



IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

CIVIL APPEAL CASE NO. 86/2018

In the matter between:

**TUNTEX TEXTILE
TUNTEX GARMENTS (Pty) Ltd**

**First Appellant
Second Appellant**

And

**ESWATINI GOVERNMENT & OTHERS
LOGICO UNLIMITED (Pty) Ltd**

**First Respondent
Second Respondent**

*Neutral Citation: Tuntex Textile (Pty) Ltd vs Eswatini Government & Others
(86/2018) 2018] SZSC 28 (31st May 2019)*

Coram:

M.C.B MAPHALALA, C.J

S.J.K

MATSEBULA, A.J.A

Date Heard: 8 May 2019

Date delivered: 31ST May 2019

Summary: Civil Procedure – two applications for condonation for late filing of heads of argument by both Appellants and First Respondent – Appellants’ Application of condonation opposed and First Respondent’s application not opposed – Appellants’ application does not deal with prospects of success which is one of two absolute requirements for applications for condonation – applications not complying with the twin requirements - dismissed.

JUDGMENT

S.J.K MATSEBULA, AJA -

INTRODUCTION

- [1] There are two applications in this matter for condonation for the late filing of heads of arguments, one from the Appellants and the other from the First Respondent. The Appellants’ application is opposed.

The principles or requirements to sustain an application for condonation for the late filing of heads of argument are well stated in the summary (head notes) to the case: **The Swazi Observer Newspaper (Pty) Ltd t/a Observer on Saturday and two Others vs Dr. Johannes Futhi Dlamini (13/2018) [2018] SZSC 26 (19/09/2018)** and numerous other cases of this Court, that is: the two absolute requirements, being a full explanation for the delay and prospects of success. I will deal first with the application from the First Respondent.

1st Respondent’s case

- [2] Counsel for the First Respondent in his supporting Affidavit for the condonation application states:-

6.

" The Appeal is set-down for hearing on the 08th May 2019 and we were supposed

to file our heads of arguments 18 days before the hearing of the matter. My wrong interpretation of section 8 of the Interpretation Act of 1970 was that the 18 days also include weekends and public holidays. We have been advised by Assistant Registrar of the Supreme Court on or about 15 April 2019 that the 18 days exclude weekends and public holidays.

7.

I humbly apologize for my wrong interpretation of the Rules of Court in so far as the computation of days is concerned and I humbly seek condonation for the late filing of our heads of arguments.

8.

The delay has been occasioned by my misinterpretation of the law and honest human mistake. I pray the Honourable Court to excuse same.

9.

The appeal does not have good prospect of success. It is our opposition to the appeal that has good prospect of success because:

- 9.1 *The successful application a quo was for cancellation of the lease between the parties.*
- 9.2 *the cancellation was a natural result of Appellant's closure of business operations expressly contemplated on the lease itself.*
- 9.3 *Appellants admitted both the closure of its business and the unlawful sublease to 2nd Respondent.*
- 9.4 *blaming the closure on 1st Respondent's loss of international trades benefits are not a term of the lease, hence irrelevant."*

[3] Counsel for the First Respondent avers that the delay for filing the heads of argument was because of his misinterpretation of Section 8 of the Interpretation Act No 21 of

1970. When the Assistant Registrar pointed out his error of the Rules of the Court or misinterpretation of the Act he understood or accepted the Assistant Registrar's understanding of the Rules hence he filed an application for condonation for the late filing of the heads of argument.

- [4] In my opinion, Counsel is correct to admit that he was mistaken to rely on the Interpretation Act. This Act does not define the word "day" but does define "year" as a calendar year and "month" as a calendar month. Rule 31 states as follows:-

"Heads of argument to be filed.

31. (1) In every civil appeal and in every criminal appeal the appellant shall, not later than 28 days before the hearing of the appeal, file with the Registrar six copies of the main heads of argument to be presented on appeal, together with a list of the main authorities to be quoted in support of each head.

(2) A copy of such main heads of argument and list shall be served within the same period on the respondent.

