HH 636-22
HC 3823/22
REF HC 6281/20

ZIMBABWE MINING DEVELOPMENT CORPORATION
and
MARANGE RESOURCES (PRIVATE) LIMITED
versus
GRANDWELL HOLDINGS (PRIVATE) LIMITED
and
MINISTER OF MINES AND MINING DEVELOPMENT
and
ZIMBABWE CONSOLIDATED DIAMOND MINING COMPANY

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE 13 & 21 September 2022

Opposed Application

Advocate *E. Mubaiwa* for applicants,
Advocate *T. Magwaliba* for first respondent,
Mr.*C. Mucheche* for third respondent,
No appearance for second respondent.

CHILIMBE J

BACKGROUND.

[1] Applicants seek condonation for taking a special plea out of time. Mr. Jingini Raphael Tsivama, applicants` legal practitioner, deposed to the founding affidavit. Similarly, Mr Chenjerai Daitai, the legal practitioner representing first respondent reciprocated with the answering affidavit. Mr. Tsivama also drew up the applicants` heads of argument. Whilst no issue was raised by either side regarding the source of these depositions, I will briefly comment, in the course of this judgment, on their peculiar relevance to the disposal of the matter at hand.

[2] This application was opposed by first respondent. Third respondent indicated that it was not opposed to the relief sought, whilst fourth respondent neither filed nor appeared. It is necessary to state that the parties to this matter have been involved in protracted litigation since 2016.Their disputes derive from a (collapsed) joint venture to exploit diamond fields located in Chiadzwa, an area in the Manicaland Province of Zimbabwe. To date, a total of 12 matters have been argued in this court as well as the Supreme Court by the essentially the same

contestants. The legal and factual ebullience characterising the disputes, was fully set out in a judgment by MAFUSIRE J[1] .

[3] A shorter summary was captured by MATHONSI JA as follows [2];-

> "The facts are that the appellant and the second respondent are each the holders of fifty percent of the issued share capital in the third respondent, a special joint venture company incorporated in terms of a joint venture agreement entered into between the appellant and the second respondent on 21 July 2009. In terms of the joint venture agreement the appellant would provide funding for the business of mining diamonds through the third respondent. The second respondent undertook to ensure that the mining rights held under special grants at Marange existed in perpetuity. The first respondent, which is the sole shareholder in the second respondent guaranteed the second respondent's performance of its obligations under the agreement. Although the appellant performed its obligations under the agreement, the second respondent did not pay the special grants' renewal fees. The second respondent let the special grants in terms of which the mining rights existed, expire. When that happened, the second respondent did not secure the reinstatement of the special grants. The first respondent, which had guaranteed the second respondent's performance of its contractual obligations, also failed to do anything about that breach of the agreement.

THE SPECIAL PLEA OF PRESCRIPTION.

[4] Following the alleged breach of contract, first respondent herein issued summons on 17 November 2020 in the principal proceedings HC 6821/22. The defendants cited were the present respondents together with an entity named Mbada Diamonds (Pvt) Ltd. The plaintiff claimed a total of US$378,536,300 comprising of the following, [in paraphrase]; -

1. US$50,600,000-00 as restitution of investment outlay following breach and wrongful conduct,
2. US$50,000,000-00 as management fees lost as a result of the breach,

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[1] High Court decision of *Grandwell Holdings [Private] Limited v Minister Of Mines & Mining Development And 5 Others HH 193-16.* [See paragraphs (a), (b) and (c) thereof]

[2] Supreme Court appeal of *Grandwell Holdings (Private) Limited v Zimbabwe Mining Development Corporation SC 5-20* against MAFUSIRE J`s decision cited above. [See pages 1-2]

3. US$38,180,001-00 being the equivalent value of 50% of assets despoiled from the mining sites,
4. US$240,356,299-00 being 50% of projected profits lost.
5. Interest and costs.

[5] The suit was defended. On 4 December 2020, applicants filed a request seeking further particulars from first defendant. The particulars sought were delivered on 3 March 2021.First respondent served applicants with a notice to plead on the next day 22 March 2021.Applicants responded by taking a special plea of prescription and pleading over to the claim. In its replication to this special plea, filed on 12 April 2021, first respondent drew applicants` attention to the fact that the special plea had been taken out of time (their last date to do so having been 15 December 2020).

[6] In his founding affidavit, Mr. Tsivama admitted that he had indeed been advised through the replication that his special plea had been filed out of time. But having considered the matter, he formed a contrary view and maintained that the special plea had been properly taken.

