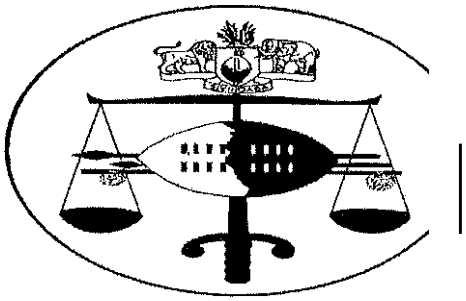

IN THE INDUSTRIAL COURT OF APPEAL OF

ESWATINI JUDGMENT

Case No. 12/2020

In the matter between:

ESWATINI NATIONAL TRUST COMMISSION Appellant

and

SWAZILAND NATIONAL TRUST COMMISSION STAFF ASSOCIATION 1st Respondent

EMPLOYEES OF THE 1sT **RESPONDENT WHO ARE MEMBERS OF THE 1[8]T APPLICANT** 2nd Respondent

UNION OF SWAZILAND CONSERVATION WORiffiRS 3rd Respondent

EMPLOYEES OF THE 1[8] RESPONDENT WHO ARE MEMBERS OF THE 3RD APPLICANT 4th Respondent

NEUTRAL CITATION: *ESwatini National Trust Commission v Swaziland\ National Trust Commission Staff Association and Another (12/2020) [2021] SZlCA 03 (17August, 2021)*

CORAM: S. NSIBANDE JP, N. NICONYANE AND D. MAZIBUKO JJA

HEARD **11/05/2021**

DELIVERED **17/08/2021**

Summary - Appeal - application for condonation for late filing of record of appeal-basic requirements for condonation restated.

Appeal - Section 19(1) of the Industrial Court Act, 2000 as amended-questions of law only-basic principles restated.

Appeal- record filed late, no application for extension prior to due date and appeal deemed abandoned - condonation required to revive appeal - requirements for condonation restated.

JUDGEMENT

N. NKONYANE, JA

BRIEF BACKGROUND.

[1] The Appellant was the 1st Respondent in the Court *a quo* and the Respondents were the Applicants. The Appellant is the employer of the 2nd and 4th Respondents and the 1st and 3rd Respondents are the employee representatives at the workplace.

[2] The Respondents instituted motion proceedings before the Industrial Court against the Appellant and two others under a Certificate of Urgency seeking orders, *inter alia*, that the Appellant be interdicted and/or restrained from proceeding with the lay-offs of the 2nd and 4th Respondents; declaring the decision to lay-off the 2nd and 4th Respondents to be in violation of the Guidelines 3 (a) and (g) and 5 (a) of **The Guidelines on Employment Contingency Measures in Response to the Coronavirus (Covid-19) Pandemic Notice of 2000 (the "Guidelines")** and that the Appellant be ordered to reinstate the 2nd and 4th Respondents with immediate effect and to pay them all wages they had lost as the result of the unlawful and unfair lay -off.

THE ISSUES AND THE FINDINGS OF THE COURT *A QUO*.

[3] The terms of the Guidelines and the fact of the lay-off of the 2nd and 4th Respondents were common cause. The main issues in dispute were whether the lay-off decision was in violation of the Guidelines, that is,

whether there had been an exhaustive and *bona fide* consultation process preceding the decision; and whether or not there had been due consultation with the Labour Commissioner. Section 4 of The Guidelines provides the following;

"Employers are encouraged to continue to pay their employees, where this is not economically possible, employers, in consultation with a recognized employees' organizations or employees' representative structure within the enterprise <u>and</u> the Commissioner of Labour, are to consider the following options to mitigate against the effects of loss of earnings by their employees during the partial lock-down period or during the entire period of the national emergency- ..." (underlining for emphasis).

[4] The Court *a quo,* on the 16th October 2020, delivered a judgement in favour of the Respondents, declaring that the relevant decision was in violation of the Guidelines, and ordering the Appellant to reinstate the 2nd and 4th Respondents with immediate effect as well as to pay them all wages that they had lost. The *ratio decidendi* of the judgment is found in paragraphs 31, 32 and 33 of the judgment, reproduced in full herein:

> *"[31] In the Court's view, the 1st Respondent had already decided that laying -off its employees was the only measure suitable for the undertaking. There is nothing that the Applicants could have said or done for the pt Respondent to change its posture.*
>
> *[32] Even though the P' Respondent submitted documents to prove the rationale for implementing the lay-offs, such as*

financial statements, the matter stands to be decided on the procedural requirements for consultation as provided by the Covid-19 Guidelines of 2020 and the common law. That said, the financial statements do not show that the salary cuts as earlier proposed were not a viable option.

CONCLUSION

[33} Based on the above reasons, the Court holds that the JS[1] Respondent's decision to lay off its employees was not preceded by consultations held in good faith and as such breached the Covid -19 Guidelines of 2020."

GROUNDS OF APPEAL.

[5] The Appellant, being dissatisfied with the judgment, noted an appeal to this Court on the 19th October 2020 well within the time stipulated by the Rules.

[6] **Section 19 (1)** of the Industrial Relations Act, 2000 (the "Act") provides that: ***"There shall be a right of appeal against the decision of the Court on a question of law to the Industrial Court of Appeal,"*** to be read with **Rule 6 (4)** of the Rules of this Court which requires that:***"The notice of appeal shall set forth concisely and under distinct consecutively numbered heads the grounds of appeal and the points of law upon which the Appellant relies."***

[7] The applicable principles have been addressed by this Court in the first two appeal cases serving on the Roll of the first session being the

matters of ***Trevor Shongwe v Machawe Sithole and Another [2021] (08/2020) SZICA 01 (10 August, 2021); and Dumisani Malinga v Nedbank Swaziland Limited [2021] (11/2020) SZIC 02 (10 August, 2021).*** In the **Dumisani Malinga case,** this Comi, per Van De Walt JA, made the following exposition of the principles, with which this Court aligns itself, on pages 11-12;

"l 1.1 ***A question of law,*** *shorn of all embellishments and simply, for purposes of an appeal means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter; the duty of the court is to ascertain the rule of law and to decide in accordance with it i.e. a question of law entails a question which a court is bound to answer in accordance with a rule of law. (Where the court had overlooked a principle of law,*

i.e. appropriate law was not applied because of the oversight, it would have failed in law and the question, therefore, would be ultimately one of law.)

11.2 *A question of law has to be distinguished, unambiguously, from* ***questions of fact*** *and* ***questions of judicial discretion:***

11.2.1 ***A question of fact*** *manifests itself where a court is seeking to ascertain the truth of the matter by making a determination on the facts and its duty is to exercise its intellectual judgement on the evidence submitted to it in order to ascertain the truth; and*

11.2.2 ***A question of judicial discretion*** *emerges where a court seeks to discover what is right, just, equitable, or reasonable (except so far as determined by law) and its duty* is *to exercise its moral judgment in order to ascertain the right and justice of the case.*

11.3 *Since an appeal to this Court on a question of fact is precluded by the Act, the point of departure in determining a question of law, would be to deem the Court a quo* 's *factual findings to be correct since same are not capable of being disturbed on appeal to this Court.*

11.4 *This Court is also entitled to have regard, in addition, to uncontested facts appearing from record of the proceedings a quo insofar as such facts are not inconsistent with those found by the Court a quo.* "

[8] The Appellant's grounds of appeal are formulated as set out below and whether or not same constitute questions oflaw as intended by the Act, shall be reve1ied to later herein:

"l. That the Court a quo erred in law in declaring that the decision to lay-off 2nd and 4th Applicants was in violation of ***Section 3 (a) and (g) of The Guidelines on Employment Contingency Measures in Response to the Coronavirus (Covid -19) Pandemic, General Notice No. 22 of 2020.***

2. *That the Court a quo erred in law and in fact in holding that the consultation process preceding the decision to effect Layoffs by*

the Appellant was not exhaustive and/or was conducted in bad faith.

