

**IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CIV/APN/0028**

In the matter between

**LIKOPO LIBE**

**APPLICANT**

AND

**MANAGEMENT WATER AND SEWAGE**

**1<sup>ST</sup> RESPONDENT**

**COMPANY (PTY) LTD (WASCO)**

**LIMPHO DEBESHE**

**2<sup>ND</sup> RESPONDENT**

**DIRECTOR CORPORATE SERVICES**

**TOKELO SELAPI**

**3<sup>RD</sup> RESPONDENT**

**WATER PRODUCTION MANAGER**

**WATER AND SEWAGE COMPANY  
(PTY) LTD (WASCO)**

**4<sup>TH</sup> RESPONDENT**

**Neutral Citation:** Likopo Libe v Management Water and Sewerage Company (PTY) LTD (WASCO) Civ 52 (22 March 2024)

**CORAM** : **BANYANE J**  
**HEARD** : **18/09/2024**  
**DELIVERED** : **22 MARCH 2024**

**Summary**

Civil procedure-application for condonation for late filing of an answering affidavit versus a rule 30 application seeking to set aside the step as irregular-whether good cause shown for non-compliance with the rules-applicable principles restated-breach condoned.

**ANNOTATIONS**

**Cited cases**

## **Lesotho**

1. Moosa and others v Lesotho Revenue authority C of A(CIV) 2/2014
2. Koaho v Solicitor General LAC (1980-1984) 35
3. Maphathe v Executors of the Estate of Maphathe and others LAC (2013-2014) 219
4. Smith v Tsepong (Pty) Ltd C of A(CIV) 22 of 2020

## **South Africa**

1. Uitenhage Transitional Local Council v South African Revenue Service 2004(1) SA 292(SCA)
2. Darries v Sheriff, Magistrate's Court, Wynberg and another 1998(3)S 34(SCA)
3. Federated Employers Fire and General Insurance co Ltd & another v Mckenzie 1969 (3) SA 360 (A)
4. Chetty v Law society Transvaal 1985 (2) SA 756 (A)

## **JUDGMENT**

**BANYANE J.**

## **Introduction**

[1] This is an opposed application filed in terms of Rule 30 of the High Court Rules, 1980. It is countered by an application for condonation for late filing of an answering affidavit. The main issue for determination is whether the Court should condone the late filing or set aside the answering affidavit as an irregular step.

## **Background facts**

[2] The applicant is an employee of WASCO (the 4<sup>th</sup> respondent). On 26 January 2023, he applied for Judicial review of his employer's decision to transfer him from Metolong Water Treatment plant to Maputsoe package plant.

[3] The respondents filed their notice of intention to oppose on 30 January 2023. Their answering affidavit was served on the applicant's counsel on 10 March 2023 and filed on 13 March 2023.

[4] On 24 March 2023, the applicant filed and served a notice in terms of Rule 30 (1) to set aside the answering affidavit on grounds that it amounts to an irregular step or proceeding.

[5] The respondents filed their notice of intention to oppose the Rule 30 application on 27 March 2023. On 28 March 2023, the respondents served and filed an application for condonation for the late filing of the answering affidavit. On 30 March

2023, the respondents delivered their answering affidavit to the Rule 30 application. The applicant's reply was filed on 11 April 2023.

### **The periods for filing**

[6] Rule 8 (10) of the High Court Rules, 1980 lays down the periods for filing as follows:

“10 Any person opposing the grant of any order sought in the applicant's notice of motion shall:

- a) Within the time stated in the said notice, give applicant notice in writing that he intends to oppose the application, and in such notice he must state an address within five kilometres of the office of the Registrar at which he will accept notice and service of all documents.
- b) Within fourteen days of notifying the applicant of his intention to oppose the application deliver his answering affidavit (if any), together with any other documents he wishes to include, and
- c) If he intends to raise any question of law without any answering affidavit, he shall deliver notice of his intention to do so, within the time aforesaid, setting forth such question.

[7] In terms of Rule 1, 'days' shall mean;

“Court days except that in the computation of time expressed in days prescribed by these rules and fixed by any order of court, Saturdays shall be included except those Saturdays which are public holidays provided that when the last day of the number of days prescribed is a non-court day or Saturday the time shall end on the next day following Legal Notice No. 12 of 1981”

[8] Since the notice of intention to oppose was served on 30 January 2023, the respondents ought to have filed their answering affidavit no later than 16 February 2023. The delay to file must therefore be computed from 16 February and not from the 31<sup>st</sup> of January 2023, as the applicant contends. When the respondents served their answering affidavit on 10 March 2023, they were 19 days late.

### **The proper approach in a condonation application**

[9] It is well-established that condonation is not a right but an indulgence that the court grants on good cause.<sup>1</sup> The Court considering an application for condonation must exercise its discretion judicially upon consideration of all the relevant factors.<sup>2</sup> Factors that usually weigh with the court include the degree of lateness or non-compliance, the adequacy of the reasons advanced for such delay, the importance of the case, the convenience of the court, the avoidance of unnecessary delay

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<sup>1</sup> Moosa and others v Lesotho Revenue authority C of A(CIV) 2/2014, para 18-19

<sup>2</sup> Koaho v Solicitor General LAC (1980-1984) 35 at 36-37, Maphathe v Executors of the Estate of Maphathe and others LAC (2013-2014) 219

in the administration of justice as well as the applicant's prospects of success. These factors are ordinarily interrelated and are not to be considered in isolation but cumulatively. Where the inordinate delay is not satisfactorily explained, the applicant's prospects of success are immaterial.<sup>3</sup>

