



**IN THE INDUSTRIAL COURT OF APPEAL**

**HELD AT MBABANE**

**CASE NO: 21/2023**

In the matter between:

**THE ATTORNEY GENERAL**

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

**THE CHAIRMAN OF THE CIVIL**

**SERVICE COMMISSION**

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

And

**DANIEL RODRIGUES CACACHAL**

**RESPONDENT**

In re:

**THE ATTORNEY GENERAL**

**1<sup>ST</sup> APPELLANT**

**THE CHAIRMAN OF THE CIVIL**

**SERVICE COMMISSION**

**2<sup>ND</sup> APPELLANT**

And

**DANIEL RODRIGUES CACACHAL**

**RESPONDENT**

**NEUTRAL CITATION:**

***THE ATTORNEY GENERAL AND ANOTHER  
V DANIEL RODRIGUES CACACHAL (21/2023)  
[2024] SZICA - 15 (19/06/2024)***

**CORAM:** D MAZIBUKO JA;  
A.M LUKHELE JA; AND  
BW MAGAGULA AJA

**DATE HEARD:** 10/04/2024

**DATE DELIVERED:** 19/06/2024

*FLYNOTE: Interlocutory application for condonation – Failure to file heads of argument within prescribed period – Applicant seeking condonation for late filing – Applicant attributing delay to late receipt of court schedule – Respondent opposing condonation, citing strict application of Rules – Court considering principles of fairness and prospects of success – Length of delay considered slight – Precedents cited in support of condonation – Registrar's practice of email notification for court schedules noted but it is not in accordance of the Rules – Recommendation for amendment of Rules to accommodate modern communication methods.*

*HELD: Application for condonation granted. Costs to be costs in the cause.*

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**RULING**  
**(Application for Condonation)**

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## **BW MAGAGULA AJA**

- [1] The ruling pertains to the interlocutory application filed by the Applicants against the Respondent.
- [2] Ostensibly, the Applicants (Appellants in the main matter) seek condonation for the Appellant's failure to file its heads of argument within the mandatory fourteen (14) days period, as per Rule 22 of the Industrial Court of Appeal Rules of 1997.
- [3] The application is opposed by the Respondent, with the notice of intention to oppose filed on the 9<sup>th</sup> April 2024, followed by an opposing affidavit.
- [4] It is acknowledged that the Applicants initially chose not to file a replying affidavit to the opposing affidavit by the Respondent. However, subsequent to a postponement, they have now done so.

### **Brief Background to the Matter**

- [5] While this ruling focuses on the prayer for condonation regarding the late filing of heads of argument, it's necessary to provide context.



- [6] The Industrial Court delivered judgment on the 29<sup>th</sup> August 2023. Dissatisfied, the Applicants, now Appellants, noted an appeal on 18<sup>th</sup> October 2023.
- [7] Subsequently, the Applicants filed a record on 13<sup>th</sup> November 2023.
- [8] The contentious issue leading to this interlocutory application revolves around the heads of argument. Rule 22 stipulates the timeline for filing heads of argument, requiring it not later than 14 days before the appeal hearing.
- [9] According to the Respondent, the Appellants failed to comply with Rule 22, with the heads of argument due no later than 5<sup>th</sup> February 2024.

### **The Applicant's Case in Support of the Application for Condonation**

- [10] The Applicants argue that their failure to comply with the provisions of the Industrial Court of Appeal Rules of 1997 was not caused by their wanton disregard for the Rules of Court. But it was due to the fact that when they received the Court's roll for the First Session on the 14<sup>th</sup> February 2024, it reflected that the matter had been enrolled for hearing on the 26<sup>th</sup> February 2024. When computing the *dies*, this means that they should have already filed two days earlier, being the 12<sup>th</sup> February 2024. This then means that by the time they received the notice from the Registrar, the time for filing had already lapsed.

[11] The Applicants /Appellants also argue that the manner in which they were served with the Notice for the date of hearing is not the medium that is envisaged by the Rules of Court. Applicants' argue that they were emailed the roll, instead of being served with a Notice of the date of the hearing at their address of service.

[12] The Applicants also argue that there have good prospects of success on appeal.

[13] The postponement of the matter on 26<sup>th</sup> February 2024 provided another opportunity for filing heads of argument.

[14] The prayer for condonation is supported by the founding affidavit of Malibongwe M. Mashinini.

