**REPORTABLE (18)**

**TENDAI LAXTON BITI**
**v**
**(1) AUGUR INVESTMENTS (2) TATIANA ALESHINA (3) KENNETH SHARPE (4) MOVEMENT FOR DEMOCRATIC CHANGE ALLIANCE**

**SUPREME COURT OF ZIMBABWE**
**GWAUNZA DCJ, BHUNU JA & CHATUKUTA JA**
**HARARE: 02 JULY 24 & 5 MARCH 2025**

*L. Madhuku*, for the appellant

*T. Magwaliba*, for the respondents

**CHATUKUTA JA:**

1. This is an appeal against the whole judgment of the High Court (the 'court *a quo*') handed down on 2 April 2024 under judgment number HH 139/24. The court *a quo* dismissed the appellant's application for condonation of failure to file an application for the rescission of a default judgment within the permitted time.

**FACTUAL BACKGROUND**

2. On 10 December 2020, the first and second respondents instituted summons against the appellant and the third respondent for US$1 000 000 being damages for defamation. The first and second respondents alleged that on 04 and 13 December 2020, the appellant published comments on his account on the social media site "Twitter" that were defamatory of them and tarnished their names. On 13 March 2021, the summons was amended and the appellant was served with the amended summons.

3. On 22 March 2021, the appellant entered an appearance to defend the action. The appellant and the third respondent requested for further particulars on 9 April 2021. The further particulars were furnished on 27 April 2021.

4. On 24 May 2021, the appellant raised an exception and a special plea in bar. The exception was that there was a defective joinder of parties. It was contended that the first and the second respondents instituted proceedings based on different causes of action that were unrelated to each other and therefore against unrelated defendants.

5. The special plea was to the effect that the first respondent, being a *peregrinus*, had failed to furnish security for costs. It was also contended that the first respondent being a company, lacked feelings and dignity which could be impaired. It could therefore not sue for defamation damages under the *actio injuriarum*.

6. The High Court, in a judgment by MANZUNZU J dated 20 August 2021, dismissed both the exception and the special plea. Disgruntled by the dismissal, the appellant filed an application in the High Court in case number HC 4612/21 for leave to appeal to this Court. He was represented by Mafume Law Chambers. The appellant alleges that the respondents did not file opposing papers and he proceeded to set down the matter on the unopposed roll.

7. At the hearing of the application for leave to appeal on 13 March 2023, one Talent Chipandu appeared on behalf of the appellant. Talent Chipandu practised as a legal practitioner under Tendai Biti Law HMB Chambers. Mafume Law Chambers had not renounced agency and Tendai Biti Law HMB Chambers had not assumed agency. The court held that the appellant was therefore in default and dismissed the application in default of the appellant.

8. On 14 March 2023, the appellant filed a chamber application in this Court under case number SC 143/23 for leave to appeal against the default judgment entered against him. The appellant withdrew the application. On 12 June 2023, he filed a fresh chamber application for leave to appeal under SC 274/23. The application was struck off the roll with costs on 7 June 2023 for the reason that it was improperly before the court as the appellant could not appeal against a default judgment.

9. On 28 June 2023, the appellant filed in the court *a quo* a composite application for condonation for the late filing of an application for rescission of the default judgment and for rescission of the default judgment.

**PROCEEDINGS BEFORE THE COURT *A QUO***

10. As regards the application for condonation, the appellant submitted that the delay in filing the application of three months was not inordinate. He explained that the delay had been occasioned by him vigorously pursuing before this Court the applications for leave to appeal.

11. The appellant submitted that he had prospects of success in the application for rescission. He argued that Talent Chipandu had been properly before the court appearing on his behalf. He further argued that Talent Chipandu had been instructed by Mafume Law Chambers to represent him and there was nothing at law that precluded Mafume Law Chambers from doing so. He further argued that his application for leave to appeal was unopposed signifying that the respondents were barred and had no right of audience. He contended that under the circumstances, the High Court should not have dismissed the application in default.

12. The appellant further submitted that he had prospects of success on appeal in the main matter. He argued that the first respondent, being a company, lacked feelings and dignity that would be impaired so as to entitle it to institute proceedings for defamation. He further submitted that, in any event, the tweets in question made no reference to the first and second respondents. He contended that the respondents failed to prove that he was in possession of a twitter account and that the tweets were generated by him.

