RIGHT OF ACCESS TO SUPERIOR COURT IN THE CONTEXT OF AN APPLICATION FOR RESCISSION OF A DEFAULT JUDGMENT

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ABSTRACT

Once a default judgment has been granted, the judgment creditor usually proceeds to execute the judgment. In some instances, the defaulting party then applies for rescission of the default judgment. In Zimbabwe, the practice has been that the application for rescission of a default judgment does not suspend the operation of a judgment being sought to be rescinded. The judgment creditor can proceed to execute the same, even pending the judgment. The challenge with this approach is that this effectively increases the cost of litigation in that the defaulting party is then required to apply for a stay of execution pending the rescission of a default judgment. A judge then has the power to decide whether the matter is urgent or not. The fate of the defaulting party then is in the hands of a judge. It is argued in this paper that the correct approach is that the application for rescission must suspend the execution of judgment. Secondly, the rescission of a default judgment must be further heard as a chamber application and allocated a date of hearing similar to an urgent chamber application. This approach would ensure that the defaulting party's right of access to the court is guaranteed while the litigation costs are substantially reduced.

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1. INTRODUCTION

This paper seeks to examine the right of access to court in the context of an application for the rescission of a default judgment. This paper examines a default judgment is rescinded and the requirements which must be met for one to be granted rescission of a default judgment. This paper also examines what happens when an application for rescission of default judgment is pending. It extends to compare the requirements that must be met in other jurisdictions, namely South Africa, Botswana, Namibia, Lesotho and Zambia, for a default judgment to be rescinded and further also what happens when the application for rescission is pending in those jurisdictions. The paper ends by proposing reform to the rules governing the rescission of a default judgment in Zimbabwe.

2. DEFINING RESCISSION OF A DEFAULT JUDGMENT

Any application for rescission of a default judgment may be made in the Magistrates Court[353], the Specialized Courts of Zimbabwe, High Court[354], the Supreme Court, and the Constitutional Court of Zimbabwe. A litigant affected by a default judgment may apply for rescission within the prescribed times. The court may grant the default or refuse to grant the same.

3. RESCISSION OF DEFAULT JUDGMENTS

3.1 Rescission of a Default Judgment in the Magistrates Court of Zimbabwe

In the Magistrates Court, the procedure for application for rescission of default judgment is found in Order 30 of the Magistrates Court Rules[355] as read with section 39 of the

353 Order 30 Rule 1 of the Magistrates Court Rules,2019 of Zimbabwe

354 Rule 29 of the High Court Rules, 2021 of Zimbabwe

355 Order 30 Rule 1 of the Magistrates Court (Civil) Rules, 2019

Magistrates Court Act[356]. In terms of Order 30, Rule 1 provides that a party whom a default judgment has been given against may no later than one month after knowing the judgment applies to the court to have the judgment rescinded.[357] The application for rescission of the default judgment is supposed to be on affidavit stating why the applicant failed to appear or enter a plea and the grounds of defence to the action or proceeding in which the judgment was given or to why the applicant opposes the judgment. [358] At the hearing of the application, the court must be satisfied that the applicant was not in willful default and that there is a good prospect of success for the applicant to reverse the judgment.[359] The court, once satisfied, may rescind or vary the judgment in question and give such directions and extensions of time as necessary for the further conduct of the action or application.[360] The court may also make such an order as it thinks just regarding amounts of money paid into court by the applicant.[361] In the event the application for rescission of default judgment fails, the default judgment will become a final judgment. [362]

The procedure set in Order 30 Rule 1 of the Magistrates Court (Civil) Rules, 2019, applies to the section 39 of the Magistrates Court Act. Section 39 of the Magistrates Court Act allows the court to rescind, vary or correct a judgment granted in the absence of the other party, obtained through fraud or a mistake common to all parties or correct an error

356 Section 39 of the Magistrates Court Act [Chapter 7:10]

357 Order 30, Rule 1, Magistrates Court (Civil)Rules, 2018.

358 Order 30, Rule 1(2) of the Magistrates Court (Civil) Rules, 2018.

359 Order 30, Rule 2(1) of the Magistrates Court (Civil) Rules, 2018.

360 *Ibid* .

361 Order 30, Rule 2(1) (c) (d) of the Magistrates Court (Civil) Rules, 2018.

362 Order 30, Rule 3 of the Magistrates Court (Civil) Rules, 2018.

in any judgment in respect to which no appeal is pending.[363] These powers can only be exercised after notice by the applicant to the other party, and any exercise shall be subject to appeal. Where an application to rescind vary or correct has been made, the court may direct either that the judgment shall be carried into execution or that execution shall be suspended pending the decision upon the application and the direction shall be made upon such terms if any, as the court may determine as to security for the due performance of any judgment which may be given upon the application.[364] Order 30 Rule 4 of the Magistrates Court Act states that any person whether the party to proceedings or not, who is affected by any judgment of the court may through an application made within seven days after he or she knows of the judgment applies for the judgment to be rescinded, varied or corrected.[365]

3.2 Rescission of default judgment in the High Court of Zimbabwe

In the High Court, the procedure for the application for rescission of default judgment is found in rules 28,[366] and 29 of the High Court Rules.[367] Rule 28 outlines the procedure where both parties agree that the default judgment must be rescinded. The parties will file a consent to the rescission of the judgment, and the Registrar will forthwith lay papers before a judge who may set aside the judgment and make such order in accordance with the consent as may be appropriate.[368] In the consent filed, the parties may agree on the filing of further affidavits or further pleadings,

363 Section 39 of the Magistrates Court (Civil) Rules, 2018.

364 Order 30 Rule 1 of the Magistrates Court Rules, 2019 of Zimbabwe

365 Order 30 Rule 4 of the Magistrates Court Rules 2019, Zimbabwe

366 Rule 28 of the High Court Rules, 2021 of Zimbabwe

367 Rule 29 of the High Court Rules, 2021, of Zimbabwe

368 Rule 28 (1) of the High Court Rules, 2021 of Zimbabwe

the time within which anything is to be done, payment of costs and any other matter the parties will consider necessary.[369] Rule 29 in relation to rescission of default judgments states that the court has the power to correct, vary or rescind the judgment.[370] Any party required to get this relief may make a court application on notice to all parties whose interests may be affected by any variation sought within one month after becoming aware of the existence of the order or judgment.[371] The court or judge shall not make an order of rescission of default judgment unless satisfied that all interested parties have the notice of the order proposed.

3.3 Rescission of default judgment in Magistrates Court of South Africa

The procedure for rescission of default judgment in South Africa is almost identical to that of Zimbabwe both in the Magistrates Court and in the High Court. Section 36 of the Magistrates Court Act[372] deals with the procedure for the rescission of default judgments in South Africa. The framers of section 39 of the Zimbabwean Magistrates Act adopted section 36 of the South African Magistrates Court Act.[373] The South African Magistrates Court Act states that any affected person can launch an application in the Magistrates Court for rescission if the judgment was given in his or her absence.[374] This provision is also read with rule 49(7) of the Magistrates Court Rules, which requires such applications must be brought on notice to all parties; and supported by affidavit/s setting out the grounds on which the applicant

369 Rule 28 (2) (c) and (d) of the High Court Rules, 2021 of Zimbabwe

370 Rule 29 (1) of the High Court Rules, 2021 of Zimbabwe

371 Rule 29 (2) of the High Court Rules, 2021 of Zimbabwe

372 Magistrate Court Act 32 of 1944 (South Africa)

373 Section 39 of the Magistrates Court Act of Zimbabwe Chapter 7.10

374 Section 36 of the Magistrate Court Act 32 of 1944 (South Africa)

seeks rescission of the default judgment. Section 49(1) of the South African Magistrates Court Act states that a party wishing to rescind a default judgment has twenty court days from the date on which the judgment came to his knowledge to serve and file the application for rescission.[375] Notice of the application must be given to all parties to the proceedings. He or she is required to show good cause why the judgment should be rescinded, or the court must be satisfied that there is good reason to do so. According to rule 32, If the applicant fails to show good reason why the default judgment should be rescinded, the magistrate may grant rescission *mero motu* in the interests of justice if exceptional circumstances warrant it.[376] In relation to good cause shown in rule 31, the party against whom the default judgment is given, in his affidavit, must explain the reasons for his default and show the existence of a prima facie defence to satisfy the court that his default was not willful. The party must show the reasons for his or her default and also show good reason why the default judgment must be rescinded in their affidavit. [377]

