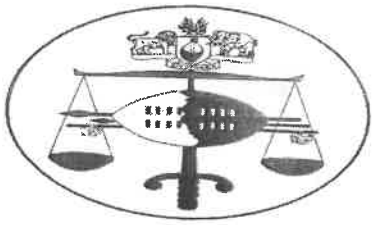

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIVIL APPEAL CASE: NO 13/2018**

In the matter between:

The Swazi Observer Newspaper t/a Observer on Saturday	**1st Applicant**
Alec Lushaba	**2nd Applicant**
Bodvwa Mbingo	**3rd Applicant**

AND

Dr. Johannes Futhi Dlamini	**Respondent**

Neutral Citation:	The Swazi Observer Newspaper t/a Observer on Saturday and 2 Others v Dr Johannes Futhi Dlamini (13/2018) [2019] SZSC 26, (31st May, 2019)
Coram:	MCB MAPHALALA CJ, MJ DLAMINI JA, SB MAPHALALA JA, JP ANNANDALE JA AND AM LUKHELE AJA.
Heard:	17th April 2019
Delivered:	31st May 2019

SUMMARY

Application for review of a judgment by the Supreme Court on appeal, under Section 148(2) of the Constitution of Eswatini, Act 001 of 2005. Alleged deprivation of right to a fair hearing under auspices of Section 21 of the Constitution. On appeal, an application for condonation of late filing of Heads of Argument and Authorities relied upon by appellant dismissed with costs. Further ordered that appeal be struck off the roll, not to be reinstated without leave of court. No such application made but instead, an application for review of Supreme Court order, including averment of disqualification of one of the judges due to alleged conflict and perception of bias. No application for recusal moved before Supreme Court on appeal, resulting in ostensible absence of right to fair hearing. Application for review dismissed, with costs.

JUDGMENT

Justice JP Annandale

[1] The right to a fair hearing in our Courts of Law is not only mandated by the Constitution of ESwatini but has always been a cornerstone of our judicial system. It encompasses a variety of aspects and factors, but to start with, Judges of integrity, knowledge, experience and impartiality are key to ensure a fair trial. Our judicial oath, which is taken before assumption of Judicial office, requires adherence to the words "...and I will do right to all manner of people according to law without fear or favour, affection or ill will". Without question, these words are taken seriously.

[2] This almost sacrosanct and inviolable principle is perceived and alleged to have been violated by an esteemed Justice of Appeal in the Supreme Court and forms the basis on which an application for review is founded. Their position is formulated as follows:

> *"The Applicants seek a review of the judgment on the ground that the hearing which culminated in the judgment was not a fair hearing as envisaged in Section 21 of the Constitution because one of the judges who heard the matter, Justice S.P Dlamini, was conflicted and therefore disqualified from sitting in a matter involving the Swazi Observer by reason of the fact that he has a pending matter with the Swazi Observer. This creates in the eyes of a reasonable person a perception that he was not impartial when he dealt with the matter and would not be impartial in dealing with the merits of the appeal.*
>
> *He is disqualified from sitting as a Judge in a matter involving a litigant with whom he has a dispute. His Lordship Justice Dlamini sitting in this matter creates the perception that he was not and may not be impartial in adjudicating the dispute"* (emphasis added).

[3] Prior to deciding the merits or otherwise of his Lordship being one of the three justices sitting in the matter, a brief background of the case will be useful. In the High Court, the plaintiff (now respondent) sued the then defendants (now applicants for review) on a claim of defamation. The plaintiff, a medical doctor *cum* businessman featured in an article published by the Observer on Saturday, a newspaper owned by the Swazi Observer Newspaper (Pty) Ltd. The second defendant is its Editor and the

author of the article was the third defendant, both being employees of the Observer and who acted in the course and scope of their employment.

[4] The nature of the complaint was focused on the marital regimes of the plaintiff, allegations and insinuations of greed and untrustworthiness, misappropriation and being manipulative. It is not necessary to delve into the merits or demerits of the damages claim any more than to state that the learned judge of the High Court who heard the matter eventually concluded that the publication was indeed defamatory and he ultimately awarded E200 000 as damages. The initial claim was for E2 million.

[5] Being dissatisfied with the adverse judgment, an appeal to challenge the merits was duly noted by the present applicants, and a cross appeal to challenge the award of "minimal damages" followed suit. Lo and behold, on the day which was allocated for hearing of the appeal, it could not be proceeded with. As it is in so many other instances, a failure to adhere to time limits for filing of documentation prior to the hearing of appeals yet again manifested itself. Instead of dealing with the merits of the appeal and cross appeal, the court was obliged to limit itself to the preliminary issue of condonation for the late filing of Heads of Arguments by the appellants (new applicants for review). The Honourable Dr BJ Odoki was the presiding judge, sitting with the Honourable Justices RJ Cloete and SP Dlamini. The judgment which is now sought to be reviewed and set aside was written by the Honourable RJ Cloete, JA.

[6] The one and only issue which came up for determination was the application for condonation of the late filing of Heads of Argument, an

issue squarely within the confines of the attorney of records, Mr Magagula's administrative functions. It was dependent upon the acceptance or not by the court, based on the merits of the application itself and not an issue occasioned or caused by the appellants themselves. As such, no determination of the correctness or otherwise of the impugned judgment by the High Court fell to be decided. Ultimately, the Supreme Court dismissed the application for condonation by the applicants with costs on the ordinary scale.

[7] It is noteworthy that the Court did not "…issue an order effectively shutting the door on a litigant", as contended by Mr Magagula in the present application for review. The appeal itself was not dismissed. It is the application to condone the late filing of Heads of Argument by the appellants' legal representative which was dismissed. In turn, it resulted in the matter being removed from the roll, an entirely different outcome as that which is pre-supposed by the same attorney in saying that the order "effectively shut(ting) the door on a litigant." Simply put, it means that the hearing of the appeal could not proceed on the date which was allocated for the hearing of the appeal because the appellant failed to comply with the rules of court.

[8] In clearly emphasising and demonstrating that the door was not shut on a litigant to have its appeal heard, despite the tardiness of its counsel, the court ordered that the appeal which was struck off the roll could very well be reinstated for hearing. This would obviously be dependent on leave to do so to be sought and obtained. It is not the end of the road as argued by their counsel.

[9] However, they did not follow the clearly indicated route to have the appeal re-enrolled to be heard. Instead, they chose to rather challenge the order which empowered them to do so by now raising an issue on review under the auspices of section 148 (2) of the Constitution hand in hand with section 21 thereof, which pertains to the right to a fair hearing. It requires to be reiterated that no application for leave to reinstate the appeal for hearing thereof has been made, nor was such an application refused. Without deciding so, I would think that it remains available despite the adverse outcome of the present application to review and set aside the judgment which dismissed the condonation application.

[10] Furthermore, the applicants who regard the impugned order as insurmountable and as having closed the door on a litigant without a fair hearing, choosing to rather raise a challenge by way of review, is wrong to conclude as they do. I say so because they have not yet run the gauntlet of an application to reinstate the matter, whereas the respondent who noted a cross appeal, may readily enroll it for hearing by arrangement with the registrar, together with its own attendant application for condonation of late filing of its Heads of Argument and Bundle of Authorities. The only distinction is that one party needs to seek and obtain leave of the court to do so while the other does not need to first seek and obtain leave of the court with regard to enrolment of its cross appeal. Also, it is during the course of such an application where the applicants will be positioned to seek the recusal of any presiding judge if they regard it as necessary.

[11] Section 148 (2) of the Constitution of ESwatini, Act 001 of 2005, makes provision for the Supreme Court to review and if necessary, correct its own

decisions. The section further provides for legislation and rules to be promulgated which would define the scope, ambit and procedural aspects of this revisional jurisdiction of self-correction but to date, none of this has yet materialised. However, the jurisprudence on this constitutionally empowered jurisdiction gives guidance and some form of clarity by way of legal precedent in the Kingdom as to how and when it is to be exercised. One of the leading judgments is recorded in the matter of President Street Properties (Pty) Ltd v Maxwell Uchechukwa and Four Others Civil Appeal Case No.11/2014 at para 26 and 27, where it was stated that:

> "26. *In its appellate jurisdiction the role of the Supreme Court is to prevent injustice arising from the normal operation of the adjudicative system, and in its newly endowed review jurisdiction this Court has the purpose of preventing or ameliorating injustice arising from the operation of the rules regulating finality in litigation whether or not attributable to its own adjudication as the Supreme Court. Either way, the ultimate purpose and role of this Court is to avoid in practical situations gross injustice to litigants in exceptional circumstances beyond ordinary adjudicative contemplation. This exceptional jurisdiction must, when properly employed, be conducive to and productive of a higher sense and degree or quality of justice. Thus, faced with a situation of manifest injustice irremediable by normal court processes, this Court cannot sit back or rest on its laurels and disclaim all responsibility on the argument that it is* functus officio *or that the matter is* res judicata *or that finality in litigation stops it from further intervention. Surely, the quest for superior justice among fallible beings is a never ending pursuit for our courts of justice, in particular, the apex court with the advantage of being the court of the last resort.*

> 27. *It is true that a litigant should not ordinarily have a 'second bite at the cherry', in the sense of another opportunity of appeal or hearing at the court of last resort. The review jurisdiction must therefore be narrowly defined and be employed with due sensitivity if it is not to open a flood gate of reappraisal of cases otherwise* res judicata. *As such this review power is to be invoked in rare and compelling or exceptional circumstances... It is not review in the ordinary sense.*"

[12] In effect, the applicants for review who are dissatisfied with the dismissal of their application to have the late filing of Heads of Argument condoned, now seek to appeal that order. They bring it under the guise of an alleged deprivation of their right to a fair hearing as enshrined in the Constitution. This they say was the result of a judge on the bench who should not have sat in the matter as he is conflicted and that the applicants have a reasonable apprehension that he is biased against them.

[13] Section 21 (2) of the Constitution of ESwatini holds that:

> *"In the determination civil rights and obligations or any criminal charge a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law"* (my emphasis).

The complaint of the applicants is that the learned judge was not impartial since he:

> *"... is conflicted and should not have been part of the appeal panel owing to the fact that he has a personal matter against the Swazi*

Observer which had not been concluded disqualifies him from sitting in matters involving the Swazi Observer. His participation in the proceedings when he should not, have rendered the proceedings null and void irrespective of whether he wrote the judgment or not."

[14] The matter between the impugned Justice and the first applicant of which the latter's counsel refers to in the present tense, as if it is a pending and unconcluded matter, was in fact withdrawn over one year before the hearing of the case at hand. This hearing was on the 20th August 2018 whereas a Notice of Withdrawal of Action was served on the applicant's attorney of record, then and now, on the 1st of day August 2017. Costs of the then defendants was also tendered. It is thus inconceivable that the attorney of record who appeared for the appellants, being the applicants for condonation, could not have been aware of the past intended but withdrawn litigation between the learned Justice and the Swazi Observer at the time when the matter was heard in the Supreme Court.

[15] Yet, despite this being so, he did not move any application for recusal at the time when he could have done so, if indeed his client had any reasonable apprehension of bias by His Lordship. It is only now that his application for condonation was dismissed on the 19th September 2018 that a review application which is premised on such a stated belief of bias comes to the fore. The Notice to seek a review is dated the 16th October 2018, about one months after the judgment was handed down.

[16] Prior to dismissal of the condonation application, the litigants were given full opportunity to argue the merits of the application itself. The court was

not concerned at the time about the actual merits of the appeal against an adverse judgment against the present applicants, but limited itself to a consideration of the application before it, whether or not to condone non-compliance with the rules pertaining to time limits.

[17] In its very comprehensive and carefully considered written judgment, the court highlighted the shortcomings in the application itself. In the summary of the judgment, which is only a summary and not the judgment itself, it was stated thus:

> *"Application for Condonation for late filing of Heads of Arguments – Two of absolute requirements being a full explanation for delay and prospects of success – Attorney filing founding affidavit not dealing with or even mentioning prospects of success despite prior warning by opposing Counsel – application fatally defective – flagrant disregard for rules of this Court – Application dismissed with costs."*

[18] The applicants counsel could not have argued that he was unaware of the legal requirements for a condonation application to pass muster. His opponent noted that the application was materially devoid of compliance and out of professional courtesy drew attention to this void by way of a letter, prior to the hearing. He said that:

> *"Your condonation application refers.*
>
> *With respect, it does not contain the basic and necessary allegation on prospects of success. Please attend to it quickly otherwise you will have a difficulty in making same in due course."*

The original application was not thereafter withdrawn and substituted with one which would meet the minimum standards.

[19] In the course of its very detailed and thoroughly motivated judgment, which cannot be faulted in any respect, the Court referred to a plethora of local and foreign case law precedents on the very point of condonation applications and the legal requirements to succeed therein.

[20] In addition to the belated and unsuccessful attack on Justice SP Dlamini, whose recusal was never sought until after such time that an adverse judgment was handed down and which is entirely unmeritious, the applicants now also seek to essentially appeal against the judgment of the Supreme Court. This second arrow in their quiver is equally without any merit.

[21] Firstly, the judgment is final and not appealable. Secondly, the applicants cannot regurgitate the same argument yet again in their quest to overcome the shortcomings in the condonation application, to have it set aside on review.

[22] In The Swazi Observer Newspaper (Pty) Ltd t/a Observer on Saturday and two Others v Dr Johannes Futhi Dlamini (13/2018) [2018] SZSC 39 (19/10/2018), (the matter now sought to be reviewed), the Court observed that:

> "*28. It needs to be recorded that this Court has every sympathy with litigants who are let down by their Counsel. Accordingly, the Court*

does not intend (nor did it intend in the dismissed application of the Appellants) to close the door on the litigants. The Cross Appeal is (as was the Appeal) merely struck off the roll and not dismissed, with an accompanying Order that the Cross Appellant, (and the Appellants in the dismissed Application) have every right to bring an Application to this Court for the reinstatement of the appeals, subject to the said Application fully meeting the requirements of the Rules of this Court and fully setting out all relevant facts and factors."

[23] It requires to be yet again emphasised as to what was said in President Street Properties (*supra*) at paragraph 15:

> *"From the above authorities some of the situations already identified as calling for judicial intervention are exceptional circumstances, fraud, patent error, and bias, presence of some unusual element, new facts, significant injustice or absence of effective remedy."*

None of these elements manifest in the present application. Instead, the judgment of the Supreme Court which is now under attack by way of a review application is a model of judicial rectitude.

[24] When the matter was argued in this court, applicants counsel sought refuge under the umbrella of what was argued to be "fair to both sides" and that it was necessary to depart from strict adherence to its own rules and precedent to have come to a different decision, to thus

have allowed condonation. *"In essence, the Court must be concerned with what is fair to both sides"* (per HB Farming Estate (Pty) Ltd and Another v Legal and General Assurance Society Ltd 1981 (3) SA 129 at 134- B.) Counsel also reminded us of the *dictum* in Unitrans Swaziland Ltd v Inyatsi Construction Ltd, Court of Appeal of Swaziland, unreported and un-numbered judgment dated the 7th November 1997, where it was held at page 2, para.2 that:

> *"In considering whether to grant condonation the Court, in the exercise of its discretion must, of course, have regard to all the facts. Amongst those facts are the extent of the non-compliance, the explanation therefor and the Respondent's interest in finality."*

[25] Of course this statement is correct, but it is not the be all and end all, it goes further. In that matter, which the applicants rely on, the preceding paragraph clearly states that counsel were invited to argue the application for condonation "... *on the hypothetical basis that the appellant had reasonable prospects of success on the merits of the appeal*" (*my emphasis*). This case is no authority for any contention that good enough prospects of success is not a *conditio sine qua non* for granting of condonation. It remains a cornerstone in this jurisdiction, as well as elsewhere.

[26] Another authority which counsel for the applicants on review strongly rely upon to dispel the notion that the prospects of success, or the patent absence of any mention of it in the condonation application, should not have so prominently featured in the

impugned judgment, is PFE International Inc (BVI) and 4 others v Industrial development Corporation of South Africa Limited 2013 (1) SA 1 (CC) where Jafta J held at para 30 that:

> *"Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their process, taking into account the interests of justice. It is this power that makes every superior court the master of its own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribed. Consistent with that power, this Court may in the interests of justice depart from its own rules."*

[27] The aim and purpose of an application for condonation as was before the Supreme Court, was indeed to seek a relaxation of the rules pertaining to time limits as to when Heads of Arguments are to be filed. Such applications are often granted, but it remains dependant on meeting the necessary criteria. One of them, and importantly so, is a demonstration by the applicant that in the event condonation is granted, there are good prospects of success in the merits of appeal. In the PFE International judgment, the contentious issue pertained to the discovery of documents, or the access to information held by the State after commencement of legal proceedings. It needed to be decided whether the Promotion of Access to Information Act (PAIA) or the Uniform Rules of Court were applicable. It is in this context that Jafta went on to say (in para 31) that:

"It is the flexibility of the interpretation and application of the rules of court that affords the applicants access to the same documents they sought under PAIA. In some cases a mechanical application of a particular rule may lead to an injustice."

[28] Our Courts are equally open for the equitable flexation of the rules, but upon good cause being shown, inclusive of the prospects of success. It is not the application of an unreasonable, rigid or the proverbial "law of Medes and Persians" approach as contended by Mr Magagula, which is to be "followed slavishly in every case no matter the circumstances."

[29] The circumstances referred to by the applicants counsel have indeed been adequately and comprehensively considered and pronounced upon by the Court in the judgment which is now sought to be set aside on review so that it can yet again be rehashed before a differently constituted bench.

[30] In conclusion, it is useful to replicate some factual findings by the Court which dismissed the application for condonation and I can do no better than a *verbatim* quotation from paragraph 29 *et sequiter*:

"*FINDINGS*

It is trite that an Application stands or falls on the Founding Affidavit and that is absolutely true in this case.

Despite all the case law referred to above and in the AG Thomas judgment supra, which his firm was involved in, Mr Magagula simply did not bother to deal with or even mention the absolute

requirement of addressing the issue of the prospects of success of the Applicants.

This is even further compounded by the fact that the opposing Counsel, very magnanimously in my view, firstly addressed a letter to him on 03 August 2018 pointing out that the Application was defective and then followed this up with an opposing Affidavit in which it was again pointed out that the Application was fatally defective. Mr Magagula simply chose to ignore both the letter and the opposing Affidavit.

As such the well-established law in ESwatini was simply ignored and the Application was bought in defiance of the relevant Rules of Court at the peril of the Applicants.

Accordingly on that ground alone, the Application for Condonation must fail with the words in the Melane judgment supra *echoing to the effect that without prospects of success, no matter how good the explanation for the delay, an Application for Condonation should be refused.*

However, it is also necessary to deal with the actual contents of the Affidavit of Mr Magagula as regards his grounds for being out of time.

It is trite that the non-availability of Counsel due to other commitments is not a valid ground. Mr Jele pointed out in his opposing Affidavit that there is no explanation given why the matter was not referred to another practitioner.

It further needs to be pointed out that a certain Attorney Z. Shabangu from his firm acted for the Applicants in the Court a quo, and as such one assumes that he was fully aware of the issues and there is

no explanation why he could not have assisted in at least bringing a timeous Applications for Condonation and/or the drawing of the Heads of Argument.

There is no explanation whether the deceased was an Attorney or what position this person held. A careful reading of Paragraph 5 of his Affidavit seems to imply that the deceased member appears to have been working on the Heads but no particularity is given. At this point it needs to be stated that the Court has every sympathy with the firm and the family for the passing of the deceased person. By his own admission, Mr Magagula knew on at least 02 July 2018, on 9 July 2018 and again on 20 July that the Heads which were due for filing were out of time. He did not launch an application then but only launched the Application for Condonation on 26 July 2018 after his messenger had been told on Friday 20July 2018 that they would not be accepted as they were already out of time.

Accordingly, the Application failed even on that ground in that no Application was brought in terms of Rules 16 and/or 17, as soon as it became apparent that the Heads were out of time as clearly set out in the BARROW judgment supra. "

[31] The Court accordingly ordered that the appeal be struck off the roll, having correctly and justifiably found that the application for condonation was fatally defective, failing on both the grounds that it did not disclose any prospects of success, or even made mention of such, as well as that the explanation for the delay did not meet the requirements of law. To now seek a review of the matter is akin to an appeal against the factual and unassailable finding of the Supreme

Court. It is not going to happen. Equally so with the belated issue concerning the composition of the bench. Had the applicants held the view, incorrectly so, that a judge had a pending claim against the newspaper, recusal should and would have been applied for before the Court heard the matter, or at minimum before it was concluded and judgment reserved.

[32] It is yet again apposite to refer to the dictum by Steyn CJ in Salojee v The Minister of Community Development 1965 (2) SA 135 (AD) at 141:

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

[33] This is yet another matter in which the litigants cannot escape under the shadow of their attorneys' failure to both seek recusal and failing to adequately motivate his application for condonation of late filing of his required documentation in the Supreme Court. In any event,

whichever way the application for a review and setting aside of the proceedings complained of is approached, it is not to result in the application being argued *de novo* before the Supreme Court, however constituted.

[34] Accordingly, it is ordered that the application for review under Section 148 (2) of the Constitution, in conjunction with a consideration of the right to a fair hearing under Section 21 of the Constitution be dismissed, with costs to follow the event.

JP ANNANDALE
Justice of Appeal

I agree

MCB MAPHALALA
Chief Justice

I agree

MJ Dlamini
Justice of Appeal

I agree

SB Maphalala
Justice of Appeal

I agree

AM Lukhele

Acting Justice of Appeal

For the Applicants: Mr M. Magagula of Magagula & Hlope Attorneys, Mbabane.

For the Respondent: Mr ND Jele of Robinson Bertram Attorneys, Mbabane.