HH 478-24
HCH 2249/24
Ref LC/H/858/22
Ref SC 73/24

RAGUEL MTOMBENI
versus
NATIONAL PHARMACEUTICAL COMPANY OF ZIMBABWE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
DEMBURE J
HARARE: 27 August 2024 & 21 October 2024

Opposed Application

S T Mutema, for the applicant
P Dube, for the respondent

DEMBURE J:

[1] On 27 August 2024 I dismissed the respondent's application for condonation and the removal of bar and expunged the respondent's opposing papers and treated the application as unopposed. I further granted the application for registration of the judgment of the labour officer, F. V. Marovanyika dated 8 September 2022 for execution purposes and ordered the respondent to pay the applicant the sum of US$935 511.57 payable in local currency at the prevailing rate and costs of this application on a legal practitioner and client scale. The order was granted following an amendment of the draft order at the hearing. On 17 October 2024, the Registrar alerted me of an appeal that was lodged against my decision and requested for the full written reasons thereof. These are they.

[2] This is a court application for registration of the judgment or ruling of the labour officer in terms of s 128(1) of the Labour Act [*Chapter* 28:01] ("the Act") for execution purposes. The application was filed on 27 May 2024 and arises from the transitional provisions brought by s 36 of the Labour Amendment Act No. 11 of 2023 deeming all labour officers' draft rulings not registered with the Labour Court judgments or rulings capable of registration before this court for execution purposes. The applicant sought an order in the following terms:

1. That the application for registration of the labour officer's judgment be granted;

2. That the respondent be ordered to pay the applicant US$935 511.57 as the capital sum awarded by the labour officer's judgment;
3. The respondent be ordered to pay the applicant's costs of suit before the labour officer on an attorney-client scale;
4. The respondent be ordered to pay interest at the prescribed rate from 14 July 2020 the date of unlawful termination to the date of full and final payment.
5. The respondent be ordered to pay the sum due at the inflation rate of 285% per annum from 14 June 2020 to the date of full and final payment;
6. The respondent be ordered to pay the costs of the application at 25% of the amount awarded in para 2 of the order in terms of the contingency fee agreement.

FACTUAL BACKGROUND

[3] It is common cause that the applicant was employed by the respondent as its Procurement Manager. His contract was terminated on notice on 14 July 2020. The applicant challenged the termination of his contract and the matter was referred for conciliation before a labour officer, F. V. Marovanyika. On 19 May 2021, the labour officer issued a certificate of no settlement which is part of the record. A draft ruling was subsequently issued on 8 September 2022 after the labour officer considered submissions from the parties.

[4] On 14 September 2022, the labour officer filed an application for confirmation of the draft ruling in terms of the then s 93(5a) of the Act in the Labour Court. The application was opposed by the respondent. On 13 January 2023, the Labour Court granted the application for confirmation of the draft ruling with amendments ordering the respondent to pay the applicant ZWL12 804 277.56. The applicant was aggrieved by this judgment and he filed an appeal against part of the judgment. By its decision on 20 March 2024, the Supreme Court allowed the appeal and set aside the Labour Court judgment. The matter was remitted to the same judge to determine all issues placed before the court.

[5] After this decision, the Labour Court heard the application for confirmation of the draft ruling on 14 May 2024. The court upheld a point in *limine* raised by the respondent and struck the application off the roll for being fatally defective. The defect related to the founding affidavit which was not properly commissioned. Given that there was no valid application for confirmation

before the Labour Court the applicant had to resort to the transitional provisions of s 128 of the Act in terms of which the draft ruling was now regarded as a final judgment or ruling of the labour officer capable of registration in any competent court for enforcement purposes. This resulted in the applicant approaching this court for registration of the labour officer's ruling.

