Swaziland National Association of Teachers

Applicant

And

Minister of Education

1st Respondent

The Attorney General

2nd Respondent

Coram : MCB Maphalala CJ; MJ Dlamini JA; SB Maphanga AJA

[1] This is an interlocutory matter for the condonation of the late filing of heads of argument and bundle of authorities by the appellant, the applicant herein. The appeal arises from the judgment of the High Court delivered on 30 September 2020 by the learned NM [redacted]

“ [redacted] *professional assistants to prepare the Heads of Arguments on or about the 5th of February 2021*

"11. The Heads were duly prepared and I signed them on the 11th February 2021 and I was of the idea that by the time of drafting this application the Heads were long served and filed....

"12. I therefore humbly submit that I was taken aback to receive a Notice to Dismiss the Appeal from 4th respondent on the 2nd March 2021. That was when I learnt that the hea[redacted] were timeously prepared had not been served.

"13....This I hu[redacted]as an oversight on [redacted]part as an office and I humbly apply that the C[redacted] such".

[3] Mr. Howe further depose[redacted] behalf of the ap[redacted]verring that applicant had *"great prospects of success on th[redacted]rits in this matte[redacted] a matter of public interest bearing upon a constitutional issue pertaining to the t[redacted]f office and appointment of a public officer, the second respondent. Interpretati[redacted]175 of the Constitution is material issue to be determined by the Court. The outc[redacted] matter will put to rest once and for all the tenor (sic) of office of all chairm[redacted]of the Public Service Commissions like the 2nd Respondent,"* who, it was[redacted], *"occupies office unconstitutionally"*. It was further asserted that the High C[redacted]n finding that it had no jurisdiction since the matter involved a section of the Co[redacted]. In the result, the merits of the matter were not disposed of by the Court *a quo*[redacted]*bmit that the above Honourable Court should find sufficient cause for condonati[redacted]e filing of Heads of Arguments"* as applicant has high prospects of success, the ap[redacted]erred. There is also a cross-appeal which points to the respondent as also eager to[redacted] matter disposed of on merits, further asserted Mr. Howe.

[4] As part of this condonation application, the applicant has attached the 'notice of appeal' in the main matter. The applicant asserts that the main matter is *"purely constitutional in nature"* and that the Court *a quo* erred in holding that the matter was labour-related involving employment contracts and recognition agreement between the parties. Instead, the deponent avers, the matter involves the clarification of the meaning

and application of section 175 of the Constitution, and if the 3rd respondent is not legally constituted, its operations may be challengeable. This shows that the matter is constitutional and calls for determination. Be it stated that if applicant is successful the matter may have to return to the High Court for determination on merits. Whether the matter is a live issue or merely academic would be for the High Court to decide.

[5] The application is strenuously opposed by the respondents, notwithstanding their cross-appeal to the effect that the Court *a quo* erred by *"not dealing with the merits of the respondents' defence which would have seen a complete dismissal of the appellant's claim"*.

[6] The threshold defence is that th mic and as such evinces no prospects of success. To this end, Lega of 2019 is attached, effecting appointments to the 3rd respondent. The nsidered by the Court *a quo*. Various other points on merits are taken up t idents. I do not think we need to fully consider these arguments. If the cond cceeds this Court would have to decide as part of the appeal whether the High correct in declining jurisdiction.

[7] In paragraph 11 Mr. Howe says that the hea of argument were signed on 11th February 2021. But he has no idea why those heads e not filed with the Court, only to be alerted by the notice of 4th Respondent on 2 March 2021 to have the appeal struck off the roll. What happened between signing the heads on 11 February and 26 February, when the heads were supposed to have been served is not explained; it's a blank. This raises the question whether the heads were ever timeously prepared and signed as deponent alleges; or, whether the matter is sufficiently important in the estimation of the deponent. Indeed, the fact that the matter of the heads had been left to an assistant also raises the very issue of the alleged importance of the matter as Mr. Simelane argued. The applicant must disabuse the Court of any reasonable notion that the heads were probably not prepared on time. One would have thought that once the heads were signed the next instruction was to have them filed. Not to have given this instruction, or if given, not to have followed up the

entire due compliance, was grossly negligent on the part of Mr. Howe. Mr. Howe's busy work schedule is no excuse for non-compliance with the Rules of Court.

