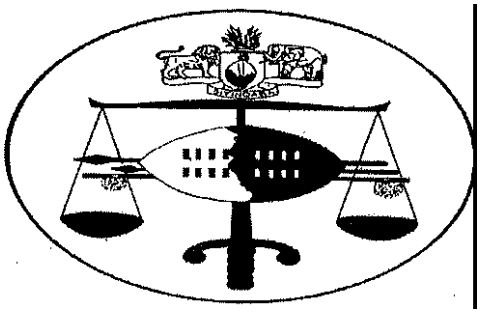

IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO.** 1531/2016

In the matter between

ROBERT MSHWEPHEZANE MABILA **APPLICANT**

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS AND 10 OTHERS **RESPONDENTS**

Neutral Citation: *ROBERT MSHWEPHEZANE MABILA V THE DIRECTOR OF PUBLIC PROSECUTIONS & 10 OTHERS (1531/2016) [2021] SZHC 108 (JULY2021)*

Coram : **MAMBA, MAPHANGA AND LANGWENYA**

JJ Heard : 18 JUNE, 2020

Delivered : 12 JULY, 2021

[lj Civil Law and procedure- Common law review- Rule 53 of High Court Rules- No prescribed time within which to file review. Review to be filed within a reasonable time, and, where necessary to include a prayer for Condonation. Application filed after twenty-eight (28) years. Reasons for delay not satisfactory. Application dismissed.

[2] *Civil Law and procedure-Application to amend pleadings- Rule 28 (8) of High Court Rules. Court has discretion to grant amendment at any time before judgment if no prejudice that can be compensated by an appropriate order for costs or a postponement to the other side. Stage at which amendment sought and reasons thereof material. Application for amendment made at end of submissions and would introduce an entirely new cause of action. Lateness of application unexplained. Application refused.*

[3] *Criminal Law- convict granted.free or unconditional Royal Pardon in terms of Section 331 of the Criminal Procedure and Evidence Act 67 of 1938 (as amended). Such convict only freed or relieved of the consequences of his conviction but conviction remains intact.*

MAMBAJ.

[l] The applicant is Robert Mshwephezane Mabila, an adult Liswati male person of Malkerns in the Manzini Region. The 1st respondent is the Government of the Kingdom ofEswatini and is herein represented by the 2nd respondent who has been cited in his nominal capacity as the 1st respondent's legal representative. The other respondents have been cited in this matter by virtue of their legal involvement in the criminal trial of the applicant beginning on 19 November, 1987, culminating in his conviction on 12 March 1988.

[2] Giving the background facts or information relevant herein, which is common cause, the applicant states as follows:

'14. In May 1987 while I was the Government ombudsman, I was arrested and subsequently charged with High Treason and the contravention of Section 2 of the Protection of The person of the lndlovukati Act N0.23/1967 (as amended by Decree No.3/1987).

14.1 It was alleged that during the period 1983 - 1984, and at Lobamba and in Mbabane I had, and acting in furtherance of a common purpose and/or conspiracy with other people, engaged in the overthrowing of the Queen and Regent (who at the time was Her Royal Highness Queen Regent Dzeliwe) and the changing of the structure of kingship and functions or powers of the Head of State of the Kingdom ofEswatini.

14.2 I was further alleged that, together with my co-accused, had wrongfully and unlawfully and with hostile intent against the Queen and Regent Dzeliwe and kingship of the Kingdom of Eswatini dethroned and deposed Queen and Regent Dzeliwe and further drafted laws with the intention of changing the structure of kingship and functions or powers of the Head of State for the Kingdom ofEswatini by committing the following acts:

(a) Preparing a decree changing or transferring the powers of the Ingwenyama to the Liqoqo for the signature of Her Majesty the Queen and Regent.

(b) Refusing to vacate my post as Principal Secretary for the Ministry of Justice and continuing to serve as Secretary of the dismissed Liqoqo which had worked against the orders of the [Queen] and Regent.

(c) That together with my co-accused, had left Lobamba and subsequently assembled at Embo State House and held a meeting where we decided to dethrone the Queen and Regent and subsequent thereto and on 09 August 1983 published a [government] Gazette removing the Queen Regent and further distributed it amongst people at Lobamba and Embo.

(d) That on the night of the 4th day of September 1983, the Queen and Regent was removed from Lobamba on our orders.

(e) That on the 17th August 1983 we opposed an application filed before the above Honourable Court by the Queen and Regent challenging her removal and subsequently stopped the High Court from hearing the application.

(f) That during 1983 we wrongfully and unlawfully and with intent of bringing into hatred or contempt or exciting disaffection or ill-will or hostility against the person of the Indlovukazi, Queen and Regent Dzeliwe and insulted her and removed her from office as Indlovukazi and Queen and Regent.

