IN THE HIGH COURT OF ESWATINI

JUDGMENT

Held in Mbabane Civil Case No. 329/2016

In the matter between:

SWAZI MTN LTD Applicant

and

SWAZILAND COMPETITION COMMISSION Respondent

Neutral Citation: ***Swazi MTN Ltd v Swaziland Competition Commission (329/2016) [2019] SZHC 88 (10h May, 2019)***

Coram: **M. DLAMINI J**

For Applicant: **M. Magagula**

For Respondents: **N. Manzini**

Heard : 3rd May, 2019

Delivered : 10th May, 2019

Civil procedure : Section 40 of Competition Commission Act not complied with – outcome therefore – court should not decide matters on technical procedures - disregard of procedure throws jurisprudence into disarray – court to censure by declining costs

: Both decision of the Secretariat and of Board are appealable – no dichotomy between two decisions – decision of Secretariat converged into that of Commission as per section 40

: Costs – unwarranted conduct of Counsel – cost follow event principle not upheld -

Summary: The applicant is demanding a full refund of monies paid by it to the respondent as notification fee. Applicant alleges that the payment by it was pursuant to an erroneous advice at the instance of the respondent that its intended merger with E-Top Up (Pty) Ltd, (E-Top Up), was liable to notification. Respondent later changed and advised that the transaction was not notifiable. Respondent, however, decided to refund applicant part of the notification fee paid instead of the full amount. In opposition, respondent objects to the procedure taken by applicant in bringing its matter to court by way of motion proceedings instead of noting an appeal.

The Parties

[1] The applicant is a company duly incorporated and registered in terms of the company laws of the Kingdom. Its principal place of business is situate at Mahlalekhukhwini House, Plot No: 14/50, Cnr. MR 103 and Royal Villas Road, Ezulwini area, region of Hhohho, eSwatini.

[2] The respondent is a regulator of trade competition in terms of a legislative enactment. Its business premises are at Ground Floor, MV-Tel Building, Off Oshoek Freeway, KaMhlaba Road, Sidwashini area, Hhohho region, Kingdom of eSwatini.

Applicant's Case

[3] Applicant averred that it owned 60% shares while Mr. Victor Gamedze held the balance in a company referred to as E-Top Up. Applicant decided to acquire the 40% owned by Mr. Victor Gamedze. Applicant's attorney then sought verbal advice from the respondent on whether the merger so intended by applicant and E-Top Up was subject to notification. Respondent through its Executive Director, Ms. Langa, advised that it was liable. Following this advice, applicant prepared and filed the notification documents. It further paid a notification fee in terms of Regulation 11 of respondent's Regulations. The notification fee was E600 000. When the notification documents were presented to the Board of Commission by the Secretariat of respondent for a determination of approval of the intended merger, the Board decided to enquire whether the transaction by applicant and E-Top Up was notifiable. It sought legal advice. The legal advice was to the effect that the transaction was not notifiable on the basis that MTN was a majority shareholder in E-Top Up. The legal advice further stated that the appellant should be refunded part of the notification fee.

Respondent, through its Board of Commissioners endorsed the legal advice on both points. Through its Executive Director, Ms. Langa, respondent wrote to applicant advising it that the transaction was not subject to notification and that it was entitled to part refund of the E600 000 notification fee. Under the same correspondence, the Executive Director of respondent attached a cheque of E200 000 as refund, in compliance with her Board's decision.

[4] Upon receipt of the correspondence and the cheque from respondent, applicant demanded full refund. This fell on deaf ears. Applicant moved the present application.

Respondent's *contra*

[5] Respondent having given the background of the matter then averred:

> "*16. Before responding to the Applicant's averments in the Founding Affidavit, the Respondent wishes to raise the following points in limine:*
>
> *16.1 The Applicant has approached this Court for a refund o the E600 000 (Six Hundred Thousand Emalangeni) instead of appealing the decision of the Board which directed that the Respondent should refund Applicant part of the Notification fee. The Applicant has therefore failed to comply with Section 40 of the Competition Act which provides for an appeal in the event a party is aggrieved by a decision of the Commission.*

17. The issue of the refund to the Applicant is still pending before the Board. The Board has not yet determined how much the refund should be as the Applicant and Secretariat failed to reach an agreement as per the Board's decision. The Applicant is aware that a decision of the Board regarding this issue is pending and as such these proceedings have been brought prematurely. Copies of letter to the Applicant's Attorneys on this issue are annexed hereto marked "A1" and "A2" ".

[6] During the hearing of this matter, Counsel on behalf of the respondent took his time to submit at length on the first point *in limine*. He did not pursue the second point of law. He meticulously articulated that in terms of section 40 of the Competition Act 2007, the applicant having received the correspondence from the respondent advising it that the transaction was not notifiable and that it would receive part refund, applicant ought to have appealed the decision of the respondent.

[7] Further, even if one were to assume for a second that the pleadings serving before court were an appeal, applicant was late in that its application was served upon the respondent on 14th April, 2016 with the respondent's decision communicated to applicant on 23rd March 2015. In terms of section 40, applicant had thirty days to lodge an appeal. The present application was filed on 14th April, 2016. This was a year later. Applicant ought to have filed a condonation application. None was serving before court during the time of hearing.

[8] **Mr. N. Manzini**, learned Counsel for the respondent further pointed out that this court has no jurisdiction to entertain applicant's application for the reason that whatever order the court might enter would have no effect on the decision of the respondent following that there was no prayer by the applicant to have the decision of the respondent on part refund to be set aside. The decision by respondent would stand in the absence of such a prayer.