[6] The application was opposed by the respondent. The applicant's heads of argument were filed on 8 July 2024. Proof of service filed of record shows that the said heads of argument were served on the respondent's legal practitioners on 9 July 2024. The respondent's legal practitioners did not file the respondent's heads of argument within the prescribed period which lapsed on 23 July 2024. The automatic bar became operative against the respondent in terms of r 59(22) of the High Court Rules, 2021. On 16 August 2024, the notice of set down was served through the IECMS platform for hearing on 27 August 2024.

APPLICATION FOR CONDONATION AND THE REMOVAL OF BAR

APPLICANT'S CASE

[7] Before the hearing of this application commenced, Mr *Dube* made an oral application for condonation for the late filing of the respondent's heads of argument and the removal of the bar. The application was opposed. For this preliminary application, I now refer to the respondent herein as the applicant while the applicant is the respondent. Counsel referred me to the case of *Maheya* v *Independent African Church* SC 58/07 as the authority which set out the requirements for condonation. He submitted that in respect of the first requirement, there is a reasonable explanation for the delay. He averred that the reason why the heads of argument were filed late was due to an infraction caused by him. There was a mix-up in his attending to the issue through the IECMS. He apologised for the mishap. Counsel further averred that the applicant's heads of argument were not served. It was alleged that they were served via email on 9 July 2024. He uses a different email address: princestardube@gmail.com. The email used svhhwacha@dmh.co.zw should have one 'h'. The administration email appears to be correctly captured.

[8] Counsel further submitted that the second requirement is that the applicant must satisfy the point that they enjoy good prospects of success on the merits of the matter. He argued that on the application for registration, the applicant enjoys good prospects of success on two grounds: Firstly, the applicant submitted that the application for registration must not be entertained because it was

pursuant to an improper conciliation. There was no proper conciliation as per the decision in *Isoquant Investments (Pvt) Ltd t/a ZIMOCO v Darikwa* CCZ 6/20. Secondly, the damages that were awarded by the labour officer were awarded in instances where the applicant did not have the opportunity to address the labour officer before the ruling was issued.

[9] On the balance of convenience, counsel submitted that the applicant must demonstrate that the balance of convenience leans towards the granting of the order. In granting the application the court will have to consider that it has a discretion. There is an ongoing labour dispute. Finally, Mr *Dube* submitted that this is an important case to the applicant as well as the respondent. The respondent wants the matter finalised so that the parties can know if there is liability that attaches to the dispute. He also stated that he profusely apologises to the court saying that he is an honest legal practitioner.

RESPONDENT'S CASE

[10] On the other hand, Mr *Mutema,* for the respondent in the application for condonation and removal of bar, submitted that the explanation given seemed to suggest that there was an improper service. The main application was also served using the same email addresses and a notice of opposition was filed timeously. He further stated that the matter was being handled by Mr *Hwacha* and that the email used was correct. Counsel for the applicant may have been allocated the matter late. There is a fraudulent misrepresentation of facts and that is punitive. There is no reasonable explanation. In terms of r 59(21), the ten days lapsed on 24 July 2024. The Registrar proceeded to notify the parties of the notice of set down. Respondent only filed heads of argument a day before the hearing. The rules provide that heads of argument must be filed at least five days before the hearing. The delay is inordinate and this is taking the court's rules for granted.

[11] Mr *Mutema* also submitted that there is a difference between an application procedure and a summons. In an application procedure, an affidavit must be filed. Evidence from the bar is not acceptable. He also said a chamber application is made in terms of r 60(1) and on notice. The evidence is not on record. There is no application for condonation before the court and the application must be dismissed.

[12] On the question of prospects of success, Mr *Mutema* submitted that the application is done in terms of s 128 of the Labour Act. Such an application does not allow the respondent to argue

appellate issues. The Act is clear that the draft ruling is now the labour officer's judgment. The determination of whether conciliation was done is not an issue before the court. The certificate of no settlement was issued after the conciliation was not concluded within 30 days in terms of s 93(5). This is also the decision in *Isoquant supra.* Once there are no prospects of success the application cannot be granted even if there is an apology. Counsel referred the court to *Blumo Trading (Pvt) Ltd t/a Colcom Commodities* v *Muduviri* HH 88/12. He also submitted that the balance of convenience does not favour the granting of the relief sought.

APPLICANT'S SUBMISSIONS IN REPLY

[13] In his reply, Mr *Dube* averred that he did not commit a fraudulent misrepresentation. He stated that he indicated that the reason for the default was as a result of an infraction on his part. He further said that he indicated that he was served with the heads of argument. He mis-diarised. The respondent indicated that it was unheard of to make an oral application but that is incorrect. Such an application is allowed in terms of r 39(5). See also *Buwu v Cecil Madondo & Ors* HH 106/23. He insisted that the applicant enjoys good prospects of success. The respondent did not touch on the issue of damages and it is accepted. Sections 128 and s 93(5a) of the Act are identical. The application for confirmation is not there for the mere asking. See *Air Zimbabwe v Mateko* SC 180/20. In an application for confirmation, the court may confirm the draft ruling with or without amendments. The application under s 128 cannot be granted for the mere asking. Evidence must be heard before that draft ruling can be registered. He finally submitted that he apologises for the infraction which was on his part and prayed for the application to be granted.

THE APPLICABLE LAW

[14] The law on condonation for non-compliance with the rules of court is settled. Where a party fails to comply with the court rules, he or she is required to seek condonation and explain adequately for his failure to comply with the court rules. Condonation is not there for the asking. This position was confirmed in *Unki Mines (Pvt) Ltd v DOHNE Construction (Pvt) Ltd* SC 18/23 at p. 5 & *Zimslate Quartize (Pvt) Ltd & Ors v Central African Building Society,* SC 34/17 at p. 7. The applicant has the *onus* to show that he has a good cause for the application for condonation for non-compliance with the rules to be granted. In *Maheya supra* at p 5 MALABA JA (as he then was) summed up the requirements for condonation when he said:

> "In considering applications for condonation of noncompliance with its Rules, the Court has a discretion which it has to exercise judicially in the sense that it has to consider all the facts and apply established principles bearing in mind that it has to do justice. Some of the relevant factors that may be considered and weighed one against the other are: the degree of non-compliance; the explanation therefor; the prospects of success on appeal; the importance of the case; the respondent's interests in the finality of the judgment; the convenience to the Court and the avoidance of unnecessary delays in the administration of justice. *Bishi v Secretary for Education* 1989 (2) ZLR 240 (H) at 242D-243C."

[15] The list of the requirements is not exhaustive though they boil down to the extent of the delay, the reasonableness of the explanation and the prospects of success. These must be considered cumulatively and not individually. This position was confirmed in *Gessen v Chigariro* SC 80/20 at p. 7 where it was held that:

> "It is also settled that these factors have to be considered in conjunction with one another as they tend to be complimentary. While it is true that consideration of the factors generally boils down to having regard to the explanation given by the applicant for condonation for delay and the prospects of success on appeal, the lack of a satisfactory explanation for the delay may be complemented by good prospects of success on appeal."

[16] Condonation is a matter for the exercise of the court's discretion. The discretion ought to be exercised judiciously. For the indulgence of the removal of the bar generally, similar factors or requirements are considered. In *Chapfika v Central African Building Society* HH 2/18 at p. 3 TAGU J outlined these requirements for the upliftment of bar as having been spelt out in the case of *Smith N O* v *Brummer N O & Anor* 1954 (3) SA 352 (O) at p 358 as follows:

> "(a) A reasonable explanation for the Applicant's delay is forthcoming;
> (b) The Application must be bona fide and not made with intent to delay the other party's claim;
> (c) The Applicant must not be guilty of a reckless or intentional disregard of the rules of court;
> (d) The Applicant's case should not be obviously without foundation; and
> (e) The other party should not be prejudiced to an extent which cannot be rectified by a suitable Order as to costs."

