JEFFERSON BANDA
and
CHRISTINE MUPATSI
and
GILBERT KARIKUIMBA
and
MICHAEL RUPANGA
and
JOSEPH TAKAVINGOFA
and
BRIDGETTE DULANI
and
MICHAEL GEZI
and
JACKY HETYA
and
LANGTON NYEVE
and
CONRAD MUZVURA
versus
WALTER TAKANHIKE
and
MOSES GWAUNZA
and
KWADZANAYI CHIKAZHE
and
UPENYU CHITUMBA
and
ADAM NHAMO
and
STEMBILE CHIKUMBA
and
CEPHAS RANGANAI
and
ALICE MHANGA
and
AMON MUTENGU
and
FABION CHIDZUDZU
and
JOU CHITEURE
and
JOSEPH RUZANI
and
JEMIAS CHINDIYA

and
REJOICE DHAVE
and
DANIEL PHIRI
and
ELLIOT HUVADZE
and
EFFORT MUNYANYI
and
FORTUNATE TAKAIDZA
and
MUCHENA CAROLINE
and
EFIAS CHIHLENGWE
and
CAROLINE MURIDZERI
and
JIMMY CHATIMA
and
NYASHA NCUBE
and
CUMPAS MATAMBURA
and
TRYMORE CHIDENDE
and
MARTIN GWATIDZO
and
PERPETUAL MASHIRI
and
SIKHUMBUDZO GUMBI
and
CECILIA CHIPEMBA
and
EDSON TIDIGU
and
SIKHUMBUDZO NDUNA
and
HERBERT MPOFU
and
ELIOT BVUNDUKAI
and
NYASHA KACHIKAWO
and
CAIN NCUBE
and

KELVIN CHIDZIKWE
and
JOEL MURANDA
and
CHRISTOPHER HAPAMIRE
and
LESLY MUNYANYI
and
RAYMOND MUTUNHIRA
and
LANCELOT SHUMBA
and
JACOB HOMWE
and
MAVIS KATURUZA
and
JONAH MUSHONGA
and
NKULULEKO TSHUMA
and
THOKOZANI NCUBE
and
RICHARD CHIWIRE
and
COMMERCIAL WORKERS UNION OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 28 July & 7 December 2022

Opposed Matter

G Maseko, for the applicants
V Mukumba, for the respondents'

MANGOTA J: At the center of the parties' dispute is control of Commercial Workers Union of Zimbabwe ("the union"). This is a registered trade union which represents the interests of workers in the commercial and allied sectors in Zimbabwe.

On 27 October, 2020 the first the forty seventh respondents ('the respondent") sued the first to the tenth applicants ("the applicant"). It did so under case number HC6329/20. It moved the court to make certain declaraturs against the applicant, in particular, the meeting which the latter held at Adelaide Acres in Harare on 15 September, 2020 as well as resolutions which it passed thereat. It moved that these be declared to be invalid, null and void. It also moved to have the applicants prohibited from holding themselves out as the lawful executive committee members, officers or office-bearers of the union and /or from using the name, movable or immovable assets of the union, among other relief. It served HC 6329/20 on the applicant on 16 November, 2020.

The applicant filed a defective notice of appearance to defend on 27 November, 2020. Following the email which the respondent addressed to it on 30 November, 2020 pointing at defects which were inherent in the notice of appearance to defend, the applicant filed the corrected notice of appearance to defend on 1 December, 2020. It filed it one day out of the time which is stipulated in the rules of court. Because the applicant did not move to remove the bar which operated against it from 2 December, 2020 to date the respondent obtained default judgment against it on 20 October, 2021.

The applicant became aware of the default judgment which was entered against it on 8 November, 2020. It applied for its rescission on 10 November, 2021 and, therefore, within the *dies*. It filed its rescission application in terms of Rule 29(1) (a) of the new rules of court. It filed it under HC 6307/21.

The applicant appears to have abandoned HC 6307/21. It filed the present application which is partly for rescission of HC 6329/20 on 7 February, 2022. It states, in para 7 of its founding affidavit to the current application, that it instructed its legal practitioners to withdraw HC 6307/21 which it alleged was pending at court. It filed the present composite application in terms of Rule 27 of the High Court Rules, 2021. The application is composite in the sense that the applicant is applying for:

a) condonation for failure to file an appearance to defend within the *dies induciae* – and
b) rescission of the default judgment which the court entered against it in the main matter.

It couched its draft order in the following terms:

"IT IS HEREBY ORDERED THAT:-

1. The application for condonation for the late filing of an application for rescission of judgment in Case No. HC 6307/21 be and is hereby allowed.
2. The application for rescission of judgment be and is hereby granted.
3. The 1st to 10th (*sic*) be and are hereby ordered to file their Appearance to Defend within five days of this order."

The composite application cannot succeed. It cannot succeed because its papers fall short of proof of the requirements for condonation. For it to succeed, it must prove, on a preponderance of probabilities, that its case is one for condonation. Where it is able to cross that hurdle, the second hurdle which it must cross relates to the need on its part to satisfy the requirements for rescission of judgment.

The respondent took issue with the fact that two persons namely one Walter Taranhike and one Ratidzai Badza each deposed to an affidavit for, and on behalf of, the union. Walter Taranhike did so as the main deponent to the composite application. Ratidzai Badza, on the other hand, did so as the President of the union, according to him.

Because the applicant had to explain the *in limine* matter which had been raised in its answering affidavit, it did not have the opportunity to make any meaningful comment in respect of it. All it did was to admit that the mentioned persons each deposed to an affidavit for, and on behalf of, the union as well as to concede the irregularity which associated itself with the stated matter. It, in the result, conceded that the union was not in, but out of, court. The concession which it made put to rest the issue of the union's involvement in the application. The union is therefore not a party to the present proceedings.

The respondent's *in limine* matter which is to the effect that the composite application which is for condonation and rescission is improperly before me is without merit. It has already been observed and stated that the current is a two-in-one application. Nothing, at law, prevents the court from entertaining an application for rescission where, for instance, the applicant has successfully proved the condonation application. Neither the law of civil practice and procedure nor any other law prohibits the hearing of a composite application. The only caveat to the same is that the applicant who files such a composite application should always keep in his mind the sequence of events and the need on his part to prove his case in a chronological order starting

with the first part and proceeding to the second and/or third part where such is the case: *Mandigo* v *Pswarayi*, HH 244/18.

A litigant who applies for condonation must admit, as his starting point, that he violated the rules of court. He must confess that he failed to comply with the court's rules and that he craves the indulgence of the court to forgive him for his infractions so that he proceeds to prosecute his case or defend the suit which the plaintiff or the applicant mounted against him. Condonation is therefore granted at the discretion of the court which expects the applicant who approaches it for the relief to appear before it with a clean and contrite heart as well as a clear mind which exhibits the intention to make amends. Condonation, it has been asserted, is not there for the mere asking. For the applicant to succeed in such an application, he has to meet certain bench-marks. These were enunciated in *Kombayi* v *Berkout*, 1998 (1) ZLR 53 (S) wherein the court stated the requirements which an applicant in a condonation application must satisfy. He, it was emphasized, must tell the court before whom he appears of:

i) the extent of the delay in complying with the rules of court;
ii) the reasonableness of the explanation for the delay – and
iii) his prospects of success on appeal.

Bishi v *Secretary for Education*, 1989 (2) ZLR 240 (HC) at 243 B-C adds a further three requirements which an applicant for condonation must satisfy in addition to the requirements which the Supreme Court enunciated in *Kombay*i v *Berkout* (*supra*). These are:

iv) the importance of the case;
v) the convenience of the court – and
vi) the avoidance of unnecessary delay in the administration of justice.

The applicant, the record will reveal, does not tell me of the extent of its delay in complying with the rules of court. Its statement is that it became aware of the default judgment on 8 November, 2021. It states, further, that it applied for rescission of the same on 10 November, 2021. It claims that it did so in terms of Rule 29 (1) (a) of the rules of court. It alleges that, because the application which it filed within the *dies* was incorrectly filed, it instructed counsel to withdraw it and file the present one in terms of Rule 27 of the rules of court.

Simple mathematical calculation would show that it delayed to comply with the rules of court for a period which exceeds two and one half months. This arises from the fact that it became aware of the judgment on 8 November, 2021 and it filed the present composite application on 7 February, 2022. The applicant does not tell why it had to withdraw the application which it filed within the *dies* in preference to the one which it filed out of time. It does not advance any reason as to why it instructed counsel to withdraw a properly filed application in preference to one where it has to apply for condonation as it is doing currently. It offers no clear reason for the position which it took in the mentioned regard. It, in short, does not tell of its degree of non-compliance with the rules of court. Nor does it tell the reasons for the same. All it asserts is that, out of incorrect advice which it received, it applied for rescission in terms of Rule 29 (1) (a) of the rules of court. It does not tell the manner in which the advice which it received was/is incorrect. Nor does it tell of the person or authority from whom/which it received the advice in question. All it asserts on the matter is that it took steps to comply with the rules of court. It does not mention the steps which it alleges it took.

It is evident that, in applying for rescission in terms of Rule 29 (1) (a) of the rules of court as it did, the applicant was conveying to the court which was to hear and determine its application to rescind HC 6329/20, that the judgment was entered in error and in its absence. The picture which it portrayed in the application was that it entered appearance to defend within the time which is stipulated in the rules of court and that, if the court which entered judgment against it was aware of the alleged matter, it would not have entered default judgment against it. It, accordingly, places blame on no one else but the court.

The question which begs the answer centers on whether or not the applicant was telling the truth, the whole truth and nothing but the truth when it portrayed the court as having acted in error by entering default judgment against it. The answer to the question is in the negative. It admits, in its founding papers, that it filed its notice of appearance to defend one day out of the time which is stipulated in the rules of court. It was therefore alive to the fact that its notice of appearance was filed by it when it was barred. It was also alive to the fact that it did not apply to uplift the bar which operated against it from the time that it became effective – i.e. on 2 December, 2020 to the time that judgment was entered against it in October, 2021. It knew

further that it was lying when it accused the court of having entered judgment against it in error. It knew that judgment was correctly entered against it.

The respondent supplies the missing link in the story of the applicant. It articulates the reasons for the applicant's non-compliance with the rules of court in para 43 of the respondent's Heads. It submits, and I agree, that the applicant has been economic with the truth. It submits, further, that the applicant made every effort to withhold from me the true state of affairs which took place from 8 November, 2021 to 7 February, 2022. The applicant, the respondent states, sought and still seeks to mislead not only myself but also the court which dealt with its urgent chamber application for stay of execution as well as the court which was to deal with its rescission application which it filed under HC 6307/21. The respondent's statement is that the applicant made an effort to conceal from me matters which it knew would be detrimental to its case.

In the urgent chamber application which it filed under HC 6605/21, the impression which the applicant conveyed was /is to the effect that it filed its notice of appearance to defend within the *dies* and that the court, wittingly or unwittingly, granted default judgment against it in error. The applicant was not being candid with the court when it stated as it did under oath. It knew that it filed its notice one day out of time and that, when default judgment was eventually entered against it, the judgment in question was above board because it had been barred and had not done anything to uplift the bar which operated against it. HC 6605/21, it stands to reason, met its fate as a result of the applicant's intention to mislead the court as it did. The application was struck off the roll when the court discovered the lie which the applicant told.

The applicant, it is observed, repeated the same lie when it applied for rescission of judgment under HC 6307/21. It portrayed the same lie to the court. It realized that the lie which it told in HC 6605/21 had been discovered and that the same could not sustain its cause. It therefore had no choice but to instruct counsel to withdraw it and refile the same in terms of Rule 27 of the High Court Rules, 2021.

The explanation which comes out of the challenge which the applicant created for itself cannot assist it at all in its application for condonation for late filing of an application for rescission of judgment. The applicant has no one to blame but itself for misleading the court in

the manner which it did and is doing. It cannot, under the observed set of circumstances, be taken seriously by the court when all it did and is doing is to abuse the court and its process.

Condonation is an indulgence which may be granted at the discretion of the court. It is not a right which is obtainable on demand. The applicant must satisfy the court that there are compelling circumstances which would justify a finding in his favour. To that end, it is imperative that an applicant for condonation should be candid and honest with the court: *Friendshi*p v *Cargo Carriers Limited and Another*, SC 1/13.

The fact that the applicant lied to the court in HC 6605/21 and HC 6307/21 says it all. It is trite that, if a litigant gives false evidence, his story will be disregarded and adverse inference may be drawn as if he has not given any evidence at all: *Moroney* v *Moroney*, SC 21/13; *Manjala* v *Maphosa*, SC 18/16.

The lie which the applicant told in the abovementioned two cases made it difficult, if not impossible, for it to explain its alleged withdrawal of HC 6307/21 as well as the filing of this composite application. It claims that it instructed counsel to withdraw HC 6307/21. I had the occasion to read the papers which the applicant filed under HC 6307/21. I placed reliance on *Nhengu* v *Mtindi*, 1986 (2) ZLR 171 (SC) and/or *Netone* v *Econet*, SC 47/18 which confer(s) power upon me to refer to the court's own records or proceedings as well as decisions. I observed that HC 6307/21 remains pending at court. Counsel whom the applicant instructed to withdraw it did not do so. The net effect of the observed matter is that the applicant has two rescission applications which it filed at court. Both of them deal with one and the same matter namely rescission of default judgment. That observed matter makes this application to stand on a very untenable ground. All this occurred as a result of the applicant's determination to abuse the court's process.

The applicant was not being candid when it stated that it received incorrect advice. The truth of the matter is that it sought to mislead the court which discovered its lie and it, accordingly, made up its mind to re-file the same application under a different rule of court in the hope that it may, as it were, get away with it. It was, therefore, unfortunate that its lie could not carry its story any further than where it had left it.

An applicant who has infringed the rules of court before which he appears must apply for condonation and in that application he must 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 dis-service as he takes the risk of having his application dismissed: *Zimalate Quartize (Pvt) Limited* v *Central Africa Building Society*, SC 34/17.

Given the maze of lies which it told in previous proceedings and continues to tell in this composite application, the applicant cannot be said to have lived up to what the Supreme Court laid down in the *Zimalate Quartize* case *(supra*). It has no explanation for the delay which is associated with its application. It tells a further lie when it alleges that its prospects of success in the main matter are high. They are not. There cannot be any prospects of success at all unless and until it has applied for upliftment of the bar which operates against it. Its case was/is premised on the logic of lies, trial and error and nothing but that. Without a statement on its part as regards its degree of non-compliance with the rules of court, without a clear explanation from it as regards the reasons for its delay in applying for condonation and without any meaningful input by it on its prospects of success, the applicant's application cannot succeed. It cannot succeed when it is premised on nothing but lies.

Given the applicant's failure to explain itself on the first three requirements which are pertinent to an application for condonation, the first part of the application cannot succeed. The lies which it told and continues to tell even in this application makes the same a non-event. There is, therefore, no need for me to consider the remaining three aspects which are characteristic in an application of the present nature. Nor is there any need on my part to consider the second part of this composite application.

The applicant failed to prove its case on a balance of probabilities. The application is, in the result, dismissed with costs.

Maseko Law Chambers, applicant's legal practitioners
Makuvaza & Magogo Attorneys, respondents' legal practitioners