run.[1]

[5] In his opposing argument to the granting of the application, Counsel for the defendant, **Adv. Loubser** contended that the applicant's Counsel had not raised one single argument why condonation should be granted yet the applicant has the responsibility to persuade the Court with a reasonable explanation for his delay and to show that he has reasonable prospects of success. It was his submission that none of the circumstances that were raised in support of this application are stated in the founding affidavit to the notice of motion. He added that the history of the matter with regard to why the respondent opposes the application is referred to in the heads of argument filed on behalf of the defendant and is self explanatory.

[6] In his written heads of argument, Counsel for the defendant stated that the granting or refusal of an application of this nature is a matter for the discretion of the Court, to be exercised judicially in the light of all the facts and circumstances before it. It was his submission that the Courts tend to allow amendments where same can be done without prejudice to the other party unless they are made *mala fide* or would cause an injustice to the other side which cannot be compensated with costs.

[7] He added that taking into account the sad history of the efforts of the plaintiff to amend his summons this application is no doubt *mala fides*. Further that the plaintiff has failed to give a reasonable explanation for his numerous delays and/or to show that he has reasonable prospects of success in the steps for which condonation is sought.

[1] Section 7 of the Motor Vehicle Order of 1992

[8] Before I proceed to consider the question whether the applicant has established sufficient grounds justifying the granting of the interlocutory application I find it apposite to state a brief history of this case.

[9] In terms of the minutes in the Court's file, a pre-trial conference was held on the 20th November 2007 and the matter was subsequently postponed to the 18th November 2011. On that date, the parties sought another postponement to a date for the hearing of an application for amendment to the summons, i.e. the same application as the current one. On the 8th June 2009, there was a further postponement to the 15th June 2009 and per the minute of that date the plaintiff indicated his intention to withdraw the amended summons and declaration. At all material times, the parties had been represented by different Counsel. After yet another postponement, the matter was allocated to me and on the 25th March 2010, **Mr. Ntlhoki** appeared before me on behalf of the plaintiff with **Ms Ramphalile** appearing for the defendant.

[10] On that day the application for condonation was moved unopposed and I duly granted it and gave an order that the plaintiff should file his amended declaration on or before the 9th April 2010. However, on the 10th November 2011 **Mr. Ntlhoki** appeared before me once again with **Adv. Loubser** appearing for the defendant and by consent, albeit **Adv. Loubser** did not seem to recall that he had given his consent, another application for amendment was moved on behalf of the plaintiff and I once again granted it and granted the defendant wasted costs.

[11] The matter was subsequently set down for hearing on the 31st March 2014 and it is on that date that the plaintiff's Counsel moved this application for amendment but alas this time around the defendant's Counsel was having none of it.

[12] I have already stated that Mr. Ntlhoki strenuously argued that the application ought to succeed because prescription does not run against minors and in this regard he referred the Court to the Court of Appeal's decision in the case of **Commercial Union v Makhabane Letsie.**[2] Indeed that was Leon JA's finding and Counsel for the defendant was in full agreement that this is the legal position. However, it is my view that this is not the determinant factor whether or not the application ought to succeed. As I have stated, the issue is whether or not the plaintiff has established sufficient grounds for the granting of the application.

[13] Against the stated background herein, there can be no argument that the plaintiff has been accorded more than his fair share of this Court's indulgence as well as the defendant's cooperation insofar as being allowed to amend his summons goes. Whilst I do appreciate the hardships and circumstances that the plaintiff's Counsel stated before this Court in support of it, all these were not stated in the plaintiff's founding affidavit. For this reason and for the fact that the numerous applications to amend were granted but never properly followed up lead me to the inescapable conclusion that the plaintiff has been at best negligent even if not *mala fides* in the strict sense of the word. To this end see the case of **Commercial Union Assurance Company Ltd v Waymark N.O.**[3]

[14] I have therefore reached the finding that the plaintiff's explanation under the prevalent circumstances fell far short of being reasonable so that not only would granting yet another order at his instance be prejudicial and cumbersome on the defendant, but it would also constitutes an abuse of this Court's process. Accordingly it falls to be dismissed with costs. I so order.

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[2] 1997 – 98 LLR/LB 339
[3] 1995 (2) SA 73 (TK)

N. MAJARA
JUDGE

For plaintiff : Mr. M. Ntlhoki

For defendant : Adv. PJ Loubser