Rule 49(5) outlines the procedure where both parties agree to rescind the judgment. Notice of the application must be given to all interested parties, and there must be written proof of the plaintiff (the party whom default judgment was in favour of) showing that he or she consents to the rescission of the default judgment.[378]

375 Section 49(1)

376 Section 32 of the Magistrates Court Act 32 of 1944 (South Africa)

377 *Leo Manufacturing CC v Robor Industrial (Pyt) t/a Robor Stewarts & Lloyds 2007* (2) SA 1 (SCA) At 4E

378 Rule 49(5) of the Magistrate Court Act 32 of 1944 (South Africa)

3.4 Rescission of default judgment in the High Court of South Africa

In the High Court of South Africa, a default judgment can be rescinded in two ways. These are through rule the South African High Court Rules[379] and through the common law route. The common law route is derived from the common law doctrine that the High Court has inherent jurisdiction and can regulate its processes. An application for rescission of default judgment using the common law route has to be brought within a reasonable time.[380] The High Court has inherent jurisdiction to rescind a default judgment provided that sufficient or good cause is shown.[381] In *Chetty v Law Society, Transvaal,'* the court held that, although the term "sufficient cause" or "good cause" defies precise or comprehensive definition, two essential elements of sufficient cause for rescission of a judgment by default are that; the applicant for rescission present a reasonable and acceptable explanation for his or her initial default; on the merits, the applicant has a *bona fide* defence which *prima facie* carries some prospect of success. The court can grant an order rescinding a default judgment, but in terms of precedent, there may be no room for exercising that discretion in favour of an applicant who has been in wilful default[382].

Herbstein & Van Winsen[383] argues that, although wilful default is not an independent or absolute requirement of the common law (or of High Court Rule 31(2)(b), an inquiry into sufficient cause clearly depends on whether the

379 Uniform Rules of Court Government Notice R48 of 12 January 1965 as amended

380 Rule 31 (1) Uniform Rules of Court ,2009 of South Africa

381 Rule 31 (2a) Uniform Rules of Court ,2009 of South Africa

382 C. Theophilus, C M van Heerden & A Boraine Fundamental *Principles of Civil Procedure* 3 ed (2015)

383 J. Herbstein, C. De Villiers, *The civil practice of the High Court and Supreme Court of Appeal of South Africa* 5 ed (2009) Cape Town: Juta

applicant acted in wilful disregard of the court rules and time limits (i.e. wilfully neglected or was deliberately in default of them).Also the aggrieved party at common law has to show sufficient cause why he defaulted appearance if default judgment was given for that reason. Rule 42(1) states that judgment that is given in the absence of the other party can be rescinded by the High Court. This is rescission of general matters including that of rescission of default judgments. However, rule 31(2)(b) read with rule 35(1)(d) are used to rescind default judgments. Rescission in terms of rule 31(2)(b) may only take place in respect of default judgments granted in terms of rule 31(2)(a). These are default judgments granted in respect of claims that are 'not for a debt or liquidated demand' (in other words an unliquidated claim) and where default judgment was granted because the defendant failed to deliver an appearance to defend or enter a plea.

If a party is dissatisfied with the judgment or directions of the registrar, however, he may, within twenty days after he has acquired knowledge of the judgment or direction, set the matter down for reconsideration by the court in terms of rule 31(5)(*d*). According to rule 31(2)(b), a defendant may within 20 days after he knows such judgment default judgment taken against him] apply to court upon notice to the plaintiff to set aside such judgment, and the court may upon good cause shown set aside the default judgment on such terms as to it deems appropriate. Under rule 31(2)(b), the court can set aside the judgment if the defendant shows good cause for the rescission.

The position in South Africa on whether an application for rescission of a default judgment suspends a default judgment is not fixed and is characterised by conflicting

and contrasting judgments. In the *Khoza and Others vs Body Corporate of Elia Court*[384], Notshe AJ ruled that rule 49(11) provided a rule of procedure as opposed to a substantive rule of law. The Honourable judge believed that the common law had to be developed and should be developed. Notshe AJ further ruled that '*An application for a rescission of an order would irreparably prejudice if the order were allowed to operate despite the application. This is no different from a situation where a notice of application for leave to appeal is delivered. In the circumstances, the rule that applies to the noting of appeals would be extended to noting of the rescission application as well*.'

Notshe AJ's position was further buttressed by Vally J in *Peniel Development (Pty) ltd and Another Pietersen and Others*[385], who held that the application for rescission itself should suspend the execution of the default judgment. Vally J held further those additional applications for stay of execution are unnecessary as the application for rescission of judgment should automatically suspend the default judgment. He ruled further that the applications for the stay of execution were a waste of resources and unwarranted. In *Labuschagne vs ABSA Bank Ltd*[386], the court relied on the Khoza judgment that irreparable harm may result; hence the application for rescission automatically suspends the default judgment.

I submit that the approach in the Khoza judgment is reasonable and seeks to protect the party who applies for rescission against irreparable harm because if the application for rescission does not automatically suspend a

384 *Khoza and Others vs Body Corporate of Elia Court* 2014(2) SA 112 (GSJ)

385 *Peniel Development (Pty) ltd and Another Pietersen and Others* [2014] 2 All SA 219 (GJ).

386 In *Labuschagne vs ABSA Bank Ltd* (2015 ZAGPPHC 226]

default judgment, even if the application was granted, the other party would have executed and caused irreparable harm hence the court's judgment would have just been an academic judgment. However, there have been judgments which have contradicted the position of preventing irreparable harm advocating that the party seeking rescission must also apply for a stay of execution since the application for rescission will not automatically suspend the judgment. Roux J, in the case of *United Reflective Converters (Pty) Ltd vs Levine*[387], held that there is no substantive rule of law that an application to vary or rescind an order automatically suspends the operation of the default judgment.[388] As such, in so far as a rule 49(11) sought to create such a substantive rule of law, it had overstepped the mark and was ultra vires and of no force or effect.[389] Regarding the automatic suspension of an order on the noting of an appeal, Roux J held that rule 49(11) merely restated the existing substantive law and was, therefore, valid in this respect. As a result of the *United Reflective Converters* case a practice has developed in South Africa and other jurisdictions that the party seeking a rescission of default judgment would also bring an urgent application to suspend the effect of the default judgment pending the outcome of the application for rescission of default judgment. In the case of *Erstwhile Tenants of Williston Court and Another vs Lewray Investments (Pty) Ltd and Another*[390], Meyer J followed the approach in the *United Reflective Converters* case. Meyer J said *'I am of the view that had it been the intention of the legislature*

387 United Reflective Converters (Pty) Ltd vs Levine 1988(4) SA 460 (W)

388 *Ibid*

389 Rule 49 (11) Magistrates Court Act 32 of 1944

390 *Erstwhile Tenants of Williston Court and Another vs Lewray Investments (Pty) Ltd and Another* (GJ) (Unreported case no 17119/15, 10-9-2015

for the operation and execution of a decision which is the subject of an application for rescission also to be automatically suspended, then the such decision would have been expressly included in section 18(1).' Meyer J ruled that the process could be abused if the Khoza approach was adopted, where an unmeritorious application for rescission would suspend a default judgment and would be heard around one year later. This would be prejudicial to the party who would have attained the default judgment. The approach by Meyer J of sounding the risk that the court processes by rescission applications without merit is understandable and commendable and a genuine concern. However, I argue that the court can punish rescission applications without merit by punitive costs on the party which abuses court processes. I further disagree with Meyer J view that the legislature would have mentioned it expressly that the rescission application suspends a default judgment and rather adopts the Khoza case that it is the duty of the courts to develop common law on whether a rescission application ought to suspend a default judgment.

3.5 Rescission of default judgment in Magistrates Court in Botswana

The procedure for application for rescission of default judgment in the Magistrates Court in Botswana is found in Order 37 of the Magistrates Court Rules[391]. Any party to an action in which a default judgment is given is allowed within fourteen days after such judgment has come to the knowledge of the party against whom it is given to apply the court to rescind the judgment. The application shall be in affidavit form, outlining why the applicant is in default and the grounds of defence to the action or proceedings in

391 Rules of the Magistrates' Courts, Statutory Instrument No.13 of 2011

which judgment was given against them. The application will not be set down for hearing until the applicant has paid into court the costs awarded against him or her under such judgment and ten per cent of the judgment debt as security (except where leave has been given for the applicant for the rescission of default judgment to act as a poor litigant). The judgment creditor that is the party whom the default judgment is in favour of, may by consent in writing lodged by the clerk of the court waive compliance with the requirement for the other party to provide security. The court after hearing the application rescind the default judgment if also good cause is shown to do so or gives further direction or extensions of time as necessary in the matter. Order 37 states that unless it is proved that good cause is shown, the order or judgment will not be rescinded. Order 37 rule 3 also states that this procedure will also apply to the exercise of jurisdiction of the Magistrate court as in section 22 of the Magistrates Court Act.[392]

3.6 Rescission in the High Court of Botswana

In the High Court of Botswana, unlike Zimbabwe and South Africa, where rescission of default judgment has a specific different procedure to other applications for rescission of judgments/orders, in Botswana, rescission of default judgments is the same as other applications for rescission of judgments. This procedure is in Order 48 of the High Court Rules of Botswana[393]. The order states that the judge can rescind a judgment erroneously granted without notice to any party affected. Though not stated expressly, this is the provision that comes close to rescission of judgment in the High Court of Botswana, for example, default caused by

392 Magistrate Court Act (Cao 04:04)

393 High Court Subsidiary Legislation : Statutory Instrument No.1 of 2011 High Court Act Chapter 04:04

absence or failure to file a plea since this can be attributed to failure by the other party to serve the other party the required pleadings so that they can appear in court. The party seeking rescission shall apply upon notice to all parties whose interests are affected. The judge can grant an order for rescission if satisfied all parties have received the notice of the order proposed.

3.7 Rescission of a default judgment in subordinates Zambia

In this Zambian Court there is no specific procedure for rescission of default judgment. The procedure is that of all general rescissions of judgments. In Zambia there are Subordinate Courts which are the equivalent of Magistrate Courts. Subordinate Courts are presided over by Magistrates. They are governed by the Subordinate Courts Act [394] and their rules. Order XLII rule 16 outlines the procedure for rescission of any judgment in Zambia.[395] The Magistrate can rescind a judgment where the debtor has omitted the name of the other party or where order has been obtained by fraud or misrepresentation. Depending on the circumstances that led to the judgment debtor is in default, it can be argued that the mentioned circumstances, which are allowed for rescission, can ultimately lead to the rescission of a default judgment acquired through fraud or misrepresentation. The judgment can be set aside on application by any person with interests in the proceedings or the creditor. The notice must be given to the other party. The other party must be informed of the date and venue and show cause why the judgment should not be rescinded. The rescission, when set aside, shall be without prejudice to anything that is done or already

394 Subordinate Courts Act Chapter 28 of the Laws of Zambia

395 Order XLII Rule 16 Subordinates Courts Act of Zambia

achieved under that order. Any money paid into court under the order may be dealt with as if the order had not been set aside or rescinded. According to rule 19, after hearing the matter, the magistrate may set aside or rescind the order, suspend the order or make a new order for payment by instalments or make an order in the prescribed form directing that the judgment shall be set aside unless the debtor pays the sum in payment of which he has made default, either within a specified time or by instalments to be specified in the order.[396]

3.8 Rescission of default judgment in the High Court of Zambia

The Zambian High Court Rules do not give much information on how to proceed with an application to rescind a default judgment. Order XX Rule 3 deals with the rescission of default judgments.[397] The rule states that any judgment by default, whether under this order or any of these rules, may be set aside by the court or a Judge upon such terms as to costs or otherwise as the court or judge may think fit. This means in the Zambian High Court, the procedure will be mainly done under common law and the direction of courts since if the rules do not give much detail, the courts develop the common law to fill this gap. This is similar to the South African approach, where the application for rescission of default judgment can also be made under common law.[398]

3.9 Rescission of default judgment in High Court of Namibia

In Namibia, the procedure for application for default judgment is found in rule 16 of the Namibian High Court

396 Rule 19 Subordinates Courts Act of Zambia

397 Order XX Rule 3 of the High Court Rules of Zambia

398 Order XX Rule 3 of the High Court Rules of Zambia

Rules[399]. It states that a defendant may, within 20 days after he or she has knowledge of the judgment referred to in rule 15(3) and on notice to the plaintiff, apply to the court to set aside that judgment.[400] The court may, on good cause shown and on the defendant furnishing the plaintiff security for payment of the costs of the default judgment and of the application in the amount of N$5 000 set aside the default judgment on such terms as to it seems reasonable and fair except that the party in whose favour default judgment has been granted may, by consent in writing lodged with the registrar, waive compliance with the requirement for security or in the absence of the written consent referred to in paragraph (a), the court may on good cause shown dispense with the requirement for security. A person who applies for rescission of default judgment as contemplated in subrule 1 must-Make apply for such rescission by notice of motion, supported by an affidavit as to the facts on which the applicant relies for relief, including the grounds, if any, for dispensing with the requirement for security Give notice to all parties whose interests may be affected by the rescission sought and make the application within 20 days of becoming aware of the default judgment. Rule 65 applies with necessary modification required by the context to an application brought under this rule.[401]

3.10 Rescission of default judgment in Magistrates Court of Namibia

The procedure for application for default judgment is found in rule 49 of the Namibian Rules of the Magistrates

399 Rules of the High Court of Namibia, High Court Act 1990

400 Rule 15 (3) High Court of Namibia

401 Rule 65 of the Magistrates Court Rules Act 32 of 1944 of Namibia

Court.[402]Any party to an action or proceedings in which a default judgment is given may apply to the court to rescind or vary such judgment provided that the application shall be set down for hearing on a date within 6 weeks after such judgment has come to his knowledge. Every such application shall be on affidavit which shall set forth shortly the reasons for the applicant's absence or default of delivery of a notice of intention to defend or of a plea and, if he be the defendant or respondent, the grounds of defence to the action or proceedings in which the judgment was given or of objection to the judgment.[403] The court may, on the hearing of any such application unless it is proved that the applicant was in willful default and if the good cause is shown, rescind or vary the judgment in question and may give such directions and extensions of time as may be necessary in regard to the further conduct of the action or application. The court may also make such an order as may be just in regard to the amounts of money paid into court by the applicant. If such an application is dismissed, the judgment shall become a final judgment. This rule shall *mutatis mutandis* govern all proceedings for the rescission or Variation of any judgment by the court in the exercise of the jurisdiction conferred by section 36 of the Act.[404] Rule 60 of the Magistrates Court Rules provides for an application procedure to rescind a default judgment that arose out of a common error in the court processes. The court may, on application, grant the applicant relief like rescinding the default judgment.[405]

402 Rules 49 Of the Magistrates Court Act 32 of 1944 of Namibia

403 Rule 49 of the Magistrates Court Act 32 of 1944 of Namibia

404 Rule 36 of the Magistrates Court Act 32 of 1944 of Namibia

405 Rule 60 of the Magistrates Court Act 32 of 1944 of Namibia

3.11 Application for Rescission of default judgment in eSwatini

The position in eSwatini (Swaziland) was expressed in the *Swazi M.T.N Limited vs MV Tel Communications (Pty) Limited and Others.*[406] The position is also a case basis and each individual court case like in South Africa can follow the *Khoza or United Reflective Converters* case depending with the circumstances of the case. In the *Swazi M.T.N* case, the court adopted the *United Reflective Converters* approach.[407] The court refused to state whether the application for rescission of default judgment suspends the default judgment automatically rather treated it on a case-by-case basis. In this case, the court suspended the default judgment pending the finalisation of the application for rescission. Unlike the *Khoza* case, the suspension of the default judgment was not automatic as the Judge in this case considered that there was need to make a ruling to stay execution pending the outcome of the rescission application.

3.12 Rescission of a default of judgment in Lesotho

The position in Lesotho is also not settled and is almost identical to that of South Africa. The case of *Abubaker and Another vs Magistrate Quthing and Others*[408] expresses the position in the courts of Lesotho. The court relied on section 51 of the Subordinates Courts Act[409], which is identical to section 78 of the South African Magistrates Court Act.[410]It states that when an application to rescind is made, the court may order execution or suspension of the judgment. The court also declared there is no substantive

406 *Swazi M.T.N Limited vs MV Tel Communications (Pty) Limited and Others Case* Number 7/06

407 *Ibid* supra.

408 *Abubaker and Another vs Magistrate Quthing and Others C of A* (CIV) NO.19/2015

409 Surbodinates Court Act 9 of 1988 (Lesotho)

410 Magistrates Court Act 32 of 1944

rule of law in Lesotho on whether an application for rescission suspends a judgment or not. The judgment debtor may apply for suspension of execution of the judgment.