3. *That the Court a quo erred in law and in fact in holding that the Appellant implemented layoff without due consultation with the office of the Labour Commissioner.*

4. *That the Court a quo erred in law in ordering the l8[1] Respondent to reinstate the 2nd and 4th Applicants with immediate effect and to pay them all wages for the period of Layoff*

5. *That the Court a quo erred in law in holding that the decision to lay-off 2nd and 4th Applicants was unlawfitl and unfair.* "

LODGING OF APPEAL RECORD.

[9] **Rule 21(1)** of the Rules of this Court, stipulates the following:

"The appellant shall prepare the record on appeal in accordance with sub-rules (5) and (6) hereof and shall, within one month of the date of noting of the appeal, lodge a copy thereof with the Registrar of the Industrial Court for certification as correct. "

[10] Non-compliance is visited with the following, in **Sub-Rule 21(4):**

"Subject to Rule ***16*** *(1)* [i.e. an application for extension], *if an appellant fails to* ***note an appeal or to submit or resubmit the record*** *for certification within the time provided by this Rule, the appeal shall be deemed to have been abandoned.* "

[11] The Appellant filed the record with the Registrar of this Comi on the 26th January 2021, approximately three months after the filing of the notice and as such, approximately two months out of time.

APPLICATION FOR CONDONATION.

[12] No application for extension had been applied for and what is now before this Court, is an application for condonation, opposed by the Respondents, which was filed on the 29th January 2021.

12.1 It was agreed between the parties that the Court should deal with and decide the application for condonation first.

12.2 The Appellant's notice of motion refers to condonation of the Appellant's failure to comply with **Rule 17** and not with **Rule 21.** The Appellant realized this mistake. In the body of the affidavit however, the Appellant did refer to the conect Rule, that is, **Rule 21.** This apparent mistake in the notice of motion caused the Respondents to raise a point *in limine* in their answering affidavit to the effect that the prayer sought was not competent as it cannot be granted by the Court. The Appellant's attorney was hard pressed to explain and con-ect the

elTOr.

12.3 This Court being a Court of equity and there being no likelihood of miscan-iage of justice in this instance should the application be heard, it would be inappropriate to dismiss the application on the basis of such error alone and consequently, the condonation application in its entirety shall be considered.

12.4 However, it needs to be made clear that this approach should not be taken as *carte blanche* for slipshod drafting. Practitioners are cautioned to be vigilant and exact in their drafting and are warned that non compliance may result in dismissals, punitive costs orders or other detrimental sanctions.

THE APPLICABLE LEGAL PRINCIPLES:

A. WHETHER AN APPLICATION FOR CONDONATION IS COMPETENT IN THE CIRCUMSTANCES.

[13] The first question is whether an application for condonation can be entertained at all, in view of the wording of **Rule 21(4)** which provides that;

"Subject to Rule 16 (1), if an appellant fails to note an appeal or to submit or resubmit the record for certification within the time provided by this Rule, the appeal shall be deemed to have been abandoned. "

[14] **Rules 16** and **17** of this Comi provide the following:

"Extension of time (Form 5)

16 (1) The Judge President or any judge of the Industrial Court of Appeal designated by him may, on application, extend any time prescribed by these Rules.

(2) *An application for extension shall be supported by an affidavit setting forth good and substantial reasons for the application and where the application is for leave to appeal the affidavit shall contain grounds of appeal which prima facie show cause for leave to be granted.* "

"Condonat·wn.