Applicant's reply on *point in limine*

[9] **Mr. M. Magagula,** on behalf of applicant submitted that as can be gleaned from the answering affidavit, upon receipt of the part refund cheque and its correspondence, they demanded a full refund. Respondent communicated to them that its Board had not taken a decision on the matter. Ms. Langa then referred applicant to the Board and advised that it should apply for the full refund. In brief, as per Ms. Langa, the Chief Executive Officer of the respondent, it was not clear on whether respondent's Board had taken the decision on the part refund or not. It therefore became difficult for them to decide whether to appeal or demand a full refund direct from the respondent. Learned Counsel referred the court to paragraph 17 of respondent's answering affidavit. The said paragraph's full quotation appears above herein at para. 5.

[10] Learned Counsel for applicant submitted further that the delay in lodging the present application was as a result of series of negotiations as supported by respondent's answering affidavit under the able hands of Ms. Langa. These negotiations were both pre and post the present

application. The court was referred to various averments by the respondent in support hereof.

Adjudication on *point in limine*

[11] In the circumstances of the case pending before me, should the applicant have noted an appeal? Respondent strenuously argued that the application should be dismissed on procedural grounds as the form taken was irregular in terms of the law. A number of circumstances guides the respondent to submit in this regard.

[12] Now the question is, "Is it common cause that the Board took the decision that the applicant be refunded part of the notification fee?" This question is pertinent to the determination on the point *in limine* raised by the respondent. The line of argument seems to be that if the answer to the poser is that the Board took the decision as per the legal advice that the applicant should not be refunded fully, then applicant ought to have appealed as submitted by respondent's counsel. If however, it is not the Board's decision but that of the Secretariat or any person, the applicant is justified in bringing the proceedings under Motion as contended on behalf of applicant.

[13] Respondent's point of law finds support in Ms. Langa's answer:

> "***The Board*** *then decided (after receipt of the opinion) that the transaction should not have been notified* ***and therefore the Secretariat should refund the Parties (Applicant) in part the***

notification fee paid. *This appears in annexure AD5 in Applicant's Founding Affidavit."*[1]

[14] Annexure AD 5 which was authored by Ms. Langa on behalf of the Board supports her version as it reads partly:

> *"6. At the meeting* ***of the Board of Commissioners*** *held on the 23rd February 2015****, the Board considered the legal opinion and concluded that-***
>
> *(i) The transaction should not have been notified to the Commission because MTN already owned 60% of equity shares in E-Top Up.*
>
> *(ii)* ***That the Secretariat should refund the parties in part*** *in accordance with the advice received from counsel.*
>
> *7. Based on the aforementioned, we would like to advise that –*
>
> *(i) This type of transaction is not notifiable.*
>
> *(ii) We enclose a refund amounting to a third of the filling fee (200 000.00.*
>
> ……
> ….
>
> *8. Please note that refunding notification fees is not a policy of the Commission. This is an exceptional case"*

[1] See page 35 para 13 of book of pleadings

[15] It is further deposed on behalf of the respondent:

> "*Contents therein are denied. As stated above herein, the Applicant is not entitled to a refund of the E600 000.00 (Six Hundred Thousand Emalangeni)* ***unless and until the decision of the Board to refund Applicant part of the notification fee has been set aside on appeal."***

[16] Taking into account the above set of circumstance from which it is glaring that the decision to refund the applicant part of the notification fee was taken by the Board together with Section 40 of the Act, which directs that an aggrieved party may note an appeal before this court, as an adjudicator, it would be justiciable to conclude that there is substance in the respondent's point of law raised and therefore dismiss the application serving before this court. However, this conclusion would not be judicious without considering also the submission made on behalf of applicant by **Mr. M. Magagula**. **Mr. M. Magagula** submitted that following deliberation and negotiations on the matter, the applicant was at the instance of the respondent left with the information that the Board had not deliberated on the decision for the part refund. This was the decision by the Secretariat. It is for this reason that the applicant challenged the issue of part refund by means of Motion proceedings**. Mr. Magagula** pointed out that such submission were confirmed in the respondent's answering affidavit. In its reply, applicant deposed:

> "*The Respondent's defence is premised on the following contentions:*
>
> *9.1* ……

9.2 secondly, that the Board has not made a decision on the amount of the refund to be made to the Applicant.

9.3 ……

9.4 fourthly, even though the Board of Commissioners of the Respondent made a decision that the transaction in question was not notifiable, the Secretariat differs and believes that he transaction was notifiable, and upon the Board making a decision on the refund, the Secretariat intends to appeal the decision of the Board of Commissioner."[2]

[17] The applicant contended further in its reply that there was nothing to appeal following that the respondent's Board made a decision which was favourable to it. Does respondent's answering affidavit supports the analysis made by applicant in its reply?

[18] When respondent (Board) convened prior to 23rd March, 2015, the agenda on the table pertaining to the applicant was whether the Board ought to approve the merger or acquisition notified by applicant. It is common cause that the question on whether the applicant's transaction was notifiable or not was raised by the respondent (Board) *mero motu*. Ms. Langa on behalf of respondent highlighted in this regard:

[2] See page 27 of the book of pleadings

"*In the present case, the Secretariat analysed the transaction and recommended to the Board of Commissioners the approval of the merger without conditions. The Board however instead of reviewing the Secretariat's recommendation decided to address itself to a point in limine raised by its then Chairperson Mr. Nkonzo Hlatshwayo. Mr. Hlatshwayo wanted the Board to decide whether the transaction was notifiable or not taking into account that the Applicant already owned 60% shares in the target company (E-Top Up).*"[3]

[19] Ms. Langa reiterated:

"*It however, turned out that the Board seriously took up the point raised by the Chairperson. After deliberations an agreement could not be reached, the Board of Commissioners directed that the Secretariat should seek legal opinion on whether the transaction was notifiable or not….*"

[20] Pointing out that the legal advice obtained by the Board was that the transaction was not notifiable, Ms. Langa further alludes that as the Secretariat, they further sought legal advice on the notification fee. She deposed: "*When requesting the opinion, the Secretariat requested counsel to give direction about the issue of the notification fee*."[4] The response from their legal advisor was that a portion of the notification fee should be returned to the applicant.