[17] Since the requirements for condonation and upliftment of bar are generally similar once the applicant satisfies them the court should condone the non-compliance with the rules and

remove the bar. Thus, in the determination of the composite application, at least the following factors are very important considerations:

1. The extent of the delay
2. The reasonableness of the explanation for the delay
3. The prospects of success on the merits

ISSUES FOR DETERMINATION

[18]
1. Whether or not there was a valid application.
2. The extent of the delay.
3. Whether or not there is a reasonable explanation for the non-compliance with the rules of court.
4. Whether or not there are any prospects of success on the merits of the application.

VALIDITY OF THE APPLICATION

[19] Before I considered the merits of the application, I noted that although Mr *Mutema* in his submissions did not specifically raise the issue as a point in *limine* he indeed raised a preliminary point challenging the validity of the application. He argued that the application can only be made in writing and on notice with an affidavit for the applicant to give evidence. He further submitted that since there was no such application there was no application before me. I do not agree. These submissions are erroneous given the clear provisions of r 39(5). The said r 39(5) reads:

> "(5) A party who has been barred may—
> (a) make a chamber application to remove the bar; or
> (b) make an oral application at the hearing, if any, of the action or suit concerned; and the judge or court may allow the application on such terms as to costs and otherwise as the judge or court, as the case may be, considers fit."

The rules clearly give the applicant the option of making an oral application for removal of the bar at the hearing of the matter. The provisions of r 39(4) even allow a party barred to appear in person or through a legal practitioner for the purpose of applying for the removal of the bar. This settles the issue. The objection has no merit and it was accordingly dismissed.

EXTENT OF DELAY

[20] The applicant did not canvass this requirement in its application. It is, however, clear that the period for the applicant to file the respondent's heads of argument in terms of r 59(21) lapsed on 23 July 2024. The heads of argument were not filed and the applicant was barred in terms of r 59(22). The application for condonation and removal of bar was only made at the hearing on 27 August 2024. The delay in seeking condonation and removal of bar was for about 22 days. Whether a delay can be considered inordinate depends on the circumstances of each case. Given the circumstances, the delay of 22 days cannot be said to be inordinate. However, I cannot end there but have to consider the other factors.

REASONABLENESS OF THE EXPLANATION

[21] The settled position of our law is that the applicant is required to provide a reasonable or satisfactory explanation for the delay in seeking condonation and removal of bar. In *Zimslate Quartize (Pvt) Ltd & Ors v Central African Building Society*, SC 34/17 at p. 7 ZIYAMBI JA remarked that;

> "An applicant, who has infringed the rules of the court before which he appears, must apply for condonation and in that application explain the reasons for the infraction. He must take the court into his confidence and give an honest account of his default in order to enable the court to arrive at a decision as to whether to grant the indulgence sought. An applicant who takes the attitude that indulgences, including that of condonation, are there for the asking does himself a disservice as he takes the risk of having his application dismissed."

[22] While r 39(5) allows a party to apply orally for the removal of the bar at the hearing I am of the view that to properly place evidence before the court the option for a written application may be the most prudent approach to take. This may also be desirable in view of the trite principle that an affidavit by a lawyer taking responsibility is required where the lawyer is blamed for the failure to abide by the rules. See *Lunat v Patel & Anor* SC 142/21 at p.6. It was quite evident that Mr *Dube* took this application lightly as if condonation was there for the mere asking. The explanation he gave ended up being incoherent, inconsistent and dishonest.

[23] At first, Mr *Dube* said that the delay was a result of his infraction as he sought to blame the IECMS. He then turned and attempted to allege that there was no proper service of the applicant's heads of argument. On this point, he challenged the email addresses used. I find this to be

inconsistent with his application in the first place. If the heads of argument were not properly served then the bar cannot arise. There would have been no need to apply for condonation and removal of bar. The bar is only triggered by r 59(22) if the respondent fails to file heads of argument within ten days after the applicant's heads of argument were delivered to the respondent. In terms of r 2 the term "deliver" means the same thing as "serve" and that is defined to mean "to either physically or electronically file a pleading or record with the Registrar and immediately thereafter, serve a copy on the other party by physical means or electronically." If indeed there was no proper service as he seemed to insinuate, he could not have blamed himself for failing to file the heads of argument and apologised as he did. He cannot, therefore, approbate and reprobate at the same time.

