**C OF A (CIV) NO.3/2008**

**IN THE COURT OF APPEAL OF LESOTHO**

In the matter between:

**NATIONAL UNIVERSITY OF LESOTHO** **1ST APPELLANT**
**KOATSA KOATSA** **2ND APPELLANT**

And

**MOTLATSI THABANE** **RESPONDENT**

**CORAM:**

Ramodibedi, P
Smalberger, JA
Guni, ACJ

Heard : 8 October, 2008
Delivered : 17 October, 2008

## SUMMARY

Appeal against award of damages – application for condonation for late filing of appeal record and reinstatement of appeal – Rules of Court of Appeal – purpose and application – authorisation – whether resolution essential in the case of a legal person – applicable principles confirmed – considerations governing the grant of condonation – application for condonation granted – no order as to costs – grounds on which appeal court may interfere with a trial court's award of damages – misdirections by trial court –

damages reassessed – striking disparity present – appeal upheld – trial court's award of damages reduced.

## JUDGMENT

**SMALBERGER JA**

**[1]** The respondent (as plaintiff) instituted action as long ago as 1997 against the appellants (as defendants) in the High Court for damages in the total sum of M95 526.00. The claim arose out of damages allegedly suffered by the respondent as a result of being unlawfully assaulted by the second appellant acting in the course and scope of his employment with the first appellant. Eventually, on 7 February 2008, after a fairly protracted trial, the respondent was awarded damages by the trial court (Mofolo J) in the sum of M95 528.00 (M2-00 more than claimed, this presumably being due to an arithmetical error). The appellants duly noted an appeal against the judgment and order of the learned judge, the appeal being limited to the amount of damages awarded.

**[2]** As the relevant facts concerning the assault were ultimately not in issue, this should have been a relatively simple appeal against a *prima facie* excessive award of damages which could, given the necessary co-operation between the parties, have been decided on agreed or admitted facts, or at the very least a truncated record. But because of the failure of the appellants to comply with the Rules of this Court, and the uncompromising, unyielding attitude of the respondent with regard to their application for condonation, the matter has now been blown up out of all proportion and has become a morass of disputed issues which we are called upon to resolve.

**[3]** The appellants filed their notice of appeal on 4 March 2008. In terms of Rule 5(1) of the Court of Appeal Rules, 2006 ("the Rules") the required copies of the record of the proceedings had to be lodged with the Registrar within three months. The appellants failed to lodge the record within the prescribed period. Their appeal consequently lapsed in terms of Rule 5(3). On 18 July 2008, after the appeal had lapsed, the appellants purported to deliver the record of proceedings. Thereafter, on

22 August 2008 the appellants filed their heads of argument. It was only when the respondent's heads of argument were filed on 1 September 2008 that the appellants became aware of the fact that their appeal had lapsed. On 11 September 2008 the appellants launched an application in which they sought condonation for the late filing of the record as well as reinstatement of the appeal ("the condonation application"). This evoked a vigorous response from the respondent. In the opposing affidavit he raised five points in *limine* before dealing with the merits of the condonation application. In response the appellants filed a replying affidavit, with annexures, comprising 24 pages.

**[4]** Before proceeding I propose to make some comments concerning the Rules. They are primarily designed to regulate proceedings in this Court and to ensure as far as possible the orderly, inexpensive and expeditious disposal of appeals. 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. Opposing parties should not seek to rely upon non-compliance with the Rules injudiciously or frivolously as an expedient to cause unnecessary delay or in an attempt to thwart an opponent's legitimate rights. 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. This Court retains a discretion to condone a breach of its Rules (see Rule 15) in order to achieve a just result. The attainment of justice is this Court's ultimate aim. 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. There is a limit to this Court's tolerance.

**[5]** Various points *in limine* were raised by the respondent. These included (1) a complaint that there was no properly certified record in breach of Rule 7(2); (2) that the record was defective because it had not been prepared by the appellants or their attorney in breach of Rule 7(1); (3) that the Notice of Motion was defective or irregular as it had not been signed by the appellants or their attorney; and (4) that the appellants had failed to exhaust all available remedies before launching the application for condonation. These points are largely technical and non-material and cannot be allowed to frustrate the hearing of the appeal.