17.The Industrial Court of Appeal or any Judge thereof may, on application and for sufficient cause shown, excuse any party from compliance with any of these Rules and may give such directions in matters of practice and procedure as it considers just and expedient. "

[15] **Rule 30(4)** of the Rules of the Supreme Comi contains a similar provision as Rule 21(4) and the following excerpts from **Themba Nzuza and 4 Others v EnockMandla Nzuza and 4 Others (69/2015) [2017] SZSC 30** ***(03 August 2017)*** are instructive:

"[27] The issue relating to the consequences of the deemed abandonment have been discussed, without any final Judgment having been based on the arguments in the matters of ***Dr. Sifiso Barrow v Dr. Priscilla Dlamini, Appeal Case No. 09/2014*** *and* ***Thandi Mkhatshwa v Nomsa Stewart and Others, Appeal Case No. 3/2016.*** *In my humble view the ordinary literal meaning of the words must be applied to this section in which event the consequences are simply that;*

1. *An Applicant is entitled to bring an Application for an extension of time within which to file the record in terms of Rule 16 (1), as a matter of absolute right; and*

2. *If he fails to follow his rights in terms of Rule 16 (1), the Appeal is then considered to be abandoned which has the effect of actual abandonment and of reducing the matter to a state of final res judicata,* and

[37}In my view, the effect of the deeming provision in Rule 30 (4), as indicated supra, simply means actual abandonment in the absence of an Application in terms of Rule 16 (1) and as such the Order of the Appeal Court in dismissing the Appeal, in the light of the papers and submissions before it in this specific matter, is entirely consistent with the ordinary interpretation of the provisions of Rule 30 (4)."

[16] The difference between an application for extension and application for condonation in the strict sense is that, extension is to be applied for prior to expiry of the due date for filing and an application for condonation, after expiry of such date.

[17] These concepts may have become merged or obscured over time and may occasion difficulties in other Coutts in their appellate jurisdictions. As regards this Court, however, and unlike ordinary civil comis:

17.1 Industrial comis are driven, firstly, by considerations of fai1ness and equity in labour relations. (See: Section 4 (b) of the Industrial Relations Act, 2000 as amended).

17.2 This Comi, in terms of **section 19 (2)** of the 2000 Act, and in considering an appeal, shall have regard to the fact that the Court is not strictly bound by the rules of evidence or procedure which apply in civil proceedings.

17 .3 All of the above is to be read with the time-honoured maxim that Rules are there for the Court, not the Court for the Rules. As was held in **Ncoweni v Bezuidenhout 1927 CPD 130** per Gardiner JP that;

"'The rules of procedure of this Court are devised for the purpose of administering justice and not of hampering it, and where the Rules are deficient, I shall go as far as I can in granting orders which would help to further the administration of justice. "

(See: Herbstein and Van Winsen: The Civil Practice of the Supreme Court o(South Africa, 4th edition, page 38).

[18] The South African Court of Appeal in **Court v Standard Bank of SA Ltd; Court v Bester NO And Others 1995 (3) SA 123 (A)** at 1390-H held that an application for condonation is required to revive a lapsed appeal. This mechanism is practical and is in accordance with the above considerations.

[19] In view of all the foregoing, this Comi comes to the conclusion that an appellant may apply to this Court for condonation for late filing of the record in order to revive an appeal that has been deemed abandoned but, in addition to the ordinary requirements, it is advisable for the appellant also to demonstrate as a point of departure, why an application for extension in terms of **Rule 16,** could not reasonably have been made.

B. **REQUIREMENTS FOR CONDONATION.**

[20] It is trite that a party seeking condonation must present a reasonable and acceptable explanation for the default and must also show that there are good prospects of success on appeal.

[21] A thorough consideration of the core principles by the Supreme Court can be found, for instance, in ***The Swazi Observer Newspaper (Pty) Ltd tla Observer on Saturday and 2 Others v Dr. Johannes Futhi Dlamini* (13/2018) [2018] *SZSC 39* (19/10/2018),** paragraphs [9] to [17]:

> *"[9]In **Dr Sifiso Barrow** v. **Dr Priscilla Dlamini and the University of Swaziland (09/2014) [2015] SZSC09 (09/12/2015)** the Court at 16 stated **"It has repeatedly been held** by **this Court, almost ad nauseam, that as soon as a litigant or his Counsel becomes aware that compliance with the Rules will not be possible,** it **requires to be dealt with forthwith, without any delay."** (my underlining)*
>
> *[lO}In **Unitrans Swaziland Limited** v **Inyatsi Construction Limited, Civil Appeal Case 9 of 1996,** the Court held at paragraph 19 that: **"The Courts have often held that whenever a prospective Appellant realises that he has not complied with a Rule of Court, he should, apart from remedying his fault, immediately, also apply for condonation without delay.** The same Court also referred, with approval, **to Commissioner for Inland Revenue** v **Burger 1956** (A) in which **Centlivres CJ** said **at 449-G** that: **"... whenever an Appellant realises that he has not complied with the Rule of Court he should, without delay, apply for condonation."***
> *(my underlining)*
>
> *[ll}In **Maria Ntombi Simelane and Nompumelelo Prudence Dlamini and Three Others in the Supreme Court Civil Appeal 42/2015,** the Court referred to the dictum in the Supreme Court case of **Johannes Hlatshwayo vs Swaziland Development and Savings Bank Case No.***

21/06 at paragraph 7 to the following effect: "It required to be stressed that the whole purpose behind Rule 17 of the Rules of this Court on condonation is to enable the Court to gauge such factors as (1) the degree of delay involved in the matter, (2) the adequacy of the reasons given for the delay, (3) the prospects of success on Appeal and (4) the Respondent's interest in the finality of the matter." (my underlining)

[12] *In the same matter, the Court referred to Simon Musa Matsebula v Swaziland Building Society, Civil Appeal No. 11 of 1998 in which Steyn JA stated the following: "It is with regret that I record that practitioners in the Kingdom only too frequently flagrantly disregard the Rules. Their failure to comply with the Rules conscientiously has become almost the Rule rather titan the exception. They appear to fail to appreciate that the Rules have been deliberately formulated to facilitate the delivery of speedy and efficient iustice. The disregard of the Rules of Court and of good practice have so often and so clearly been disapproved ofby this Court that non-compliance ofa serious kind will henceforth result in procedural orders being made*

- such as striking matters off the roll - or in appropriate orders for costs, including orders for costs de bonis propris. As was pointed out in Saloiee vs The Minister of Community Development 1965 92) SA 135 at 141, "there is a limit beyond which a litigant cannot escape the results of/tis Attorney's lack of diligence". Accordingly matters may well be struck from the roll where there is a flagrant disregard

- *of the Rules even though this may be due exclusively to the negligence of the legal practitioner concerned. It follows therefore that if clients engage the services ofpractitioners who fail to observe the required standards associated with the sound practice of the law, they may find themselves non-suited. At the same time the practitioners concerned may be subiected to orders prohibiting them from recovering costs from the clients and having to disburse these themselves." (my underlining)*

[13] *In the matter of Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA), the summary of the matter is as follows: "Appeal - Prosecution of - Proper prosecution of - Failure to comply with Rules of Supreme Court of Appeal - Condonation Applications - Condonation not to be had merely for the asking - Full, detailed and accurate account of causes of delay.*

and effect thereof to be furnished so as to enable Court to understand clearly reasons and to assess responsibility *-* ***To be obvious that if non-compliance is time-related, then date, duration and extent of any obstacle on which reliance placed to be spelled out."*** *(my underlining)*

[14] *As was said in /***(ombayi v Berkhout 1988 (1) ZLR 53 (SJ** *at 56 by* ***Korsah JA:***

"Although this Court is reluctant to visit the errors of a legal practitioner on his client, to whom no blame attaches, so as to deprive him ofa re-hearing, error on the part of a legal practitioner is not by itself a sufficient reason for condonation ofa delay in all cases. As Steyn CJ observed in Salooiee & Anor NNO v Minister of Community Development 1952 *(2)* ***SA 135*** *(A)* ***at 141C:*** *(my underlining)*

A duty is cast upon a legal practitioner, who is instructed to prosecute an Appeal, to acquaint himself with the procedure prescribed by the Rules of the Court to which a matter is being taken on Appeal."

[15] *In Darries v Sheriff, Magistrate's Court Wynberg and Another, 1998* (3) *SA 34 (SCA) Plewman JA (with whom Hefer HA, Eksteen JA, Olivier JA and Melunsky AJA concurred) stated as follows;*

"Condonation of the non-observance of the Rules of this Court is not a mere formality."

