



INDUSTRIAL COURT OF APPEAL OF ESWATINI

RULING ON APPLICATION FOR CONDONATION

Case No. 19/2021

In the matter between

MUSA DOUGLAS KHUMALO & 31 OTHERS

Applicant

And

STEEL AND WIRE INTERNATIONAL (PTY) LTD

Respondent

Neutral citation Musa Douglas Khumalo and 31 others vs Steel and Wire International (Pty) Ltd (19/2021) 19//2021 [2021] SZICA 6 (2022)

Coram: MAZIBUKO JA, NKONYANE JA, VAN DER WALT JA

Last called: 29th March 2022

Delivered: 20th July 2022

Summary: *PROCEDURE REGARDING CONDONATION FOR LATE FILING*

- 1) *Section 19 (3) of the Industrial Relations Act no.1/2000 (as amended), allows a litigant to appeal a decision of the Industrial*

Court – within 3 (three) months – from the date of noting the appeal.

- 2) *Rule 21 (1) requires the Appellant to file the record (of proceedings from the Industrial Court), within 1 (one) month from the date of noting the appeal.*
- 3) *Rule 16 (1) gives the Court authority to extend the time limit within which a litigant may comply with the rules.*
- 4) *An appeal shall be deemed abandoned – if the appellant fails to file the record within the time provided for in rule 21 (1) as read with rule 16 (1).*
- 5) *Rule 17 vests the Court with authority to condone failure by a litigant to comply with the rules of Court, provided the litigant shows ‘sufficient cause’ for the relief sought.*
- 6) *When hearing an application for condonation – the Court has a judicial discretion to exercise. The Court will consider all factors relevant to the case. No single factor is dispositive of the matter.*

However, where there are no prospects of success on appeal, there would be no point in the Court granting condonation for late filing, no matter how good is the explanation for the delay.

Held: In the present matter; the applicants (appellants) have a weak explanation for the delay in filing the record. The Appellants have an arguable case though - on the merits of the appeal.

Held further: The Appellants have prospects of success on appeal which (in this case in particular) compensate for the Appellants' weak explanation for the delay. The appeal requires the Court to determine important questions of law which are not settled yet.

D. MAZIBUKO JA

RULING ON APPLICATION FOR CONDONATION

THE PARTIES

1. The Appellants before Court is Mr Douglas Khumalo and 31 (thirty one) others who are his colleagues at work. The Appellants were applicants

before the Industrial Court. The Respondent is the Appellants' employer and was also respondent before the Industrial Court.

2. About the 30th November 2017 the Applicants moved an application before the Industrial Court against the Respondent under SZIC case no 382/2017. Inter alia, the Appellants claimed salary increment at the same rate which the Respondent had offered another employee – with retrospective effect. The application was opposed. The Respondent raised 2 (two) points of law which are summarized below.

- 2.1 The Respondent submitted that the Appellants' dispute had prescribed by the time it was reported at the Conciliation, Mediation and Arbitration Commission (hereinafter referred to as the Commission). The Industrial Court had no jurisdiction therefore to entertain the dispute that had since been filed before it, following the issuance of the Certificate of Unresolved Dispute by the Commission.

- 2.2 The Respondent further submitted that in any event the Appellants had unduly delayed in filing their dispute in Court (for determination), after the Commission had issued its certificate

(aforementioned). The Industrial Court was requested to dismiss the application due to the alleged – undue delay.

INDUSTRIAL COURT RULING

3. The Industrial Court heard argument on the points of law aforementioned. The first point, relating to prescription, was decided in favour of the Applicants (Appellants). The second point relating to an alleged undue delay in prosecuting the dispute before the Industrial Court - was decided in favour of the Respondent. The ruling of the Court a quo is dated 27th August, 2021.

4. About the 25th November 2021 the Appellants filed a notice of appeal in which they challenged the ruling of the Industrial Court aforementioned. In particular the ruling upheld the point of law – relating to undue delay in the prosecution of the dispute before the Industrial Court. The Respondent opposed the appeal by filing a notice dated 29th November 2021.

APPLICATION FOR CONDONATION

5. About the 7th March 2022 an urgent application was placed before the present Court and it was supported by a founding affidavit of attorney

Luke Simelane. In the Notice of Application the following relief was sought:

- “1. *Dispensing with the normal rules of this Honourable Court as they relate to form service and time limits and hearing this matter as an urgent one.*

2. *Condoning the Appellants’ late filing of the record of proceedings, the Heads of Arguments and Bundle of Authorities.*

3. *Granting Appellants any further and/ or alternative relief that this Honourable Court may deem appropriate.”*

(Condonation application page 3)

6. The Court is being asked to condone the late filing of the record of proceedings (from the Industrial Court), and also to condone the late filing of the heads of argument plus the authorities. The Appellant conceded that the filing of the record, as well as the heads of argument plus authorities was late.

SECTION 19 (3) – FILING OF A NOTICE OF APPEAL.

6.1 In terms of Section 19 (3) of the Industrial Relations Act (supra) an appeal against a decision of the Industrial Court shall be lodged within 3 (three) months of the date of the decision. The relevant section is hereby reproduced:

“3. An appeal against the decision of the Court to the Industrial Court of Appeal shall be lodged within three (3) months of the date of the decision.”

6.2 As aforementioned, the Industrial Court issued its decision on the 27th August 2021. The Appellant appealed the Industrial Court decision on the 25th November 2021. The notice of appeal was filed on time.

RULE 21 (1) – FILING OF A RECORD

7. According to rule 21 (1) of the Industrial Court of Appeal rules (1997) an appellant has to file a record within 1 (one) month from the date of noting the appeal. The sub-rule is hereby reproduced.

“21 (1) The appellant shall prepare the record 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.”

(Underlining added)

7.1 In the matter of SWAZILAND ELECTRICITY BOARD VS MOSES SHONGWE SZICA case no. 12/2019 (unreported) the Court expressed itself as follows regarding rule 21 (1), to which we respectfully agree:

“From the date of noting the appeal, the appellant has one month within which to file the record.”

(Underlining added)

(At page 16 paragraph 17.6)

7.2 In this case the Appellants filed the record with the Registrar of this Court on the 3rd March 2022. Since the Appellants had 1 (one) month to file the record, as calculated from 25th November 2021, the filing of the record was therefore late approximately by 2 (two) months.

RULE 16 (1) – EXTENSION OF TIME

7.3 In terms of rule 16 (1), the Court is empowered to extend the time limits that are prescribed in the rules, on a proper application placed before it. When a party perceives that it may not meet the time limits that are prescribed in the rules, that party may apply to Court to extend the time within which to comply. The Court has a judicial discretion to exercise – when it determines that application.

7.4 The Appellants’ attorney must have realised, at some point, that he was running out of time to file the record from the Industrial Court and that he was not going to meet the deadline. The Appellants’ attorney expressed himself as follows regarding this point:

“I humbly submit that I did not make an application for an extension of time because [I] was of the view that it would be improper and unreasonable to apply for an indefinite extension of time.”

(Application for Condonation at page 31 paragraph 11)

FAILURE TO APPLY FOR EXTENSION OF TIME

7.5 The reason the Appellants' attorney did not apply for an extension of time to file the record, was because he alleged - he could not apply for an indefinite extension. He did not know when the missing file would be located.

7.6 The Appellants' attorney could have applied to this Court for extension of time in order to file the record. In a situation (such as the present) where the learned attorney could not commit himself to a specific date, he could have explained his predicament to the Court and then rely on an approximate time period that would be reasonable in the circumstances. No one could predict when exactly the missing file would be found. The Court would have been asked to take that fact (of uncertainty), into consideration when it heard the application for extension of time. In this case it is not the Court that refused to grant the Appellants an extension of time within which to file the record. Instead, it is the Appellants who failed to file an application for an extension.

7.7 Supposing, hypothetically, it were to be said that the Appellants applied and the Court granted them an extension of time to file,

and that extension was based on an estimated time limit – which eventually proved insufficient for the Appellants to file, the Appellants could approach the Court again for further consideration. The Court could still exercise its discretion in the matter taking into consideration such fresh evidence as may be presented before it at that point. The failure by the Appellants to comply with rule 16 (1) – meaning to apply for an extension of time within which to file the record, is unreasonable.

APPEAL DEEMED ABANDONED

7.8 The law provides that: where an appellant has noted an appeal but failed to file a record within 1 (one) month of the date of noting the appeal, and has not obtained an extension of time within which to file the record, that appeal shall be deemed to have been abandoned.

7.8.1 Rule 21 (4) reads thus: *“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.”*

7.8.2 The effect of failure by an Appellant to file the record in time was dealt with extensively by the Supreme Court in the matter of: THEMBA NZUZA AND OTHERS VS ENOCK NZUZA AND OTHERS SZSC case no. 69/2015 (unreported). The Court restated the principle as follows:

- “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 considered to be abandoned which has the effect of actual abandonment and of reducing the matter to a state of final res judicata ...”*

(At pages 21 -22)

7.8.3 In the matter of DR SIFISO BARROW VS DR PRISCILLA DLAMINI AND ANOTHER SZSC case no. 9/2014, (unreported) the Court confirmed the legal principle as follows:

“... if an appellant fails to ... submit the record for certification within the time provided by this rule, the appeal shall be deemed to have been abandoned.”

(At paragraph 19)

7.8.4 In the matter of THANDI MKHATSHWA VS NOMSA STEWART AND OTHERS SZSC case no 3/2016, (unreported) the Court emphasized the legal principle as follows:

“The first thing to note is that ... [Rule 21 (1)] is peremptory. It commands that the appeal which has not been followed through with filing of record should be deemed abandoned. No amount of discretion appears except may be as built into Rule 16 (1) [as] read with Rule 17”

(At page 7 paragraph 11)

7.8.5 On the authority of rule 21 (4) as read with the Supreme Court judgments - aforementioned, the appeal before this Court is deemed to have been abandoned – with the concomitant consequences.

RULE 17 – APPLICATION FOR CONDONATION

8. On the 7th March 2022 the Appellants brought before Court an application for condonation. An excerpt of the prayers is reproduced in paragraph 5 above.

9. In terms of rule 17 the present Court has the authority to condone non-compliance with the rules, provided the party seeking condonation has shown sufficient cause for the relief sought. For the sake of completeness rule 17 is hereby reproduced.

“17. The Industrial Court of Appeal ... 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.”

- 9.1 The Court has noticed that the phrase: “... *sufficient cause* ...” has been used synonymously with the following phrases: “... *reasonable and acceptable explanation* ...” or “... *good cause*...”

which are found in other Court judgments. The principle remains the same despite the variation in the expression – as shown above:

9.1.1 In the matter of: ESWATINI NATIONAL TRUST COMMISSION VS SWAZILAND NATIONAL TRUST COMMISSION STAFF ASSOCIATION AND 3 OTHERS SZICA case no 12/2020 (unreported) the Court referred to ‘... *a reasonable and acceptable explanation for the default ...*’
(At page 14 paragraph 20)

9.1.2 In the matter of NZUZA VS NZUZA (supra) the Court referred to: “... *a good cause ...*”.
(At page 9 paragraph 6)

9.2 According to the Appellants’ attorney he was instructed on the 25th November 2021 to note an appeal against the ruling of the Industrial Court. The learned attorney did not however, have access to the file that had been used to argue the case at the Industrial Court. At the Industrial Court the Appellants were represented by a gentleman called Mr Shadrack Masuku who

carried on business as ‘*a labour consultant*’ and was therefore not an attorney.

9.3 Due to certain personal problems Mr Masuku did not immediately hand over the file to the Appellants’ attorney. Mr Masuku did file a confirmatory affidavit dated 8th March 2022 which accompanied the replying affidavit of the Appellants’ attorney. In that affidavit Mr Masuku explained the reason he delayed releasing the file to the Appellants’ attorney.

9.4 According to Mr Masuku he relocated his office in December 2021 and in that process he misplaced, inter alia, the Appellants’ file that was under his control. The files and pleadings that were in his possession were ‘*mixed up*’, meaning they were not kept in an orderly fashion. Mr Masuku added that he: “... got the pleadings one by one in different places in the office. Consequently, there was a delay in getting the full set of pleadings for submission to the Appellants’ attorneys.”

(Underlining added)

(Application for Condonation page 36 paragraph 3)

9.5 Mr Masuku mentioned that it took him over a month to collect a “ *full set of pleadings*”. He handed over to the Appellants’ attorney the said – full set of pleadings – in the last week of February 2022. The Appellants’ attorney had stated in his founding affidavit that:

“... it took Mr Masuku over a month to get the pleadings in the matter. He brought the pleadings to me in the last week of February 2022.”

(Underlining added)

(Application for Condonation page 6 paragraph 12)

9.6 Words and phrases such as ‘*pleadings*’ and ‘*full set of pleadings*’ which have been excerpted from both the founding affidavit of the Appellants’ attorney and the confirmatory affidavit of the said Mr Masuku have been underlined for the sake of emphasis. The Court will revisit these words and phrases later in this judgment.

9.7 The Appellants’ attorney further confirmed that he did not write to the Registrar of the Industrial Court to request assistance in

locating the file. His explanation was that he had enquired from the officers in the office of the Registrar who had advised him that the file was missing from the Records Section. In particular 2 (two) officers are mentioned by name from whom the learned attorney alleges he sought assistance in locating the file viz: Ms Zama Dlamini and Mr Bonginkosi Dlamini.

9.8 An excerpt of the replying affidavit of the Appellants' attorney reads thus:

“8.1 I maintain that I encountered difficulty in getting the Court files in the Court a quo. I first approached Ms Zama Dlamini. She looked for the files and could not find it [sic]. She then referred me to Mr Bonginkosi Dlamini who was the Presiding Judge’s Clerk in the Court a quo. I approached Mr Dlamini and requested him to look for the file. He made an undertaking to look for the file.

8.2 I humbly submit that I could not get a confirmatory affidavit from Ms Dlamini and Mr Dlamini. They said they do not have legal authority to make affidavits pertaining to their duties at work.

9. *I submit that I did not write a letter to the Registrar seeking her assistance to obtain the Court files. In my view it was not necessary because I kept on going to the Court's Clerk to check progress about the missing files. My view was that going to the Court physically to make enquiry about the Court files was going to give me positive results faster than writing a letter to the Registrar.*

10. *I maintain that after the Christmas holidays I went several times to make a follow up with Mr Dlamini who had made an undertaking to continue with the search for the files that were missing. He made an undertaking that he will continue searching for the files.”*
(Application for Condonation page 31 paragraphs 8.1 to 10).

9.9 According to the learned attorney, he communicated his predicament to the 2 (two) officers aforementioned, and in his opinion – that exercise was equivalent to him communicating with the Registrar – since the aforementioned officers worked as assistants to the Registrar.

9.10 In Section 7 (2) of the Industrial Relations Act (supra), the following is provided:

“(2) The Registrar shall be ... in charge of the administrative functions of the Industrial Court ...”

(3) ...

(4) The Registrar shall be assisted by –

(a) ...

(b) *so many other officers as the administration of justice requires.*

(5) The officers, under the supervision of the Registrar, shall perform the administrative functions of the Court.”

(Underlining added)

9.11 According to the Industrial Relations Act (supra) the Registrar is entitled to be assisted by officers (under his/her supervision), in carrying out certain administrative function – in relation to his/her office. The Registrar is however in charge of the office and therefore custodian of the Court files. The Appellants or their attorney had an obligation therefore to formally communicate with the Registrar concerning the urgent need to locate the file. There is no evidence before Court that the Registrar failed to locate the file.

Had the assistance of the Registrar been sought, and had the Registrar failed to deliver the file as requested, the Registrar would have been expected to file an affidavit supporting the Appellants' contention that the file was missing in his/her custody. The Registrar can testify under oath concerning an incident that has occurred in his/her office which he/she has witnessed.

9.12 In the circumstances, the failure by the Appellants and their attorney to formally communicate with the Registrar concerning the missing file cannot be classified as a “*sufficient cause*” as required in rule 17.

9.13 When the Appellants' attorney mentioned on affidavit that he experienced delay in receiving the record from the labour consultant aforementioned, he actually meant the pleadings filed under SZIC case no.382/2017. In paragraphs 9.4 and 9.5 above the Court laid emphasis on the Appellants' reliance on the absence of pleadings as the only reason it failed to file the record on time. In other words the matter was decided by the Industrial Court solely on the evidence as contained in the pleadings and that oral evidence

was not led. An additional excerpt from the founding affidavit of the Appellants' attorney makes the point vividly clear and it reads thus:

9.14 *“In the circumstances, I submit that the delay in filing the record and the Heads of Argument was not deliberate or due to lack of diligence on my part. Firstly, it was difficult for me to get the pleadings for the purpose of compiling the Court record.”*

(Underlining added)

(Application for Condonation page 7 paragraph 14)

10. What is glaringly missing from the application for condonation, is the failure by the Appellants and/or their attorney to request a copy of the pleadings from the Respondent's attorney. When the matter was argued before the Industrial Court, each of the parties, as well as the Court, had a copy of the pleadings.

10.1 According to the Appellants attorney; he realised soon after the 25th November 2021, that he was in need of the pleadings that had been used at the Industrial Court.

10.2 The learned attorney also mentioned that he became aware that the aforementioned Mr Masuku had temporarily misplaced his file.

10.3 The Appellants' attorney was also aware of the legal requirement, viz: to file the record within 1 (one) month from the date of noting the appeal. At that point the Appellants' attorney was legally entitled to request the Respondent's attorney to avail a Book of Pleadings which had been used during argument before the Industrial Court. If requested, the Respondent's attorney would have been legally obligated to comply, so far as it could be practicable.

10.4 Rule 21 (5) (a) provides as follows:

“The appellant in preparing the record shall, in consultation with the opposite party, endeavor to exclude therefrom documents not relevant to the subject matter of the appeal and to reduce the bulk of the record so far as practicable;”

(Underlining added)

10.5 According to rule 21(5) (a), it is mandatory that the Appellant should consult the Respondent when he/she prepares the record –

particularly to ensure that the record is complete and correct, so far as practicable. It follows logically that the Respondent has a duty to co-operate with the Appellant in order to ensure that a proper record is placed before the Court, in order for the appeal to proceed.

10.6 In this case it appears that, the Appellants' attorney overlooked the provision of rule 21(5) (a). Rule 21(5) (a) is peremptory. The Appellants' attorney failed to invite the Respondent's attorney to avail a Book of Pleadings. That conduct amounted to failure by the Appellants' attorney to consult the Respondent's attorney regarding preparation of the record. There is no explanation before Court for the failure by the Appellants' attorney to consult the Respondent's attorney regarding preparation of the record. In other words the Appellants' failure to file the record on time was not caused by circumstances beyond their control. In the circumstances the Appellants' failure to file the record on time was not supported by a '*sufficient cause*,' such as is required in rule 17.

10.7 The concept of ‘... *sufficient cause* ...’ has been explained in various Court judgments, some of which are reproduced below.

11. In the matter of MELANE VS SANTAM INSURANCE Co. Ltd 1962 (4) SA 531 at 532B-E, the Court confirmed the fact that it exercises judicial discretion in order to determine whether or not ‘...*sufficient cause* ...’ has been shown in an application for condonation. The Court went further to explain the factors that it takes into consideration when it exercises its discretion as follows:

11.1 *“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 usually relevant are the degree of lateness, the explanation therefor, the prospect 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. What is*

needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for the prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.

- 11.2 According to the MELANE case, an appellant who has failed to file the appeal record on time - may be granted condonation (for late filing), even if he has a weak explanation for his delay, provided he has strong prospects of success on appeal, or that the matter involves important legal principles which require determination by Court. In other words, a weak explanation for the delay is not by itself fatal to the application for condonation. There are other factors that an applicant for condonation may present in order to persuade the Court to condone his non-compliance with the rule. However where there are no prospects of success on appeal, condonation will fail even if “good cause” has been shown for non-compliance.

11.3 The MELANE case has been quoted with approval in some local cases, for instance, ESWATINI NATIONAL TRUST COMMISSION VS SWAZILAND NATIONAL TRUST COMMISSION STAFF ASSOCIATION SZICA (supra).

12. The principle in the MELANE case has been confirmed in other legal authorities as shown below:

12.1 *“When the applicant relies upon the ineptitude and remissness of his own attorney and his explanation leaves much to be desired, condonation will be granted only if the prospects of success on appeal are strong.”*

(Underlining added)

ERASMUS H.J: SUPERIOR COURT PRACTICE, 1994 Juta (ISBN 0 7021 3013 6) page B1 – 364.