(g) That further we accused the Indlovukazi, Queen and Regent Dzeliwe as being against Liqoqo and a woman who did not want to listen to her in-laws,

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[3] Before his arrest and detention, the applicant also worked as secretary to the Liqoqo, which was referred then as the Supreme Council of State. This is an advisory body to the Head of State. The

Supreme Council of State was established after the death of His Majesty King

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. Sobhuza II and was later dissolved after the Coronation of His Majesty King Mswati III.

[4] The applicant and his co-accused were not tried before the conventional Courts that existed and operated in Eswatini then, but before a special Tribunal specifically set up or established to deal and hear their case and similar such cases. This was the Tribunal Decree 1987 and its functions was to hear and determine all charges wherein

any person is alleged to have committed 'an offence which in the opinion of the Prime Minister involves the person or office of the Ngwenyama, the person or office of the Ndlovukazi or any matter mentioned in Schedule 3 to the repealed Constitution or any aspect of Siswati Law and Custom'. The Tribunal comprised six (6) members and its Chairman was Nicholas R. Hannah, the then Chief Justice of this Court. It was established or promulgated through Legal Notice No.112 of 1987. In addition to its members, four (4) persons were appointed as officers of the Tribunal, as per Legal Notice No.113 of 1987. One of the said officers was Mr. AbsalomF.M. Twala, who was the proforma Prosecutor.

[5] In terms of Section 8.2, the Tribunal was empowered to make rules for regulating its practice and procedure which included, sittings, forms in respect of proceedings and any oaths to be taken by its officers or witnesses before it. The Tribunal was mandated to apply Siswati Law and Custom prevailing in the country, 'together with such other rules relating to procedures as may be made by the Tribunal'.

Section 8.4 provided or decreed that 'all proceedings of the Tribunal or any part thereof shall be held in camera if the proforma Prosecutor, at any time, so requests, and the Tribunal shall comply with any such request.' Section 8.6 provided that no person charged before the Tribunal shall be entitled to legal representation and had to conduct his or her own defence in person. This, it declared, was in keeping with Siswati Law and Custom.

[6] Upon being arraigned before the Tribunal, the applicant, and all his co-accused pleaded not guilty to all the charges. At the end of the trial, the applicant was sentenced to a term of eight (8) years imprisonment. His sentence was backdated to the 2l't day of May, 1987; that being the date on which he had been arrested and incarcerated. The Tribunal

found or held that the applicant had played a subordinate but important part or role in the 'traitorous project' of High Treason.

[7] After spending or serving a period of 16 months in custody, the accused and his co-convicts, were granted clemency or a Royal Pardon by His Majesty the King in September 1988.

[8] Following his trial, conviction and sentencing aforesaid, the applicant has filed this application wherein he seeks the following prayers: namely:

'1. Reviewing and setting aside King's Decree No.3/1987 --- and Legal Notice No.112 of 1987 established and or gazetted and or issued in terms of Section 4 of the said Tribunal decree---

2. Upon the grant of prayer 1. Above, reviewing and setting aside the Tribunal proceedings and the consequent conviction or sentence of the applicant.

ALTERNATIVELY

3. Reviewing and setting aside the Tribunal Proceedings and the resultant conviction and sentence of the applicant on 12 March 1988.

4. Directing that any criminal record entered against the applicant in any Criminal Record Book pursuant to the Tribunal Proceedings (and its decision) as referred to in prayers 1, 2, and 3 above be expunged.

5. Costs.'

(9] This review application was filed with the Registrar of this Court on 24 August 2016.

[10] It is common cause that on 12 December 2003, the applicant filed an application before his Court under case No. 3347/2003 whereby he, basically sought to be furnished with a copy of the record of the proceedings before the Tribunal aforesaid. After being joined by two of his former Trialists, in the form of Prince Mfanasibili Dlamini and Dr.Llewelyn George Mzingeli Msibi, that application was granted. The judgment in this regard is dated 27 March 2009. (It would appear that both the Doctor and Prince herein have since died).

[11] In or about July 2004, the applicant sought to be given a copy of the Tribunal proceedings by the office of the 2nd respondent. This was unsuccessful.

[12] The chairman of the Tribunal complied with the order of the 27th March 2009 and supplied the applicant with his notes and a copy of the relevant judgment. (It is not clear from the papers herein when this was done but it was clearly before the filing or launching of this review application).

[13] The applicant states further that upon receipt of the Tribunal's proceedings, he, together with the Doctor and Prince stated above, sought audience with the country's Traditional authorities or Labadzala (Elders). The aim was to try and resolve the issue pertaining to their trial and conviction 'outside court so as to avoid attracting publicity---.' (Paragraph 49 of Founding Affidavit). The Prince was, apparently their emissary. He assured them that their matter was to be discussed privately '---due to its sensitivity'. (Paragraph 50 of Founding Affidavit). It was only after the death of the Prince that the applicant filed this application before this Court.

[14] The grounds of this application may be summarised as follows:

[17) The application is opposed by the respondents, who have only raised preliminary or legal points in this regard. These legal points are as follows:

17.1 This Court has no jurisdiction to hear or determine this application because it relates to matters involving the office of the Ingwenyama and the office of the Indlovukazi which in

terms of Section 151 (8) of the Constitution are not cognisable before this Court as they are regulated or governed by Siswati Law and Custom.

17.2 The matter is *Lis pendens* inasmuch as the applicant avers that it is pending before the traditional authorities or structures.

17.3 The application has been filed or brought out of time; the applicant having waited for 28 years to file it before this Court.

17.4 The application is now moot or academic because the applicant received and accepted a Royal Pardon 'removing all the consequences of his conviction.' And,

17.5 Decree No.3 of 1987 and Legal Notice 112 of 1987 were never invalidated by the Court of Appeal in *Ray Gwebu and Another v Rex* and therefore they remain in force. In any event, the said judgment was issued by the Court in 2002 and did not have an

effect on the trial and conviction of the applicant which took place in 1988.

[18] After the pleadings were closed, the matter was fully argued before us on 06 June 2019. During applicant's reply (on points of law), it was queried by a member of the bench whether it was legally permissible of the Court to review a piece of legislation. Counsel for the applicant conceded that the proper thing to do would be for the applicant to seek a declaratory order that the impugned decree be declared invalid. He thus applied for leave to file a supplementary affidavit or application to amend prayer 1, of his notice of motion. This application was granted by the Court and the respondents were similarly granted the opportunity to respond to such application. However, the applicant filed and served an amended application without the said amendment having been argued before and granted by this Court. This was corrected after due objection by the respondents.

[19] The application to amend the main application was subsequently argued together with the main application in view of the fact that both sides were in agreement that the main application had already been sufficiently argued in Court. It was further acknowledged by both sides that it was in the best interests of justice that the matter be dealt with holistically rather than piece meal or in separate stages or silos. I now deal, first with the application to amend the main application, which application is of course opposed by the respondents.

[20] The application to amend prayer 1 of the notice of motion was filed on 14 October, 2019. The nub of the intended amendment is to replace or ubstitute prayer 1 with a new prayer to the effect that decree number 3 of 1987 and legal Notice 112 of the same year be declared null and void and ofno force and effect. In support of this application, the applicant only deals with his submissions why he thinks the said Decree or legal Notice are invalid and then submits that 'the respondents will suffer no prejudice if the amendment is allowed'. (Per paragraph 6.10.1). In addition to this application, the applicant in the same affidavit applied for 'leave to introduce new evidence and facts'. The crux of this new evidence and facts is that the matter is not pending before the traditional structures; referred to

in the affidavit as

Labadzala (Elders). This is nothing but an argumentative piece to the point of Lis pendens raised by the respondents, and for this reason alone, I would, without any further elaboration on it, dismiss it.

[21] As a general rule, the Court may allow an amendment of any pleading at any time or stage during the course of the hearing and before judgment provided that such amendment would not cause prejudice or an injustice to the other side which cannot be cured or compensated by an appropriate order for costs or a postponement.

Vide *De Wet v Bouwer 1918 CPD 433, Moolman v Estate Moolman 1927 CPD, Frankel, Wise and Co. Ltdv Cuthbert 1947 (4) SA 715 (C) andKhunou and Others v Fihrer and Son 1982 (3) SA.* The applicable rule of Court in this regard is rule 28 (8). In the present case, no reason whatsoever has been advanced by the applicant why the intended or proposed amendment did not form part of the initial notice of motion or why it is sought to be made at this late stage of the proceedings or hearing. I have already stated above that this came consequent upon a query by or from the Court during the applicant's reply.

Vide *Dale Hunter Horwarth v Fargowork Investments (Pty) Ltd and Another Case 685/2018 (ECLD)).*

[22] The respondents have opposed this interlocutory application mainly on the ground that it introduces a totally new cause of action and that this would not only delay these proceedings but also cause an injustice to them. The applicant concedes or acknowledges that the proposed amendment introduces a new cause of action. He submits, however, that such amendment would not cause an injustice to the respondents. He argues further, that the matter was, in any event, postponed to allow the applicant to file the said application for leave to amend and the respondents were afforded the chance to reply to the said application. This is, of course, not a complete answer to the objection. The reality of the matter is that, if the application is granted, the matter would again be postponed to allow the respondents to plead thereto.

[23] In *Gecko Salt (Pty) Ltd v The Minister of Mines and Energy (HC-MD Civ-MOT-REV-2017/00307) [2019] NAHCMD 187 (12 June 2019),* a case cited to us by the respondents, the Court refused to grant an application to amend a review application whereby the applicant sought to introduce an entirely new cause of action in the form of a declaratory order. This is precisely what is sought in this matter. The Court held that:

'[21] I should immediately say that I do not agree with the contention that the amendment sought is not substantial and therefore does not require a detailed explanation. In my view, the amendment sought is substantial. A declaration is a distinct and independent relief from a review. Different requirements and consideration apply to each relief, that is, a declaratory and a review. With regard to a declaratory, the Court approaches the question of a declaratory in two stages; firstly, the Court enquires: is the applica,nt a person interested in any existing, future or contingent right or obligation? Secondly, and only if satisfied at the first stage, the Court decides whether the case is a proper one in which to exercise its,discretion. With a review relief the Court exercises its inherent power, e.g. if a public body exceeds its powers, the Court steps in to set aside the impugned act or decision.

[22] In my view, it is not correct, as Mr. Rorke tried to put it, that the amendment sought is to amplify or amend the initial relief. The proposed amendment does not seek to amend the initial existing relief. The amendment sought, if granted, will constitute a free-standing, distinct and independent relief not

framed as an alternative relief to the existing relief. It seeks declaratory relief not framed as an alternative relief to the existing relief. It seeks declaratory relief as opposed to the existing review relief initially sought. On the applicant's own version, if the relief sought by the amendment is granted, it will finally determine the real issues of dispute between the parties. Under the circumstances the applicant was therefore required to give a detailed explanation. On the other hand if only the review relief is granted the licences will still continue to exist and act as a burden over the land to which the licences relate.

[23] There is no sufficient, plausible or detailed explanation placed before Court why the relief now sought was not included in the original notice of motion, given the fact that on the applicant's own case the allegation of abandonment was made in the founding affidavit. Furthermore, there is also no explanation why the amendment was not sought at the time when the applicant supplemented its founding affidavit after receipt of the record as provided by rule 76 (9). It is rather unfortunate that the applicant took upon itself to decide that the amendment does not require a detailed explanation. That is an

issue for the Court to decide. The applicant appears not to appreciate that it is seeking an indulgence from the Court. The applicant was under an obligation to give a full and detailed explanation and not hold back any or further reasons or facts that explain the delay, as it appears to have decided in its wisdom. In my view, the explanation suffers from candour and forthrightness to justify an indulgence from the Court.

[28] It is fair to say that the relief sought in the notice of motion ordinarily determines and dictates the content of the founding affidavit. On a proper reading of the founding affidavit it becomes clear that the allegation of abandonment contained in the founding affidavit was not made to obtain a declaratory relief. This much is not in dispute. It is clear from the papers that the declaratory relief was not contemplated when the original relief was drafted. It is, in my view, rather unfortunate for the applicant to deny that the amendment sought is not an afterthought. It is clear that at some stage the applicant realised that it could, so to speak, kill two birds with one stone by praying for the declaratory relief in order to finally get rid of the

burden of the licenses over its property once and for all, given the fact that an allegation of abandonment had been made in relation to the review relief.

See also *Kali v Incorporated General Insurances Ltd 1976 (2) SA 179 (D&CLD at 181-182* where the Court noted that:

'Mr Raftesath opposed this application on the ground that the plaintiffs whole case had been conducted on the basis that this defence was restricted to the aspect already referred to and stated that, if the Court were to allow the amendment, he would be compelled to ask for an adjournment in order to consider the matter with a view to re-opening the plaintiffs case. I reserved my decision on this application. I now refuse the application for leave to amend on the following grounds. In the first place it is quite clear, as I have already indicated, that the plea directed the attention of the plaintiff to the issue as to whether or not the first notice received by the defendant of the accident or loss was a written one on 13 March 1972 and to that issue alone. The purpose of pleading is to clarify the issues between the parties and a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another. *Cf Nyandeni v Natal Motor Industries Ltd., 1974 (2) SA (D)*

at p. 279B. The application was made at a very late stage, viz after the plaintiff and the defendant had both closed their cases and during the course of the argument of counsel for the defendant. The mere fact that the application is made at such a late sage is nor *per se* a ground for refusing the application. Where, however, the amendment may result in prejudice to the plaintiff which cannot be cured by any adjournment and an appropriate order as to costs, then that would be a good ground for exercising my discretion against the defendant. I use the word 'may' advisedly since I respectfully agree that in considering whether or not to grant an amendment,

'where there is a real doubt whether or not prejudice or injustice will be caused to the defendant if the amendment is allowed, it should be refused'. *Per* Schreiner J. (as he then was), in Union Bank *of South Africa Ltd v Abramson, 1951 (3) SA 438 (c) at p.451.*

[24] In the instant case, the applicant has totally failed to advance any explanation why the amendment is being sought at this eleventh hour. He contends himself by simply saying that it would not prejudice the respondents (if granted). This has been demonstrated not to be entirely correct. This application is in my view, an afterthought and introduces

a totally new cause of action and stands to be rejected. To hold otherwise would be an injudicious exercise of my discretion.

[25] There is another reason why this application must be dismissed and it is this. The applicant avers that his rights to a fair trial were violated by or in the way his trial was conducted before the Tribunal. Amongst those violations was the denial of his rights to legal representation by counsel of his choice. He also asserts that the rules of natural justice were violated and thus the whole trial, conviction and sentence were a sham and must be declared a nullity and set aside. The consequences of such a declaration would inevitably result in the quashing of his conviction and absolving him from blame or from all the legal consequences of a criminal conviction, which he says, the royal pardon did not result in. To achieve this result, however, the applicant does not need to rely on the constitutional provisions which he has called in aid or to support his case. The Common Law is clearly available to him to achieve this result or goal. Thus, the doctrine of avoidance comes into the spotlight in this case. This doctrine is both a canon or tool of interpretation and a constitutional remedy. (Vide *Eric S. Fish;* **Constitutional Avoidance as Interpretation and as Remedy).**

[26] In *Nombuyiselo Sihlongonyane v Mholi Joseph Sihlongonane (470/2013A) [2013J SZHC 144 (18 July 2013)* this Court quoted with approval the remarks by *BRANDEIS J.* in *Ashwander v Tennessee Valley Authority, 297 US 288 (1936)* that:

'(a) The Court will not pass upon that constitutionality of legislation in a friendly, non-adversary proceeding---.

(b) The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it---.

(c) The court will not formulate a rule of Constitutional law broader than is required by the precise facts to which it is to be applied ...

(d). The court will not pass upon a Constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed ...

(e) The court will not pass upon the Constitutionality of a statute unless the plaintiff was injured by operation of the statute.

(f) The court will not pass upon the Constitutionality of a statute at the instance of one who has availed himself of its benefits... and

(g) Even if serious doubts concerning the availability of an act of congress are raised, the court will first ascertain whether a

construction of the statute 1s fairly possible by which the question may be avoided'.

[18] The above doctrine is of course part of our law. *Vide Jerry Nhlapo and 24 others v Lucky Howe N* 0. *(in his capacity as Liquidator of [VIF] Limited in Liquidation) Civil Appeal No. 37/07, Daniel Didabantu Khumalo v The Attorney General Civil Appeal 31/2010, Lomvula Hlophe (On Behalf of Acting Chief Ntsetselelo Maziya v Office In-Charge, Big Bend Correctional Institution) and 4 Others, Civil Case 2799/08.'*

[27] In *Chawira & 13 Others v Minister, Justice Legal & Parliamentary Affairs & Others (CCZ 3/2017 Const. Application No. CCZ 47/15 Const. Application No. CCZ50/15 [2017} ZWCC03 (20march2017)* the Court stated the doctrine in the following terms:

'As we have already seen, in the normal run of things courts are generally loathe to determine a constitutional issue in the face of alternative remedies. In that event they would rather skirt and avoid the constitutional issue and resort to the available alternative remedies. This has given birth to the doctrine of ripeness and constitutional avoidance ably expounded by

EBRAHIM JA in Sports and Recreation Commission v Sagittarius Wrestling Club and Anor 2001 (2) ZLR 501 (S) at p 505 G where the learned judge had this to say:

'There is also merit in Mr. Nherere's submission that this case should never have been considered as a constitutional one at all. Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration right.' (See also *Zantsi v Council of State, Ciskei & Others 1995 (4) SA 615 (CC).*

The doctrine of ripeness and constitutional avoidance gives credence to the concept that the Constitution does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable subsidiary legislation together with other available legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to the Constitution. That conceptualisation of law as previously stated finds recognition in the leading case of

abeyance pending the deliberations thereon by the traditional authorities to whom the matter had been reported. He stated that the Prince had advised them not to pursue the matter in Court 'due to its sensitivity'.

[31] For a party to successfully raise the plea of *Lis pendens*- that the matter is duly pending before another competent forum, he must satisfy the Court that it is the same matter; between the same parties; for the same relief and based on the same cause of action and that it is before a competent forum. In other words, that forum must be competent to grant or award the relief sought. That, in my view, is trite law. In the present matter, whilst the competency or status of Labadzala to hear this matter and grant the relief sought has not been spelt out by the respondents, it is clear to me that this plea cannot succeed in this case. The traditional authorities are not a Court. They do not have the power to review and overturn a criminal conviction, which is the main or central prayer sought by the applicant in this case. The applicant has approached this Court to seek this relief because amongst other things, the Royal Pardon did not and could not afford him this relief. Therefore, whilst I am in respectful agreement with

the general principles enunciated by this Court in *Zwane and Others v Masuku and Other (4124/2007) [2009} SZHC 38 (19 March 2009),* the facts and the reliefs sought in those two cases are dissimilar. Furthermore, I do not think that Labadzala have the jurisdiction to review and set aside legislation that has been lawfully promulgated or enacted. Therefore, in the context of this matter, the special plea of *Lis pendens* is inapplicable and is hereby rejected.

[32] Section 329 of the Criminal Procedure and Evidence Act 67 of 1938 (as amended) (hereinafter referred to as the CP&E), empowers His Maj'esty 'to grant a pardon either free or subject to lawful conditions to any convict. Section 330 deals with the commutation of Sentence to any person or convict under sentence of death. Such commutation is referred to or classified as a conditional pardon. A free or unconditional pardon on the other hand is one which has 'the effect of discharging the convicted person from the consequences of the conviction'. This is regulated or governed by section 331 of the CP&E. There is a significant difference between the two. A free or unconditional pardon wholly wipes away the effect or consequences of a conviction whereas a conditional one does not have such an effect

but relates to the sentence that has been imposed on the convicted individual. This is governed by both section 330 and 332 of the CP&E. Section 331 is a stand-alone section and is in the following terms:

> '331 A free or unconditional pardon by His Majesty shall have the effect of discharging the convicted person from the consequences of the conviction'.

[33] Therefore, where a convict has been granted a free or unconditional pardon, he becomes fully and completely discharged or cleared of the consequences of the conviction. The conviction, however, remains intact. It is common cause that this is the pardon that the applicant was granted in September 1988. I have already noted that the applicant's main aim in this application, as articulated by him in his founding affidavit is to clear his name from the conviction and its consequences. Thus, I cannot agree with counsel for the respondents that there is no issue or Lis as between the applicant and the respondents as a result of this free or unconditional pardon.

[34] In England, the Royal Prerogative of Mercy is reserved for the British Monarch, on recommendation by the Secretary for Justice. As in our law, there are two types of pardon, namely; a conditional pardon and a free or unconditional pardon. In the case of a free or unconditional pardon, the convicted person is relieved or freed of all the penalties or punishment and other consequences of his conviction. The conviction is, however, not affected. It remains intact and the reason for this is that only a Court of law may quash a conviction. The crown under English law is said to 'have no J>rerogative of Justice, but only a Prerogative of Mercy. It cannot, therefore --- remove a conviction but only pardon its effects.' *(See Bentley [1994} QB 349).*

[35] Under South African Law, the issue of a free pardon is regulated by Section 327 of the Criminal Procedure Act 51 of 1977. The power to grant such pardon resides with the State President. The provisions of the section are very detailed or elaborate and the President only acts after receiving advice from the Court or judge and subsection (6) (a)

(i) provides that the president may

'(i) direct that the conviction in question be expunged from all official records by way of endorsement on such records, and the effect of such

a direction and endorsement shall be that the person concerned be given a free pardon as if the conviction in question never occurred;---'

In my judgment, section 331 of the CP&E does not have the same meaning and effect as this subsection inasmuch as the provisions of the South African law do affect and quash the conviction. Our law is similar to English law as stated in the preceding paragraph.

[36] For the sake of completeness of this topic; section 329 of the CP&E empowers His Majesty to grant a pardon to a person convicted by a Court of criminal jurisdiction- 'now or hereafter established in Eswatini'. The relevant Tribunal in this instance falls under such Court as it was established with criminal jurisdiction to hear or try specific criminal offences. Section 2 of the Act also defines a Court to mean

'--- the judicial authority which under this act or <u>any other law has jurisdiction in respect of that matter'.</u> (Underlining added by me).

[37] This application has been filed in terms of the common law. There is no statute governing or regulating it. In terms of Rule 53 of this court, this Court has jurisdiction to hear a review application from any subordinate Court, Tribunal, board or officer performing

judicial,

quasi-judicial or administrative function. The law requires that the application be filed within a reasonable time. Where there has been undue and unreasonable delay, the Court may refuse to hear the application. Each case will of course be determined on its particular facts. Erasmus, **Superior Court Practice (1994 ed) at Bl-382** states as follows:

> 'No statutory period is prescribed within which proceedings for review must be brought, but it is clear that they must be brought within a reasonable time. Where it is alleged that the applicant did not bring the matter to Court within a reasonable time, it is for the Court to decide (a) whether the proceedings were in fact instituted after the passing of a reasonable time and (b), if so, whether the unreasonable delay ought to be overlooked. Insofar as (b) is concerned, the Court exercises a judicial discretion, taking into consideration all the relevant circumstances. Among these circumstances are the giving of a satisfactory explanation and the absence of prejudice to the complaining party.
>
> Delay in initiating review proceedings is pre-eminently a point which the respondent or the Court should raise, unless the delay is so manifestly inordinate that an applicant can be

expected to

explain the delay in his founding affidavits. If such an objection is raised by the respondent, the applicant can deal with it in his replying affidavits'. (Footnotes omitted by me).

[38] It is generally accepted that, where the application has been filed after a long period of time, the applicant ought to file an application for the Condonation of such late filing of the application. The late filing must be adequately explained in the application for Condonation. It is common cause that whilst the applicant has given some reasons for the late filing of this application, he has not accepted that he is out of time and he has not prayed for Condonation. The application for Condonation need not be separate from the main one (See paragraph 44 below).

[39] In *Mandela v Executors Estate late Nelson Rolihlahla Mandela & Others (131/17) [2018} ZASCA 2; [2018} I All SA 669 (SCA); 2018* (4) *SA 86 (SCA) (19 January, 2018)* the Court stated as follows:

'[9] In Van Zyl para 46-47, it was pointed out that it is desirable and in the public interest that finality be reached within a reasonable time, in respect of judicial and administrative

decisions and litigation in general. It was a long-standing rule that Courts have the power, as part of their inherentjurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party has been guilty of unreasonable delay in initiating the proceedings. The rationale for the long-standing rule is twofold: first, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Second, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. If so, should the delay in all the circumstances be condoned?

[10] In Van Zyl para 48, it was stated that the reasonableness or unreasonableness of a delay is dependent on the facts and circumstances of each case. It is a matter of factual enquiry upon which a value judgement is called for in the light of all the relevant circumstances, including any explanation that is offered for the delay. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of the case, the delay was reasonable. In *Gqwetha v Transkei Development Corporation Ltd & Others 2006 (2) SA 603 (SCA) para 24,* it was pointed out that a material fact to be taken into

account in making that value judgment was the nature of the challenged decision, as not all decisions have the same potential for prejudice, which may result from their being set aside. It was emphasised in Van Zyl that although this involved the exercise of a value judgement, it was not to be equated with the judicial discretion involved in the next question if it arose, namely, whether a delay which has been found to be unreasonable should be condoned.

[40] Briefly, the facts in *Mandela* were as follows: The appellant was married to the late President of the Republic of South Africa, Nelson Mandela through civil rites. They got div9rced on 19 March 1996. In November 1997, the Minister of Land Affairs for the Republic of South Africa donated, what later became popularly known as the Qunu home to Nelson Mandela, who died on 05 December 2013 and bequeathed the Qunu home to the N. R. Mandela Family Trust which had to administer the property for the benefit of the Mandela family in perpetuity. The members of the Mandela family excluded the appellant.

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On 14 October 2014, the appellant instituted review proceedings to set aside the 1997 minister's decision to donate the Qunu home to Mr.

N.R. Mandela. The application was dismissed with costs on account of the fact that the appellant had unreasonably delayed in filing it and this had resulted in severe prejudice to the respondents. It ruled that no acceptable explanation had been offered or given for the inordinate delay, which was about 17 years and the appellant had done nothing to assert her rights over the property in question during that period. She claimed that, through customary law, she owned the property and therefore the minister had no right to donate it to her former husband and that in any event, even after their civil rites marriage was dissolved, she was still married to him in terms ofcustomary law. The appeal was dismissed due to the delay in filing the review application. The Court reasoned as follows:

> '[28] I agree with the submission by the respondents that a person in the position of the appellant would have asserted her right to ownership of the property before the death of Mr. Mandela. To wait until after his death is extremely prejudicial to his estate and heirs because his version of events is not available. Part of the prejudice lies in the very fact that, because

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the appellant's claim was only asserted after Mr. Mandela died, the evidence in her favour may now seem to be stronger than it would have been had Mr. Mandela's counter-version been before the Court.

[29] Another relevant consideration is that if Mr. Mandela had been aware of this claim in good time, he most probably would have devolved his estate differently. He bequeathed substantial sums to the children, grandchildren and great-grandchildren from his marriage with the appellant. If he had known that the appellant laid claim to the Qunu property for herself and for the benefit of the children from her marriage to Mr. Mandela, he may well not have made these bequests or may have bequeathed more modest amounts. He may have taken steps to exclude her as a beneficiary of family trusts on the basis that the value of the Qunu property would be sufficient for her and the descendants from that marriage.

[30] Be that as it may, I am prepared to assume, without deciding, that on the evidence before the Court, the appellant's case on the merits has good prospects of success and that a meaningful result for the appellant would be achieved by setting

aside the decision of the Minister. These assumed prospects of success are however not sufficient to swing the balance in her favour when it comes to the discretion as to whether to overlook the delay, when due regard is had to the potential for severe resultant prejudice of the decision of the Minister is set aside.

[31] It must be made clear that the decision to dismiss the appeal is exclusively based on the excessive undue delay coupled with the potential for severe resultant prejudice to be suffered by the respondents, and the lack of an acceptable explanation for the unreasonable delay'.

[41] From the above legal principles, it is clear that in order to determine whether an application for review is to be dismissed or not on account of delay, the Court must decide or ascertain

(a) whether or not the proceedings have been brought within a reasonable time; and if not,

(b) should the Court condone such delay. *(Vide wolgroeiers Afslaers (Edms) BPK v Munisipaliteit van Kaapstand 1978 (1) SA 13 (A) at 41-42 and Setsokosane Busdiens (Edms) BPK v Voorsitter, Nasionale Vervoer Kommissie en'n Ander 1986*

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SA57 (A) at 86. Prejudice to the other side and the prospect of success form part of the equation. The degree of lateness, the extent thereof and the cogency or acceptability of the explanation also form the ingredients or essential factors for consideration by the Court.

[42] In the present case the following issues are common cause.

The applicant was convicted on 12 March 1988.

42.2 He was granted Royal Pardon in September 1988 and was released from custody.

42.3 In October 2003 he instituted proceedings under case 3347/2003 before this Court where he prayed for, *inter alia,* that he be furnished with a copy of the Tribunal's proceedings.

42.4 In July 2004, he wrote to the Attorney General, demanding to be furnished with the record of the proceedings.

42.5 The judgment by this Court under case 3347/2003 was granted in his favour on 27 March 2009.

42.6 The applicant was represented by counsel in the hearing under case 3347/2003.

42.7 By letter dated 12 April 2005, the request for the copies of Tribunal proceedings was made by his counsel to the Chairman of the Tribunal. These copies were subsequently furnished to him by the Chairman, although the exact date is not stated in the papers herein.

42.8 After receiving the said record, the applicant together with Dr. Msibi and Prince Mfanasibili, met with their legal team and resolved, on the advise of the prince, that before proceeding with the present application 'we must seek audience with the Kingdom's authorities (Labadzala) and see if we could have the matter resolved outside of Court so as to avoid attracting publicity---'(paragraph 49 of Founding Affidavit) and they did so.

42.9 Again, it is not clear from the papers herein when this matter was reported to the traditional authorities.

42.10 After the demise of the prince, the applicant decided to file this application. It is dated 12 August 2016. He waited for about 28 years to file this application and he submits that this is not an unreasonably long or inordinate period. I cannot agree. Additionally, his lateness is inadequately explained. There is no reason, in my judgment why he could not file the application

before getting the record of proceedings. Whilst it is generally a salutary practice to have the record in such matters, this is not an absolute necessity. In any event, he could have launched the application and prayed for an order that he be furnished with such record by the relevant respondents. The applicant, as already stated started making means to procure the Tribunal record in about 2003. That is about fifteen (15) years after his release from detention.

[43] The applicant also appears to justify his late filing of the application, on the fact that he had reported it to the traditional authorities. He did so after meeting with his legal team. At that stage he must have been advised on the legal effect or consequences of the free pardon; namely, that it was a complete discharge from the consequences of his conviction and that he could only approach this Court in order to quash his conviction. A litigant is not entitled to engage in a fruitless exercise ostensibly trying to assert his rights and then after a long and unreasonable wait, approach the Court for the same relief. The applicant did not as a matter of law strictly require or need the record of the proceedings before the Tribunal to prosecute this application. Indeed there was never any reference to it in these proceedings.

[44] Taking into account the unreasonably long period taken by the applicant to file this review application, the inadequate or unsatisfactory explanation given for such lateness, the lack of any prospects of success in this review, the want of a prayer for Condonation, this application cannot succeed and is hereby dismissed with [illegible] in favour of respondents.

MAMBA J.

MAPHANGA J.

I AGREE,

I ALSO AGREE,

LANGWENYA J.

FOR THE APPLICANT: **MR. T. R. MASEKO**

FOR THE RESPONDENTS: **MR. S. M. KHUMALO (ATTORNEY GENERAL)**