[7] Matters progressed uneventfully for over a year until 26 May 2022, the eve of the pre-trial conference (PTC) in the said principal proceedings. Mr Tsivama states thus in paragraphs 18 and 19 of his founding affidavit; -

18 "It is as I was preparing for the pre-trial conference the day before, on 26 May 2022, that I came across the Supreme Court case of Sammy`s Group (Private) Limited v Meyburgh SC 45/15 which quite hook my confidence regarding the position I had taken on the special plea having been taken timeously.

19 A reading of this case gave the impression that any special plea taken after twenty days would not be properly before the court unless such delay had been condoned. This did not make sense to me and I said as much to the 1st respondent`s counsel but communicated my intention to apply for condonation of the delay. I also sought the 1st respondent`s consent to the condonation for the delay so that -that would be recorded at the pre-trial conference but the request was turned down."

THE 2 PRE-TRIAL CONFERENCES.

[8] The (first) pre-trial conference was held before CHIRAWU-MUGOMBA J on 27 May 2022. All parties (except present first respondent duly excused) attended with their legal practitioners. The latter included Advocate *Magwaliba* and Mr. Tsivama. The conference confirmed the earlier-identified issues for trial. The judge then adjourned the conference to

permit the legal practitioners to draw up a draft minute in long hand. During the adjournment, Mr. Tsivama engaged Advocate *Magwaliba* over the issue of prescription and the special plea. Mr. Tsivama`s proposal that prescription be added to the PTC list of issues for trial was declined by Advocate *Magwaliba.*

[9] Upon resumption of the pre-trial conference, the draft PTC minute setting out the issues and other matters for trial, which incidentally had been drawn by Mr. Tsivama`s own hand, was adopted before the judge. Prescription was neither raised as a matter, nor included as an issue during that pre-trial conference. Mr. Daitai`s answering affidavit records, in paragraph 9.14, records thus; -

> "After the recording of the agreed issues and other matters, the Presiding Judge specifically asked each legal practitioner if they had any other issues to which all legal practitioners indicated that they did not have any other issues."

[10] CHIRAWU-MUGOMBA J thereafter directed the parties` respective legal practitioners to jointly execute the pre-trial conference minute and file it with the Registrar of the High Court by 31 May 2022.The judge`s directive was not met. Applicants` legal practitioners refused, contrary to prior agreement and the judge`s directions, to sign the pre-trial conference minute. Another (the second) conference was convened before MANGOTA J on 7 June 2022.Its purpose apparently; to resolve the non-execution of the pre-trial conference minute by applicants` legal practitioners.

[11] It is not disputed that the applicants` legal practitioners then raised, before MANGOTA J, the issue of prescription. That intervention did not, however succeed in persuading the pre-trail conference to admit prescription onto the list of PTC issues for trail. Instead, the judge directed applicants to sign the pre-trial conference minute per previous resolution and judge`s direction on 27 May 2022.The applicants` legal practitioners acquiesced. Thus, the signed PTC minute now forms part of the record in HC6821/20.

[12] Faced with the prospect of a trial precluding their defence of prescription, applicants filed the present application on 9 June 2022 in a bid to avert such peril. As stated, the application was opposed by first respondent. First respondent alleged, among other issues, that the application was incompetent, based on bad faith and designed to delay proceedings. These allegations were denied with vehemence.

THE ISSUES AND ARGUMENTS.

[13] The key issues emerging from the papers and arguments before the court can be summarised as follows;

1. Is the special plea filed by the applicants a nullity or a mere irregularity?
2. If it is a nullity can it be cured by this application for condonation?
3. If it is curable, have the applicants made out a case for condonation regarding [3]; -
    i. "The extent of the delay involved or non-compliance in question.
    ii. The reasonableness of the explanation for the delay or non-compliance.
    iii. The prospects of success should the application be granted.
    iv. The possible prejudice to the other party.
    v. The need for finality in litigation.
    vi. The importance of the case.
    vii. The convenience of the court."
    viii. The avoidance of unnecessary delays in the administration of justice."
4. What is the implication of section 20 (2) of the Prescription Act [*chapter 8:11*]?
5. Can prescription be raised otherwise than through the special plea?
6. What standard must be applied to evaluate the conduct of a legal practitioner to whom non-observance of the rules of court is attributed? The issues are dealt with below.

IS A SPECIAL PLEA FILED OUT OF TIME AN IRREDEEMABLE NULLITY OR CONDONABLE IRREGULARITY?

[14] Confronted by a similar argument, DUBE JP expressed the issue as follows in *Fungai Munyorovi v Weston Sakonda HH 467-21* [paragraph 1]; -

> "The main issue in this application is whether a special plea filed outside r 119 of the High Court Rules 1971, is a nullity. Secondly, whether condonation for late filing of the special plea is permissible, if so, the stage at which an application for condonation of the late filing of the special plea ought to be made."