[16] *In* ***Commissioner for Inland Revenue v Burger 1956 (4) SA 446 (A)*** *it was stated that;*

"Nor should it simply be assumed that, where non compliance was due entirely to the neglect of the Appellants Attorney, condonation will be granted". *(my underlining)*

[17] *In* ***Meldne v Santam Insurance Co Ltd, 1962 (4) SA 531 (A),*** *the Court held that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an Application for Condonation should be refused.* "

[22] In labour matters in particular, the South African case **ofMkhize v First National Bank & Another [1998] 11 BLLR 1141 (LC)** is apposite to our law and instructive, reading as follows at 1142;

"An applicant who seeks condonation is required to show good cause why such condonation should be granted. The approach this Court and the Labour Appeal Court have followed in determining whether good cause has been shown is the one enunciated by Holmes JA in ***Melane v Sanlam Insurance Co Ltd 1962 (4) SA 531 (A) at 532C-F,*** *which is to the following effect:*

> *'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, is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case....* "

C. **THE EXPLANATION FOR THE DELAY.**

[23] The founding affidavit was deposed to by the Appellant's attorney of record and was accompanied by a confirmatory affidavit by a junior clerk from the relevant law fi1m.

23.1 In sh01i, it was stated that the clerk, who had been made responsible for the compilation of the record, tested positive for Covid-19 on or around the 13th November 2020 after he had taken the file home and was in self-isolation until the 17th December 2020, when he was cleared, therefore, it was difficult to access the file. Nor could the record be filed when the clerk returned to work because the end of the Court session was on the 11th December 2020. Upon the opening of the

Appellant's attorneys' offices on 11 January 2021, they still could not file the record because they were advised that the Court session would start on the 25th January 2021. On the first day of the first session the file could not be located at the Registry Office and the record was eventually lodged on the following day, the 26th January 2021. The delay and non-compliance, it was contended, were not due to the Appellant's blatant disregard of the Cami's Rules.

23.2 A medical ceitificate in respect of the clerk was eventually filed after the appeal hearing. According to this document, the clerk was attended to at a medical clinic on the 14th November 2020 and was to return to full duties on the 14th December 2020.

[24] The Respondents urged this Court to hold that the Appellant's explanation falls dismally shmi of what is required.

[25] The record was due to be lodged by the 19th November 2020 at the latest but was only lodged on the 26th January 2021 and the application for condonation was launched on the 29th January 2021.

[26] In evaluating the Appellant's explanation, this Court is particularly mindful of what was stated as requirements in the **Uitenhage Transitional Local Council** case (in Paragraph [13] of the **Swazi Observer** case) to wit:

"...Full, detailed and accurate account of causes of delay and effect thereof to be furnished so as to enable Court to understand clearly

reasons and to assess responsibility...if non-compliance is time related, then date, duration and extent of any obstacle on which reliance is placed to be spelled out. "

[27] After careful consideration of all the facts and circumstances, it is the view of this Court that the delay of approximately two months is not validated by the facts and circumstances, with specific reference to the following:

27.1 The att01ney seized with the matter should have diarised the due date for filing of the record. A junior clerk is not a legal practitioner and should be supervised by the attorney tasking him or her to prepare and file the record.

27.2 There is no indication why, knowing that the clerk had become indisposed due to the viral infection around the 13th November 2021, a few days (four clear working days) before lodging would be due, an application for extension had not been made right away and/or why a different person did not take over the task.

27.3 Any sanitary fears about the file in the sick clerk's possession could have been cured by making copies from the relevant papers in the Court file.

27.4 The Respondents clearly challenged the stated sickness of the clerk in their answering affidavit. A medical certificate was not attached to the replying papers or handed in from the bar, but only filed after the hearing. This clearly was prejudicial to the

Respondents as they were effectively denied the opportunity to question and/or challenge the authenticity of the document or its contents.