12.2 *“The appeal Court will tend to grant relief where the case involved a substantial sum of money, or will decide an important legal issue, The general importance of the issue may incline the court toward leniency in considering the applicant’s explanation of the delay.*

(Underlining added)

ERASMUS (supra) page B1 – 364

- 12.3 *“Though, as has been said above, the court will not fetter its discretion, but will consider all the circumstances of the case, there are certain facts that are usually relevant to the decision whether to grant relief, namely the reason for the default, the nature of the case, the probability of success on the merits, the time that has elapsed, the benefit to the applicant and the nature of the default.”*

(Underlining added)

HERBSTEIN AND VAN WINSEN: THE CIVIL PRACTICE OF THE HIGH COURTS AND THE SUPREME COURT OF APPEAL OF SOUTH AFRICA, 5th edition Juta, 2009, (ISBN 978 0 7021 7933 4) page 1229.

- 12.4 *“The applicant may be able to show such merits as justify the court in granting relief even though the delay is abnormal, and conversely, there may be such lack of merit as justifies the court in refusing indulgence sought even though the delay is both short and satisfactorily explained.”*

(Underlining added)

HERBSTEIN AND VAN WINSEN (supra) page 1232.

12.5 “... *the court will more readily grant indulgence where the delay was not unduly protracted and there are other favourable circumstances.*”

(Underlining added)

HERBSTEIN AND VAN WINSEN (supra) pages 1235.

12.6 In the matter of: KANDERSSEN LTD VS BOWMAN NO 1980 (3) SA 1142 the Court dealt with the issue of prospects of success as follows:

“If, however, I were convinced that the applicant’s prospects of success in the appeal are very strong, I would be inclined to grant condonation”

(At page 1146 B – C)

12.7 In the matter of UNITED PLANT HIRE (PTY) LTD VS HILLS 1976 (1) SA 717, the Court stated the following:

“And so to the prospects of success on the merits of the appeal, for these, if strong, could carry the day despite an inauspicious dilatoriness and explanation.”

(At page 722 C- D)

- 12.8 The aforementioned authorities emphasize the fact that – the prospects of success on appeal, is an important element which the Court will invariably take into consideration when making a determination whether or not to condone the applicants’ (appellants’) non – compliance with the rules.
13. In the TRUST COMMISSION case (supra), the Court was called upon to determine an application for condonation for non- compliance with the rules relating to a matter on appeal. The application was unsuccessful because, in that case, the applicant (appellant) failed to show prospects of success.
14. The Appellants have stated that they have good prospects of success on the merits of the appeal. The Appellants have, inter alia, raised the following issues in their notice of appeal.

14.1 One of the reasons the Industrial Court gave for dismissing the application before it, was that: the Applicants (Appellants) delayed in filing their application before Court – after a Certificate of Unresolved Dispute had been issued.

14.2 According to the Applicants; there is no legal provision that regulates the time within which an applicant is obligated to file a claim before Court – after the certificate had been issued. There is therefore no legal basis on which the Industrial Court could arrive at the conclusion that the Applicants had unduly delayed in filing their claim in Court.

14.2.1 In its ruling the Industrial Court stated the following:

“There was no mention of case no 368/2012 in the founding affidavit, as well as any of the confirmatory affidavits that were filed herein by the Applicants. It is also true that the Applicants did not apply for condonation for the filing of their claim when they filed the current application which is presently serving before Court.”

(Record page 137 paragraph 5.5)

14.2.2 In the relying affidavit the Appellants stated the following regarding the issue:

“26.1 There has been no delays in the institution of this Application/ Proceedings as the matter was in Court albeit under IC case No 368/2012.”

(Record page 83)

14.2.3 From the ruling of the Industrial Court, there is no indication whether or not the replying affidavit of the Applicants (Appellants) was considered. If it was considered, there is no indication as to whether or not clause 26.1 of the replying affidavit had any effect on the portion of the ruling that made reference to case no 368/2012 - as aforementioned. The said clause 26.1 in the replying affidavit of the Applicants is quoted in full in paragraph 14.2.2 above.

14.3 Another reason the Industrial Court gave for dismissing the application is that; the Applicants failed to apply for condonation

for late filing of their claim before Court. The concept of condonation is interlinked with that of – undue delay in filing a claim before Court, after the certificate had been issued. The Industrial Court made specific mention of the absence of condonation - in its decision.

