Judgment No. HB 1/2004
Case No. HC 1570/2002
X-Ref: 1984/01 & 3746/01

NHLIZIYONHLE SHOPPING CENTRE P/L

and

TRIPHINE NHLIZIYO

Versus

EVIDENCE MARKETING (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 28 MARCH 2003 & 29 JANUARY 2004

T Khumalo for applicants
C Hikwa for respondent

Judgment

CHIWESHE J: The applicants seek an order rescinding the judgment of this court obtained in default by the respondent under case number HC-1984-01 on 21 September 2001. The second applicant is the managing director of the first applicant and as such authorised to speak on its behalf.

It is common cause that the application was lodged well out of time. It comes nine months after the applicants became aware of the order granted against them. An application for condonation of late filing of the application was made and granted. The matter was then argued on the merits.

In order to succeed in an application for rescission of judgment the applicant must show that there is good and sufficient cause for the setting aside of the judgment that was entered against it. In that regard the applicant must show that they were not in wilful default and proffer an explanation for their default. In addition they must show that they have a *bona fide* defence on the merits of the main matter.

The applicants have in their founding affidavit blamed their legal practitioners who despite full instructions to defend the matter failed to do so. It is common cause that a report was filed with the Law Society on 20 February 2002. In a letter dated 26 April 2002 the said legal practitioners wrote to the Law Society explaining their position and denying the allegations made against them by the applicants. Part of that letter reads:

> "We also attach hereto some of the letters and documents which obviously show that their client was well informed of the proceedings. She was even aware of court date (d) and why court refused to hear us (she had been advised of that by letter dated 13 September 2001) attached as well.
>
> The writer did his best to pursue dialogue but failed hence the court confirmed the order."

Indeed correspondence filed of record show that the applicants knew or ought to have known that the matter had been set down for hearing on 21 September 2001. It is also clear that the applicants had been advised by their erstwhile legal practitioners that they had no defence on the merits and that for that reason they should pursue an out of court settlement. I am satisfied that for those reasons the applicants did not bother to attend court leading to the default judgment. They knew they had no defence from the word go. I find that the facts as they stand point to the conclusion that the applicants never intended to defend the matter. This application appears to have been triggered by the contempt of court proceedings brought against the applicant.

Inevitably I come to the conclusion that the applicants were in wilful default. Further it is clear from the papers that the applicants have no *bona fide* defence on the merits. The applicants have thus failed to show that there is good and sufficient cause

to set aside the judgment granted on 21 September 2001 under case number HC-1984-01.

It was for these reasons that the application was dismissed with costs.

James, Moyo-Majwabu & Nyoni applicants' legal practitioners
Mabhikwa, Hikwa & Nyathi respondent's legal practitioners