LARRY BEN MPOFU

Versus

MIKA PARIRA MPOFU

And

STEPHEN DUBE

And

CITY OF BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 12 FEBRUARY 2009

S S Mlaudzi, for the applicant
S S Mazibisa, for the respondents

Opposed Application

NDOU J: The applicant seeks rescission of judgment granted in his absence. Briefly, the 1st and 2nd respondents issued out summons and an urgent chamber application in respect of the same matter on 10 June 2005 i.e. HC 1026/05 and HC 1027/05. The application has not been set down by the respondents. The respondents were instructed to serve the application on the applicant. The applicant's legal practitioners filed opposing papers. The application had not been set down.

Due to oversight, the applicant did not at the same time file an appearance to defend in the action proceedings. The long and short of it is that the applicant admits being negligent in his tardiness. He has, however, shown his *bona fides* in that he filed opposing papers in the application that was filed. In essence, the opposing papers point to his opposition of this action as well. What the applicant should have done, after receiving the summons under HC 1026/05 and the application under HC 1027/05 simultenously, is to file an appearance to defend and the opposing papers respectively. He did the latter and negligently omitted to do the former. Bearing in mind that the 1st and 2nd respondents issued out the action HC 1026/05 and the application HC 1027/05 simultenously arising mainly from the same facts, the applicant's explanation is understandable and reasonable. The applicant has given a

candid and comprehensible explanation for his default. It is trite that a litigant who admits that he was negligent in his tardiness may nonetheless be found to merit rescission if he shows *bona fides* – *Songore* v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S) at 211E-F and *Khumalo* v *Mafurirano* HB-11-04 at page 7 of the cyclostyled judgment. This is the case here. Looking at the facts that are common cause I do not consider the applicant's case as being hopeless. It is trite that the court would not consider that the application should be refused unless if it thought that the applicant's case is hopeless – *Stevenson* v *Broadly NO* 1972(2) RLR 467(A). In this regard, this is what McNALLY JA said in the *Songore* case, *supra*, at 213A:

> "One is naturally reluctant to reach a decision which would result in the giving of judgment against a person without his being heard, when he protests that he has a valid defence. If I were convinced that the defendant in this case was *bona fide* and had a *prima facie* defence, then I might be unjustified in condemning him for a short delay despite the inadequacy of his explanation."

I have already indicated above that the applicant gave a *bona fide* explanation. But does he have a *prima facie* defence on the merits with reasonable prospects of success? That there was an agreement in respect of the piece of land in dispute is beyond dispute. It is common cause from the papers that the applicant paid to the 1st and 2nd respondents a sum of $2 000,00 and a Toyota Hilux motor vehicle pursuant to the agreement between the parties. Under HC 1026/05 and HC 1027/05 the 1st and 2nd respondents' case is simply that there was no agreement of sale but a partnership. So the main issue is the nature of the legal relationship between the parties. Further, the 1st and 2nd respondents placed a lot of the emphasis on the absence of the consent of the Bulawayo local authority. The lack of such consent at the time of the signing of the agreement does not invalidate the agreement as such consent may still be obtained later – *Mukarati* v *Mkumbu* 1996(1) ZLR 212 (S). The applicant has a *bona fide* defence to the 1st and 2nd respondents' claims. I would be doing applicant injustice if I do not give him an opportunity of presenting such a defence – *Ndebele* v *Ncube* 1992(1) ZLR (S) at 290C-E.

Accordingly, it is hereby ordered that:

1. the default judgment granted against the applicant on 15 July 2005 be and is hereby rescinded.

2. the automatic bar be and is hereby uplifted.
3. that applicant files his appearance to defend within 7 days of the date of this order.
4. the costs be costs in the cause.

Samp Mlaudzi & Partners, applicant's legal practitioners
Cheda & Partners, 1st and 2nd respondents' legal practitioners