IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIVIL CASE NO: 36/2021**

In the matter between:

THABSILE DAPHNE MKHATSWA Applicant

and

ESW INVESTMENT GROUP LTD Respondent

In re:

ESW INVESTMENT GROUP LTD Applicant

and

THABSILE DAPHNE MKHATSWA Respondent

Neutral Citation: *Esw Investment Group Ltd v Thabsile Daphne Mkhatswa (36/2021) [2023] SZSC 21 (15 June 2023)*

CORAM: **S.P. DLAMINI JA**
S.J.K. MATSEBULA JA
J.M. VAN DER WALT JA
M.J. MANZINI AJA
L.M. SIMELANE AJA

HEARD: 31 May 2023

DELIVERED: 15 June 2023

Summary: *Application for review in terms of* ***section 148*** *of the Constitution of the Kingdom of Swaziland Act 2005 – Application to condone the late filing of Heads of Argument and Bundle of Authorities – Held to be practical, reasonable and commensurate with common sense, justice and fairness, that provisions and requirements of* ***Rule 31*** *shall apply mutatis mutandis to such applications for review – Since legislation and Rules of Court not promulgated regarding procedural matters – Court in exercise of its inherent powers may regulate its own processes and procedures in manner which would enable practical justice to be administered and matters to be handled along practical lines – Held that since the first review case this Court has been in the process of formulating its procedures – Held that the application for condonation demonstrates a care free approach to the practice regarding dies in the prosecution of such application before this Court and stands to be dismissed with costs – Held that however, in the interest of justice the Court accepts the late filing of the Heads of Argument and Bundle of Authorities in line with Rule 33(3).*

JUDGMENT

S.P. DLAMINI JA

INTRODUCTION

[1] The main matter before this Court is an application for review in terms of **section 148(2)** of the **Constitution of the Kingdom of Swaziland Act 2005** which was postponed to the next session of this Court, pending the determination of an opposed application for condonation in respect of filing of heads of argument herein.

PARTIES

[2] The applicant in the application for condonation is the respondent in the review matter and for current purposes, will be referred to herein as the "Applicant."

ISSUES

[3] The issue falling for determination by this Court is whether the Applicant has satisfied the requirements for condonation in order to persuade this Court to exercise its discretion and condone the

late filing of the Heads of Arguments and Bundle of Authorities.

[4] Further, whether the Respondent's opposition to the application for condonation has the necessary merit to compel the Court to dismiss the application.

[5] A crisp issue soon materialized during the course of argument by Counsel to wit what time parameters, if any, find application to filing heads of argument in such review matters. It was common cause that neither the Constitution nor any other statute, nor any Rules of Court currently regulates the position pertaining to such review matters and that **Rule 31** of the Rules of this Court, in dealing with heads of argument, grammatically deal with same in the context of appeals only.

APPLICANT'S CASE

[6] Mr Simelane for the Applicant urged the Court to hold, insofar as heads of argument may be required in review proceedings, that the "*reasonable time*" common law position should prevail in respect thereof and consequently, that the Applicant's heads of argument,

on Mr Simelane's assessment, had been filed within a reasonable time. Mr Simelane also submitted that the Applicant's application was in order in all respects.

RESPONDENT'S CASE

[7] Mr Maphalala for the Respondent argued to the effect that "*reasonableness*" is possessed of a high degree of uncertainty and that the existing Rules of this Court should take precedence, in accordance with which the Applicant's heads of argument would have been filed out of time. Further, that the requirements for condonation have not been met.

APPLICABLE LEGAL PRINCIPLES

[8] The requirements for condonation are trite; they have been spelled out, expounded and repeated in a plethora of authorities, as being a full and satisfactory explanation for the delay and good prospects of success.

