

IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

Case No. 07/2023

In the matter between:

THAMSANQA MHLANGA

Appellant

and

ESWATINI WIRE INDUSTRIES (PTY) LTD

Respondent

Neutral Citation: Thamsanqa Mhlanga v. Eswatini Wire Industries
(Pty) Ltd (07/2023) [2024] SZICA 02 (21 February
2024)

Coram: A.M. LUKHELE JA, N. NKONYANE JA AND D.
MAZIBUKO JA

Heard: 21 SEPTEMBER 2023

Delivered: 21 FEBRUARY 2024

Summary: *Application for condonation of late filing of appeal in terms of Section 19 (3) of the Industrial Relations Act, 1/2000 (as amended);*

Court does not have power to grant condonation in terms of that Act.

Application for condonation and leave to appeal dismissed. No order as to costs.

JUDGMENT

A.M. LUKHELE J.A.

I. INTRODUCTION

[1] This is an application, (filed by the Appellant), for condonation for the late filing of an appeal, coupled with a prayer for leave to file an appeal out of time. The judgment appealed is that of the Industrial Court delivered on the 24th November, 2022.

II. BACKGROUND FACTS AND RELEVANT HISTORY

[2] The background facts on which this application is based are largely common cause, and the relevant facts are briefly set out hereunder;

2.1 The Applicant is Thamsanqa Mhlanga. The Respondent is Eswatini Wire Industries a company with limited liability carrying on business at Matsapha.

- 2.2. The Applicant was employed by the Respondent on about 1998 as a Marketing Manager and worked continuously until he was suspended without pay. The Applicant later was dismissed from his employment on the 1st December 2020. On the 23rd October 2020, while suspended, the Applicant was charged by the Respondent for violating Respondent's code of conduct. The hearing was chaired by an Independent Chairperson;
- 2.3. While the disciplinary hearing was ongoing, the Appellant instituted proceedings against the Respondent in which he, inter alia, sought an Order for the re-instatement of his salary;
- 2.4. The Applicant alleges that an interim order was issued by the Court *a quo*. He alleges that this order stayed the disciplinary hearing pending the finalization of the application filed by him in the Court *a quo*. He further alleges that for some reasons the Respondent's disciplinary hearing proceeded with the Chairperson finalizing the hearing. He says the Chairperson found him guilty of the charges and recommended that the Applicant be dismissed. Subsequently by letter dated the 1st October 2020 the Applicant was dismissed from his employment.

2.5. On the 9th March, 2021, the Applicant filed an application before the Court *a quo* in which he challenged his dismissal on the basis that it was invalid and unlawful. The Applicant alleged that his dismissal had been effected while a Court Order staying the disciplinary hearing (that resulted in his dismissal) existed.

III. COURT A QUO ORDER

[3.1] The application challenging Applicant's dismissal was heard by the Court *a quo* and judgment was delivered on the 24th November 2022.

[3.2] The Court *quo*'s order is as follows:-

"[49] Taking into consideration the evidence as adduced above,

This is the Order of the Court:-

- 1) The Application is dismissed on points of law;***
- 2) The Applicant is directed to file fresh proceedings using the Provisions of Part VIII of the Industrial Relations Act 2000 (as amended);***
- 3) Each party be hereby ordered to pay its own costs."***

IV. GROUND OFS OF APPEAL

[4] Following the above Order, the Applicant did not timeously file an appeal to the judgment of the Court a quo. An appeal was only filed on the 2nd May, 2023. The date on which the appeal was filed was way out of the statutory limits imposed by **Section 19 (3) of The Industrial Relations Act 1/2000 (as amended)**.

4.1. The grounds of appeal set out by the Appellant in his notice of appeal dated the 20th May, 2023 are that:-

“1. The Court a quo erred in law; in finding that the dismissal of the Appellant was not invalid despite the fact that, the hearing that led to the dismissal of the Appellant was held even though there was a Court Order issued by the Judge President of the Industrial Court staying the disciplinary hearing pending the outcome of Court proceedings.

2. The Court a quo erred in law in finding that, it did not have the power to set aside the dismissal of the Appellant. The Court a quo erred in law in equating an invalid dismissal to be same as an unfair dismissal.”

