

IN THE HIGH COURT OF LESOTHO
(Commercial Division)

In the matter between:

TLHOMPHO MOKUBUNG

APPLICANT

AND

AON LESOTHO (PTY) LTD

RESPONDENT

JUDGMENT

Coram : L.A. Molete J
Date of Hearing : 06th May, 2015
Date of Judgment: 22nd June, 2015

SUMMARY

Rules of Court – Application for joinder and condonation made out of time – Court’s discretion to condone non-compliance with the rules – discretion to be exercised judiciously to avoid injustice – determining factor whether the party to be joined has substantial interest in the matter and whether remedy sought based on determination of the same point of law or fact.

ANNOTATIONS

CITED CASES

Lesotho District of the United Church v Rev. Moyeye and Others 2007-2008 LAC 103

STATUTES

High Court rules 1980 1 Rule 10

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BOOKS

RULING ON CONDONATION AND JOINDER

- [1] This is an application by Plaintiff for the joinder of **Aon Lesotho (PTY) Ltd** as the 2nd defendant in this matter.
- [2] The common cause facts are that;
- (a) Applicant had a fire policy for her house.
 - (b) The house was substantially destroyed by fire on **23rd September 2005**.
 - (c) That house was bonded per deed of hypothecation with the Standard Lesotho Bank, 1st defendant.

- (d) In terms of the mortgage bond the Plaintiff was obliged to insure the building. The Plaintiff insured the building for M500,000-00
- (e) Upon the destruction of the house by fire, Plaintiff lodged a claim with the insurance Lesotho National General Insurance Co ltd using the services of the **Aon Lesotho (Pty) ltd**, as a broker
- (f) The insurance made an offer; which the Plaintiff objected to because no valuations were made as yet. The defendant declined also to accept the offer without Plaintiff's consent.
- (g) On or about the 15th November 2006 the defendant exercised its right under the cession agreement and accepted a settlement amount of M231,969-77 as compensation for the fire damage. (It is noteworthy that in the discharge the LNGIC had offered M309,489-50 in full and final settlement.)

[3] The Plaintiff therefore claims the amount that is the difference between the actual payment accepted by the defendant and what she reckons the insurance should have paid were it not for acceptance of a lesser amount. She also claims for emotional trauma alleged suffered as a result; and the rent paid in respect of the alternative house she had to occupy for five months. The claims are set out as M330,510-87 for under insurance and acceptance of the inadequate offer, M500,000-00 for emotional trauma and M16,700-00 for alternative accommodation.

[4] It is upon those facts that the Plaintiff sought to join the Aon Insurance Company as the 2nd defendant in these proceedings.

- [5] The Respondent, Aon Insurance Company raised a number of objections regarding the late filing of the Replying Affidavit, and the lack of condonation application for such affidavit.
- [6] Indeed when one looks at the time frames and the filing of documents in this case, one is dismayed at the level of non-compliance with the rules.
- [7] The Applicant filed the joinder application on the 1st March 2013, and it was opposed by Respondent. The opposing Affidavit was filed on 2nd May 2013. On the 14th November 2013, more than six months later the Applicant filed a Replying Affidavit, but did not apply for condonation for the late filing. The Respondent then filed an application to set aside the irregular step of filing the late reply without the condonation application, this was on 20th November, 2013.
- [8] On the 19th December 2014, the Applicant probably appreciated the irregular step taken; and at that time only filed an application for condonation. This was some thirteen months later than it should have been done.
- [9] This type flagrant disregard of the rules is not acceptable and should not occur.
- [10] The Applicant says in her affidavit for condonation that Respondent had also flouted the rules by the filing of the opposing affidavit late; and assumed that they could both violate the rules. That was a wrong assumption.

- [11] In explaining the reasons for delay the Applicant advances a combination of reasons including absence from Lesotho and inability to come and sign the affidavit timeously; as well as a lengthy period in which she says the court file went missing.
- [12] At the hearing of the matter, the Respondent's counsel submitted that the court ought to make a ruling on the condonation aspect, and admissibility of the Replying Affidavit and then only to determine the merits of the Joinder, and thereafter to go to trial on the merits of the claim. This is one correct approach, but it is lengthy and may result in the court making the mistake of focussing on the formality; rather than the substance of the issue.
- [13] In order to avoid dealing with the matter in that way; the court must if satisfied that condonation is to be granted, also admit the affidavit and grant the application for Joinder. This will enable the parties to go to the merits of the case immediately.
- [14] It is common cause that an application for Joinder can be made at any stage in the proceedings. It is also a well-established principle that the party sought to be joined must have a substantial interest in the proceedings, and the remedy sought against the party to be joined must be based on the determination of the same point of law or fact.

High Court rules 1980¹

Lesotho District of the United Church v Rev. Moyeye and Others²

¹ 1 Rule 10

² 2007-2008 LAC 103

- [15] The Joinder of parties may also be ordered for administrative convenience, which includes in my view fair determination of the matter and timeous conclusion.
- [16] The statement of Plaintiff in the action (Applicant in this case) informs me that Aon was engaged by herself as a broker because she required time and expertise to address the matter properly.
- [17] A number of statements and the evidence to be brought by plaintiff certainly implicate the Aon Insurance Company directly in the matter.
- [18] As broker and agent (or middleman) it is said of its role by Applicant that;
- “Aon sent a letter of acceptance to the Bank for signing.....
the Bank refused to sign for acceptance of the offer on the grounds that they did not know the details of the claim. The letter of offer was then addressed to me for signing by Aon.”
- [19] Plaintiff had a meeting with Aon and tabled a number of complaints. She says from there the Bank and Aon was made aware that the matter had not been resolved to her satisfaction.
- [20] However, she says at a certain stage the bank instructed Aon, the broker to accept the offer despite her disagreement. It is unclear how the bank ended up being the one instructing her broker to accept the offer.
- [21] The applicant was of the view that the Respondent was now interested in serving the interests of the bank rather than she who had instructed it as her

broker. She contends that a professional institution and broker would have been obliged to seek a fair settlement of the claim taking the interest of all parties into consideration.

Joubert : The Law of South Africa³


- [22] The argument advanced on behalf of the applicant is basically that despite the number of issues she had raised to show her dissatisfaction, both the broker and the bank decided to ignore her objections and accepted the offer.
- [23] It is not clear what the extent of the involvement the bank and the broker was in that acceptance which the applicant says was unreasonable and insufficient. It is however clear that liability may be imputed to the party who did so.
- [24] In addition, the amount offered by LNIG differs significantly from the amount ultimately paid into the bank to reduce the loan, and this also requires explanation from one or both parties, (i.e. Bank and Broker). It may ultimately determine who is liable and to what extent.
- [25] It is trite law that the court may condone any non-compliance with the rules; and in so doing must ascertain what is just and equitable between the parties in the granting or refusal of the application.
- [26] While it is difficult to see how the Respondent could possibly be held liable for the emotional trauma claimed, it is clear that in the circumstances the acceptance of the amount offered could have been prejudicial to the applicant and it is at this stage unclear who was responsible for that and

³ Vol 12 Para 171

for what reasonable explanation. The two parties being bank and broker have a hand in that decision, but only the evidence will reveal to what extent for each of them.

[27] For these reasons I shall make the order that;

- (a) The late filing of the application for joinder is condoned.
- (b) The application for joinder of Aon as the 2nd defendant in the proceedings is granted.
- (c) There is no order as to costs.



L.A. MOLETE

JUDGE

For Plaintiff/Applicant : Mrs M. Tau Thabane – (Attorney)

**For Defendant/Respondent: Adv. T. Laubser – (Instructed by Webber
Newdigate)**