(3) The respondent shall, not later than 18 days before the hearing of the appeal similarly file with the Registrar his copies of the main heads of his arguments and supporting authorities to be presented on appeal and shall serve a copy thereof upon the appellant.

(4) Notwithstanding anything to the contrary herein an appellant or respondent who is not to be represented by an attorney or counsel at the hearing of the appeal shall be excused from compliance with the provisions of this rule.

(5) The foregoing time limits may be abridged with leave of a single judge of the Court of Appeal authorized by the Judge-President."

Section 31(1) mentions 28 days and 31(3) mentions 18 days. As pointed out the Interpretation Act does not define "day" or "days" and reliance on such an Act was a serious mistake and unreasonable. If this application had been opposed on this unreasonableness, it would have suffered the consequences of being dismissed.

- [5] On the second requirement for applications for condonation, namely, prospects of success, the application has made a good effort in paragraph 9 of the Supporting Affidavit.

As the Court has pointed out that the Appellants are not opposing this application notwithstanding the fact that the First Respondent has strongly alleged that the appeal has no prospects of success under its paragraph 9 above.

Appellants' case

[6] I now turn to the Appellants' application for condonation for the late filing of heads of arguments. I reproduce the Founding Affidavit substantially for three reasons, completeness of the submissions, to show the mind thereof that Counsel for the Appellants did not believe that it was necessary to make the application but for the insistence of the office of the Registrar, and, thirdly, the lack of one or two or both of the twin requirements to sustain an application for condonation for the late filing of heads of argument.

[7] The Founding Affidavit partly states as follows:-

"5. Appellants were dissatisfied with the Ruling of the High Court, and proceeded to file and serve a Notice of Appeal timeously together with the Amended Notice. For the purposes of this application the aforesaid Notices are not necessary but same appear on the Heads of Arguments and in the Court Record.

6. Appellants proceeded in term of the Rules of Court to draft their Heads of Arguments as provided for it in terms of Rule 31 of the Supreme Court Rules. The said Rules provide that the Appellants shall file their Heads of Arguments with copies twenty-eight (28) days before the date of the hearing;

6.1 The Respondents shall in turn file their Heads eighteen (18) days before the hearing of the matter together with all the necessary copies as provided for;

6.2 The Appellants were informed by the Registrar of the Supreme Court that the matter has been enrolled for hearing on the 8th May, 2019, and as such they proceeded to draft and prepare their Heads for service. The said Heads were ready for service on the 8th of April, 2019 as appears on the date stamp by the Respondents who received them on the said date;

- 6.3 *The Appellants proceeded after serving the Respondents, on the same day to file the same with the Court at the Registry. Upon attendance they were advised through the Messenger of the Appellant's Attorneys, that the Heads will not be accepted as they were late;*
- 6.4 *The Messenger returned and advised our Mr. Howe of the same who proceeded on the 9th of April, 2019 to file the Heads at the Registry and advised the Clerk who was present that the Heads were two (2) days early and I accordingly left them with her. I was then later informed by hand written note and the Messenger from the High Court that we are required to make an Application for Condonation for the late filing of the Heads. This we were informed at our office and the said Heads were returned to our office by the Messenger;*
- 6.5 *I advised the Messenger that we had previously informed that the Clerk according to our understanding we had twenty-eight (28) days within which to file the Heads and that the Heads were filed thirty (30) days before the date of hearing of the appeal.*
7. *Since the Rules of this Honorable Court do not define "days" as anything other than calendar days, our understanding of the rule is that days are ordinary days and not Court days. This therefore means that you include week-ends and public holidays and you exclude the day of the hearing. We have thirty (30) days in our understanding before the hearing and as such our Heads have been filed timeously.*
- 8, *It is for the reasons stated above that we believed and still believe that our computation of the days is correct and that the Heads were filed on time. It is the Appellants' intention to proceed with the Appeal and it is our humble submission that, for the reasons articulated in the appellants' heads of argument, the appellants have good prospects of success in the appeal.*