V. APPLICATION FOR CONDONATION

- [5] The Applicant has been compelled to move the application for condonation to prosecute his appeal out of time. In the founding affidavit which Applicant filed in support of his application dated 23rd May, 2023, the Appellant states the reasons for the late filing of his appeal as follows:-

"AD REASONS FOR LATE FILING OF APPEAL

9. *On the 28th day of September, 2022 the application which I had filed seeking to set aside my dismissal was heard before Her Lordship Justice B. Ngcamphalala A.J. judgment was reserved after arguments were made.*
10. *During the hearing of the matter, I was represented by my Attorney Mr. Vusi Kunene, of Kunene-Dlamini Associated. I was advised by Mr. Kunene that judgment was reserved and that the Court had indicated that the Registrar of the Industrial Court was going to call my Attorney once judgement was ready.*
11. *I constantly made a follow up with Mr. Kunene regarding the handing down of the judgment. Mr. Kunene would advise me, he has still not received information from the Registrar of the*

Industrial Court. He further advised me that it was unethical to pester a judge of the Industrial Court regarding the delivery of a judgment.

- 12 On the 2nd May 2023; I decided to go to the office of the Registrar to file a complaint because I felt that, the period that it was taking for the handing down of the judgment was too long. I did this after consulting Mr. Kunene, who advised me that, as a litigant I was entitled to complain. He advised me that, he could not accompany me to such an exercise.*
- 13. To my utter dismay, I discovered that, judgment had been handed down by the Court on the 24th day of November, 2022.*

AD CONDONATION

- 14. The late filing of the notice of appeal had not been deliberate on my part. Had I been aware that judgment was delivered on the matter, I would have filed the notice of appeal in time.*
- 15. I did not unnecessarily delay in filing of the appeal. I was not aware that judgment had been handed down on my matter. The office of the Registrar of the Industrial Court had neglected to inform my erstwhile Attorney Mr. Kunene that*

judgment was to be handed down on the 24th day of November 2022.”

- [6] The Respondent filed an Answering Affidavit by Lungisani Mkoko dated the 4th August 2023 in which the Respondent opposed the application for condonation. In the answering affidavit the Respondent essentially stated that the Court has no jurisdiction to grant condonation on an appeal filed out of time in terms of the Act.
- [7] Before considering the application for condonation, it is important to re-state the law regarding the principles of filing appeals out of time.

VI. ANALYSIS AND APPLICABLE LEGAL POSITION
APPEAL FILED OUT OF TIME

- [8] It is not in dispute that the appeal herein was filed out of time. The appeal was filed on the 20th May, 2023.

8.1. In terms of **Section 19 (3) of the Industrial Relations Act**, an appeal to the Industrial Court of Appeal should be noted within three (3) months of the handing down of the judgment as opposed to the date of a party being aware of the judgment (**see Musa Douglas Khumalo and 31 others v. Steel & Wire International (Pty) Limited (19/2021) [2021] SZICA 6 (20/07/2022); Standard Bank of Eswatini v. Freeman; and Nhlanguano Town Council v. Jeremiah Kuhlase and 4 Others (Consolidated)**)

(11 & 18/2021) [2022] SZICA 8 (23/08/2022).

8.2 A long line of authorities from our Courts have stated that the Industrial Court of Appeal has no jurisdiction to grant condonation for the filing of an appeal which is out of time.

[9] In **Arthur Mndawe & 74 Others vs. The Central Bank of Swaziland Case No. 08/2006 SZICA No. 8/2006 (17/09/2010)** Maphalala MCB AJA (as he then was, now Chief Justice), at page 14 stated that:-

***“[24] From a reading of Section 19 of the Industrial Relations (Amendment) Act 2000, it is apparent that this Court does not have jurisdiction to condone the late filing of an appeal; in addition, nowhere in the Act is this Court granted such jurisdiction either expressly or by necessary implication. It is only the legislature by appropriate amendment of Section 19 that could give this Court the power. This Court cannot subvert the will of Parliament and arrogate to itself powers not given in the Enabling Legislation.*”**