[15] I was urged by Advocate *Mubaiwa* for the applicants to follow the approach taken by DUBE JP in *Munyorovi v Sakonda* where the court reasoned and found as follows; -

[3] See *Paul Hoyland Read versus John Stewart Mathews Gardiner and Another, SC 70-19, [page 5], which* cited with approval, *Kodzwa* v *Secretary for Health & Anor 1999 (1) ZLR 313* and *Kombayi v Berkout 1988 (1) ZLR 53 (S).*

> "33. The *Sammy's* case settles the point that a special plea filed out of time is invalid and cannot have any validity in the absence of condonation for the noncompliance with the rules. A failure to file a pleading on time raises questions of validity of the pleading. Clearly, the court accepted that condonation of late filing of a special plea could be made. I did not understand the court to have stated that a pleading that has been filed out of time is a nullity. Invalidity should not to be equated with nullity. For this reason, a failure to file the special plea on time is condonable under r4C (a) from where it derives validity. A pleading that is fatally defective and a nullity is not on the same footing as one filed in compliance with the rules but is invalid and therefore susceptible to condonation for noncompliance with the rules in terms of r4C to have it corrected. An application for condonation gives the invalid and irregular pleading validity.
>
> 34. Consequently, a special plea or other pleading filed outside the provisions of the rules is invalid and constitutes an irregular step or proceeding taken contrary to the rules, see the *Russel Noach case*. Because the rules provide a remedy for noncompliance with the rules in the case of a defect, noncompliance with the rules gives rise to the question of validity of the pleading. Where the noncompliance with the rules does not result is a nullity, it can be condoned. It does simply not follow that because a pleading has been filed out of time it is a nullity. The enquiry goes further than that. A breach of rule 119 in a case where a special plea is filed out of time is not visited with nullity.
>
> 35. The special plea filed by the defendant is impugned simply on the basis that it was not filed in terms of the rules and not on the basis of its form or substance, inadequacy or other flaw. Clearly therefore, the special plea is not in itself fatally defective and nor is it a nullity. The special plea filed by the defendant being an irregular step is invalid and condonable."
>
> [Underlined for emphasis]

[16] Advocate *Magwaliba*, appearing for first respondent, argued otherwise. He submitted that the question confronting the court in *Munyorovi v Sakonda* had been well-settled by the Supreme Court. His interpretation of *Sammy`s Group* and other Supreme Court authorities was that *Munyorovi v Sakonda* was incorrectly decided. In *Ncube v CBZ Bank Ltd and 2 Others HB 99-11,* the court had stated [at page 4]; -

> "That an application for condonation must precede the main application has already been determined by the Supreme Court: *Sibanda v Ntini* 2002(1) ZLR 264(S); *Mlondiwa v Regional Director of Education, Midlands Province N.O and Another* HB 19-94.

> In *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) (Ltd)* 1998(2) ZLR 249(S) at 251 C-D SANDURA JA stated that a party who finds himself out of time to make an application must first seek condonation:
>
> "If he does not make the application within that period but wants to make it after the period has expired, he must first of all make an application for condonation of the late filing of the application. This should be done as soon as he realises that he has not complied with the rule. If he does not seek condonation as soon as possible he should give an acceptable explanation, not only for the delay in making the application for the rescission of the default judgment, but also for the delay in seeking condonation."
>
> [Emphasis added]

[17] Counsel further referred to *David Chiweza & Anor v Munyaradzi Paul Mangwana & 2 Ors HH 55/21*[4] where CHAREWA J held as follows; -

> "It is trite that an application stands or falls on its founding papers. Where an application is made without due regard to the procedural requirements as to time limits, and no application for condonation has been made, such an application is improperly before the court and is a non-event. The impropriety cannot be cured by a subsequent application for condonation because, at the time that the improper application is made, it is not valid. A dead horse cannot be brought to life by the introduction into its paddock, of a live horse".
>
> [Again, emphasis on the underlined]

[18] Having considered the two sets of authorities, I am unable to find that *Munyorovi v Sakonda* is inconsistent with the Supreme Court authorities. Nor does it clash with *David Chiweza & Anor v Munyaradzi Paul Mangwana & 2 Ors* [The CHAREWA J judgment]. I reach such conclusion for the following reasons; -

[19] Firstly, the authorities cited by Advocate *Magwaliba*, dealt with litigants who consciously and deliberately proceeded to file pleadings well-aware of the expiry of the *dies*. Faced with a choice (or more importantly-opportunity), between applying for condonation or applying for rescission of judgment, the parties in question had elected to do the latter. In the present proceedings, it has been argued by first respondent that the applicants ought to have known or realised that the special plea needed to be filed by 20 December 2022. It has not been suggested that the applicants knew very well that their special plea was out of time but proceeded,

[4] "The CHAREWA J judgment" to distinguish it from another matter between the same parties earlier decided by DUBE J as she then was- "The DUBE J judgment".

nonetheless, to file same. In other words, it has not been contested that the applicants only realised that their special was filed out of time, after the fact. This position raises the second point.

