IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO: 847/19

In the matter
between:

SIBUSISO BONGIKHOSI SHONGWE	1ST **APPLICANT**
SIBUSISO B. SHONGWE & **ASSOCIATES**	2ND **APPLICANT**

And

THE DIRECTOR OF PUBLIC	1ST **RESPONDENT**
PROSECUTIONS THE ANTI-CORRUPTION	2ND **RESPONDENT**
COMMISSION	3RD **RESPONDENT**
THE ATTORNEY GENERAL	4TH **RESPONDENT**
SIPHO MTHETHWA	STH **RESPONDENT**
THANDA MNGWENGWE N.0	

Neutral Citation:	*Sibusiso Bonginkosi Shongwe and Another vs. The Director of Public Prosecutions and 4 Others (847/ 19) [2019] SZHC (213)]4th November 2019*
Coram:	**Mlangeni J., Langwenya J., Tshabalala J.**
Heard:	**11th November 2019**
Delivered:	14th **November 2019**

Summary: *Civil procedure - application for condonation of the late filing of a recusal application where time lines had been set by the court - application a hybrid that did not comply with the peremptory requirements of Rule 6 (25) in respect of urgent applications.*

Held: *An application that purports to be urgent but does not comply with Rule 6 (25) cannot be enrolled.*

RULING ON APPLICATION FOR CONDONATION
(for the late filing of an application for recusal of judges)

MLANGENI J.

[1] In the main application the Applicant seeks to establish that his arrest was unlawful. Because the matter raises constitutional issues the Honourable Chief Justice, by memorandum dated 28th May 2019, empanelled three judges of the High Court to hear and determine the application by one Sibusiso B. Shongwe. The judges are Mlangeni, Langwenya and Tshabalala JJ. On the 18th June 2019 the respective legal representatives appeared in Mlangeni J's chambers and informed the court that both sides were engaging counsel from South Africa to deal with the matter, that counsel for the Applicant was available in August 2019 whereas that of the Respondents was available in July. The litigants were then asked to agree on a date and inform the court on the 20th June 2019. On this date the court was informed that the parties had agreed on the 22nd August as the date for the matter to be heard. Time lines were set for the filing of heads of arguments.

[2] In the meantime the Applicant was pursuing a Rule 30 application in respect of the Respondents affidavits. Because of the then pending Rule 30 application the main matter was not proceeded with on the 22nd

August 2019. It was then postponed, by consent of both sides, to the 12th November 2019. On this date two of the empaneled judges were on annual leave but agreed to avail themselves for the reason that the parties' counsel were available on this date. For the Applicants, the next date could only be in 2020. The court was not willing to let the matter go into 2020 without being finalized.

[3] Everything was in place for the matter to be argued on the 12th November 2019. On the 7th November 2019 - exactly four days before the matter was to be argued - I was informed that the Applicant intended to approach the court in chambers to request two of the judges to recuse themselves from the matter. It is worth noting that this request was coming more than five months after the court was constituted and the panel was known to both sides. On the same date that I was informed about the Applicant's intended request, I hastily asked the other judges to make themselves available the following morning - 8th November 2019 at 9:00 am, so that we could hear the verbal request. We were not persuaded by the reasons that were advanced by Mr. Shongwe and we advised him to make a written application so that the other side may respond if it so wished and the matter properly ventilated.

[4] This being on the 8 th November 2019, three days before the date to hear the main matter, we set time lines that would see the recusation application argued on Monday the 1 ith November 2019 and, depending on the outcome, the main matter could proceed on the 12th, One consideration was to ensure that the 12th November did not go to waste, especially since counsel are booked well in advance, and it had taken a lot to settle the date of 12 th November 2019. The set time lines for the recusal application were as follows: -

Application: To be filed by 4:00 pm on Friday 8th November.

Answer:	To be filed by 4:00pm on Saturday 9th November.
Reply (if any):	To be filed by end of the day on Sunday 10th November

The matter was to be argued on Monday 11th November at 9:30 am. Applicant did not object to the time limits and it was expected that he would file. He hopelessly failed to comply with the time lines that were set by the court.

[5] The Application was not filed on the 8th November, and it was not filed on the 9th or the lQth November. The court, and the Respondents, became aware of the application in the morning of Monday the 11th November. It was presented together with an application for condonation for the late filing of the recusal application. At this stage the other side obviously did not have the opportunity to respond to the papers.

[6] The application for condonation is dated 11th November 2019. It states that if the Respondents wished to oppose it they were to file notice to that effect within one (1) day and file answering papers on the same day - the 11th November 2019. Curiously enough, the matter was still to be heard **"on Monday the 11th day of November, 2019 at 9:00 am "**
The court became aware of the application well after 9:00 am.

[7] The condonation application purports to be an urgent one. And indeed it should be an urgent one because it could not comply with the normal rules of time limits in respect of applications.

Prayer 1 is in the following words:-

"Dispensing with the procedures and manner of service pertaining to form and time limits prescribed by the rules. of the above Honourable Court and directing that the matter be heard as one of urgency."

Prayer 2 is the usual surplasage that seeks condonation **"for non compliance with the said rules of the above Honourable Court."**

[8] The application has no certificate of urgency, neither does the Applicant make averments in the affidavit that render the matter urgent enough to justify the court in dispensing with the normal rules relating to time limits and procedure. Rule of court 6 25 (b) provides that in every affidavit in support of an urgent application:-

".....the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course".

[9] It is our considered view that the court is not allowed to make inferences and conjecture regarding urgency. In this jurisdiction the *locus classicus* is the case of HUMPREY H. HENWOOD v MALOMA COLLIERY AND ANOTHER, CIVIL CASE NO. 1623/94 (unreported), where His Lordship Dunn J. made the following apposite remarks:-

"The provisions of Rule 6 .....are peremptory. The mere existence of some urgency does not permit an applicant to disregard the provisions of the Rule ....."

The judgment quoted above has been followed with reverence over the years.

[10] Some years after the case of Humphrey H. Henwood, Sapire J .[1] stated the following:-

> **"If practitioners.....issue certificates · of urgency without regard to the objective urgency of the matter, the certification becomes meaningless....."**

It is our understanding that the certificate of urgency is clearly not a formality.

[11] It is trite in this jurisdiction that an applicant stands or falls by its founding papers. See ROYAL SWAZILAND SUGAR CORPORATION LTD t/a SIMUNYE v SWAZILAND AGRICULTURAL AND PLANTATION WORKES' UNION AND 8 OTHERS, CIVIL CASE No. 2959/97.

[12] It is on the basis of the aforegoing that this court unanimously declined to have the condonation application enrolled.

[13] Now that we have become aware of the Applicant's appeal, we bring to the attention of the higher court the following relevant facts:-

13.1 The request for recusation was made in chambers in terms of established practice in this jurisdiction, to enable the

[1] In H.P. Enterprises (Ply) Ltdt/a HEATHER'S FASHIONS v NEDBANK (SWAZILAND) Ltd

''

judge or judges to decide whether or not the matter warrants full ventilation in open court.

13.2 It is factually and legally incorrect that the request was dismissed. The court was of the unanimous view that in the interests of justice the application must be made formally and in open court, so that the other side gets an opportunity to respond and be heard.

13.3 The Applicant did not object to filing a formal application for recusal, neither did he object to the time lines that were set by the court, largely in the interest of the litigants who are on record as having instructed counsel from South Africa to argue the main matter on the 12th instant.

MLANGENI J.

I agree:

LANGWENYA J.

I agree:

TSHABALALA J.

Applicant: **In person**

For the Respondent: **Mr. T. Dlamini**