[21] Ms. Langa deposed further on behalf of respondent:

[3] See page 34 of book of pleadings para. 10
[4] See page 34 para 12 lines 6-7 of book of pleadings

"*The issue of the refund to the Applicant is still pending before the Board. The Board has not yet determined how much the refund should be as the Applicant and Secretariat failed to reach an agreement as per the Board's decision. The Applicant is aware that a decision of the Board regarding this issue is pending and as such these proceedings have been brought prematurely. Copies of letters to the Applicant's Attorneys on this issue are annexed hereto marked "A1" and "A2".*[5]

[22] A1, authored by respondent under the hand of Ms. Langa reads:

"***RE: REFUND NOTIFICATION FEE OF E 600 000.00. NOTIFICATION OF THE ACQUISITION OF 40% SHARES IN THE E-TOP – UP (PTY) LTD BY SWAZILAND MTN LTD***

We refer to the above matter.

Please be advised that at a meeting of the Board of Commissioners held on 21 March 2016 the Board deliberated on the matter but did not made a final determination. The Board of Commissioners resolved to postpone the matter to allow the Board time to consider all the issues which will assist the Board in making an appropriate determination."[6]

[23] Pretty obvious from Ms. Langa's contention that the matter is not *res judicata* before the Board and this is confirmed by the correspondence

[5] See page 36 para 17 of book of pleadings
[6] See page 49 of book of pleadings

referred to immediately above herein the only reasonable conclusion therefore from this given set pleaded is that it is not the Board's decision to refund applicant part payment but that of the Secretariat who after all has pointed out that it is challenging the Board's decision that the applicant's transaction is not notifiable. Ms. Langa deposed in support of this position:

> *"….. Furthermore, whereas it is true that the Board said the transaction was not notifiable, the Secretariat is still of the view that it was notifiable and hence Secretariat intended to appeal the decision once the matter was finalized. The matter has not yet been finalized as the Board has not made a decision on the amount of the refund."*[7]

[24] Again, this averment would fortify the position by applicant that the Board had not deliberated and taken a decision against the applicant that it should be refunded partly. It would be correct to hold that following that the letter authored by Ms. Langa advising applicant that the matter of the refund was postponed by the Board in its meeting of 21 March 2016, the initial correspondent written by Ms. Langa a year before on 23rd March 2015 that it was the decision of the Board that the applicant should receive part payment was erroneous. This would therefore justify a ruling in favour of the applicant that its form of application is therefore correct.

[25] I must however, hasten to point out that the ruling in favour of applicant on the point *in limine* as clarified in paragraph 26 herein is crushed by a

[7] See page 47 para 36

correspondence attached immediately after annexure A1. This is annexure A2 as mentioned by Ms. Langa in her para.36 of the answering affidavit as cited above. A2, again authored under the hand of Ms. Langa outlines:

: "***RE: REFUND NOTIFICATION FEE OF E600 000.00 NOTIFICATION OF THE ACQUISITION OF 40% SHARES IN THE E-TOP-UP (PTY) LTD BY SWAZI MTN LTD.***

1. ……

2. *Please be advised that while we are prepared to reach an amicable solution in this matter, the Secretariat cannot on its own make independent decisions outside the Board of Commissioner (the "Board"), especially* ***because it was the Board who decided that the Commission should return only part of the amount.***

3. *We advise that the Board has now been appointed. We advise further that we will be taking the matter before the board to deliberate upon it on any one of the dates between the 14th and 22nd March 2016. We suggest that you take the opportunity to make an application for the refund of the money at this meeting.*

[26] It must be borne in mind that this correspondence was written on 22nd February, 2016 prior to correspondence marked A1. Now, reading the pleadings serving before me holistically, it is clear that the respondent has always maintained that the decision to refund applicant part of the notification fee was not made by the Secretariat. It was taken by the Board. Following applicant's position that it could only appeal an

adverse decision of the Board and not of the Secretary, the above immediate narrated circumstances dictate that applicant ought to have appealed the decision for part refund.

[27] As an adjudicator, I must however point out that on the procedural question on whether to appeal or not, the answer must be found from the respondent's enabling statute. In this regard, section 40 of the principal Act reads:

> *"**Appeals***
>
> *The Commission shall have power to issue orders or directives it deems necessary to secure compliance with this Act or its decisions and any person aggrieved by a decision of the Commission made under this Act or under any regulations made hereunder may, within 30 days after the date on which a notice of that decision is served on that person, appeal to the Court."*

[28] The respondent as the Commission is established in terms of section 6 of the Act. Section 11 (2) (a) clothes the Commission with investigative power as it stipulates:

> *"(2) Without limiting the generality of subsection (1), the Commission shall perform the following functions:*
>
> *(a) Carry out, on its own initiative or at the request of any person, investigations in relation to the conduct of business, including the abuse of a dominant position, so as to determine whether any enterprise is carrying on anti-competitive trade practices and the extent of*

such practices and issue such orders or directives it deems necessary to ensure compliance with this Act."

[29] Section 18 then provides:

"*Secretariat of the Commission*

The Secretariat of the Commission shall made up of the Executive Director and other employees of the Commission as may be appointed under this Act and the Secretariat shall be the investigative arm of the Commission."

[30] From sections 11 (2) (a) and 18 of the Act, it is abundantly clear that the Secretariat is the integral part of the Commission. It is, in mathematical jargon, an inner circle (Secretariat) of the larger circle (Commission). Applying this interpretation to section 40 of the principal Act, it means that there is no difference in decisions made by the Secretariat in their investigative duties and those taken by the Commission in their general functions as far as an aggrieved party is concerned. In brief, whether the decision is communicated by the Board or the Secretariat is irrelevant. Should a party be displeased with an order either by the Board or Secretariat, it should in the event it intends to challenge it, note an appeal within thirty days from such an order. The Secretariat in exercise of its investigative power is not a separate entity discharging such function at parallel lines with the Board, especially with regard to noting an appeal. Any decision of the Secretariat converges into that of the Commission by virtue of sections 11(2) (a) and 18. . It becomes a misnomer therefore in light of sections 11(2)(a), 18 and 40 to say that an appeal could not be noted because the decision to withhold the balance

of E400 000 as notification fee was not made by the Board but by the Secretariat or to put it in applicant's words, that the Board had issued a favourable order to it.

Outcome?

[31] The next question is, following that the applicant failed to note an appeal but decided to lodge application proceedings before this Court, what ought to be the outcome of its application? Should it be dismissed for want of procedure? This question must be answered in line with the circumstance mentioned by **Mr. N. Manzini** for the respondent that the applicant did not just embark on the wrong procedure but failed to file even the present application in time, namely, within thirty days from the date of the decision being 23rd March, 2015 in terms of section 40 of the Act.

[32] Motivating a dismissal for the applicant's application, **Mr. N. Manzini** reasoned that if for a second the court would determine the merits of the application and ignore the procedural aspect and at the end of the day grant applicant's prayers, an acrimonious situation would be that there would be two orders existing side by side. One would be the order by the Commission of 23rd March, 2015 and the second by this Court. This would be so because applicant had not prayed that the order by the Commission should be set aside or be impugned as the case may be. Further, all things equal, by reason that applicant filed the present application outside the time limit, there is no application for condonation serving before court.

[33] **Mr. M. Magagula** for the applicant on the other hand lamented a dismissal based on procedural reasoning, wondering how the court could kick out a litigant who is already before it for reasons that it had come through the wrong door. He undertook to submit authorities justifying that the court ought to deal with the merits of the case rather than concentrate on form. He urged the court to exercise its inherent jurisdiction over the matter. One of the authorities submitted was **Pick 'N Pay Retailers (Pty) Ltd and Another v The Gables and 2 Others (1639/2012) [2012] SZHC 1639 (11th March, 2013)** where a similar point of inherent jurisdiction was advanced. The learned Justice, **Ota J** as she then was, made a comparison of section 40 of the Act with section 8(1) of the Industrial Relations Act. She pointed out that section 8(1) of the |Industrial Relations Act imported the language "*exclusive jurisdiction*". By so stating under section 8 (1), the legislature was clear and unambiguous that the High Court's inherent jurisdiction was ousted. This connotation could not be extended to the Commission because section 40 was devoid of ousting wording. I must however, hasten to point out that even though the learned Justice found so, she nevertheless held, reciting **O'Regan J[8]:**

> "***The court should take care not to usurp the functions of administrative agencies***. *Its task is to ensure that the decision taken by the administrative agencies fall within the bounds of reasonableness as required by the Constitution…..*
>
> ***….a court should be careful not to attribute superior wisdom in relation to matters entrusted to other branches of government***. *A court should thus give weight to findings of fact and policy decisions made by those with special expertise and experience in*

[8] Bato Star Fishing (Pty) Ltd v Minister of Environment Affairs and Tourism & Others (2004) 2 ACC 15

the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself as well as on the identity of the decision-maker ……. A decision that requires an equilibrium to be struck between a range of competing interest or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the court. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker."

[34] In the result of the above **Ota J** declined to interfere with the investigative powers of the Commission which was 3rd respondent in that case despite the mandatory language of the Rule. She concluded that the Commission's investigation should run its full cause.

[35] Applying the cardinal rule *strict sensu*, the applicant's application ought to be dismissed for want of procedure as I have demonstrated in the preceding paragraphs. As correctly pointed out by learned Counsel **Mr. N. Manzini** for the respondent, the applicant's case is confounded by the absence of an application for condonation explaining the delay. **Silence Gamedze and 2 Others v Thabiso Fakudze (14/2012) [2012] SZSC 52 (30th November, 2012)** is authority that "*rules of court are not sacrosanct but meant to be observed."*

[36] Faced with a similar case **Ota JA** in **Silence Gamedze's** case (*supra*) had to reason whether to throw it out based on failure to adhere to

procedure stipulated under Rule 6 (4) of the Supreme Court Rules. This Rule was found to be mandatory by the learned Justice based on the use of "*shall*". She articulated the predicament as follows:

> "*In the past the sort of scenario depicted above generally posed a dilemma for the Court* ***whether to throw out the Notice of Appeal in the gabbage*** *[sic****] bag like a piece of unwanted meal, or to condone the irregularity and proceed to the determination of the issues arising.*** *The event of condonation would be in acknowledgment of the recent trend of the Court towards* ***substantial justice, which dictates that Courts should strive to do justice and should not sacrifice same on an altar of procedural technicalities, which were put in place in the first place as a handmaid to justice."*** [9] (My emphasis)