[2] Secondly, what then were the applicants obliged to do in order to put the horse properly before the cart? Advocate *Magwaliba* submitted that the applicants ought to have withdrawn their defective special plea, and tender costs in order for their application for condonation to be deemed properly before the court. I take the view that (a) such an approach would amount, in the face of my findings on *Munyorovi v Sakonda*, to a perfunctory application of the Supreme Court authorities cited herein. And (b) that it could turn out as an unproductive, duplicitous and costly exercise; -the applicants would be required to withdraw a pleading already improperly before the court. That step bring taken in order to validate an application also improperly before the court. What had been done could simply not be undone.

[20] Thirdly, in *Sammy`s Group*, the court merely pronounced itself on the impropriety of the court *a quo* having accepted or treated the defective special pleas and exceptions as if they were valid. That is the legal basis upon which the court a quo`s decision was declared a misdirection. That scenario differs from the present circumstances. In *Sammy`s Group* the court held as follows [at 23]; -

> "However, the provision in the Rules is mandatory and the documents filed in contravention thereof cannot, in the absence of condonation of the non-compliance with the Rules, have any legal validity. The sanction must, in my view be, that the pleading is invalid by virtue of its non-compliance with the Rules. First respondent's exception was filed 15 days out of time. Second respondent's special plea and exception were filed 6 and a half months out of time. Both applications were in violation of the Rules without explanation, without condonation, sought or granted. There was, therefore, no legal basis on which they were entertained by the court *a quo*."

[21] Fourthly, I note that in the same authorities including *Chiweza & Anor v Mangwana*, [the CHAREWA J judgment] the distinction between an invalid pleading and a nullity did not preoccupy the court`s inquiry to the same extent as in *Munyorovi and Sakonda*. On the other hand, such inquiry formed the mainstay of *Munyorovi and Sakonda* where DUBE JP punctiliously examined this distinction between the two sets of defect in the process of ascertaining the nature of violation. DUBE JP premised her reasoning on this difference in

Munyorovi v Sakonda. The learned Judge President sought to (a) classify the nature and extent of breach and (b) establish whether it deserved condonation or condemnation under rule 4C or 7. Such an approach means that the assessment of condonation applications remains rooted in the practical realms of common sense. The cardinal common-sense considerations by a court faced with prayers for mercy after breach of its rules are that the rules are made for the court and not vice versa[5], and) that condonation will not be had for the mere asking[6].

[22] Associated with this point is that *Munyorovi v Sakonda* dealt specifically with a special plea already taken, albeit improperly, whilst the other matters were engaged over applications for rescission of judgment. DUBE JP stated [at 34] thus in *Munyorovi and Sakonda;* -

> "It does simply not follow that because a pleading has been filed out of time it is a nullity. The enquiry goes further than that."

The court thus reached the conclusion that the breach was condonable on the following basis [at 35]; -

> "The special plea filed by the defendant is impugned simply on the basis that it was not filed in terms of the rules and not on the basis of its form or substance, inadequacy or other flaw. Clearly therefore, the special plea is not in itself fatally defective and nor is it a nullity. The special plea filed by the defendant being an irregular step is invalid and condonable."

[23] *In casu,* first respondent`s criticism of the application is centred on (a) applicants` failure to file the special plea on time and (b) their delay in filing this application for condonation. First respondent has not argued that special plea itself is an incurably bad pleading filed under the wrong procedure. If anything, the direct attacks on the special plea *per se* is confined to the merits. It would have been a different matter had the special plea been condemned as hopelessly lifeless; - like the dead-horse in *Chiweza & Anor v Mangwana & Ors* [The CHAREWA judgment]. In that case, the court faced a daunting compendium of unrelenting breaches in the 4 different matters before it; -

1. HC1952/20 - Dismissal of HC 694/20 for want of prosecution
2. HC694/20 – Setting aside of the Sheriff's confirmation of a sale in execution

