

IN THE LABOUR APPEAL COURT OF LESOTHO

In the matter between

MOHLOMI JOEL SELETENG

APPLICANT

And

EXAMINATION CONCIL OF LESOTHO

1ST RESPONDENT

THE LABOUR COMMISSIONER

2ND RESPONDENT

EX TEMPORE JUDGMENT

Delivered on: 4 November 2015

- [1] Applicant, Mr. Seleteng, applied to this court to, amongst other things, review and set aside a certificate issued by the Labour Commissioner (2nd Respondent) exempting the Examinations Council of Lesotho (1st Respondent) from paying him severance pay upon the termination of his services.
- [2] The 1st Respondent filed papers opposing the application.
- [3] Subsequently Applicant filed a notice to amend the prayers set out in his founding papers.
- [4] 1st Respondent opposed this, arguing that:-
- (a) “The application does not comply with the Rules of this Court which prescribe that every Application shall be accompanied by an Affidavit detailing the facts upon which the relief sought is based. In the circumstances the 1st Respondent is unable to answer issuable thereto.”
 - (b) “The Respondent will be highly prejudiced if this Application is entertained because they will discover the grounds upon which the remedy sought is based for the first time from the bar. This amounts to litigation by ambush.”
- [5] The rules of this Court¹ do not have a provision which deals specifically with amendment of pleadings.
- [6] The closest applicable provision is Rule 19(2) which states that the “Judge may give directions that are considered just and expedient in matter of practice and procedure.”

¹ The Labour Appeal Court Rules, 2002 (LN 185 of 2002)

[7] We have sought guidance from the rules of the High Court² – in particular Rule 33 which deals with “amendment of pleadings and of documents.”

[8] The practice is that where it is necessary to amend or correct pleadings after they have been filed at court and served on the opposing party:-

- (a) the party wishing to amend must first serve a notice of intention to amend on all other parties;
- (b) the notice must set out the details of the amendment sought;
- (c) if there is no opposition, the amendment is effected;
- (d) if the other party wishes to object, it must clearly and concisely state the grounds upon which its objection is founded;
- (e) a party seeking leave to amend a pleading must give the court a reasonable explanation for the proposed amendment.
- (f) the matter is then set down for hearing as would any interlocutory application.

[9] Courts will usually lean in favour of granting the requested amendment. This is because the usual purpose of an amendment is to allow for a proper “ventilation of the dispute between the parties” in order to “determine the real issues so that justice may be done.”

² High Court Rules, 1980 (LN 9 of 1980)

[10] The test used to determine whether to grant amendment or not is whether:-

- (a) the proposed amendment is being made *mala fide* or *bona fide*;
- (b) the amendment will cause prejudice to the opposing party;
- (c) such prejudice may be cured by an order of costs or, where appropriate, a postponement.

[11] Since the application to amend is an interlocutory one, when *bona fides* is not an issue a supporting affidavit need not be provided. But where *bona fides* is at issue a supporting affidavit which sets out a reasonable explanation for the proposed amendment must accompany the application.

[12] In the present case the proposed amendments cannot be construed as *mala fide*. They are not intended to secure any advantage for the Applicant by introducing a new cause of action. In our view these amendments are just meant to remove ambiguities. The amended reliefs sought are recognisable as the same or substantially the same right of action as that disclosed in the original notice of motion. Consequently it was not necessary for Applicant to accompany his application with a supporting affidavit.

[13] Secondly, since the requested amendments are not of a material kind we are persuaded that Respondents will not suffer serious inconvenience or adverse consequences as a result thereof.

[14] Lastly, we are satisfied that permitting the amendment, will not result in respondents being prejudiced in a manner that cannot be corrected.

[15] For these reasons we order as follows:-

- (a) that the application to amend is granted as prayed, save for prayer 4 thereof.
- (b) that the amendments proposed in the notice of amendment be effected by filing the amended pages at court, and serving them on the respondents by no later than 13 November 2015,
- (c) that the respondent may by no later than 27 November 2015 make any consequential adjustments they wish to their own pleadings.
- (d) that applicant must pay 1st respondent costs occasioned to it by the amendment.

**KEKETSO MOAHLOLI, AJ
JUDGE OF THE LABOUR APPEAL COURT**

I agree

**S. KAO
ASSESSOR**

I agree

**L. RAMASHAMOLE
ASSESSOR**

Appearances

For Applicant: Adv. PA ‘Nono

For 1st Respondent: Adv. M Rafoneke