



**IN THE SUPREME COURT OF ESWATINI**

**JUDGMENT**

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**HELD AT MBABANE**

**Case No. 81/2017**

In the matter between:

**BOYCEY BHEKI GAMA**

**Applicant**

and

**CHAIRMAN OF PREROGATIVE OF**

**MERCY COMMITTEE**

**1<sup>st</sup> Respondent**

**THE COMMISSIONER GENERAL OF**

**HIS MAJESTY'S ORRECTIONAL SERVICES**

**2<sup>nd</sup> Respondent**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**3<sup>rd</sup> Respondent**

**THE ATTORNEY GENERAL**

**4<sup>th</sup> Respondent**

In re:

**CHAIRMAN OF PREROGATIVE OF**

**MERCY COMMITTEE**

**1<sup>st</sup> Appellant**

**THE COMMISSIONER GENERAL OF**

**HIS MAJESTY'S CORRECTIONAL SERVICES**

**2<sup>nd</sup> Appellant**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**3<sup>rd</sup> Appellant**

**THE ATTORNEY GENERAL**

**4<sup>th</sup> Appellant**

and

**BOYCEY BHEKI GAMA**

**Respondent**

**Neutral Citation:** *Boycey Bheki Gama vs Chairman of Prerogative of Mercy Committee & 3 Others (81/2017) [2022] SZSC 25 (21/06/2022)*

**Coram:** **J.M. CURRIE AJA.**

**Heard:** 01 June, 2022.

**Delivered:** 21 June, 2022.

**SUMMARY:** *Appeal – Appeal deemed lapsed – Basic principles restated – Applications for condonation – Constitutional issues and the interests of justice restated.*

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**JUDGMENT**

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**J.M. CURRIE AJA**

**INTRODUCTION**

[1] The parties cited in the main appeal are the four Respondents as Appellants and **BOYCEY BHEKI GAMA** as Respondent. For ease of reference, the former will be referred to as the Appellants and the latter as “Mr Gama.” The 4<sup>th</sup> Appellant (hereinafter referred to as the “Attorney -General”) acts on

behalf of the other Appellants and is represented in Court by Mr N. G. Dlamini (hereinafter referred to as “Mr Dlamini.”) Mr Gama, who has been detained at Matsapha Correction Institutional as a convict, is represented by Mr Gumedze of V.Z. Dlamini Attorneys.

[2] There are three preliminary applications falling for consideration before this Court, set out in chronological order hereunder, namely:

1. An application entitled Notice of Application: Extension/Condonation dated 14 August 2020 by the Attorney-General on behalf of the Appellants as Applicants.
2. An application by Mr Gama as Applicant dated 26 November 2021 for an order declaring the Appeal filed by Appellants deemed to have been abandoned.
3. An application by Mr Gama dated 23 May 2022 for condonation for late filing of the Respondent’s Heads of Argument.

[3] The application for an order declaring the Appeal deemed abandoned is opposed by the Appellants and the application for an extension of time and condonation by the Appellants is opposed by Mr Gama.

## **BACKGROUND**

[4] On 23 September 1993 Mr. Gama was convicted by the High Court on a charge of murder and was sentenced to death.

[5] Mr. Gama appealed against both conviction and sentence and on 21 April 1995 the Court of Appeal dismissed the Appeal and confirmed both conviction and sentence.

[6] In 2001 the issue of Mr. Gama's death sentence was submitted to the Prerogative of Mercy Committee. On 5 November 2001 His Majesty commuted the death penalty to life imprisonment on the condition that Mr. Gama would be released from prison upon attaining the age of 75 years.

[7] On 13 August 2015 Mr. Gama, as Applicant, instituted review proceedings in the court a *quo* to set aside the age condition precedent to his release, declaring him to have served his commuted sentence of life imprisonment

and directing his release from prison. He stated that at the time of the pardon on 6 November 2001 he had already been in custody for 8 years. On the date of the hearing of the application on 1 December 2016 he had already been in custody for twenty three years. He contended that in terms of the Prisons Act No. 40/1960 a life sentence translates to twenty years and, in terms of the Constitution, to not less than 25 years. He maintained that in both respects he had completed a life sentence in terms of the law.

