CASE NO. 2915/09

BETWEEN

ABEL SIBANDZE...	**APPLICANT**
AND	
STANLIB SWAZILAND (PTY) LIMITED...	**FIRST RESPONDENT**
LIBERTY LIFE SWAZILAND (PTY) LIMITED...	**SECOND RESPONDENT**
THE PRESIDING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND...	**THIRD RESPONDENT**

CORAM	AGYEMANGJ
FDR THE APPLICANT:	N. J. HLDPHE ESQ.
FDR THE FIRST AND SECDNO RESPONDENTS:	ADV. WDODSTRA SC (INSTRUCTED BY ROBINSON BERTRAM)

DATED THE 14™ **DAY** OF SEPTEMBER 2009

JUDGMENT

This is an application of the review of a ruling delivered by the industrial Court (the court a quo) granting an application before that court for the striking out of certain paragraphs contained in the founding affidavit of the applicant therein, more particularly, the said paragraphs were paragraphs 28, 29, 30, 31, 32, 33, 34, 35, and 40 thereof.

The applicant is an employee of the first respondent whose work has also involves the running of the second respondent.

The first and second respondents are companies duly registered under the laws of Swaziland. They are also the respondents in a suit commenced by the applicant at the Industrial Court against them, in challenge of a suspension procedure against the applicant.

It is regarding certain paragraphs in the founding affidavit of the said suit that the ruling complained of in this application was made.

The third respondent who delivered the said ruling has been cited in that capacity. The first and second respondents are hereafter referred to as "the respondents".

In response to the founding affidavit filed in support of the present application, the respondents filed an answering affidavit in which the following points were raised *in limine:* first was a point objecting to the jurisdiction of this court to hear the present matter and then there was an objection regarding the review sought in respect of a ruling upon an interlocutory matter in an on-going hearing before the court a quo. The latter point was taken up in argument and will be addressed in this judgment. The argument on jurisdiction however, was said to be shelved for the moment.

The applicant in this application, has complained that the ruling of the court a quo had resulted in an irregularity and so invokes the review jurisdiction of this court to correct, review or set aside the said ruling of the court a quo.

1. The present review has been brought on the following grounds: That the ruling of the court a quo unfairly prevented the applicant from having a fair hearing as it prevented him from pursuing his cause of action;

2. That in ordering the striking out of the said paragraphs which set out unfair labour practice the court a quo failed to apply its mind to the matter at hand, which was that the suit essentially sought redress against an unfair labour practice;

3. That the court a quo misdirected itself and by such, made an unreasonable and illogical finding that there was a dispute thus enabling it to misapply a legal principle;

4. That the court a quo misapplied a legal principle thus preventing it from exercising its discretion in the matter, resulting in a gross irregularity;

5. That by reason of an erroneous finding and the misapplication of the law in the ruling complained of, the applicant had suffered prejudice in that it had been denied a fair hearing.

These are the antecedents of the case before the court a quo that resulted in the ruling the subject of this application.

As aforesaid, the applicant is an employee of the first respondent. As Managing Director of that organisation, he has also had responsibility for the second respondent. The two outfits are companies duly registered under the laws of Swaziland. Yet in spite of the apparent propriety of the existence of these companies under the laws of Swaziland, the two companies operated as branches

or divisions of Stanlib Ltd, and Liberty Ltd, companies based in South Africa. Indeed, in one of the documents filed in this application, a performance appraisal of the applicant herein as employee, the first respondent was described as a Division of Stanlib. Furthermore, in the answering affidavit of the respondents sworn to by one Nicholas Trevor Haines, the first respondent was described as "part and parcel of the Liberty Group of Companies" in an argument regarding the alleged lack of jurisdiction of this court to deal with matters arising out of the applicant's employment with the first respondent, a Swazi company. It is a matter not controverted that the employment of the applicant with the first respondent was negotiated in the offices of Stanlib, Johannesburg, South Africa, for these reasons, although the applicant's employment contract was with the first respondent a Swazi company, in which he worked as its Chief Executive, he worked as under an outfit in South Africa, with a line Manager first Lanz Zulu and later Jerome Mouton who apparently worked in Stanlib Ltd, South Africa. The latter gentlemen were responsible for appraising the work performance of the applicant. The applicant also negotiated the terms of his employment with the first respondent and those of officers under him, with certain superior officers in South Africa although the terms of his employment were contained in his letter of employment with the first respondent. It seems that this arrangement worked without difficulties until the applicant started making complaints about his remuneration. First there was the complaint that he had not been paid a reviewed salary in accordance with his letter of employment. Then there was the complaint of unequal treatment of employees. The applicant's particular problem regarding this was that two of his subordinate officers: were receiving bigger salaries than he was and furthermore, that their salaries were reviewed upon a higher percentage scale than his was. There was

also a complaint regarding how other officers under him had not received their due and that his intervention on their behalf had yielded no response from the proper officers. These matters generally were the substance of the applicant's complaints at first directed at those he referred to as his superior, and later, contained in a letter addressed to one Bernard Katompa from whom the applicant was in expectation of some redress. The letter seemed to have brought him more problems than solutions. In the matters that followed including communication from that gentleman, telephone conversations and a teleconference, relations between the saidBernard Katompa and the applicant soured until there was no redeeming same.

It is the case of the applicant that by reason of the unsavoury relations he had with the said gentleman aforesaid, he was asked to resign his employment. A package made up of three months of his salary was offered him for this. The applicant disagreeing with the content of the package, engaged the bearer of the news: Nicholas Haines self-described as an officer of Liberty Africa, and one Darren Graham and on this. In the disagreeable atmosphere that ensued, a decision was reached that attorneys for both sides be brought into the matter. The discussions between the attorneys and certain officers of the South African company only produced a stalemate. After these things, the applicant received a letter purporting to suspend him from his employment. Although the applicant was offered full pay for the period of the purported suspension, certain privileges were withdrawn. An investigation into the matters bringing about the suspension was to be conducted after which the applicant if found culpable, would be dismissed. The applicant then commenced a suit before the court a quo in challenge of the said suspension. In his founding affidavit, he included the paragraphs that were struck out by order of the court a quo in the ruling the subject of this application for review.

These having been struck out by the court a quo in its ruling, the applicant has brought the present application.

As a preliminary matter, learned counsel for the applicant in argument, challenged the capacity of Nicholas Trevor Haines, the deponent to the respondent's answering affidavit herein (and indeed to the application before the court a quo), averring that the said gentleman had no authority to represent the first and second respondents in the present suit. Inviting the court to apply substantive justice over technical justice in line with the exhortation of the Court of Appeal in ***Shell Oil Swaziland (Pty) Ltd v. Motor World (Pty) Ltd. Appeal Case No. 23/2006 p.22*** he urged the court to permit him to raise this challenge to the case of the respondents although it was not raised before the court a quo. These were the grounds for the said challenge: first, that the resolutions purporting to empower the deponent Nicholas Trevor Haines to represent the respondents in proceedings such as the present one, were made by two foreign (South African) companies Stanlib Ltd and Liberty Ltd and not the respondents herein. He averred that although these companies appeared to be closely linked with the respondents, they remained separate and different from the respondents, in line with the principle of corporate personality expounded in the celebrated case of ***Salomon v. A. Salomon & Co Ltd (1897)*** *AC* ***22 HL.*** Counsel argued that it was for this reason that the resolutions passed by those companies in apparent conferment of authority over Nicholas Haines to represent the respondents, were fatally defective thus rendering the said authority ineffective to achieve

that purpose. The second ground was that even though the respondents attempted to cure the defect in the said deponent's authority by exhibiting new resolutions made by the respondents, those resolutions were defective in that it was not signed

by the directors of the first respondent. Arguing the merits of the application, learned counsel elaborated on the matters contained in the applicant's founding affidavit and contended regarding the first ground set out before now, that the court failed to appreciate that central to his case in the matter before it, was an unfair labour practice which was contained in the paragraphs the court ordered to be struck out. The consequence was that he would be prevented from pursuing that cause of action. This would have the effect of preventing him from ventilating his case, thus denying him a fair hearing. Expounding on this, learned counsel averred that the applicant's case was that he was summoned by his superior to South Africa where he was told to resign his employment and take a proffered package, or face suspension which would result in a dismissal. The reason he was allegedly given was that the said Bernard Katompa (described as the Chief Executive of Liberty Africa) no longer wished to work with him. He alleged that this was said at a time when all that the applicant had been pursuing was redress regarding his remuneration. He alleged that the applicant who was not in agreement with the forced resignation and the proffered terms refused this, a matter that resulted in a disagreement between the applicant and his "superiors". This, learned counsel contended, was the crux of the matter which amounted to an unfair labour practice contrary to Ss. 35 and 36 of the Employment Act of Swaziland, provisions that protect employment in this country. He averred that these matters resulted in a purported suspension which was a smoke-screen to get rid of him. The purported suspension that followed these events he said, gave rise to the applicant's cause of action pursued in the application before the court a quo. For this reason when the very paragraphs that contained the matters amounting to an unfair labour practice were struck out by order of this court, the court prevented the applicant from making

his case before that court and indeed before other fora such as CMAC which would by guided by the ruling. The applicant had thus been denied his constitutionally guaranteed right to a fair hearing. Learned counsel contended that this would not have occurred if the court a quo had applied its mind to the matter before it, appreciating that the cause of action was founded upon an unfair labour practice which it would be precluded from hearing if the said paragraphs were no longer part of the applicant's case.

On the second ground of complaint, learned counsel averred that the court a quo unreasonably and without any basis made a finding that there had been a dispute between the parties. He contended, that apart from the fact that there had been no dispute and no basis existed for such finding, the court in making such finding was misled into a mis-application of the law on bona fide negotiations and the application of the "without prejudice" principle to such.

Learned counsel argued that what happened between the parties was not a dispute, for the applicant had been summoned to South Africa and told to leave his employment and that, on certain terms. That the applicant was unwilling to take same, a matter resulting in conversations, emails, and other communication did not transform what essentially was an unfair labour practice committed by an employer, into a dispute with the employee regarding which negotiations were held. On another ground of complaint, learned counsel averred that the court a quo having allegedly misdirected itself into the alleged unreasonable finding that there was a dispute between the parties which they were trying to settle by means of negotiations, then held that the said negotiations were without prejudice and privileged in accordance with that legal principle regarding bona fide negotiations. Learned counsel contended that the court a quo misapplied the law in that it

equated every meeting with a negotiation and furthermore failed to consider that it is the bona fide negotiation (which did not obtain in the present instance) that would be regarded as privileged.

He contended that the alleged misdirection leading to an erroneous finding of fact and the consequent misapplication of the law prevented the court from exercising its discretion not to grant the application for striking out of the paragraphs. Relying on the case of ***Feinstein and Anor v.***

Taylor 1961 *(4)* ***SA*** *554,* he contended that as in that case, the court's ruling ordering a striking out of the said paragraphs had resulted in prejudice to the applicant as he was allegedly deprived of his cause of action and ultimately, a fair hearing.

All these matters, learned counsel contended, grounded an application for review which he urged the court to grant in exercise of its review jurisdiction.

Lastly in response to the point raised *in limine* by opposing counsel, learned counsel addressed the issue of the propriety of the instant application which seeks the review of a ruling in a suit yet to be concluded. Regarding this, he insisted that the present circumstance (in which the ruling of the court a quo had allegedly denied the applicant a fair hearing), was a proper case for the court to intervene in an on-going trial as grave injustice would result unless the court intervened. Learned counsel for the respondents on his part first of all announced that the respondents had chosen not to canvass the objection raised regarding jurisdiction at the present time.

In reply to the arguments of opposing counsel, learned counsel for the respondents asserted, regarding the preliminary matter raised concerning the authority of the deponent to 'the respondent's answering affidavit, that the resolution of the first respondent exhibited as such in the present instance, was regular on the face of it, proper and effective to confer power on Nicholas Haines the deponent. He contended that in any case, a challenge regarding the signatories to the resolution of the first respondent, particularly as to whether or not the directors thereof were the ones who signed the resolution, was a matter for oral evidence and not for argument in an application such as the present one. He thus urged the court to discountenance the arguments on that point. Counsel furthermore, relying on dicta from cases such as *Sita and Anor v. Olivier N.O and Anor. 1967 (2) SA 442 (A), S v. Haysom 1997 (3) SA 155 (CPD at 160 B-C) Mendes and Anor. v. Kitching N.O and Anor 1996 (10 SA 259 (ECD at 268J - 269E),* which discouraged interventions by the Superior Court regarding on-going proceedings in inferior courts, except in exceptional circumstances where non-interference would lead to a miscarriage of justice, see *Walhaus v. Additional Magistrate, Johannesburg 1959 (3) S A 1 1 3 A at 119H-120E,* urged this court not to interfere with the uncompleted proceedings of the court a quo. Indeed in the heads of argument filed on behalf of the respondents, it was canvassed that an interference with the ruling of the court a quo in an interlocutory matter would not only pre-empt that court's decision, but that this courts decision would be merely academic while the applicant ,rnay find himself in contempt of the court a quo.

Regarding the arguments on the merits, learned counsel for the respondents contended that there was no merit in the charge of the applicant that the court a quo failed to apply its mind to the matter before it.

He cited and relied on the dictum of Corbett JA in *Johannesburg Stock Exchange v. Witwaiersrand Nigel Limited 1988 (3) SA 132 AD at 152 A-D* by which that learned judge expatiated on the circumstances under which an adjudicator might be said to have failed to apply his mind to a matter before him.

Upon hearing both counsel and upon reading the papers filed in support and against the application, I am of the view that the application for review should be granted in part. I say so for reasons appearing hereunder.

First of all in respect of the preliminary point on the alleged lack of authority of the deponent to the respondent's answering affidavit, I find no merit in the argument seeking to disqualify the deponent to the answering affidavit of the respondents although my decision would have been otherwise had the respondents not seen fit to exhibit a resolution of the first and second respondent herein, made to operate retrospectively arid in substitution of the resolutions of the two South African companies Stanlib Ltd and Liberty Ltd. I say so although it is settled law now that in proceedings relating to a body with corporate personality, it is not necessary for a resolution to be exhibited, see: per ***Joubert's The Law of South Africa 3 Ed. Civil Procedure and Costs p.74 at pp138,*** "the annexing of a copy of the resolution itself is not always necessary but sufficient proof under the circumstances that the application was properly authorized should be laid before the court..." also ***Dowson & Dohson Ltd v. Evans & Kerns (Pty) Ltd 1973 (4) SA 136; Thelma Courts Flats (Pty)*** *Ltd* ***v.*** *McSwigin* ***1954 (3) SA 457.*** Even so, as was held in ***J.K. Maseko & Co. (Pty) Ltd v. Lung He Dlamini and two ors Civil Case No. 3629/05 para. 7 (Unreported)*** the duty of the deponent to demonstrate his authority is not to be glossed over where same has been challenged. As I have said before now, but for the resolutions of the first and second

respondents now exhibited, I would have upheld the argument of the lack of authority of Nicholas Trevor Haines to represent the respondents herein. In that adventure, I would have had little difficulty in throwing out the resolutions of the two foreign companies Stanlib Ltd and Liberty Ltd marked N1/NH1, purporting to confer authority on a deponent to prosecute or defend proceedings against the respondents, whatever their affiliation to the respondents.

In considering the first leg of the objection which was in relation to the resolutions of Stanlib Ltd and Liberty Ltd of South Africa, I have had to exercise the utmost self-restraint in this judgment which is upon an application for the review of a ruling, so as not to veer into a pronouncement on the capacity of foreign companies (such as Stanlib Ltd and Liberty Ltd are), and of their employees to purport to involve themselves in a matter involving entities with corporate legal personality under this country's laws no matter how much they may be involved in its business operations or management. My self-restraint is partly due to the fact that there is a point raised *in limine* regarding jurisdiction which is said to have been shelved and I do not wish to pre-empt arguments should the respondents be inclined to raise same at a future date. Suffice it to say that the corporate personality of the first and second respondents as persons in Swaziland, separate and distinct from any other, and with the power of suit must be upheld by this court in line with the principle of corporate personality expounded in the *locus classicus Salomon v. Salomon (supra).* For this reason, in a suit against the respondents herein, the only persons who may represent them are those empowered by them alone so to do, and not by any outside entity no matter how vast their stake, or how involved they may be in the business or management of the respondents. It is for this reason that the resolutions of Stanlib Ltd and Liberty Ltd (both foreign companies) purporting to

authorise a person to represent the respondents herein in the present proceedings would not have been given the light of day in these proceedings.

The respondents obviously recognising the faux pas, have exhibited resolutions purporting to be those of the respondents herein. That resolution appears to be regular on its face. Learned counsel for the applicant has invited the court in this application, to perform the function of a handwriting expert and as such to discern subtle differences in signatures appearing on the first respondent's resolution as compared with those on other documents. It is an invitation I must respectfully decline. As learned counsel for the respondents rightly stated, a challenge regarding the signatures is a challenge of fact which can only be established by oral evidence and not in the manner adopted by learned counsel in this application. In any case, I do not see any real challenge to the signatures in the evidence proffered by way of affidavit such as will move my hand to set same down as a dispute of fact and thus to exercise the options available to the court including the calling of oral evidence to establish that fact.

Now onto the merits of the application:

It is my view that the court a quo did not misdirect itself in the finding that there had been a dispute between the parties in respect of which a negotiated settlement was sought. It seems to me that there was clearly a dispute which came into being between the applicant and those he referred to as his superiors (not the respondents herein), after the applicant was allegedly told to give up his employment on proffered terms. Clearly, although the matters that occurred before this request of forced resignation, being the complaints made by the applicant in relation to his remuneration et al may have brought on matters resulting ultimately in his suspension, those matters were not the circumstance regarding which attorneys

of the feuding parties met with a view to reaching a settlement. From a reading of the communication between the applicant and Bernard Katompa Chief Executive Officer (CEO) of Liberty Africa, it seems to me that although the CEO may have been unhappy with his relationship with the applicant, this in itself did not bring about a dispute between them, but rather resulted in a decision taken by the CEO that the applicant ought to leave the employment of the respondents on certain terms. It was after this decision was communicated to the applicant by Nicholas Haines, that the applicant, clearly unhappy with it, took a stance in opposition to that of his "superiors". Apparently aggrieved by the request, the applicant refused to leave his employment on the terms offered. In the challenge he mounted against what he regarded as unacceptable treatment, he made a demand for an exit package on his own terms which was rejected. The unyielding positions of the feuding parties regarding what the applicant's exit package was to be in the light of what the applicant considered to be unfair treatment, was the matter that was ultimately, in the pursuit of a solution, placed in the hands of attorneys for the feuding parties for a negotiated settlement. It seems to me, from the matters deposed to in the affidavits of the parties that the attorneys in their negotiations, concerned themselves not so much with the fact of the applicant's forced resignation or the circumstances that brought about same, as with the kind of exit package for the applicant that was appropriate in the circumstances. But there is no denying that at that point, the parties had taken different positions and that a dispute had arisen which became the subject of the negotiation between the attorneys. The finding of the court a quo that there had been a dispute was thus quite correct.

Even so it seems to me that the court a quo erred in finding that all communication and interaction between the feuding parties that followed the time the applicant was

allegedly told to leave his employment on proffered terms was with a view to settling the dispute. These matters are evident from the affidavits: that when the applicant was asked to resign his employment, he protested this treatment and in this regard, engaged with Nicholas Haines who made the announcement and others who seemed to be in a position to influence in change in the attitude of the applicant's "superiors". This reaction in challenge of the treatment meted out to the applicant resulted in his making his own demand for an exit package that was turned down. All these, it seems to me, are consistent with the circumstance of an employee challenging his forced exit, engaging with his employer in a bid to influence the latter's decision. It could not without more, be regarded as an attempt to negotiate with his superiors. Nor was there evidence that at that point, the employer (apparently represented by the said superiors), was interested in reaching any middle ground with the applicant. Each party had clearly remained entrenched in his position in the dispute. It appears that it was when the applicant's challenge and the back and forth between him and his superiors did not yield the desired fruit of getting him to resign and on terms acceptable to both parties, that the attorneys of the feuding parties got involved with a view to settling the matter.

This is the point at which a genuine attempt was made to negotiate a settlement, and not before.

For this reason, I hold that the finding of the court a quo regarding bona fide negotiations between the feuding parties was amiss only in this respect; that it included the circumstances preceding the involvement of the attorneys of the feuding parties. These were contained in paragraphs 28, 29 and 30 of the applicant's founding affidavit. Having upheld the finding of the court a quo that the feuding parties were involved in bona fide negotiations over a dispute, I go ahead to

say that there was no misapplication of the law of privilege relating to "without prejudice" negotiations which the court a quo rightly concerned itself with in relation to paragraphs 31-35 and 40 of the founding affidavit. It seems to me then that there is no merit in the applicant's complaint that the court a quo failed to direct its mind to the matter at hand. Although admittedly, the applicants case before that court was that the respondents' decision to suspend him from work was unlawful, having been founded on an unfair labour practice, the court would have done both parties a disservice and indeed abdicated its responsibility to do procedural as well as substantive justice if upon considerations regarding that cause of action and in a bid to aid the applicant in the prosecution of his case, it had refused to make the appropriate order of striking out depositions constituting inadmissible evidence.

While the recent trend is for courts to tilt towards the achievement of substantial justice rather than technical justice, that attitude cannot be allowed to derogate from the value of our court rules of practice and procedure and evidential principles which certainly have their place in our jurisprudence.

Having said this, I must say that what the court a quo did (in making the orders it did in its ruling), was not an indication that it failed to direct its mind to the matter at hand.

What does it mean to say that a court has failed to direct its mind to the matter at hand? In seeking a definition of this expression so often used and abused in review applications, I am helped and guided by the learned judge Corbett JA who in ***Johannesburg Stock Exchange v.*** *Witwatersrand* ***Nigel Limited 1988 (3) SA 132 AD at 152 A-D*** set out a few examples of the circumstances under which an adjudicator might be said to have failed to apply his mind to a matter before him.

These included when a decision was arbitrarily or capriciously made, or made mala fide or arrived at as a result of "unwarranted adherence to a fixed principle".

Certainly apart from having an ulterior motive for deciding the case in a particular way, it must be evident that the adjudicator must have completely misconceived his powers, failed to appreciate the issues before him, or failed to realize the gravamen of the matter he is called upon to adjudicate, for such a charge to be tenable.

It seems to me that that is not the case in the present instance. Having said this, I must say however that I have difficulty with the striking out of paragraphs 28, 29 and 30 of the applicant's founding affidavit before the court a quo. It seems to me that there was a misdirection that ied to the striking out of those paragraphs. These paragraphs appear to deal with the announcement made to the applicant as employee regarding his forced resignation. The applicant's reaction to that announcement/request led to interaction and engagement between himself and the bearer of the bad news: Nicholas Haines. Included in that engagement was a challenge mounted by the applicant who protested that he had done nothing to merit treatment he alleged to be unfair. Finally, having apparently accepted to exit, he challenged the terms offered and offered other terms which were turned down. It was at that time that the dispute in respect of which the attorneys sought to find middle ground crystallised. The said paragraphs do not contain matters occurring in the course of bona fide negotiations. Rather those paragraphs set out the source of the dispute and how it was that the unsuccessful but bona fide attempt to negotiate a settlement came about. It must be borne in mind that the applicant's suit before the court a quo challenged his suspension on grounds *inter alia* that being an employee subject to the employment laws of this country including Ss 35 and 36 of the Employment Act, he had been unfairly treated by his employer. To strike these

paragraphs out would be to prevent the applicant from introducing competent evidence that should form a background for the prosecution of his case before the court a quo.

I hold then that the court a quo did misdirect itself when it held that the averments contained in paragraphs 28, 29 and 30 were in respect of matters relating to bona fide negotiations. The said misdirection led to a gross irregularity occasioning prejudice to the applicant in that matters he needed to bring to the attention of the court in pursuit of his case were excluded thereby, thus denying him a fair hearing. I am therefore minded to grant the application in part and to review the ruling of the court a quo by restoring paragraphs 28, 29 and 30 of the applicant's founding affidavit. The other paragraphs I am afraid, must remain excluded for the very reason cited by the court a quo: they were matters obtaining in the course of bona fide negotiations between the parties.

Does this court have jurisdiction at this point in the proceedings before the court a quo to intervene therein by way of the present review sought? It surely does, for I find that the exclusion of paragraphs 28, 29 arid 30 will unnecessarily affect the prosecution of the applicant's suit before that court in that it may prevent him from having his case adequately heard. That course will not be in the pursuit of justice. The intervention of this court at this stage, for the reason I have given, will not pre-empt the decision of the court a quo; nor can the applicant be accused of merely

making an academic argument, or showing contempt for the court a quo -matters canvassed in the respondent's heads of argument. While I have no difficulty with the attitude of the courts to generally avoid interference in the unfinished proceedings of inferior courts as clearly indicated in such cases as ***Sita and Anor v. Olivier N.O and Anor 1967*** *(2)* ***SA 442 (A; Mendes and Anor v. Kitching N.O and Anor 1996 (10 SA 259*** *(ECD* ***at 268J - 269E,*** the present instance, for the reasons set out before now, is a circumstance excepted from that general treatment for I fear that grave injustice may ensue or simply, justice may not be served otherwise, see: ***Walhaus v. Additional Magistrate, Johannesburg 1959 (3) SA 113 A at 119H-120E.*** The application is thus granted in part and the ruling of the court a quo striking out certain paragraphs contained in the applicant's founding affidavit is reviewed to exclude paragraphs 28, 29 and 30 in its application.

I make no order as to costs.

MABEL AGYEMANG

HIGH COURT JUDGE