9. *It is unclear on what basis the Registrar contends that the heads of argument were tendered late, but on the assumption that the Registrar is of the opinion that the Court rules refer to "court days." Then the heads of argument ought to have been filed on 25th March 2019. As there are no less than four public holiday between 22 March and 8 May 2019, (19,22,25 ad 26 April and 1 May 2019) this means that the heads of argument were tendered for filing ten days late, in part due to the abundance of public holidays between 5 March and 8 May 019. .*
10. *It is submitted that any error in our reading of the Court rules, if any, as a reasonable one and that this therefore constitutes a reasonable explanation for the late filing of the heads, if any. The length of the delay is not excessive and there is no prejudice to the Government.*
11. *This Application is filed with the abundance of caution as we have been informed by the Messenger that we are required to apply for the late filing. This application is for that purpose and to avoid any undue hardship on the Appellants in their matter being postponed at a cost to them and the Respondents. I enclose and attach copies of the Heads of Arguments which were returned for ease of the Court and to enable the matter to proceed.*
12. *I submit that the Respondents will suffer no prejudice in this regard as they have previously accepted the said Heads of Arguments and have not raised any objection to the same. We confirm that we do not object to the application for condonation by the Respondents for the late filing of their Heads in this matter."*
(My underlining)

[8] As earlier stated the Application is apposed and the pertinent averments are in the following paragraphs of the First Respondent's Opposing Affidavit:-

" 4.

AD PARAGRAPHS (6 1-6.5)

It is denied that Appellants' heads of arguments were served and presented for filing in terms of the dies of rule 31 of the Court of Appeal Rules.

4.1 Having failed to serve and file the heads 28 days before the hearing date, Appellants ought to have applied for condonation.

4.2 The fact of the belated heads was admittedly communicated on 8th April 2019, Appellants failed to promptly apply for condonation. Such application has been filed a month late on 6th May 2019, a day before the hearing of the matter.

5.

AD PARAGRAPHS 7-9

Appellants failed to timeously serve and file their heads and refused to apply for condonation in good time. They misinterpreted the law on the computation of time for doing what the law required to be done.

3.1 By necessary implication, "days" in Rule 31 means "court days" because the service and filing is done on court days when the registry is open and the other Attorney' offices are open. The 28 days certainly excludes Saturdays, Sundays and public holidays.

3.2 To construe "days" to mean calendar days would lead to the absurdity of requiring service and filing on impossible days, there being no one available to be served and to file the court papers.

3.3 Appellants plea for condonation because they "have good prospects of success in the appeal" should be dismissed as a bald assertion not supported by any factual and/or legal basis. They have made no attempt to demonstrate such good prospects of success.

6

ADD PARAGRAPHS 10 AND 11

Appellants have already conceded that they failed to serve and file on time, thus applied for condonation. Their attorney has been adamant that his construction of the rules was correct for a whole month, therefore their error in reading and interpreting the Rules is not excusable. The explanation of the delay is unreasonable, coming from an attorney at law.

7

The delayed filing has been prejudicial to the First Respondent who has been culpably misled to believe that the appeal would not proceed for want of Appellants' heads. the First Respondent has been made to file his heads outside the 18 days prescribed by the Rules hence First Respondent had to promptly apply for condonation. This has been a grave inconvenience to the court too. First Respondent has borne unnecessary costs in this application.

- [9] The matter was set down for hearing for the 8th May, 2019. Rule 31 of the Rules of this Court quoted above required the Appellants to file their heads of argument and list of authorities 28 days (not 4 weeks) before the date of hearing and the First Respondent to file theirs within 18 days. The Appellants say they were notified by the Assistant Registrar that the matter had been set down for the 8th May, 2019 but they do not confide to the Court as to what date they were notified of the set down. Be that as it may, on the 8th April they tried to serve the Registrar's office with the heads of argument and were advised that they were already late and further advised to file an application for condonation. On the 9th April, 2019 Mr. Howe, Counsel for the Appellants, personally went to the Registrar to serve the heads of argument arguing that he was not out of time in terms of the Rules of this Court. Without reaching any agreement with the Assistant Registrar's office he left the heads of argument. The Registrar's office on the subsequent day returned the heads of argument to Mr. Howe as an indication for rejection of same unless an application for condonation was filed. A month passed by until the 6th May 2019, two days before the date of hearing of the case an application for condonation was filed.