[8] On 5 October 2017 the Court *a quo* (High Court sitting as a Constitutional Court) granted the application and made the following orders:-

***“(a) An order reviewing and setting aside and/or correcting the condition of the pardon recommended by the Prerogative of Mercy Committee that Applicant may only be released on attainment of the age of 75 years is hereby granted.***

***(b) An order declaring that the Applicant has served a life sentence in the form of the pardon recommended by the Prerogative of Mercy Committee is hereby granted.***

***(c) An order that the Applicant be released from custody for the reason that he has served his sentence is hereby granted.”***

[9] On 6 October 2017 Respondents filed a Notice of Appeal, the effect of which was to suspend the operation of the judgment appealed against as a result of which Mr Gama’s incarceration continued.

[10] Thereafter the Appellants did not file the Record of Appeal within two months, as is required in terms of Rules 30(1) of the Rules of this Court.

**APPELLANTS’ CASE REGARDING EXTENSION/CONDONATION  
LATE FILING OF THE RECORD OF APPEAL.**

[11] On 14 August 2020 the Attorney-General by way of Notice of Motion filed a combined application for an extension of time and condonation seeking, *inter alia*, the following orders:

**“1. Condonation of Appellants’ failure to file the Record of Appeal within the prescribed dies of two months from delivery of the Judgment appealed against;**

2. ***Appellants be allowed to file the Record of Appeal within three days of the Order on Prayer 1 above if granted.***
3. ***The parties be directed to file Heads of Argument on such dates as the Honourable Court may deem appropriate.”***

[12] The Attorney-General submits as follows in the Founding Affidavit and in the Heads of Argument which were filed on 23 May 2022, out of time:

1. That the file was misplaced in December 2017 when the Attorney General’s Chambers relocated to a new wing of the Ministry of Justice Building.
2. That the Crown Counsel who had been custodian of the file and who had been assigned Counsel, resigned.
3. The High Court file was missing from the High Court Registry.

4. Eventually, in conjunction with Mr. Gama's substituted attorney, the parties were able to prepare the record.

5. Mr. Dlamini contends in his affidavit that "*I have had to work my finger to the bone to take this matter forward.*"

6. He further submits that there are good prospects of success on Appeal in that:

6.1 The Court *a quo* was *functus officio* when it heard the matter in 2017 and it could not review its own decision.

6.2 The Court *a quo* was incorrect when ordering the release of the Respondent. The crisp issue is the age of 75 condition. Although the Respondent has in 2022 served 28 [sic] years (3 beyond the Constitutional minimum of 25 years) the conditional age for his release has not yet come to be.



6.3 The Court *a quo* incorrectly gave precedence to the Prisons Act over the Constitution.

[13] In Court, Mr Dlamini conceded that the continued imprisonment of Mr Gama was prejudicial to Mr Gama in that he had been further deprived of his freedom.

13.1 However, M Dlamini submitted, “*the inconvenience of not knowing his fate weighs far less than knowing his fate by determination of this appeal.*”

13.2 In order to compensate Mr Gama for the prejudice he has suffered, costs were tendered by Mr Dlamini on behalf of the Appellants.

13.3 Despite the inordinate delay in bringing this matter to finality, Mr. Dlamini further submitted, the constitutional question of the applicable law requires a full hearing as this is a novel case involving complex issues and it is imperative that the matter be fully ventilated before this Court and adjudicated upon.

[14] A confirmatory affidavit by Mr .Dlamini was attached to the founding affidavit of the Attorney General, wherein Mr Dlamini states that he did assist the then Crown Counsel, Bonginkhosi Sengwayo, who argued the Appellants' case in the Court *a quo*.

[15] A further supporting affidavit of Ms Phindile Dlamini, Commissioner General of His Majesty's Correctional Services was annexed to the founding affidavit wherein she states as follows:

15.1 There are five other inmates whose death sentences were commuted by His Majesty on the same condition that they would be released upon attaining specified ages which they shall reach after having served beyond twenty years of imprisonment. It is for this reason that her predecessor instructed the Attorney General to prosecute the appeal in order to obtain clarity on the issue.

15.2 Three of the five inmates received their commutations before the advent of the Constitution. The other two had their death sentences commuted to life imprisonment after the commencement of the 2005

Constitution. They are being detained, like the Respondent until they reach their conditional ages set in their respective Certificates of Pardon.

15.3 The Second Appellant fully supports the application as it is imperative that this Court pronounces itself definitively on the question of whether the age condition as fixed by His Majesty or the commuted sentence should prevail.

**MR GAMA'S CASE IN OPPOSITION TO THE APPLICATION FOR EXTENSION: CONDONATION LATE FILING OF THE RECORD OF APPEAL.**

[16] Mr Gama strenuously opposes the application for an extension of time and condonation.

[17] Mr Gama submits that the Appellants filed their Notice of Appeal on 6<sup>th</sup> October 2017 but did not file the Record of Appeal within the requisite time period nor did they bring an application for extension of time as soon as it was realized that the court file could not be found; nor was an application for condonation filed until 2020.

[18] Reliance was placed on the case of *Terror Maziya v The Attorney General (66/2020) [2021] SZSC 03 (02<sup>ND</sup> JUNE, 2021)* wherein it had been held at Paragraph 17 that: *“It is well-settled in this jurisdiction than an application for condonation should be made as soon as the litigant realises that the Rules of Court have not been complied with. Negligence on the part of the litigant’s Attorney will not exonerate the litigant. The general principle of our law regarding condonation is that whenever a prospective appellant realises that he has not complied with the Rules of Court, he should, apart from remedying his default immediately also apply for condonation without delay.”*

[19] Mr Gama further disputes that the Appellants have good prospects of success, on the following grounds:

1. In terms of the Prisons Act 40 of 1964, Section 43 (2) of the Act deems a life sentence to be 20 years.
2. When the Respondent received the pardon, the Constitution of the Kingdom of Eswatini Act, 2005 which stipulates that

a convicted person who has been granted pardon may only be released upon attaining the age of 75 was not yet in place.

3. The Court *a quo* therefore came to the correct conclusion when ordering that Respondent should be released from custody as he has already spent thirty years in prison.

### **THE APPLICABLE LAW**

[20] An appeal is deemed abandoned in the following circumstances set out in Rule 30 of the Rules of this Court:

***“30. (1) The Appellant shall prepare the Record of Appeal in accordance with sub-rules (5) and (6) hereof and shall within two months of the date of noting of the Appeal lodge a copy thereof with the Registrar of the High Court for certification as correct.***

.....

***30. (4) Subject to Rule 16 (1), if an Appellant fails to note an Appeal or to submit or resubmit the Record of Certification within the time***

*provided by this Rule, the Appeal shall be deemed to have been abandoned.”*

[21] These sub-rules are read with Rules 16 and 17:

*“Rule 16 (1) The Judge President or any Judge of Appeal designated by him may on application extend any time prescribed by these rules: provided that the Judge President or such Judge of appeal may if he thinks fit refer the Application to the Court of Appeal for decision.”:*

*“Rule 17 The Court of Appeal may on application and for sufficient cause shown, excuse any party from compliance with any of these Rules and any give such directions in matters of practice and procedure as it considers just and expedient.”*

[22] Section 30 (4) is unambiguous and is couched in peremptory terms. Therefore, if an Appellant fails to submit the Record within the prescribed period of 2 months in terms of Rule 30 (1), the Appeal is deemed to have been abandoned unless the Appellant has launched an application for extension of time in terms of Rule 16 (1). Such application should be launched as soon as an Appellant realizes that, for whatever reason, it is not possible to file the Record within the requisite time period.

[23] The following excerpts from **Themba Nzuzwa and 4 Others v Enock Mandla Nzuzwa 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 Mkhwatshwa 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).”*

[24] In *casu* it is common cause that the Record was not filed within the prescribed period of 2 months and that there had been no application for extension prior to the expiry of the *dies*. In the circumstances Rule 30 (4) applies with full force and the Appeal is deemed abandoned.

[25] As far as application for condonation is concerned, be it for revival of an Appeal deemed to have lapsed or other purpose, the position is enunciated in crisp terms in the **Terror Maziya v The Attorney General** case referred to above:

1. Application to be made forthwith - Paragraph 17: *“It is well-settled in this jurisdiction than an application for condonation should be made as soon as the litigant realises that the Rules of Court have not been complied with. Negligence on the part of the*



*litigant's Attorney will not exonerate the litigant. The general principle of our law regarding condonation is that whenever a prospective appellant realises that he has not complied with the Rules of Court, he should, apart from remedying his default immediately also apply for condonation without delay."*

2. Negligence of legal representative - Paragraph [29]:

*"The failure to comply with the Rules of Court and the need to apply for condonation timeously upon realising non-compliance applies equally to the litigant as it does when non-compliance is caused by the negligence of the Attorney.<sup>1</sup> Steyn CJ in **Saloojee and Another v Minister of Community Development**<sup>2</sup> emphasized the legal principle applicable to condonation applications succinctly as follows:-*

***". . . . it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant***

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<sup>1</sup> Saloojee & Another v Minister of Community Development (*supra*) at 141 .

<sup>2</sup> Saloojee & Another v Minister of Community Development (*supra*) at 141; Barrow v Dlamini and Another (*supra*) at para 16; Usuthu Pulp Company v Swaziland Agricultural & Plantation Workers Union (*supra*) at para 40.

***cannot escape the results of his attorney’s lack of diligence or the insufficiency of the explanation tendered.”***

3. Two essential requirements, both to be met – Paragraph [30]:

*“Notwithstanding the legal position in South African law, it would seem that the preponderance of legal authorities in this jurisdiction hold the view that a party seeking condonation for non-compliance with the Rules of Court should satisfy two essential requirements.<sup>3</sup> Firstly, he must give a reasonable explanation for the delay. This encompasses the degree of delay involved in the matter as well as the adequacy of the reasons given for the delay. Secondly, he must show on a balance of probabilities that there are reasonable prospects of success on the merits. Accordingly, it is trite law that a litigant seeking condonation for non-compliance with the Rules of Court cannot rely solely on prospects of success,<sup>4</sup> without giving a reasonable explanation for the delay. The two essential requirements for*

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<sup>3</sup> Zama Joseph Gama v Swaziland Building Society and Four Others Civil Appeal No. 85/2012 at para 9; Ferreira v Ntshingila 1990(4) SA 271(A) at page 281; Johannes Hlatshwako v Swaziland Development and Savings Bank and Others Civil Appeal Case No. 21/2001 at para 17; Chetty v Law Society, Transvaal Works 1985(2) SA 756(A) at 765; Jabulani Patrick Tibane v Alfred Siphso Dlamini Case No. 17/2013.

<sup>4</sup> P.E Bosman Transport Committee & ORS v Piet Bosman Transport (Pty) Ltd 1980(4) SA 794(A) at 799; Commissioner: SARS, Gauteng West v Lercie Investments [2007] 3 All SA 109 SCA.

*‘sufficient cause’ should be satisfied before condonation is granted.”*

[26] As regards constitutional importance of issues on appeal:

26.1 In **Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC) (2011 (7) BCLR 651; [2011] ZACC 6) (Glenister II)** in Paragraphs 49 – 50 the South African Constitutional Court held that:

*“The explanation furnished for the delay is utterly unsatisfactory. Ordinarily, this should lead to the refusal of the application for condonation. However, what weighs heavily in favour of granting condonation is the nature of the constitutional issues sought to be argued in the intended appeal, as well as the prospects of success. This case concerns the constitutional authority of Parliament to establish an anti-corruption unit, in particular the nature and the scope of its constitutional obligation, if any, to establish an independent anti-corruption unit. These are constitutional issues of considerable importance. . . .*

***It is, therefore in the interest of justice to grant condonation.”***

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*** (93/20 1 8B) [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.

**APPLICATION MY MR. GAMA RE LATE FILING OF HEADS OF ARGUMENT**

[27] The third application pending before this Court for determination is an application by Mr. Gama for condonation for the late filing of his Heads of Argument.

1. Rule 31 (1) of the Rules of this Court provides as follows:

***“31 (1) In every Civil Appeal and in every Criminal Appeal the Appellant shall, not later than twenty eight days before the hearing of the Appeal, file with the Registrar six copies of the main Heads of***

***Argument to be presented on Appeal, together with a list of the main authorities to be quoted in support of each head.”***

2. Rule 31 (3) of the Rules of this Court provides as follows:

***“31(3) The respondent shall, not later than 18 days before the hearing of the appeal similarly file with the Registrar six copies of the main heads of his argument and supporting authorities to be presented on appeal and shall serve a copy thereof upon the appellant.”***

3. Mr Gama alleges that one of the attorneys assisting him with this matter from the office of V.Z. Dlamini Attorneys, Mr. Siphon Gumedze, was indisposed during the last two weeks of April and could not prepare the Heads of Argument and the other attorney in the same firm had been appointed an Acting Judge of the Industrial Court. Furthermore the attorneys assisting him were doing so on a *pro bona* basis and there was no other attorney available to assist him.

4. Mr Gama's application was not opposed and the Court, being satisfied that a proper case had been made out by Mr Gama, granted condonation.

### **APPLICATION OF THE LAW TO THE FACTS**

[28] There can be no doubt that Mr Gama has a clear-cut interest in finality in this matter. The Appellants' non-compliance did not only fall foul of the Rules of this Court but also, *ex facie*, of the fundamental protection of the right to personal liberty enshrined in section 16 of the Constitution, 2005 in that the noting of the Appeal served to extend Mr Gama's incarceration whereas, should the appeal be unsuccessful, he would be entitled to immediate release in terms of the High Court Order.

