THE COMMISSIONER GENERAL OF POLICE
and
THE POLICE SERVICE COMMSSION
versus
INSPECTOR HLANGABEZA H 040553D

THE HIGH COURT OF ZIMBABWE
**DUBE-BANDA J**
HARARE 14 May 2025

**Application for rescission of Judgment**

*D Machingauta*, for the applicants
*Ms L Michael,* for the respondent

DUBE-BANDA J:

[1] This is an application for rescission of judgment. After hearing argument, I dismissed the application with costs on a legal practitioner and client scale. The applicants have requested written reasons for the decision. These are they.

[2] The facts of this matter are that the order sought to be rescinded was granted on 1 February 2023. The deponent to the founding affidavit in support of the application is Mr Machingauta. The deponent avers that he is counsel of the applicants, i.e., respondents in HC 2551/20 the main matter. He depones that he misdiarized the set down date in the main matter, in that the matter was set down for 1 February 2023, and instead he diarized 2 February 2023. He alleges that he became aware on 29 May 2023 that the respondent had obtained a default judgment. This application was filed on 12 June 2023. He contends that the default was not willful.

[3] The deponent also very briefly deals with the merits of the matter. He avers that the applicant was dismissed from the Police after being charged and convicted of criminal abuse of office, bribery and corruption. He was sentenced to twenty-four months imprisonment with six months suspended on the usual conditions of good behaviour. It is disputed that the respondent resigned from the Police Service but was dismissed. It was averred further that in the main matter the applicants have prospects of success on the merits.

[4] In the opposing affidavit the respondent raised three points *in limine*, *viz* that the founding affidavit is defective in that the deponent does not state for which applicant he is

deposing to the affidavit, and does not state the reasons the applicant did not depose to the affidavits themselves; that the applicants have dirty hands and must be non-suited because there is an extant order of court which they have not complied with; and that this application is fatally defective in that it was filed outside the timeline allowed by the rules of court.

[5] On the merits, it was argued that the applicants were served with a notice of set-down for 1 February 2023. It was contended that even if the deponent to the founding affidavit misdiarized the set down date, on 2 February he ought to have checked with the Registrar of the High Court the position of the matter. It was argued that the default was willful. It was further argued that the applicants have no prospects of success in the main matter. The respondent avers that he resigned from the Police Service and was not dismissed. He avers that a resignation is a unilateral act, therefore the applicants had no discretion but to accept his resignation. It was argued that they could not approve or disapprove a resignation, it must be accepted unconditionally. The respondent sought that this application be dismissed with costs on a legal practitioner and client scale.

[6] I now turn to the points *in limine*. The respondent contends that the application is fatally defective. In terms of r 27(1) of the High Court Rules, 2021, a party against whom judgment has been given in default, may make a court application not later than one month after he has had knowledge of the judgment for it to be set aside. The main matter was set down for 1 February 2023, and Mr *Machingauta* avers that he misdiarized the date, and recorded 2 February as the set down date. The founding affidavit is silent about what he did on 2 February 2023. In submissions in court, he contended that on 2 February he consulted the Assistant to the Judge before whom the matter was set down and was informed that the matter was dealt with on 1 February. He says he did not act because there was no written order.

[7] It is clear that Mr *Machingauta* had knowledge of the order sought to be rescinded on 2 February 2023. I say so because he got to know that the matter was heard and finalized on 1 February. The fact that he did not see a written court order is inconsequential. The applicants did not depose to affidavits to confirm the date they had knowledge of the order; it can therefore be inferred that they had knowledge of it on 2 February. The date Mr *Machingauta* got to know it. The applicants cannot escape such a finding. The rules require that such an application be filed not later than one month after the litigant has had knowledge of the order sought to be rescinded. Therefore, in terms of the rules this application must have been filed not later than 2 March 2023. However, it was filed on 12 June 2023, approximately more than three months outside the timeline allowed by the rules of court.

[8] A party who has not complied with the rules of court must first seek condonation. In *casu*, the applicants have not sought condonation for such an infraction. It is for these reasons that the point *in limine* that this application is defective in that it was filed outside the timeline allowed by the rules of court has merit and must succeed.

[9] The respondent sought costs on a punitive scale. It is trite that such costs are not for the mere asking. Something more underlies the practice of awarding costs as between attorney and client than the mere punishment of the losing party. The operative principle in determining whether to award punitive costs is whether the litigant's conduct is frivolous, vexatious or manifestly inappropriate. See *Kangai* v *Netone Cellular (Pvt) Ltd* 2020 (1) ZLR 660 (H). In *casu,* this is clearly one of those reckless and thoughtless applications flooding this court for no good measure. It must have been clear to the applicants that this application is out of the timeline allowed by the rules of court. No application for condonation was made. This is a frivolous and vexatious application which amounts to an abuse of the process of this court. It is for these reasons that the applicants deserve to be mulct with costs on a punitive scale

[10] For completeness, I need to allude to an issue that has caused me some trouble in this application. Everything about this matter seems to be turning on Mr *Machingauta.* He is the legal practitioner for the applicants in the main matter. He is the legal practitioner who was served with a notice of set down in the main matter. He is the legal practitioner who alleges that he misdiarized the set down date. He is the legal practitioner who did not attend court on 1 February 2023. He is the legal practitioner who deposed to the founding affidavit in this matter; in the founding affidavit he does not only confine himself to issues of procedure, he deals with the merits of the dispute. He is the legal practitioner who argued this case before this court.

[11] I need to underscore that generally, it is undesirable and, in some instances impermissible for a legal practitioner to depose to an affidavit on behalf of his/her client. This is particularly so in instances where the legal practitioner deposes to the merits of the matter. See *Baron v Baron And 2 others* (HB 92 of 2021; HC 1665 of 2020) [2021] ZWBHC 92 (3 June 2021). In *Mandaza t/a Induna Development Projects* v *Mzilikazi Investments (Pvt) Ltd* (HB 23 of 2007) [2007] ZWBHC 23 (7 February 2007). In addition, for a legal practitioner to argue a matter in which he deposed to a founding affidavit, especially on the merits presents challenges in that one cannot be a witness and counsel at the same time. I let these infractions to pass in this matter because of the decision I had taken to uphold the point *in limine* that this

application is fatally defective in that it was filed outside the timeline allowed by the rules of court.

[12] Because of the decision I have reached, it will serve no useful purpose to deal with the other preliminary points taken by the respondent. However, I note that my notes indicate that I dismissed this application. This was an error because I did not deal with the merits, and therefore could not dismiss it. I could only strike it off the roll. Dismissing the application was a patent error, and I therefore correct it in terms of r 29(1)(b) of the High Court Rules, 2021.

In the result, I order as follows:

i. The point *in limine* that this application is fatally defective in that it was filed outside the timeline allowed by the rules of court is upheld.

ii. The application is struck off the roll with costs on a legal practitioner and client scale.

**DUBE-BANDA J:…….**

*Civil Division of the Attorney-General's Office,* applicants' legal practitioners
*Mugiya Law Chambers,* respondent's legal practitioners