

**IN THE SUPREME COURT OF ESWATINI**

**JUDGMENT**

**HELD AT MBABANE**

**Case No.: 22/2021**

In the matter between:

**SWAZILAND NATIONAL ASSOCIATION  
OF TEACHERS BURIAL SCHEME**

**Applicant**

And

**EUNICE SHIBA**

**Respondent**

In re:

**SWAZILAND NATIONAL ASSOCIATION  
OF TEACHERS BURIAL SCHEME**

**Appellant**

And

**SENIOR MAGISTRATE SIMANGELE MBATHA N.O.**

**1<sup>st</sup> Respondent**

**EUNICE SHIBA**

**2<sup>nd</sup> Respondent**

**THE ATTORNEY GENERAL**

**3<sup>rd</sup> Respondent**

**Neutral Citation:** *Swaziland National Association of Teachers Burial Scheme vs  
Eunice Shiba (22/2021) [2022] SZSC 66 (20/12/2022)*

**Coram:** S.P. DLAMINI JA; R.J. CLOETE AJA AND M.J.  
MANZINI AJA.

**Date Heard:** 08 November, 2022.

**Date Delivered:** 20 December, 2022.

**SUMMARY** : *Civil procedure – Appeal – Appeal, Application for extension of time and Condonation of late filing of Heads of Argument and Bundle of Authorities all having been overtaken by events – Applicant urging Court to determine abstract issues – Whether competent to decide abstract issues.*

*Held: Court ought not to engage abstract issues and render advisory opinions – Appeal and ancillary applications dismissed with costs.*

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## JUDGMENT

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**M.J. MANZINI, AJA:**

- [1] Before us is an Appeal noted on the 3<sup>rd</sup> May, 2021 (*the "Appeal"*); Notice of Motion in terms of Rule 16(1) launched on the 22<sup>nd</sup> September, 2021; and a Notice of Motion for Condonation of the late filing of Heads of Argument and Bundle of Authorities, launched on the 20<sup>th</sup> October, 2022 (*"the ancillary applications"*).
- [2] The Applicant is Swaziland National Association of Teachers Burial Scheme (SNAT Burial Scheme), who is the Appellant in terms of the Notice of Appeal to this Court against a Judgment handed down by the High Court (per Nkosi J, as he then was) on the 14<sup>th</sup> April, 2021. For convenience sake Appellant shall be referred to as Applicant. The Respondent is Eunice Shiba, who originally filed a claim against the Applicant in the Magistrate's Court, where the initial dispute between the parties played itself out.
- [3] According to the Record of Proceedings and all other pleadings before us, Respondent sued out summons in the Manzini Magistrates Court claiming payment of E15,000.00 (Fifteen Thousand Emalangeni) from Applicant in respect of burial expenses for her deceased husband. In the summons she alleged that a verbal agreement had been concluded between her and

Respondent in terms of which the latter would pay certain burial benefits should her spouse die. The amount promised was E15,000.00 (Fifteen Thousand Emalangi) in return for which she would pay premiums of E13.00 (Thirteen Emalangi) per month. She alleged that she duly paid her premiums in accordance with the agreement. She further alleged that her husband passed away on the 17<sup>th</sup> September, 2018, and, therefore, Respondent was liable to pay her the funeral benefit agreed upon by the parties.

[4] Respondent resisted the claim. Pleadings were exchanged and the matter was eventually set down for trial before Senior Magistrate Simangele Mbatha.

[5] The trial commenced, and in the course of cross-examination Applicant's Attorney put questions to Respondent in relation to the contents of a document said to be the "Bye Laws" of the Respondent, and this was met by an objection from Respondent's Attorney on the ground that the document forming the basis of the questioning had not been discovered in accordance with the Magistrate's Court Rules. The objection was upheld.

[6] Dissatisfied with the adverse Ruling of the Senior Magistrate, Applicant launched urgent review proceedings at the High Court. Applicant prayed for various reliefs, the main being an order reviewing, correcting and setting aside as irregular and unreasonable the decision of the Senior Magistrate.

[7] The matter came before Nkosi J. (as he then was) who heard arguments by the parties, and thereafter issued an Order remitting the matter back to the Magistrate's Court for continuation of the trial.

[8] Respondent subsequently noted an appeal against this Order. We are currently seized with this first appeal. During the course of his oral address to this Court Counsel for the Applicant confirmed that the trial was concluded by the Senior Magistrate and Judgment entered in favour of Respondent. An appeal (the second appeal) was noted against this Judgment, and it is pending before the High Court. So, in effect there are now two appeals pending before this Court in respect of this matter.

[9] The appeal serving before us was noted on the 3<sup>rd</sup> May, 2021. The trial was concluded by the Magistrate's Court as per the Order of the High Court, notwithstanding the appeal. In light of these developments we took the view that is it not competent for this Court to entertain and decide the appeal and ancillary applications considering the fact that the proceedings which the High Court had been asked to review, correct and set aside were actually concluded. Effectively, the High Court Order which is the subject of the appeal was implemented, and the trial concluded. Counsel for both parties were invited by this Court to specifically address this point.

[10] Applicant's Counsel urged this Court to determine the appeal and ancillary applications, notwithstanding conclusion of the trial by the Court of first instance and the second pending appeal. Counsel contended that the High Court's refusal to deal with the merits of the review application and consequent remittal to the Magistrate's Court constituted a violation of Applicant's right to a fair hearing, which is guaranteed by Section 21 of the Constitution of Eswatini, 2005. He argued that the Ruling of the Senior Magistrate was itself a violation of the right to a fair hearing. He further argued that Applicant was entitled to approach the High Court to enforce its right to a fair hearing as provided by Section 35, which deals with enforcement

of protective provisions of the Constitution. He further contended that this Court ought to make a determination which would benefit other litigants and give clear directives as to when Section 35 applies.

[11] Respondent's Counsel, on the other hand, submitted that Applicant's arguments stood to be rejected, as it (Applicant) was essentially seeking this Court's opinion on the application of Section 35. He submitted that the issues raised by Applicant were moot, as they had clearly been overtaken by the conclusion of the trial and subsequent noting of an appeal. He further submitted that, in any event, Applicant had not been denied a fair trial by the Magistrate's Court. He highlighted that Applicant's Counsel was actually advised to apply for leave of Court to use or cross-examine Respondent in relation to the documents which had not been discovered, but he refused to do so and opted instead to approach the High Court. He argued that order XVII (4) of the Magistrate's Court Rules made provision for applying for leave of Court to use a "*book or document*" not discovered. It was argued that Applicant's arguments stood to be rejected, as a failure to apply for leave under Order XVII (4) could not amount to a violation of Section 21 of the Constitution.

[12] It is trite law that Courts should generally decline to entertain litigation in which there is no live or existing controversy. This is principally for the benefit of the Court so as to avoid it being called upon to pronounce upon abstract propositions of law that would amount to no more than advisory opinions.

See: Masuku v Director of Public prosecutions and Another (14 of 2002)  
[2002] SZSC 28 (10 June, 2002); Rex v Ndumiso Lawrence  
Shongwe (13/2002) [2022] SZSC 14 (22 September, 2022).


[13] In *casu*, it is common cause that the High Court Order which is the subject matter of the appeal was implemented, the trial subsequently concluded, and judgment entered against Applicant. Deciding whether that Order was rightly or wrongly made would undisputedly be an academic exercise. Setting aside the Order would be of no practical value to Applicant, as the Senior Magistrate is now *functus officio*, and there is an appeal against her judgment. This Court cannot engage matters which are abstract and render a Judgment which would, for all intents and purposes, be an advisory opinion.



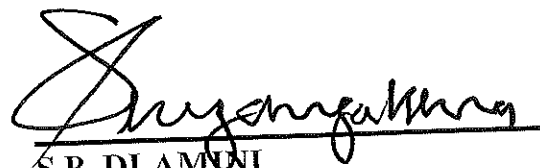
[14] In the circumstances, the appeal and ancillary applications all stand to be dismissed with costs on the ordinary scale.

[15] **ORDER:**

1. The Appeal is dismissed.
2. The Notice of Motion in terms of Rule 16(1) is dismissed.
3. The Notice of Motion for Condonation of the late filing of Heads of Argument and Bundle of Authorities is dismissed.
4. Appellant is to pay costs in respect of the appeal and ancillary applications.

  
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M.J. MANZINI  
ACTING JUSTICE OF APPEAL

I agree

  
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S.P. DLAMINI  
JUSTICE OF APPEAL

I agree

I agree



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R.J. CLOETE

ACTING JUSTICE OF APPEAL

**For the Applicant:**

P.K. MSIBI AND Z. DLAMINI (DLAMINI  
KUNENE ASSOCIATES)

**For the Respondent:**

B.J. SIMELANE (BEN. J. SIMELANE AND  
ASSOCIATES)