[37] Her Ladyship wisely propounded in addressing the predicament noted:

> "*A lot of juristic ink has poured and will continue to pour on how Courts should deal with this situation. What has emerged from a plethora of judicial pronouncements is that though rules of Court are not sacrosanct, they are however meant to be obeyed,* ***and the Court has a duty to discourage the violation of it's*** *[sic]* ***rules except for very good reasons and in exceptional circumstances."***

[9] See para 16

[38] She continued to expound on what formed the exceptional circumstances:

> "***What will constitute an exceptional circumstance that would warrant a condonation of noncompliance with the rules will depend on the peculiar facts and circumstances of each case.*** *However, such a situation will arise where the irregularity has been waived by the other party generally, or where the irregularity does not affect the merits of the case or* ***where a miscarriage of justice will be occasioned if the irregularity is allowed to vitiate the proceedings***. *In such situations the Court will be entitled to waive strict compliance with it's [sic] rules."*

[39] Justice **Ota JA** proceeded to enquire whether overlooking appellant's failure to comply with Rule 6(4) would result in the miscarriage of justice. She concluded that the failure by the appellant to state clearly, concisely and with tabulation of the grounds of appeal was tantamount to denying the respondent the right to a fair hearing. The respondent was denied the right to address the court specifically to issues raised. She concluded that the appellant had pleaded spurious grounds of appeal and failed to refer the court to the portion of the impugned judgment. In the result, the court concluded that appellant's failure to adhere to the Rule would result in miscarriage of justice and dismissed the appeal with a punitive cost order.

[40] Using the same analogy, could it be said *in casu* that the failure by the applicant to file an appeal in terms of section 40 of the Act would result

in miscarriage of justice? Was the respondent denied the right to fully answer to the issues raised by the applicant?

[41] During the hearing, Counsel for respondent submitted on the point *in limine* only. When the court urged him to get to the merits of the case, he declined saying there was no need as the case of the applicant fell on non-compliance with section 40. What was of note though is that the answering affidavit was detailed on the merits. Now the question is, are there material allegations missing in the applicant's application which would have been present if an appeal was lodged? Would the respondent answered differently if the application was an appeal? A total reading of both the founding affidavit and answering affidavit reveal that nothing is missing and respondent would not have answered differently. An appeal is just a form. In brief, respondent has neither suffered any real or substantial prejudice nor has it alleged any by applicant's failure to adhere to the rule of procedure as stipulated by section 40 of the Act. In the postulates by **Ota JA**, there is no miscarriage of justice by the form adopted by applicant.

[42] Again the question must be probed on the missing application for condonation. Both applicant and respondent are at *ad idem* on the reason for the matter to be brought to court after a lapse of a year from the date of the correspondence advising applicant of the decision of the Commission. This is contained in the founding and the answering affidavits. They both deposed that after receipt of the letter dated 23rd March, 2015, they both embarked on a series of negotiations. This averments are present in the set of pleadings serving before me, albeit not in a stand-alone application known as condonation application.

[43] The end result of the analysis of the papers presented before this court is that there would be no miscarriage of justice by this court on making a determination on the merits of the case. **Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors (23/2006) [2006] SZSC 11 (21st June, 2006)** lends further credence to this position as **P.H. Tebbutt JA** of the Supreme Court expounded:

> "*The learned Judge a quo with respect, also appears to have overlooked the current trend in matters of this sort, which is now well-recognised and firmly established, viz* ***not to allow technical objections to less than perfect procedural aspects to interfere in the expeditious and, if possible, inexpensive decisions of cases on their real merits*** *(see e.g. the dicta to that effect by Schreiner JA in Trans-African Insurance Co Ltd vs Maluleka 1956 (2) SA 273(A) at 278G; Federated Timbers Ltd v Botha 1978 (3) SA 645 (A) at 645 C-F; Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others 2004 (2) SA 81 (SE). In the latter case the Court held that (at 95F-96A, par 40):*
>
> > ***'The Court should eschew technical defects and turn its back on inflexible formalism in order to secure the expeditious decisions of matters on their real merits, so avoiding the incurrence of unnecessary delays and costs."***[10]

[10] See para. 39

[44] On the above, **Tebbutt JA** propounded for our jurisdiction:

> "***The above considerations should also be applied in our courts in this Kingdom. This Court has observed a tendency among some judges to uphold technical points in limine in order it seems, I would dare to add, to avoid having to grapple with the real merits of a matter. It is an approach which this Court feels should be strongly discouraged."***[11] **(**My emphasis)

Determination on the merits

Synopsis:

[45] There exists a company by the name of E-Top Up. Applicant held 60% shares while one Victor Gamedze (Mr. Gamedze), unfortunately now deceased, held 40% shares. An agreement was reached between applicant and Mr. Gamedze that applicant should acquire all his 40% shares. Despite that Mr. Gamedze was a minority shareholder, the shareholders' arrangement was that Mr. Gamedze had a veto power in E-Top Up. This acquisition of the shares by applicant had a bearing on competition laws of the Kingdom.

[46] Applicant's attorney decided to seek legal advice from Ms. Langa, the Executive Director of respondent. Whether the advice was formal or unformal is neither here nor there. What is relevant is that Ms. Langa advised that the transaction by applicant involving E-Top Up was

[11] See para 40

notifiable in terms of the Act and this is common cause.[12] Applicant duly paid the notification fee and submitted necessary documents for an application for approval by respondent in terms of Rule 11 of respondent's Rule.

