# IN THE SUPREME COURT OF ESWATINI

# JUDGMENT

**HELD AT MBABANE** **Case No.: 73/2021**

In the matter between:

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|---|---|
| **THE PRIME MINISTER OF ESWATINI** | **First Appellant** |
| **THE MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS** | **Second Appellant** |
| **THE DIRECTOR OF PUBLIC PROSECUTIONS** | **Third Appellant** |
| **THE ATTORNEY GENERAL** | **Fourth Appellant** |
| and | |
| **THULANI MASEKO AND OTHERS** | **Respondents** |

**Neutral Citation:** *The Prime Minister of Eswatini and Others vs Thulani Maseko and Others (73/2016)* [2022] *SZSC* 37 (22/09/2022)

**Coram:** **M.C.B. MAPHALALA CJ, S.B. MAPHALALA JA, A.M. LUKHELE AJA, J.M. CURRIE AJA AND M.J. MANZINI AJA.**

**Date Heard:** 10th June, 2022.

**Date Delivered:** 22nd September, 2022.

**SUMMARY :** *Constitutional law – Appeal against decision of a Full Bench of the High Court – High Court having found that certain provisions of The Sedition and Subversive Activities Act, No. 16/1938 as well as Suppression of Terrorism Act, No.3/2008 to be inconsistent with sections 23, 24 and 25 of the Constitution and therefore declared unconstitutional*

*Civil procedure – Application for Condonation of late filing of record of appeal – requirements considered*

*Civil procedure – Application to deem appeal abandoned in terms of Rule 30(4) – whether issue of abandonment res judicata*

*Civil procedure – Application for leave to amplify or supplement grounds of appeal – requirements considered.*

*Held: Application for Condonation for late filing granted.*

*Held: Application to deem appeal abandoned dismissed.*

*Held: Application for leave to amplify or supplement grounds of appeal granted.*

## JUDGMENT

**M.J. MANZINI, AJA:**

[1] The parties to this long and drawn out appeal proceedings are The Prime Minister of The Kingdom of Eswatini, the Minister of Justice and Constitutional Affairs, the Director of Public Prosecutions, and The Attorney General – all cited as the Appellants. The Respondents are Thulani Maseko, Mlungisi Makhanya, Maxwell Dlamini, Mfanawenkhosi Mntshali, Derrick Nkambule, and Mario Masuku (since deceased).

[2] A brief excursion into the facts giving rise to the dispute between the parties is necessary in order to put matters into perspective.

[3] The genesis of the dispute currently serving before this Court is a Judgment of the High Court delivered as far back as the 16th September, 2016 by a majority of two Judges to one, of the High Court then sitting as a Full Bench in terms of Section 151(2) of The Constitution of The Kingdom of Eswatini 2005, which declared Sections 3 (1), 4(a), (e) and 5 of the Sedition and Subversive Activities Act 46 of 1938 to be inconsistent with Sections 23, 24

and 25 of The Constitution, and therefore null and void; The High Court further declared paragraphs (1) of Section 2, paragraph (2) (f), (g), (i), (ii), (iii), (j); paragraph (b), Section 11 (1) (a) and (b), and 11 (2); Sections 28 and 29 (4) of The Suppression of Terrorism Act No. 3 of 2008 to be inconsistent with the constitutional provisions relating to Freedom of Speech and Association as provided under sections 24 and 25 of The Constitution, and therefore invalid to the extent of such inconsistency with The Constitution.

[4] On the 23rd September, 2016 the Appellants filed a Notice of Appeal against the impugned Judgment. Contrary to the requirements of Rule 6 of the Court of Appeal Rules which prescribes that the grounds of appeal must be set out concisely and with sufficient clarity, the solitary ground of appeal set out in the aforesaid Notice of Appeal was that:

> **".....the Learned Judge erred in fact and law by declaring that the sections cited under paragraph 42 of the majority Judgment were invalid. Full and further grounds of appeal will follow in due course."**

[5] Subsequently, on the 11th October, 2016, and still within the time period stipulated in Rule 8, the Appellants filed a revised Notice of Appeal. The stated grounds of appeal were that:

1. **The Court *a quo* erred in law and in fact in holding and declaring that Sections 3(1), 4(a), (e) and 5 of the Sedition and Subversive Activities Act 46 of 1938 infringed Respondent's rights and freedoms under Section 24 and 25 of the Constitution in a manner not justified in terms of the limitation provisions of the same sections of the Constitution and accordingly striking down the said sections of the Act as unconstitutional and invalid;**