[5] See *Stuttafords Holding v Madzudzu HH 33/203* and *Antech Laboratories v Permanent Secretary of Mines and Mining Development & 2 Ors HB 19/20*

[6] *Zimslate Quartize (Pvt) Ltd & Ors v Central African Building Society* SC 34/17

3. HC10007/19 – Correction of an order granted in HC3113/17.
4. HC1689/20 – Condonation of late filing of application for review in HC694/20

[24] It is for these reasons that I find that *Munyorovi v Sakonda* not at all inconsistent with the Supreme Court decisions and CHAREWA J`s *Chiweza and Mangwana*, on the matter. It merely qualified these authorities. *Munyorovi v Sakonda* took the approach that whether a pleading will qualify for a reprieve under rule 7 will depend on the nature and extent of applicants` breach. Given that the present applicants` breach relates only to filing the special plea out of time, I hold same to be a condonable infraction. The application for condonation is therefore properly before the court. I now will proceed to examine its soundness.

THE APPLICATION FOR CONDONATION.

[25] Listed in paragraph [13] above are the considerations which ought to guide a court when dealing with an application of this nature. As a backdrop, it is necessary to recognise the significant nature, in all respects, of the claim before the court. As stated, the amount claimed in the summons, at USD378 million, is by no means trivial. The underlying contract is a significant investment transaction involving state actors, private entities and external partners. MAFUSIRE J dwells on this aspect to some extent in of *Grandwell Holdings [Private] Limited v Minister Of Mines & Mining Development And 5 Other (supra).* In fact, the learned judge likened the underlying transaction to a marriage. That marriage was proposed, accepted and consummated and after a brief, blissful spell, ran aground. This marriage, to use the learned judge`s words, eventually deteriorated into "utter chaos" at some point. The battles spilled over into the courts. Twelve Superior Court judgments later, the relationship issues are still to be fully resolved.

[26] This background helps to accentuate the question of "interests of justice"; -an application for condonation involves striking a balance in the interests of justice. But the "interests of justice" have been described as "*…a concept incapable of precise definition*[7]". Whilst they may, as a principle, be neither simple nor easy to define, the interests of justice can still be attained through a proper exercise of discretion. (See *Simon Shonhayi Denhere v Mutsa Denhere (Nee Marange) & Anor CCZ 9-19*. Put differently, a court is merely required to pay attention to appropriate considerations in weighing the interests of justice. And in this case,

[7] *Simon Shonhayi Denhere v Mutsa Denhere (Nee Marange) & Anor CCZ 9-19 at page 5.*

those considerations comprise of the background to the dispute set out in [25]. The background points toward the need (if not demand) to (a) to quell the raging disputes between the parties, (b) do so with requisite speed, (c) recognise and resolve the issues at stake for the parties involved, and (c) acknowledge the unique characteristics of the dispute. In that regard, the factors determining whether or not condonation ought to be granted must necessarily reflect these overarching considerations.

[27] In the same vein, the parties` averments and submissions by counsel ought to be evaluated from that same perspective. I thus express some reservation over the fact that depositions issued from the parties` legal practitioners rather than the parties themselves. The issue of legal practitioners deposing to affidavits has always generated some controversy[8]. I am well aware too, of the need for legal practitioners to file affidavits so as to account for inexplicable gaps in a party`s story as held in *United Refineries v The MIPF & 3 Ors SC 63-14* and *Dombo Chibanda & 2 Ors v City of Harare SC 83-21*. I am aware as well, that the parties herein will naturally feel justified in the course taken. After all, only their lawyers could file affidavits to found the claim and opposition. That is precisely the point! Lawyers belong to the bar and not the stand. And lawyers never take the stand unless there is some sort of problem. In this matter indeed lies a problem; -*dies induciae* were overshot. Further, the altruism of lawyers belonging to the bar becomes more glaring when the roles practitioner and witness conflate to discolour affidavits with the sort of defects noted by CHITAPI J in *Central African Building Society v Patience Magodo HH 34-22.* Whilst I cannot say that the affidavits of Messrs Tsivama and Daitai offend the good standards described by CHITAPI J, the affidavits concerned still carry traces of hybrid witness statements and heads of argument. Such being the stubborn blemishes in many a lawyer`s affidavit.