[29] As regards the explanation for the delay, same is far from satisfactory with reference to *inter alia* the following:

1. The delay of some four (4) years is inordinate, requiring overwhelmingly compelling cause to be shown and the Appellants' version falls far short of the required standard.

2. On Mr Dlamini's version he assisted with the matter in the Court *a quo*. He did not apply for an extension of time in terms of Rule 16 as soon as he realized that the Record could not be prepared and filed within the prescribed time limits.
3. The Appellants are vague as to exactly when their default was discovered and why an appropriate application had not been brought forthwith.
4. Mr. Dlamini suggested that the delay was also aggravated by the fact that Mr Leo Mduduzi Gama, the Respondent's then attorney of record had passed away in September 2018 "*without moving a finger to cause the appeal to be disposed of.*" This suggestion does Mr Dlamini no credit; is it the Appellants and not Mr Gama who are *dominis litis*? In the circumstances it is disingenuous to attempt to lay the blame on the other side.

[30] Ordinarily, the absence of a satisfactory explanation for the delay would sound the end of an application for condonation. *In casu*, however, the Attorney-General contends that there is a constitutional perspective that requires the attention of this Court. As alluded to above, in the supporting

affidavit attached to the Appellant's Application for extension/condonation Ms Phindile Dlamini states that there are five inmates whose death sentences were commuted to life imprisonment by His Majesty with the same condition attached and the legal issues require to be fully ventilated and decided upon by this Court.

[31] The Court finds the South African Constitutional Court's judgment in the Glenister case referred above, to be persuasive authority for the proposition, once constitutional issues are involved, that it would be in the interests of justice to grant condonation.

[32] At the time that Mr Gama was pardoned, the 1968 Constitution still prevailed and section 92(1) (a) thereof provided that: "(1) *The King may —*

*(a) grant to any person convicted of any offence under the law of Swaziland a pardon, either free or subject to lawful conditions;...*"

which is what happened in this case, coupled with a ban on release until the age of 75. Section 78 of the Constitution of 2005 deals with the Prerogative



of Mercy and reads, in similar terms, in section 78(1)(a) that: “78.(1) *The King may, in respect of a person sentenced to death or life imprisonment - grant a pardon, either free or subject to lawful conditions.*” The Constitution 2005 further in section 15(3) stipulates that a sentence of life imprisonment shall not be less than 25 years.

[33] Section 43 of the Prisons Act 40 of 1964 under the heading: “*Remission of part of sentence of certain prisoners*” reads:

**“43.(1) *Subject to this Act, criminal prisoners sentenced to imprisonment, for a period exceeding one month, whether by one sentence or consecutive sentences, may, by industry and good conduct, earn a remission of one-third of the remaining period of such sentence:***

***Provided that in no case shall —***

***(a) remission earned result in the release of a prisoner until he has served one month; and***

***(b) remission be granted to a prisoner sentenced to be detained pending the signification of His Majesty’s pleasure.***

***(2)A prisoner sentenced to imprisonment for life shall, for the purposes of this section, be deemed to be a prisoner sentenced to imprisonment for twenty years.”***

[34] I have quoted the above section 43 in full because the reference to twenty years in subsection (2) “*for the purposes of this section*” is to be read: “*for the purposes of remission,*” in order to do the mathematical calculation of one third. In my view, the section on the face of it does not constitute authority that any life sentence is limited to twenty years

[35] It would then follow, *prima facie*, that there was no legal justification for interference in the terms of the constitutionally granted pardon and that this is an issue which, in the interests of justice, requires full ventilation at an appeal hearing and in the result, condonation is granted.

### **COSTS**

[36] The Attorney-General, correctly in my view, has tendered costs; it indeed is unfortunate that the Appellants did not deal with this matter with the attention it deserves as the liberty of an individual is at stake.

## **ORDER**

[37] In view of the foregoing the following orders are made:

1. The Application by the Appellants for condonation for the late filing of the Record is granted and the appeal is reinstated.
  
2. The Application by the Respondent for condonation of the late filing of his Heads of Argument is granted.
  
3. Costs on the party and party scale are awarded to the Applicant.

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**J. M. CURRIE**

**ACTING JUSTICE OF APPEAL**

**For the Applicant:** MR. GUMEDZE, V.Z. DLAMINI ATTORNEYS

**For the Respondents:** MR. N.G. DLAMINI, ATTORNEY GENERAL'S  
CHAMBERS