THE CASE LAW

- [10] *Van Ransburg J. in Fanapi v East Cape Administration Board* 1983 (2) SA 688 at 690, said :-

“Condonation of non-observance of the Rules of Court is by no means a formality. It is for the Applicant to satisfy the Court that there is sufficient cause for excusing him from compliance. What calls for some acceptable explanation is not only the delay in noting the appeal and the delay in the prosecution thereof but also the delay in seeking condonation.” The learned Judge added, “The explanations furnished by the Applicants’ attorney leave much to be desired. This, however, need not be fatal to the success of the Application if the prospects on appeal are strong. Good prospects of success may transcend deficiencies in an application for condonation and warrant a granting of the application notwithstanding the present of the deficiencies.”

In the present case there are no details of prospects of success except a bold and bare statement that there are prospects of success. One wonders what prospects of success is the Appellants referring to. They are not stated in the Founding Affidavit. The Appellant cannot refer to heads of argument that are still out side and the Appellants is still applying for condonation seeking their admittance.

- [11] An application for condonation should be brought to Court without delay as soon as the Attorney for the Appellants becomes aware that he is in default of complying with any Rule of this Court. In the present case after Mr. Howe was notified by the Assistant Registrar that he was late for filing the heads of argument and he did not act quickly to remedy the default but chose to argue and disagree with the Assistant Registrar until a month passed by, a whole month was wasted before reluctantly filing the condonation application. Cloette AJA (as he then was) in *De Barry Anita Belinda v A.G. Thomas (Pty) Ltd* (30/2015) [2016] SZSC 07 930 June 2016) imported the principles in *Dr. Sifiso Barrows v Dr. Priscilla Dlamini and the University of Swaziland* (09/2014) [2015] SZSC 09 (09/12/2015) where the Court at 16 stated :-

“It has repeatedly been held by this Court, almost *ad nauseam*, that as soon as a litigant or his Counsel becomes aware that compliance with the Rules will not be possible, it requires to be dealt with forthwith, without delay.”

The learned judge quoted several authorities with the same principle including the *Unitrans Swaziland Limited v Inyatsi Construction Limited*, Civil Case 9 Of 1996 where the Court held at paragraph 19 that:-

“The Courts have often held that whenever a prospective Appellant realizes that he has not complied with a Rule of Court, he should apart from remedying his fault, immediately, also apply for condonation without delay.”

In the same case Cloette AJA (as he then was) also referred to the case of *Johannes Hlatshwayo v Swaziland Development and Savings Bank* case No. 21/06 at paragraph 7 where it was stated :-

“It required to be stressed that the whole purpose behind Rule 17 of the Rules of Court on condonation is to enable the Court to gauge such factors as (1) the degree of delay involved in the matter, (2) the adequacy of the reasons given for the delay, (3) the prospects of success on Appeal, and (4) the Respondents’ interest in the finality of the matter”

Mr. Howe’s argument with the Assistant Registrar from the start had no prospects of success but as a senior attorney of this Court, he could have reserved his arguments for the Court to give directions through a court process.

- [12] It has already been stated that the argument with the Assistant Registrar by the Appellants’ Attorney resulted in the passage of a month before the condonation application was eventually filed with the Court. The Appellants’ attorney maintained before the Registrar as he still maintains before this Court that they were not late but within the stipulations of Rule 31 (1) which required them to file the heads of

argument and list of authorities not later than 28 days before the date of hearing. They submit that the 28 days is calendar days and not Court days. the First Respondent in his opposing affidavit state that even if they were counting calendar days they would still be late by 3 days. Mr. Craig Watt-Pringle SC (instructed by Mr. Howe) for the Appellants then referred the Court to the Interpretation Act, 21 of 1970 which excludes certain days when computing days for doing certain things. The reason for this is that the month of May had many holidays and the belief is that by resorting to this Act they would be placed in a position where there would be no need for the condonation application.