[47] Upon applicant having paid the notification fee of E600 000.00 and submitted all necessary documents for approval of the acquisition, the Secretariat presented the matter to its Board and recommended an approval of the transaction. However, the Board took a different line of approach. It enquired whether the applicant's transaction was notifiable. It is apparent from the papers that there was among the members of the Board differing views. At the end, the Board decided to seek independent legal advice on the question of notification. The Executive Director, *mero motu* also requested the legal advisor to give direction on the notification fee paid, particularly on whether it was refundable. A response from the legal advisor was that the applicant's transaction was not notifiable. The notification fee paid should be refunded but partly. The Board endorsed both recommendations.

[48] Glaring though, the Board did not specify how much ought to be the part refund. The Executive Director by correspondence dated 23rd March 2015, notified the applicant that its transaction was not notifiable and that it was entitled to a refund of E200 000.00. The Executive Director then enclosed a cheque in the same amount. It appears this refund fueled the applicant as it objected to the part refund and returned the cheque of E200 000.00 with a demand for a full refund. The Executive Director together with the Board invited the applicant for a

[12] I say this because much time was spent by both parties addressing in their affidavits and arguments with Ms. Langa asserting that the advice was off the cuff while applicant disputed that.

negotiation on the amount to be refunded. It appears that there was a deadlock as applicant insisted on the full refund, with respondent on the other hand not ready to barge from its position that applicant should negotiate only for part refund. For almost a year, the parties could not settle their dispute. The result is the present application.

[49] **Is applicant entitled to a part or full refund?**

Respondent advanced a number of grounds on why the applicant was not entitled to a full refund. It was deposed on its behest, firstly, "*Counsel advised that given the fact that the Commission had incurred costs only part of the fee should be returned"*[13] It expatiated:

> "*Following the demand of the fee the Board ruled that the Commission cannot return all the money given the fact that the transaction had already been worked on at the point at which it was decided that the transaction is not notifiable.*[14]

[50] The respondent emphasised further on the same point:

> "*I submit that the Respondent is entitled to the notification fee as provided in Regulation 11(2) of the Competition Commission Regulations of 2010. Notification fees are paid towards an analysis of a transaction and the Applicants transaction was analysed. …."*[15]

[13] See page 35 para 12 of book of pleadings
[14] See page 35 para 15
[15] See page 44 para 31 of book

[51] It was also reasoned:

> "*It is true that the Act and the Regulations provide for the payment of the notification fee and that the law and the Regulations do not make a provision for a refund. It is therefore difficult to see how the Applicant is demanding a refund when by their own admission the law and Regulations do not provide for refunds."*[16]

[52] Do the above grounds justify withholding of the portion of the notification fee? The answer lies in the Act and Regulations of respondent.

[53] The Competition Commission Regulations Notice 2010 (Regulations) formed pursuant to section 43 of the Act stipulates under Regulations 11(2):

> "***Fees are payable to the Commission for the notification of a merger or acquisition***, *for an exemption application and for the provision of an advisory opinion*."

[54] Regulation 11 (2) stipulates in no ambiguous words that notification fees are payable only for a merger or acquisition and etcetera. The wording of this Regulation is simple, clear and concise. It does not need any interpretation other than the simple day to day meaning of the

[16] See page 46 para 33.3

words therein. In the legal parlance, the Regulation requires the golden canon of interpretation.

[55] For purposes of our case at hand, the applicant was obliged to pay fees as notification for a transaction that would result in a merger or acquisition. The Act and the Regulation defined what constitutes a merger and an acquisition respectively. It is common cause in the present case that the Board took the decision that the transaction between the applicant and E-Top Up was not notifiable. Whether this decision is correct or not is not my terrain. What is of paramountcy is that the Board took the decision that the transaction was not notifiable. In brief, the Board came to the conclusion that the applicant's transaction was neither a merger nor an acquisition in terms of the definition of these legal terms in the Act and Regulation respectively.

[56] With the Regulation providing that a merger or acquisition and etcetera was notifiable and the Board finding that the transaction was not notifiable, or that it did not fall under Regulation 11(2) which calls for notification fee, simple logic dictated that the fee of E600 000.00 was paid in error. Again common sense calls for anything done in error to be rectified. The rectification must take the form of restoring the status *quo ante*.

[57] I have already pointed out that the respondent justifies its stance that it could only refund the applicant a portion of the fee paid owing to the opinion sourced from its legal advisor and further that it had already done some work on the transaction. It must be borne in mind that neither the Act nor the Regulation stipulates the list of what the fee

should be expended upon except that it is for a notice. Respondent is of the view that applicant had then notified it. It was then entitled to withhold part of the fee. The fallacy of this reasoning is firstly, that why then not withhold the entire fee. Why choose to withhold part, if indeed applicant notified respondent? Secondly, the obligation to notify is sanctioned by the law (section 35 (1) of the Act) and the conditions for notification are well articulated by the Act and the Regulations. In other words, it is upon certain circumstances existing that the notification fee must be paid. These conditions were not present according to the Board. It is not done at the whims and caprices of a party as violation attracts a criminal penalty according to section 35(1). This means therefore, once a party is not obliged to comply with section 35 (1), any compliance must be taken to be a *justus error*. Simple put therefore, the legal opinion to withhold part of the fee cannot be supported by the Act or Regulations. What exacerbates respondent's position is that in the general eyes of the trader or corporate such as applicant, respondent is presumed not just to know but possess the necessary expertise in such matters as regulated by its Act. To seek advice on a simple matter such as what constitutes a merger or acquisition and then extract the expenses from the pocket of the applicant is totally injustice. The law cannot countenance such. There are no merits in the grounds so advanced. I must assume, whether correctly or wrongly, that it could be the reason why even respondent's own Counsel declined to motivate the grounds advanced in the answering affidavit despite a repeated invitation by the court to do so.

