

IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter between:

Case No. 31/2019

AGRIPPA VELAPHI BHEMBE

Applicant

And

**HIS LORDSHIP R MURPHY AJ JUDGE OF THE
INDUSTRIAL COURT N.O**

1st Respondent

**CHAIRMAN OF THE JUDICIAL SERVICE
COMMISSION N.O**

2nd Respondent

**ATTORNEY GENERAL N.O.
PRINCESS KHULEKILE MALINGA**

3rd Respondent

4th Respondent

Neutral citation : *Agrippa Velaphi Bhembe v His Lordship R. Murphy AJ Judge of the industrial Court and Three Others (31/2019) [2019] SZHC 52 (20th March, 2024)*

Coram : **M. Dlamini J**

Heard : 1st December, 2023

Delivered : 20th March, 2024

Rule 27 : Condonation: good or sufficient cause - the court must exercise its discretion judiciously [5]

Rule 49(1) : Certificate for leave to appeal: - prospect of success [15] ...the court may ask if the case may on appeal provide as a precedent. The grounds of appeal must not be frivolous or intended to frustrate the other party from executing the impugned judgment.[16]

...the provision of the law has moved away from the narrow or traditional approach which focused on prospect of success for leave to appeal. Now the question is wider in that the court must ask further whether there are other compelling circumstances to grant leave to appeal.[19]

Summary : The applicant, having been transferred from the position of the Registrar of the Industrial Court to a Magistrate, challenged to no avail his transfer at the court *a quo*. He then moved for a review application before this Court whose grounds were found to be flawed. He now seeks, *inter alia*, for leave of appeal. The 2nd respondent is opposed to its grant on mainly that there are no prospect of success.

Orders sought

1. The applicant, whose description, as well as that of the respondents, was given in the judgement under the review application, seeks for orders of

condonation for late filing of the present application and leave of appeal to the Supreme Court together with costs of suit.

Determination on condonation

Legal principles

2. In discussing Rule 27 on condonation, it is apposite to commence on Rule 49 in this matter. Rule 49 reads:

*“(1) Where the certificate of the judge who heard the appeal is sought for leave to appeal to the Court of Appeal from a decision of the court in its civil appellate jurisdiction is required, application shall be made by the delivery **within fourteen days after the date of the judgment sought to be appealed against** of a notice stating that the applicant desires to appeal and setting forth the grounds upon which such leave is sought. The application shall be set down on a date to be arranged with the registrar.”*

3. It is not in issue in these proceedings that the applicant has been late by a relatively considerable period spanning seventeen (17) months from the date of the impugned judgement. It is for that reason that the applicant has approached this court for an order for condonation.

4. Rule 27 provides on condonation:

“(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any

act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems fit.

(2).....

(3) The court may on good cause shown condone any non-compliance with these rules."

5. Good cause: Writing on this requirement for good cause or sufficient cause and having stated that prior, condonation was granted upon the party showing exceptional circumstances and the position of the law having shifted to that the court must exercise its discretion judiciously, Harms¹ then eloquently authored:

"Certain factors have been indicated as being usually relevant but the weight to be given to any factor depends on the particular circumstances of each case. These factors are not individually decisive but must be weighed the one against the other. For instance, a slight delay and a good explanation may compensate for weak prospect of success. The cogency of any factor will vary according to the circumstances, including the particular rule that has been infringed. In each case the question is whether good or sufficient cause has been shown for the relief sought.

*Among the factors that the court has regard to are: the degree of non-compliance, the explanation of the delay, the prospect of success, the importance of the case, the nature of the relief, the other party's interest in finality, the convenience of the court, the avoidance of unnecessary delay in the administration of justice and the degree of negligence of the persons responsible for the non-compliance."*²

¹ Civil Procedure in the Superior Courts," Issue 36 (2008) at B-181-812

² See *N*³

6. Applicant started off by giving a narrative of the matter, having pointed out that he had filed a review application from the decision of the court *a quo*, the applicant deposed further, *“In exercise of its provisional jurisdiction, this Honourable Court dismissed my application with costs as reflected in the judgment of the Court delivered on 29th April, 2022.”*³³ I must from the onset correct the error. In as much as this court did dismiss the applicant’s review application, it did not do so with costs. The dismissal was ordered without a costs order.

Applicant’s grounds for condonation

7. In motivating his grounds for condonation for late filing, applicant deposed:

*“After this Honourable Court dismissed my application, I proceeded to instruct my Attorneys to appeal against its judgment. Several delays in making this application for leave to file the appeal were however, occasioned. The first challenge had to do with the issue of the High Court’s revisional jurisdiction over Industrial Court judgments remained unsettled until the judgment of the full bench in the Supreme Court judgment of **NEDBANK SWAZILAND LIMITED AND OTHERS V PHESHEYA NKHAMBULE CASE NO. 70/2020**. This delay was coupled with the replacement delays in my Attorney’s firm after the Attorney who was seized with my case was appointed to judicial position. I had no control over these occurrences. It was for these reasons that I*

³³ See page 7 para 11 of book of pleadings

did not proceed earlier to apply for leave to appeal and I beg the Court's indulgence in this regard."⁴

8. The applicant, in his founding affidavit has taken much time demonstrating that he has prospects of success. Applicant has further, as can be deduced from the above quoted averment,⁵ raised two grounds, viz.:

- The conflicting judgements of the Supreme Court on the review powers of the High Court and subsequent right to appeal to the Supreme Court over judgements of the labour courts or specialised tribunals in terms of section 152 of the Constitution;
- The substitution of his legal Counsel who was subsequently appointed to the bench.

Adjudication on condonation

9. From the pleadings serving before me, the impugned judgment was delivered by this court on 29th April, 2022. It is of judicial notice that a number of conflicting judgments exist on the question whether this court and subsequently the appellate court has, respectively, revisionary and appellate jurisdiction over judgments emanating from the labour courts or labour specialised tribunals. Until the appellate court constituted as a full bench (Review Court) under the case *Nedbank Swaziland Ltd and Others v Phesheya Nkambule Case No. 70/2020* the position of the law in this regard was precarious. The judgment under Nedbank case was delivered on 27th February, 2023. The applicant filed the present

⁴ Para 12, page 7 of the book

⁵ N²

application as per the Registrar of this court's date stamp on 13th October, 2023, the same date upon which it was served on the 2nd respondent's legal representative. This still reflects a period of about eight month's delay, from the date of the judgment that settled the position of the law on the revisionary jurisdiction of this court over the Industrial Court and Industrial Court of Appeal judgments.

10. Applicant contends as can be seen from his founding affidavit⁶ that the judgment of the apex court (Nedbank) must be considered with the appointment to the bench of his legal Counsel. On record, his Counsel was Mr. S. Masuku then, albeit from the same chambers of attorneys. S. Masuku J was in terms of the legal gazette which is public knowledge, appointed in October 2022. This averment on the appointment of his Counsel to the bench does not assist the applicant in that looking at the judgment of the Supreme Court which settled the law, his Counsel had long been appointed. In brief, the appointment to the bench of his legal representative does not discount the period of eight months. The period of delay therefore still stands at eight months.
11. However, the enquiry does not end here as case law is to the effect that the court must decide the matter on the ground of sufficient cause. Harms, as demonstrated above,⁷ lays down some of the factors as good cause. He mentions, *inter alia*, the nature of the case at hand and public interest.

⁶ N⁴

⁷ Para 5

12. Nature of the case and public interest: The sum of the nature of the application by the applicant is that the applicant wants to exercise his constitutional right of appeal from this court to the appellate court. He has deposed in this regard, "*Condonation is at the discretion of the Court and the balance of probabilities and on good cause shown by the applicant seeking the same. I submit that in law one should not put form before substance to the extent that the constitutional right to appeal will be discarded by a court due to failure of an applicant to comply with the Rules of Court.*"⁸
13. It is common cause in this proceedings that the condonation is sought for purposes of obtaining a certificate of leave in order to appeal this court's judgment on his transfer from the position of a registrar of the specialised tribunal to that of an ordinary magistrate. This leads to the question as to whether every litigant who wishes to obtain a certificate of leave to appeal is by virtue of his constitutional right entitled to condonation. The answer is obviously a 'No'. So the desire to exercise a constitutional right standing alone may not be a guarantee for condonation. The right must be viewed with other factors. In the present case, I think one must ask, 'What are the peculiar or distinguishing features of this case?' Learned Counsel on behalf of the respondents referred to this factor as exceptional circumstances. This extends to the poser on public interest. Is this a case of public interest?

⁸ Para 14, page 8 of the book

14. No doubt, the parties in the present matter and more particularly the respondents, with the exception of the 3rd respondent of course, are persons who, and I shudder but respectfully say, wield power within the corridors of the judiciary. They are over and above custodians of the Constitution. In other words, these are not just ordinary litigants as we see from the day to day cases that come before our courts. This alone is bound to attract public interest on the matter of the applicant who is, in the whole arm of the judiciary, of a lower standing. In this regard, condonation must be granted.