[13] Mr. Watt-Pringle SC referred the Court to Section 8 of the Interpretation Act, 1970 and it stipulates as follows:-

"Computation of time.

8. *In computing time for the purpose of a law, unless the contrary intention appears-*
 - (a) *a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happened or the act or thing is done;*
 - (b) *if the last day of the period is Sunday or a public holiday which days are in this section referred to as "excluded days", the period shall include the next following day not being an excluded day;*
 - (c) *when any act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards not being an excluded day;*
 - (d) *when an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time."*

Mr. Watt Pringle SC submitted that paragraphs 8 (b) and (c) were relevant to show

that the 28 days referred to in Rule 31 (1) of the Rules of this Court were calendar days. Notwithstanding his vast experience of around 33 years he had no authorities to support his argument and to assist the Court except the insistence on the Interpretation Act as imputing calendar days.

- [14] From the legislative drafting point of view, words are used by legislative drafters with precision on legislative instruments to minimize ambiguity as it may be accepted that words and language are not very perfect but fraught with ambiguities and double or more meanings. Some meanings of words make much sense when they relate to circumstances, places, institutions and other entities such as churches, clubs, fields of study, professions and many more.

Section 2 of the Interpretation Act, 1970 does not define the word “day” but defines the word “month” as a calendar month and the word “year” as a calendar year.

In my opinion as a legislative draftsman, the difficulty is that the Interpretation Act is a general law and not a specific law on a specific subject matter but tries to be all encompassing. The word “day” has a different meaning to different circumstances, different places, different institutions such as churches, clubs, field of study, professions and many more. This diversity makes it impossible to define “day” in a law of general application such as the Interpretation Act.

In a church situation “day” may mean the day of worship which is usually a Sunday. So if a Preacher says he works for 4 days a month that should be inferred to 4 Sundays. So the word “day” is interpreted in reference to the institution, being the Church. The Rules of Court are a specific legislation relating to the Court institution. The word “day” should be relative to the days the Court works, where it can accept court process. In the Rules of this Court, my opinion is that “day” should be used in reference to the institution and taking cognizance of how the institution works and on

which days it works. If the institution is a Court then it is “court days”. It must be further noted that the drafter of the Rules was alive to words like day, week and month. He must be presumed that he carefully chose which words to use in the Rules when he intended a different meaning. For example, in Rule :-

8 (1)	4 weeks
9(1)	6 weeks
11	10 days
30 (1)	2 months
30 (2)	14 days
31 (1)	28 days
31 (3)	18 days
36 (a)	21 days
36 (b)	14 days

- [15] The drawing between days, weeks and months must have been intentional, in case of “days” setting strict time lines for the doing of certain things. The conclusion I arrive at is that the days in the Rules refer to “court days”.

On further consideration, I see no logic or reason why the Supreme Court should regard “day” having a different meaning from the High Court. Regulation 2 of the High Court Rules has this definition :-

“court day” means any day other than a Saturday, Sunday or Public Holiday, and only court days shall be included in the computation of any time expressed in days prescribed by these rules or fixed by any order of court;

Section 8 (b) of the Interpretation Act, 1970 says Sundays and public holidays are “excluded days”. Saturdays are not excluded days. A litigant cannot serve a Court document on the Court on a Saturday because it is not a court day and the same applies to Attorneys officers. The High Court Rules got it *courtly* correct, if there can be such a word.

Section 8 (c) simply says if anything needs to be done on a certain day it must be done on that day unless that day is an excluded day in which case it can be done on the next day if that day too is not an excluded day. In the example above if a court document is to be served on a Sunday and because Sunday is an excluded day, that document can be served on Monday. The problem is when the document is to be served on a Saturday, because Saturday is not an excluded day the document must be served on Saturday even if the Court is not open. That is impossible.

My opinion is that using the Interpretation Act, 1970, except causing absurdity, is an unreasonable thing to do when trying to interpret the Rules of this Court.