[24] It is also clear from the record that the same electronic method of service was used when the court application was served and the applicant managed to oppose the application within the prescribed period. See pp 451 – 153 of the record. Mr *Dube* even conceded that the administration email address used was correctly captured. Since the administration email address used was confirmed to be correct and was also used to serve the application itself there was proper service in terms of the court rules. The applicant's counsel cannot now say his own personal email address should have been used. The IECMS shows that this case was registered with the law firm's administration email address; admin878777@dmh.co.zw as the primary email address while svhwacha@dmh.co.zw was the secondary email address.

[25] As if the above was not enough, Mr *Dube* in his reply started to say that he mis-diarised. It was illogical for counsel to allege improper service or that the heads of argument were not served and at the same time claimed he mis-diarised. One wonders what then he was diarising if he was not served with the heads of argument. He also went on to accept the failure to comply as a result of what he said was his own 'infraction' and he even apologised for the infraction. An applicant in an application of this nature must give an honest and accurate account or explanation. He must be candid with the court. See *Zimslate Quartize*. In *Taruwona v Cobra Security (Pvt) Ltd & Ors* SC 24/17 at p. 5 where GOWORA JA (as she then was) succinctly put this position thus:

> "That is to say that such applicant must provide a full detailed and accurate account of the reasons for the delay and the failure to do that which the rules require to be done."

[26] I agree with Mr *Mutema* that counsel for the applicant sought to mislead the court and was not candid with the court. Such conduct cannot be expected from an officer of the court or a litigant who seeks relief in court. I found the explanation to be unacceptable and unreasonable. I am not convinced that there was a genuine mistake in view of the fact that the applicant could only say he mis-diarised in his reply and not when he addressed the court before the respondent's submissions. In my view, he attempted to perfect his reasons as the hearing progressed which could not assist him. It is clear that the respondent's legal practitioners were properly served with the applicant's heads of argument but consciously chose to sit on their laurels waiting for the date of hearing to make this application as if the indulgence is simply given as a matter of course. Counsel's apology cannot absolve him or the applicant.

[27] Further, it is trite that the mistake of a legal practitioner cannot be a reasonable explanation and cannot be used as an excuse. See *RioZim Ltd v Dixon-Warren N.O* SC 21/23 at p 9. I, however, accept that there are instances where a genuine mistake can be an accepted explanation especially one that does not border on gross negligence. See the remarks in *Zimbabwe Banking Corporation* v *Masendeke* 1995 (2) ZLR 417 (S) at 420E. However, in this case, I have found the applicant's counsel not to have been honest or candid with this court. As I alluded to above, Mr *Dube*, on the one hand, appeared to challenge the service of the heads of argument and blame the IECMS and the email addresses used and then turn in his reply to start to claim that he mis-diarised. This conduct does not show that he was candid with the court for me to accept his mistake as something which was genuine and which indeed happened.

[28] The applicant is bound by the sins of its legal practitioners of choice. This is trite law. See *Chibanda & Ors v City of Harare* SC 83/21. The Supreme Court has also been emphatic on this position in several cases including in *Machaya v Muyambi* SC 4/05 ZIYAMBI JA had to say:

> "The time has come for sterner measures to be taken of applications of this nature where negligence, tardiness and disdain for the rules of court is exhibited by legal practitioners. The often quoted passage from the judgment of STEYN CJ in *Saloojee & Anor, NNO v Minister of Community Development* 1965(2) SA 135(A) at 141C-E bears repeating here, namely that:
> "There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad*

> *misericordiam* should not be allowed to become an invitation to laxity. In fact, this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to act was due to neglect on the part of the attorney. The attorney after all is the representative whom the litigant has chosen for himself and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are."