Leave to appeal – Rule 49(1)

Legal principle

15. What guides the court in determining an application for leave to appeal? Hughes J⁹ referred to Plasket AJA¹⁰ as follows:

“[7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.’ [My emphasis]”

⁹ Costas Fourouclas and Another v Pretorius (10619/10) [2017] ZAGPPHC 843 (16 November 2017)

¹⁰ S v Smith v S 2012 (1) SACR 567 (SCA) 570

16. An appeal lies on both the question of fact and law. In determining reasonable prospect of success, the court may ask if the case may on appeal provide as a precedent. The grounds of appeal must not be frivolous or intended to frustrate the other party from executing the impugned judgment.

Determination on Rule 49(1)

17. The Rule, as already quoted¹¹, calls for the applicant to set out the grounds of appeal. The applicant has laid down a number of grounds for his appeal. Some are based on the question of fact while others on the question of law. It is common cause that the applicant, while challenging 2nd respondent's decision of transferring him to the Magistrate Court at Nhlengano, complied with 2nd respondent's decision. It is on this regard therefore that the applicant deposed a number of times in his pleadings that a grant of leave to appeal shall not prejudice the respondents. On the other hand, the respondent strenuously argues that the decision to transfer the applicant was complied with immediately. There are no basis for the applicant to be challenging his transfer in light of the compliance over the period of about five years.
18. It is correct, as so ably argued by Counsel on behalf of 2nd respondent that there must be an end to litigation. Rule 49 was provided for that purpose. Learned Counsel argued that applicant has no formidable case or prospects of success. He embarked on each and every ground of appeal, demonstrating with eloquence that the applicant's case was flawed. I do

¹¹ Para 2 herein

appreciate the well-researched and supported submissions by Counsel on behalf of 2nd respondent.

19. Hughes J¹², although making reference to section 17 of the Superior Courts' Act No. 10 of 2013 pointed out that the provision of the law has moved away from the narrow or traditional approach which focused on prospect of success for leave to appeal. Now the question is wider in that the court must ask further whether there are other compelling circumstances to grant leave to appeal. I must hasten to point out that I am very much alive to the common law guiding principle that legislative enactment are strictly applicable to the jurisdiction from which they emanate. Such that section 17 cannot extend to our jurisdiction but confined to the Republic of South Africa. However, this is not the law of Medes and Persians. In the quest for justice and on the principle of our common law that law must not be static, it must revolve with the people, I see no reason at all, especially under the present case, to ignore such a sound principle which resonates well with the dictates of justice. The applicant, in as much as being adamant that he will not accept his transfer lying down, immediately vacated the office of the Registrar of the Industrial Court and moved to his new office at the Magistrate Court, Nhlengano, a place remote from the seat of this court where he was previously stationed. He has since then been discharging his duties of the magistracy faithfully and with due diligence. His Counsel was therefore on point in submitting that the respondent shall suffer no prejudice in the prosecution of the appeal by reason that the applicant has not frustrated the

¹² N⁹

respondent in execution of the judgment of the court *a quo* as confirmed by this court.

20. In search for compelling circumstances, Hughes J¹³ who was faced with an application for leave to appeal a matter which was dismissed on ground of prescription held that prescription hinged on the constitutional right of the litigant to access courts. He therefore granted leave. On the same note, the applicant averred that it was the first of its kind that a registrar could be transferred to be a magistrate. I understand applicant's case to say that the transfer relegated him. I appreciate that the response from the respondents is that when he was transferred, his benefits as a registrar were not taken away. It is however, my considered view that such matter must be ventilated by a superior court than this.
21. Will this matter form a precedent? This is another enquiry which this court ought to engage in as one of the factors considered when determining leave to appeal. It will certainly do in that it will clarify the hierarchy, if any, between a registrar and an ordinary magistrate. I am therefore inclined to grant the certificate for leave to appeal.

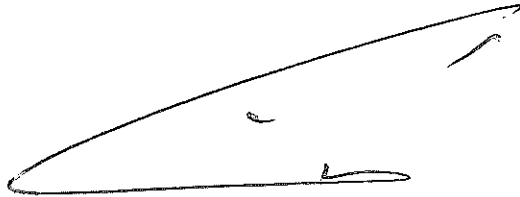
Orders

22. In the above, it is my considered view to enter:
- 22.1 Applicant's application succeeds in the following:
- 21.1.1 Application for condonation is granted;

¹³ Op. cit. (N⁹)

21.1.2 Application for leave to appeal granted;

22.2 No order as to costs.

A handwritten signature in black ink, consisting of a large, sweeping loop followed by a smaller, more intricate flourish.

M. DLAMINI J

For the applicant : **N. Gumede of Howe Masuku Attorneys**

For the respondents : **Z. Jele of Robinson Bertram**