BEN MAMBARA
and
SILAS MKODZA
and
RIGHTON MOYO
and
DENNIS MUCHENU
and
ABEL GUMPO
and
CLEMENT KAUSA
versus
NATIONAL ENGINEEERING WORKERS UNION
and
WISE GARIRA
and
SHEPHERD MASHINGAIDZE
and
NATIONAL EMPLOYMENT COUNCIL FOR THE ENGINEERING
IRON AND STEEL INDUSTRY
and
ENGINEERING IRON AND STEEL ASSOCIATION OF ZIMBABWE
and
BEKEZELA MANGENA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 11 May 2023

Opposed Court Application

P Tichaona with B Makuriru, for the applicants
S Ushewokunze, for the 1st, 2nd and 3rd respondents

CHITAPI J: The applicants coined their application in the heading as "Court Application for condonation of late noting of an application for rescission and rescission of a default judgment in terms of r 29 of the High Court Rules, 2021." In para 13 of the founding affidavit, the deponent who is the first applicant averred that the application was for "condonation for late noting of an application for default judgement, upliftment of a bar for failure to file heads of argument and an

application for rescission of a default judgement in terms of r 29(1)(a) of the High Court Rules 2021." Rule 29 was previously r 449 in the repealed High Court Rules 1971. The repealed rule did not provide for the time limits within which to make the application. Rule 29(2) now provides that a party seeking relief under r 29 may file and serve on interested parties a court application for relief provided thereon within one month after becoming aware of the court judgement in question.

The applicants have filed a hybrid application wherein they concomitantly seek condonation for filing a late rescission application as well for upliftment of a bar for failure to file heads of argument and for rescission of a default judgement. The default judgement in question was granted by MUSHORE J in case number HC 8111/19 on 23 January 2020. The default judgement reads as follows:

> "IT IS ORDERED THAT:
> 1. 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, and 9th defendants are barred for failing to comply with the following rules of the High Court:-
>   i. O 12 r 83
>   ii. O 21 r 138(1)(C)
>   iii. O 21 r 137(2)
> 2. Judgement is entered for 1st, 2nd, and 3rd plaintiffs in the following terms:-
>   i. Its is hereby declared that the 4th to 9th defendants are not legitimate members or holders of any office position in the 1st plaintiff and/or 1st defendant.
>   ii. It is hereby declared that and to 9th defendants, or anyone claiming through them, have no *locus standi* to act for no represent, in any capacity whatsoever, the 1st plaintiff in the 1st defendant or any institution/without the express approval of the 1st plaintiff.
>   iii. Defendants are hereby interdicted from interfering whatsoever in the management/affairs of the 1st plaintiff or deciding who should represent the 1st plaintiff in the 1st defendant.
>   iv. It is hereby declared that the 2nd plaintiff (or any person succeeding him as President of the 1st plaintiff) be allowed to chair the proceedings/business of the 1st defendant up to the 31st of the month of December that follows the lapse of a period of 12 calendar months from the date of this court's order which the chairmanship of the 1st defendant shall proceed on a rotational basis and in terms of the 1st defendant's constitution.
>   v. The 4th – 9th defendants (or anyone acting through them) are hereby interdicted from entering the 1st plaintiff's property/premises or using the 1st plaintiff's name, letterhead and or logogram.
>   vi. The 1st, 2nd and 3rd defendants (or any one acting through them) are hereby ordered not to deny the plaintiffs/1st plaintiff's officials full and unfettered access to all the premises/property and business of the 1st defendant.
>   vii. In respect of all act, meetings, negotiations, decisions, resolutions, business contracts, collective bargaining agreements, payments or transactions conducted or executed by the defendants (or some or one of them at or in the name of the 1st defendant or 1st

plaintiff without the participation and approval of the plaintiffs from 1 November 2018 and to the date of this court's order be and are hereby declared null and void.

viii. The chairing of the meetings/business of the 1st defendant by the 3rd defendant or any person who succeeds him before the grant of this court's order is hereby declared null and void.

ix. The 1st defendant pay to the plaintiff the industrial outreach monetary disbursements computed at 1% of the Engineering Monetary Fund's monthly takings plus 1% of the defendant's monthly takings with effect from 1 November 2018 to the date of this court's order.

x. Any monetary payments/purportedly made to the 1st plaintiff through defendants or one of them or through modes/accounts other than 2nd plaintiff, 3rd plaintiff or the 1st plaintiff's official bank accounts are hereby declared invalid.

xi. The 2nd to 9th defendants bear costs of this suit at attorney client scale.

