IN THE HIGH COURT OF LESOTHO
(Commercial Court Division)

HELD AT MASERU **CCT/0246/2021**

In the matter between:

RETHABILE JUTA KOMPI **APPLICANT/PLAINTIFF**

And

FUSI PETROSE NTSEKHE **RESPONDENT/DEFENDANT**

Neutral Citation: Rethabile Juta Kompi v Fusi Petrose Ntsekhe [2022] LSHC 240 Com (22nd September 2022)

JUDGMENT

CORAM: MATHABA J

HEARD ON: 10th August 2022

DELIVERED ON: 22nd September 2022

SUMMARY:

Application in terms of Rule 30(1) of the High Court Rules of 1980 – Plaintiff claiming that defendant took an improper or irregular step – Withdrawal of application without consent of plaintiff or leave of court – Notice of withdrawal not containing consent to pay costs – Notice of withdrawal filed before the matter was set down for hearing – Consent of the other party or leave of court not required - Plaintiff to pursue costs under rule 43(1)(d) – Application under rule 30 dismissed.

ANNOTATIONS:

STATUTES

High Court Rules 1980

CASES

Lesotho

Lesotho Bank (In Liquidation) v Teboho Mphahama t/a Joala Boholo Restaurant (CIV/T/543/2003) [2014] LSHC 12

Liquidator Lesotho Bank v Raleting (CIV/T/16/2007) [2008] LSHC 79

South- Africa

Louw v Grobler & another (3074/2016) [2016] ZAFSHC 206 (15 December 2016)

The Standard Bank of South Africa Limited v Roland Piper and One (15325/2010) [2021] ZAKZDHC 4 (17 February 2021)

Trans-African Insurance Co., Ltd. v Maluleka, 1956 (2) SA 273 (AD)

Uitenhage Municipality v Ulys1974 (3) SA 800 (E) at 805 D-E.

INTRODUCTION:

[1] This is an opposed application in terms of rule 30 of High Court Rules of 1980, *('the rules')* in which the plaintiff (applicant) seeks an order setting aside as irregular or improper proceeding or step, a notice of withdrawal and notice of motion dated the 31st August 2021[1] filed by the defendant (respondent).

BACKROUND:

[2] The plaintiff instituted action against the defendant on the 27th May 2022, amongst others for cancelation of sale agreement in respect of a truck bought from the defendant and for a refund of purchase price. The defendant entered appearance to defend.

[1] The applicant got it wrong - the notice of motion is not dated the 31st August 2021. It is only dated August 2021. Though there is a provision for the exact date to be inserted in page two of the notice of notion, such has not been inserted.

[3] Subsequently, in August 2021, the defendant was barred from further pleading having failed to file a plea. In response, the defendant filed an application on the 8th August 2021 to lift the bar. The plaintiff opposed the application and duly filed answering affidavit. On the 1st September 2021, the defendant concurrently served the notice of withdrawal of the application and notice of motion reinstituting the application to lift the bar.

[4] Mr. *Potsane* for the defendant explained that the initial application to lift the bar had been casually prepared and as a formality based on the undertaking made by plaintiff's Counsel not to oppose the application. Conversely, a serious challenge was mounted against the application. The plaintiff had exposed fatal deficiencies in the affidavit hence the application had to be withdrawn and reinstituted, so clarifies Mr. *Potsane.*

[5] On the 13th September 2021 the plaintiff filed a notice in terms of rule 30 attacking both the notice of withdrawal and the fresh application to lift the bar. The defendant reacted with the so-called notice in terms of rule 8(10)(c) contending that the notice in terms of rule 30 is an abuse of court process. Mr. *Chondile* for plaintiff conceded during argument that rule 30 notice was incompetent as against the fresh application since he took further step following receipt of same.

ISSUE FOR DETERMINATION:

[6] Following the concession by the plaintiff, the only issue which requires determination is whether the notice of withdrawal is irregular or improper proceeding or step.

PLAINTIFF'S CASE:

[7] The plaintiff asserts that the defendant "caused his case to be set for hearing *dies induciae* and later withdrew same without consent of the court" and "without paying costs or without an offer as to costs". He contends that the rules of this Court make it peremptory that a person who intends to withdraw a case must do so with the consent of the other party and or by leave of court.

[8] In support of this submission the plaintiff relies on the case of **Lesotho Bank (In Liquidation) v Teboho Mphahama t/a Joala Boholo Restaurant (**CIV/T/543/2003) [2014] LSHC 12 which he submits held that rule 43(1) only allows for the withdrawal of a matter before it is set down, otherwise the withdrawal can only be by consent of both parties or by leave of court. The

plaintiff submits that the matter was withdrawn without his consent, nor by leave of court, as well as without an offer as to costs.

DEFENDANT'S CASE:

[9] The defendant in resisting rule 30 notice indicates that the plaintiff is abusing court process. As it appears from the notice, the plaintiff is dissatisfied with the fact that the defendant withdrew the application without payment of costs or making an offer for same, so contends the defendant. Therefore, the plaintiff should have invoked rule 43(1) (d), the argument continues.

[10] The defendant denies that the matter was set down as envisaged by rule 43(1)(a) and submits that since the notice of withdrawal was filed before the matter was set down, he was free to withdraw it any time without consent of the plaintiff or leave of court. The date on which the application was going to be moved, the 24th August 2021, reflected in the notice of motion was inserted pursuant to rule 8(8), so argues the defendant. Mr. *Potsane* submitted that the date is not set down as envisaged in rule 43(1)(a) but that a date has to be fixed so that the application may be moved if it is not opposed.

THE LAW AND ANALYSIS:

[11] Rule 30 (1) provides as follows:

"30 (1) where a party to any cause takes an irregular or improper proceeding or improper step any other party to such cause may within fourteen 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 the irregularity or impropriety shall be entitled to make such application.

(2) Application in terms of sub-rule (1) shall be on notice to all parties in the cause specifying particulars of the irregularity or impropriety involved.

(3) If at the hearing of such application the court is of the opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part either as against all the parties or as against some of them, and grant leave to amend or make any such order it deems fit, including any order as to costs."

[12] In **Liquidator Lesotho Bank v Raleting** (CIV/T/16/2007) [2008] LSHC 79 the Court adopted the Concise Oxford English Dictionary meaning which defines the word improper as "not in accordance with accepted standards of behavior" and irregular as "contrary to a rule, standard or convention".

[13] In dealing with a similar provision, Uniform rule 30, in **The**

Standard Bank of South Africa Limited v Roland Piper and One (15325/2010) [2021] ZAKZDHC 4 (17 February 2021), the court observed that the "rule is intended to deal with matters of form not of substance. It is intended to deal with irregular steps taken by parties during the course of litigation and where the irregularity emanates from the inappropriate use of the rules of court."

[14] Where improper or irregular step caused no prejudice to the other party, the court may refuse to set it aside, but rather order that it be corrected by some non – litigious means. *See*: **Raleting**, *supra*. There must be substantial prejudice to the other side for improper or irregular step to be set aside. *See*: **Uitenhage Municipality v Ulys**1974 (3) SA 800 (E) at 805 D-E. In **Trans-African Insurance Co., Ltd. v Maluleka**, 1956 (2) SA 273 (AD) at page 278, Schreiner, J.A. says that -

> "... technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits".

[15] Of necessity in my view in this case is to determine if the matter was set down by the time the notice of withdrawal was filed by the defendant. Without necessarily dismissing Mr. *Potsane*'s argument relevant to rule 8(8), the most relevant rule is rule 8(21). The rule provides that:

> "Notwithstanding anything to the contrary contained in this Rule, [rule 8] interlocutory and other applications incidental to pending proceedings may be brought on notice accompanied by such affidavits as may be required and set down at a time assigned by the Registrar or as directed by a judge".

[16] In my view, the application to lift the bar is an interlocutory application or an application incidental to pending proceedings. Therefore, it can only be set down at a time assigned by the registrar or a judge. In *casu*, there was no suggestion that the date on which the application was going to be moved, the 24th August 2021, as reflected in the notice of motion was assigned by the registrar or a judge.

[17] There is therefore a semblance of truth in Mr. *Potsane*'s argument that the date was fixed pursuant to rule 8(8) which requires the applicant to indicate the date on which the application will be set down for hearing if it is not opposed. However, I observe that the notice of motion to lift the bar was defective because the applicant did not set forth a day, the *dies induciae*, by which the respondent was expected to file his intention to oppose after service of application to him.

[18] Be that as it may, without the registrar or a judge having assigned a date on which the application to lift the bar was going to heard, I cannot conclude that the application was already set down at the time that it was withdrawn. In the result, the defendant did not require plaintiff's consent or leave of court to withdraw the application to lift the bar filed on the 18th August 2021. Consequently, the relevant notice of withdrawal was not irregular.

[19] Again, there is nothing in the rules to suggest that failure to consent to pay costs in the notice of withdrawal is inconsistent with or contrary to the rules and therefore renders the notice irregular or improper. I agree with Mr. *Potsane* that if the plaintiff was unhappy that the notice of withdrawal was silent on costs, his remedy was to invoke rule 43(1)(d). The rule provides that:

> "If there is no consent to pay costs contained in the notice of withdrawal or if such taxed costs are not paid within fourteen days of demand, such other party may apply to court on notice for an order for costs".

[20] The reliance on rule 30 by the plaintiff was, in my view, inappropriate and unnecessarily delayed the conclusion of this matter. The notice of withdrawal did not constitute irregular or improper step or proceeding. I totally agree with Rampai J 's sentiments in **Louw v Grobler & another**

(3074/2016) [2016] ZAFSHC 206 (15 December 2016) para 18 where he said the following:

> 'The purpose of the uniform court rules is to regulate the litigation process, procedures and the exchange of pleadings. The entire process of litigation has to be driven according to the rules. The rules set the parameters within the course of litigation has to proceed. The rules of engagement, must, therefore, be obeyed by the litigants. However, dogmatically rigid adherence to the uniform court rules is as distasteful as their flagrant disregard or violation. Dogmatic adherence, just like flagrant violation, defeats the purpose for which the court rules were made. The prime purpose of the court rules is to oil the wheels of justice in order to expedite the resolution of disputes. Quibbling about trivial deviations from the court rules retards instead of enhancing the civil justice system. The court rules are not an end in themselves.

COSTS:

[21] In my view, there is no reason why costs should not follow the event.

ORDER:

[22] The application in terms of rule 30 is dismissed and the plaintiff is directed to pay the costs occasioned by such application.

A.R. MATHABA J
Judge of the High Court

For the Applicant : Mr.W. Chondile
For the Respondents: Mr.T. Potsane