4. CONCLUSIONS

In Zimbabwe, the approach is that an application for rescission does not suspend a default judgment automatically.[411] For the default judgment to be suspended, the party applying for a rescission of the default judgment has to also make an application for a stay of execution that suspends the default judgment.[412] Another alternative is for the application for rescission of default judgment to be successful before the default judgment is executed. In *Chiwalo vs Musekiwa*[413], the court stated that the application for rescission of default judgment alone does not automatically suspend the default judgment in question. In the case of *Africare Zimbabwe vs Misihairabwi*[414], the court granted an application for the rescission of a default judgment. The application alone did not automatically suspend the default judgment; rather, the granting of the application for rescission of the default judgment is the one that suspended it. In addition, Zimbabwe when granting a rescission application for a default judgment, the prospects of success are taken into account; this was decided in the case of *Norta Marketing Agency (Pvt) Ltd vs Muchaya.*[415]

The approach in Zimbabwe is the one in the *United Reflective Converters* case, that the application for

411 Order 30 Rule (2) (1) of the Magistrates Court Rules, 2019 of Zimbabwe

412 Order 30 Rule (4) of the Magistrates Court Rules, 2019 of Zimbabwe

413 *Chiwalo vs Musekiwa* 2010 ZWHHC1186

414 *Africare Zimbabwe vs Misihairabwi* LC/H/345/2013

415 *Norta Marketing Agency (Pvt) Ltd vs Muchaya* LC/H/235/11

rescission alone does not suspend the default judgment. The party must also have the default judgment suspended through another application of stay of execution. Though the approach is understandable by the courts in Zimbabwe, it is quite expensive for litigants, as mentioned in the *Peniel Development* case.[416] However, the Zimbabwean approach is based on the reasoning that this expense on the litigants is a better devil than the risk of abuse, allowing applications for rescission without merit to suspend the operation of default judgments automatically as there is a risk the court processes will be abused as was mentioned in the *Erstwhile Tenants of Williston Court* case.[417] It is argued that the appropriate position is to suspend the operation of a judgment pending the recession. Also, the Courts may deal with applications for rescission as chamber applications to reduce the time frame upon which the matter must be disposed of. Suspending a decision sought to be rescinded would balance the applicant and the respondents' interests in that while the applicant is protected from swift execution of judgment, the respondents can always be protected by setting the matter swiftly as in chamber matters and also award punitive costs were the rescission is meant to frustrate the process.

416 *Piniel Development (Pty) Ltd and Anor v Pietersen and Others* 34819/2013

417 *Erstwhile Tenants of Williston Court and Another v Lewray Investment (PTY) Ltd and Another* 17119/15

AN ANALYSIS OF THE ZIMBABWEAN LAW ON PROCEDURAL IRREGULARITIES IN EMPLOYMENT DISMISSAL CASES

BY DENNIS MUMBIRE

ABSTRACT

This paper analyses the Zimbabwean courts to procedural irregularities in unfair dismissal disputes. The paper observes that Zimbabwean courts favour the view that procedural irregularities do not necessarily render a dismissal unfair, rather a dismissal can only be set aside if it can be shown that the irregularity caused some prejudice to the employee or the irregularity was gross. In the case of a "gross" irregularity the court must remit the matter for a hearing de novo so that the irregularity can be cured. The Zimbabwean approach is comparable to the English law approach which resolves irregularities by applying the "band of reasonableness" test. The paper concludes that the courts approach provides further evidence that unitarism is still the dominant philosophy in the determination of labour disputes.

Key words/terms: *procedural irregularities, Dismissal, Reasonableness, employment.*

INTRODUCTION

Although employees enjoy a statutory right not to be unfairly dismissed, unfair dismissal claims are by far, the most common type of labour dispute in Zimbabwe.[418] According to Professor Madhuku many of the appeals against dismissal to the Labour Court are based on procedural irregularities.[419] This is because the most popular method

418 Section 12B of the Labour Act (28.01)

419 L Madhuku, Labour Law in Zimbabwe, Weaver Press 2015

for terminating employment is through dismissal at the conclusion of disciplinary proceedings in terms of an employment code of conduct. Disciplinary proceedings and workplace codes are managed by non-lawyers which increases the chances of procedural irregularities.[420] Procedural fairness is a fundamental component of a fair dismissal as well as a key safeguard against arbitrary exercise of managerial prerogative. This paper analyses how courts have dealt with procedural irregularities that are committed during dismissals through an employment code of conduct.

BACKGROUND OF STUDY

Labour is a unique field of law in that it entails the idea of workers subordinating themselves to the capitalist enterprise.[421] It has been remarked by a leading labour law jurist that:

> …. the relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however, much the submission and the subordination may be concealed by the indispensable figment of the legal mind known as the 'contract of employment[422].

From a unitarist standpoint worker subordination is an acknowledgement of the employer's right to manage, particularly the right hire and fire. This right is not absolute. In *FEDA v RRIA Commission*[423] it was, held that: -

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420 See Malimanjani v CABS and Coh Coh Enterprises v Mativenga & Another S-30-2001

421 S Deakin, Unfair Dismissal, Disciplinary Procedures and the Contract of Employment, 1995 Cambridge University law Journal

422 Davies and Freedland Kahn Freund's Labour and the Law, (1983) at page 18

423 [1987] AILR 131

> Managerial prerogative is not a sword that can be wielded in wanton disregard of the industrial consequences nor is it a shield to hide behind. An employer has a responsibility to manage fairly.

Procedural fairness is an important aspect of employment law and ensures that employers "manage fairly". In the same vein, Otto Kahn-Freund argues that:

> ...the main object of labour law has been, and... will always be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.[424]

PURPOSE OF LABOUR LAW

According to Miliband (1983) the state is only capable of acting in the rational interests of capital. In this context the most common aim of labour law has been eloquently summed up by eminent labour jurist Otto Kahn Freund who stated that;

> The main object of labour law has always been, and will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation-legislation on the employment of women, children and young persons, on safety in mines, factories, and offices, on payment of wages in cash, on guaranteed payments, on race or sex discrimination, on unfair dismissal, and indeed most labour legislation altogether - must be seen in this context. It is an attempt to infuse law into a relation of command and subordination. [425]

424 Davies and Freedland (in 6 above)

425 P Davies and Freedland Kahn-Freund's Labour and the Law, Stevens and Sons Pvt Ltd, 1983

THEORIES OF LABOUR RELATIONS AND LAW

Labour relations dynamics create one of the greatest and intricate challenges of the contemporary industrial society that is accompanied by constant change and "industrial unrest".[426] At the centre of labour relations is the employment relationship. The employment relationship brings together parties with divergent interests, thus the labour relations systems denote contradictions with regards to profit and wages, authority and compliance. There are different theories which attempt to explain the complexities, contradictions, and outcomes of labour relations.

Unitarism

The unitarist theory of labour relations is credited to Alan Fox. It assumes that a labour relations system is or ought to be, a unified assembly of actors with one loyalty structure. The actors are unified by a set of shared and mutual goals. According to this theory, management is right to manage (also called managerial prerogative) is accepted as legitimate and rational. Attempts to oppose managerial prerogative are viewed as either irrational or a result of the influence of outside agitators such as trade unions. Courts are enjoined to recognise and uphold this right. The basis of managerial prerogative is two-fold;

1. The market power of the employer, that is, employer commands and owns capital (right to property).
2. Right to manage arise from the bureaucratic structure of an enterprise that is, when an employee accepts employment, he submits/ subordinates to those above him.[427]

426 P Blyton et al Dynamics of Industrial Relations, MacMillan Business, 1998

427 H Collins Labour Law, Cambridge University Press, 2012

To be enforceable the prerogative must be originating from law and unitarists rely on the legal figment created by law called the employment contract. Unitarist judicial decisions typically emphasise on common law principles such as the freedom and sanctity of contract and ignore the wider context of labour relations and law. This preference for common law principles can be seen in *Wells v SA Alumenite Co*, where it was said:-

> ... if there is one thing which, more than other, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. [428]

From a unitarist perspective it follows, that procedural irregularities should not vitiate management's decision since ultimately, they have the right to manage, and this right is derived from contracts freely entered into. In the case of *BRT Dunlop v NUMSA*[429] the court stated that *"the right to trade includes the right to manage that business, often referred to as the managerial prerogative."* It is therefore evident that from a unitarist point of view the employer enjoys unfettered discretion in deciding whether to dismiss or not unless that discretion has been applied in a way that is contrary to the individual contract of employment[430].

Pluralism

The pluralist society is characterised by the acceptance and institutionalisation of both industrial and societal conflict. Management objectives of efficiency, productivity and

428 1927 AD 69

429 (2) 1989 10 ILJ 701 (IC)

430 Smit (2010) International Perspectives on South Africa's Unfair Dismissal Law

profitability are in contrast with labour objectives of better pay and job security. Management of conflict under pluralism entails the creation of platforms (institutions) and suitable processes that help achieve partnership through inclusive, organized systems and agreed regulation. Under pluralism employee participation and involvement is accepted on the basis that their interests are legitimate and must be accommodated for the survival of the enterprise. Management shifts from *"managing by right"* to "*managing by consent*". Thus, employee participation in decision making becomes an important procedural requirement.[431] Accordingly, Fox (1969), posits that managerial legitimacy, is not only premised on industrial authority or acceptance of their right to manage, but also on processes which acknowledge and accommodate the goals of other groupings.

Marxism

The most important theme in a Marxist theory of labour relations and law is that; law is both political and ideological. The law provides legitimation to the values of the dominant class.[432] The content and procedures of law directly or indirectly, reveal the interests of the dominant class. Law is essentially an instrument of class oppression and domination.

Richard Hyman (1975) sums up the Marxist perspective of industrial relations by stating that workplace relations are all about the accommodation of competing ideological interests, political and economic dynamics in an imperfect capitalist system. For Marxists, the economic structure of a society determines the power relations of that society and

431 See Section 25A of the Labour Act (28.01) on Composition, Procedure and Functions of Works Councils

432 Hunt (1981) Marxist Theory of Law

other institutions such as courts conduct their affairs/ mandate in a manner that acknowledges the economic structure. The state and courts are therefore only capable of acting in the rational interests of capital emphasising on aspects such as duty of subordination and punishing revolutionary tactics such as strikes. The decisions of the courts patently betray the class partisan nature of the institutions of adjudication particularly superior courts which emphasise on "law" rather than equity. The law serves the dual function of making labour an acquiescence resource and allowing capital to achieve super profits through super exploitation of labour.

LABOUR LAW AND FAIRNESS

The principal statute governing labour relations in Zimbabwe is the Labour Act. As per Section 2A its aim is to *"… advance social justice and democracy in the workplace…."* This position has been underscored in various court decisions. For example Hove P, in *Marcussen & Cocksedge v Dzikiti* stated that the Labour Court was thus established *"to dispense simple, cheap and speedy industrial justice, unhampered by legal jargon and technicalities. The Court is a creature of statute created by the Labour Act whose purpose included to advance social justice. The Court enjoys the full authority to look into issues of equity".*[433] This jurisprudence follows the remarks of Bhunu J in *Zhakata v Mandoza N.O. and N M Bank Ltd.*[434] The Labour Court is therefore generally considered a court of equity created to advance social justice. The same can be said of the South African position.

433 Marcussen & Cocksedge v Dzikiti LC/H/53/05

434 HH 22-2005

In *Cox v Commission for Conciliation Mediation and Arbitration (CCMA)* the LAC had this to say;

> In the circumstances, even if the court is bound by judgments of the Supreme Court of Appeal...as these decisions are based purely on law and since the Labour Court is also one of equity, the court is entitled to broaden such interpretation as long as such interpretation does not negate the legal provisions set out in the statutes. [435]

The Right "not to be" Unfairly Dismissed

The right not to be unfairly dismissed is expressly provided for under section 12B(1) of the Labour Act. This right is also derived from two important sources of labour law namely:

a) The Constitution under Section 65 (Labour Rights) which guarantees the right to fair labour standards and practices.

b) ILO Conventions and Recommendations.

Right not to be Unfairly dismissal under the Constitution

The constitution is the supreme law of any country and any law inconsistent with it is ultra vires and therefore void. Several provisions of the constitution have a bearing on labour in particular Chapter 4 on the Declaration of Rights. Section 65 (Labour Rights) which provides that *"Every person has the right to fair and safe labour practices and standards and to be paid a fair and reasonable wage"*

Section 65 is further amplified by the fact that rules of constitutional interpretation under Section 46, Section 326 and 327 demand that the courts must adopt a generous and purposive interpretation when dealing with rights under Chapter 4. The South African Constitutional Court has provided important learning points for Zimbabwe on the

435 [2000] ZALC 111

application and interpretation of Section 65. For example, in *SACCWU, Moeng and Others v Woolworths*[436], the Constitutional Court ruled that although constitutional rights to fair labour standards under Section 23 cannot be defined with precision, the right by implication incorporates the right to job/employment security and therefore the right not to be unfairly dismissed. Furthermore, in *Old Mutual Life v Gumbi* the Supreme Court ruled that *"common law contracts of employment should be developed in light of the constitution, specifically the right to fair pre-dismissal procedures.*[437]

In addition to Section 65, there are other important constitutional provisions that can be used to guarantee procedural fairness for employees. Section 68(1) provides that everyone *"has the right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair."* In *Machiya v BP Shell Marketing*[438] the High Court ruled that an employment code of conduct creates a relationship between the company and its workers which is of a sufficiently public character to be said to have an administrative law element.[439] In addition Section 69 (Right to a Fair Hearing) is another constitutional guarantee on procedural fairness as it provides for some important procedural safeguards as follows:-

> (1) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an

436 [2018] ZACC 44

437 Old Mutual Life Assurance Co SA Ltd v Gumbi [2007] 5 SA 552 (SCA))

438 1997 (2) ZLR 473 (H)

439 Madhuku (2015:166)

> independent and impartial court, tribunal or other forum established by law…
>
> (6) Every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum."

The above provisions show that modern constitutions seek to emphasise on procedural values, which can be imported into labour jurisprudence as well.

Right not to be Unfairly Dismissed under The Labour Act

The Labour Act does under Section 12B(1) provides that *"every employee has the right not to be unfairly dismissed"*. The Act does define what 'unfair dismissal' is but gives circumstances under which a dismissal would be deemed unfair. The four circumstances can be summarised as follows:

> (1) Where the employer fails to prove that the dismissal was in terms of a registered code
>
> (2) Where there is no registered code, the employer fails to demonstrate that the dismissal was in terms of the model code
>
> (3) Where the employee resigned because the employer deliberately *"made continued employment intolerable for the employee"*
>
> (4) Where the employee was engaged on a fixed-term contract and *"the employee had a legitimate expectation of being engaged and another person was engaged in his stead."*[440]

While employees enjoy a right not to be unfairly dismissed under Part IV and specifically Section 12B of the Labour Act, labour laws acknowledge that the employer still retains his prerogative to hire and fire. The law further recognises the

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440 Section 12B(2)(b)

employer's discretion to dismiss for misconduct which goes to the root of the relationship. However, the right to dismiss must be exercised fairly. This means that an employer may only dismiss where there is a valid reason (substantive fairness), furthermore, the employer must act in a procedurally fair manner in arriving at the decision to dismiss. It is therefore critical for the employer to demonstrate that the dismissal was for a valid reason and was arrived at fairly.[441]

Right not to be unfairly Dismissal Under International Law
Under ILO jurisprudence, which is embodied in various conventions and recommendations, the (un)fair dismissal doctrine has two components namely;

a. Substantive fairness
b. Procedural fairness.

Substantive fairness requires that there must be a valid reason for the termination which is related to the capability or (mis)conduct of the employee or the dismissal must based on economic requirements of the undertaking. This is provided for under Article 4 of Convention 158 which reads:

> The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service. [442]

Procedural fairness is concerned with the steps taken by the employer in reaching the dismissal penalty. Grogan argues that procedural fairness is the benchmark against which the employer's pre-dismissal steps are assessed. Procedural

441 National Education Health and Allied Workers Union v UCT 2003 (3) SA 1 (CC)

442 Convention Concerning Termination of Employment at the Initiative of the Employer

fairness demands that the employer acts judiciously before meting out a disciplinary sanction.[443] Procedural fairness is about following the principles of natural justice. The most fundamental rules of natural justice are the right to be heard also called the *audi alteram partem rule* and the right to an impartial hearing authority (the nemo judex principle).