[8] In paragraphs 16 and 17, the learned Judge *a quo* stated:

> *"[16]…. (A)nd, [redacted] made an issue of the appointment [redacted] position of the 3rd Respondent.*
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> *"17. It is com[redacted] a labour-related dispute because of the [redacted]ent that exists [redacted]n the parties and which is still in force a[redacted]en the two parti[redacted] a labour-related dispute because the ap[redacted]testing and / or chal[redacted] the appointment of the 3rd Respondent who[redacted] surely is an occurrence or grievance whic[redacted] mployment and / or labour relations between the [redacted]eing [redacted]d the employee, being the applicant".*

[9] The learned Judge *a quo* als[redacted]e 3rd respondent exercises disciplinary functions over t[redacted], for instance. It should be noted however that disciplina[redacted] over individual teachers who happ[redacted]be members [redacted] difference between individual members[redacted]

[10] Central to an [redacted]use has been established for the Court to condone [redacted]ourt to decide *whether a proper explanation has been advanced and the respondent's attitude cannot bind this Court"*[1] and *"It is for the applicant to satisfy this Court that there is sufficient cause for excusing him from compliance, and the fa[redacted]he respondent has no objection,*

[1] **PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd**, 1980 (4) SA 794, 797G

although not irrelevant, is by no means an overriding consideration"[2]. Holmes JA in **Melane** [3] had this to say:

> *"In deciding whether ... cause has been shown, the basic principle is that the Court has a discretion ... 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 ... explanation therefor, the prospects of success, and the importance of the case ... arily, the facts are interrelated; they are not individually decisive, for that would be a piece-meal 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.....What is needed is a conspectus of all the facts"*

[11] In argument before this Court Mr. Howe refe... aragraphs 18 and 20 of his affidavit and showing the existence of prospects of s... the respondents stand to suffer no prejudice by the condonation being granted. ...averred as follows:

> *"18 I humbly submit that we have great prosp... s on the merits in this matter as it is a matter of public interest be... onstitutional issue pertaining to the tenor (sic) of office and appoinum... officer, the second respondent. Interpretation of Section 175 of the Consti... material issue to be determined by the Court. The outcome of this matter will put to rest once and for all the tenor (sic) of all chairman (sic) of the Public Service Commissions like 2nd Respondent.*
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> *"19. It is therefore submitted that the balance of convenience favours the granting of the condonation hence the hearing of the Appeal. On the merits it will be submitted that the 2nd Respondent occupies office unconstitutionally. There is also*

Saloojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A) at 138E
Melane v Santam Insurance Co. Ltd 1962 (4) SA 531 (A) at 532

a cross-appeal in the very matter wherefore the desire on both parties to have the matter heard is very high.

"20. The Court a quo also erred in its finding that it had no jurisdiction to hear the matter ar of the appointments in ch with and brought to finali nstitution and develop it as the

"22 .... of succe that the Court has the jurisaiction cons ter ..."

[12] With regards to the for nts by half of the applicant, I would agree with him that the mat some pu d as such important. But is that enough to win the Court's condonation o pliance? The importance of the matter is one of the factors to be taken into on in the process of the search for the sufficient cause which is a product o rs (conspectus) set out by leading Judges in this field. It will be note a matter does not represent 'prospects of success'. It is ra scales in favour of granting or not granting condonation. t out on their own and be not confused with the import s case.

[13] As often happens in the man condona are invariably cited in which it is pointed out that cess have n or alleged at all. But what form the expected pr cess must take has not been indicated by the opponents of the applications. licant stands seriously challenged in showing prospects of success short of straying into the merits which may or may not prove successful in the appeal. *In casu* Mr. Simelane has boldly stated in the respondents' heads of arguments: *"4. The applicant has failed to state their prospects of success in the matter. To simply argue that this matter is of national interest and the Court must interpret and*

guide the board appointments made...(4) without stating how they are wrong in the founding affidavit doe [redacted] then made to paragraphs 18 to 20 cited above. It nee[redacted]pointed out that in their very nature prospects of success can never be specific c[redacted]eak to something which has not yet happened – as I have said short of da[redacted]n merits whi[redacted]bject for the appeal. What is required of the applica[redacted]fficiently high-l[redacted]e aspects of the case which purportedly supports c[redacted]ll su[redacted]. There does not have to be many prospects, one solic[redacted]But prospects alone, are not necessarily decisive they are part of a[redacted]

[14] Mr. Simelane also cited the [redacted]**wa**[5] and referred to what has been termed the 'two main legal require[redacted]s for g[redacted] an application for condonation' namely that *"the applicant must prese[redacted]le explanation for the delay in complying with the Rules of Court"* and [redacted]e Court that he has prospects of succession the merits". These 'two main [redacted] however, are like a mute or silent movie. They must be made to talk [redacted] so to see how they apply or fail to apply in any given situation. As a [redacted]e learned Chief Justice was correct. But life must be breathed into the st[redacted]melane has not been helpful in this regard. The same is also true of the [redacted]**nes Hlatshwayo** [6]case at paragraph 17. To some extent, the latter case unde[redacted]r. The degree of delay and the prospects of success a[redacted]uacy of the reasons for the delay or non-com[redacted]of the Court to a[redacted]pondent's interest in the finality of the judg[redacted]ot be properly represented by the applicant who may be the appellant. It must [redacted]he respondent. Further, the Court has a discretion to [redacted]dicially in evaluating t[redacted] determine the presence or otherwise of the s[redacted]. In all this and th[redacted]e entire process, there is

[4] It is important that in Court or in controversial situations His Majesty's name should be avoided as far as it may be practicable.

Floyd Mlotshwa & Another v Chairperson, Elections & Boundaries Commission, Civ. Case No. 96/2018

Johannes Hlatshwayo v Swaziland Development & Savings Bank, Civ. Case No.21/2006

nothing really hard and fast. A degree of flexibility must be sustained if the Rules of Court are not to be made hard to operate with consummate effect.

[15] Generally speaking, the respondent has an interest in the finality of the judgment he has in his favour which the appellant s[redacted]. That is why Mr. Simelane so soon after 26 February applied to ha[redacted]truck off. Thus respondent's interest is also a factor to [redacted]t for the sufficient cause. In Cairns' Executors [7] In[redacted]owing

> *"With rega[redacted]ink it can be properly taken to me[redacted] to be used in a wider sense, as co[redacted]n granting relief from the operat[redacted]e so special in their circumsta[redacted] feel bound to assist the applican[redacted]and its cause must always be impo[redacted]nts to be considered in arriving at a concl[redacted]ame an exhaustive definition of what w[redacted]stify the grant of indulgence. Any attemp[redacted]e of a discretion which the rules have pu[redacted]ery extensive, [redacted]highly desirable not to abridge. All [redacted] is that the app[redacted] in the words of Cotton LJ (**In re M[redacted]nomic Socie[redacted]**), 'something which entitles him [redacted]he indulgence [redacted] something is must be decided up[redacted]mstances [redacted]n".*

[16] But the decision must [redacted] the application passes muster. This case is somehow unique. The heads of argument were due for filing on or before 26 February. On

Cairns' Executors v Gaarn 1912 SC 180 at 184

5 February Mr. Howe instructs a professional assistant to prepare the heads which Mr. Howe later approves and signs, but somehow omits giving the instruction to have the heads promptly filed with the Registr[redacted]. And further omits to follow up to ensure that the filing has been duly done. Lo and beh[redacted]ld, by due date, that is, 26 February, the heads were still not filed contrary to the Rules. T[redacted]ere can be no doubt that the applicant by its attorney was very negligent. There simply [redacted] explanation why the heads were forgotten from being filed and served. In other w[redacted]ver explanation Mr. Howe has tendered falls far too short such that even take[redacted] the prospects of success on appeal and the alleged importance of the matt[redacted] has not been established. This case is made even more difficult by the fa[redacted]licant was only alerted to the missed filing by the Notice to Dismiss or Strik[redacted]ll the appeal at the instance of the respondent. That makes the case very bad f[redacted]licant. On the face of it, the non-compliance may be said to be slight when measured [redacted]y the time of the application for condonation. The reality however is that applicant was not aware that it had not filed its [redacted]ds and that time had run out. That was a disaster on the part of the applicant and i[redacted]

[17] We must then look at the facts of the particular c[redacted]Court. Pertinently, the question is whether the applicant has set out in the four[redacted]vit anything or better still, something which entitles the applicant to ask for the i[redacted]e of the Court. As has been shown, the applicant inadvertently missed the date for[redacted] heads of argument. In my view, mere forgetfulness cannot be used to justify failur[redacted]ly with the Rules of Court since every other defaulting litigant might be minded t[redacted]ad similarly.

[18] The long and short of this application is that good and sufficient cause has not been established by the applicant to justify the exercise of the Court's indulgence in its favour. In the result the following order is made –

1. The application for condonation is dismissed with costs.

2. The appeal is struck off the roll not to be reinstated without leave of Court.