14.4 The Applicants (Appellants) have raised an arguable issue on appeal. In this particular case the Appellants have prospects of success on appeal. The question as to when should an applicant file his claim before the Industrial Court – after a certificate had been issued – does not appear to have been settled. It is clearly a question of law that deserves a further consideration and determination by the Court. The concomitant question as to when (if at all) should the applicant, (before the Industrial Court), apply for condonation for late filing of his claim – is also a question of law which has not been settled yet. The nature of the legal question that is contained in the notice of appeal as well as the extent of the delay in filing the record, has persuaded the Court to grant condonation for late filing of the record on appeal. As aforementioned, the question whether or not to grant condonation

is an exercise of judicial discretion which requires a consideration of all the relevant factors.

14.5 An appeal that was deemed abandoned in terms of rule 21 (4) can be revived, by a successful application (in terms of rule 17), viz; for condonation for late filing of the record. In the case before Court the Applicants (Appellants) have presented prospects of success on appeal – which tilted the scales of justice in favour of granting condonation.

15. In the matter of ETHEL DLAMINI (born Gule) VS PRINCE & CHIEF GASAWANGWANE SZSC case no. 93/2018 B, the Supreme Court *mero motu*, granted the appellant condonation for non-compliance with the rules. There was absence of an appropriate application either for extension of time to comply with the rules or condonation for non-compliance.

15.1 An excerpt of the judgment reads thus:

“25. It is clear that the late filing of the record was clearly due to the negligence of the appellant’s attorney. Furthermore, having

discovered that the filing of the record was out of time, he failed to prepare a comprehensive and detailed application for extension or condonation, the principles of which have been enunciated in this Court in many decisions. Even when he knew the matter was on the roll, he failed to file heads as required in terms of the law.”

26. *Whilst the Court mero motu granted condonation in the interests of justice...”*

(Underlining added)

(At page 12)

“15 *Notwithstanding the defects in the applicant’s application referred to above, the Court mero motu and reluctantly granted the application for condonation in the interest of justice...”*

(Underlining added)

(At page 9)

15.2 The ETHEL DLAMINI matter was decided on the 9th October 2019.

15.3 The basis on which the Court granted condonation in the ETHEL DLAMINI case was ‘*the interest of justice.*’ In the ETHEL DLAMINI case, the Supreme Court introduced a new dimension in the manner the principle of “*sufficient cause*” has hitherto been interpreted. In other words the Court can grant condonation- if it is in the ‘*interest of justice*’ – to do so, notwithstanding a weak explanation for non- compliance with the rules. However the ‘*interest of justice*’ requirement - presupposes that the appellant has prospects of success on appeal. As stated in the MELANE case (supra), it would serve no purpose to grant condonation in a case where there are no prospects of success on appeal.

15.4 In a recent case of BOYCE BHEKI GAMA VS CHAIRMAN OF PREROGATIVE OF MERCY COMMITTEE AND 3 OTHERS SZSC (81/2017) [2022] SZSC 25 (01 June 2022), the Supreme Court endorsed the principle in the ETHEL DLAMINI case as follows:

“26.2 *there are several judgments in our jurisdiction wherein condonation was granted on the basis of the interests of justice, for instance Ethel Dlamini (born Gule) vs Prince [&] Chief GasawaNgwane (93/2018 B) [2019] SZSC 40 (8 October 2019) wherein the application for condonation did not meet the required threshold but the Court mero motu, in the interests of justice granted condonation.”*

(Underlining added)

(At page 20)

15.5 The BOYCE GAMA case was decided on the 21st June 2022.

15.6 In addition to the determination by this Court – aforementioned, the concept of ‘*the interest of justice*’ supports the Applicants’ (Appellants’) argument. It is in the ‘*interest of justice*’ that the legal question that has been raised on appeal be judicially determined. This is an additional reason the Court grants the Applicants (Appellants) condonation for non- compliance with the rules.

16. Wherefore the Court makes the following order:

16.1 Condonation for the late filing of the record is hereby granted.

16.2 The appeal is accordingly revived.

16.3 The parties are to comply with the rules of Court regarding filing heads of argument and supporting authorities.

16.4. Each party is to pay its costs.

D. MAZIBUKO
JUSTICE OF APPEAL

I agree

N. NKONYANE
JUSTICE OF APPEAL

I agree

J.M. VAN DER WALT
JUSTICE OF APPEAL

For the Appellants:

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C/o LM Simelane and Associates

For the Respondent:

Ms Q. Dlamini
C/o Musa M. Sibandze