IN THE SUPREME COURT OF ESWATINI

JUDGMENT

CASE NO. 100/2018

HELD AT MBABANE

In the matter between:

The Prime Minister	1st Applicant
The Minister of Justice and Constitutional Affairs	2nd Applicant
The Attorney General	3rd Applicant
And	
Michael Vusane Masilela	Respondent

Neutral Citation: The Prime Minister, Minister of Justice and The Attorney General vs.Michael Vusane Masilela... (100/2018) [2023] SZSC.38. (13th September, 2023)

Coram : **MJ Dlamini, JP Annandale, SJK Matsebula, JM Currie, MD Mamba JJA**

Heard : 25 August 2023

Delivered : 13 September 2023

Civil Procedure: Non-compliance with time limits – Failure to lodge record in time – Application for condonation – Sufficient cause – Degree of delay not alarming – Appellants having reasonable prospects of success - Importance of the matter to the Applicants – No prejudice to Respondent – Condonation granted

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JUDGMENT

M.J. Dlamini JA

Introduction

[1] In this matter there was the application for reinstatement, fully opposed and had reached stage of hearing; there was the application for deeming the appeal abandoned in terms of Rule 30 and had also reached hearing, also opposed, and there was this application for condonation for the late filing of the record. There were also applications for the late filing of heads in one or another of the applications before court. On my first meeting with the parties for the purpose of setting a date for the hearing of these diverse applications and counter-applications, I had considered it prudent to expedite the hearing of the appeal, it being relatively the more important object in the process. After allowing the parties a short break to consider ways and means of hitting the target, I thought as consensus had been reached by the parties to abandon the preliminary issues and hear the appeal on the set date. It being generally accepted that the appellants may be at fault, Respondent wanted costs in his favour. That was briefly considered and resulted in costs to be in the cause. But, alas, on the date set for the hearing, the edifice came down crushing like a house of cards at the instance of the Respondent who still wanted a determination on condonation for the late record. It sounded contradictory: it may have been due to a 'typo' in the order that turned out to have been issued. That is now water under the bridge.

This application

[2] This is a condonation application for the late lodging of the record. When the Court could not begin with the hearing of the appeal as had been anticipated, a short break to obtain the recording of what had happened on the first day, the parties had occasion to consider the way forward. When the Court reconvened, we were informed by the learned Attorney-General (for the Appellants) that a tender had been offered to but rejected by the Respondent. The result was that the application for condonation be heard then and defer the appeal indefinitely or pending the outcome of the condonation application.

[3] The appealed judgment was delivered on 22 October 2018. The appeal in question was noted on 21 November 2018. The record on appeal was lodged with the Registrar of **this Court on 13 February 2019**. This lodging was some three weeks late. Rule 30 (4) prescribes that unless there is an extension of time, if a record of appeal is not lodged within a period of two months from date of noting the appeal, the appeal shall be deemed to have been abandoned. However, Rule 17 of the Rules of this Court states that a litigant who has failed to comply with any rule of the Court may apply for condonation. In the application for the Court's indulgence, the litigant must show sufficient cause.

[4] After the alleged lodging of the record, seemingly nothing happened; both parties seemingly went on vacation. The apparent explanation for the lull was that the Respondent had been unable to secure a place in the Senate and it would be some four years or so next before there was need to employ the services of the impugned section 5(3). This *lacuna* in the process is partly covered in the founding affidavit of 2nd Appellant in the quest for reinstatement of the appeal:

> "12. There arose a supervening event that derailed the appeal. As neither Chairperson of the Elections and Boundaries Commission nor Clerk to Parliament who conducted the Senate elections was cited and /or interdicted, the elections were proceeded with on or about 28 November 2018. The Respondent was not nominated into the Senate on that second occasion. The appeal was thereby rendered nugatory.

13. The appeal was thus not pursued by both the Appellants and the Respondent. Neither did the Registrar of the Supreme Court cause the appeal to be enrolled. No heads of argument had been filed by both parties in the evidently moribund appeal".