2. **The Court *a quo* erred in law and in fact in holding and declaring that "paragraph (1) of section 2; paragraph 2(f), (g), (i), (ii), (iii), (j); paragraph (h); section 11(1) (a) and (b), and 11(2)...." Of the Suppression of Terrorism Act 3 of 2008 infringed the Respondents' rights and freedoms under Section 24 and 25 of the Constitution in manner not justified in terms of the limitations provisions of the same sections of the Constitution and accordingly striking down the said sections as unconstitutional and invalid;**

3. **The Court *a quo* erred in law in holding that the onus for showing that the limitations on Respondents' rights and freedoms in terms of the impugned provisions are reasonably justified in a democratic society rested with the Appellants instead of the Respondents in terms of Section 24 and 25 of the Constitution;**

4. **The Court *a quo* erred in law holding and striking down Sections 28 and 29(4) of the Suppression of terrorism Act 3 of 2008 as bad and unconstitutional for not providing for a hearing before the recommendation**

5. **The judgment of the Court *a quo* is bad in law for failure to appreciate that it is the entity PUDEMO as a specified entity that has generated the charges against the Respondents in terms of the impugned provisions;**

6. **The Court *a quo* erred in law in holding or implying that the impugned provisions are 'over broad or vague'.**

[6] The Record does not indicate what transpired after the Revised Notice of Appeal was filed. It appears that on the 8th March, 2017, The Attorney General

(4th Respondent) wrote a letter to Mkhwanazi Attorneys (1st Respondent's Attorneys) indicating that the office was preparing the Record of Appeal. The Attorney General further advised that the record would consist of Volume 1, being the book of pleadings and both Judgments of the High Court. Mkhwanazi Attorneys was invited to suggest any additions or deletions to the record by the 13th March, 2017.

[7] By the time the letter referred to above was penned, the period within which to file the Record of Appeal had lapsed. In terms of Rule 30(1) a Record of Appeal ought to be filed within a period of two (2) months of noting an appeal, or within such other period as may be prescribed by this Court pursuant to an Order issued under Rule 16 or 17 of the Rules of this Court, as the case may be.

[8] In response to The Attorney General's letter, Mkhwanazi Attorneys raised the issue of the non-filing of the record of proceedings as is required under Rule 30(1). Mkhwanazi Attorneys further intimated that they had received *"instructions to move an application for a declaration that the appeal is*

*deemed abandoned on account of non-compliance with the mandatory provisions of Rule 30".*

[9] The letter from Mkhwanazi Attorneys appeared to have spurred The Attorney General's office into action. On the 17th March, 2017 an Application for Condonation for late filing of Record of Appeal was launched wherein The Attorney General prayed for Condonation of the late filing of the record of proceedings and set out the reasons for the delay.

[10] The Application for Condonation was met with resistance from the First Respondent. On the 3rd April 2017 the First Respondent filed his Opposing Affidavit and Counter-Application and prayed that the Application for Condonation be dismissed. He also applied for an Order declaring that the purported Appeal by the Appellants to have been abandoned in terms of Rule 30(4), respectively. The other Respondents did not file any opposition to the Application for Condonation. On the papers in this Court and as things stand the Application for Condonation is opposed only by the First Respondent.

[11] On the 25th July, 2017 The Attorney General filed a Replying Affidavit, and the matter became ripe for argument.

[12] It would appear that the matter was subsequently allocated a date for hearing, being the 23rd October, 2017. On the allocated date there was no appearance on behalf of the Appellants and the matter was struck off the Roll, with a directive that it should not be reinstated without leave of the Court.

[13] On the 5th December, 2017 the Appellants launched an Application for Reinstatement seeking an Order *"condoning the Appellants for not attending Court on the 23rd October, 2017"* and *"Reinstating the matter for a hearing on a date to be determined by the above Honourable Court"*. The Application for Reinstatement was opposed by the First Respondent only, who duly filed an Answering Affidavit setting out his grounds of opposition.

[14] The Appellants filed their Replying Affidavit on the 23rd January, 2018 and the matter was eventually heard by His Lordship S.P. Dlamini JA on the 13th February, 2018.

[15] On the 5th March, 2018 His Lordship S.P. Dlamini JA delivered Judgment and made the following Orders:

> "(a) **That the Applicant's non-appearance on 23 October 2017 be and is hereby condoned;**
>
> (b) **That the appeal herein be and is hereby reinstated;**
>
> (c) **The Respondents are awarded costs;**
>
> (d) **The matter is referred to the Registrar for allocation of dates of hearing."**

[16] The parties have different interpretations of the above Order. At this stage of the appeal proceedings this is what lies at the core of the dispute between them. I shall revert to this aspect of the dispute presently.

