

**IN THE LABOUR APPEAL COURT OF LESOTHO**

**LAC/APN/06/10**

In the matter between:

**FORMER LESOTHO BANK EMPLOYEES  
MOKOTJO MPHAKA**

**1<sup>ST</sup> APPLICANT  
2<sup>ND</sup> APPLICANT**

AND

**LIQUIDATOR LESOTHO BANK  
LESOTHO BANK (IN LIQUIDATION)  
LABOUR COMMISSIONER  
THE ATTORNEY GENERAL**

**1<sup>ST</sup> RESPONDENT  
2<sup>ND</sup> RESPONDENT  
3<sup>RD</sup> RESPONDENT  
4<sup>TH</sup> RESPONDENT**

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**HEARD ON : 19 DECEMBER 2011**

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**JUDGMENT BY : MUSI, AJ**

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**DELIVERED ON : 21 DECEMBER 2011**

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[1] This is an opposed application for condonation. The applicants who are the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the main application sought the following relief:

- “(a) first respondent’s late filing of its supplementary answering affidavit is condoned.
- (b) costs, only in the extend of opposition.
- (c) further and / or alternative relief.”

[2] The applicants in the main application sought *inter alia* an order reviewing and setting aside the decision of the Labour Commissioner (the Commissioner) exempting the first and second respondents from paying severance pay to the applicants.

[3] The main application is opposed. The respondents, in that application, filed an answering affidavit on 22 February 2011. The applicants did not file a replying affidavit. I will for the sake of convenience refer to the parties as they are cited in the main application.

[4] The respondents aver that they consulted with Senior Counsel on 18 November 2011. During such consultation it became evident that not all the information that was before the Commissioner is part of the papers filed in the main application. Counsel advised them to file a supplementary affidavit in order to put all the relevant evidence that was before the Commissioner before us.

[5] Mr. Rafoneke on behalf of the applicants objected to the supplementary answering affidavit being filed. He argued that the notice of motion does not contain a prayer seeking leave to file the affidavit. He further argued that the Rules of the Labour Appeal Court, 2002 (the Rules) do

not make provision for the filing of supplementary answering affidavits. Mr. Daffue on behalf of the respondents argued that the respondents have a right to put the evidence that served before the Commissioner before us.

- [6] The main reason why the respondents seek to place the evidence before us is because the applicants did not comply with rule 16(3) (a) and (b) of the Rules. The relevant parts of Rule 16 read as follows:

“16(2) A party wishing to review a decision shall file a notice of motion with the Registrar and serve the notice of motion on the decision maker and on the other affected parties.

- (3) The notice of motion shall-
  - (a) Call upon the decision maker to show cause why the decision or proceedings should not be reviewed and corrected or set aside;
  - (b) Call upon the decision maker to deliver to the Registrar within 14days of the service of the notice of motion on the decision maker –
    - (i) the record of the proceedings; and
    - (ii) any reasons that decision maker is required to give or wishes to give;...”

- [7] (See also Rule 17(1) and (2) which is similar to Rule 16(2)) and (3). The applicants did not comply with the Rule in that they did not call upon the Commissioner to deliver the record of the proceedings and his/her reasons. The respondents took it upon themselves to put the relevant information before us.

- [8] Mr. Rafoneke is correct that the Rules do not make provision for filing a supplementary answering affidavit. The Rules envisage four sets of affidavits. The founding affidavit (Rule 16 (3) (c) and Rule 17 (2) (c). The accompanying affidavit (Rule 16 (6) (a) and 17 (5) (a)). The answering affidavit (Rule 16(7) and Rule 17(6)) and the replying affidavit (Rule 16 (8) and Rule 17 (7)). Rule 16 is applicable to this matter because the respondents seek to have a decision of the Commissioner set aside. It is not in dispute that the decision of the Commissioner is administrative action.
- [9] As much as the Rules do not make provision for the filing of additional affidavits, there is also no Rule that expressly prohibits the filing of additional affidavits.

Rule 19 reads as follows:

- “19(1) The Court may, for sufficient cause shown, excuse the parties from the compliance with any of these Rules.
- (2) The judge may give any directions that are considered just and expedient in matters of practice and procedure”

Section 12(8) the Constitution reads as follows:

“Any Court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any

person before such a Court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time”

[10] The parties were *ad idem* that this Court has a discretion to permit the filing of further affidavits. The discretion is one that must be exercised judicially after taking into account all the relevant facts and circumstances of the particular case. The Court must be satisfied that the party seeking leave to file a further affidavit is not *mala fide* or that the reason why the information was not put before the Court in the first place was because of culpable remissness on the part of that party. The Court’s decision should also be guided by considerations of fairness and whether the other party will be prejudiced by the filing of a further affidavit. The party seeking an indulgence to file a further affidavit must satisfy the Court that, although the affidavit is late and an additional affidavit, the Court should nevertheless, in the interest of justice and fairness receive the affidavit. See **Milne NO v Fabric House (Pty) Ltd** 1957 (3) SA 63 (N) at 65A. **Standard Bank of SA LTD v Sewpersadh and Another** 2005 (4) SA 148 (CPD) at 153B – 154E. **Watloo Meat and Chicken SA (Pty) LTD v Silvy Luis (Pty) LTD** 2008 (5) SA 461 (TPD) at 473 A-D.

[11] This Court will ultimately have to decide whether the decision of the Commissioner is a decision which his reasonable notional alter ego could not reach. In doing so this Court must consider all the facts that was placed before him/her.

- [12] This Court will only be in a position to do so if all the relevant evidence that was before the Commissioner is also placed before us. The respondents aver, which averment cannot be gainsaid, that the evidence contained in the supplementary answering affidavit is absolutely material for the proper adjudication of this matter because it is evidence that the Commissioner considered.
- [13] The explanation as to why the evidence is tendered at this late stage is also plausible and acceptable. The applicants did not call upon the Commissioner to deliver the relevant information to the Registrar. The respondents were advised to rather place the evidence that was before the Commissioner before us. Mr. Rafoneke could not point us to any prejudice that the respondents would suffer if the affidavit is allowed.
- [14] Mr. Rafoneke's submission that the notice of motion does not contain a prayer seeking leave to file the supplementary answering is correct. A party does not have a right to file a further affidavit. It is an indulgence and as such leave should be sought to file such affidavit.
- [15] In this matter the issue was clearly foreshadowed in the founding affidavit to the condonation application and in the supplementary answering affidavit. In the founding affidavit the deponent states the following:

“I verily believe that it is in the interest of justice to allow the supplementary answering affidavit to serve before the Honourable Court for it to adjudicate the main application after having considered all relevant evidence.”

In the supplementary answering affidavit he declared as follows;

“I have already deposed to an answering affidavit and shall seek leave from the Honourable Court to place this supplementary affidavit before the Court to enable it to properly adjudicate the dispute between the parties I dealt with the reasons for not placing this evidence before the Court from the onset in the founding affidavit in support of the application for such leave.”

[16] It is clear that the respondents are seeking leave to file and condonation for the late filing of the supplementary answering affidavit. Both these issues are properly canvassed in the application.

[17] With regard to the condonation application, there are no prescribed times for filing a supplementary answering affidavit because it is generally not permissible to do so. We are satisfied that the delay has been properly and satisfactorily explained. It is important that the information be placed before us. This matter is of importance to the respondents and the applicants. Any decision will have huge financial implications for the respondents and the applicants. To deny the respondents the opportunity to place relevant evidence before the Court would be inimical to the notion of doing justice between the parties.

[18] The notice of motion contains a prayer for further and or alternative relief. In **Johannesburg City Council v Bruma Thirty-two (Pty) Ltd** 1984 (4) SA 87 (T) at 93 E-F Coetzee J said:

“The prayer for alternative relief is to my mind, in modern practice, redundant and mere verbiage. Whatever the court can validly be asked to order on papers as framed, can still be asked without its presence.”

In **Tsosane and Others v Minister of Prison** 1982 (2) SA 55 (c) at 63 E-G it was said that:

“In any event and insofar as the relief sought may not have been appropriate or even legally competent, I would have been prepared to grant an appropriate order directed at the decision of the second respondent (assuming the merits of the matter justified this) under the prayer for further or alternative relief. Relief may be granted under this prayer where what is sought is not inconsistent with the substantive relief claimed and where further the basis for such relief has been laid in the supporting papers and dealt with in the answer of the respondent (see *Queenland Insurance Co Ltd v Banque Commerciale Africaine* 1946 AD 272 at 286; *Rooibokoord Sitrus (Edms) Bpk v Louw’s Creek Sitrus Kooperatiewe Maatskappy Bpk* 1964 (3) SA 601 (T) at 608.”

[19] The sentiments expressed in **Tsosane** supra were endorsed albeit in slightly different terms in **Port Nollorth Municipality v Xhalisa and Others; Luwalala and Others v Port Nollorth Municipality** 1991 (3) SA 98 (C) at 112 C-F.



- [20] The legal position can be summarized as follows. An order in terms other than those set out in the notice of motion may be granted provided that it is foreshadowed in the founding affidavit and dealt with in the answering affidavit. There must be satisfactory and sufficient evidence on the papers to justify such an order. The applicant should not be penalized for an oversight in the formulation of his/her/its prayers in the notice of motion. The relief granted must not be inconsistent with the substantive relief claimed. If no proper basis for the alternative relief is laid or if it is inconsistent with the substantive relief claimed it should not be granted. The absence of a prayer for further or alternative relief is no bar against granting such relief.
- [21] Granting leave to file the affidavit is not inconsistent with the relief sought in the notice of motion. In fact it is implied in the relief sought. Refusing leave to file the supplementary answering affidavit because there is no prayer for leave to file would be to allow form to triumph over substance.
- [22] The general rule is that a party seeking an indulgence should pay the costs of opposition if reasonably incurred. The opposition of this application was unreasonable. The respondents conduct necessitated this application. No order as to costs should therefore be made.
- [23] Accordingly the following order is made:

- (a) Condonation is granted for the late filing of the supplementary answering affidavit.
- (b) Leave is granted to file the said affidavit forthwith.
- (c) No order as to costs is made.

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**Musi, AJ**

I agree

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**Ms M Mosehle**  
**Member**

I agree

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**Mr Kao**  
**Member**

**For Applicant** : Adv Daffue SC  
**Assisted by** : Adv Malebanye  
**Instructed by** : Harley and Morris  
Maseru

**For Respondent** : Adv Rafoneke  
T. Maleane  
Maseru