[10] A party seeking condonation must apply for such as soon as non-compliance with the Rules of Court is apparent. The party must make a full and frank disclosure of all the relevant facts that led to the non-compliance, must explain every period of the delay and also set out the prospects of success.<sup>4</sup>

[11] In **Darries v Sheriff, Magistrate's Court, Wynberg and another** (cited with approval in **Smith v T'sepong**) Plewman JA stated the position as follows:

“Condonation of the non-observance of the rules of this court is not a mere formality. In all cases, some acceptable explanation not only of, for example, the delay in noting an appeal, but also where this is the case, any delay in seeking condonation must be given. An appellant should whenever he realises that he has not complied with a rule of the court apply for condonation as soon as possible. Nor should it be simply assumed that, where non-compliance

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<sup>3</sup> Koaho v Solicitor General LAC (supra), Smith v Tsepong (Pty)Ltd, C of A(CIV) 22 of 2020, Maphathe (supra at 219), Federated Employers Fire and General Insurance co Ltd & another v Mckenzie 1969 (3) SA 360 (A) at 362 G-H. See also Chetty v Law society Transvaal 1985 (2) SA 756 (A) at 765.

<sup>4</sup> Moosa v LRA (supra), Smith v Tsepong (pty) Ltd, (Supra)

was due entirely to the neglect of the appellant’s attorney, condonation will be granted. In applications of this sort the applicant’s prospects of success are in general, important though not decisive. When an application is made for condonation, it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the court to assess the appellant’s prospects of success, which is but one of the factors relevant to the exercise of the court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success.”<sup>5</sup>(underlining mine)

**[12] In Uitenhage Transitional Local Council v South African Revenue Service<sup>6</sup> the Court said:**

“...Condonation is not to be had merely for the asking; a full, detailed, and accurate account of the causes of the delay and their effect, must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related, then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.”<sup>7</sup>

**[13] In light of the principles illuminated above, I proceed to consider the respondents averments explaining the delay in filing the answering affidavit.**

### **Reasons for delay**

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<sup>5</sup> 1998(3) SA 34(SCA) at 40H-41E

<sup>6</sup> 2004(1) SA 292(SCA), para 6

<sup>7</sup> Para 6 of the judgment

**[14]** In the condonation application, the Chief Executive Officer of WASCO explains why the respondents were disabled from filing their answering affidavit within the time prescribed by the rules. He deposes that the delay was not due to remissness on his part but due to his swamped schedule. He avers those consultations with their attorneys began on 30<sup>th</sup> January 2023. Unfortunately, Mr Tokelo Selapi (water production Manager), being the officer who had first-hand knowledge of the matter was not in office that week until 8<sup>th</sup> February 2023.

**14.1** The drafting of the answering affidavits therefore began when Mr. Selapi was in office. They were finalized on 14 February 2023. The drafts were thereafter emailed to WASCO Legal Officer Advocate ‘Musu for verification of the facts. The affidavits were sent back to the attorneys with corrections on 16 February 2023. The final drafts of the affidavits were sent back to their offices on 20 February 2023 to be signed by himself, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

**14.2** At this time there was a national water crisis caused by WASCO’s indebtedness to Lesotho Electricity Company (LEC). As a method of debt collection, the latter cut the power supply to WASCO, consequently paralyzing the water supply to a substantial number of stations nationwide. The situation necessitated back-to-back meetings intended to source funds to settle the LEC’s bill, so for the best part of this period, he was not in office. At some point, the WASCO team was summoned before the Parliamentary Portfolio Committee on Natural Resources to account for this crisis. When he finally settled in office after

the restoration of power and consequent distribution of water, his incoming tray was overflowing. Amongst the pile was the answering affidavit with an “urgent” sticker for his attention. It was only then he was able to depose to the affidavit before the Commissioner of oaths. This was on 10 March 2023.

**14.3** According to him, the affidavits were only twelve (12) days late and thus the delay is excusable. He further asserts that they have prospects of success in the matter.

### **Discussion**

[15] As stated earlier, the court has the discretion to condone non-compliance with the rules. It is indisputable that the respondents’ answering affidavit ought to have been accompanied by a condonation application because it was 19 days late. The condonation application was only filed 14 days later, on 28 March 2023. The main question is whether the degree of lateness is unreasonably long. The second question is whether the CEO’s affidavit contains cogent reasons for the delay.

[16] Giving due weight to all the relevant factors, the period is not unreasonably long viewed in the light of the CEO’s explanation of the causes of the delay. He explained that after service of their notice of intention to oppose, a national water

crisis required his undivided attention. His allegations are not refuted by the applicant. In my view, the CEO has given cogent reasons why he could not depose to an affidavit within the time prescribed by Rule 8 (10).

[17] Moreover, this matter is important to the parties and the affected communities because it implicates the supply or rendering of essential services (water) to such communities. The matter also concerns employer and employee rights and obligations. The employer is therefore entitled to be heard about the applicant's move to another station. The allegations of the applicant's neglect of duty are relevant matters that must be considered in determining the reasonableness of the decision to transfer.

### **Disposal**

[18] All things considered, a case for condonation has been made out. As a result:

- a) The application for condonation is accordingly granted, and the Rule 30 application is dismissed.
- b) Each party to bear its costs for both applications.

**P. BANYANE**  
**JUDGE**

For applicant : Advocate Setlojoane  
For respondent : Advocate Libe