

IN THE HIGH COURT OF LESOTHO
(Commercial Court Division)

HELD AT MASERU

CCA/0039/2022

In the matter between:

LAXTON GROUP LIMITED

APPLICANT

And

**PROCUREMENT UNIT,
INDEPENDENT ELECTORAL COMMISSION**

1ST RESPONDENT

**THE TENDER PANEL,
INDEPENDENT ELECTORAL COMMISSION**

2ND RESPONDENT

PROCUREMENT POLICY & ADVICE DIVISION

3RD RESPONDENT

INDEPENDENT ELECTORAL COMMISSION

4TH RESPONDENT

AXON AND CLOUD HUB

5TH RESPONDENT

FACE TECHNOLOGIES (PTY) LTD

6TH RESPONDENT

ZERO ONE GROUP

7TH RESPONDENT

ATTORNEY GENERAL

8TH RESPONDENT

Neutral Citation: Laxton Group Limited v Procurement Unit IEC & 7 others
(No.1 [2022] LSHC 99 COM. (5th May 2022))

CORAM: MATHABA J
HEARD ON: 3rd May 2022
DELIVERED ON: 5th May 2022

ANNOTATIONS

LESOTHO

Maketene v Lekhanya 1991-1992 LLR-LB

SOUTH AFRICA

**Ferreiras (Pty) Ltd v Naidoo Vishner Kinstensamy [2017] ZAGPJHC 392;
2022 (1) SA 201**

**IBR Fire Protection CC t/a IBR Fire v Minister of Labour and others
[2015] ZAGPPHC 972**

**Pangbourne Properties Ltd v Pulse Moving CC and another 2013 (3) SA
140**

**Waltloo Meat and Chicken SA (Pty) Ltd v Silvy Luis (Pty) Ltd and others
[2008] ZAGPHC 136; 2008 (5) SA 461**

RULING

INTRODUCTION:

[1] The dispute in this case turns on whether in reversing the decision of the second respondent to award the tender for the supply of Elector and Voter Management Information System to the applicant and directing re-evaluation of the tender, the third respondent gave the applicant a hearing as enshrined in

regulation 54(2) of the Public Procurement Regulations 2007. The applicant contends that it was not. It brought a review application before this Court and obtained interim interdict whose net effect is to maintain status quo until the review is determined.

[2] The interim interdict was granted on the 14th April 2022 and the rule was returnable on the 28th April 2022 at 09h30. It is trite and requires no authority that, on the return date, the rule must either be confirmed or discharged. Neither happened because the answering papers had not been filed for reasons which were explained by the respondents' Counsel. The Court was given the impression that the third and the eighth respondents answering affidavit was long prepared. I will return to this aspect later on in this ruling.

[3] As a result, my brother *Mokhesi J*, extended the rule to the 3rd May 2022 for mention having provided the following filing directives:

- “(i) *The respondents should file their Answering affidavits by close of business on the 29th April 2022.*
- (ii) *the applicant should file the reply by close of business on the 3rd May 2022.*”

[4] The first, second and fourth respondents' answering affidavit, as well as the record of proceedings of the second respondent, were filed on the 28th April 2022. On the other hand, the third and the eighth respondents had not filed their answering affidavit by the 3rd May 2022 when the matter was called. This necessitated the applicant to move the Court to confirm the rule and grant the application.

ARGUMENTS BY PARTIES:

[5] Mr. *Phafane* for the applicant gallantly motivated urgency and why the matter was of national importance. He then moved the Court to confirm the rule and grant the application in light of the third and the eighth respondents' failure to file their answering affidavit as directed. Mr. *Letuka* for the first, second and the fourth respondent confirmed that the matter was urgent and that his clients were prepared to abide the decision of this Court on the merits.

[6] Argument was raised in the motion Court where there were other Counsel waiting on the queue with different matters to be heard. As a result, the matter was stood down to 14h30 on the 3rd May 2022 to enable Mr. *Thakalekoala* for the third and the eighth respondent to address me.

[7] However, there were developments at 14h30 when the Court resumed. The third and the eighth respondents had filed their answering affidavits which one of the parties had received on without prejudice. No formal application was made for non-compliance with the directive to file by the 29th April 2022. Mr. *Thakalekoala* moved the Court from the bar to condone non-compliance with the directive. He indicated that some paragraphs in the answering affidavit as well as his own supporting affidavit explained why the answering affidavit was not filed on time.