See also *Kodzwa v Secretary for Health & Anor* 199 (1) ZLR 313 (S) at 317E.

[29] The applicant cannot be absolved from the normal consequences of its legal practitioners' lack of diligence. The explanation for the delay despite being dishonest and incoherent was unreasonable and unacceptable. Litigants and their legal representatives must show seriousness when presenting their cases and should not seek "to play football with the court" as remarked by MATHONSI J (as he then was) in *Mangena v Edgars Stores Ltd & Anor* HB 8/16.

PROSPECTS OF SUCCESS

[30] What is meant by prospects of success was clearly explained in *Mlambo v Arosume Development (Pvt) Ltd & Ors* SC 35/23 at p. 10 where MUSAKWA JA stated:

> "Prospects of success refer to the question of whether the applicants have an arguable case on appeal or whether the case cannot be categorised as hopeless.
> In the case of *Essop v S*, [2016] ZASCA 114, the Court in defining prospects of success held that; "What the test for reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[31] The applicant had to show that it had prospects of success on its grounds of opposition to the application for registration in terms of s 128 of the Act. The said provisions read:

> "**128 Transitional provisions**
> (1) Where a labour officer made a draft ruling in terms of section 93(5)(c) and for what reason, the draft ruling was not registered with the Labour Court in terms of section 93(5a) and (5b) of the replaced provisions, such draft ruling shall automatically be deemed to be a judgement or ruling of the Labour Officer which for execution purposes shall be registered in the appropriate court: Provided an employer shall

have a right of appeal of the Labour Court within 30 days after notice of registration.

(2) The quantum shall be calculated based on the currency in which the judgement was made and payable in Zimbabwean currency at the prevailing official rate."

[32] The law on registration of these labour decisions including labour arbitral awards and Labour Court judgments is now a matter of settled law. See *CFI Holdings t/a Farm & City v Machaya* SC 37/23 where the issue was buttressed;

> "The requirements to be satisfied in an application for the registration of an award were listed in *Biltrans (Pvt) Ltd* v *Minister of Public Service, Labour and Social Welfare & Ors* 2016 (2) ZLR 306. Malaba DCJ (as he then was), citing with approval the remarks by Chiweshe JP (as he then was) in *Olympio & Ors v Shomet Industrial Development* HH-191-12, remarked at 311 B–G as follows,
>
> "In registering an arbitral award, the High Court and the Magistrates Court are not carrying out a mere clerical function. **While the registering Court may not go into the merits of the award, since its duty is to provide an enforcement mechanism and not to usurp the powers of the Labour Court, it must be satisfied before registering an award that all the necessary formalities have been complied with**. In *Olympio & Ors v Shomet Industrial Development* HH-191-12, CHIWESHE JP at 1 and 2 of the cyclostyled judgment, outlining the requirements for registering an arbitral award, stated:
>
> 'The purpose of registration is merely to facilitate the enforcement of such an order through the mechanism availed to the High Court or the magistrate court, namely the office of the Deputy Sheriff or the messenger of court, respectively… In an application such as the present one, this Court is not required to look at the merits of the award - all that is required of this Court is that it must satisfy itself that the award was granted by a competent arbitrator, that the award sounds in money, that the award is still extant and has not been set aside on review or appeal and that the litigants are the parties, the subject of the arbitral award. There must also be furnished, a certificate given under the hand of arbitrator…'
>
> **The requirements that must be satisfied before the High Court or the Magistrates Court grants an application for registration of an award are:**
>
> **a) The award must have been granted by a competent arbitrator.**
> **b) The award must sound in money.**
> **c) The award is still extant and has not been set aside on review or appeal.**
> **d) The litigants are the parties to the award.**
> **e) The award must be certified as an award of the arbitrator**." (emphasis added).
>
> As correctly noted by the court *a quo*, whilst both cases related to the registration of arbitral awards, they apply with equal force to the registration of Labour Court judgments."