It will be noted that there were nine defendants in case number HC 8111/19. Of those nine, all but three are applicants herein and they were listed as the fourth to ninth defendants in the default judgment. The two defendants in case number HC 8111/19 who have not applied for relief herein are the fourth and fifth respondents herein. In terms of the quoted order, all nine defendants were barred for a failure to comply with High Court Rules 1971 Orders 12 r 83, 21 r 138(1)(C) and 21 r 137(2) . Order 12 r 83 then provided that where a party is barred in terms of rr 80-81, the Registrar was precluded from accepting for filing any pleading or other document from the barred party. It also provided that the barred party or the party's legal practitioner could not appear in subsequent proceedings until the bar was uplifted. The same six applicants herein were inter-alia declared not to be legitimate members or holders of any office position in the first respondent herein. It was declared that the same applicants did not have *locus standi* to represent the first respondent and they were interdicted from accessing property and premises of the first respondent.

The applicants were further barred as noted for failure to comply with rr 137(2) and 138(1)(C). Rule 137 provided for alternatives to pleading on the merits on the part of a defendant required to file a plea. Rule 138 provided for the procedure to be followed where the defendant had filed, a special plea, exception or application to strike out. Specifically r 138(1)(C) provided that where a party had filed a special plea, that party was required to set it down for hearing as provided in r 223(2) within ten days of the opposite party consenting to the set down. Failing such consent, either party could set the matter in terms of r 223(2) within a further period of four days, failing which the party raising the special plea, exception or application to strike out was required to plead over to the merits within a further period of four days. In such a case, the special plea,

exception or application to strike out would only be dealt with at the hearing of the case at trial.

MUSHORE J determined that the applicants herein as defendants had failed to set down a special plea which they had filed on time as per rules requirements and further had ignored a notice to plead and intention to bar with the result that they were bared. The Registrar had mistakenly accepted the filing of further pleadings despite the existence of the bar. The matter was erroneously set down on the opposed roll and the Learned Judge noted the irregularity that the applicants did not file heads of argument timeously. The Learned Judge noted that whilst the plaintiffs counsel had consented to the late filing of the applicants heads of argument, the defendants counsel had not informed the court about the existence of the bar which was in operation yet counsel commenced to argue the matter despite his want of audience until the bar was uplifted. The Learned Judge consequently granted a default judgement because of the existence of the bar. The written reasons for judgement are ventilated in case number HH 686/20.

The six applicants herein noted an appeal to the Supreme Court against the judgement of MUSHORE J under case number SC 34/2020. The Supreme Court determined another appeal number SC 32/20 filed by the first and sixth respondents against the judgement of MUSHORE J in HC 8111/19 as noted (supra). The judgement order which the Supreme Court granted was as follows:

"**IT IS ORDERED BY CONSENT THAT**:

1. The appeal under SC 32/20 succeeds in part.
2. Paragraph 2(vii) of the judgement of the court a quo under HC 8111/19 is hereby set aside and substituted with the following:
   2.1 the 1st-2nd appellants and 1st-3rd respondents shall mutually respect the autonomy and self-determination of the 1st appellant and the 1st respondent.
   2.2 the acts, decisions and resolutions or transaction that had been nullified by the order under HC8111/19 in terms of paragraph 2 (VII) therefore (insofar as they relate to the business and operations of the 4th respondent) and for the period from 1 November 2018 to date shall be tabled and opened for deliberation and operation ratification or non-ratification at an executive committee meeting or executive committee meetings of the 4th respondent within 30 days from the date of this order.
   2.3 all duties and roles of a General Secretary shall forthwith be performed by the respective General-Secretaries, or any other duly nominated person(s) from the 1st appellant and the 1st respondent until the issue of the General Secretary of the 4th respondent has been resolved.
   2.4 the 1st appellant and 1st respondent shall not repeal or seek to cancel any collective bargaining agreements (however concluded) signed in respect of the 4th respondent's business from 1 November 2018 to date of the order of this Court.
   2.5 there shall be no order as to costs under HC8111/19.

3. The order of the court a quo under HC 8111/19 remains operational and extant save and except as varied herein.
4. The appeal under SC27/20 is hereby withdrawn.
5. The application under SC241/21 is hereby withdrawn.
6. There shall be no order as to costs in respect of matters No. SC27/20; SC32/20; SC241/21."

Therefore as far as judgment number HH 686/20 in case number HC 8111/19 is concerned, the only order made on it on appeal was by virtue of case number SC 32/20 (supra).

The applicants' on appeal was as stated SC 34/20. The applicants did state what the fate of the appeal was. All that the applicants have set out are procedural pitfalls which they encountered upon the appeal having been deemed lapsed for failure by the applicants to settle the issue of the record of proceedings. They filed applications effectively for reinstatement of appeal which according to the applicants depositions were struck off the roll for want of applying for condonation and extension of time to note fresh appeal or reinstatement as the case maybe. What I discovered from the imprecisely averred paper trail on what became of appeal number SC 34/20 is that this appeal remains lapsed and there is therefore no pending appeal filed by the applicants against judgement in case number HC 8111/19.

The applicants averred in the founding affidavit in para(s) 28 – 31 that they became aware that the judgement of MUSHORE J had been uploaded on Zimlii on 30 October 2020. They expressed disquiet that they had not received reasons for the judgement as requested by the Supreme Court in appeal number SC 27/20 and their appeal SC 34/20. They averred that only the transcript had been prepared. In para 31 of the founding affidavit the applicants averred that the Supreme Court disposed of both appeals by consent without their participation. The record however shows that the appeals disposed of were SC 32/20, with appeal cases SC 241/21 and SC 27/20 being withdrawn. There is no reference on the Supreme Court order of appeal number SC 34/20. It is either it was lapsed and was not resuscitated or the applicants are deliberately misleading the court, the latter being a serious indictment on counsel and the applicants both being equally blameworthy for the misleading averment. If there is no pending appeal, the question is where does this leave the applicants because judgement HC 8111/19 remains extant against them.

The applicants seek to have the judgement against them set aside on the basis that the same was erroneously granted in their absence and that the judgement affects their interests. In terms

of r 29(1) of the current High Court rules 2021, the court has a discretion to correct, vary or rescind its judgement either on its own initiative or on application by any affected party.

The applicants seek the setting aside of a default judgment granted on 23 January 2020. This application was filed on 14 October 2021 which is about 21 months after the judgement sought to be set aside was granted. At the time that the default judgement was granted r 449 of the High Court Rules then in force did not provide a time limit within which the application should be filed. The applicants having noted the delay, have taken the precaution to seek condonation of the late filing of the application for rescission. The current rule 29(1) provides that such application may be made within one month of the date on which the applicant becomes aware of the judgment. In the absence of r 449 providing for time limit, the courts did emphasize the need for the applicant to act expeditiously when bringing an application under r 449.

In the case of *The Milton Gardens Association and Anor* v *Tecla Mvembe and Ors* HH 94/16 DUBE J (as she then was) considered the application of r 449; the equivalent of r 42 of the South Africa Uniform Court Rules and quoted from the authors *Herbstein and Van Winsen*; The Civil Practice of the High Court of South Africa, 5th Edition at p 930 as follows:

> "Although rule 42 lays down no time limit by which rescission of a judgment should be sought, delay or acquiescent in the execution of the judgement would normally bar success on an application to rescind as it will be regarded as acquiescence in the granting of the judgement. The court will normally exercise its discretion in favour of an applicant who through no personal fault was not afforded an opportunity to oppose the order granted against him and who having ascertained that such an order has been granted, takes expeditious steps to have the position rectified."

It does seem to me that when rr 449 and 63 as they stood in the 1971 High Court Rules are related, it was not an omission by the rule maker to refrain from placing a time limit by which applications made under r 449 to be made. If a r 63 rescission of judgement application had a 30 day time limit for launching the application from the date that the defendant has had knowledge of the judgement, the omission of the same in r 449 was arguably intended that time be of the essence and certainly not unreasonably longer in my view. Expeditious action on the part of the defendant would be key as the Supreme Court stated in *Grantuily & Anor* v *UDC* 2000(1) ZLR 361 (SC) where it is stated at page……

> "……I consider that he was justified in the exercise of his discretion in dismissing the application by reason of the inordinate lapse of time. After all rule 449 is a procedural step designed to correct

> expeditiously an obviously wrong judgement or order per ERASMUS J in Bakoven's case (supra) at 47 E – F. See also *Firestone South Africa (Pty) Ltd* v *Gentusico* (supra) at 306 H ……"

In relation to what could be considered a reasonable period, the circumstances of each case will be determinant. It would be unwise to seek to lay a specified period. The case of *First National Bank of Southern Africa Ltd* v *Jurgens & Ors* 1994(1) SA 677(T) has often be quoted as laying the rule that a reasonable period is one which does not exceed three years. The case did not lay a rule. The Learned Judge stated as follows:-

> "……The power created by r 42(1) is discretionary. See (*Tshivhase Royal Council and Anor v Tshivhase and Anor*; *Tshivase and Another* v *Tshivase and Anor* 1992(4) SA 852 (A) at 862 in fine – 863 (A) and it would be a proper exercise of that discretion to say that, even if the applicant proved that r 42(1) applied; it should not be heard to complain after the lapse of a reasonable time. A reasonable time in this case is substantially less than three years referred to ……"

The dicta in the quoted case was informed by the peculiar circumstances of that case. And with due respect the court was in fact non committed and defined the reasonable time in that case as "substantially less than three years, an ambiguous expression as it were" but quite understandable in that the court noted the folly of being specific on time lines since the rule maker left the issue open ended.

From an analysis of the case law which I have set out, it is clear that there was a delay of 21 months which would require condonation to be applied for and granted before rescission under r 449 could be considered. Secondly to the extent that the applicants rely on an error committed by MUSHORE J, then the error had to be shown to be apparent from the record. The error alleged by the applicants was that the Learned Judge wrongly "stated" that the applicants should have set down their special plea by 19 November 2019 yet the correct calculation ought to have shown the cut off date as 21 November 2019. To this averment the respondents responded quite notably and significantly that the applicants did not in any event set down the special plea by 21 November 2019. The applicants did not apart from alleging that the bar would start operating on 21 November 2019 and not 19 November 2019 then demonstrate or even allege that they set down the special plea in terms of the rules by their calculated date of 21 November 2021. The applicants were not rule compliant and even if MUSHORE J miscalculated the date by which the special plea ought to have been set down, it made no difference because on 21 November 2019 the applicants were not rule compliant on set down cut out date.

The applicants in the answering affidavit averred that they filed the special plea on 1 November 2019 and set it down on 20 November 2019, thus they were rule compliant. However as pointed out by the respondents, there was no valid set out. No heads of argument had been filed, the record was not indexed or paginated and there were no steps taken to ensure the hearing of the special plea or before 21 November 2019. A notice of set does not on its own establish that a matter was set down. A set down is sought in terms of the rules. What this means is that the notice exists as part of a rule paper trial. All pleadings required for purposes of an effective set down must have been settled in terms of the rules. The matter should be ready for hearing. The applicants did not show that they complied with the filing of all pleadings which are requisite for an effective set down. In fact they did not even explain what became of the process of setting down the special plea or pleading over to the merits after 21 November 2021. Since the applicants were not rule compliant, the Learned Judge's finding to that effect was correct.

An even bigger obstacle arises for the applicants. The judgement of MUSHORE J was not granted in default of appearance of the applicants. It was a default judgement granted in the presence of the applicant's counsel who in fact made submissions on behalf of the applicants. The applicants were therefore heard first before the decision was made by the Learned Judge that the applicants stood barred. The Learned Judge noted that the respondents had consented to the late filing of heads of argument. However, the Learned Judge noted that the applicants had been barred for defaulting on taking steps to dispose of their special pleas or to plead over. It was not the applicants as respondents who disclosed the status of the pleas to the court but the respondents herein who were applicants. In the light of the non-disclosure and the fact that the applicants had not pleaded over, there was in fact no defence filed as the rules required. The non-filing was the non-compliance and was a ground for judgement against the applicants.

In fact, consequent on the judgement, the applicant noted appeal number SC 34/20. The grounds of appeal were stated as:-

> "1. The court *a quo* erred in refusing the appellants audience in circumstances where the bar was inoperative against them considering that first to the third respondents had consented to removal of the same.
> 2. The court a quo further erred in relating to final relief in the main matter when what in fact lay for determination was the special plea.
> 3. The court a quo further erred in giving relief under s 14 of the High Court Act [*Chapter 7:06*] on matters that required to be ventilated at trial.

4. Consequently, the court a quo erred in granting reinstatement of second and third respondents through declaratory relief in circumstances where the labour law ought to have been pursued.
5. The court a quo further erred in granting an interdict where first to third respondents had not fulfilled the requirements of the law.

WHEREFORE Appellants prays that:-
1. The appeal be allowed with costs.
2. The judgement of the court a quo in HC 8111/19 set aside.
3. The matter is remitted back to the court a quo for a re-hearing of the special plea."

The grounds of appeal are clear that the applicants were not relying upon any of the grounds set out in r 449 or r 29(1) of the High Court Rules. What happened was that the applicants having bungled or failed to progress the appeal decided to be ingenious and try their luck at impugning the default judgement after realizing that they were out of time to invoke rescission under r 63 now r 27. It is however clear that there is no ambiguity or patent error or omission in the judgement of MUSHORE J. There is no mistake common to all parties which led to the granting of the judgement as I have demonstrated. The authorities I have cited are also clear that the relief of r 449 is meant to afford the court an opportunity "to exercise its discretion in favour of an applicant who through no personal fault was not afforded an opportunity to oppose the order granted……"

In my view the facts and circumstances of this matter do not commend themselves as grounding a good case for the exercise by the court of its discretion as provided for in the old r 449 now r 29 of the High Court Rules to act in terms thereof.

Lest it be alleged that I did not deal with every issue raised by the parties. I infact considered all issues and submissions made thereon. The approach I adopted was simple. I considered that the substance of the application was to seek that the court rescinds its judgement in terms of r 449(1)(C) now r 29(1)(C). In such application, the court takes a relook at its judgment and analyses to see whether the criticisms made against it establish a *prima facie* for a rescission under the relevant rules. Upon an analysis of case authorities on the approach of the court to such applications, I had to decide whether the requisites were alleged and established in the application. It was clear that the applicants were active players at the hearing of the case which culminated in the judgement whose rescission is sought. It was clear that no ambiguity, patent error or omission was alleged or was apparent. The issue of a mistake common to all parties was again highly contested. What was the mistake so I asked myself. On the papers there was no common mistake apparent therefrom because the calculation of days for setting down the special plea even if the

point had substance, became insignificant because the applicants did not establish that they were rule compliant.

The determination of said issues made it unnecessary in my view to singularly deal with the points *in limine* on *res judicta* and dirty hands.

I deal with the issue of costs. The general rule is that costs follow the event. It is also a trite principle of the law of costs that the award of costs and scale thereof are matters left to the judious discretion of the court informed by the circumstances and facts of the individual case. See *John Dhokotera* v *Zimra* HH 301/21. The respondents have sought costs on the legal practitioner and client scale. They supported the prayers on the basis that the applicants proceeded with the application which the respondents considered ill-fated and ill-advised. The respondents attached a copy of a letter dated 21 October 2021 which the respondent's legal practitioners wrote to the applicant's legal practitioners. In the letter the respondent's legal practitioners were urged to withdraw the application on the basis that the Supreme Court had in case number SC 32/21 upheld judgement HC 8111/21 at least to the extent that the applicants were declared non members of the first respondent and that resultantly they had no *locus standi*. As already indicated I did not find it necessary to deal with the interpretation of MUSHORE J nor the Supreme Court judgement. This was not what the applicants had prayed for. I did not consider that punitive costs were justified on that ground.

The other ground for seeking costs at the punitive level was that the applicants having been part of the proceedings in case number HC 8111/19 should not have adverted to r 29(1) procedure. I do agree that this application was ill advised. It was in my view filed to find a way of attacking the judgement when the correct procedure for appeal had been messed up by the applicant's legal practitioners. The applicants were court hopping between the Supreme Court and this court which is undesirable as there should be finality to litigation. Such conduct amounts to an abuse of the process of court.

In my view whilst the courts are slow to grant costs on the punitive scale of legal practitioner and client save in circumstances where the conduct of a party or his/her legal practitioners is deserving of censure, the facts of this case justify the award of such costs. Legal practitioner and client costs are awarded by the court to mark its disapproval of the conduct of a litigant. The costs are penal in nature and must be justified. *In casu*, the applicants clearly abused

the court process. Having faced procedural hurdles in progressing their appeal, they came to this court upon a contrived misrepresentation that there was a r 29(1) then 449(1) ground justifying interference on the basis of a mistake common to the parties committed by the court. The truth known to them was that the alleged mistake was hotly contested by the respondents and was hardly a common one.

Under the circumstances, in the judicious exercise of the court's discretion and after consideration of all facts and circumstances of this application including the parties submissions, I consider that the respondents are entitled to their costs on the scale claimed.

Consequently, the application fails and I issue an order as follows:

IT BE AND IS HEREBY ORDERED THAT:

1. The application is dismissed.
2. The applicants jointly and severally, the one paying the other to be absolved pay costs of the application on the legal practitioner and client scale.

Mudzinga & Kabasa Legal Practitioners, applicants' legal practitioners
Ushewokunze Law Chambers, first, second and third respondents' legal practitioners