[17] On the 2nd August, 2018 the Appellants, no doubt buoyed by their own interpretation of the Orders referred to above, filed a set of Supplementary Heads of Arguments. This filing was met with an objection from the Second to Sixth Respondents on two grounds, namely:

"(a) **That the Appellants had already filed their heads of argument and the Rules did not make provision for the filing of supplementary heads of argument without leave of the Court; and**

(b) **That the supplementary heads dealt entirely, alternatively, with grounds of appeal not stated in the Appellants' Notice of Appeal."**

[18] Soon after the Notice of Objection was filed by the Second to Sixth Respondents, the Appellants, on the 31st August, 2018, launched an Application for Declaratory/Condonation Order, seeking the following reliefs:-

"(a) **An order declaring that the late delivery of the appeal record by the Appellants has been condoned in terms of a Judgment of this Honourable Court on 5 March 2018;**

(b) **In the alternative to paragraph one (1) hereof an order condoning the late delivery of the appeal record by the Appellants;**

(c) **An Order condoning the omission of the Supplementary Affidavits, a copy of which constitutes provisional pages 372 to 510 of the**

**Appeal Record and authorizing the addition of those pages to the Appeal Record;**

(d) **The Appellants are given leave to amplify their grounds by adding the supplementary grounds of appeal annexed hereto marked "D"; and**

(e) **Costs in the event of opposition."**

[19] The Application for Declaratory/Condonation Order is opposed by all the Respondents, albeit on different grounds. The Second to Sixth Respondents' Opposition, is limited to the amplification of the grounds of appeal, and in respect of the other reliefs sought they have elected to abide by the decision of this Court.

[20] The First Respondent's main argument, as shall be discussed in more detail below, is that the Application for Condonation and Counter-Application are still live and remain unresolved. First Respondent maintained that these applications must be dealt with first. On the other hand, the Appellants contend that the Judgment of the 5th March disposed of the aforesaid

applications. As a result, the parties agreed that this Court should first deal with the Application for Condonation; Counter-Application, and Application for Declaratory/Condonation Order, all collectively referred to as the *"interlocutory Applications"*. This agreement was recorded as a Consent Order on the 25th October, 2018. At this stage of the proceedings this Court is only concerned with the Interlocutory Applications.

**Issues of determination by this Court.**

[21] First and foremost, this Court must determine the effect, if any, of the Orders made by His Lordship S.P. Dlamini JA in his Judgment of the 5th March on the Application for Condonation dated 17th March, 2017 and the Counter-Application dated 3rd April, 2017. If the Applicant's version is correct and upheld, this will dispose of the one or both applications. However, if this Court concludes that there was no effect on either of the applications, or one or both remain live and unresolved, we are enjoined to deal with them accordingly.

[22] Secondly, and depending on the outcome of the main issue outlined above, this Court may have to deal with the remaining prayers in the Application for Declaratory/Condonation Order.

[23] Now turning to deal with the first issue. The Appellants contend that there has already been condonation by the Supreme Court of the late delivery of the Record of Appeal. The Appellants allege that as a result of their non-appearance on the 23rd October, 2017 the Appeal was struck from the Roll but permission was given to apply to have the Appeal reinstated. As a result, the Application for Reinstatement launched on the 5th December, 2017 prayed for reinstatement of the Appeal (in addition to Condonation for non-appearance). Appellants further contend that on a plain reading of the Order issued by the Supreme Court on the 5th March, 2018, the Appeal was reinstated. Appellants further contend that the Appeal could not have been reinstated yet there still be no condonation for the late delivery of the Record of Appeal, and simultaneously the Appeal be regarded as lapsed. They argued that *"The notions of, on the one hand, reinstatement; and on the other of no Condonation and still being lapsed or abandoned; are polar opposites."*

[24] The Appellants further contend that, the grounds of opposition raised by the First Respondent were dealt with by His Lordship S.P. Dlamini JA, and were decided against him. Therefore, it is argued, these issues are now *res judicata*.

[25] First Respondent's position on the first issue is that there is no Appeal before this Court, owing to the Appellants having failed to file the Record of Appeal in accordance with Rule 30(1). He contends that the Appeal was abandoned in terms of Rule 30(4). First Respondent further contends that the Counter-Application stands unopposed as the Appellants did not file an answering or opposing affidavit thereto. First Respondent also contends that the Application for Declaratory/Condonation Order is an abuse of Court process. He argued that the Application for Condonation launched on the 17th March, 2018 was still pending as it had neither been disposed of nor withdrawn. He further argued that if the late filing had been condoned, as claimed by the Appellants, they need not have launched a fresh Application for Condonation. Rather, Appellants ought to have simply argued that condonation was previously granted.

