



**IN THE SUPREME COURT OF ESWATINI**

**JUDGMENT**

**HELD AT MBABANE**

**CIVIL CASE NO: 78/2020**

In the matter between:

**SLOMOES CORPORATION (PTY) LTD**

**APELLANT**

And

**BONGANI S. DLAMINI N.O.**

**1<sup>ST</sup> RESPONDENT**

**ESWATINI PUBLIC PROCUREMENT**

**REGULATORY AGENCY**

**2<sup>ND</sup> RESPONDENT**

**ESWATINI INVESTMENT PROMOTION**

**AUTHORITY**

**3<sup>RD</sup> RESPONDENT**

**MUKWA ELECTRICAL SERVICES (PTY) LTD**

**4<sup>TH</sup> RESPONDENT**

**DESTINY GROUP (PTY) LTD**

**5<sup>TH</sup> RESPONDENT**

**CONSTRUCTION INDUSTRY COUNCIL**

**6<sup>TH</sup> RESPONDENT**

**Neutral Citation:** *Slomoes Corporation (PTY) LTD vs Bongani S. Dlamini & 5 Others (78/2020)*  
*[2021] SZSC 33 (15 September 2021)*

**CORAM:** **M.C.B MAPHALALA CJ**

**S. P. DLAMINI JA**

**J. M. CURRIE AJA**

**DATE HEARD:** 15 September 2021

**DATE DELIVERD:** 18 November 2021

**Summary:** *Civil Procedure - Appeal before the Supreme Court preceded by an Application for Condonation for the late filing of the Third's Respondent's Heads of Argument and it stands to be decided first - The substantive prayer in the said application sought both condonation and extension of time, the relevant legal principles and the rules of this court regarding condonation and extension of time considered - Held that the application falls below the required legal standards - Held that the extension of time is a legal impossibility in the circumstances and hence it falls away - Held that notwithstanding that the Application for Condonation does not meet the requirements, the court mero mutuo in consideration of such factors as the significance of the matter, that the Appellant did not oppose the Application and that the Heads of argument and Bundle of Authorities were already served and filed of record before the hearing of this matter, it decided to condone the late filing of the Third Respondent's Heads of Argument and Bundle of Authorities - Held further that the decision by this court to condone the late filing of Third's Respondent's Heads of Argument mero mutuo is not a precedent for departing from the firm jurisprudence of this court when it comes to the requirements to be met by a party seeking condonation - Held further that the Appeal is postponed sine die pending the allocation of a date for hearing - Held further that prior*

*to the hearing of the Appeal, the parties are directed to file affidavits regarding the status of the tender subject to the appeal and held that there is no order as to costs regarding the Application for Condonation.*

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## **JUDGMENT**

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**S.P. DLAMINI – JA**

### **INTRODUCTION**

[1] Falling for consideration before this court is a judgment of the High Court delivered on 19 August 2020 per Her Ladyship Q.M Mabuza PJ and an Application for Condonation for the late filing of the Third Respondent's Heads of Argument.

[2] At the hearing of the matter, the court directed that it would hear the Application for Condonation only and that the appeal will be dealt with on a subsequent date to be allocated in the current session.

[3] Accordingly, only the Application for Condonation was heard and is subject of this Judgment.

### **THE PARTIES**

[4] Even though this is an Application for Condonation and not the Appeal, the Applicant is referred to as the Third Respondent. The parties retain original citation on appeal. This court will therefore proceed on that basis in order to avoid confusion.

[5] *Ex facie* the papers before the High Court, the impugned judgment and the papers before this court as well as the appearances, there are two protagonists in this matter namely the Applicant and the Third Respondent.

### **RELIEF**

[6] The Third Respondent by way of Notice of Application dated 26 August 2021 sought an order in the following terms;

*"1. Condoning and extending the time frame for filing of the 3<sup>rd</sup> Respondent's Heads of Argument as provided for in terms of the Supreme Court Rules.*

2. *Further and/or alternative relief.”*

[7] The Notice of Application was issued out of the office of the Registrar of the Supreme Court on 25 August 2012 and was served upon the Applicant's Attorneys on 27 August 2021. There were no papers filed in opposition of the Application. In fact, Mr. Manzini counsel for the Applicant, submitted at the hearing that the Application was not being opposed on the basis that Applicant wished for the Appeal to be determined without any delay.

[8] I hasten to point out that it is a trite position of our law that whether the papers before court are being opposed or not, it remains a legal obligation on the part of the court to determine if the papers meet the legal requirements for the relief sought hence the court proceeded with the hearing.

**THE THIRD RESPONDENT'S CASE FOR CONDONATION**

[9] The Third Respondent relied on the Founding Affidavit deposed to by its Counsel, Sabelo M. Masuku, together with a Confirmatory Affidavit deposed to by the Legal Advisor, Patience Bennett.

[10] The premise for the Third Respondent's application is set out in paragraphs 11, 12 and 13 of the Founding Affidavit wherein Masuku states the following;

11.

*"The present application is an application for the condonation of the late filing of Heads of Argument in the present appeal. It is with regret that we have found ourselves late by three (3) days in filing the Heads of Argument in this matter. The Appellant filed his Heads of Argument on the 12<sup>th</sup> August, 2021, after the publishing of the roll, our client had earlier on in the year of 2020 when the matter was not enrolled made a decision to abandon the defence because it was running behind schedule with the project under scrutiny in this appeal.*

12.

*When the matter was enrolled this session and given dates, we had to take instructions on the prosecution of the appeal. Due to the 3<sup>rd</sup> wave of the Covid-19, the decision makers in the legal department of the 3<sup>rd</sup> Respondent were indisposed and not in the office to take a decision on our awaited instructions. We finally got hold of the instructions to proceed on the 19<sup>th</sup> August, 2021. We inadvertently believed we had fifteen (15) days to file the Heads when in fact we had eighteen (18) days. We started to work on the Heads on the weekend to serve and file on the 25<sup>th</sup> August, 2021, only to be reminded that we were out of time, by the Registrar of the Supreme Court.*

13.

*There was no deliberate delay intended and we submit that it should not cause great inconvenience to Court and to the Appellant. The Honourable Court has lost three (3) days and the said delay is not such that the Court will not be able to read the Respondent's Head of Argument. The 3<sup>rd</sup> Respondent intends to oppose the appeal and has high prospects of success in the matter, as will be seen below."*

[11] Masuku's averments are supported by Bennett in her Confirmatory Affidavit in paragraphs 3, 3.1, 3.2 and 4 wherein she states the following;

3.

*"I beg of the above Honourable Court to repeat the submissions made by our legal representative, Mr. Sabelo Masuku in so far as the merits of the case, the reasons of the delay and the prospects of success. I pray that same be incorporated herein as if specifically pleaded herein so as not to repeat the said allegations therein. The Appellant, in our humble submission, will suffer no prejudice if the condonation is granted to the 3<sup>rd</sup> Respondent as the issues will be ventilated before the Court and each party will be given an opportunity to clearly state their case.*

3.1 *It is our humble submission that it is an important matter to the 3<sup>rd</sup> Respondent, the Appellant and all parastatals and persons who have to comply with public procurement that this issue ruled upon by the Court a quo is given clear direction by this Court. The 3<sup>rd</sup> Respondent is involved in procurements daily and the guidance which will be given by the Court is important;*

3.2 *Should the condonation not be granted, the views and perspectives of the 3<sup>rd</sup> Respondent in argument and in assistance of the authorities and understanding of the legal principles, which assist the Court in determining the matter will not be before the Court.*

4.

*It is correct that when the appeal was filed in the year, 2020, the 3<sup>rd</sup> Respondent had anticipated it would find its way on the 2020 session. However, it only got to be enrolled in September, 2021. The 3<sup>rd</sup> Respondent had withdrawn its instruction to pursue the appeal opposition on account of the delays that were to be occasioned in*

*getting enrolled. When our attorney informed us that it had been enrolled, there was a considerable amount of delay from the 3<sup>rd</sup> Respondent to instruct that we proceed to place our defence on the appeal before Court. Due to the prevailing Covid-19 pandemic, it took a while to get a decision and the instructions through. We were also not aware of the appeal time frames. We only got to instruct our attorney to proceed with the appeal on the 19<sup>th</sup> August, 2021 and apparently a day before the Heads were due.”*

## ANALYSIS AND THE APPLICABLE LAW

[12] At this juncture it is apposite to deal with certain issues that are relevant, in my view, do not warrant detailed attention by this court;

12.1 Firstly, it is the issue of the extension of time. The issue of the extension of time appears only in prayer 1 of the Notice of Application. Neither the Founding Affidavit nor the Confirmatory Affidavit advance a case for the extension of time to justify any further attention from this Court.

In any event, the extension of time is provided for in terms of Rule 16 of the Rules of this court and the Rule provides that;

(1) *“16. (1) The Judge President or any judge of appeal designated by him may in 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.  
(Amended L.N. 102/1976.)*



- (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 good cause for leave to be granted.”*

On its plain reading, Rule 16 applies in instances whereby a party appreciates that for one reason or another she or he may not comply with a *dies* contained in the Rules hence requires an extension of the stipulated time. The application for extension of time comes prior to the expiry of the *dies* and not after.

However, Third Respondent's application was launched after the expiry of the *dies*. In addition, no arguments were advanced beyond the mention of the extension of time in prayer 1. For these reasons, this issue falls away.

- 12.2 Secondly, it is the issue of the Third Respondent's bundle of authorities. In the application for condonation nowhere do the papers seek an order to condone or address the late filing of the Bundle of Authorities. Notwithstanding this shortfall, my view is that the fate of the Bundle of Authorities is sealed with that of the Heads of Argument and shall be treated accordingly.

## ISSUES FOR CONSIDERATION

[13] The above - mentioned issues having been addressed, the only issue that falls for consideration by this court is whether the Third Respondent's Application for Condonation meets the requirements for the relief sought.

[14] Condonation is provided for under Rule 17 of the Rules of this Court and it states that;

*"17. The 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".*

[15] A plain reading of Rule 17 is that a party due to one reason or another fails to take a prescribed legal step within the stipulated time may seek the Court to condone such a failure. This is antithesis to the operation of Rule 16 in that Rule 17 serves as a basis for relief after the expiry of the prescribed *dies*.

[16] This Court has pronounced itself on a number of cases regarding the requirements to be met by a party seeking condonation and consequently the applicable law is now settled in our jurisdiction. To mention but a few

relevant cases, see; **UNITRANS CONSTRUCTION LIMITED vs INYATSI CONSTRUCTION LIMITED APPEAL CASE NO.9 OF 1996, DR. SIFISO BARROW vs DR. PRISCILLA DLAMINI AND THE UNIVERSITY OF SWAZILAND (09/2014) [2015] SZSC (09/12/15); DR. BANY ARVITA BELINDA vs A.G. THOMAS (PTY) LTD (30/2015) [2016] SZSC 07 (30 JUNE 2016); ROYAL ESWATINI SUGAR CORPORATION LIMITED vs ACTING JUDGE MSIMANGO N.O AND 4 OTHERS (93/2020) [2021] SZSC 21 (12/10/2021); ABEL MPHILE SIBANDZE vs MAGAGULA & HLOPHE ATTORNEYS (86/2019)[2020] SZSC 25 (24/08/2020); NOKUTHULA MTHEMBU AND FOUR OTHERS vs THE MINISTRY OF HOUSING AND ANOTHER (94/2017) [2018] (30/05/2018).**

- [17] This Court has considered and cited with approval cases from other jurisdictions particularly the Republic of South Africa. In this regard see; **MELANE versus SANLAM INSURANCE COMPANY LTD 1962 (4) SA 531 (A); COMMISSIONER OF INLAND REVENUE versus BURGER 1956 (4) SA (A); THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES versus CANDICE JEAN VAN DER MERVE (20152/2015) [2014] ZASCA 86 (28/05/2015).**

[18] In the **NOKUTHULA MTHEMBU CASE** (*supra*), His Lordship Dr. Odoki, considered some of the cases referred above both from within and outside our jurisdiction and stated the following legal requirements to be met in order for an Application for Condonation to succeed;

- (a) That as soon as a party becomes aware of non-compliance with the Rules she or he must immediately take steps to remedy such by way of application;
- (b) That in such an application the Applicant must provide a reasonable explanation for the default;
- (c) That in the application the Applicant must demonstrate good prospects of success; and
- (d) That the court in granting or denying the relief sought ought to consider prejudice likely to be suffered by the innocent party and the importance of the case.

[19] In the **MELANE vs SANLAM** Case (*supra*), the Court had this sought at page 532 C - F;

*“without a reasonably 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.”*(my emphasis).

[20] In this matter it is not disputed that the Third Respondent was out of time by three days to file the Heads of Argument and Bundle of Authorities. Such a delay in my view is relatively short to justify the Court granting the relief sought provided the other legal requirement for condonation have been met.

[21] The Third Respondent has laid a basis for prospects of success as envisaged by the law namely the challenge as to whether the matter is one of review or appeal, in view of the Applicant's contention that the matter was reviewable by the High Court. The High Court held that there was nothing to review.

[22] The Third Respondent also contended that there will be no prejudice suffered by the Applicant if the Court condones the late filing of the Heads of Argument. I find nothing that counters this argument.

[23] However, what is clearly the elephant in the room for the Third Respondent to deal with is the explanation for the default. The explanation at best is a warped up one. The Third Respondent at one stage is said to have abandoned the defence; as to what this means is unclear to me that there were delayed instructions and miscalculations of days on the part of Third Respondent's Counsel. The explanation falls far short of the standard set as per the cases above.

[24] Therefore, a reasonable and acceptable explanation for default has not been given by the Third Respondent. The Application for Condonation must fail as per the MELANE vs SANLAM CASE (*supra*).

### **MERO MUTU ORDER**

[25] Notwithstanding the fact that not all the requirements for an Application for Condonation have been satisfied by the Third Respondent, the Court *mero mutu* condones the late filing of the Third Respondent's Heads of Argument and Bundle of Authorities.

[26] The decision of the Court must not be construed as a departure from the now settled principles of our law regarding condonation. The Court has considered the following factors; the Application for Condonation was not opposed, the degree of lateness (3 days) was relatively short, the seriousness of the matter in view of its commercial implications and that the Applicant will not suffer any prejudice as a result of the order. The Heads of Argument and Bundle of Authorities were served and filed.

## COSTS

[27] The Application for Condonation was not opposed by the Applicant. Therefore, Applicant did not incur any costs in connection with the Application. It is my view that an appropriate order in the circumstances is not to make any costs order.

## RULE 33 (1) ORDER

[28] In the course of the hearing of this matter before this Court the question as to the status of the tender arose. Both Counsel could not be of assistance to the Court to shed some light on the matter. This is a very important question that requires a truthful response.


[29] In the circumstances the Court has elected to exercise its powers in terms of Rule 33 (1) of the rules of this Court by calling the parties to file Affidavits explaining the status of the tender in question.

Rule 33 (1) provides that;

*“No party to an appeal shall have the right to adduce new evidence in support of his original case; but for the furtherance of justice, the Court of Appeal may where it thinks fit allow or require new evidence to be adduced.” (my emphasis).*

[30] In view of the foregoing, the Court makes the following order:

1. The Respondent's application for condonation for the late filing of heads of argument and bundle of authorities does not meet the necessary legal requirements.
2. Notwithstanding paragraph 1 above, the Court *mero mutuo* condones the late filing of the Third Respondent's heads of argument and the bundle of authorities.
3. In terms of Rule 31 (1) of the Rules of this Court, the parties are directed to file affidavits disclosing the current status of the tender-subject to the litigation within fourteen days hereof.
4. The appeal is postponed to the next session of the Supreme Court for hearing on the merits.
5. No order as to costs is made.



S. P. DLAMINI J.A



I AGREE



M.C.B MAPHALALA

C.J.

I AGREE



J. M. CURRIE

A.J.A

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