Ancillary matters

[58] The respondent, notable, without on the alternative, raised as follows as well:

> "*The issue of the refund to the Applicant is still pending before the Board. The Board has not yet determined how much the refund should be as the Applicant and Secretariat failed to reach an agreement as per the Board's decision. The Applicant is aware that a decision of the Board regarding this issue is pending and as such these proceedings have been brought prematurely."*[17]

[59] I have already highlighted under paras 27 – 30 of this judgment that a decision whether taken by the Secretariat or Board forms part of the Commission. For purposes of decision making therefore in respect of third parties, there is no dichotomy. Once the Executive Director decided to withhold the sum of E400 000.00 that decision must be taken by the outsider to be that of the Commission, period. The Commission was *functus officio* both on the decision to withhold part of the fee and the specific sum of E400 000 withheld upon applicant withdrawing its willingness to negotiate.

[60] Respondent also averred:

> "*The decision of the Board was that the transaction submitted by the Applicant was not notifiable but the Secretariat has always held the view that the transaction was notifiable and was awaiting the matter to be finalized so that it can appeal the decision of the Board of Commissioners*."

[17] See page 36 para 17

[61] Ms. Langa then proceeded to justify why the Secretariat maintains that the transaction is notifiable. With due respect and I say this *en passe,* as I am not fully seized with this issue, the voice of the Secretariat and the Board is unison. The Secretariat, as the provisions of the Act bears testimony, is that it is the extension of the Commission. *Ex facie*, to challenge the Board would be tantamount to challenging oneself. I guess the Secretariat would be accordingly advised on this one. I do write *en passe* because at the end of the day this would dig deep into the tax payers" pockets. By so writing, I guess this would be avoided. Nevertheless, I must emphasis that I do not make a definitive finding on this.

Costs and interest

[62] A legion of authorities support the legal position that costs follow the event. The rationale was well articulated by **Innes CJ**[18]: "*Now costs are awarded to a successful party in order to indemnify him for the expenses to which he has been put through having been unjustly compelled either to initiate or to defend litigation."* At the same time, common law provides that costs are at the discretion of the trier of fact. That discretion must be exercised judiciously. **Hutton J**[19]expounded on this subject, "*[T]he question of costs is entirely in the discretion of the Court. The Court on question of costs will be influenced by (a) the gross impropriety or otherwise of the plaintiff's conduct or (b) by the seriousness or otherwise of the charges which the defendant fails to justify (c) by both."* This leads me to inquire on whether in the circumstances of the case, the applicant is entitled to costs.

[18] Taxes Co. (SA) Ltd v Cape Town Municipality 1926 AD 467 at 488
[19] In Kennedy v Dalasile 1919 EDL at 37 see also Nicholson v Nicholson 1998 (1) SA 48

[63] In **Sipho Shongwe v The Director of Public Prosecutions (134/2019) [2019] SZHC 74 (23rd April, 2019)** the court expounded that the tendency at the hands of senior lawyers not to comply with Rules of Court as to form and procedure is throwing our jurisprudence into disarray. I have already highlighted in the preceding paragraphs that the applicant ought to have noted an appeal. It did not. It chose to come by way of motion proceedings despite that the impugned part refund was a decision taken by the Commission. The correspondence of 23rd March, 2015 categorically makes it clear that the decision to pay part of the notification fee was taken by the Commission. During the hearing, this court was informed that **Mr. M. Magagula** for the applicant was the erstwhile attorney for the respondent. Surely, the provisions of the Act and the Regulations are reasonably expected to be in his figure tips, moreover as respondent's Act contains relatively few provisions. Why a total disregard of section 40 under this circumstance? The answer is only privy to him alone.

[64] Further, during the parties negotiations, Ms. Langa deposed that at all material times, the applicant was invited to present its complaint about the decision to refund it some of the money to the Board. Applicant chose to say that the Board was *functus officio*. Considering that the respondent is a functionary seized with administrative powers over trading competition matters, and further once applicant took the view that it was amiable to negotiate, it is not clear as to why applicant then chose to say the Board was *functus officio*. **Byles J's** observations are apt, viz., "*although there are no positive words in a statute requiring that the party shall be heard, yet the justice common law will supply the*

omission of the legislation."[20] The reason the law would take this position is that the right to be heard is one of the cornerstone of fundamental constitutional right. This right was extended to applicant but it chose to ignore it. There was nothing wrong with respondent inviting applicant to present its grievance over the matter. Functionaries ought not to be taken as courts of law. They have the right to regulate their procedures. The reason is not very far to fathom. They thrive on tax payers' money. If, by revisiting a mater, they can avoid litigation, thereby save the tax payer, so be it. The pleadings reveal that applicant reserved time to negotiate. However, when given the opportunity to do so, took the view that the Board was *functus officio*. Why elect one course of action and fail to abide by it. *"[H]aving a choice between two courses of conduct is to be treated as having made an election from which he cannot resile…,"* it is so narrated in **Halsbury Laws of England**.[21] The issue is not that the parties failed to reach a *consensus*. It is that having submitted to negotiations, applicant declined to attend to the same. The answer in law is that applicant approbated and reprobated, a position which the law does not countenance.