13. *Per contra*, the respondents argued that the delay in seeking rescission was inordinate. They further argued that the explanation for the delay was "inadequate, illogical and implausible". It was contended that the appellant ought to have known that he could not appeal a default judgment yet he persistently sought leave from this Court to appeal against the judgment.

14. On prospects of success, the respondents contended that an artificial person such as the first respondent could sue for defamation. They further contended that reference to the second respondent was implied in the tweets and the third respondent was specifically mentioned by name.

15. The respondents further argued that the appellant's exception was devoid of merit and the intended appeal was merely a delaying tactic. They also contended that the High Court Rules, 2021 permit the joinder of several causes of action in the same action and in the present circumstances, the publications were interconnected.

**DECISION *A QUO***

16. The court *a quo* held that the delay to file the application for condonation was inordinate and the explanation for the delay was unsatisfactory. It found the explanation to be unsatisfactory because the appellant, being a seasoned legal practitioner, ought to have

known that a default judgment was not appealable. His applications in the Supreme Court were therefore irrational and at his own peril.

17. The court *a quo* further held that the appellant did not have prospects of success on appeal as the judgment dismissing the appellant's special plea and exception was well reasoned. It held that the likelihood of it being overturned on appeal was very remote. It also held that Tapiwa Chipandu, could only represent the appellant after Mafume Law Chambers had renounced agency. It found that the balance of convenience weighed in favour of the main matter proceeding on the merits.

18. In the result, the court *a quo* dismissed the application for condonation. Aggrieved by the decision of the court *a quo,* the appellant noted the present appeal on the following grounds of appeal:

**GROUNDS OF APPEAL**

1. The court *a quo* improperly exercised its discretion and thereby misdirected itself in that in dismissing the appellant's application for condonation of the late filing of his application for rescission, it only took into account one factor namely the reasonableness of the explanation for delay instead of also taking into account other mandatory factors such as possible prejudice to the respondents, appellant's prospects of success on the merits and the balance of convenience.
2. As an alternative to 1 above, the court *a quo* improperly exercised its discretion and thus erred in law in dismissing the appellant's application for condonation of the late filing of his application for rescission without giving reasons for its following findings listed in 2.1 to 2.3 below in respect of the mandatory factors that it ought to have considered:

2.1 Appellant's prospects of success were not bright.
2.2 Finality to litigation was apt.
2.3 Balance of convenience was against the granting of condonation.

3. The court *a quo's* decision to dismiss the appellant's application for condonation of the late filing of his application for rescission was so unreasonable that no reasonable court, applying its mind to the circumstances of the case and the mandatory factors such as length of delay, explanation for the delay, prospects of success and the balance of convenience, could ever have made such a decision.

**SUBMISSIONS MADE BEFORE THIS COURT**

19. The first and second respondents raised two preliminary objections, the first being that the judgment of the court *a quo* is interlocutory in nature and unappealable save with the leave of the court *a quo*, and in the absence of such leave, with the leave of this Court. He submitted that the appeal is improperly before this Court as it is common cause that the appellant did not have leave of the court *a quo* or this Court.

20. The second objection was that the appellant failed to comply with r 55 (2) of the Supreme Court Rules, 2018 as it had not paid into court security for costs determined by the Registrar. The respondents abandoned this point during the hearing of the appeal.

21. *Per contra*, Mr *Madhuku*, for the appellant, argued that the appeal did not require leave to appeal. He argued that the application for rescission was the main case before the court *a quo*. He further argued that even if the judgment *a quo* was interlocutory, it was final and definitive in nature as it brought to an end the application for rescission.

22. On the merits, it was submitted by Mr *Madhuku* that the court *a quo* failed to consider all the requirements for a chamber application for condonation except the one relating to

the need to proffer a satisfactory explanation for the delay. It was further argued that the court did not give reasons for its decision.

23. *Per contra*, Mr *Magwaliba* argued that the court *a quo* set out the factors that must be considered when determining a chamber application for condonation and that it considered all the main requirements. He further contended that the appellant was simply not content with the reasons given by the court *a quo*.

## ISSUES FOR DETERMINATION

24. The core issues for determination before this Court are as follows:

    1. Whether or not leave to appeal was necessary in terms of s 43 of the High Court Act [*Chapter 7:06*].
    2. Whether or not the court *a quo* misdirected itself in dismissing the application for condonation for late filing of the application for rescission of default judgment.

## APPLICATION OF THE LAW TO THE FACTS

**Whether or not leave to appeal was necessary in terms of s 43 of the High Court Act**

25. The respondents' preliminary objection before this Court was premised on the argument that the appellant ought to have sought leave to appeal against the dismissal of the application for condonation as the dismissal was interlocutory in nature.

26. Section 43 (2) (d) of the High Court Act speaks to the appealability of orders and provides as follows:

> "(2) No appeal shall lie –
> (a)…
> (b)…
> (c)…
> (d) from an interlocutory order or interlocutory judgment made or given by a judge of the High Court, without the leave of that judge or, if that has

been refused, without the leave of a judge of the Supreme Court, except in the following cases—

(i) where the liberty of the subject or the custody of minors is concerned;
(ii) where an interdict is granted or refused;
(iii) in the case of an order on a special case stated under any law relation to arbitration."

27. An interlocutory order is an order issued during the course of litigation with respect to the main dispute, which order addresses intermediate matters. To identify whether or not an order is interlocutory or final in nature, one must consider the form and effect of the order. The decisive factor is that it must have the effect of disposing of a substantial portion of the relief claimed and terminates the suit.

28. In *South Cape Corporation Pty Limited* v *Engineering Management Services (Pty) Limited* 1977 (3) SA 543 (A) at 549G-550A, the court distinguished the various forms of interlocutory orders as follows:

"(a) In a wide and general sense the term "interlocutory" refers to all orders pronounced by the court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes:

(i) those which have a final and definitive effect on the main action; and
(ii) those, known as "simple (or purely) interlocutory orders" or "interlocutory orders proper", which do not. (See generally *Bell* v *Bell*, 1908 T.S. 887 at pp. 890 - 1; *Steytler, N.O.* v *Fitzgerald, supra* at pp. 303, 311. 325 - 6, 342; *Globe and Phoenix Gold Mining Co. Ltd.* v *Rhodesian Corporation Ltd.*, 1932 AD 146 at pp. 153, 157 – 8, 162-3; *Pretoria Garrison Institutes* v *Danish Variety Products, supra* at pp. 850, 867.)

(b) Statutes relating to the appealability of judgments or orders (whether it be appealability with leave or appealability at all) which use the word "interlocutory", or other words of similar import, are taken to refer to simple interlocutory orders. In other words, it is only in the case of simple interlocutory orders that the statute is read as prohibiting an appeal or making it subject to the limitation of requiring leave, as the case may be. **Final orders, including interlocutory orders having a final and definitive effect, are regarded as falling outside the purview of the prohibition or limitation (see generally *Steytler's* case, *supra* at pp. 304, 312,326, 345 - 6**;

(c) The general test as to whether an order is a simple interlocutory one or not was stated by SCHREINER JA, in the *Pretoria Garrison Institutes* case, *supra*, as follows (at P. 870):

> "... a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit' or, which amounts, I think, to the same thing, **unless it 'irreparably anticipates or precludes some of the relief which would or might be given at the hearing'**."

See also *Chitsaka & Ors* v *Heyns & Ors* SC 46/23, *Netone et al* v *Econet et al* SC 36/17 and *Blue Ranges Estate (Pvt) Ltd* v *Muduviri & Anor* 2009 (1) ZLR 368 (S), at 376 G.

29. What emerges from the above authorities is that once a procedural order anticipates and precludes the grant of the main relief before a court, it is final and definitive and appealable. It ceases to be an interlocutory order that requires leave to appeal.

30. An application for condonation is an ancillary procedure intermediate to the main action and in this case the main action before the court *a quo* being the application for rescission. The judgment *a quo* dismissing the application for condonation, though interlocutory, was clearly final and definitive as it anticipated and precluded the determination of the application for rescission as well. This is evident from the reasoning of the court *a quo*. It remarked at p 2 of its judgment on what would be the fate of the application for rescission as follows:

> "Considering that these are two applications, I will deal first with the application for condonation and if it is granted, I will proceed to deal with the other application **but if it is denied that will be the end of the matter**."(Own emphasis)

31. It follows from the above that once the court *a quo* denied the application for condonation, that was the end of both applications. The effect of the dismissal of the application for condonation was to render the application for rescission redundant. The judgment of the court *a quo*, was therefore final and definitive, and appealable without

leave.

32. The preliminary objection is without merit and ought to be dismissed.

**Whether or not the court *a quo* misdirected itself in dismissing the application for condonation for late filing of the application for rescission of default judgment.**

33. The requirements that a court must consider when confronted with an application for condonation are trite. These are in the main; the extent of the delay, the explanation for that delay and the strength of the applicant's case on appeal, or the prospects of its success. The aforesaid requirements are not exhaustive. At the bare minimum, the court must consider the three foregoing factors cumulatively.

34. The appellant essentially raised one ground of appeal since ground 2 is an alternative to ground 1. In ground 1, the appellant alleged that the court *a quo* relied only on one factor, being the reasonableness of the explanation tendered by him. In the alternative ground 2, he alleges that the court *a quo* failed to provide reasons for its findings on the appellant's prospects of success on appeal, finality to litigation and balance of convenience. The alternative ground presupposes that the court *a quo* considered the other mentioned requirements for condonation. All it failed to do was to provide reasons for its findings.

35. The two grounds are mutually destructive. The appellant cannot in one ground allege that the court *a quo* only considered one requirement, the explanation for the delay to the exclusion of other requirements for condonation and at the same time in the alternative ground allege that it also considered prospects of success, finality to litigation and balance of convenience but only failed to give reasons for its decision. In ground 3, which is broadly worded, the appellant contends that the court *a quo's* decision to dismiss the application for condonation was grossly unreasonable on account of the fact that the court did not apply its mind to all the circumstances of the case. This ground also

presupposes that the court considered the requisite requirements and gave reasons for its findings. However, the court in so doing, did not apply its mind to all the circumstances of the case. The ground is tied to the first and second grounds of appeal. The decision of the court *a quo* can only be said to be unreasonable on account of the issues raised in ground 1 or ground 2.

36. However, a reading of the judgment *a quo* shows that the court considered the central requirements. It considered that the delay of three months in bringing the application for condonation was inordinate and the explanation thereof was 'totally unsatisfactory'. It considered the question of prospects of success on appeal and held that the appellant's likelihood of success on appeal was slim having regard to the judgment by MANZUNZU J in which he dismissed the application for leave to appeal the default judgment. It further held that the balance of convenience weighed in the respondents' favour for the reason that there was need for finality in litigation.

37. The court *a quo* cannot in the circumstances be said to have considered only one requirement for condonation, neither can it be said not to have given reasons for its decision. What is important to note from the grounds of appeal is that the appellant impliedly acknowledges that the court *a quo* considered the requirements for the application before it and gave reasons for its findings. He, however, does not challenge the adequacy of the reasons given by the court *a quo*. The failure to do so, having acknowledged the existence of the reasons, is fatal to his appeal.

38. The determination of an application for condonation is a matter of a judicious exercise of the court's discretion. The appellant has not laid in the grounds of appeal a basis for impugning the exercise of that discretion. The appeal cannot therefore succeed.

39. Costs are in the discretion of the court. Whilst the respondents prayed for punitive costs, the Court finds no basis for awarding such costs. However, costs follow the cause. There is no basis for deviating from that rule.

**DISPOSITION**

40. The main issue before the court *a quo* was the rescission of judgment. However, in order to arrive at that issue, the court *a quo* had to consider the application for condonation. Once that application was dismissed, the judgment was final and definitive as the court could not thereafter determine the application for rescission of judgment. The judgment, being final and definitive, was appealable without leave.

41. On the merits of the appeal, all three grounds of appeal lack merit. The court *a quo* considered all the relevant requirements for an application for condonation. It provided reasons for its decision. The grounds of appeal do not in any way impugn the reasons for judgment.

42. In the result, it is ordered as follows:

    1. The preliminary point raised by the respondents be and is hereby dismissed.
    2. The appeal be and is hereby dismissed with costs.

**GWAUNZA DCJ** : I agree

**BHUNU JA** : I agree

*Lovemore Madhuku Lawyers*, appellant's legal practitioners

*Scanlen & Holderness*, respondents' legal practitioners