27.5 On a closer scrutiny of the medical certificate, the dates contained therein are confusing, to say the least. It is unclear how the clerk could have been diagnosed with the virus a day before he had attended the clinic and why, if he had to resume work on the 14th December 2020, he was in self-isolation until the 17th December 2020.

27.6 The reasoning that lodging of the record was precluded because this Court was in recess, is startling. There was no evidence that the Registry was closed or otherwise inaccessible for approximately a month and a half and in any event, it would have been most peculiar had that been the case. I say this because even if the Comi is in recess, the administration department of the Comi, that is, the Registry Office remains fully functional. The explanation that the compilation of the record could not be completed on time because the Comi was in recess is therefore clearly untenable.

27.7 It also is not explained why an application for condonation had not been made as soon as it was realised that that the due date for lodging of the record was fast approaching.

27.8 Fmiher, there is no explanation by the Appellant's attorney why he could not seek assistance from the pt Respondent's attorney as he was entitled to do that in terms ofRule 21 (5) of this Court's Rules. In addition, the Appellant's attorney could have obtained a copy of the pleadings from the Registrar's Office.

[28] The explanation proffered raised ce1iain material concen1s and this, unfmiunately, is one of those cases where a litigant cannot escape the results of his, her or its attorneys' lack of diligence or the insufficiency of the explanation tendered.

[29] It having been held that there is no reasonable or acceptable explanation for the delay and in accordance with the case authorities set out above, the prospects of success are immaterial and the application for condonation should be refused without further ado.

[30] However, for the sake of completeness and in the event that this Comi may have erred in respect of the explanation provided by the Appellant, the prospects of success will be considered briefly.

D. **REASONABLE PROSPECTS OF SUCCESS ON APPEAL.**

[31] Prior to assessing prospects of success, it first has to be established whether an appellant's ground or grounds of appeal constitute questions oflaw, as intended by the Act.

[32] It was argued on behalf of the Respondents that the 2nd, 3rd and 4th grounds of appeal do not constitute questions of law, but questions of fact and therefore are not appealable. These grounds are to the following effect:

32.1 2nd ground: the Court *a quo* ened in law and in fact in holding that the consultation process preceding the decision to effect Layoffs by the Appellant was not exhaustive and/or was conducted in bad faith.

32.2 3rd ground: the Cami *a quo* ened in law and in fact in holding that the Appellant implemented lay-offs without due consultation with the office of the Labour Commissioner.

32.3 4th ground: the Cami *a quo* ened in law in ordering the Appellant to reinstate the 2nd and 4th Respondents with immediate effect and to pay them all wages for the period of the lay-off.

[33] The pt and 5th grounds of appeal are to the effect that the Court *a quo* ened in law in declaring that the decision to lay-off was in violation of the relevant sections of the Guidelines and also in holding that the said decision was unlawful and unfair. It was argued on behalf of the Respondents that even though these grounds may be the only proper grounds of appeal, there are no prospects of success on appeal because the Cami *a quo* did not misdirect itself on the law or legal principles relating to consultation at the workplace.

[34] On behalf of the appellant, the appellant's attorney, with reference to paragraph 24 of the judgment, argued that there was a wrong application of the law entitling this Court to set aside the judgment.

34.1 This paragraph reads as follows:

"[24] While it is correct that the parties agreed to stringent timelines for completion of consultations, this was not a licence for the 1'1 Respondent to rush through the process without considering the salary cuts option, which at that time was the only short-term and viable option capable of causing the parties to reach consensus. Even if the application for the lay-offs had been submitted to and approved by the 2nd Respondent, the 1'1 Respondent could still have exercised, restraint and not rush to implement the lay-offs until such time that the Applicants had advised that all the employees had again rejected the salary cuts. "

34.2 The Appellant's attorney's sense of disquiet was raised by the Court *a quo* 's use of the word *"consensus".* He argued that this meant that the Court *a quo* held the position that there was supposed to be an agreement between the parties before the decision was implemented, which was not a requirement in consultation, and thus the Court *a quo* applied the wrong legal principle.