[5] As already stated above, on 18 April 2023, the Appellants applied for the 'reinstatement' of the appeal. Somebody within the circle of the Appellants must have remembered that the validity or otherwise of section 5 (3) had not been finally settled at appeal level. This was about four years down the line and elections were again due soon. The Appellants (hurriedly) applied for 'reinstatement' of the appeal as if the appeal had earlier been on the roll but later removed therefrom. Unfortunately for the Appellants, reinstatement is harder to justify than instatement. The latter is normally at the instance of the Registrar, with or without support of the litigant(s). In other words, if the appeal, with the record lodged, had not been enrolled for hearing, the Appellants needed only to request the Registrar to so enroll it – unless there was reason not to so enroll without a hearing. The issue before Court is thus not that the record of appeal was not lodged, but that is was lodged out of time requiring the granting of condonation to clear the way for hearing the appeal.

General

[6] Herbstein and van Winsen [1] write:

(a) "It has been observed that a failure by a party to comply properly or timeously with the rules governing appeals may in its discretion be condoned by the Court of Appeal. Particular provision on the point is made by statute or rules of court…but the court has in any event inherent jurisdiction to grant relief even in the absence of any such provision", at p.1227.

[1] **The Civil Practice of the High Courts of South Africa**, 5th Edition (Vol. 2)

(b) **"In Suidwes-Afrikaanse Munisipale Personeel Vereniging v Minister of Labour** (1978 (1) SA 1027 (SWA) at 1038 B-C), Hart AJP held that the principle has now been firmly established that in all instances of time limitation, whether statutory or in terms of the rules of court, the Supreme Court had an inherent right to grant condonation when principles of justice and fair play demand it to avoid hardship and when the reasons for non-compliance with time limits have been explained to the satisfaction of the court" (p. 1227-8).

(c) "The Supreme Court of Appeal and other courts have consistently refused to frame an exhaustive definition of what will constitute sufficient cause to justify the grant of indulgence:

> 'Any attempt to do so would merely hamper the exercise of a discretion which the Rules have purposely made very extensive, and which it is highly desirable not to abridge. All that can be said is that the applicant must show…'something which entitles him to ask for the indulgence of the Court'" (p.1228).

[7] As we have indicated the record of appeal was lodged about three weeks out of time. The Respondent only applied to have the appeal deemed abandoned after Appellants applied for reinstatement. It has been said over and over that rules of court must be obeyed. If Appellants did not comply with Rule 30 (4), it was equally incumbent on the Respondent to also comply by launching a reasonably timeous application for the order declaring the appeal abandoned. In this regard, the parties are equally guilty. From February 2019 to date (4 May 2023) is an unreasonable period to wait before seeking a remedy as the Respondent has done. This is to be contrasted with whether in all the circumstances of the case the period of about three weeks is such a delay as must not be condoned. The importance of the issue lies in that it concerns the invalidation of a statutory provision,

regulating membership to Parliament, and not the 'licensing of dogs'. Questions of prejudice, if any, to Respondent and prospects of such also rally for consideration.

[8] The application for condonation was only made after the Respondent applied for the appeal to be deemed abandoned. But that was after the Appellants had applied for the reinstatement. Deponent for the Appellants states that at the time he lodged the record, which was already late, he overlooked the fact that he had not applied for condonation: this according to him "flipped out of his mind ..." The reason for not lodging in time, on or before 20 January 2019, was that that was the time of the year which coincided with important end of year national events, such as *Incwala* ceremony. He concedes labouring under the mistaken belief that similar to the High Court the period between 16 December and 7 January was "excluded from computation of *dies*" even for this Court. Deponent avers: "7...That period is busy on the national calendar and end of year ceremonies...I, myself lost track of the *dies* while attending the national *Incwala* ceremony in the same period." Deponent has attached a letter from the Eswatini National Administration to the Principal Secretary, Ministry of Justice and Constitutional Affairs dated 14 December 2018 requesting for the services of the deponent, reporting at "Ludzidzini Royal Residence on the 17th December 2018 until the end of *Incwala* ceremony". Deponent concludes by stating that he was alerted to the need to file for condonation by the Respondent's answering affidavit to the application for reinstatement.