[26] First Respondent also contends that the Application for Condonation did not serve before His Lordship S.P. Dlamini JA. First Respondent referred to several paragraphs in the Judgment of the 5th March, 2018 to buttress the argument that the Application for Condonation did not serve before that

Court. First Respondent further contended that His Lordship S.P. Dlamini JA in fact did not hear any submissions or arguments on the 17 March application. It is alleged that the Court could not have done so without having regard to the Opposing Affidavit and Counter-Application filed by the First Respondent. Thus, it is argued that the notion that the late filing of the Record of Appeal was condoned *"is a figment of imagination"* by the Appellants.

[27] Before considering the actual contents of the Judgment and Order in contention, it is perhaps important to restate the cardinal rule in the interpretation of Court Judgments and Orders. This Court has approved and applied the rule articulated by Trollip JA in **Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A.D)**. See in this regard **Beauty Build Construction (Pty) Ltd v Muzi P. Simelane Attorneys and Others (68/2015) [2019] SZSC 64 (1st March, 2019) and Teaching Service Commission and Another vs Timothy Tsabedze (61/2019) [2021] SZSC 48 (25/02/2022)**. In the **Firestone South Africa** (*supra*) case, at page 304, Trollip JA said:

"The basic principle applicable to construing documents also apply to construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. Se Garlick v. Smartt and Another, 1928 A.D. 82 at 87; West Rand Estates Ltd v. New Zealand Insurance Co. Ltd 1926 A.D 173 at p.188. Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it (CF Postmasburg Motors (Edms) Bpk v. Peens en Andere, 1970 (2) SA 35 (N.C.) at p.30 F – H). Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise – see infra. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting

**the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court a quo and its reasons therefore, can be used to elucidate it. If, despite that, the uncertainty persists, other relevant extrinsic facts or evidence are admissible to resolve it."**

[28] The Order, which is the executive part of the Judgment delivered by His Lordship S.P. Dlamini JA, is that *"...the appeal herein be and is hereby reinstated"* and that *"The matter is referred to the Registrar of this Court for allocation of dates for hearing."*

[29] On a plain reading of the Order, the Court ordered that the Appeal be reinstated. The text of the Order is clear and unambiguous. However, what is debatable is its effect on the Application for Condonation and Counter-Application in terms of Rule 30(4), matters which, technically speaking, were not before His Lordship. In the Application for Reinstatement the Appellants specifically alleged that they *"seek the Honourable Court's indulgence for not attending the Court on the 23rd of October 2017 when the matter was*

*called on for hearing"*. The affidavit in support thereof sets out the reasons for the non-appearance, and then concludes by saying that *"the Appellants have demonstrated sufficient cause that the interest of justice require the Court to grant the Appellants leave to reinstate the matter"*. It is apparent from the affidavit that there is no reference to the Application for Condonation or Counter-Application in terms of Rule 30(4). The Court was not urged to deal with or determine these applications. Clearly, the tenor of the Application for Reinstatement was not directed at either of the Application for Condonation or Counter-Application.

[30] That notwithstanding, it is clear that the issue of abandonment of the appeal was specifically raised as a defence by First Respondent in his Opposing Affidavit. First Respondent contended that there was no pending appeal as it had *"lapsed"* and *"completely died"*. First Respondent urged the Court not to assist the Appellants as they had been lax in the prosecution of the appeal, arguing that *"there is now no appeal pending and therefore, nothing to reinstate as the appeal long lapsed in terms of Rule 30 of the Rules of this Honourable Court"*. The issue of abandonment of the appeal, as a defence to the Application for Reinstatement, was raised and canvassed in several other paragraphs in the Opposing Affidavit.

[31] In light of the foregoing, I have no doubt that although the Application for Condonation and Counter-Application were not serving before His Lordship, the issue of abandonment of the appeal was specifically raised as a defence to the Application for Reinstatement. Thus, whether the Appeal had been abandoned or not was one of the issues in dispute calling for determination by that Court. And, the Court's finding on this issue was that *"the appeal against the majority decision of the Court a quo should be disposed of in one way or the other in a fully blown hearing"*. The Court further expressed the view that the issues arising from the appeal were serious, and *"it would leave a bitter after taste in the Court's palate for such serious matters to be decided by default as it were..."*.