[8] The kernel of Mr. *Thakalekoala* 's excuse for non – compliance was that he was busy with another urgent matter of public importance at the main division of this Court. He emphasised that the applicant should have invoked rule 8(13) and apply for a date of hearing if it wanted the matter to be heard despite the fact that the answering affidavits were not yet filed. He moved the

Court to exercise its discretion in terms of rule 59 to condone non-compliance with the directive to file the answering affidavit by the 29th April 2022.

[9] In response, Mr. *Letuka* argued that the Court had already granted dispensation on how the matter should be handled as a result of which reliance on rule 8(13) was misplaced. Mr. *Phafane* on the other hand argued that reliance on rule 59 was preposterous in view of the fact that what the third and the eighth respondents have not complied with was an Order of Court and not the rules. The import of the argument was to make a distinction between non-compliance with the rules and an Order of Court. He referred this Court to the case of **Maketene v Lekhanya** 1991 – 1992 LLR – LB where the Court denounced non-compliance with its Orders.

[10] In light of the arguments that were advanced by the parties, I postponed the matter to 14h30 on the 4th May 2022 to give my ruling on whether I was going to confirm the rule and grant the application and ignore the answering affidavit that was filed out of time. I had invited Counsel who wished to provide me with authorities to do so latest by the 07h00 on the 4th May 2022. This was to afford me time to consider the authorities before 14h30.

[11] On the 4th May 2022 my Judges Clerk availed me the heads of argument for the applicant around 08h00 and delivered the message that Mr. *Thakalekoala* had sought indulgence to file his heads of argument by 09h00 latest. I had still not received Mr. *Thakalekoala*'s heads of argument or authorities when the matter was called after 15h00 on the 4th May 2022. Mr. *Thakalekoala* 's explanation was that he was only able to email the heads of argument to the Judges Clerk around 14h00. More or less the same explanation as on the previous occasion was provided - Mr. *Thakalekoala* promptly had to prepare and submit heads of argument on another urgent application of national importance, hence the delay to submit the heads of argument in this matter. Mr.

Thakalekoala indicated that it was important that I consider his heads of argument before I determined the issue before me.

[12] As a consequence of the heads of argument having been filed late, it became clear that the matter had to be postponed for me to consider the heads. I then asked Mr. *Thakalekoala* to explain why I cannot impose special costs of the day in view of persistent non – compliance with the orders of this Court in a matter where all the parties agreed that it was of national importance and was urgent.

[13] Mr. *Thakalekoala* did not show a concern with special costs order being made against his clients, but he clearly indicated that he would need time to make submissions if the Court was considering costs *de bonis propriis* against him. On the other hand, Mr. *Phafane* insisted that it was either that the Court ignored Mr. *Thakalekoala*'s heads of argument or impose costs *de bonis propriis* against him if the matter was going to be postponed. In order to avoid a postponement and dodge costs *de bonis propriis*, Mr. *Thakalekoala* moved the Court to discard his heads of argument and deliver its ruling without having had the benefit of his heads of argument. Unfortunately, that was late in the day. It was inevitable that the matter had to be postponed. I also felt I should consider the heads, especially when Mr. *Thakalekoala* had earlier expressed his desire for his heads of argument to be considered before I made a decision. The matter was then postponed to the 5th May 2022 for a ruling.

[14] Having considered the submissions from the parties, I am of the view that it will not be in order at this stage to ignore the answering affidavit and proceed with the matter as though the affidavit is *pro non scripto*. In the interest of justice and in order to do justice to both parties, courts have accepted affidavits that are filed late. The effect of some decisions is that no application

for an extension of time or for condonation is necessary if an answering affidavit is served before the hearing. *See: IBR Fire Protection CC t/a IBR Fire v Minister of Labour and Others* (70285/13) [2015] ZAGPPHC 972 (7 August 2015); *Pangbourne Properties Ltd v Pulse Moving CC and Another* 2013 (3) SA 140 (GSJ) para 14; and *Ferreiras (Pty) Ltd v Naidoo, Vishner Kistensamy* [2017] ZAGPJHC 392; 2022 (1) SA 201.

[15] I am also aware of the earlier decision where a replying affidavit that was filed out of time was disregarded. As in the instant case, there was no formal application for condonation, but the grounds thereof were contained in the said replying affidavit whose legitimacy was challenged. *See: Waltloo Meat & Chicken SA (Pty) Ltd v Silvy Luis (Pty) Ltd & Others* [2008] ZAGPHC 136; 2008 (5) SA 461.

[16] In my view, the decision whether to disregard the answering affidavit or not will properly be made by the Court that will eventually hear the matter. An affidavit is evidence and I cannot decide to disregard it at this stage, when I have not been allocated the matter. Until the time when this issue is resolved, it will be premature to grant the application as requested by the applicant. As a result, I decline the applicant's request to confirm the rule and grant the application.

COSTS AT ATTORNEY AND CLIENT SCALE:

[17] The matter was postponed for mention to the 3rd May 2022, but a date was not obtained because the third and the eighth respondents had not filed their answering affidavits. Again, the matter had to be postponed to the 5th May 2022 in order to afford the Court time to consider the heads of argument which the third and the eighth respondents filed out of time. I consider failure to abide

with court orders an objectionable behaviour warranting special costs. Particularly when that militates against expeditious disposal of the matter.

[18] It is worthy of note that based on my brother *Mokhesi J*'s minute on the record, when the parties appeared before him on the 28th April 2022, Mr. *Thakalekoala* for the third and the eighth respondents had indicated that the answering affidavit was prepared a long time ago and that they were ready to argue the interim reliefs but could not log into the meeting when the matter was heard. However, Mr. *Thakalekoala* had changed tune when he appeared before this Court. The emerging version now is that the answering affidavit was not filed on time because Mr. *Thakalekoala* was busy with another urgent matter. It is clear that there is inconsistency in Mr. *Thakalekoala* 's account which he must explain. It is possible that Mr. *Thakalekoala* misled my brother *Mokhesi J* when he appeared before him on the 28th April 2022 and said that the answering affidavit was prepared a long time ago. But I need to hear his explanation before arriving at this conclusion. It is possible that when my brother *Mokhesi J* ordered the third and the eighth respondents to file their answering affidavit on the 29th April 2022 he relied on the information he was getting from Mr. *Thakalekoala* that the affidavit was prepared a long time ago.

[19] While I was already contemplating special costs order against the third and the eighth respondent, I did not seriously consider that the infraction warranted imposition of costs *de bonis propriis* against Mr. *Thakalekoala*. As a result, I did not think it was necessary to give Mr. *Thakalekoala* an opportunity to make submissions on costs *de bonis propriis* when he made such a request on the 4th April 2022, hence I was committed to delivering my ruling on the 5th May 2022 without having given him such an opportunity as it was unnecessary.

[20] However, as I was preparing this ruling, I found the minute of my brother *Mokhesi J* on the Court file too revealing to ignore. This is the issue which I am not prepared to let slide without a proper explanation being provided. Otherwise I will be shrinking my responsibilities. This Court needs to understand why Mr. *Thakalekoa* gave the Court two mutually destructive versions thereby implicating his integrity as an Officer of this Court. It could be there is a valid explanation, but the Court will only know that by providing Mr. *Thakalekoala* an opportunity to make his submissions.

ORDER:

[21] In the circumstances and having engaged the parties on the issue of costs *de bonis propriis* and the applicant on how it intends to proceed with the matter in view of my decision not to grant the application at this stage, I make the following Order:

- 21.1 the applicant 's request for this Court to ignore the answering affidavit that was filed out of time and confirm the rule and grant the application is refused.
- 21.2 the applicant is ordered to file the replying affidavit, if any, latest by the 9th May 2022, which it indicated that it would be filing without prejudice to its position regarding the answering affidavit that was filed out of time.
- 21.3 the third and the eighth respondents must pay the applicant costs of the day for the 4th May 2022 at attorney and client scale.

21.4 Mr. *Thakalekoala* must submit his written submissions (affidavit or heads of argument) on or before the 10th May 2022 why he may not contribute to the costs in para 18.3 above.

21.5 The matter is postponed to the 9th May 2022 for parties to obtain a date of hearing.

A.R. MATHABA J
Judge of the High Court

For the Applicant: Adv. S. Phafane KC with Adv. R. Setlojoane

For the 1st, 2nd and 4th Respondents: Adv. K. Letuka

For the 3rd and the 8th Respondent: Adv. T. Thakalekoala

For the 3rd and 8th Respondents: (on the date of the ruling) Adv. M. Chitja