



IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

Case No. 300/17

In the matter between:

TIMOTHY VILAKATI

APPLICANT

and

LIDWALA INSURANCE COMPANY

RESPONDENT

Neutral citation : Timothy Vilakati vs Lidwala Insurance Company
(300/2017) [2018] SZIC 37

Coram : **L. MSIMANGO – ACTING JUDGE**
(Sitting with Mr. P.S. Mamba and Mr. E.L.B.
Dlamini Nominated Members of the Court)

Date Heard : 03 April 2018

Date Delivered : 18 May 2018

JUDGEMENT

1. The Applicant instituted motion proceedings seeking the following orders:
 - (a) Directing the Respondent to pay the applicant an annual bonus for the year 2017.
 - (b) Costs of suit.
 - (c) Further and/or alternative relief.
2. The application was opposed by the Respondent who accordingly filed an answering Affidavit, the Applicant also filed its replying affidavit. The Respondent thereafter filed an interlocutory application for leave to file its supplementary Answering Affidavit to the substantive application on the basis that the Respondent's Replying Affidavit raises new issues which require that the Respondent answer to.
3. The inter-locutory application is opposed by the Applicant, and the parties will be referred to as cited in the main application.
4. The Applicant objects to the filing of the supplementary affidavit on the basis that there are now-new facts which have been raised by the Respondent, whereas those facts never existed at the time of filing of its substantive answering affidavit, or issues which came to light thereafter and need to be brought to the attention of the Court.
5. The rules of this Court do not provide for the filing of further pleadings once a replying affidavit has been filed. Rule 28 (a) of the Industrial

Court Rules provides that **“where these Rules do not make provision for the procedure to be followed in any matter before the Court, the High Court Rules shall apply to proceedings before the Court with such qualifications, modifications and adaptation as the presiding Judge may determine”**.

6. Hence we have resorted to the High Court (Amendment) Rules 1990, where in Rule 28 (8) provides: ‘the Court may during the hearing at any stage before Judgement grant leave to amend any pleading or document on such terms as to it seems fit’.

6.1 The Respondent in this matter wishes to file a supplementary affidavit. It is settled law that in deciding such an issue the Court has a discretion which is exercised judiciously. **The Appellate Division in James Brown & Hammer (PTY) Ltd, V Simmons 1963 (4) (SA) 656 at 660 E-G1**, held that;

“It is in the interests of the administration of Justice that the well-known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly observed: some flexibility controlled by the presiding Judge exercising discretion in relation to the facts of the case before Court, must necessarily also be permitted. Where as in the present case, an affidavit is tendered out of its ordinary sequence, the party tendering it, is seeking not a right, but an indulgence from the Court; he must advance his explanation of why the affidavit is out of its sequence and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, hereafter be received’.

7. From the above authority, the position can then be summarised as follows:

- (a) The benchmark rule is that three sets of affidavits are allowed, namely: founding/supporting affidavits, answering affidavits and replying affidavits.
- (b) The Court may, however, at its discretion allow the filing of further affidavits,
- (c) In exercising its discretion, the Court will do so with a measure of flexibility taking into account all the facts of the case,
- (d) Allowing the filing of further affidavits is not a right that a party has, but an indulgence from the Court.
- (e) Leave to file further affidavits out of sequence, may be allowed, for example, where there was something unexpected in the Applicant's replying affidavit or where a new matter was raised or where the information/evidence was not available to the Respondents when the founding affidavits were filed and before the answering affidavits could be filed.
- (f) The material sought to be raised in the supplementary affidavit must be relevant to the issues for determination of the main claim or application
- (g) There must be a satisfactory explanation/evidence which negatives mala fides as to why the information/evidence could not be put before the Court at an earlier stage.
- (h) The Court must be satisfied that no prejudice is or will be caused to the opposite party which cannot be remedied by an appropriate order as to costs.

8. This Court has on occasion permitted the filing of supplementary affidavits in motion proceedings. In so doing the Court exercised its

judicial discretion having considered the facts as summarized above. Similarly, the Court has also refused to allow the filing of supplementary affidavits where circumstances and the facts of the case so require.

9. The Applicant's argument is that the general law in motion proceedings is that three sets of affidavits are allowed and no further affidavits will be allowed once pleadings are closed. The exception is, however, that additional affidavits may be allowed when special circumstances dictates as where it is in the interest of Justice to do so. Special circumstances that may warrant the permission for additional affidavits is where something unexpected had happened or something new emerges from the Applicants replying affidavits. The Applicant argues further, that the filing of the affidavit by Respondent is unnecessary as there are no new issues that have arisen neither from the Applicant's replying affidavit nor that something unexpected came to light thereafter. The reason for filing the further affidavit is not justified and the Respondent is buying time at the detriment of the Applicant.

10. As it has been stated earlier on in paragraph 6.1 that it is in the interest of the administration of Justice that the well-known and well established general rule regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied, some flexibility, controlled by the presiding Judge exercising discretion in relation to the facts of the case before him must necessarily also be permitted. In the present case, an affidavit is tendered out of its sequence, the party tendering it is seeking not a right but an indulgence from the Court. Every case should be determined not only according to its own circumstances by having due regard to the contents of the further affidavit

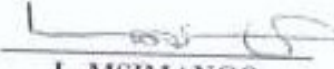
and especially whether some reasonable explanation has been given. It is desirable that where there is a good explanation for not following the rules of Court and where the Court is fully satisfied that such explanation is made in good faith and the material contained in the further affidavit is relevant to resolving the dispute between the parties, the court should be loath to dogmatically stick to the rules where to do so will result in the Court not having the full facts before it or injustice in the case.

11. The Court should only stick to the rules where it is clear that the prejudice cannot be remedied by an appropriate award of wasted costs. The Applicant has therefore in its submissions failed to give a satisfactory justification as to why the Respondent should not be allowed to file the supplementary affidavit. As pointed out by **Nathan C.J, as he then was in the case of Motsa V Carmichael Investments (PTY) Ltd, 1979-1981 SLR 166 at 169.** In this case the Respondent has objected to the filing of supplementary affidavits by the Applicant on the basis that they introduced a cause of action that had not occurred at the time of institution of the application. The learned Judge stated:

“There can be no prejudice to the Respondent in the permitting of supplementary affidavit to remain on the papers. Even if this can be said to introduce a cause of action which did not exist when the application was launched, and I am by no means certain that this is the case where the Court has a discretion in the matter”.

12. Thus the Court in exercising its discretion makes the following order:
 - (a) The Respondent is granted leave to file its supplementary affidavit.
 - (b) There is no order as to costs.

The Members agree.



L. MSIMANGO
ACTING JUDGE OF THE INDUSTRIAL COURT

For Applicant : Z. Mkhonta

For Respondent : H. Magagula