[32] Hence, the Order that the Appeal is hereby reinstated. Reinstatement of the Appeal was granted, and the defence raised by the First Respondent rejected.

[33] Although by saying that *"whether there is a lawful appeal or not and the final determination of matters on all these issues antecedent therefore must be the decision of the Bench of this Court and not for me as a single Judge of this*

*Court"*, His Lordship appeared, at a glance, to be deferring his decision on the question whether there was a lawful appeal or not, but in effect he decided this specific issue in favour of the Appellants. It is inconceivable that the Court would have issued an Order for the reinstatement of an *"unlawful"* appeal. If the Appeal had *"lapsed"* or *"completely died"* as contended by the First Respondent in his Opposing Affidavit, the Order for its reinstatement brought it back to life. That Order stands unless it is set aside. In these proceedings there is no prayer or case made out for it to be set aside. The First Respondent must be taken to have accepted the Order, for better or worse.

[34] In the circumstances, I find that the issue of whether or not the Appeal was abandoned in terms of Rule 30(4) was determined by His Lordship S.P. Dlamini JA in his Judgment, and it is now *res judicata*. It is trite law that one of the requisites for a successful plea of *res judicata* is that the same matter should be in issue in both sets of proceedings, that is, the concluded and current proceedings. In order to decide what matter(s) is/are in issue, the pleadings and the Judgment, and indeed whatever goes to make up the record may be looked at. **(See Marks and Kentor v Van Diggelen 1935 TPD 29 at 33).** As earlier indicated the First Respondent's claim that the Appeal had been deemed abandoned in terms of Rule 30(4) was a central issue in opposing

the Application for Reinstatement, which the Court granted. The issue is therefore *res judicata*, and cannot be re-opened. Consequently, it is not competent for this Court to determine the Counter-Application.

[35] As is apparent from the Judgment and the Orders made by His Lordship S.P. Dlamini JA there is no specific reference to condonation of the late filing of the Record of Appeal. Can it be said, as the Appellants contend, that the reinstatement impliedly condoned the late filing of the Record of Appeal, or is the Application for Condonation, too, *res judicata*? Again, this Court needs to consider the pleadings and the Judgment in order to determine this question. In the Application for Reinstatement the Appellants prayed for Condonation of *"the Applicants not attending Court on the 23rd October, 2017"*. Nothing is said about Condonation of the late filing of the Record of Appeal. In his Opposing Affidavit the First Respondent did not make any substantive averments regarding the late filing of the Record of Appeal. At least nothing which would suggest that he was relying on the pending Application for Condonation as a defence, as he did in the Counter-Application.

[36] In light of the above, this Court is enjoined to deal with the Application for Condonation of the late filing of the Record of Appeal on its merits. In doing so the Court will confine itself to the affidavits relating to the application, and will disregard any attempts by the Appellants at augmenting their papers, as they have purported to do in their Application for Declaratory/Condonation Order.

[37] In terms of Rule 17 this Court may on application and *"for sufficient cause shown"* excuse any party from complying with its Rules. In deciding whether *"sufficient cause"* has been shown the guiding principles set out in **Melane v Santam Insurance Limited 1962 (4) SA 531 (A)** have been approved and followed in this jurisdiction with minor modifications where necessary. The emphasis is on judicial discretion – 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"*.

See in this regard: **Terror Maziya v The Attorney General (66/2020) [2021] SZSC 03 (2nd June, 2021); Simangaliso Patrick Mamba vs Ackel Zwane and 2 Others (12/2021) [2022] SZSC 13 (07/06/2022).**

[38] In summary, the factors to be considered, *inter alia*, are as follows:

(i) the explanation for the delay;

(ii) the degree of lateness;

(iii) the prospects of success;

(iv) the importance of the case to the parties; and

(v) the absence of prejudice to any of the parties.

[39] The events which unfolded after the impugned Judgment was delivered, which are relevant to the issue of condonation of the late filing of the Record of Appeal, are set out in some detail in the Judgment of His Lordship S.P. Dlamini JA. I do not intend to again traverse these events in much detail. To some extent I agree with His Lordship's observation that the Application for Condonation falls below the legal benchmark as reflected in recent cases dealing with Condonation. Significantly, this Court must consider the same reasons for the delay which were proffered by the Appellants in their Application for Reinstatement. Unacceptable as they are these reasons were considered not to outweigh the importance of reinstating the Appeal.

[40] Despite the shortcomings of the Application for Condonation it is significant that the Record of Appeal, minus the Supplementary Affidavit now sought to be incorporated, was filed as far back as the 17th March, 2017. It was filed simultaneously with the Application for Condonation. I have carefully analysed the First Respondent's Opposing Affidavit (and Counter-Application) to ascertain if there are allegations which dealt with prejudice, flowing from the late filing, to be visited upon him. The Opposing Affidavit is largely devoted to refuting the explanation for the delay in bringing the Application for Condonation. No attention at all is devoted to the issue of prejudice. The First Respondent did not show what prejudice, if any, he stood to suffer if the late filing was condoned.

[41] The Appellants did not do themselves any justice by failing to deal with the issue of the prospects of success of their appeal, yet this Court has in several of its Judgments emphasized the need to demonstrate that prospects of success exist. In some cases the bar has been set considerably high. In some cases the requirement was termed as *"absolute"*. In my view, however, prospects of success in the appeal are but one of the factors to be considered in weighing

up whether to grant Condonation or not. In themselves, they are not definitive. In the recent case of **Simangaliso Patrick Mamba Case** (*supra*) I made the following statement:

> **"In assessing the Applicant's prospects of success in his appeal I have considered the impugned Judgment, as I must, and not simply confined myself to what the affidavits contain. Considering the impugned Judgment is an important aspect of the assessment, for a prospective appellant does not have prospects of success merely because he or she says so. No amount of detail or colourful words can alter the course of an appeal that is doomed to fail. Therefore, a Court must make its own objective assessment of whether there are prospects of success in an appeal, albeit without delving too much into the merits".**

[42] As a result, in the context of this matter, the fact that the Appellants failed to deal with prospects of success is not in and of itself fatal to their application. That is to say this omission does not outweigh the other relevant factors.

[43] In my assessment what weighs heavily in favour of granting an indulgence to the Appellants is the importance of issues which the appeal is intended to address. The main issues concern the constitutionality of the impugned provisions of the Sedition and Subversive Activities Act, and the Suppression of Terrorism Act. The thrust of the First Respondent's complaint is that the impugned provisions of the Subversive Activities Act are inconsistent with Section 24 of the Constitution in that they are *"overbroad"* and/or *"wide and overbroad"*. The Second to Sixth Respondents made a similar complaint against the impugned provisions of the Suppression of Terrorism Act, contending that they have the effect of dangerously, unreasonably and unnecessarily derogating on human rights because of the wide and overbroad manner in which they have been couched.

[44] On the other hand, the Appellants contend that the issues at stake are of national and international importance, relating to the prevention of terrorism and sedition. Emphasis is placed on the view expressed by His Lordship S.P. Dlamini JA to the effect that the issues raised in the appeal should not be decided by *"default"* as it were, owing to the confusion that seems to have reigned at the office of the Attorney General.

[45] Thus, the importance of the issues raised in this appeal cannot be gainsaid. Both parties must be afforded an opportunity of addressing the apex Court on the correctness or otherwise of the majority Judgment of the Court *a quo*. Likewise, it must consider the correctness or otherwise of the minority judgment.

[46] Now turning to deal with the Appellants' prayer for condonation of the omission to file their Supplementary Affidavit in the Record of Appeal. The Appellants allege that the Supplementary Affidavit was not included in the Record notwithstanding the fact that the Registrar certified the Record of Appeal as being complete. It is also alleged that the said Supplementary Affidavit was the subject of an application before the Court *a quo*, which admitted it into evidence. The Appellants asserted that the omission was as a result of a genuine mistake on their part, and that the Registrar also mistakenly overlooked that the Supplementary Affidavit was accepted into the Court file by the Court *a quo*. The Appellants contend that it is vital to refer to the information contained in the Supplementary Affidavit in order to demonstrate that the finding by the majority was erroneous.

[47] As earlier indicated the Second to Sixth Respondents do not oppose the granting of the Condonation prayed for. Meanwhile, the First Respondent has not proffered any cogent reason why the relief sought by the Appellants should not be granted. First Respondent contends that the *"Appellants cannot further supplement their papers without leave"* (which is what the Appellants have actually applied for). First Respondent further contends that the Appellants ought to have prepared the Record *"in consultation with the opposite party"*, as is required by Rule 30(5). He asserts that had this been done *"there would be no confusion around the record as it is now"*.

[48] In my view, these reasons are not strong enough to persuade this Court to decline granting the relief prayed for by the Appellants. The Supplementary Affidavit was admitted by the Court *a quo* into evidence, and as such it forms part of the Record. There is no sound legal basis on which it ought to be excluded. All the Respondents have at all material times been aware of its contents, and it does not seek to introduce anything new. For this reason I am inclined to grant the condonation sought by the Appellants. Accordingly, Prayer [3] of the Notice of Motion is hereby granted.

[49] The Appellants have also prayed for *"leave to amplify their grounds by adding the supplementary grounds"* of appeal annexed to their application. The Supplementary Notice of Appeal which the Appellants seek leave to file consists of five (5) additional grounds of appeal. The Appellants contend that the additional grounds of appeal are already covered by the existing general grounds, but as a matter of caution and in fairness to the Respondents, it is in the interests of justice and certainty that they should be explicitly set out in the notice of appeal. They further contend that it would be in the interests of justice for the existing grounds of appeal to be amplified specifically in relation to the Supplementary Affidavit, and for them to be the subject of the Supplementary Heads of Argument to which the Respondents have objected. The Appellants assert that the Respondents stand to suffer no prejudice if the relief prayed for is granted, as they have had sufficient time to consider the additional grounds of appeal and Supplementary Heads of Argument.

[50] The Second to Sixth Respondents strongly opposed the granting of leave to supplement the Appellants' grounds of appeal and the filing of Supplementary Heads of Argument on several grounds. *Inter alia*, they contend that the relief

should not be granted in the absence of an explanation as to why the additional grounds of appeal were not set out and relied upon in the first place. The Respondents further contend that this Court must first be satisfied that the Appellants have not waived their rights in relation to the additional grounds of appeal, considering that the Supplementary Heads now seek to make out different and contradictory arguments to the Heads initially filed. It is argued that the initial grounds of appeal and heads of argument placed no reliance on the reasoning of the minority Judgment of the High Court with regard to an abstract challenge to the impugned statutory provisions, yet the Supplementary Heads attempt to resuscitate that argument.

[51] The Second to Sixth Respondents further contend that the Supplementary Affidavit is unrelated to the vast majority of the supplementary grounds of appeal, yet the founding affidavit in support of the Application for Declaratory/Condonation Order places a singular focus on the Supplementary Affidavit. The founding affidavit is said to be *"lacking in substance"*, and contains assertions which are *"inaccurate"*. They go on to allege that whilst the supplementary grounds may, to a limited extent, be read to amplify one or two of the grounds as set out in the revised notice of appeal, they are more accurately characterized as *"new grounds of appeal."*

[52] Rule 12 deals with the amendment of a notice of appeal filed in terms of the Rules of this Court, and provides as follows:

> **"The Court of Appeal may allow an amendment of the notice of appeal and argument, and allow parties or their Counsel to appear, notwithstanding any declaration made under rule 11 upon such terms as to service of notice of such amendment, costs and otherwise as it may think fit."**

[53] Rule 12 clearly bestows a discretion on this Court, to be exercised judiciously, in deciding whether or not to allow an amendment of *"the notice of appeal and arguments"*. In our jurisdiction there is a dearth of case law dealing with the application of Rule 12. An amendment of a notice of appeal was allowed by this Court in **Emangweni Holdings Sugar Association (Pty) Ltd v Kubuta Agri-Designs & Civils (Pty) Ltd (89/2019) [2020] SZSC 29 (21 September 2020)** on the basis *"that to allow the amendment would not be prejudicial to the Respondent's case particularly because the Respondent will have the opportunity to respond to same. Furthermore, the Appeal has not*

*been heard on the merits."* The facts and the issues involved in the above cited case were, however, distinguishable from the ones we are dealing with in this matter. The significance of the above matter lies in the fact that an amendment was allowed, and the Court placed emphasis on the absence of prejudice.

[54] According to **Erasmus Superior Court Practice 2nd Edition (2015), Volume 2 at D1 – 668:**

> **"When a bona fide effort has been made, in noting an appeal, to state clearly and specifically the grounds of appeal, and other or further grounds of appeal are subsequently found to exist, the Court will allow amplification of the grounds in a proper case, subject to any orders as to adjournment and costs rendered necessary by the inadequacy of the original notice. Such amplification will be considered more favourably if the appellant has given timeous notice to the Court and to the respondent".**
>
> [Own underlining]

[55] The Learned Authors also state that:

> **"A point not taken in the notice of appeal is thereby waived and cannot be taken <u>except by leave of the appeal Court</u> and on terms as to adjournment and costs. The Appellate Division/Supreme Court of Appeal has, however, often permitted an appellant to rely on a new ground of appeal on the basis that the Court cannot be prevented from deciding an appeal on a point of law merely because the appellant had not relied thereon; otherwise the intolerable position would arise that the Court of appeal would be bound by a mistake of law on the part of the appellant. However, this approach only applies when the issue involved is a pure question of law covered by the pleadings and turning on facts which have been fully canvassed."**
>
> [Own underlining]

[56] *In casu*, the Supplementary Notice of Appeal is dated 31st August, 2018. The application for leave to amplify the initial notice of appeal is also dated 31st August, 2018. This application was intended to be heard (or was set down for

hearing) for the 11the September, 2018. The Respondents, as things stand, have had notice of close to four (4) years to deal with any issues arising from the Supplementary Notice of Appeal. In the circumstances I am satisfied that the Respondents have had more than adequate notice of the additional and/or amplified grounds of appeal.

[57] In my consideration of the impugned Judgment, the initial Notice of Appeal, the Revised Notice of Appeal, and the Supplementary Notice of Appeal, the issues which this Court is confronted with in this appeal are largely questions of law involving the interpretation of The Constitution, The Sedition and Subversive Activities Act, and The Suppression of Terrorism Act. The issues raised in the Supplementary Notice of Appeal are covered in the Supplementary Affidavit which the Court *a quo* admitted in evidence by the Court *a quo.* One of the supplementary grounds of appeal, as I understand it, is that the interpretation by the Court *a quo* did not take into account what was set out or canvassed in the Supplementary Affidavit, when this ought to have been the case. None of the Respondents have disputed that the Supplementary Affidavit was admitted in evidence. On this basis I am satisfied that the Supplementary Notice of Appeal is based on issues which were canvassed in the pleadings serving before the Court *a quo.*

[58] Furthermore, the 2nd-6th Respondent concede that the supplementary grounds of appeal "may" be read to amplify one or two grounds of appeal. This concession, without any demonstrable prejudice, is sufficient basis to allow the amplification.

[59] Following from the above, I am inclined to find that no prejudice will be visited upon any of the Respondents if the Appellants are granted leave to amplify or raise the additional grounds of appeal as set out in the Supplementary Notice of Appeal, as well as to file their Supplementary Heads of Argument. Any potential prejudice to the Respondents can adequately be ameliorated by an order granting them leave to file their own supplementary heads of arguments, if they are so minded.

Costs

[60] It is apparent from the pleadings serving before this Court that this case involves issues of significant constitutional importance. For this reason each party should bear its own costs.

**Order**

[61] In the result, the Court hereby issues the following Orders:

1. The Application for Condonation of the late filing of the Record of Proceedings is hereby granted;

2. The Counter-Application to deem the Appeal abandoned in terms of Rule 30(4) is hereby dismissed;

3. The Supplementary Affidavit, which constitutes pages 372 – 510 is hereby directed to form part of the Record of Appeal;

4. The Appellants are granted leave to amplify their grounds of appeal as set out in the Supplementary Notice of Appeal;

5. The Appellants are granted leave to file their Supplementary Heads of Arguments;

6. The Respondents are granted leave to file their Supplementary Heads of Argument, if any, within a period of twenty one (21) days from the date of this Order;

7. Each party is to bear its own costs in these proceedings; and

8. The matter is referred to the Registrar of the Supreme Court to allocate a date which is suitable to all Counsel involved for hearing on the merits of the Appeal.

**M.J. MANZINI**
**ACTING JUSTICE OF APPEAL**

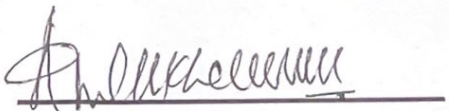
I agree

**M.C.B. MAPHALALA**
**CHIEF JUSTICE**

I agree

**S.B. MAPHALALA**
**JUSTICE OF APPEAL**

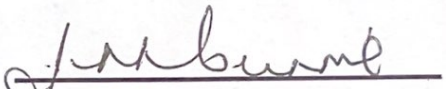
I agree



**A.M. LUKHELE**

**ACTING JUSTICE OF APPEAL**

I agree



**J.M. CURRIE**

**ACTING JUSTICE OF APPEAL**

**For the Appellants:** G D HARPUR SC INSTRUCTED BY THE ATTORNEY GENERAL'S CHAMBERS

**For the First Respondent:** L HOWE (MKHWANAZI ATTORNEYS)

**For the Second to Sixth Respondents:** J BERGER (INSTRUCTED BY TR MASEKO ATTORNEYS)

**For the Seventh Respondent:** TR MASEKO ATTORNEYS