[65] Applicant averred:

> "*The significance of this is that the Respondent was informed that it has no jurisdiction in the merger because it falls within the jurisdiction of another Regulator, the Swaziland Communications Commission which is vested with the authority to regulate all competition matter in the telecommunications sector. Since the Applicant is licensed to exclusively by itself or*

[20] Cooper v The Board of Works for the Wandsworth District (1863) 143 ER 414
[21] 3rd Ed para 340

through distributors sell airtime, another regulator cannot alter the terms of the licence issued by the regulator of the sector. Put directly, there was no need for the Respondent to evaluate the merger because competition matter in the telecommunications sector are regulated by Swaziland Communications Commission. The evaluation of the merger presupposes that the Respondent could refuse authorisation to implement the merger. This would be in direct contradiction with the licence granted by the sector regulator."

[66] Reading the above, it is clear that the applicant is challenging the respondent's jurisdiction over its matter. Applicant dedicated about two pages of its founding affidavit on how respondent lacked jurisdiction over its matter following the establishment of Swaziland Communication Commission. The question is how is this relevant to the question whether applicant is entitled to the refund paid in error or put directly, to the prayers sought? The answer is that these averments are irrelevant. Why burden the pleading and usurp the court's time then? Respondent had to spend time and money answering to irrelevant depositions. It could not reasonably be expected of the respondent to ignore applicant challenging its powers by so attesting. It was better to err on the correct side for the respondent following the nature of the challenge. Again this kind of action deserves censure by this court.

[67] Lastly on costs of suit, as correctly analysed by **Mr. N. Manzini**, applicant filed the present application before this court on 17th February, 2016. Almost two months later, (14th April, 2016) applicant served the application to the respondent. Respondent filed its answering affidavit on 9th May, 2016. Applicant filed a reply almost a year later, namely on

9th May, 2016. Why such delays at the hand of applicant who is *dominus litis*? When the matter was eventually enrolled on the 22nd June, 2018, an application to have the matter removed from the roll was made. Applicant had its representative on that day. The matter was enrolled in my roll of 28th January, 2019 and a hearing date noted as 15th February 2019 in the presence of attorneys for both parties. On this date (15th February, 2019) applicant's legal representative was however, absent**. Mr. Manzini** appeared alone. Why? The matter had to be postponed to 29th March, 2019 at the instance of the *dominus litis*. What confounds applicant again is that **Mr. N. Manzini** had to move an application for the applicant to file its heads of arguments. Pleadings had not closed almost three years later at the instance of the applicant. Again, a clear action deserving of the court's disapproval.

[68] The applicant has prayed as follows as well:

> "*Interest on the said sum of E600 000.00 calculated at the rate of 9% per annum from the date of service of this application to date of final payment."*

[69] As already indicated above, date of service is 14th April, 2016. Now, it is easy for the applicant to say there were on-going negotiations even after the present application was filed. I have demonstrated above that the applicant having acceded to negotiations, failed to present itself to the Commission despite invitation from Ms. Langa the Executive Director of respondent.[22] What cofounds the matte further is the manner in which the replying affidavit is couched. It pays total disregard of the Rules of this court that pleading should be numbered with each

[22] See para 29 page 44

opponent's averment addressed. In its reply, applicant chose to reply generally without paying particular attention to each of the respondent's answer. This necessitated the court to decipher from its reply on which paragraph of its reply addressed a particular answer. This is totally prohibited in terms of our law. At any rate, applicant replied generally that the Board was *functus officio*. The question then is, why not prosecute its application which it filed, for so long (almost three years)? Applicant now claims costs from the period of service whereas it was slack in prosecuting its application. The law unfortunately cannot support its claim in the circumstances.

[70] I would consider that the application was removed from the roll on the 22nd of June, 2018. It was reinstituted on 28th January, 2019. It ought to have been heard on 15th February, 2019 but for applicant's none appearance and failure to close pleadings. In all fairness, I consider that had applicant conducted itself accordingly, more specifically by filling pleadings timeously and appearing in court on due dates, this matter would not have been left pending in our court's roll. It would have been disposed within, at the most, a period not exceeding three months from date of service, including post negotiations. Any interest accruing must be considered in that regard therefore.

[71] Applicant claims interest calculated on the entire E600 000.00. In its founding affidavit, applicant attested that respondent enclosed a cheque of E200 000.00 as a refund. Applicant sent it back and demanded the full amount. Why? Applicant is in business. Surely, business acumen dictates that applicant ought to have accepted the sum of E200 000.00 and demanded the balance. It could have invested this sum to earn interest. Of course, the interest earned would not have attracted such

high interest rate as claimed. Is that the reason applicant returned the cheque of E200 000.00? Applicant is entitled to interest on the sum of E400 000.

[72] Lastly, it is imperative that I mention for purposes of the litigants out there on why the sins of its attorneys have to be visited upon them. **Ramodibedi CJ**[23] wisely recited **Steyn CJ** [24]as follows on this issue:

> "***There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or insufficiency of explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of Court.*** *Consideration ad misericordiam should not be allowed to become an invitation to laxity.* ***……. The attorney, after all is the representative whom the litigant has chosen for himself and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.*"** (My emphasis)

[73] In the foregoing, the court declines to uphold the principle of our law that costs follow the event. The court must administer its disapproval for the unwarranted conduct displayed in this proceedings.

[23] In Christopher Dlamini v Sebenzile Malinga (34/12)[2012] SZSC 53 (30th November, 2012) at para 8
[24] In Saloojee and Another, NNO v Minister of Community Development 1965 (2) SA 136(A) at 141

Orders

[74] In the final analysis, I enter the following orders:

[74.1] Applicant's application succeeds;

[74.2] Respondent is ordered to;

[74.2.1] refund the applicant the sum of E600 000.00;

[74.2.2] pay the applicant interest at the rate of 9% *per annum a tempore morae* calculated from a period of three months as litigation period to date of final payment on the sum of E400 000.00;

[72.4] Each party to bear its own costs.