[9] Deponent avers that time for election has again arrived and the need to have the appeal concluded has become very urgent, for obvious reasons. He records that it is their appeal that the "Court *a quo* erred in law in its determination that Section 5 (3) of the Senate (Elections) Act, 7 of 2013 is inconsistent with Section 20 of the Constitution...in that it is discriminatory in its nature and its effect..." Deponent further asserts "... I maintain that the High Court judgment found discrimination where none existed. The Act only differentiates between the first-timers and second-timers. This is logical... It is not in any way arbitrary". There is accordingly a reasonable prospect of success. And this must be assessed in light of the "extreme importance" of the case to the Appellants (Respondents

then). He urges that "it is imperative to the fair administration of justice" that the matter be aired in this Court, as "the Appellants have a legitimate and proper case to bring to the attention of the apex court for its determination rather than disposing of it on mere technicality". The result has "much wider consequences than just the matter between the parties..." having regard to the "national parliamentary elections". The late filing will not prejudice the Respondent, so submits the deponent on behalf of the Appellants.

[10] In his heads of argument, the Respondent says that Appellants were late in lodging the record by 37 days, counting two months from date of noting the appeal, to wit, 21 November 2018. According to Respondent, Appellants were due to lodge the record not later than 6 January2019. Without much argument, Respondent is mistaken in his calculation of the delay period in terms of Rule 30 (1). The correct date of expiry of the two months period is 20 January, 2019 not 6 January 2019 and therefore not 37 days but 21/22 days' (about three weeks) delay. Respondent further states that the condonation application was four years late. It is noted in this regard that the issue here is lateness of the lodging of the record of appeal not the lateness or otherwise of the application for condonation. In any case, Respondent was also four years late in applying for the deeming of the appeal to be abandoned.

[11] The question of good or sufficient cause for the delay must then be assessed in light of the background information. The rules of court must be obeyed. In cases like the present, the rules leave it to the parties to settle the score. If the Appellants were late on the record and or the application for condonation and if the condonation fails, the Respondent may have to show that his application for the declaration that the appeal was abandoned was itself not unduly late, it, also being about four years out of time. A case must be made for every application to court.

[12] We note the explanation given by the Appellants, including the prospect of success and absence of prejudice to Respondent, and the importance of the case to the Appellants and the nation at large. The explanation for the non-compliance may be short but is not

entirely uncreditable. At that time of the year, the deponent who was responsible for handling the appeal says that he was called upon to be elsewhere away from office resulting in the matter escaping his immediate attention. What we can say is that the non-compliance was not flagrant and the period of the non-compliance is not alarming. For the non-compliance to be flagrant must be committed during a time or period when the applicant was aware of the breach but deliberately did nothing about it. The delay in the lodging of the record should be separated from any other delay such as the application for condonation. For the flagrant disregard of the rules, reference may be made to the case of **P.E.Bosman Transport** [2] where Muller JA stated:

> "In a case such as the present, where there has been a flagrant breach of the Rules of this Court in more than one respect, and where in addition there is no acceptable explanation for some periods of delay and, indeed, in respect of other periods of delay, no explanation at all, the application should, in my opinion, not be granted whatever the prospects of success may be".

[13] In the present case, I cannot say that the breach was flagrant and unforgivable. This does not mean that the delay is not without any fair criticism such as the lapse in attention on the part of the deponent. The question always is whether the applicant has made out a case for the relief sought, that is, whether sufficient cause has been shown to exist for the Court to grant the relief prayed for. In **Cairn's Executors** [3] Innes J observed:

> "Cases might conceivably arise so special in their circumstances that, in spite of abnormal delay, the Court would fill bound to assist the applicant. But on the other hand the length of the delay and its cause must always be important (in many cases the most important) elements to be considered in arriving at a conclusion. It would be quite impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of indulgence. Any attempt to do so would

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[2] **P.E. Bosman Transport Works Committee and Others v. Piet Bosman Transport (Pty) Ltd** 1980 (4) SA 794 (AD) 799 D-E.

[3] **Cairn's Executors v Gaarn** 1912 AD 180, 184

merely hamper the exercise of a discretion which the rules have purposely made very extensive, and which it is highly desirable not to abridge. All that can be said is that the applicant must show, in the words of Cotton LJ (**In re Manchester Economic Society,** 24 Ch. D. at p. 498), 'something which entitles him to ask for the indulgence of the Court'. What that something is must be decided upon the circumstances of each particular application".

[14] *In casu,* are the Appellants estopped from asking for the Court's indulgence? I do not think so, in light of the circumstances alleged. In **Melane v Santam Insurance** [4] Holmes JA stated:

"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 that are 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".

[15] On the promptness of applying for condonation, Respondent contends that when Appellants' deponent lodged the record but realized that is was late deponent also realized that condonation was needed. But deponent says that was not so, the need to apply for condonation escaped his mind at the time and did not realise the necessity to do so until the Respondent's **application to have the appeal declared deemed to be abandoned.** The period between the Respondent's application to have the appeal declared deemed to

[4] **Melane v Santam Insurance Co Ltd** 1962 (4) SA 531 at 532 cited in **Swazi Auctioneers (Pty) Ltd and Others v Swaziland Development and Savings Bank** [2017] SZSC 15 at [8] & [15]

be abandoned and the application for condonation is according to deponent not four years but ten days, being the period between the filing of the application to deem abandonment of the appeal and the 15 May 2023 when deponent applied for the condonation. Appellants admit being in breach of Rule 30 but contend that in all the circumstances of the case they have given a reasonable explanation and that on a conspectus of all the relevant facts they ought to be granted condonation.

[16] In his answering affidavit the Respondent rejects the explanation tendered for the delay in lodging the record. Respondent also asserts that the period 16 December to 7 January should never have been any problem to Appellant's deponent as Rules of this Court are clear. The Respondent continues (Ad para 8):

> "8. The contents thereof are denied. This issue has not become live again merely because it is an election year. The Applicants herein were, I am informed by my attorney, sent a letter in February 2019 alerting them that the Record was filed out of time. I note that the letter is dated 2018 but, I am advised this is an error and it was actually served in 2019.
>
> A copy of the letter is annexed hereto and marked LI".

Unfortunately, there is no such 'LI' attached to the affidavit. And nowhere else in the proceedings has the letter been mentioned. Even then as Wessels, JA says: "This Court is understandably loath to penalize a blameless litigant on account of his attorney's negligence. Nevertheless, practitioners ought to realize that circumstances may arise which could impel this Court to do so. In such event, the unfortunate litigant's only remedy may be an action for damages against the negligent attorney." [5]

[17] According to Respondent, there are no prospects of success on the merits: "There is no discernible reason to bar a citizen for exercising his/her constitutionally entrenched right to stand for elections to the Senate having failed to become a Member of Parliament",

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[5] **Reinecke v. Incorporated General Insurances Ltd** 1973 (2) SA 84 (AD) at 92F-G

because the Senate and the Assembly are distinct organs or bodies, contends Respondent. I can only say here that the entrenching provision has not been cited. Section 84 which is specially entrenched gives Respondent no right to stand for elections; and section 85 (1) which is generally entrenched protects the right to vote but not to stand for elections. As to whether Respondent still has a live interest likely to be prejudiced by grant of the condonation, one factor to consider is the fact that the Respondent is no longer in the same situation in which he was when he launched the application in 2018, and that is why, I think, in part, the matter has been allowed to drag on for so long. It cannot be said that Appellants have no prospects of success in the appeal.

[18] Whilst I agree with the judgment in **De Barry Anita Belinda** case, I think that the magnitude of the delay renders that case unhelpful in this matter. In that case, notice of appeal was filed on 5 June 2015 and the Record of Appeal lodged on 4 February 2016. The periods of delay are largely incomparable, other factors being equal.

[19] In **Moodley v Town Board** [6] leave to appeal was granted on 21 July 1995 and the record of the proceedings was in terms of Rule 5 (4) (c) due for lodging on or before 21 October 1995: "The record was only lodged on 6 March 1996, approximately 4 months later than it should have been," noted Mahomed CJ at p. 60d. At p. 61c-d, the learned Chief Justice states as follows:

> "In the result the record was lodged some four months after the date on which it was required to be lodged in terms of Rule 5(4). The explanation for part of this delay is not very persuasive, but what is clear is that the appellant was determined to pursue the appeal which had serious consequences for him. In my view the degree of non-compliance is, in the circumstances of this case, not so substantial as to itself justify a refusal of the application for condonation for the appellant's failure to file the record of the proceedings timeously **(Federated Employers Fire & General Insurance Co. Ltd and Another v McKenzie** 1969 (3) SA 360 A at 362 G;

[6] **Moodley v Town Board of the Town Council, Umzinto North** 1998 (2) SA 57 (SCA)

National Union of Metal Works of South Africa v Jumbo Products CC 1996 (4) SA 735 (A) at 741 E-I). The decisive issue is whether the appeal has any prospects of success on the merits". *In casu,* the delay is much less than four months.

[20] In the summary to the **Moodley v. Town Board** case, at p. 58, the judgment reads:

"With regard to the application for condonation of non-compliance with the time limit in Rule 5(4) (c), the Court held that the Appellant's degree of non-compliance with the Rules was not substantial and although he had failed on the merits, the argument advanced on his behalf could not be said to have had no reasonable prospects of success"

[21] The **Federated Employers Fire** case 'succinctly formulated' the principles usually relied upon in matters of condonation, as follows (at p362 F-H), bearing in mind always that none of these factors is individually decisive:

'(T)he factors usually weighed by the Court include the degree of non-compliance, the explanation therefor, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice; ..."(See **Byron v Duke Inc** 2002(5) SA 483 9(SCA) para [2], per Zulman JA where, at para [4], the learned Justice stated:

"It is apparent from the afore-going history that there were a number of instances where the Rules of Court were not complied with. Furthermore, inadequate and indeed, in some cases, no explanation is given for such non-compliance. I do not believe, however, that the non-compliances in question were so flagrant and gross that merely because of them the application for condonation should be dismissed without considering the appellant's prospects of success on appeal (...)"'.

Conclusion

[22] At stake is the invalidation of a statutory provision and it would be most unfortunate if the invalidation were to be confirmed and finalized by a technical default. Also, Respondent no longer has a live interest in the matter as against the live interest of the Appellants. Even the matter of discrimination is not a simple instance of differential treatment of persons. The facts of the individual instance must be carefully considered. The striking down of a statute is a constitutional issue of some significance which deserves a second consideration in particular by the highest Court in the land. As was stated in **Glenister:**[7] "However, what weighs heavily in favour of granting condonation is the nature of the constitutional issues sought to be argued in the intended appeal, as well as the prospects of success." The case before Court concerns the authority of Parliament to regulate and protect its integrity by streamlining its qualification for membership. In this regard, the public at large has an overriding interest in the appeal being heard and not frustrated by issues of condonation for late lodging of the record.

[23] It will be noted that in the **Glenister** case the Court observed that "the explanation furnished for the delay [was] utterly unsatisfactory," but in consideration of what it called "constitutional issues of considerable importance" felt justified to grant condonation "in the interest of justice". *In casu,* the Court is faced with an issue of similar constitutional importance and, what is more, I cannot say that the explanation given for the delay is "utterly unsatisfactory", that is, that at about that time of the year the officer handling the matter was deployed away from the Chambers of the Attorney-General. The weight to be attached to the explanation given by Appellants' deponent depends a lot on the significance one accords to the letter from eSwatini National Administration. I cannot fail to pay due attention to the letter with the result that when lodging of the record ran out of time deponent may be said to have been on a frolic of his own. The Court cannot turn a blind eye to the letter even if it be not a full explanation.

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[7] **Glenister v President of the Republic of South Africa and Others** 2011 (3) SA 347 (CC) paras 49-50.

[24] For the foregoing reasons and in the interest of justice, condonation is hereby granted and no order as to costs is made.

MJ Dlamini JA

I Agree **JP Annandale JA**

I Agree **SJK Matsebula JA**

I Agree **JM Currie JA**

Dissenting opinion

[25] This is an application in terms of Rule 17 of the rules of this Court for the Condonation of the late filing of the record of appeal by the applicants. I have carefully read the majority judgment and without any hesitation, I agree that the application must be granted and I also fully agree with the reasons for the order. I, however, am unable to agree that there should be no order as to costs. The Respondent is, in my judgment, entitled to the costs of this Condonation application.

[26] The salient and common cause matters in this application are as follows:

26.1 On 03 October 2018, the Respondent filed an urgent application before the High Court for, *inter alia*, an order declaring section 5 (3) of the Senate (Elections) Act 7 of 2013 inconsistent with section 20 of the Constitution Act 1 of 2005 and therefore invalid to the extent of such inconsistency. The application was opposed by the applicants and was granted by a full bench of the High Court. This was on 22 October 2018.

26.2 On 21 November 2018, the applicants duly noted an appeal against the said judgment.

26.3 The applicants filed the record of appeal with the office of the Registrar of this Court on 13 February 2019. In terms of Rule 30 (1) of the rules of this Court, the said record ought to have been filed within two (2) months of the noting of the Appeal. The record was thus filed about three weeks late.

26.4 On or about the 18th day of April 2023, the applicants filed and served an application for the reinstatement of the appeal. This application was opposed by the Respondent and before the matter could be heard and finalized by this Court, the Respondent filed and served an application under rule 30 (4) of the rules of this Court on 04 May 2023 to have the appeal deemed abandoned in view of the late filing of the record of appeal. It was no doubt, this rule 30 (4) application and opposition to the reinstatement that prompted the applicants to file and serve this Condonation application on 16 May, 2023.

26.5 In support of the application for Condonation, Mbuso Dlamini, a Crown Counsel in the Attorney General's Chambers states as follows:

> '6. I erroneously filed the Record of Appeal without the Application for Condonation. I was acting in haste upon realizing that our Record of Appeal is late and forgot to file it together with the Application for Condonation. What made it worse was the fact that even our Appeal was never enrolled to appear before Court thus it flipped out of my

mind that I had to file the Condonation application. Respondents too did not file an application to deem the appeal as having been abandoned after seeing that we had not filed our Record of Appeal on time and that the matter was not enrolled in Court.

7. The Honourable Court is prayed to take cognisance of the fact that within the period in which the record was due fell in the stretch from 16 December to 7 January which the Learned Chief Justice, as imbued with judicious wisdom, excluded from computation of *dies* in the High Court. We only decry the omission of a similar provision in the Court of Appeal Rules. The [rationale] remains the same. That period is busy on the national calendar and end of year ceremonies. Judges, legal practitioners and Court staff are or ought to be on recess from the hurly burly of Court work and focus on their social being. Indeed, I myself lost track of the *dies* while attending the national *Incwala* ceremony in the same period.

8. We have now reached the next election year from 2018 when the dispute first arose, the same issue re-emerges and becomes live again, and we now then seek the Court to allow us to file the Record of Appeal outside the Court time limits. I have now appreciated the need to file the Condonation application for the late [filing] of the Record of Appeal immediately upon being alerted to by the Respondent in his answering affidavit.

...

12. This matter is of extreme importance to the Respondents, for obvious reasons.'

From the above submissions for and on behalf of the applicants the following emerges or can be deduced:

(a) The applicants accept that they are in default of filing the record of appeal timeously.

(b) This error was caused by being too busy during the *Incwala* Ceremony, forgetfulness and 'acting in haste upon realising that our record of appeal is late.'

(c) The Respondent took too long to file his rule 30 (4) application – to declare the appeal to be deemed abandoned.

(d) The rules of this Court should be aligned with the rules of the High Court and exclude the period from 16 December to 07 January in the computation of the *dies* for doing or performing anything in terms of the rules.

(e) Court officials need to take a break from Court duties to attend to their social needs.

[27] The language employed by the deponent to the applicants' supporting affidavit is rather chatty, imprecise and even condescending. That the officer in question was busy or on duty on other important national exercise is no excuse in my opinion for failure to comply with the rules of Court. There are, and this is common cause, many competent and senior legal officers in the Attorney General's Chambers who could and should have attended to the matter in the absence of Mr. Dlamini. But of course, Mr. Dlamini would want this Court to believe that he forgot to file the Condonation application for close to five (5) years. The conclusion is, in my view, inescapable that he was not aware at all that the Court record was filed late and if so what he had to do to remedy the situation. Indeed he states that he was 'alerted to by the Respondent in his answering affidavit' in the application for reinstatement. He does not say that he was reminded by the Respondent. This turn of phrase explains the fact that he was not aware of the relevant rules of Court and he wants them amended to be on similar terms as those of the High Court.

[28] Strangely and rather surprisingly, the applicants also blame the Respondent for not filing the rule 30 (4) application before 04 May, 2023. The argument or suggestion is that the Respondent ought to have alerted them earlier that the Court record was filed late. If this had been done, so the argument goes, this Condonation application would have been filed timeously. It is based on this warped reasoning that the majority judgment finds that the Respondent is to be blamed as well. It states that;

> 'If the Appellants did not comply with rule 30 (4) it was equally incumbent on the Respondent to also comply [by] launching a reasonably timeous application for the order declaring the appeal abandoned.'

I cannot agree. The Respondent had no such duty in law towards the applicants. The applicants were, to boot, legally represented by a contingent of legal officers and did not need any guidance from or prompting by the Respondent on how to conduct or prosecute their appeal.

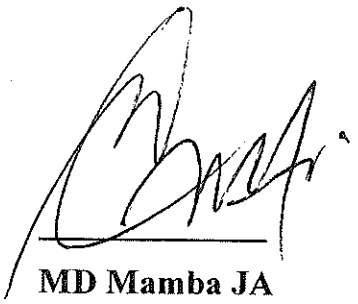
[29] Whilst it is true that the Respondent only raised the question of the appeal to be deemed to have been abandoned in 2023, and that was in reaction to the application for the reinstatement of the appeal, I do not find this as an infraction of either the rules or practice of this Court. The lateness of the application in terms of rule 30 (4) may be a factor to consider in determining that application. It cannot, in my view, be a defence against an order for costs against the applicants or be a sound reason or excuse for filing the application for Condonation after four (4) years. Moreso, it can never be a defence to the late filing of the record.

[30] I also note that during argument before us, Mr. S.M.M. Khumalo, Counsel for the applicants, conceded, correctly so in my view, that because of the nature of a Condonation application, the applicants could not in the particular circumstances of this case, escape an order for costs being granted against them.

[31] Whilst I accept that the issue of costs is, as a general rule, a matter within the discretion of the Court, such discretion, however, must be exercised based on sound

legal principles and proven facts. In this case the legal bases for not granting an order for costs in favour of the Respondent, is in my view, unsound. Although the application for Condonation succeeds, the applicants ought to pay for the indulgence sought inasmuch as this Court has not found that the opposition thereto was malicious, vexatious or frivolous.

[32] For the foregoing reasons, I would grant an order for the Condonation of the late filing of the record and also order the appellants to pay the costs of this application for Condonation.



MD Mamba JA

For Appellants / Applicants **SMM Khumalo.**

For Respondent **MS Magagula.**