

MUNYARADZI HOVE
v
**(1) ZIMPHOS LIMITED (2) REGISTRAR OF THE SUPREME
COURT (3) SHERIFF FOR ZIMBABWE**

**SUPREME COURT OF ZIMBABWE
HARARE, JANUARY 24, 2018**

G. Pendei, for the applicant

E. T. Moyo, for the respondent

IN CHAMBERS

Before **ZIYAMBI AJA**, in chambers in terms of r 5 of the Rules of the Supreme Court, 1964.

[1] This application is brought in terms of ‘Rule 63 as read with Rule 449 (1)(a) of the High Court Rules’ 1971 for condonation of the late noting of an application for rescission of a default judgment given in chambers by **MAVANGIRA JA** in chambers on the 13 July 2017.

[2] The applicant states that he learnt of the judgment on 28 July, 2017. He approached the second respondent who advised him to seek legal assistance. His legal practitioners attempted to file an application for rescission but this was rejected by the second respondent who believed the Rules did not provide for such an application. After a series of comings and

goings and much discussion with the registry staff the applicant's legal practitioners eventually filed this Application on 6 November 2017.

[3] The applicant attached to his papers a return of service by the Deputy Sheriff dated 21 June 2017 indicating that there was merely an attempted service at the applicant's address for service which is the address of the applicant's Trade Union. He averred that since the notice was not served on him the default judgment ought to be set aside and he be allowed to file an application for rescission of the default judgment a copy of which application was attached to his founding papers.

[4] The applicant further averred that as far back as 19 April 2017, when collecting a letter from the second respondent relating to the payment of security for costs, he had advised the second respondent of his change of address. He attached in support a letter from the second respondent of 19 April 2017 showing that he had indeed uplifted the letter on that date. The letter bore the applicant's name and new address. Despite this, he averred, the second respondent had continued to use the old address. His default was, therefore, not wilful and the reason therefor had been satisfactorily explained.

[5] He averred further that the application for leave to appeal was not 'doomed to failure' since the Labour Court's error on the composition of the Grievance and Disciplinary Committee of the first respondent has 'since been pronounced by this Court in another similar matter'.

[6] The supporting affidavit by *Governor Pendei*, the legal practitioner, confirmed the application was drawn on the 30 August 2017 but encountered administrative hurdles at the

office of the second respondent which hindered the timely filing thereof. He averred, without more, that the application enjoyed ‘high prospects of success as explained in the founding affidavit’.

[7] Mr *Moyo* who appeared for the first respondent submitted that the application for rescission bore no prospects of success as there were no prospects that the application for leave to appeal might be successful.

[8] The genesis of the matter as appears from the judgment of the Labour Court refusing leave to appeal, is that “the applicant was dismissed from employment by respondent after due process. The applicant appealed to the Labour Court which dismissed its appeal”. That was in January 2014. In June 2014, some 5 months after the date for filing an appeal had expired in terms of the Labour Court Rules, the applicant filed an application for condonation of the late noting of an application for leave to appeal. That application was dismissed by the Labour Court mainly on grounds that there were no prospects of success on appeal.

[9] On May 14 2015, the applicant sought leave of the Labour Court to appeal against its order dismissing the application for condonation. The Labour Court considered the 3 grounds of appeal raised, namely, whether the disciplinary committee was properly constituted, whether there was evidence on a balance of probabilities against the applicant and whether it was competent for the Disciplinary Committee *mero motu* to call witnesses. After considering the grounds of appeal and finding them to be devoid of merit, the Labour Court expressed the view that in any event the applicant had not shown that the court which dismissed the application for condonation had exercised its discretion improperly. It therefore dismissed the application for leave to appeal.

[10] In his submissions Mr *Pendei* justified his application in terms of the High Court Rules by stating that the application was properly brought in terms of the said Rules as the Supreme Court Rules are silent on this subject without citing the relevant Rule of the Supreme Court. In my view legal practitioners ought to cite the relevant Rule in terms of which an application is placed before the courts. Merely to assume that the court is aware of its Rules is insufficient. The Rules are to be cited for the purpose of drawing the attention of the Registrar as well as the opposing party to the legality of the course taken by the applicant. Had the applicant cited the correct rule of this Court empowering him to adopt the course which he did, most of the time wasted in argument and discussions with the second respondent would have been avoided.

[11] In order to succeed in the instant application the applicant had to establish, among other considerations, that the application for rescission of judgment to be placed before this Court enjoys prospects of success. As explained to Mr *Pendei* the applicant made no averments in his founding affidavit that would satisfy me that on that score. Neither the two judgments of the Labour Court dismissing his appeal and his application for condonation nor the record of proceedings was attached to his papers. In addition, nothing has been averred which shows an improper exercise of the discretion of the Labour Court which dismissed the application for condonation. The fact that the court's decision was not to the applicant's liking is insufficient to invoke the limited powers which the Supreme Court has to interfere with a judicial exercise of discretion by a primary court. The bland averment, without more, that the Supreme Court has pronounced otherwise is most unhelpful.

[12] In my view it has not been shown that there are prospects of success on appeal both on the grounds of appeal raised as well as the fact that no impropriety has been shown in the

manner in which the Labour Court's discretion to dismiss the application for condonation was exercised.

[13] While this is not an appeal against the decision of the Labour Court, its reasons for denying the application for leave to appeal cannot be ignored.

[14] For the above reasons the application for rescission of judgment has no prospects of success and the instant application for condonation is accordingly dismissed with costs.

Machaya & Manyangadze, applicant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners.