

**REPORTABLE (9)**

**TENDAI BONDE**  
v  
**(1) NATIONAL FOODS LIMITED (2) LOVEJOY NYANDORO** (as  
Chairman of Appeals Committee) **(3) CHIPO NHETA** (as Chairman of Works  
Council)

**SUPREME COURT OF ZIMBABWE**  
**HARARE, 22 JUNE 2023 & 26 JANUARY 2024**

The applicant in person

*A.K. Maguchu*, for first respondent

No appearance for second and third respondents

**IN CHAMBERS**

**KUDYA JA:**

[1] On 19 April 2023, the applicant sought condonation for failure to file an application for leave to appeal within the prescribed period and for leave to appeal. The first part of the application is in terms of r 43 (3) of the Supreme Court Rules, 2018. The other part is made in terms of r 60 (2) as read with r 43 (7) of the said Supreme Court Rules and s 92F (3) of the Labour Act [*Chapter 28:01*] (the Act). It is contested by his former employer, National Foods Limited (the first respondent).

**THE FACTS**

[2] The battle between the applicant, who was employed as a laboratory analyst by the first respondent, and the first respondent has been raging since 7 March 2018. It has taken this long because of the many conceded procedural missteps that the applicant has taken and for which he has inevitably suffered costs on the punitive scale.

[3] On 7 March 2018, the applicant and 51 other employees sought the permission, in terms of s 104 of the Act, of a labour officer to undertake collective job action over some six grievances that the first respondent failed to resolve. The applicant attached a cache of private and confidential e-mails exchanged amongst the first respondent's Group Legal Counsel (Ms. Leigh Howes), the Human Resources Manager (Ms. Rossewater Usayi) and one Michael Lashbrook. As the applicant was not entitled to access these e-mails, the first respondent engaged an information technologist (James Matengera) to conduct a deep scan on three desk top computers used in the laboratory and production department. His findings caused the first respondent to charge the applicant with the infringement of its IT policy in breach of s 19.8.4 of the first respondent's Code of Conduct as read with ss 3.1 and 3.5 of its information technology (IT) Policy. He was alleged to have shared private and confidential e-mails with unauthorized external parties without the consent of the information owners. He was also charged with the possession and retention of confidential documents, files and reports that were above his pay grade. These acts were considered to be inconsistent with the core of his contract of employment.

[4] The disciplinary hearing suffered five false starts between 28 June 2018 and 26 July 2018, which were occasioned by the applicant's failure to attend. He produced five sick leave

certificates ahead of each scheduled hearing that excused him from duty. On 26 July 2018 the applicant caused the production of yet another sick leave note for the period 27 to 30 July 2018. Thereupon, the disciplinary committee, in consultation with the applicant, set down the hearing on 31 July 2018. It served the notice of hearing by courier service (DHL) and by WhatsApp electronic service on his cellular phone. He was informed of his right to representation. He was also warned that the disciplinary committee could not countenance any further delays in the commencement of the hearing.

- [5] The disciplinary committee consisted of five members. Two members and a chairman were nominated by management while the remaining two were nominated by the workers committee. The chairman had a casting vote.
- [6] On the date of hearing, all the members nominated by management attended the hearing. The workers' nominees deliberately boycotted the hearing. The applicant defaulted. The disciplinary hearing was procedurally conducted in their absence. The charges were put and both oral and documentary evidence adduced from the witnesses. The Disciplinary Committee retired and on resumption found the applicant guilty and after consideration of mitigation and aggravation duly dismissed him from employment, with effect from 31 July 2018.
- [7] On 5 September 2018, the applicant appealed to the Appeals Committee. He sought rescission of the decision of the disciplinary committee on three grounds. The first was that unbeknown to the disciplinary committee, he could not attend the hearing because he had been on sick leave from 31 July 2018 to 2 August 2018. He attached a sick leave note

to that effect. The second was that he had been charged, convicted and dismissed on the basis of an inapplicable code of conduct. The last was that the determination, having been signed by two members only (out of a possible five members) constituted a non-binding minority decision.

[8] The appeal commenced in earnest, after the fourth attempt, on 12 September 2018, before the Appeals Committee that was chaired by the second respondent. Notwithstanding that he was aware of the date of hearing, the applicant, again defaulted. His lay representative, Knowledge Deve, attended the hearing and on his instructions, renounced agency. The two members appointed by the workers committee walked out of the meeting leaving the chairman and the two management nominees. The remaining members of the Appeals Committee considered the appeal on the papers and duly dismissed it in the applicant's absence.

[9] Thereafter, the applicant's appeal against the Appeals Committee's default judgment was predictably struck off the roll by the Labour Court on 22 March 2019. His re-enrolled appeal to the same court suffered the same fate on 17 July 2019.

[10] On 8 August 2019, he requested the Appeals Committee to rescind its default judgment. It declined to set the matter down on the ground that the code of conduct did not provide for the rescission of its own judgments. On 15 August 2019, he requested the Chairperson of the Works Council (the third respondent) to clarify whether he had been charged under the correct code of conduct. The applicant asserted that the code under which he had been charged, which was registered on 25 June 2003, had been superseded by a new code, which

was purportedly registered on 26 April 2018. The minutes of the Appeals Committee show that it was aware that the question of the correct code of conduct was before the Works Council even as it deliberated over the appeal.

[11] Irked by the refusal, he sought its review by the Labour Court on 24 September 2019. His intended review will be premised on his sick leave note proven absence, breach of his right to be heard and concomitant failure to consider exculpatory documents in his possession like the CID National Cyber Forensic Laboratory Report dated 12 September 2019 deep scan that did not find the “Bonde” file in the desktop used by him, the Appeals Committee lack of quorum and his purported summary dismissal.

[12] As he was woefully out of time, the application was struck off the roll. He then filed **LC/MT/17/20**, an application for condonation and extension of time within which to file the application for review, on 28 October 2019. The application was dismissed on 13 March 2020. His further application for leave to appeal against the dismissal (**LC/MT/48/20**) was also dismissed on 17 March 2020.

[13] Thereafter he brought eight incompetent chamber applications before judges of this Court, which were all struck off the roll with orders for punitive costs.

### **ANALYSIS**

[14] In terms of s 9.4 of the code of conduct under which the applicant was charged, convicted and dismissed, the Appeals Committee may determine an appeal on the record unless it

decides to call for further evidence. It has the power to confirm, vary or rescind an earlier finding or remit it for fresh evidence or a rehearing.

[15] An applicant who fails to timeously file an application for leave to appeal must seek condonation and extension of time within which to do so. The application must be accompanied by a prospective notice of appeal. The purpose of the notice of appeal was articulated in *Ngazimbi v Murowa Diamonds (Pvt) Ltd* SC 27/13 at p 3 thus:

“The purpose of requiring leave before noting an appeal to be given by the President of the Labour Court or upon refusal, by the judge of the Supreme Court in terms of s 92F (2) of the Act is to prevent appeals not based on questions of law getting to the Supreme Court. The right to appeal given by s 92F (1) is a limited right. The exercise of it is made conditional upon leave being granted.”

The conjunctive requirements for such an application are generally, the extent of the delay, the reasonableness of the explanation for the delay and the prospects of success. See *Kombayi v Berkout* 1998 (1) ZLR 53 (S), *Kutiwa v Zimpost* SC 85/05 and *Mhora v Mhora* CCZ 5/22 at p 8.

[16] It was common cause that the period of the delay for seeking leave to appeal commenced to run on 31 July 2020. The period of the delay to 19 April 2023 approximates 32 months. The applicant breaks the period into 11 segments. The cumulative reasons for the delay comprise his failure to appreciate the requirements of the Supreme Court Rules, the 6 weeks between 23 March 2021 and 10 May 2021 when this Court’s operations were curtailed by the COVID 19 pandemic and his lack of financial resources to seek legal advice and representation.

[17] In *Chiutsi v The Sheriff of the High Court & Ors* SC 2/19 at p 3, this Court emphasized that:

“A litigant’s explanation for his or her non-compliance must be devoid of any undertones of complacency regarding the observance of the rules of court and it must be adequate and tolerable.”

I agree with Mr. *Maguchu* for the first respondent, that his failure to comprehend the Supreme Court Rules cannot be regarded as a reasonable excuse for the delay. Further, the effects of COVID 19 do not constitute a reasonable explanation, as he was able to file many of his fatally defective applications in between COVID induced closures of the courts. His explanations are patently intolerable. I am accordingly satisfied that the period of the delay was inordinate and that he has failed to proffer a reasonable explanation for the delay, especially in view of the fact he failed to learn from the pronouncements and guidance of the judges of this Court advertent to his many procedural missteps. These included his repeated failure to relate his grounds of appeal to the condonation judgment and assailing factual findings instead of raising points of law as exemplified in para 22 of an earlier judgment between the present parties *Tendai Bonde v National Foods Ltd & Ors* SC 11/21.

[18] It is trite that a lengthy of the delay and an unreasonable explanation may be counterweighed by strong prospects of success. The applicant’s prospects of success are premised on the following 9 prospective grounds of appeal.

“Grounds of appeal:

The court *a quo* erred at law:

1. When it determined that refusal to hear rescission of default judgment did not warrant termination of its legal performance.

2. In finding that the appeals committee that was empowered by the employment code to decide on the record could issue default judgments.
3. When it determined an issue in the province of the tribunal; in the exercise of its function the Labour Court cannot decide a question anterior to the decision of the Tribunal.
4. When it did not remit *de novo* application for rescission of default judgment.
5. When it did not review the charge, minority decision of the hearing committee, screen shot, cyber forensic report and documents because they were not (in the grounds for review, the failure to distinguish review from appeal constitutes failure to act in accordance with the law governing proceedings.
6. When it ignored other issues brought for resolution.
7. It condoned a dismissal on a day covered by a valid sick leave certificate against s 14 (1) of the Labour Act [*Chapter 28:01*].
8. When it upheld minority decision of the hearing committee without that minority on cross appeal.
9. When it made a finding that the appeals committee was properly constituted whereas the presence of KNOWLEDGE DEVE violates s 23 (1) of the Labour Act [*Chapter 28:01*] thereby giving reasons that are bad at law.”

He will seek the success of the appeal, the vacation of the judgment *a quo* and its substitution by the granting of the application for condonation and an order for him to file the application for the review of the Appeal Committee’s decision dated 12 September 2018 in the Labour Court within 21 days of the order and an award of costs of suit against the first respondent.

[19] The applicant’s prospective grounds of appeal seek to impugn the condonation judgment. It is also apparent from the manner in which his relief is worded that he will be seeking the

granting of the application for condonation and the filing of the application for review within 21 days of the order.

[20] The first ground of appeal will assail the court *a quo*'s failure to recognize that the refusal of his application for rescission by the Appeals Committee was, in effect, final and definitive. The second ground of appeal attacks the propriety of the finding *a quo* that the Appeals Committee could issue a default judgment when it was empowered to determine the appeal on the papers. This ground will contradict the fourth ground which impugns the failure of the court *a quo* to recognize that it had the power to order the Appeals Committee to hear his application for rescission. The third attacks the inclusion in the period of delay of the days before he sought rescission from the Appeals Committee. The fifth, seventh and eighth grounds impugn the treatment of an intended review as if it was an appeal by ignoring the propriety of the off the record sick note dated 31 July 2018, the charge, the minority decision and erroneous documentary evidence simply because these would not be adverted to in the prospective grounds for review. The sixth will attack the failure to determine all the issues raised in the application for condonation that had a bearing on the prospects of success. The last ground will attack the propriety of the Appeals Committee proceedings in which his representative Knowledge Deve, a conventional employee, purported to represent him, also a conventional employee, in purported breach of the provisions of s 23 (1) of the Labour Act.

[21] In motivating his intended grounds of appeal, the applicant made the following four contentions. Firstly, the court *a quo* confined its focus on the records of proceedings generated by the Disciplinary Committee and the Appeals Committee. It ignored his

exculpatory off the record documentary evidence that would demonstrate the procedural improprieties that afflicted the Appeals Committee's refusal to assume jurisdiction over his intended rescission. The documents consisted of the belated sick note and the CID National Cyber Forensic report. They would demonstrate that he was not in willful default at the Disciplinary Committee hearing and his innocence of the possession and retention of unauthorized Company data and documents. He further argued that the wrong finding *a quo* that the disciplinary hearing took place on 31 August 2018, instead of 31 July 2018, erroneously negated the cogency and impact of the belated sick note, *viz*, that he was not in willful default of that hearing nor would the hearing pass muster the provisions of s 14 (1) of the Act, which excused an employee on sick leave from duty. He also contended that the CID Cyber forensic report would also countervail the screenshot used by the first respondent to show that he had unlawfully created a "Bonde" e-file that housed the cache of unauthorized information. He also argued that the court *quo*'s limited focus on the four corners of the Appeals Committee's record of proceedings to the exclusion of his outside the record evidence tended to show that it treated the intended review as an intended appeal. It therefore erroneously excluded off the record evidence, which would be inadmissible in an appeal but would be perfectly permissible in review proceedings, in its consideration of the prospects of success of the intended review application.

[22] Secondly, that his initial conviction, which was confirmed by the Appeals Committee, by the chairman and one member nominated by the management instead of all the five-member panel, constituted a minority decision that would for that reason be adjudged irregular and therefore invalid.

[23] Thirdly, that s 9.4 of the code, which prescribed the powers of the Appeals Committee, precluded it from passing a default judgment. He argued that the discretionary requirement therein for it to hear the appeal on the record and the power to confirm, vary, rescind or remit the lower tier decision permitted it to determine the appeal on the merits even in his absence. He further contended that as the code did not specifically clothe the Appeals Committee with the power to grant a default judgment, it could not lawfully do so.

[24] Fourthly, that the refusal by the Appeals Committee to assume jurisdiction of the rescission breached his right to the *audi alteram partem* rule. This negated his right to challenge the cogency of the evidence that was used to convict him.

[25] In summary, the applicant attacked the court *a quo*'s purported omissions and commissions, the injudicious exercise of discretion, the application of wrong principles of law and the consideration of the wrong facts in dismissing his application for condonation, particularly in respect of prospects of success.

[26] *Per contra*, Mr. Maguchu contended that the applicant failed to advert to the prospects of success in his founding affidavit. He argued on the authority of *Sibanda v TS Timber Building Services (Pvt) Ltd* SC 50/15 at para 7 that:

“A bare and unsubstantiated averment that such prospects exist is insufficient”.

He further contended that the court *a quo* related to the prospects of success raised before it by the applicant. The applicant indicated his intention to impugn the procedural impropriety of not calling his name three times before he was declared to be in default before the two internal tribunals, the purported invalidation of the Appeals Committee

decision occasioned by the walkout of the workers nominees and the use of an invalid code of conduct. He submitted that the court *a quo* could not be assailed for determining only those issues that the applicant asked it to consider. He also submitted that the applicant's prospects of success in the present application should be limited to the dismissal of the application for condonation and should not be extended to his generalized attacks of the conduct of the Appeals Committee and the Disciplinary Committee. He, however argued that as the applicant's failure to appear before the Appeals Committee was not linked to any sick note, he was in deliberate and intentional default. He further submitted that his purported appeal to the Appeals Committee, against a default judgment of the Disciplinary Committee, was in any event a nullity. He therefore submitted that these additional factors further clearly demonstrated an absence of any prospects of success against the dismissal of his application for condonation.

[27] The applicant is correct that while an appeal is confined *ex facie* the record of proceedings a review has a wider remit of considering evidence outside the record of proceedings. Mr *Maguchu* is also correct that a court cannot be attacked for limiting its decision to the factors that are raised before it. See *Nzara & Ors v Kashumba N.O. & Ors* 2018 (1) ZLR 194 (S) at 195B. The prospects of success, to which the court *a quo*, in an application for condonation and extension of time to file an application for review, would inevitably relate to the intended review. Some of the applicant's prospective grounds for review attacked the refusal of Appeals Committee to assume jurisdiction of the application for rescission, the confirmation of a default judgment that was based on a non-existent code and the confirmation of default proceedings held in applicant's absence, when unbeknown to the Disciplinary Committee he was on sick leave. These three factors were raised and

addressed by the applicant in the present application but were not addressed by Mr. *Maguchu*.

[28] It seems to me that the refusal to exercise jurisdiction by a tribunal on the basis that it lacks such jurisdiction is a proper ground for review. If a party, like the applicant, is denied such jurisdiction by a tribunal and is able to show that the tribunal actually has such jurisdiction, it would have surmounted the prospects of success hurdle. The two cases of *Air Zimbabwe (Pvt) Ltd v Mnensa & Anor* SC 89/2004 and *Mackenzie v Rio Tinto Zimbabwe* SC 144/04, which were determined by the same panel of judges provide the answer to the question whether a tribunal possesses the inherent power to deal with a rescission of its own judgment in circumstances where its code of conduct does not specifically accord such power to it. While both cases concerned a code of conduct which did not legislate the power of remittal of an appellate committee, the principle would, in my view, apply with equal force to rescission. In the *Air Zimbabwe* case, *supra*, at p 6 CHIDYUSIKU CJ, with the concurrence of ZIYAMBI and MALABA JJA, as they then were, remarked that:

“I do not agree that the General Manager did not have the power to order a new enquiry. The General Manager was vested with the power to hear the appeal. Remitting a matter of a hearing *de novo* is inherent in the power to hear an appeal. Failure to specifically provide for remission of a matter does not, in my view, mean that the General Manager does not have such a power. The code does not specifically provide that the General Manager can allow or dismiss such an appeal. To then argue that he does not have the power to allow or dismiss the appeal is nonsensical. Remitting a matter for re-hearing is a power that is inherently associated with the power to hear an appeal. I accordingly hold that the General Manager of the appellant had such power.”

[29] Again, in the *Rio Tinto* case, *supra*, at p 5 the LEARNED CHIEF JUSTICE stated that:

“An appeal court or a body vested with authority to hear an appeal has, at least, the jurisdiction to allow an appeal, dismiss an appeal, or remit the matter for a re-

hearing. The jurisdiction to do any of the above is inherent in the authority to hear an appeal. Where the lawmaker does not wish the appeal court or authority to have any of the three above options the language of the statute has to be explicit. Thus, in the absence of explicit language or implication from the language that an appeal authority cannot remit a matter for a hearing *de novo*, the appeal court or authority has such jurisdiction. I do not accept that the words “shall be final” mean that the designated authority cannot remit a matter for a hearing *de novo*. In the present case the designated authority was satisfied that the decision of the respondent was a default judgment reached in the absence of the appellant and, therefore, not on the merits. He also was satisfied that the committee that adjudicated on the matter was not properly constituted. In those circumstances the proper course to follow was to remit the matter for a hearing *de novo*. The decision of the designated authority in this case cannot be faulted.”

[30] By parity of reasoning, it seems to me that a tribunal that has the power to pass or enter a default judgment also possesses the inherent power to rescind that judgment on good cause shown. In the circumstances, the court *a quo* grossly misdirected itself in failing to find that the refusal of jurisdiction by the Appeals Committee was an error of law that would constitute a strong prospect of success on appeal. Again, as the sentiments of this Court in the *Rio Tinto* case, *supra*, demonstrate, the power of the Appeals Committee is not constrained by the fact that the appeal to it concerned a judgment passed in default by the first tribunal such as the Disciplinary Committee.

[31] The above findings are dispositive of the application. It is therefore not necessary to consider the factors that were raised by the applicant on the impact of the purported exculpatory evidence, the suggestion that the two tribunals lacked a *quorum* and that a wrong code of conduct was used.

[32] In the circumstances, the first part of the application succeeds.

[33] The success of the second part of the composite application is inextricably tied to the first. The considerations thereto are the same. The first respondent did not oppose it. In the premises, it must also succeed.

[34] Costs must follow the cause.

### **DISPOSITION**

[35] It is accordingly ordered that:

1. The application for condonation of non-compliance with r 60 (2) of Supreme Court Rules, 2018 be and is hereby granted.
2. The application for the extension of time within which to file an application for leave to appeal in terms of r 60 (2) of the Supreme Court Rules, 2018 be and is hereby granted.
3. The application for leave to appeal in terms of r 60 (2) of the Supreme Court Rules, 2018 be and is hereby granted.
4. The applicant shall file his notice of appeal within 5 days of this order.
5. The first respondent shall pay the applicant's costs.

*Calderwood, Bryce Hendrie & Partners*, the 1<sup>st</sup> respondent's legal practitioners.