- [16] In South Africa the word “day” has been defined. The Civil Procedure in the Superior Courts, Service Issue 25, November 2002 at page 1003 in reference to the Supreme Court Act 59 of 1959 defines “court day” as meaning “any day other than a Saturday, Sunday or public holiday.” This Act was repealed but the same definition is found in “Rules and Practice Notes of Superior Courts (Supreme Court of Appeal: Rules of the Supreme Court of Appeal (As amended) [1998] Z A R C (28 December 1998).
- [17] The conclusion is that the Interpretation Act, 1970 is not suitable and therefore not applicable in computing days mentioned in the Rules of the Supreme Court. The Rules were made for the Court or an institution that works on certain days only and my opinion is that the drafters thought and hoped that the institution and the users of the Rules would appreciate that the Court, in the ordinary run off the mill, does not operate during weekends and on public holidays. It would seem the Assistant Registrar understands this logic or conclusion which has grown to be an established practice of this Court. The legal practitioners understand this practice very well too until it works against their cases when they turn around and allege the days to be calendar days. Mr. Watt-Pringle SC, notwithstanding his vast experience would not provide any authority in support of his submission that the 28 days in the Rules of this Court is calendar days.

- [18] The legal requirements for the granting of an application for condonation are two-fold: firstly, reasonable explanation for the delay in complying with the Rules of Court, and secondly, the prospects of success on the merits. The principle is also found in the summary at page 2 of the case of *Floyd Mlotshwa and Another v Chairperson- Elections and Boundaries Commission and Others* (96/2018) [2019] SZHC 3 (2019).
- [19] I have dealt with the first part of the twin requirements and hold that the explanation given by the Appellants is not reasonable and not adequate to convince this Court to grant the application for condonation. I hold that the delay in filing the heads of argument and list of authorities was caused by the negligence of the Appellants' Attorney who refused to file as soon as he was advised by the Assistant Registrar. He filed the condonation application after a month after advice from the Assistant Registrar who was following the established practice of this Court. The application does not provide an acceptable and reasonable explanation for the delay in complying with the Rules of this Court. The Interpretation Act has nothing to do with Rule 31 of the Rules of this Court.
- [20] What is left now is to deal with the second part: prospects of success on the merits of the case.

The Appellants in their Founding Affidavit made a bold and bare allegation that they have prospects of success. Mr. Watt-Pringle SC submitted that detailing the prospects of success in the Founding Affidavit would burden the Court and that the prospects of success are by reference in the heads of argument. The Court pointed out that the detailed prospects, as per numerous decisions of this Court, should be stated in the Founding Affidavit and nowhere else. Mr. Watt-Pringle SC said the Court should take cognizance that the Founding Affidavit was drafted by a person who is a laymen in law. The Court was taken aback by this revelation as it has always viewed Mr.

Howe as a senior attorney of this Court and learned in law, and, he is the drafter of the Founding Affidavit and further signed it on behalf of the Appellants. Be that as it may, the condonation application fails to meet the second requirement for condonation applications as acceded to by Mr. Watt-Pringle when he referred to Mr. Howe as a laymen.

- [21] In *De Berry Anita Belinda v A.G. Thomas (Pty) Ltd* (30/2015) [2016] SZSC 07 (30 June 2016) at paragraph 12, Cloette AJA (as he then was) said:-

“Despite numerous Judgments, circulars, warnings from Judges, practitioners in this Court nevertheless continue to fail to abide by the Rules of this Court with seeming impunity and we hope that this judgment will demonstrate that this Court will no longer tolerate non-compliance of the Rules of this Court nor the flagrant abuse of such Rules. Having said that, this Court will always consider genuine, well documented applications in terms of the Rules provided that full acceptable details are set out in the Founding Affidavits, the Court taken into confidence of the Applicant and such Applications brought in terms of the Rules of this Court immediately upon a problem arising. (my underlining).

Acceptable details should be in the Founding Affidavit and not by reference to some other documents and worse still if the document is not before the Court but still subject to an application for condonation for its acceptance.

- [22] The following dictum is *Melane v Santam Insurance Co. Ltd* 1962 AD 531 at 532 is relevant in persuading in considering Applications for Condonation:-

“ In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among

the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if

there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits ..."

In the present application there is no details of the prospects of success in the Founding Affidavit as is expected as a matter of law and practice. The details are required to assist the Court gauge the very prospects of success in the Appeal.

[23] The Appellants have dismally failed to satisfy this Court of prospects of success in the merits.


In addition I might add His Lordship Justice Steyn CJ's dictum in *Saloojee and Another v Minister of Community Development* supra on page 141:-

"...it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the Attorney. 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. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney, after all, he 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.”

[21] Accordingly the following order is made:

- (a) Application for condonation for the late filing of heads of argument by Appellants is hereby dismissed;
- (b) Application for condonation for the late filing of heads of argument by First Respondent is hereby dismissed;
- (c) Appeal is hereby dismissed; and
- (d) No order as to costs.


S.J.K. MATSEBULA
ACTING JUSTICE OF APPEAL

I agree


M.C.B MAPHALALA
CHIEF JUSTICE

**For the Applicant / Appellants : Craig Watt-Pringle SC (Instructed by
Lucky Howe)**

For the Respondents : Mbuso Simelane for the Attorney General.

MINORITY JUDGMENT

S.P. DLAMINI JA

- [1] I have had occasion to read the majority judgment written by His Lordship Justice S.J.K. Matsebula AJA with which His Lordship the Chief Justice M.C.B. Maphalala concurs.
- [2] Whilst I concur with the reasons for the judgment, respectfully I cannot concur with the order issued in the majority judgement.
- [3] Since I agree with the reasoning and authorities relied upon in the majority judgment that is no need for me to reopen that part of the judgment. Therefore, I will only concentrate on the minority order.
- [4] The 1st Respondent makes the case in the papers before Court that due to the manner in which the appeal was being prosecuted it deemed it abandoned. The Appellants have not challenged this argument by the Appellants. I am inclined to agree with the argument of the 1st Respondent taking into consideration the circumstances leading to the failure by the Appellants to comply with the Rules of Court.

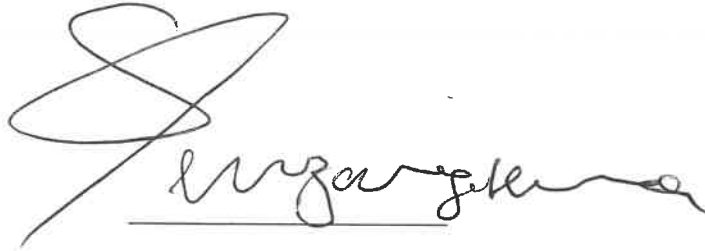
[5] In addition, the Court has to consider the issue of prejudice. An appeal per se cannot be said to be prejudicial to a party since it is part of our law. However, the manner in which is prosecuted by an Appellant might cause prejudice to a respondent who is a beneficiary of a judgment *a quo*; failure to comply with basic Rules of Court and unnecessary delays are examples whereby the beneficiary of a judgment *a quo* is precluded from enjoying the benefits of such a judgment.

[6] Regarding costs, it is a well of well an established principle of our law that costs will follow the cause unless there are compelling reasons to order otherwise. I have found no such reasons in this matter. Therefore, the costs must be awarded to the successful party. However, the awarded costs should exclude the costs of the unsuccessful applications for condonation for the late filing of Heads of Argument launched by both parties.

[28] In view of the foregoing, I make the following order:

1. The Applications for condonation the late filing of Heads of Argument by the Appellants and 1st Respondent are hereby dismissed and no costs order is made.
2. The appeal is hereby deemed to have been abandoned.

3. Costs are awarded against the Appellant at an ordinary scale.

A handwritten signature in black ink, featuring a large, stylized initial 'S' followed by the name 'P. Dlamini' in a cursive script.

S. P. DLAMINI JA