[15] The application is underpinned by the following reasons:

15.1 The failure to comply with the Rules was not due to wilful disregard of the Rules, but rather delayed receipt of the Court's First Session roll;

15.2 that Counsel received the roll on the 14<sup>th</sup> February 2024, which indicated that the appeal's hearing was on the 26<sup>th</sup> February 2024.

[16] At the due date for filing of the heads of argument, counsel stated that he was unaware of the Court's role, and he cited Rule 14 which obliged the Registrar to serve the notice of the hearing date.



[17] The Applicants also submit that they have good prospects of success on appeal, *inter alia*, because the Respondent would not be able to prove the elements of the *condictio indebiti*.

### **The Respondent's Grounds for Opposing the Condonation Application**

[18] The Respondent opposed the condonation application for the following reasons:

- 18.1 The Appellants had ample time to file heads of argument after noting the appeal.
- 18.2 The delay was not due to unforeseen circumstances.
- 18.3 The computation of the timelines for filing the heads of argument should adhere to court days, not calendar days.

### **The Law on the Subject Matter**

[19] Rule 17 allows the Court to excuse non-compliance with Rules for sufficient cause shown.

[20] The Rule 22 jurisprudence is derived from the South African case of **Melane vs Santam Insurance Company Ltd 1962 (4) SA 531 (A)**, which emphasizes the exercise of the Court's discretion based on fairness and consideration of various factors.

### **Survey of the Respective Arguments by the Parties**

- [21] The Applicants cited the Melane Judgment, emphasizing fairness in granting condonation.
- [22] The Applicants argue that computation of timelines must consider the actual date of hearing, not the initial hearing date.
- [23] The Applicants had argued that there was a delay, but it was slight.
- [24] The Respondent referred to a legal notice that had been issued by the Registrar, reminding the parties to adhere to the time for filing court papers.
- [25] The Respondent distinguishes the Melane case and argues for a stricter approach in condonation applications.
- [26] The Respondent emphasizes strict adherence to Rule 22, regardless of the reasons for the delay.

### **Adjudication and Analysis:**

[27] The Respondent presented several points in his argument for opposing the application for condonation. The Respondent asserts that the Appellants had ample time to file the heads of argument after noting the appeal. This implies that the delay was not due to any unforeseen circumstances, but rather a lack of diligence on the part of the Appellants.

27.1 Furthermore, the Respondent contested the assertion by the Applicants that the failure to comply with the timelines was not due to wilful disregard for the Rules.

27.2 The Respondent also challenged the computation of timelines stating that court days should be considered, excluding Saturdays, Sundays, and public holidays. By this calculation, the deadline for filing heads of argument would have been February 5th, 2024.

27.3 Additionally, the Respondent raised concerns about the conduct of the Appellants after the adjournment of the matter. The Respondent highlighted that there was communication from the Assistant Registrar who indicated that the matter would be recalled within two weeks for resetting before a different bench. This, according to the Respondent, provided the Appellants with another opportunity to file heads of argument.

[28] The Respondent's argument primarily focused on challenging the reasons provided by the Applicants for the delay in filing heads of argument. The Respondent asserted that the delay was not justified, considering the ample time available to the Appellants and the requirements outlined in the Industrial Court of Appeal Rules. Additionally, the Respondent emphasizes the



importance of adherence to court timelines and proper conduct in legal proceedings. This arguments underscores the Respondent's position that condonation should not be granted due to the Appellants' failure to comply with the Rules and their lack of diligence in pursuing the appeal.

### **Application of Law to the Facts:**

- [29] Rule 17 of the Industrial Court of Appeal Rules grants the court discretion to excuse parties from compliance with the Rules for sufficient cause shown. This discretion must be exercised judicially, taking into account various factors, including the period of delay, reasons for the delay, prospects of success and importance of the issue.
- [30] Rule 22 of the Rules specifies the time frame for filing heads of argument, requiring them to be filed not later than 14 days before the hearing of the appeal. The Respondent relies on the decision in **Melane vs Santam Insurance Company Ltd** (*supra*) to emphasize the importance of adherence to procedural timelines and the exercise of the court's discretion in condonation applications.
- [31] In their argument, the Applicants referred to previous court decisions, such as **Musa Douglas Khumalo and 31 Others vs Steel and Wire International (Pty) Ltd (19 of 2021) [2022] SZICA 6 (20 July 2022)**, to support their contention that condonation is a matter of judicial discretion guided by

fairness to all parties. The court emphasized factors such as the period of delay, reasons for the delay, prospects of success and importance of the issue in determining whether or not condonation should be granted.