[28] Drawing from that same point, summons commencing action in this matter were served on the defendants in November 2020.The parties had been involved in the broil of legal battles since 2016.It is safe to assume that issuance of summons took none of the parties by surprise. The question to ask is; -what were the strategies adopted by the parties involved in this dispute from the point relations soured? This question is central to an evaluation of the reasonableness of the parties` conduct in the present dispute. It is also quite relevant to the considerations

[8] See the differing opinions expressed in (a) *Chafanza v Edgars Stores Ltd & Anor 2005 (1) ZLR 301 (H*) and (b) Ngoni *Mudekunye & 3 Ors v Aaron Evans Mudekunye & 2 Ors HH 190-10* and the authorities cited therein.

regarding significance of the matter to the parties, the impact of the present application on finalisation of the matter, the issue of prejudice as well as the convenience to the administration of justice. In other words, the present applicant`s decisions must be tested as they inform into the justice of the matter.

[29] To put this issue into context, Part V of the current High Court Rules sets out in detail the options available to a party who has been served with a summons commencing action. Effectively, Part V of the rules assists parties sit down, reflect on their options and craft the legal strategy and steps to take. Any party served with process will naturally raise a series of questions. Should the suit be resisted or acceded to? Can a compromise or settlement be reached or negotiated? If so to what extent, how and at what stage? What exactly shall be the defence? Is a counter claim necessary? What evidence or witnesses will be required to back up a defence of claim? Is such evidence or are those witnesses available? In addition to such questions, the rules of court also guide a party over very critical procedural requirements most critical of which are the timelines.

[30] Given the importance of matters at stake, one presumes that the parties and their legal practitioners interrogated with intensity, their options as provided for not just under Part V of the rules, but every other aspect relevant to the defence or prosecution of a legal claim. It would thus not be too much to expect a certain state of readiness on the part of the parties and their respective counsel. This brings in the core issue; - why did and how could the applicants miss the *dies* within which to file the special plea? This aspect marks the exact point where "the wheels came off". The question of delay and reasons therefore should be examined from this same point.

[31] This question sustains despite the detailed explanation (given with frankness and to the credit of Mr. Tsivama) offered. Advocate *Mubaiwa* and indeed Mr. Tsivama himself in the affidavits filed, argued to their strengths that missing a point of law did not amount to lack of diligence. Counsel`s error of judgment ought not condemn him into that category of derelict and blameworthy legal practitioners noted in the authorities cited in both counsel`s heads of argument[9] as well as a plethora of others. In supporting this contention, counsel amplified the

[9] *Saloojee & Anor v Minister of Community Development 1965 (2) SA 135 (AD); Kawondera v Mandebvu 2006 (1) 110 (S); Tamanikwa & Anor v Zimdef & Anor SC 73-17; Vengesai and Others v Zimbabwe Glass Industries Limited 1998 (2) ZLR 589.*

essence (and intricacies, see [32] below), of Mr. Tsivama`s legal reasoning around the *dies*. It suffices to say that when arguing this point, Advocate *Mubaiwa* adopted a subjective approach whilst Advocate *Magwaliba* relied on a more objective test. Neither approach would, on its own be entirely appropriate in reviewing the legal practitioner-originated mishap as shown in the succeeding paragraphs.

[32] From the papers and arguments, the delay in this matter can be split into three stages. The first stage ran from 15 December 2020, the date when the special plea ought to have been filed, to 12 April 2021 when the replication informed the applicants` legal practitioners accordingly. The explanation for the non-filing of the application for condonation during this period is, as noted, that counsel believed that they were still within time. Mr. Tsivama may have formed his own conclusions as to why he believed the *dies* were yet to run. But were those conclusions reasonable? Reasonable for a practitioner seized with such a critically significant claim? What exactly were the diligent steps that he took to sense check or verify his conclusion? Did the applicants and their legal practitioners hold a Part V of the rules "war council" to assess their options and strategy after service of summons on 17 November 2020? Did that war council meticulously check the critical aspects of the suit including in particular, the timelines? On the part of counsel, the duty to ascertain applicable *dies induciae* constituted the simplest of tasks. That assignment did not at all require an inordinately intricate legal inquiry. After all, he was eventually persuaded otherwise by a simple case authority (which incidentally, is cited as a near "anthem "in special plea and exception heads of arguments that daily come before the courts). It matters not therefore that Mr. Tsivama applied himself diligently. His industry was, unfortunately, fruitless.

[33] The second stage in the delay period stretched from 12 April 2021, the replication day, to 26 May 2022 when Mr. Tsivama was "*quite shook"* [to borrow Advocate *Magwaliba*` s descriptor in the heads of argument] upon discovering the correct position as set out in *Sammy`s Group*`s case. Mr. Tsivama still sustained his position despite this second indication, (one coming from the Supreme Court) that his views on the point were incorrect. Naturally, as argued by Advocate *Mubaiwa,* Mr. Tsivama tendered persuasive reasons behind the legal considerations that exercised his mind. He indeed formulated what appear, on the face of it, to be cogent criticisms of the decision in *Sammy`s Group*. I am not surprised. Mr. Tsivama is a wily, old hand at the practice of law. He said so himself in paragraph 20 of his answering

affidavit. And in as many words, with some indignation too, when he felt slighted by the opposing affidavit. As such counsel would find little difficulty in crafting an attractive legal posit. But that notwithstanding, his legal prognosis, as stated was incorrect. Alternatively, it was inconsistent with judicial precedent. The following reminder by MATHONSI J (as he then was) in *Ncube v CBZ Bank Limited & 2 Ors* (*supra*) [at page 4] becomes apt; -

> "As this issue has been settled by the Supreme Court in a number of cases, I find myself in total agreement with the words of NDOU J in *Sai Enterprises (Pvt) Ltd v Girdle Enterprises (Pvt) Ltd t/a Quality Engineering Services (Pvt) Ltd* HB 62/09 (as yet unreported) at page 2 where he said: "This court is bound by the precedents set by the Supreme Court. Arguing against such clear decisions of the Supreme Court is province of academics and not this court.""

See also *Simon Shonhayi Denhere v Mutsa Denhere (Nee Marange) & Anor CCZ 9-19* per MALABA CJ from page 16.

[34] The third stage extended from 26 May 2022, the *Sammy`s Group* Damascene night, to 9 June 2022, when this application for condonation was finally filed. It must have occurred to Mr. Tsivama on 26 May 2022 that he was about one year and five months late in filing his application for condonation. Again the question arises; -with that realisation, what steps did he take to arrest the defect? Immediately? And at next opportunity?

[35] Immediately, nothing was done. The next opportunity presented itself at the first pre-trail conference held the next day. I note that the deponents` respective versions generated some heat and steam regarding what transpired during and around the two sets of pre-trial conferences. The disagreements aside, the important points flowing from such are that (a) counsel for applicants was aware as at 26 May 2022 that they were terribly out of time. And (b) that the intention to include the defence of prescription was never formally raised during the first pre-trail conference. Given the lengthy delay, I found the decision not to immediately raise (or attempt to) the defence of prescription at the first PTC rather puzzling. After all, this was but a pre-trial conference where the usual strict and formal rules of court were generally relaxed. Applicants thus acquiesced to the framed PTC minute whose issues excluded prescription. This present application was only filed after MANGOTA J`s order of 7 June 2022 restricted the applicants` options and compelled them to proceed and adopt the issues as previously agreed before CHIRAWU-MUGOMBA J, or risk having their defence struck out.

Based on these considerations, I am not persuaded that a reasonable explanation has been tendered by the applicants to account for (a) the failure to file the special plea on time and (b) the failure to earlier approach this court for a reprieve.

[36] That notwithstanding, this factor, significant as it is to the issue of condonation, must still be evaluated against other considerations as was noted by DUBE J (as she then was) in *David Chiweza & Anor v Munyaradzi Paul Mangwana & 4 Ors HH 186-17*[10] ["The DUBE J judgment"], where the following reminder was sounded [see page 4]; -

> "The court is required to consider the requirements for an application for condonation cumulatively and weigh them against each other. The application for condonation is not decided on one exclusive factor."

[37] Applicants also made reference to their entitlement to raise the defence of prescription at *any point during the course of the proceedings* in terms of section 20 (2) of the Prescription Act. Applicants stated thus it its heads of argument; -

> "16. Section 20 (2) of the Prescription Act [Chapter 8:11] provides that "a party who invokes prescription shall do so in the relevant documents filed of record in the proceedings provided that a court may allow prescription to be raised at any stage of the proceedings" The relevant documents filed with the court are obviously the pleadings and, in this case, the special plea. Therefore, since the applicants can technically seek the court`s indulgence to raise the defence of prescription at any stage of the proceedings it is only proper that this be dome through the special plea that is already before the court and which the 1st respondent responded to."
>
> [Emphasis added]

[38] This argument regarding section 20 (2) of the Prescription Act may be disposed of with simplicity. The applicants elected to pursue their defence of prescription through the filing of a special plea. They did not pursue a different route as occurred in *Pomelo Mining (Private) Limited v Tonnie Mutunja HH 609-21*. In the present matter, applicants` special plea was however, obstructed by the rules of court. Applicants proceeded to file this present application in order to free the special plea from its impropriety and facilitate its consideration by the court. In that regard, the application will be duly processed and concluded in terms of the applicable principles. This approach is consistent with the Supreme Court`s guidance in *Allied Bank*

[10] Note that this was an earlier application for review before DUBE J (as she then was) between the self-same parties who later appeared before CHAREWA J in the HH 55-21 decision also referred to herein.

Limited v Celeb Dengu & Anor SC 52-16, where MALABA DCJ (as he then was) held that [at page 5]; -

> "Although it is trite that a point of law can be raised at any stage during proceedings, that does not mean that the point of law can be raised anyhow. In order for one to raise a point of law validly at any stage, notice must be given to the other party of the intention to raise the point. There must be a formal way of raising the point."

[39] On the issue of prospects of success of the defence of prescription as well as any likely prejudice that might befall either party, I comment as follows. Firstly, I find it once again, necessary to state that the principal claim underlies a significant transaction and a correspondingly complex dispute. Mr. Tsivama gives a sense of this complexity when he states the following about the trial in paragraph 26 of his founding affidavit; -

> "…The trial alone is estimated to take five days, the documenting exhibits alone are over 1500 pages long, not to mention the time to consider and write the judgment"

[40] Indeed, the bundles of documents in the principal claim HC 6281/22 are rather formidable. They comprise of copious documents dealing with complex and technical legal, financial and mining matters against the background of fierce contestations. The court orders and judgments in the 12 disputes, as well as incisive questions raised in the request and delivery of further particulars also form part of the bundles. They similarly give an indication of the intensity and complexity of the issues to be addressed under the principal proceedings. What this all points out to, even after assessing arguments by counsel, is that the determination of prospects of success of the special plea becomes a matter rooted in a maze of complexities. In any event, the defence of prescription can only be established after the leading of evidence. It was thus imperative for applicants to give an indication of the sort of evident they purported to lead and how such was to offset the claim of continuing breach. Advocate *Mubaiwa*`s arguments on the reckoning of the period of prescription were anchored in the legal rather than the evidentiary/factual. Counsel traced, in such arguments, the commencement of the period of prescription, down to a specific date. Contrary to the thrust of counsel`s argument, it was not possible, on the facts of the matter before the court, to establish, with pin-prick accuracy, the point in time when prescription commenced to run. This fact remains so despite the year 2016 featuring in plaintiff`s summons and declaration, and the date 22 February 2016 being marked

specifically therein. I may mention that the date 22 February 2016 is referenced to the interest claim.

[41] In any event, as an additional point, I am not certain that the provisions of section 19 of the Prescription Act relating to judicial interruption of prescription would still not trip applicants` purported defence of prescription. There have been, as stated above,12 other suits involving the present parties in one form or other. One may focus on the primary spoliation suit before MAFUSIRE J (*Grandwell Holdings [Private] Limited v Minister Of Mines & Mining Development And 5 Others HH 193-16).* Did this matter not interrupt the running of prescription in the sense envisaged in section 19 of the Prescription Act? My belief is that it may have done so. The nature of the claims laid before the court in that matter could very well be classified as a debt. (See the definition of "debt" in *John Conradie Trust v The Federation of Kushanda Pre-Schools Trust & 3 Ors SC 12-17*.)

DISPOSITION.

[42] In the final analysis, the applicants did not proffer a plausible reason for having failed, in the first instance, to timeously file their special plea. The applicants also failed to provide a reasonable explanation for the lengthy one-and a half year delay in filing the application for condonation. They in that regard, failed to take appropriate action to remedy their breach despite having ample opportunity to do so during the course of that period. In addition, the prospects of success of the special plea have not been demonstrated. It must be remembered that in applications for condonation the duty lies on the applicant to demonstrate that it is deserving of the court`s clemency. (See *David Chiweza & Anor v Munyaradzi Paul Mangwana & 4 Ors* [The DUBE J judgment]). That duty emanates from nothing other than the age-old requirement that litigants` must adhere to the rules of court and that condonation will not be granted as a matter of course. The dispute between the parties must be put to bed. I believe that it will be in the best interests of justice that this matter proceeds to trial on the issues identified during the pre-trial conference. I am not persuaded that applicants have tendered good and sufficient cause for condonation and as such, the application will be declined. On the question of costs, Advocate *Magwaliba* urged the award of punitive costs. Based on the tortuous legal history of the parties, and earnest attempt to incorporate an additional defence on the part of the applicants, there is merit is an ordinary award of costs.

Accordingly, it is ordered that; -

1. Application for condonation of late filing of special plea be and is hereby dismissed.
2. Applicants to pay first respondent`s costs of suit on an ordinary scale.

Sawyer & Mkushi- applicants` legal practitioners
Magwaliba & Kwirira-first respondent`s legal practitioners
Caleb Mucheche and Partners-third respondent`s legal practitioners.

CHILIMBE J…….