[33] The above law applies with equal force to the registration of a labour officer's ruling or judgment in terms of s 128 of the Act. The same process is also done for execution purposes only.

The provisions of the Act in respect of the requirement for registration of an arbitral award, Labour Court judgment and a judgment of the labour officer are similarly worded that the registration in the appropriate court is merely for execution or enforcement purposes.

[34] The applicant's grounds of opposition and even the submissions made on prospects of success are to simply challenge the ruling on the merits the case determined by the labour officer. Mr *Dube* submitted that there was no conciliation and also that the applicant was not given an opportunity to address the labour officer on the quantum for damages or give evidence thereto. In the opposing affidavit, the respondent largely devoted its time on seeking to challenge the labour officer's ruling on the merits of the case. Counsel for the applicant also further challenged this ruling on substantive issues reserved for the Labour Court. I agree with Mr *Mutema* that those are not the issues this court considers in an application for registration of the ruling for execution purposes.

[35] It is also not correct that this court exercises confirmation powers as those used to be performed by the Labour Court when these rulings were simply considered to be draft rulings. By virtue of s 128(1) of the Act, they are no longer draft rulings but were confirmed as final judgments or rulings by operation of the law. This law accordingly provides for their registration before the appropriate court only for enforcement purposes. When determining an application under s 128(1) of the Act, the High Court does not sit as a confirmation court nor neither is it called upon to reconsider the merits of the case the decision settled. This is why the *proviso* to s 128(1) of the Act exists. The said provision reads:

> "Provided an employer shall have a right of appeal to the Labour Court within 30 days after notice of registration."

The appropriate forum for the applicant to challenge the merits of that case from the judgment is not this court. The issue is one within the exclusive jurisdiction of the Labour Court.

[36] In his address counsel for the applicant did not raise any valid grounds of opposition to the registration of the ruling. The applicant did not even canvass the considerations for registration of a judgment of this nature as set out in *CFI Holdings supra*. Mr *Dube*'s submissions and even the opposing papers did not state that: the ruling was not made by a competent labour officer, that this ruling was suspended or set aside on review or appeal or is not extant, that it is not sound in money, that the litigants are not the parties to it and that it is not authentic.

[37] Counsel informed this court that an appeal was noted against the ruling in the Labour Court but looking at s 128(1) of the Act the appeal must actually be made after the judgment or ruling is registered. In any event, in terms of s 92E (3) of the Act, the appeal does not have the effect of suspending the decision of the labour officer appealed against. All the applicant raised, therefore, has nothing to do with the requirements for an application for registration but rather the merits of the case. To that extent, counsel even erroneously suggested that this court can correct or set aside the ruling by exercising confirmation powers. This court has no such powers as its powers are limited in an application of this nature. Thus, in *Machaya supra* at p 9, the CHATUKUTA JA emphasised the correct approach by saying:

> "The limitation of the court *a quo*'s powers was addressed in the remarks cited above from *Vasco Olympio, supra*, and *Biltrans (Pvt) Ltd* v *Minister of Public Service, Labour and Social Welfare & Ors, supra*, where it was clearly pronounced that the court *a quo* would not have the power to delve into the merits of the case in an application for the registration of an award and in this case a Labour Court judgment. All that the court *a quo* was required to do was to determine whether the requirements for registration of the judgment had been met."

[38] Given the above, I did not find any reasonable or arguable points or grounds of opposition to the registration of the ruling from the submissions by Counsel and the opposing papers. The applicant clearly has no prospects of success. In *Gessen supra*, the Supreme Court emphasized that at least where the applicant has no satisfactory explanation for the delay, he must show that very strong prospects of success exist for the indulgence of condonation to be granted. This is not the case here.

THE CONVENIENCE TO THE COURT AND IMPORTANCE OF CASE

[39] While the above considerations namely the extent of the delay, the reasonableness of the explanation for the delay and the prospects of success are universally accepted as the most important ones, the list is not exhaustive. It was the counsel for the applicant's submission that the balance of convenience requires that the application be granted. He also submitted that the case is important. I do not see how these two factors can assist the applicant's precarious position in this case. The convenience of the court is for its system not to be clogged unnecessarily and for there to be finality to litigation. As alluded to above, the applicant's only focus was to seek to have the ruling discredited and set aside yet there is a statutory remedy provided under the *proviso* to s

128(1) upon registration of the judgment. That process should be allowed to take place so as to avoid wasting this court's time. The need for finality in litigation is an essential part of our justice system. See *Ndebele v Ncube* 1992 (1) ZLR 288 (S) at 290.

[40] The applicant should simply direct its energy through the correct forum which is not this court. The closure to the long outstanding dispute in respect of the merits of the case is only available in the Labour Court and on appeal thereafter in the Supreme Court. The convenience of the court outweighs the importance of the case as is merely for enforcement purposes. This court is not called upon to decide the substantive issues on the merits of the case. Its correctness can only be challenged in the Labour Court.

[41] I also assessed that the applicant's grounds of opposition are completely hopeless and that there was no reasonable and acceptable explanation for the delay. Although the extent of the delay was not inordinate that sole factor which I decided in favour of the applicant cannot cumulatively outweigh all the other factors. In all the circumstances of this case, the indulgence sought cannot be granted. The only proper decision would be to dismiss the application for condonation and removal of bar in its entirety as it is devoid of any merit.

[42] The above reasons informed my decision to issue the order I issued to also expunge the respondent's opposing papers and treat the matter as unopposed given the provisions of r 59(22). I choose the option to proceed to hear the application for registration as an unopposed matter instead of referring the matter to the unopposed roll to avoid unnecessary delays in the finalization of these proceedings. There was no reason for me to direct that the matter be set down for hearing on the unopposed roll.

DRAFT ORDER

[43] I was satisfied that this application met all the requirements for registration of a judgment or ruling by the labour officer in terms of the law. Mr *Mutema* sought an amendment of the draft order by the deletion of paragraphs 3 to 5. I had also objected to the relief sought in those paragraphs as they were designed to amend the labour officer's ruling. The said ruling contained no reference to interest for the sum awarded, the costs of the proceedings before the labour officer and the inflation percentage claimed. The court can only register the judgment as it was granted and cannot seek to incorporate into it its own orders.

[44] On the issue of the costs of this application, Mr *Mutema* rightly conceded that an order for payment to the applicant of 25% of the amount awarded as costs of this application on a legal practitioner and client scale based on the terms of the contingency fee agreement was legally incompetent. It is trite that a court can only grant costs either on an ordinary scale of party and party or on a legal practitioner and client scale. In terms of r 72(7) costs on a legal practitioner and client scale are assessed or taxed using any tariff by the Law Society of Zimbabwe or recommended by the Council of the Society under the Legal Practitioners Act [*Chapter* 27:07] and not any contingency fee agreement as proposed.

[45] I find that costs on a higher scale were warranted as the opposing papers which I expunged from the record, in my view, did not show that the respondent was serious in opposing this application in the first place. The respondent simply attacked the merits of the case before the labour officer and did not consider the requirements for an application for registration thereby making the applicant incur further unnecessary litigation expenses. This abuse of the court process was conduct that warranted an order for punitive costs against the respondent. As remarked by MATHONSI J (as he then was) in *Mangena supra* at p 5:

> "There must be consequences for a litigant who thinks he can abuse the process of the court to avoid the inevitable. Not only was this [defence] a sheer waste of time, [respondent] has been shown to be a litigant that wants to play football with the court."

DISPOSITION

[46] I accordingly granted the application with costs on a legal practitioner and client scale in terms of the draft as amended.

DEMBURE J: …….

Stansilous & Associates Law Firm, applicant's legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners.