FABIO APONTE
versus
ANTOLINI LUIGI AND C.S.P.A (1)
and
FAENEX MINING ZIMBABWE (PRIVATE) LIMITED (2)
and
EMMANUEL NYANYIWA (3)
and
RUTENDO JOSEPHINE NYANYIWA (4)

HIGH COURT OF ZIMBABWE
DEMBURE J
HARARE: 28 August 2024 & 9 September 2024

Opposed Application

H. Muromba, for the applicant
G. R. J. Sithole, for the 1st respondent
No appearance for the 3rd and 4th respondents

DEMBURE J: This is a composite court application for condonation for the late filing of an application for rescission of default judgment and the rescission of default judgment in terms of rule 29(1) of the High Court Rules, 2021. The default judgment was handed down by this court on 18 July 2022. In that judgment, the court ordered the applicant (who was the second respondent therein) to deliver to the first respondent (the applicant therein) the outstanding 1, 020, 26 cubic metres of granite blocks, alternatively, pay the sum of US$446 322.31 being the total value of the 1, 020, 26 cubic metres of granite blocks together with interest at the prescribed rate and costs of suit. The applicant is now seeking an order as follows:

1. The application for condonation for non-compliance with rule 29(2) of the High Court Rules, 2021 and for the late filing of an application for rescission of default judgment be and is hereby granted.
2. The default judgment entered on 18 July 2022 under Case No. HC 8511/18 be and is hereby set aside.

3. The High Court Rules, 2021 shall apply in relation to the filing of the Appearance to Defend, Plea, Summary of Evidence and Bundle of Documents.
4. First respondent shall pay applicant's costs of suit on an attorney and client scale.

BACKGROUND FACTS

The applicant is an Italian citizen currently resident and domiciled in Italy. The first respondent is a company registered in Italy. It is common cause that in 2005 the first respondent approached the applicant and expressed interest in purchasing granite blocks once produced from new quarries in Zimbabwe. In furtherance of the agreement with the first respondent, the applicant and the third respondent incorporated a company in 2005 to venture into the business of granite extraction in Zimbabwe. The second respondent was incorporated as a result, with the applicant and the third respondent being the directors of the company. On 10 December 2009, a written agreement was signed between the first and second respondents to govern their granite business project. As directors of the second respondent, the applicant and third respondent signed the agreement on behalf of the second respondent.

Parties sharply differed on the operations of the granite extraction business during the relevant period. While the applicant averred that the business faced numerous financial and economic challenges leading to the closure of the mine and the termination of the agreement between the first and second respondents in 2010, the first respondent on the other hand contended that the applicant as a director carried on the business of the second respondent recklessly and with an intention to defraud the first respondent. The first respondent further averred that the agreement was never cancelled as it was valid for ten years.

It is common cause that the applicant resigned as a director of the second respondent on 15 December 2013. In the Form CR14 filed with the Registrar of Companies confirming that resignation and the appointment of the fourth respondent as his replacement in the board of directors of the second respondent, the applicant's residential or business address was recorded as 33 Middle Road, Morningside, Sandton, Johannesburg, South Africa. The applicant averred that he resigned from being director after he had relocated to Italy where he had been residing since then and never had anything to do with the second respondent or its business. He alleged that he would only thereafter get a letter of demand from the first respondent in 2016 for what it claimed

was for refund of money advanced to him while he was in South Africa. He averred that he denied this claim and received no further communication from the first respondent until 8 April 2024 when he received by registered post the legal process for the registration of the order of this court granted in favour of the first respondent.

On 3 September 2018, this court before CHIRAWU-MUGOMBA J granted an order attaching the applicant's 489.900 shares in the second respondent to confirm the jurisdiction of the court. The same order granted the first respondent leave to serve the summons and declaration for the restitution of the sum of US$446 322.31 against the applicant by publication of the process in any daily edition of the Citizen newspaper circulating in South Africa. The application granted was based on the facts presented by the first respondent that the applicant was a *peregrinus* and his last known address was in South Africa based on the Form CR14 filed when the applicant resigned. The said CR14 was attached to the application and has a South African address for the applicant.

Following the said court order for *edictal citation*, the first respondent had summons issued against the applicant and the second, third and fourth respondents. In the summons filed in case number HC 8511/18 the first respondent's (the plaintiff therein) claim was for the delivery of outstanding 1, 020, 36 cubic metres of granite blocks pursuant to an agreement entered into by the first and second respondents sometime in December 2009, alternatively, payment of US$446 322.31 being the total value of the outstanding 1, 020, 36 cubic metres of blocks paid to the second respondent for the purchase of the blocks.

The summons was duly served by way of publication in the Citizen newspaper in South Africa in terms of the court order. The applicant attached the proof of service to this application. The other defendants in the said suit filed their appearances to defend. The applicant did not enter an appearance to defend within the *dies induciae* and was automatically barred in terms of the rules of the court. This resulted in a chamber application being filed for default judgment against the applicant. The court before MUREMBA J granted default judgment on 18 July 2022 against the applicant in terms of the summons. This is the default judgment which the applicant seeks to be set aside in terms of rule 29(1) of the High Court Rules.

The applicant contended that the first respondent fraudulently misrepresented to the court that his last known address was in South Africa when it was fully aware that he had relocated to Italy and had previously in 2016 sent him a letter of demand using his Italian address. He argued that the default judgment was accordingly erroneously sought or granted and ought to be set aside. The applicant averred that he became aware of the default judgment on 8 April 2024 but failed to file the application for rescission within the time prescribed in rule 29(2) and accordingly launched this composite application for condonation for the non-compliance with the court rules and rescission of default judgment in terms of rule 29(1) of the High Court Rules, 2021. The application was opposed by the first respondent.

The first respondent abandoned all the points *in limine* which it had raised and the matter proceeded on the merits. While the parties made submissions on both applications, the court must first consider the application for condonation. The application for rescission of default judgment can only be considered if the applicant overcomes the first hurdle of condonation. In respect of the application for condonation, the parties made the following submissions.

APPLICANT'S SUBMISSIONS

Mr *Muromba*, for the applicant, submitted that the applicant has satisfied all the requirements for condonation. He stated that the applicant had given a reasonable explanation for the delay. The applicant demonstrated that he was reasonably unaware that the default judgment had been entered against him in Zimbabwe as he had been resident in Italy. He further argued that the first respondent had acted maliciously as the letter of demand at p.32 of the record written at its instance stated the applicant's address in Italy being Via San Massino 4, 80063 Piano Sorrento. He further submitted that he had maintained this address after he left Zimbabwe in 2010. The first respondent knew this address as they sought the registration of the default judgment in Italy and served him at the same address. The applicant was not aware of the default judgment as he was in Italy at the relevant time.

Counsel submitted that the applicant became aware of the default judgment on 8 April 2024. He did not sit on his laurels as he first had to contact the third respondent to obtain the case documents. He thereafter consulted his lawyers in Italy and after he got advice on 25 April 2024, he further engaged a colleague in South Africa who recommended his current legal practitioners.

Counsel referred the court to the full explanation in the founding affidavit and further argued that the extent of the delay was not inordinate.

On the prospects of success, Mr *Muromba* submitted that the applicant raised four possible defences to the summons by the first respondent. He argued, firstly, that the cause of action had prescribed as the summons was issued on 18 September 2018 when the agreement had been terminated in 2010. Secondly, the dispute ought to have been taken to arbitration in terms of the arbitration clause in the parties' agreement and the arbitration clause ousted the court's jurisdiction on the matter. Thirdly, the first respondent had not made a case for personal liability of the applicant as he was a director of the second respondent. Finally, the first respondent did not aver how it is entitled to the amounts it is seeking. Counsel argued that the prospects of success are reasonable on the said basis.

Mr *Muromba* further submitted that the summons against the applicant was filed on 18 September 2018 yet the first respondent is still to obtain judgment as against the other respondents. Counsel argued that the balance of convenience favours the granting of the application, that the applicant had been in Italy and the first respondent maliciously applied for default judgment. The applicant should be allowed to deal with the application for rescission of default judgment. Counsel finally cited the decision in *Tapvice Enterprises (Pvt) Ltd v Tetrad Investment Bank* HH 230/20 where it was held that the address for service provided for a party in terms of the rules continues to be his address for services for the purpose of the pleadings he had instituted unless and until he furnishes another address for service. I, however, failed to find the relevance of this case or as one which can assist the applicant's case. He urged the court to grant the application for condonation.

FIRST RESPONDENT'S SUBMISSIONS

Mr *Sithole*, for the first respondent, submitted that there was an inordinate delay in seeking condonation. This was because when the applicant said he became aware of the default judgment he said he approached his lawyers in Italy for legal advice but it was his word only as he failed to place evidence before the court to show that he was dealing with the lawyers to account for the delay. The delay was from March to 23 May 2023 the time when the application was filed and for those two months, he simply made bald allegations that he got advice and assistance in South Africa. He argued that the applicant made bald statements.

Counsel submitted that the applicant must be candid with the court. The applicant, he submitted, deliberately gave a scanty explanation for the delay. When dealing with lawyers we should expect affidavits or documents on the engagements he made with the lawyers. Mr *Sithole* further submitted that the explanation was unreasonable and the applicant's case cannot be salvaged by the court looking into the prospects of success. He argued that in the absence of supporting evidence from the lawyers, the application was manifestly unreasonable and the court should dismiss the application without considering the prospects of success. Counsel cited the case of *Friendship v Cargo Carriers Ltd & Anor* SC 1/13 as authority that the absence of a satisfactory explanation for the delay makes it convenient for the court to dismiss the application no matter the prospects of success. I, however, observed that Mr *Sithole* oversimplified what the court stated in that decision.

On the prospects of success, Mr *Sithole* submitted that since we are dealing with an application for rescission of judgment under rule 29(1) the prospects of success to be looked at is whether the default judgment was erroneously sought or granted. This, he argued, must be looked at before we can talk about the defence on the merits of the main matter. The applicant did not address the prospects of success of the application for rescission under rule 29(1). There are no reasonable prospects of success when the applicant is not impugning the first order granted by CHIRAWU-MUGOMBA J.

Further, counsel submitted that the court must look at the fact that the proceedings in question were instituted against a company incorporated in Zimbabwe and that the applicant having been its director gave an address for South Africa as his last known address in the CR 14. That address is where he was residing when he was running the company. There was no fraudulent misrepresentation. The application for service in South Africa was granted by the court and acting in terms of that court order and in pursuing the director at his last known address the summons was published in South Africa and a default judgment was granted. He argued that the applicant is the one who gave the South African address indicated in the CR 14 for the second respondent. Further, in the face of those facts which are common cause, there was no error.

Concerning the merits of the main claim, Mr *Sithole* submitted that the applicant's defence has no reasonable prospects of success. It was submitted that the contract was not terminated in 2010 as alleged as it was supposed to run for ten years. There was no notice of termination issued in terms of the agreement and the defence of prescription cannot succeed. On arbitration, he argued that the existence of an arbitration clause does not oust the jurisdiction of the High Court. There might be no dispute to necessitate arbitration. The defence is only a dilatory plea and only a process of determining a matter. He further argued that the issue of personal liability is based on the cause founded in terms of the former s 318 of the old Companies Act, now s 197 of the COBE Act. It was submitted that the applicant admits that at the time he was running the affairs of the company he had the blocks and that advance payments were made but there was no delivery. The issue of the quantum was not challenged as there was a failure to defend the matter.

Finally, Mr *Sithole* submitted that the prospects of success are nil. There is an extant order by CHIRAWU-MUGOMBA J and we cannot ignore what was stated in the CR14. The first respondent argued that the application failed to meet the requirements for condonation and must be dismissed with costs on a punitive scale.

THE LAW

It is a settled principle of the law that an applicant must show that he has a good cause for the application for condonation for non-compliance with the rules to be granted. To succeed in an application for condonation, it required at law that the applicant must *inter alia*, give a reasonable explanation for the delay and the non-compliance with the rules of the court and show that he or she has good prospects of success – particularly in the present application, on the application for rescission of judgment in terms of rule 29(1). GUBBAY CJ in *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S) held that in an application for condonation the court must consider:

> "(a) That the delay involved was not inordinate, having regard to the circumstances of the case;
> (b) That there is a reasonable explanation for the delay;
> (c) That the prospects of success should the application be granted are good; and
> (d) The possible prejudice to the other party should the application be granted."

See also *Friendship v Cargo Carriers Ltd & Anor supra* at p.4.

It is trite that the factors to be considered in an application for condonation are not individually decisive but are considered cumulatively. This was emphasised in *Gessen v Chigariro* SC 80/20 at p. 7 where it was held that:

> "It is also settled that these factors have to be considered in conjunction with one another as they tend to be complimentary. While it is true that consideration of the factors generally boils down to having regard to the explanation given by the applicant for condonation for delay and the prospects of success on appeal, the lack of a satisfactory explanation for the delay may be complemented by good prospects of success on appeal."

See also *Kodzwa v Secretary for Health & Anor* 1999 (1) ZLR 313 (S); *Director of Civil Aviation v Hall* 1990 (2) ZLR 354 (SC) at 357.

In terms of rule 29(2) of the High Court Rules, 2021 the applicant must file an application for rescission of an order or judgment made under rule 29(1) "within one month after becoming aware of the existence of the order or judgment". Where a party fails to comply with the court rules, he is required to seek condonation and explain adequately for his failure to comply with the court rules. Condonation is not there for the asking. This position was confirmed in *Unki Mines (Pvt) Ltd v DOHNE Construction (Pvt) Ltd* SC 18/23 at p. 5 & *Zimslate Quartize (Pvt) Ltd & Ors v Central African Building Society,* SC 34/17 at p. 7.

APPLICATION OF THE LAW TO THE FACTS

ISSUES FOR DETERMINATION

1. The extent of the delay.
2. Whether or not there is reasonable explanation for the non-compliance with the rules of court.
3. Whether or not there are any prospects of success on the application for rescission of default judgment in terms of rule 29(1) of the High Court Rules, 2021.

These issues are duly considered and resolved as follows:

EXTENT OF THE DELAY

The applicant seeks condonation for the late filing of an application for rescission of a default judgment that was granted on 18 July 2022. The application for rescission of the default

judgment on the basis that it was erroneously sought or granted is required to be filed within one month of the applicant becoming aware of the order or judgment in terms of rule 29(2). The applicant averred that he became aware of the order or judgment on 8 April 2023. The first respondent disputed this fact but it simply speculated in para. 15.1.3. of its opposing affidavit that it was highly improbable for him not to have been informed by the third respondent. In his submissions, Mr *Sithole* related to the delay being two months reckoned from March to May 2023 as inordinate. In my view, this submission was a concession by the first respondent's counsel that the applicant could not have been aware of the default judgment earlier and it gave credence to the date the applicant averred he became aware of the judgment.

Once it is accepted that the applicant became aware of the order or judgment on 8 April 2023, he had up to 8 May 2023 in terms of the court rules to file the application for rescission of default judgment. He, however, failed to do so. The present application was filed on 23 May 2023. The delay to seek condonation can only be reckoned from 8 May 2023 to 23 May 2023 when the present application was eventually filed. The delay to seek condonation was for about 14 days. The law requires an acceptable explanation not just for the submission of the application for rescission but also in seeking condonation. This position was confirmed in *Makwabarara* v *City of Harare* SC 139/20 at p.6.

Whether the delay can be considered inordinate depends on the circumstances of each case. In para. 25.1.2. of the first respondent's opposing affidavit it is stated that the delay was more than two years and, therefore, inordinate. It is clear that this was calculated from the date of the order or judgment but there was no evidence to show that the applicant was aware of the order or judgment before 8 April 2023. It is, however, not the date the order or judgment was granted which is essential under subrule 2 of rule 29 but the date the applicant became aware of the order or judgment. Mr *Sithole* seemed to have abandoned the stance taken in the opposing affidavit when he reckoned the delay from March to May 2023 and said it was two months and, therefore, inordinate. This view is erroneous. The correct position is that the delay is looked at from the time the application for rescission was due to be filed and the delay in seeking condonation. As stated above, the delay to seek condonation and rescission, as correctly submitted by the applicant, was

for only 14 days (or two calendar weeks). Given the circumstances, it is my finding that the length of the delay is not inordinate.

REASONABLENESS OF EXPLANATION

It is trite that the applicant is required to provide a reasonable or satisfactory explanation for the delay in seeking condonation and filing the application for rescission of default judgment. In *Zimslate Quartize (Pvt) Ltd & Ors v Central African Building Society*, SC 34/17 at p. 7 ZIYAMBI JA remarked that;

> "An applicant, who has infringed the rules of the court before which he appears, must apply for condonation and in that application 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 disservice as he takes the risk of having his application dismissed."

The applicant explained that when he received the legal process for the registration of the order of the High Court of Zimbabwe on 8 April 2023 he was in Italy. There was no evidence to the contrary on this fact. He explained that he immediately contacted the third respondent to obtain information and documents about the case and that he eventually got the necessary information of what had transpired and the case documents around 19 April 2023. He had to seek legal advice from his lawyers in Italy and got advice on 25 April 2023. He further explained that he eventually had a meeting with his current legal practitioners on 13 May 2023. This application was then filed on 23 May 2023.

While on the other hand, Mr *Sithole* submitted that the absence of supporting affidavits or documents confirming the applicant's engagements with the unnamed lawyers was fatal to his case or made his explanation scanty and manifestly unreasonable I am of a different view. The explanation looked at as a whole show that the applicant did not sit on his laurels. It cannot, therefore, be said that he did nothing. He has been candid with the court and revealed all the steps he took which were linked with dates as well. He may not have named the lawyers in Italy or his friend in South Africa or attached the lawyers' affidavit but that does not take away the clear efforts he made to meet the deadline which he missed by about two weeks. An affidavit from the lawyers was not necessarily a requirement in the circumstances of this application. It is trite that an affidavit

by a lawyer taking responsibility is required where the lawyer is blamed for the failure to abide by the rules. See *Lunat v Patel & Anor* SC 142/21 at p.6. This is not the case in this matter as the applicant is not blaming the lawyers for the delay. When he consulted his present legal practitioners, it was on 13 May 2023 after a delay of about 5 days.

Mr *Sithole* also referred me to the decision in *Friendship v Cargo Carriers supra* where the court made these remarks:

> "In any event, it has been held that in cases of flagrant breaches of the Rules, especially where there is no acceptable explanation thereof the indulgence of condonation may be refused whatever the merits of the appeal are. This applies even where the blame lies solely with the attorney…"

In my view, the principle of law set out in this case is not applicable in the present matter. To be flagrant the behaviour must be found to be extremely bad and shocking or the violation must border on recklessness or repeated failure to make reasonable efforts to ensure compliance with the rules. It cannot be said that the applicant flagrantly breached the rules. His case is different. He indeed failed to comply with the rules and missed the deadline required in rule 29(2) by only 14 days. His explanation is acceptable. In that context and from his explanation for the delay in filing the application and seeking condonation it cannot be said the breach was flagrant. His explanations show the efforts of a serious litigant who was out to rectify a breach of the rules and protect his interests. This accordingly is not a matter where the merits of the application should not be looked at. This court finds the explanation for the delay to be reasonable or satisfactory.

PROSPECTS OF SUCCESS

In *Mlambo v Arosume Development (Pvt) Ltd & Ors* SC 35/23 at p. 10 MUSAKWA JA explained what is meant by prospects of success as follows:

> "Prospects of success refer to the question of whether the applicants have an arguable case on appeal or whether the case cannot be categorised as hopeless.
> In the case of *Essop v S,* [2016] ZASCA 114, the Court in defining prospects of success held that;
> "What the test for reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

The applicant is required to show good prospects of success as the existence of a reasonable explanation for the delay or non-compliance is not on its own decisive. In the absence of good prospects of success, the application cannot succeed as it will simply achieve no purpose for the court to give the indulgence on the road to nowhere. The applicant must demonstrate that the application for rescission premised on rule 29(1) is not hopeless or is arguable. I wish to point out that there is a difference between an application for rescission under rule 29(1) and an application for rescission of default judgment in terms of rule 27(1). The applicant in his papers appeared at times to be confusing the requirements for the two applications. With an application for rescission of default judgment under rule 27(1) the applicant must have prospects of success in respect of its defence on the merits of the claim in the summons. But the hurdle the applicant must overcome for an application for rescission of default judgment in terms of rule 29(1) is simply whether there are good prospects of success in the order or judgment being viewed as erroneously sought or granted. Once it is held that there was an error that is the end of the enquiry. The judgment must be set aside without further ado. The issue of the *bona fides* of the applicant's defence on the merits of the main claim is irrelevant. This position of the law was confirmed by the court in *Muvungani v Newhan Financial Services (Pvt) Ltd & Ors HH* 57/17 at p.4 which is the decision of the court relating to the similarly worded provisions of the old rule 449(1) now rule 29(1) of the High Court Rules. The court held that:

> "The requirements for setting aside a default judgment in terms of r 449 are settled.
> The applicant must satisfy
> 1. That the default judgment must have been erroneously sought or erroneously granted.
> 2. Such judgment must have been granted in the absence of the applicant and
> 3. Applicant must be affected by the judgment.
>
> See *Mutebwa* v *Mutebwa and Another* 2001 (2) SA 193. *Munyimi* v *Tauro* 2013 (2) ZLR 291 (S).
> A judgment is said to have been erroneously granted when a court commits an error. In the case of *Bakoven Ltd* v *GJ Howes (Pvt) Ltd* 1990 (2) SA 446 at 471 E to H the court said;
> "An order or judgment is erroneously granted when the court commits an error in the sense of a mistake in a matter of law appearing on the proceedings of a court of record. (The Shorter Oxford Dictionary). It follows that a court in deciding whether a judgment was 'erroneously granted' is, like a Court of Appeal confined to the record of proceedings. In contradistinction to relief in terms of rule 312 (b) or under common law, applicant held not show 'good cause' in the sense of an explanation for his default and a bona fide defence (*Hardroad (Pvt) Ltd* v *Oribi Motors (Pvt) Ltd* (*supra*) at 578 F-G, De Wet (2) at 777 F-G *Tshabalala and Another* v *Pierre* 1979 (4) SA 27 (T) at 30 C-D. Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission." (My emphasis).

The same position was buttressed by the Supreme Court in *Munyimi v Tauro* SC 41/13 at p. 5 where GARWE JA (as he then was) held that:

> "Further it is also established that once a court holds that a judgment or order was erroneously granted in the absence of a party affected, it may correct, rescind or vary such without further inquiry. There is no requirement that an applicant seeking relief under r 449 must show "good cause" – *Grantually (Pvt) Ltd & Anor v UDC Ltd*, supra at p 365, *Banda v Pitluk* 1993 (2) ZLR 60 (H), 64 F-H; *Mutebwa v Mutebwa & Anor* 2001 (2) SA, 193, 199 I-J and 200 A-B." (My emphasis)

In light of the above legal position, the applicant must satisfy the court that he has good prospects of success on the application for rescission under rule 29(1) which clearly does not look at the merits of the defence but whether or not there was an error. If there was no error, the application has no life. There will not be need to look at the defence of the applicant on the merits of the claim in the summons. The applicant clearly was misdirected as in relation to his application for condonation he submitted the defences he has on the merits of the claim as his submissions on the prospects of success of the application for rescission. The prospects of success in an application under rule 29(1) simply relate to whether or not it can be argued that there was an error. Mr *Sithole* correctly submitted that the court should simply look at the prospects of the application for rescission under rule 29(1) and not the prospects of success on the merits of the main claim itself. He also correctly observed that the applicant did not canvass this critical aspect of the application both in his founding affidavit and the submissions from his counsel. It is trite that failure to canvas the prospects of success in an application for condonation is fatal. In *Unki Mines (Pvt) Ltd v DOHNE Construction supra* at pp. 8 – 9 the court held that:

> "It is clear from the record that the applicant did not canvass the prospects of success. Failure to canvass prospects of success in a founding affidavit is fatal to an application of this nature as correctly submitted by Mr *Mpofu*. It is trite law that an application stands or falls on the averments made in the founding affidavit…"

At p. 8 the court concluded that:

> "In *casu*, the contention made by the respondent in relation to failure to address prospects of success in the founding affidavit has merit. The applicant ought to have explained in detail why it believes its intended appeal has prospects of success rather than merely stating so. The applicant has an obligation to satisfy the Court that once an application for condonation is granted, it has prospects of succeeding on the merits of the matter. These prospects need to be explained in depth in order to convince the Court to grant the application."

The applicant having submitted what he believed were his prospects of success in the main matter, took a wrong turn to a road to nowhere. He went off on a tangent to a point of no return. He looked at the irrelevant prospects of success of his defence on the merits of the main matter. Those are not the prospects of success of the application for rescission of default judgment in terms of rule 29(1). He failed to canvass the prospects of success on the merits of the application for rescission under rule 29(1), which is fatal to his application. Given the decision in *Unki Mine*s *supra,* this should be the end of the enquiry and the application must accordingly be dismissed.

In any event, there are no reasonable prospects of success on the application for rescission in terms of rule 29(1). The default judgment entered by MUREMBA J cannot under any stretch of imagination be said to have been erroneously sought or granted in the circumstances. While the applicant alleged that the first respondent fraudulently misrepresented his address for service when it obtained the court order handed down by CHIRAWU-MUGOMBA J those facts were irrelevant to the application for default judgment since there was an extant court order. It is a settled principle of the law that a court order remains valid and binding and has the force of law unless varied or set aside – See *Chiwenga* v *Chiwenga* SC 2/14; *Mauritius & Anor* v *Versapak Holdings (Pvt) Ltd* SC 2/22. This means that the court order issued on 3 September 2018 for the service to be effected in South Africa by publication in the Citizen newspaper was valid and binding when in July 2022 MUREMBA J considered the application for default judgment and issued the order in question.

When the fact that there was an extant court order for *edictal citation* which led to the application for default judgment and the order was put to the applicant's counsel, he submitted that the order was a nullity and nothing could flow from a nullity citing *McFoy v United Africa Co. Ltd* [1961] 3 All ER 1169 (PC) at 1171. I find that submission to be erroneous as the law is clear that an order of court remains binding and has the force of law unless varied or set aside. The order by CHIRAWU-MUGOMBA J was never varied or set aside. The facts relating to how the order for publication was obtained were not part of the record before MUREMBA J when the court entered the default judgment. What the court in the application for default judgment had to satisfy itself was whether there was proper service of summons in terms of an existing court order and whether the defendant failed to enter an appearance to defend within the *dies induciae*. In this case, it is common cause that the proof of publication was filed of record and was even attached to the

present application. It is also common cause that the applicant did not file an appearance to defend and was barred. With those issues properly resolved, there was no error when the default judgment was granted. No new facts can be placed before the court which have the effect of impugning an existing court order without having taken steps to have it set aside or varied and when that order is still extant. The decision in *Grantuilly (Pvt) Ltd & Anor* v *UDC Ltd* 2000 (1) ZLR 361 (S) cited by Mr *Muromba* does not assist the applicant's cause.

In *Wector Enterprises (Pvt) Ltd v Luxor Services (Pvt) Ltd* SC 31/17 at p. 7 the court emphasised what can be errors and held that:

> "Rule 449 has been invoked, among other instances, where there is a clerical error made by the Court or Judge; where entry of appearance had been entered but was not in the file at the time that default judgment was entered; where, at the time of issue of the judgment, the Judge was unaware of a relevant fact namely a clause in an acknowledgement of debt. Although for other reasons, mainly the inordinate delay in making the application, the court in *Grantuilly* declined to grant the remedy sought, it was of the view that had the clause been brought to the attention of the Judge, the default judgment would not have been granted. Where applicable, the Rule provides an expeditious way of correcting judgments obviously made in error. It envisages the party in whose absence the judgment was granted being able to place before the Court the fact or facts which were not before the Court granting the judgment. There is no need for the applicant to establish good and sufficient cause as required by Rule 63. However, in each case, the error or mistake relied upon must be proved and in each case the court exercises a discretion."

In this case, the applicant failed to show that there was an error when the default judgment was granted. No error would arise since there was an extant court order authorising service of the summons upon the applicant by way of publication in a South African newspaper. The court cannot be said to have erred when the order by CHIRAWU-MUGOMBA J which authorised the service of the summons as effected had not been varied or set aside. The court order was binding on the court determining the application for default judgment. The merits of the application for rescission in terms of rule 29(1) clearly show that the applicant's prospects do not exist completely.

CONCLUSION

This is a matter in my view where, as correctly pointed out by Mr *Sithole*, the applicant should have sought condonation and proceeded in terms of rule 27. The emphasis he placed on his defence on the merits of the claim also shows that the applicant mistakenly thought his main application was founded on rule 27(1). When questioned at the beginning of the hearing on the rule upon which the main application was premised, Mr *Muromba* initially attempted to claim that

he was proceeding on both rules 27(1) and 29(1) but he later quickly retracted this position and insisted that the application for which he seeks condonation is for rescission of default judgment in terms of rule 29(1). In any event, the applicant's founding affidavit confirms that the condonation was sought for him to apply for rescission of default judgment under rule 29(1). His application stands or falls on that founding affidavit. Since I have found that there was no error or that it has not been shown that the order was erroneously sought or granted, it was not necessary for me to even consider the applicant's defence on the main claim. That issue does not arise in an application under rule 29(1) where the applicant is not required to show good cause for the rescission of the default judgment. Without any prospects of success on the application for rescission under rule 29(1), this application for condonation ought to fail. The application is devoid of any merit. The court cannot, therefore, consider the application for rescission of default judgment.

COSTS

The first respondent sought costs on a legal practitioner and client scale on the basis that this application was ill-conceived. I agree with Mr *Sithole* that the applicant ought to have proceeded in terms of rule 27. This application for condonation to seek rescission under rule 29(1) should not have been filed as presently premised. Mr *Muromba*, in his reply, did not make any submissions on the appropriate order for costs once the court reject the application. The question is whether the applicant deserves to be punished for his behaviour or conduct in instituting these proceedings. His conduct must be shown to have amounted to an abuse of court process in bringing unwarranted proceedings thereby putting the other party out of pocket. See *Mutunhu v Crest Poultry Group (Pvt) Ltd*. As a litigant, the applicant suffers the consequences of the approach taken by his legal practitioners who pushed on an unwarranted matter where it should have been apparent this was a journey to nowhere. The condonation sought to seek rescission of default judgment under rule 29(1) in light of the alleged facts relating to an order handed down by CHIRAWU-MUGOMBA J which was still extant, was an abuse of court process. The application was a complete waste of the court's time. I agree that costs on a punitive scale are appropriate in the circumstances.

DISPOSITION

In the result, it is hereby ordered that:

1. The application be and is hereby dismissed with costs on a legal practitioner and client.

DEMBURE J: …….

Kantor & Immerman, applicant's legal practitioners
Sibanda & Partners, first respondent's legal practitioners.