[35] What the parties were in agreement on, was that the extracts from cases referenced by the Court *a quo* were applicable to the issue of consultation. Two particular cases stand out being:

35.1 **Swaziland Agricultural Plantations Workers Union v Usuthu Pulp Company Ltd, Case No 423/2006 (IC)** at paragraph 42:

"...Consultation, on the other hand involves seeking information, or advice on, or reaction to, a proposed cause of action. It envisages giving the consulted party an opportunity to express its opinion and make representations, with a view to taking such opinion or representations into account. It certainly does not mean merely affording an opportunity to comment about a decision already made and which is in the process of being implemented:" and

35.2 **Eswatini Government & 2 Others v Swaziland National Association of Civil Servants (SNACS) on behalf of Swaziland National Fire and Emergency Employees & 3 Others, High Court Case No 4276/2010,** per MCB Maphalala J, (as he then was). After an in-depth review of the judgements and legal writers dealing with the subjects of negotiation and consultation and citing John Grogan: Workplace Law, seventh edition, page 296, the High Court held as follows at paragraph 45;

"Consultation is to be distinguished both from joint decision making and collective bargaining. It requires the employer to do more than notifY the forum of any proposal and in good faith to consider any suggestions it may make ...."(Underlining for emphasis only).

[36] Having carefully considered the contents of the grounds against the relevant legal principles, it is the finding of this Court that;

36.1 The Court *a quo* was fully alert to the appropriate law to be applied as appears from Paragraph [32] of the judgment, to wit: "*... the matter stands to be decided on the procedural requirements for consultation as provided by the Covid-19 Guidelines of 2020 and the common law"* and in its judgment

did not adopt an approach the matter on the basis that consensus was required.

36.2 As regards the pt ground, that is, a declaration that the lay-offs were in violation of the Guidelines, the factual findings of the Court *a quo* cannot be disturbed and the point of departure in determining a question of law, would be to deem those factual findings to be correct. The Appellant has not demonstrated that the Court *a quo* applied the wrong law to these factual findings and this ground is doomed to failure.

36.3 As regards the 2nd and 3rd appeal grounds, that is, the questions whether or not a consultation was exhaustive or conducted in bad faith, or whether there had been consultation with the Labour Commissioner, these are clear questions of fact in that a court is seeking to ascertain the truth of the matter by making a detennination on the facts, its duty being to exercise its intellectual judgement on the evidence submitted to it in order to ascertain the truth.

36.4 As regards the 4th ground, that is, the Order of reinstatement and payment, this was the logical consequence of the factual findings of the Court *a quo* and is inextricably intertwined with the other grounds of appeal. The Appellant has not demonstrated that the Court *a quo* had applied the wrong law to its factual findings. No apparent question of law has been made out in this respect and the prospects of success, if any, of this ground are slim.

36.5 As regards the 5th ground, that is, that the finding that the lay-off decision was unlawful and unfair, the Appellant again failed to demonstrate that the Court *a quo* had applied the wrong law to its factual findings and again, the prospects of success, if any, of this ground are slim.

[37] This Court therefore comes to the conclusion that the Appellant has failed to make out a case for reasonable prospects of success on appeal and that condonation should be refused on this basis as well.

E. **CONCLUSIONS AND ORDER.**

[38] In terms of **Rule 21{4)** and absent an application for extension, the appeal is deemed to have been abandoned.

[39] The application for condonation was unsuccessful and therefore the appeal was not revived.

[40] The appellant failed to make out a case for reasonable prospects of success on appeal.

[41] Accordingly, the following order is made:

The appeal is dismissed, with no order as to costs.

-N.Gt:

JUSTICE OF APPEAL

I agree

S. NSIBANDE

JUDGE PRESIDE

Iagree

D. MAZIBUKO

JUSTICE OF APPEAL

For the Appellant: Mr. M. F. Tengbeh
(S.V. Mdladla & Associates)

For the Respondents: Mr. M. Hlophe
(M. Hlophe & Associates)