**[6]** As far as (1) and (2) above are concerned, the record was certified as correct by the appellants' senior counsel, and junior counsel was responsible for the preparation of the record, both acting on the instructions of the appellants. As this was not done by the appellants or their attorney Rule 7(1) may strictly speaking not have been complied with, but in the circumstances this is the merest technicality as there has clearly been substantial compliance with the Rule. With regard

to (3), the Notice of Motion was signed by the appellants' previous attorney on behalf of their present attorney. This cannot be allowed to constitute on impediment in the way of hearing the appeal.

**[7]** Point (4) related to the appellants' alleged failure to seek the written agreement of the respondent to extend the time limit for the lodging of the appeal. This would have been the appropriate course to have adopted and, if followed, may well have obviated the need for an application for condonation (with all its attendant issues). The failure to do so appears to have been because the appellants' attorney only realised that the record had not been lodged timeously when the respondent filed his first heads of argument. By then the appeal would have lapsed and the provisions of Rule 5(2) could no longer be invoked. The only course open to the appellants was to seek condonation and reinstatement. This point is therefore equally without merit.

**[8]** The further point raised *in limine* related to an alleged lack of authorisation in the case of the first appellant, based on the absence of a resolution from the Council of the first appellant authorising the appeal, more particularly in the face of a challenge by the respondent as to the existence of such authorisation. In the case of a legal person like the first appellant authorisation is best provided by a resolution passed by its governing body in a manner provided by its constitution. But, as was said in *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk)* 1957 (2) SA 347 (C) at 352A:

> "I do not consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf."

**[9]** 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. Mahomed JA held as follows in the case of *Central Bank of Lesotho v Phoofolo* 1985-1989 LAC 253 at 258 J – 259 B:
>
> '*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. This objection was without substance, and was correctly dismissed by Molai, J. 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. In the present case the authority of the Governor to represent the appellant in the proceedings in the Court a quo appears amply from the circumstances of the case, including the filing of the notice of opposition to the application.'*
>
> See further *Tattersall and Another v Nedcor Bank Ltd* 1995 (3) SA 222(A) where it was held at 228 G-H that a copy of the resolution of a company authorising the bringing of an application need not always be annexed. This is particularly so where there is sufficient *aliunde* evidence of authority and where the denial of authority is a bare one, like in the present case."

This is definitive of the law on the point.

**[10]** There can be no doubt that on the facts of the present matter the required authorisation has been established. Affidavits have been filed confirming that the necessary authorisation exists by both the Registrar and the Vice-Chancellor. The

former is the secretary to both the Council, the first appellant's highest decision making body, and the Senate; the latter is the chief academic and administrative officer of the first appellant. Apart from that the history of the matter, the affidavits before the Court and the fact that a stay of execution was sought renders it unlikely that anyone other than the first appellant is involved in the litigation. In addition there is every reason for the first appellant to want to pursue the appeal given the fact that, for reasons that will appear later, the award of damages was clearly excessive. The affidavit of Lefu Lechesa, which appears to be of doubtful validity, is in any event incapable of displacing the above conclusion.

**[11]** I turn to the question of condonation. It is incumbent upon the appellants to show sufficient cause for the granting of their application. In the matter of *Motlatsi Adolph Mosaase v Rex* C of A (CRI) No. 12 of 2005 (unreported) this Court quoted with apparent approval the general principles applicable when considering an application for condonation as enunciated in

*Melane v Santam Insurance Co. Ltd.* 1962 (4) SA 531 (A) at 532 C-F:

> "In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are compatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked".

These principles have been consistently followed over the years in South Africa and may be taken also to apply to Lesotho.