- [32] The Respondent contended that the Appellants had sufficient time to file heads of arguments and that the delay was not justified. The Respondent argued that adherence to court timelines is essential for upholding the rule of law and ensuring fair and speedy disposal of the Appeal. Furthermore, the Respondent highlighted the procedural requirements outlined in the Industrial Court of Appeal Rules and argued that the Appellants had failed to comply with these requirements.
- [33] In contrast, the Applicants argued that the delay was due to unforeseen circumstances, such as the late receipt of the court's roll and developments following the adjournment of the matter. The Applicants asserted that they acted diligently in pursuing the appeal and that condonation should be granted considering the slight delay and the merits of the appeal.
- [34] The court must carefully weigh the arguments presented by both parties and consider the relevant factors, including the period of delay, reasons for the delay, prospects of success and the importance of the issue. Ultimately, the decision to grant or deny condonation will depend on a holistic assessment of these factors in light of the principles outlined in the cited law and relevant legal precedents.



- [35] Rule 17 of the Industrial Court of Appeal Rules vests the Court with the discretion to excuse parties from compliance with procedural requirements if sufficient cause is shown. This discretionary power allows the Court to consider the circumstances of each case and ensure fairness to all parties involved.
- [36] Condonation is essential to uphold principles of fairness and equity in judicial proceedings. Granting condonation in appropriate cases prevents procedural technicalities from impeding substantive justice.
- [37] In *casu*, the delay in filing heads of argument by the Appellants was relatively slight, amounting to nine days beyond the prescribed deadline. This minimal delay, coupled with valid reasons presented by the Applicants, weighs in favour of granting the condonation.
- [38] The late receipt of the court roll by the Applicants contributed to the delay in filing of the heads of argument. This unforeseen circumstance demonstrated that the delay was not attributable to wilful disregard for the Rules, by the Applicants.
- [39] The court finds that the Applicants have demonstrated good prospects of success on the appeal, as indicated by legal argument and precedents cited in



support of their application for condonation. Granting condonation would enable the court to adjudicate the appeal on its merits and ensure a just outcome of this matter.

[40] Upholding the right to a fair hearing and access to justice serves the public interest by promoting confidence in the legal system. Granting condonation in this case aligns with the overarching goal of facilitating fair and efficient resolution of legal disputes.

[41] In this case denying condonation would unduly prejudice the Applicants/Appellants, as the delay in filing heads of arguments did not significantly impact the overall timeline of the proceedings, whereas allowing condonation would enable both parties to fully present their cases before the court. Moreso, because there was no strict compliance with the Rules of court by the Registrar. The notice for the court session was published on the swazilii.co.sz website, yet the Rules clearly state that the notice must be served on both the Appellant and the Respondent. In as much as publishing of the aforesaid notice is an innovative step, it still does not amount to strict compliance with Rule 14 as it stands. In the event service by publication on the swazilii website is convenient and in line with new technological ways of communication, the Rules should be amended to incorporate the innovation. At present without an amendment, the Rules must be complied with.

## CONCLUSION

[42] In light of these reasons, granting condonation is warranted in this case in order to ensure fairness, uphold the rule of law and facilitate the proper administration of justice. Condonation is accordingly granted.

## ORDER

In the result, the court makes the following order:

- 1) The application for the late filing of the heads of argument, and supporting authorities by the Applicants (Appellants) in the appeal, is hereby condoned.
- 2) Costs of this application are to be costs in the course.



BW MAGAGULA

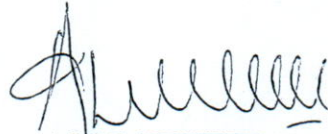
ACTING JUDGE OF THE  
INDUSTRIAL COURT OF APPEAL

I, agree



D MAZIBUKO  
JUDGE OF THE INDUSTRIAL COURT  
OF APPEAL

I, agree



**AM LUKHELE**

**JUDGE OF THE INDUSTRIAL COURT  
OF APPEAL**

For The Applicants:

Mr M. Vilakati (Attorney General)

For The Respondent:

Mr D. R. Cacachal (In person)