***“[26] There is a great need to amend Section 19 to give this Court the power to condone the late filing of appeals in deserving cases where*”**

the reasons for non-compliance are legally sound, and there are reasonable prospects of success on appeal. The Appellant could have filed his appeal late for a variety of equally sound reasons including sickness, lack of resources to engage an Attorney, the loss of Court Record from Court a quo, the disappearance and loss of cassettes in the custody of Court Officials which recorded the proceedings in the Court a quo. The list is endless and to shut the doors to condonation in deserving cases denies litigants their rights to a fair hearing. This may particularly be the case where the aggrieved party (party) is a dismissed worker who does not have all the resources at his disposal as does the employer.

[32] *Having interpreted Section 19 as I have done above, I agree with the Respondent that this Court lacks jurisdiction to condone the late filing of the appeal in the instant case. Until such time that Section 19 is amended as stated above, I have no reason to depart from this Court's earlier judgment in Manzini City Council vs. Workers Representative Council (Industrial Court of Appeal Case No. 2/1999 at; page 4; the issue before Court was whether it had the power to condone the late*

filing of an appeal, the appeal was late by one day. His Lordship Justice Sapire JP who delivered the unanimous judgment of the Court stated the law as follows:-

“There would however be difficulty with condonation of the late noting of the appeal. The time for noting the appeal is fixed by statute. The statute makes no provision for the Court to extend the period or to condone non-compliance therewith. The only conclusion to which it is proper to come is that the legislature intended that the appeal had to be noted within the three months allowed, without the possibility of condonation or extension where the appeal was not timeously noted. Rule 17 which gives the Court power to excuse non-compliance... refers specifically with the Rules. It does not and could not apply in cases of non-compliance with the terms of the Statute itself. It is perhaps undesirable that the legislature has seen it fit to prescribe a time limit, which the Court itself normally imposes, by either rule or practice. This would allow for some flexibility where as in this case the

Statute prescribes the time limit, condonation for non-compliance is only available to the extent provided for by the Statute itself.”

- [10] The position in the **Arthur Mndawe** case was followed in the case of **United Plantations Swaziland t/a Tambuti Estates v. Elphas Gina and Others (Case No. 15/2007) [2007] SZICA (23/03/2011)**, where Mamba A.J.A. had this to say:-

“[8] I observe that in terms of Section 19 (3) of the IRA, an appeal must be noted within three months of the date of the judgment appealed against... There was therefore, one should assume, a deliberate or conscious decision by Parliament to provide that an appeal must be noted within three months rather than seven days.”

- [11] In **Siyabonga Magudulela Dlamini v. Eswatini Electricity Company (05/2019) [2019] SZICA 16 (16/10/2019)**, Maphanga A.J.A., at paragraph 29, confirmed the position to be as follows:-

“[29] In sum I have no hesitation in light of the decided cases; albeit subject to the reservation expressed by this Court on the perverse effect of Section 19 (3) in the Mndawe case, that the provisions of the section are decisive and that

the point of law taken that it is not competent for this Court to grant the relief of condonation and leave to appeal in the circumstances must take hold.”

- [12] Further, in **Thulani K. Sikhondze v. Civil Service Board and Attorney General Case No. 18/2003 SZICA (17/9/2010)** – Hlophe AJA, stated the position as follows:-

“[11] Whilst this Court has no power to condone a failure to note an appeal within the three months provided for in Section 19 of the Act, there is no doubt that the Court does have power to condone a failure to file a record within the one month period from delivery of judgment provided for in the Rules. The rationale is that where the time limits are set by the statute without it further giving this Court the power to condone the failure to comply with the said statutory provision, this Court has no power to condone such failure as it cannot in law extend the period set by statute. A case in point here is the Manzini Council v. Workers Representatives Council (ICA) Case No. 2/1999 where this Court per its then President S.W. Sapire with the members thereof concurring, expressed the position as follows at page 4.

“There would however be difficulty with condonation of the late noting of the appeal. The

time for noting the appeal is fixed by statute which makes no provision for the Court to extend the period or to condone non-compliance therewith. The only conclusion to which it is proper to come is that the legislature intended that the appeal had to be noted within three months allowed, without the possibility of condonation or extension where the appeal was not timeously noted Mr. Flynn for the Respondent referred us to Rule 17, which gives the Court power to excuse non-compliance with the rules. This rule refers specifically with non-compliance with the rules. It does not and could not apply in cases of non-compliance with the terms of the statute itself."

- [13] In the case of **Vusi Gamedze and 6 Others v. United Plantations (Pty) Limited t/a Tambuti Estates (03/2021) [2021] SZICA 8 (29/10/2021)**, Nkonyane JA also had occasion to consider the issues on the Court's powers to condone the late filing of an appeal in terms of **Section 19 (3) of the Industrial Relations Act No. 1/2000**.

- [13.1] At paragraph 18, Nkonyane JA, had this to say:-

"...The Act is clear that the appeal must be lodged within three (3) months of the date of the judgment or decision. The Court cannot condone the late filing of the appeal as the

period is fixed by the Act. The Act did not give the Court discretionary powers to condone any late filing. This court had occasion to express itself on a similar issue in the case of Manzini City Council v. Workers Representative Council Case Number 02/1999 (ICA) where Sapire P. (as he then was) stated the following at page 4 of the judgment.

“There would however be difficulty with condonation of the late noting of the appeal. The time for noting the appeal is fixed by statute. The statute makes no provision for the Court to extend the period or to condone non-compliance therewith. The only conclusion to which it is proper to come to is that the legislature intended that the appeal had to be noted within the three (3) months allowed without the possibility of condonation or extension where the appeal was not timeously noted.”

[13.2] This Court agrees with the above statement of the law as expressed in the above cases to situations such as the case before Court relating to the lodging of an appeal and it is duty bound to follow the law as stated.

[13.3] This Court does not have the power or the right to extend the time limit stipulated in **Section 19 (3)** of

the Industrial Relations Act. Therefore, there is no need to consider other issues relating to condonation.

VII. CONCLUSION

[14] The Court re-affirms that the principles set out in the **Arthur Mndawe** and **Manzini City Council** and **Thulani F. Sikhondze cases (supra)** are applicable in the instant case. The position that this Court has no jurisdiction to condone the period as set out on **Section 19 (3) of the Industrial Relations Act 1/2000** still obtains. The time limit stipulated in **Section 19 (3) of the Act** must be strictly observed. (See also **Vusi Gamedze and 6 Others v. United Plantations (Pty) Limited t/a Tambuti Estates (supra)**).

[15] With this Court having no power to extend the period for the filing of the appeal in terms of **Section 19 (3) of the Act**, Applicant's application for condonation to file his appeal out of time should therefore fail, and it is so ordered. In these circumstances, it will serve no purpose to consider an application to leave to appeal.

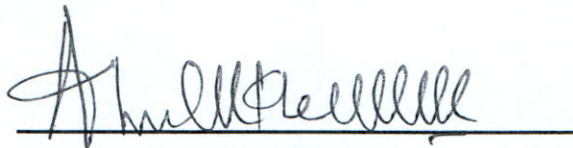
VIII. COSTS

[16] As regards costs of the appeal, this Court finds that it would be in the interests of justice that each party bears its own costs.

IX. ORDER

[22] In the result, the Court makes the following Order:-

- 1. The appeal is out of time.**
- 2. The application for condonation and the prayer for granting of leave to appeal are dismissed.**
- 3. There is no order as to costs.**



**A.M. LUKHELE
JUSTICE OF APPEAL INDUSTRIAL COURT OF APPEAL
ESWATINI**

I agree



**N. NKONYANE
JUSTICE OF APPEAL INDUSTRIAL COURT OF APPEAL
ESWATINI**

I agree



**D. MAZIBUKO
JUSTICE OF APPEAL INDUSTRIAL COURT OF APPEAL
ESWATINI**

For the Appellant:

Mr. S. Gumedze
(V.Z. Dlamini Attorneys)

For the Respondent:

Mr. L. Dlamini
(Dlamini Nkambule Mahlangu
Attorneys)