**[12]** As previously mentioned, condonation was only sought after the appellants were alerted to the fact that their appeal had lapsed. The lapsing of the appeal was due to slackness on the part of the appellants' legal representatives. Once alerted to

the problem, however, they proceeded with due expedition to apply for condonation. The record comprises 333 pages. The first 74 pages comprise the pleadings, notices, grounds of appeal and the like. The actual court proceedings cover 234 pages, and the exhibits and judgment a further 25 pages. (It should be noted in this regard that the record produced falls woefully short of the requirements laid down in Rule 5 of the Rules. The Registrar should in future refuse to accept records that do not comply substantially with Rule 5.)

**[13]** The explanation put forward by the appellants for the failure to file the record timeously was that problems were allegedly experienced with the transcription of the evidence covering 234 pages. (There is no suggestion that the other documents were not readily available for copying.) The cause of the problems was said to be the power failures and load shedding prevalent at the time. In his opposing affidavit the respondent challenged the explanation that had been advanced and pointed out that the record of evidence had been transcribed before argument had been presented in the court below primarily to acquaint

Adv. Phafane, who had been brought into the case at a late stage, with the evidence that had been given. The respondent claimed that the recorded evidence in the appeal record was simply a photocopied reproduction of the transcribed evidence available in the court *a quo* and disputed that it had been newly transcribed.

**[14]** The respondent's claim evoked the following response from the appellants' junior counsel who claimed responsibility for the preparation of the record.

> "I reiterate that I have attended to the transcription, copying and binding of this record. I aver that the obviously incomplete and uncertified record that had been prepared and typed that was used in the Court below, could not be a record for this Honourable Court. I had to attend to a preparation of a proper and complete transcription of a record as I have done. I could not simply place before this Honourable Court the said uncertified and incomplete record that was used in the Court *a quo* without ensuring that it was a proper record".

He further went on to state in very definite and clear terms:

> "I reiterate that this record is not and cannot be a photocopy of the record used in the court *a quo* even if the two may be similar".

**[15]** In argument Mr. Mahlakeng, for the respondent, embarked upon a detailed comparison between the record of evidence, which it is common cause was available in the court below, with the recorded evidence appearing at pages 75 to 308 of the appeal record. The pages are identical from first to last. The typesetting and spacing is the same. The transcription errors, omissions and spelling mistakes in the one correspond identically with those in the other. Handwritten alterations to the numbering of the original transcript are identically reproduced in the appeal record. The same page is missing in both records. On the appeal record the marks apparently left by punch holes in the original transcript are clearly visible throughout. Whatever perusal and checking may have been done by junior counsel when preparing the record, I am satisfied on a balance of probabilities (indeed, convinced beyond all reasonable doubt) that the transcribed evidence in the appeal record is simply a photocopy of the transcription used in the court *a quo.* The similarities go too far and are too striking to simply be coincidental. It would therefore seem that in claiming it was the preparation of a new transcript that had

been the major cause of the delay in preparing the appeal record, junior counsel was not frank with this Court, a matter for profound regret, to say the least.

**[16]** It follows that the appellants have not given a satisfactory explanation for their failure to file the appeal record timeously. However, that is not the end of the matter. The appeal record was ultimately filed a little more than a month late; the hearing of the appeal will not have been delayed as a consequence; the appellants have always been anxious to pursue the appeal; a proper record of appeal (in the sense of one that is complete – not one that complies with Rule 5) is before us; and the respondent has not suffered any legally cognisable prejudice. More importantly, for reasons that will appear later, the appellants have excellent prospects of success on appeal. To refuse condonation, and to allow the award of the court *a quo* to stand, will have unfortunate repercussions. The excessive award, for that is what it is, would stand as a precedent and could, incorrectly and prejudicially, influence future awards of

damages; and moreover substantial justice between the parties will not have been done.

**[17]** Accordingly I am of the view that this Court, in the exercise of its discretion, should allow the application for condonation and reinstate the appeal. Furthermore, I consider it would be appropriate to make no order as to costs in respect of the condonation application. It was the appellants' initial slackness that necessitated an application for condonation. The respondent was not wholly unreasonable in opposing the application on the basis that no satisfactory explanation had been provided for the appellants' failure to file the appeal record within the prescribed time. In so doing he exposed the appellants' deponent's lack of frankness. Unfortunately the respondent resorted to placing unnecessary obstacles in the way of the condonation application by ill-advisedly raising technical and unsustainable points *in limine,* thereby unduly extending the issues to be dealt with. All this could have been avoided had there been greater co-operation between the parties. In the result there was fault on the part of both parties

in more or less equal measure. It is only equitable that they should share the blame and the costs.

**[18]** This finally brings me to the merits of the appeal, which is really all that should have concerned us. The appeal which is against quantum only, must be considered on the basis of an acceptance of the respondent's evidence of the events on the day in question. Regrettably counsel for the respondent did not favour us with heads of argument in respect of the appeal itself. His heads of argument were confined to the appeal having lapsed and opposition to the application for condonation. His apparent confidence that the appeal would not be reinstated was misplaced. It is incumbent upon counsel in a matter such as the present, where condonation and reinstatement are sought, to be ready to argue the appeal should the relief sought be granted, and to file heads of argument on the merits timeously. Notwithstanding the absence of heads of argument Mr. Mahlakeng was given a full opportunity to present argument on the appeal itself.

**[19]** At the time of the incident which led to the assault upon the respondent he was a senior lecturer at the appellant University and head of the Department of Contemporary History. He was also a member of the University Senate. The second appellant was a security guard in the employ of the University. On the morning in question the respondent returned to the University campus with a printer belonging to the University which he had previously removed for repair. He encountered a number of security guards at the entrance gate. He was told by one of them that "he should go and register this printer" (by which I take it was meant that he should enter the printer in a register kept for such purpose). The respondent explained that it was University property he was returning and was then allowed to proceed. At that stage the second appellant intervened and insisted that the respondent should sign the register. The respondent refused because he considered he had not been given a satisfactory reason why he should do so. This apparently led to friction between the respondent and the second appellant. The latter caught hold of the respondents' hands in a vice-like grip. The respondent pleaded with him to

let him go as he had an urgent Senate meeting to attend, and told the second appellant to report him to the authorities if he felt so inclined. He then broke free from the second appellant's grip and entered the premises. He had progressed about 30 metres when the second appellant and another security guard caught up with him. The second appellant grabbed him by the neck while the other security guard held his hands. Together they forcibly dragged him back to the guard house at the entrance gate. While dragging him the second appellant used insulting language towards the respondent. These events were observed by many students who were changing classes at the time, as well as by University workers going about their daily tasks. The respondent was then dragged a further 10 metres to an adjoining office. There the second appellant struck him in the face with his fists while the other guard held him. The assault ended when the head of security arrived on the scene.

**[20]** As a result of the assault the respondent suffered certain injuries, and his spectacles were broken and had to be replaced. He consulted a doctor in connection with his injuries

and was furnished with a medical report. This recorded that the respondent had sustained a swollen left eye, a laceration of the upper lip and tenderness of the right scapular region. The degree of force used was recorded on the report as "considerate" but was presumably meant to be "considerable". The doctor in question was not available to give evidence, but the report was ultimately not seriously called into question. The respondent further testified that he left for Zimbabwe the following day to attend a conference bearing the marks of the assault upon him. At no stage was an apology forthcoming from either of the appellants.

**[21]** The respondent's claim of M95 526-00 was made up as follows:-

(a) M25 000.00 for unlawful assault

(b) M25 000.00 for pain and suffering

(c) M45 000.00 for contumelia

(d) M475.00 for damaged spectacles

(e) M51.00 for medical expenses

As previously mentioned the respondent was granted the full amount claimed as damages.

**[22]** The determination of quantum requires the exercise of a discretion by the judicial officer concerned. As views may differ on what the correct measure of damages should be in any given case, a court of appeal has limited powers of intervention. An appeal court will generally only interfere with an award by a trial court:

(a) Where there has been an irregularity or material misdirection;

(b) Where the appeal court is of the opinion that no sound basis exists for the award made by the trial court;

(c) Where there is a substantial variation or a striking disparity between the award made by the trial court and the award which the appeal court considers ought to have been made.

These are the established principles which apply in South Africa and they should be accepted as the guiding principles also in Lesotho. (See *Paul Mohlaba and Others v Commander*

*of the Royal Lesotho Defence Force and Another* 1995 – 96 LLR-LB 235 at 242 with regard to (c) above.)

**[23]** It is clear from his judgment that Mofolo J was incensed by the treatment meted out to the respondent which he considered called for the imposition of "heavy penalties". This approach is reflected in the amount of damages he awarded. Punishment and deterrence which underlie the notion of "heavy penalties" are functions of the criminal law not the law of delict. The purpose of a civil action in delict is to compensate the victim for the harm actually done; punitive damages unduly enriches a plaintiff who is only entitled to compensation for loss suffered. See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at paras [63] and [80]. In setting out to impose "heavy penalties" Mofolo J clearly misdirected himself. This entitles us to consider the award of damages afresh.

**[24]** In determining an award of damages a court must take care to ensure that the award is essentially fair to both parties. As

famously stated by Holmes J in *Pitt v Economic Insurance Co. Ltd* 1957 (3) SA 284 (D) at 287F a court:

> "Must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense".

While a trial court's discretion remains unfettered, regard may generally be had to previous awards in comparable cases as a general indication of what is fair and appropriate compensation, always bearing in mind as stated in *Hulley v Cox* 1923 AD 234 at 246:

> "a comparison with other cases can never be decisive, but is instructive".

**[25]** Mr. Phafane in his helpful heads of argument has referred us to a number of so called "comparable cases", some being less comparable than others. No point would be served in analysing each case. Many are referred to in an unreported judgment by Prinsloo J in the Transvaal High Court delivered on 24 January 2008 in the matter of *Mabena and Others v Minister of Safety and Security and Others* which can be located at [2008]

ZAGPHC 13. A consideration of the judgment and the cases referred to therein is helpful in arriving at an appropriate award of damages in the present matter.

**[26]** The respondent was unlawfully assaulted in the presence of students and workers, manhandled and forcibly dragged more than 40 metres to an office where he was assaulted with fists, receiving the injuries I have mentioned. Overall, the assault was a prolonged one. The injuries were significant if not severe. The appellant was 42 years old at the time and no match for the second appellant and his fellow security guard. The respondent may have displayed arrogance in his dealings with the second appellant to the latter's annoyance but that did not justify his being followed thirty metres, dragged back and beaten. A senior and respected member of the University, he suffered the indignity and humiliation of being assaulted and sworn at in front of students and workers. He suffered the further indignity of having to travel to another country for a conference still bearing visible marks of the assault upon him. No apology was ever forthcoming from the appellants.

**[27]** In all the circumstances I consider a reasonable and fair award of damages for unlawful assault and pain and suffering (as the two should logically be taken together in the present case) to be M15000.00 and for contumelia M25000.00, a total of M40000.00. To this should be added the cost of the replacement spectacles and the medical expenses (items not in issue) amounting to M526.00, giving a total of M40 526.00. From that it follows that the court *a quo's* award of damages was excessive. Clearly there is a striking disparity between what I consider to be an appropriate award of damages and the amount awarded by the trial judge. On this ground too interference with the award is justified.

**[28]** The following order is made:

(1) The appellants' application for condonation for the late filing of the appeal record is granted, and the appeal is reinstated;

(2) No order as to costs is made in respect of the application for condonation.

(3) The appellants' appeal against the award of damages made by the court *a quo* is allowed, with costs.

(4) The order of the court *a quo* is altered to read:

> "Judgment for the plaintiff in the sum of M40 526.00, with costs, against the defendants jointly and severally, the one paying the other to be absolved."

_____
J.W. SMALBERGER
JUSTICE OF APPEAL

I AGREE

_____
M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I AGREE

_____
K. J. GUNI
ACTING CHIEF JUSTICE

FOR APPELLANTS : ADV. S. PHAFANE KC.
FOR RESPODNENT : MR. T. MAHLAKENG