In *Rwodzi v Municipality of Chegutu* Mavangira J quoting from Riekert outlined the critical elements of procedural fairness as follows:-

1. **The hearing must precede the decision**. This is meant to ensure that the employee has an opportunity to lead evidence in rebuttal of the charge, and to challenge the assertions of his accusers before an adverse decision is taken against him[444].
2. **The hearing must be timeous**. This is meant to ensure that the hearing takes place when the facts are still fresh in the minds of the parties and their witnesses. However, where the employee requires time in order to prepare for the hearing or to arrange for representation, he should be given a reasonable opportunity to do so[445].
3. **The employee must be informed of the charge(s) against him**. This is meant to meet the need for adequate preparation.
4. **The employee should be present at the hearing**. This is meant to achieve fairness. However, if an employee refuses to attend the hearing without good cause or has absconded the employer may be entitled to proceed with a hearing in his absence.
5. **The employee must be permitted representation**. Besides giving the employee normal support, this ensures

443 J Grogan Workplace Law, Juta Publications, 2012

444 See also Article 7 of ILO Convention 158

445 Article II (10) of ILO Recommendation 166 suggests that an employer who unreasonably delays in convening a hearing is deemed to have waived the right to discipline the employee.

that the scales are tipped less steeply against him. It also ensures that justice is seen to be done.

6. ***Nemo ius iudex principle***. *The presiding officer should be impartial*. [446]

In South Africa, the Industrial Court which was the predecessor of the Labour Court developed procedural guidelines for employers to follow before effecting a dismissal. The guidelines include:-

1) The employee has to be promptly informed of the charge against him. The relevant particulars of the offence and documents must be attached to the chargesheet.
2) The hearing has to be conducted without unreasonable delay.
3) The employee has a right to notice before the hearing to allow him sufficient time to prepare his defence, secure witnesses and representation.
4) The employee is entitled to representation
5) The employee must be allowed to bring his/her own witnesses and also to cross-examine witnesses brought in against him/her
6) To ensure that the right to be heard is upheld the employee must be afforded with an interpreter where necessary.
7) The employee has a right to be informed of the outcome within reasonable time;
8) The employee has a right to address the hearing authority in mitigation
9) The employee must be afforded the right to appeal.[447]

According to P Smit and BPS van Eck (2010) it is this approach and the philosophy of the ILO that was carried over into Section 188 of the Labour Relations Act No 66 of 1995 which provides that:

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446 2003 (1) ZLR 601 (H)

447 (1986) 7 ILJ 346 (IC)

> *A dismissal that is not automatically unfair, is unfair if the employer fails to prove-*
>
> *(a) that the reason for dismissal is a fair reason-*
> *(i) related to the employee's conduct or capacity; or*
> *(ii) based on the employer's operational requirements; and*
> *(b) that the dismissal was effected in accordance with a fair procedure.*

Section 188 of the LRA must be read together with the Code of Good Practice on Dismissal-Item 4(1) which reads:

> *4 Fair procedure*
> *(1) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.*

THE ZIMBABWE COURTS APPROACH TO PROCEDURAL IRREGULARITIES

Although the case of *Dalny Mine v Banda* is considered to the leading case on procedural irregularities, it is crucial to note that the Dalny Mine decision was a culmination and synthesis of various decisions which dealt with procedural aspects of fairness in different areas of law.[448] Prior to the Dalny Mine case, the most notable case to deal with

448 1999 (1) ZLR 220 (H)

procedural irregularities in employment dismissal was *Minerals Marketing Corporation of Zimbabwe (MMCZ) v Mazvimavi*.[449] In *MMCZ v Mazvimavi* the employee was charged with various acts of misconduct which the disciplinary committee found him guilty and recommended his dismissal. The dismissal was endorsed by the General Manager. The employee appealed to the then Labour Relations Tribunal under Section 101 of the then Labour Relations Act. The Tribunal reversed, the dismissal on the basis of a number of irregularities in the hearing among them:

1. Denial of the employee's request to be legally represented.
2. Improper composition of the committee (The Human Resources Manager had sat in the hearings as an "observer" but had actively influenced the outcome)
3. Violation of the nemo judex principle

The Tribunal having found that the dismissal was tainted by several irregularities ordered reinstatement of the employee. On appeal by the employer, the Supreme Court, upheld the tribunal's decision on the basis that: -

> What is plain is that in allowing Mr Sibanda (the Human Resources Manager) to be present, in a capacity other than a silent observer, the disciplinary committee went beyond the parameters of the code. It was an act impliedly forbidden. Thus, a procedural irregularity occurred which, if not vitiating the proceedings, rendered them voidable at the instance of the respondent. The irregularity was calculated to prejudice the respondent and was not shown by the Corporation not to have caused any prejudice.

449 1995 (2) ZLR 353 (S)

It is from this case that the Courts began to classify irregularities into two categories, that is,

a. Gross irregularities that vitiate the proceedings
b. Minor irregularities that do not warrant a setting aside of the proceedings (dismissal)

The *MMCZ v Mazvimavi* case appears to place the burden on the employer to show that an irregularity did not cause any prejudice to the employee. This position is apposite to the ratio in the *Nyahuma* case where the employee must show that the irregularity caused the prejudice in order to succeed in setting aside the dismissal.

In 1997 the Supreme Court had another opportunity to deal with procedural irregularities in *Air Zimbabwe Corporation v Mlambo*.[450] In this case the employee was dismissed in terms of a registered code of conduct. Aggrieved by the dismissal the employee appealed to the Labour Relations Tribunal. The Tribunal found that there had been irregularities in the proceedings that led to the dismissal and the procedures set out in the code had not been followed. It ordered the reinstatement of the employee. On appeal the Supreme Court held that the matter should have been remitted for a "re-hearing" by a disciplinary committee composed of different persons than those who sat in the original hearing. In this case the seeds of Dalny Mine were sawn, McNally JA went on to hold that the Tribunal is empowered, in the event of an appeal against a determination made under a code of conduct, to take one of three courses of action:

(a) It may confirm the original decision;
(b) It may remit the matter for a re-hearing; or

450 1997 (1) ZLR 220 (S)

(c) It may substitute its own determination for that appealed against.

The Supreme Court held that in the present case the Tribunal did not utilise any of these options. Once the Tribunal made a finding that there had been serious irregularities it had only one option, which is to remit the issue for a hearing de novo. This is because the finding that the disciplinary proceedings were a nullity meant that the employee was never lawfully dismissed and must continue to be treated as an employee. The parties reverted to the status quo ante the "dismissal" that is, Suspension pending disciplinary hearing.

The Dalny Mine v Banda decision

Mr Banda worked for Dalny Mine as a Clerk and in December 1992, he was dismissed for offences related failure to adhere to laid down procedures. Mr Banda made an appeal in terms of the code to the Mine Manager. The Mine Manager upheld the dismissal and offered a demotion as alternative. Mr Banda refused to take the demotion. Mr Banda pursued his appeal with the Ministry of Labour which was dismissed by the Senior Labour Relations Officer. He further appealed to the tribunal which did not go into the merits based on three procedural points it had raised *mero motu* and *in limine*. The Tribunal found the procedural irregularities to be fatal and on this basis it *"considered it proper to uphold the appellant's (Mr Banda's) appeal without going into the merits"*. The tribunal ordered Mr Banda's reinstatement or alternatively payment of damages.

The employer appealed to the supreme court which referred to Air Zimbabwe v Mlambo where McNally JA himself had held - *"The Tribunal is not given a discretion*

whether to remit or not. Once it decides that the proceedings were fatally irregular, and that it cannot come to a conclusion on the merits, it has no choice but to remit." McNally JA made further observations that once the Tribunal made findings of irregularities it had to remit, on the other hand once it decided to determine the issue itself, irregularities became irrelevant. In his words;

> The point I am making is that when the Tribunal decides, as it did in this case, to exercise its powers under s 97(4)(a) of the Act, and to "proceed with the appeal by way of a hearing", then it is starting afresh, starting as it were, on a clean page. The errors of the past are no longer relevant.[451]

In other words, McNally JA took the view that once the Tribunal has heard all the evidence, then it does not matter that the hearing official who heard the evidence previously may have done so unprocedurally. The Tribunal hearing *de novo* has the effect of curing any defects or irregularities. McNally JA therefore concluded that the Tribunal ought not have decided the issue on technicalities or procedural irregularities. Its choice was either to remit the matter back so that the irregularities might be cured in a re-hearing, or to hear the evidence itself, thus rendering the procedural irregularities irrelevant, and to come to a conclusion on these merits. He (McNally JA) proposed therefore that the Supreme Court should remit the case to the Tribunal for that purpose, unless the Supreme Court could decide the matter finally itself. Concerning the alleged "procedural irregularities" in Mr Banda's dismissal the Supreme Court concluded that there were no irregularities. In the opinion of the Court the Tribunal had all the necessary evidence before it to make a

451 1999 (1) ZLR 220 (S)

determination. The Supreme Court then chose to examine the evidence thus taking it upon itself to decide the matter on the merits. The Supreme Court found that the Tribunal should have dealt with the merits, and in the "absence of the irregularities" should have concluded that Banda was properly discharged. The tribunal's failure to do this amounted to a clear misdirection in law. Accordingly, the Supreme Court allowed the mine's appeal and confirmed Mr Banda's dismissal and set aside the tribunal's reinstatement order. It is in this context that the ratio decidendi in Dalny Mine must be understood. The rule in Dalny Mine was put across by McNally JA as follows:-

> *As a general rule it seems to me undesirable that labour relations matters should be decided on the basis of procedural irregularities. By this, I do not mean that such irregularities should be ignored. I mean that the procedural irregularities should be put right. This can be done in one of two ways:*
>
> (a)*by remitting the matter for hearing de novo and in a procedurally correct manner.*
> (b)*by the Tribunal hearing the evidence de novo.*

It is submitted that the true import of *Dalny Mine v Banda* is that once the Labour Court makes a determination that the proceedings were fatally defective it has no choice but to order a hearing de novo so the defects can be corrected. The Labour Court is also equally entitled to determine the matter itself if it is of the view that the matter can be determined based on the evidence before or based on the record. The decision in Dalny Mine however, raises an important question which was also canvassed in *Eastern Highland Plantations v Farai Mapeto & 136 Others*[452], that is, *Does the labour court have powers to remit*?

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452 SC 43/2016

Power of the Labour Court to Remit

Where procedural irregularities are observed in any proceedings, McNally JA in the Dalny Mine case essentially said the Labour Court had two options either to remit he matter for a hearing de novo or to determine the dispute itself based on the evidence before it. Both options are meant to cure any irregularities so as to ensure that labour matters are not determined on technicalities but on merits. Over the years there have been two contrasting supreme court decisions on the power of the Labour Court to remit a matter. In *Mackenzie v Rio Tinto*[453] Chidyausiku CJ ruled that the power to remit is a power that is inherent in any appellate body that can only be ousted by a clear statutory provision to the contrary.

On the contrary in *Eastern Highlands Plantations v Farai Mapeto and 136 Others* the court took a different view. The matter concerned an employer's appeals a Labour Court order to remit a matter to an arbitrator for a reconsideration of the dismissed employees' cases individually. The appeal was based on a narrow reading of Section 89(1) of the Labour Act. The employer's reading of the provision was that when determining an appeal in terms of Section 89, the Labour Court does not have the power to remit a dispute to an arbitrator. Such powers are only available when the Labour Court is hearing an appeal in terms of Section 93(7). This contention found favour with Gowora JAA who started by stating that the Labour Court is a creature of statute and thus only capable of exercising only those powers that it is imbued with by the enabling statute. Thus, when the Labour Court heard the appeal in terms of Section 89(1) it did not have this power to remit,

453 SC 144/2004

the decision of the Labour Court to remit was therefore not competent as the Labour Court is not imbued with the power to order a remittal outside the perimeters of Section 93. As a creature of statute, by giving a remittal order the Labour Court "*it assumed a power it did not possess*".

It is submitted that the Supreme Court in the *Eastern Highlands* case took a very narrow approach to interpreting the Labour Act, contrary to the jurisprudence set in the Dalny Mine case, Section 2A of the Act and Section 65 of the constitution. A better view of the powers of the Labour Court with regards to the power to remit is the one expressed by Chidyausiku CJ in *Mackenzie v Rio Tinto* when he said:

> *……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.*[454]

The powers of the Labour Court as the principal and specialised platform for the resolution of labour disputes must be interpreted widely and purposively so as to allow it to fully meet the purpose of the Labour Act as per Section 2A of the Labour Act.

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454 S-144-2004

In the aftermath of the Dalny Mine decisions courts have generally followed the rule that labour disputes should not be decided on technicalities. In *Standard Chartered Bank of Zimbabwe Ltd v J. Chikomwe and 211 Others*the court followed the first option in the Dalny Mine case of remitting the dispute back for a fresh hearing (hearing de novo) procedurally prudent manner.[455] In *Air Zimbabwe (Pvt) Ltd v Mnensa & Another* the Court endorsed the approach taken in the Chikomwe case, and added that:

> A person guilty of misconduct should not escape the consequences of his misdeeds simply because of a failure to conduct disciplinary proceedings properly by another employee. He should escape such consequences because he is innocent.[456]

The court went further to reiterate that a court aquo is bound by the Supreme Court decision in *Chikomwe*, once the court observed irregularities, the respondents reverted to the status quo ante dismissal, which is suspension awaiting the disciplinary proceedings.

Decisions post the Dalny Mine Case

The Supreme Court again dealt with procedural irregularities in *Nyahuma v Barclays Bank (Pvt) Ltd* where Sandura JA stated that "*Before dealing with the procedural irregularities alleged by the employee, I wish to state that it is not all procedural irregularities which vitiate proceedings. In order to succeed in having the proceedings set aside on the basis of a procedural irregularity it must be shown that the party concerned was prejudiced by the irregularity."* In enunciating this principle, the judge made reference to two South African cases *Jockey Club of South*

455 S-77-2000

456 S-89-2004

Africa and Ors v Feldman[457] and *Rajah & Rajah (Pty) Ltd and Others v Ventersdorp Municipality and Others* both cases emphasise that there must be some prejudice arising from irregularity complained of in order to set aside the dismissal.[458] The prejudice requirement has been criticised by McMullen (1988) who this should not the "true test". The true test should be whether the employer conducted himself properly as opposed to whether the employee suffered an injustice. The inquiry should be on the employer's conduct. McMullen argues that most English cases on procedural irregularities relied on *British Labour Pump v. Byrne*[459] where it was stated; *"In the first place have the employers shown on the balance of probabilities that they would have taken the same course had they held an inquiry and had they received the information which that inquiry could have produced? Secondly, have the employers shown-the burden is on them that in the light of the information they would have had, had they gone through the proper procedure, they would have been behaving reasonably in still deciding to dismiss?"*

For McMullen (1998) this approach fails to make a distinction between the inquiry into reasonableness of the employer's conduct at the time of dismissal with the inquiry into overall prejudice to the employee.

WHEN ARE PROCEDURAL IRREGULARITIES FATAL?

As held in the *Nyahuma Case* for disciplinary proceedings to be set aside, the employee must have suffered some prejudice. There are a number of decided cases which provide guidance as to when irregularities can be deemed

457 1942 AD 340

458 1961 (4) SA 402 (AD)

459 [1979] ICR 347

to be fatal. The circumstances when proceedings can be vitiated by irregularities involve a gross violation of the natural principles of justice and these include;

(a) Denial of the right to be heard
(b) Denial of the right to representation
(c) Inadequate notice
(d) Denial of access to witnesses for cross examination
(e) Application of the wrong code
(f) Improper composition of a hearing panel
(g) Violation of the nemo judex principle

Denial of the right to be heard

The right to be heard or the *audi alteram partem* rule is the cornerstone of a fair hearing, the right to be heard is the first element of procedural fairness. A dismissal without a hearing is invalid. In *Brake and Clutch v Nyama* a dismissal was set aside on the basis that an employee had been denied the right to be heard. The court made a finding that *"there is nothing in the evidence to show that the respondent was ever notified of a hearing or given an opportunity to reply to the allegations against him. That alone was, in my (court's) view, a gross irregularity entitling the court to interfere."*[460] It must be noted however, that where an employee has been invited to a hearing but without reasonable cause chooses not to appear, that would not constitute a denial of the right to be heard.[461]

Denial of the right to representation

Section 69 (4) of the constitution provides for a right to legal representation before any court, tribunal, or forum as an important aspect of the right to a fair hearing. As noted by Gubbay CJ in *City of Mutare v Mlambo* the denial of

460 SC 42/2001

461 Moyo v Rural Electrification Agency SC 4/2014

legal representation constitutes a gross infringement to an employee's right to a fair hearing which warrants judicial intervention. [462] In *Chirenga v Delta Distribution* the denial of the right to representation was accepted as constituting a fatal defect in the proceedings rendering the dismissal a nullity. [463] The above cases follow the reasoning by Lord Denning in *Myanard v Osmond* where it was held:

> On principle, if a man is charged with a serious offence which may have grave consequence for him, he should be entitled to have a qualified lawyer to defend him…….it should be the same in most cases when he is charged with a disciplinary offence before a tribunal, at any rate when the offence is one which may result in his dismissal from the force or other body to which he belongs; or to loss of his livelihood; or, worse still, may ruin his character forever.[464]

Inadequate Notice

The realisation of the other employee rights to a fair hearing are largely dependent on the employee being given sufficient time to make preparations such as securing his representation and witnesses. The right to notice must thus be seen as a fundamental corollary to the realisation of the natural principles of justice. In *Air Zimbabwe v Mlambo* an employee was given one day's notice and on the day of the hearing additional charges were also brought against him, the Supreme Court accepted arguments by the employee that the disciplinary proceedings were therefore a nullity and parties were restored to the status quo ante the nullified proceedings.

Denial of access to witnesses for cross examination

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462 SC 229/91

463 2003 (1) ZLR 517 (H)

464 [1977] QB 240

Section 6(4)(c.) of the National Employment Code provides for an accused employee's right to call witnesses and to cross examine witnesses from the complainant. The right to bring own witnesses as a fundamental component of a fair hearing. Professor Feltoe argues that during hearings the accused employee must be present to hear all evidence against him so that he can also controvert it. It would therefore be a gross irregularity to hear witnesses' testimony in the absence of the accused. This position was made clear in *Mawuta v Secretary for Ministry of Finance and Economic Development where* the court nullified a hearing where the committee excluded the accused employee from listening to the testimony of several witnesses as they were being led by the complainant.[465] The High Court held that this went against the grain of what constitutes a fair hearing and offended one's notions of fairness and justice.

Violation of the nemo judex principle

It is also a fundamental principle of fairness in labour law that an employee must be heard before an impartial body. Labour law jurisprudence in Zimbabwe recognizes that it is trite that *"no man can be judge in his own cause"*. Situations where there is violation of the nemo judex principle involve where a person participates in a hearing as a member or chair of the hearing committee and is also a witness.[466] Situations also arise where a hearing authority might also be conflicted so as to render them impartial in determining the matter at hand. It must, however, be accepted that there is always an aspect of institutional bias in disciplinary proceedings.[467]

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465 HH 169/2003

466 Muza v Batanai Supermarkets LC/H/2009

467 Musariri v Anglo American SC 53/2005

Improper composition of the Hearing Committee

Where a hearing committee has been constituted in a manner contrary to the dictates of the code, any proceedings that arise can be nullified on the basis of improper composition. In *Madoda v Tanganda Tea Company Ltd*, Sandura JA held that

> …where a disciplinary committee is established in terms of a registered code of conduct and the composition of the committee is not as provided for in the code, the deviation from the provisions of the code constitutes a procedural irregularity. In addition, the attendance and participation of a stranger at the disciplinary hearing is an irregularity which renders the proceedings at least voidable at the instance of the convicted employee ….[468]

Application of a Wrong Code

In *Chikomba Rural District Council v Pasipanodya* the Supreme Court held that the application of a wrong code to be fatal.[469] Even where parties have agreed to the application of the National Code, the statutory provisions that the model code only applies in the absence of a registered code would render that agreement null and void. The *Chikomba RDC* case must be read in line with *Masinire v City of Gweru* where it was held that the phrase "in the absence of" must be interpreted purposefully to ensure that parties are not left without a platform to resolve their dispute.

WHEN ARE IRREGULARITIES NOT FATAL?

Generally, courts may condone irregularities that are shown not to be prejudicial to the employee. In the *Nyahuma v*

468 S-97-2002

469 S-26-2012

Barclays Bank case a delay in concluding the proceedings within the stipulated time was held not to be fatal as the employee was not prejudiced in any way in presenting his case to the committee. In this case the delay was four days. However, in the same case another irregularity was noted which the court held had it not been for the appeal to the Appeals Board and Labour Court which made determinations on the merits would have been fatal. The irregularity related to the Appeals taking a step not provided for in the code of referring the matter back to the Human Resources Department to constitute another Grievance Disciplinary Committee to consider the appeal, instead of the Committee itself holding a further meeting as guided by section 6(5) of the Code. Sandura JA conceded that the code did not provide for such a procedure, and it thus constituted an irregularity which would vitiate proceedings. This irregularity was rendered irrelevant since the matter had been pursued on appeal to the Appeals Board of the NEC and the Labour Court and a determination on the merits made.

In *Circle Tracking vs Mika Mahachi* any employee sought t challenge his dismissal on the basis that the employer had failed to properly cite the relevant part of the code. This oversight or irregularity was deemed insignificant to deice the matter. The Supreme Court remarked as follows;

> It appears that in framing the charge against the respondent reference was made initially to Part V2 and thereafter to Part V1. In my view, the respondent knew the particulars of the offense he was facing. The failure to correctly cite the relevant part of the Code applicable was never made an issue. In my view, nothing turns on this.[470]

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470 S-4-2007

CAN AN EMPLOYER CORRECT IRREGULARITIES?

It is often the case that employers act with haste and disregard the proper procedure in effecting dismissals. An employer may fail to follow the requisite steps as the code of conduct or apply the wrong code. When the employer later realises his/her mistake the question that arise is whether *"the employer can correct the irregularities?"*

This question was canvassed in *Madawo v Interfresh Holdings*and and in *Munchville Investments t/a Bernstein Clothing v Mugavha*.[471] According to Marume (2021) labour law appears to law recognize the employer's right to correct a wrongly adopted procedure in dismissing an employee by instituting fresh proceedings without falling foul of the *functus officio* principle. The author's observation is based on Chinhengo J's remarks in *Madawo v Interfresh Holdings* where he stated that:

> If an employer recognizes that it has adopted an incorrect or inappropriate procedure in effecting a dismissal there is nothing to prevent him from adopting the correct procedure to effect the dismissal.[472]

In *Munchville Investments v Mugavha*, Patel JA while accepting that the employer can correct the irregularities acknowledged the need to create some exceptions. Patel JA started by accepting that existing case law seems to follow the principle that labour matters must not be decided on technicalities. Consequently, an employer is entitled to rescind the improper proceedings and have a "second bite of the cherry" in the proper manner. However, there are situations where exceptions to this general rule

471 S-62-2019

472 2000 (1) ZLR 669 (H)

must be created. The justification for the exceptions is to advance social justice at the workplace as required by Section 2A of the Labour Act. In the words of Patel JA:-

> The particular circumstances that would warrant such departure is the situation where the employer proceeds in a manner that evinces bad faith or where he actively and explicitly acquiesces to his participation in alternative proceedings for the resolution of any dispute with the employee. In the instant case, I take the view that the appellant acted disingenuously and clearly mala fide in the following respects. Firstly, the appellant only reversed the irregular dismissal of the respondent after the matter was referred to a labour officer and on the very day that it received the labour officer's notification to attend the conciliation hearing two weeks later. Secondly, and again quite insidiously, the appellant almost immediately thereafter instituted fresh disciplinary proceedings and hurriedly concluded them, fully aware of the fact that the conciliation hearing before the labour officer was scheduled to take place only three days later.[473]

CONCLUSION

From a discussion of the cases above, the Zimbabwean courts approach to pre-dismissal procedural irregularities can be summed as *"it is not all procedural irregularities in disciplinary proceedings in terms of a code of conduct which vitiate such proceedings."*[474] Procedural irregularities are classified or categorised into two:

a) Gross irregularities which without any proof of prejudice to the employee vitiate proceedings at the instance of the employee. (Such irregularities include denial of the right to be heard[475],

473 S-62-2019

474 Madhuku (2015) at page 176

475 Sable Chemicals v Easterbrook 2010 (1) ZLR 342 (S)

representation[476], improper composition leading to violation of the nemo judex principle[477], application of the wrong code[478])

b) Irregularities which may not be gross or serious and do not vitiate proceedings unless the employee can demonstrate that they suffered some prejudice.

A court dealing with an allegation of irregularities must either remit the matter back for a hearing in a procedurally current manner or it may hear the matter itself if evidence is available for it to do so. Either way the aim is to run away from deciding matters on technicalities and indirectly afford uphold managerial prerogative in the area of dismissal. Employees are left exposed and unprotected by the law as even in the area of substantive law the courts have largely held that employer has the discretion to impose a penalty he wishes and such discretion cannot be interfered with. This reasoning has been followed ruthlessly in *Innscor v Letron Chimoto* and *ZB Bank v Maureen Manyarara* to justify dismissal on substantively questionable grounds. It is fair to say that the courts favour the view that, the adjudicating authority should ask whether that procedural irregularity led to matters of substance being neglected.[479]

476 Chirenga v Delta Corporation

477 MMCZ v Mazvimavi

478 City of Gweru v Masinire

479 Grogan J (2012) Workplace Law