MAKHOSINI HLONGWANE
versus
IQBAL EALIAS KARBANEE

HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO: 17 APRIL, 2018 & 9 MAY 2019

Court Application

L. Nkomo, for the applicant
N. Mazibuko, for the respondent

BERE J: On 18 December 2015, the applicant filed an application for rescission of judgment in this Court. The application was opposed by the respondent.

On the date of the hearing and before the application could be heard on merits, the respondent raised preliminary points and urged the court to make a specific finding that the applicant's case was not properly before the court, and therefore sought its dismissal on that point.

The point *in limine* raised by the respondent's counsel concerned the interpretation of order 9 Rule 63(1) of the High Court Rules, 1971 which is framed as follows:

> "63 court may set aside judgment given in default
> 1. A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside."

The respondent's position

Mr *Mazibuko* who appeared for the respondent took the view that a simple reading of the Rule in issue was to the effect that an application for rescission of judgment ought to be filed and finalized within a period of one calendar month from the time the applicant becomes aware of the judgment against him.

Counsel further expressed the view that an applicant who fails to seek rescission within one month must first apply for condonation for failure to act within the period prescribed by the rule. He further argued that the absence of an application for condonation meant that the application was not properly before the court. Counsel further brought it to the attention of the court that the applicant had earlier on successfully raised this technical argument under Case HC 799/08 and could not be seen to be vacillating from that well settled legal position in the instant case.

In support of his argument counsel relied on the case of *Mushosho v Mudimu and Anor*[1], per CHIGUMBA J.

The applicant's position

Mr *Nkomo* who appeared for the applicant opposed the application arguing there was no merit in the stance taken by the respondent as according to him the issue had been resolved by the judgment of MATHONSI J in the case of *Moyo and Ors v Sibanda & Anor*[2]. By implicating counsel seemed to imply that the MATHONSI judgment had changed the Supreme Court position.

[1] 2013 (2) ZLR642 (H)
[2] 2011 (2) ZLR186 (H)

The correct legal position

The issues raised by both counsel have already been dealt with by the Supreme Court in this country.

In dealing with the interpretation of the Rule in issue, SANDURA JA (as he then was), in the case of *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd*[3] concluded that a defendant against whom a default judgment has been granted has a period of one month from the date he becomes aware of the judgment to apply for rescission of that judgment. If such time lines are not met, then it is incumbent upon the applicant to first make an application for condonation of the late filing of his application for rescission.

The learned judge went further to state in very clear terms that "If he does not seek condonation as soon as possible, he should give an acceptable explanation, not only for the delay in making the application for rescission of the default judgment, but also for the delay in seeking condonation. There are, therefore two hurdles to overcome."[4]

In concluding this case SANDURA JA gave a stern warning to those litigants who flagrantly breach rules of the court. He put it this way:

> "However, even if the appellant had a *bona fide* defence, that fact would not have necessarily assisted it. In this regard, the words of NESTADT JA in *Tshivhane Royal Council & Anor v Tshivane and Anor, 1992 (4) SA 852 (A),* are pertinent. At p 859E-F, the learned Judge of Appeal said: this Court has often said that in cases of flagrant breaches to the Rules, especially where there is no acceptable explanation therefore, the indulgence of condonation may be refused whatever the merits of the appeal are: this applies even where the blame lies solely with the attorney (see eg *P E Bosman Transport Works Committee & Ors v Piet Bosman Transport (Pvt) Ltd 1980(4) SA 794(A) at 799D-H".*

[3] 1998 (2) ZLR249(S)

[4] At page 251

This extremely elaborate and enlightening position taken by SANDURA JA was reaffirmed by the Supreme Court in the case of *Sibanda v Ntini*[5] where MALABA JA put the icing on the cake by stating:

> "It must follow from the provisions of r 63(1) that an application for rescission of a default judgment would not be properly before the court if it is made after the expiry of one month from the date the applicant had knowledge of the judgment, which date he must disclose in the application failing which it will be presumed, in terms of r 63(3), to be the second day after the date of judgment. …There was no application for condonation of the failure to comply with the provisions of r 63(1). The application which the court a quo heard …was not properly before it as it was not an application made in terms of r 63(1)…"[6]

CHIGUMBA J, in the *Mushosho* case (*supra*) relied on by Mr *Mazibuko* anchored her reasoning on the ratio laid down in the Supreme Court as highlighted above. That is the correct position of our law.

In dealing with the interpretation of r 63(1) in the case of *Moyo & Ors v Sibanda & Ors (supra),* MATHONSI J was fully conscious of the position of the Supreme Court in both the *Viking Woodwork (Pvt) Ltd case and Sibanda v Ntini (supra).* The learned Judge restated the view that in terms of r 63(1) if an applicant files an application for rescission of judgment within one month of his knowledge of the judgment, there is no need to file an application for condonation. He then proceeded to deal with the factors which a court seized with an application for rescission of judgment must consider.

[5] 2000(1) ZLR264(S)
[6] 2000(1) ZLR 264 at p 2669

I do not see in MATHONSI J's judgment any attempt to foul the position of the law as laid down by SANDURA JA and restated by MALABA JA. If anything MATHONSI J's position was consistent with the correct position of the law.

From the papers filed by both counsel, it is clear that it was imperative for the applicant to prefix the application for rescission with an application for condonation explaining the courses of failure to fully comply with the mandatory provisions of r 63(1) as outlined.

Because the applicant was fully conscious of the need to comply with the Rule. given his earlier position in HC 799/08, it is not difficult to conclude that he deliberately chose not to comply with the Rule and such attitude cannot avoid an order of costs.

Accordingly, it is ordered as follows:

1. That the application be and is hereby struck off the roll for failure to comply with r 63(1) High Court Rules, 1971.
2. That the applicant pays costs of suit.

Sengweni Legal Practice, applicant's legal practitioners
Calderwood, Bryce-Hendrie & Partners, respondent's legal practitioners