[9] The following passages from ***SIKHUMBUZO MATSEBULA V MBABANE MUNICIPAL COUNCIL CASE NO.84/2022 [2023] SZSC 14 (17TH MAY 2023)*** address the exigency where the Rules

are silent regarding certain aspects of applications for leave to appeal:

> *"[19] It is trite that the rules exist for the courts and not the other way around.*
>
> *19.1 As emphasised in **Arendsnes Sweefspoor CC v Botha, [2013] (5 SA 399 (SCA), paragrphs [18] and [19],** considerations of justice and fairness are of prime importance in the interpretation of procedural rules.*
>
> *19.2 Where the Rules are silent on an issue, the Court has inherent powers to regulate its own procedures and processes. As was laid down for instance in **Brown Bros. Ltd. v Dois [1995](1) SA 75(W) at 77, reaffirmed e.g inRepublikeisies Publikssies (Edms) Bpk v Sfrikaanse Pers Publikasies (Edms)Bpk 1972(1) SA 773 (A) and S v Malindi and Others 1990(1) SA 57 (A)]***
>
> *"In my view this is a case where the Rules of Court as framed do not provide for one particular set of circumstances which can arise, and I think that the Court has inherent power to read the Rules applicable to the procedure of the Court in a manner which would enable practical justice to be administered and a matter to be handled along practical lines."*
>
> *[20] Vis-a-vis applications for leave to appeal, the Rules do not expressly mention a notice of intention to raise points of law, or heads of argument. The apparent absence of pronouncements on these issues calls for clarification in order to promote legal certainty and, in casu, by way of regulation by this Court in the exercise of its inherent powers, of its processes and procedures."*

[10] In our opinion, the same considerations hold true in respect of heads of argument in review matters.

[11] In the case of ***ATTORNEY GENERAL VS. THE MASTER OF THE HIGH COURT*** **CASE NO 55/2014 [2014] SZSC10 (30TH JUNE 2016), paragraph [56]** the issue as to within which time

frame such review proceedings should be instituted, was expressly raised and then decided by this Court. It was held therein that such proceedings should be brought within a reasonable period of time pursuant to the delivery of the impugned judgment and that the test in determining what is reasonable, is an objective test.

[12] Counsel have been unable to refer the Court to any cases in point wherein the issue of filing of heads of argument in review matters, within any prescribed time periods or at all, expressly had been raised and decided. The Court also has been unable to locate any such judgments.

ANALYSIS

[13] In assessing the respective submissions on behalf of the parties, we take into account the following:

13.1 "*Reasonableness*" is a relatively nebulous concept. The question arises as to against which criteria, in particular, reasonableness should be measured. Put differently, in colloquial terms, the concept poses the vexing question of how long a piece of string is.

13.2 Facts and circumstances prevailing in different matters prior to institution of review proceedings may be fluid and divergent and may require case-specific examination and analysis. Different factors and/or parameters may constitute appropriate criteria for reasonableness on an ***ad hoc*** case-to-case basis.

13.2.1 Once a matter has been registered in a court, however, a road mapped administrative process is triggered and the landscape changes to one where practicality and efficient administration demands uniformity, which is provided by extant Rules that have stood the test of time.

13.2.2 By way of demonstration, if a case-specific determination should be made in respect of each and every appeal noted as to when it would be reasonable to file heads of argument, the proper functioning of this Court will be crippled, if not completely paralysed.

13.3 There is no apparent reason why the Rules relating to appeals should not ***mutatis mutandis*** find application to reviews:

13.3.1 At the very least the same appeal record that was placed before the Court in its appellate jurisdiction would be before the same Court in its review jurisdiction, but with the addition of the appeal judgment sought to be impugned and the papers filed of record in the review application.

13.3.2 It would then follow, logically, that it would be unreasonable to permit filing of heads of argument in respect of reviews, within a shorter time period than in respect of appeals.

13.4 The following observations in the ***SIKHUMBUZO MATSEBULA*** case *supra* would apply with equal force to reviews:

> ***"27.1 Applications for leave to appeal require meticulous consideration of the facts and/or the law, in order properly to assay prospects of success, and these matters can be quite complicated. It goes without saying that any suggestion that heads of argument need not be filed in respect thereof, would be untenable.***

> ***27.2 Filing of heads of argument at whatever time a party may deem fit to file, does not pass muster either and to suggest that the Court should be approached ad hoc to issue directives as to the filing of heads of arguments, would suggest a cumbersome and unbusiness like practice.***
>
> ***27.3 There appears to be no cogent reason for the same time line not to apply where leave to appeal is applied for, more so since applications for leave to appeal are captured and scheduled in the same Court roll as appeals. Imposition of the same time lines by reading "appeals" in Rule 31, for the purpose of this Rule, to include "applications for leave to appeal," in my considered view would enable practical justice to be administered and would allow for applications for leave to appeal to be handled along practical lines.***

[14] Taking cognisance of all of the above considerations, it is practical and reasonable, and commensurate with common sense, justice and fairness, that said **Rule 31** shall apply *mutatis mutandis* to reviews, and we so hold accordingly.

[15] This conclusion would marry Counsel's respective promotions of reasonableness on the one hand, and not reinventing the wheel where Rules are extant, on the other hand.

[16] Furthermore, when the Constitution was adopted in 2005, it established the Supreme Court and vested it with both appellate and review jurisdictions. For the appellate jurisdiction, it exercised the powers of the then Court of

Appeal including applying the rules and procedures that were exercised by the Court of Appeal. It is illogical in that the exercise of its appellate jurisdiction Rules apply but in its review the Rules are not be applied by the Supreme Court.

[17] To conclude otherwise would render this area of our law chaotic; thus undermining proper access to justice thereby compromising the Rule of law which is one of the pillars of the justice system.

CONCLUSION

[18] In a nutshell, we are in agreement with Counsel for the Respondent that the application falls short of what is required and, we would add, so woefully falls short. Accordingly, the application stands to be dismissed.

[19] Fortunately for the Applicant, this Court enjoys a discretion to grant or refuse an application for condonation. In view of the perceived prior absence of legal certainty on the issue and the fact that an unequivocal pronouncement thereon has been

wanting, the Court ***mero mutu*** accepts the late filing of Respondents Heads of Argument and Bundle of Authorities.

[20] The considerations persuading the Court to take this approach are;

20.1 Firstly, there will be no prejudice suffered by the Respondent as a result of the Court accepting Applicants Heads of Argument and Bundle of Authorities in view of the fact that the main application has been postponed to the next session.

20.2 Secondly, is that there was an effort to file the Heads of Argument and Bundle of Authorities a few days after the ***dies.***

COMPUTATION OF DIES

[21] The issue as to whether ***dies*** is computed in terms of calendar or Court days was raised by Counsel for Respondent in relation to the filing of the Respondent's Heads of Argument. My view is that whatever uncertainty might have existed such uncertainty ought not

to exist after the latest judgment of this Court on the issue. In the matter of **TUNTEX TEXTILE & ANOTHER VS ESWATINI GOVERNMENT & OTHERS (86/2018) [2018] SZSC 28 (31ST MAY 2019)** penned by His Lordship S.J.K. Matsebula JA, wherein the Learned Judge stated the following at paragraph 14 of the Judgment;

> ***"...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 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."***

COSTS

[22] As for costs, the general rule that costs follow the result is not an absolute rule. The Court retains a discretion, to be exercised in accordance with that is equitable and just. Having regard to the material shortcomings on the merits of the Applicant' application,

this is an instance where it would not be fair that the Respondent be mulcted in costs.

COURT ORDER

[23] Accordingly, it is ordered that:

1. The application for condonation is dismissed.

2. The Court ***mero mutu*** and in terms of Rule 33(3) accepts the Applicants heads of Argument and Bundle of Authorities.

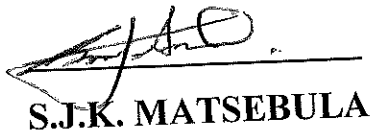
3. The Rules applicable to appeals apply ***mutatis mutandis*** to review applications before this Court and for the purposes of computing the ***dies***, Court days are considered.

4. The application for review is to take its course.

5. The Applicant is to pay the costs of this application.

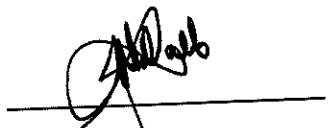
S.P. DLAMINI JA

I agree



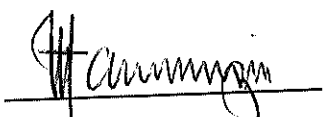
S.J.K. MATSEBULA JA

I also agree



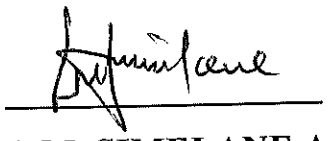
J.M. VAN DER WALT JA

I also agree



M.J. MANZINI AJA

I also agree



L.M. SIMELANE AJA

FOR THE APPLICANT: **S.M. SIMELANE**
SM SIMELANE AND COMPANY

FOR THE RESPONDENT: **P. MAPHALALA**
S.V. MDLADLA AND ATTORNEYS