HB 10-17
HC 45-16
XREF HC 805-15,
XREF HC 165-15
XREF HC 1698-14
XREF HC 1699-14

SHEPHERED CHIPADZA
versus
ERNEST TEKERE
and
PRECIOUS SIHLE SIBANDA

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 17 JANUARY 2017 AND 26 JANUARY 2017

Opposed Application

L Nkomo for the applicant
J Sibanda for the 1st respondent

MATHONSI J: The applicant seeks an order for the upliftment of a bar imposed upon him by reason of his failure to make discovery in terms of the rules of this court in HC 1698/14 after being called upon to do so. The application is opposed only by the first respondent who moved for the imposition of the bar against the applicant in the first place.

In HC 1698/14 the first respondent sued the applicant and one Precious Sihle Sibanda by summons action for an order declaring the sale agreement entered into between the applicant and Sibanda in respect of stand No 1701 Kumalo Township, being a portion of stand No 4125 Bulawayo Township (the property) null and void. He also sought an order directing Sibanda to transfer that property to himself and for the eviction of the present applicant from the same.

Both the applicant and Sibanda contested the action with the applicant then represented by the law firm of Muzvuzvu and Mguni Law Chambers. During the course of the filing of pleadings that firm was served with a notice to make discovery which it received on behalf of the applicant. There is a very long story as to why discovery was not effected in terms of that notice but it has been rendered unimportant because *Mr Sibanda* for the first respondent conceded at the commencement of the hearing of this application that the explanation given for failure to discover is correct and is not being contested.

In other words, it is common cause that discovery was not effected not as a result of any fault of the applicant, who in fact says he signed the discovery affidavit timeously but for some reason it was not filed. The fault lies with the applicant's then legal practitioner. When the applicant failed to heed the notice to discover, the first respondent approached the court in HC 165/15 and obtained an order on 11 February 2015 compelling him to effect discovery within 5 days of the date of that order.

Apparently the applicant again failed to discover in terms of that order resulting in the first respondent returning to court in HC805/15. He obtained another court order on 13 May 2015 in terms of which the applicant's plea in HC 1698/14 was dismissed with the first respondent being granted leave to make an approach for default judgment to be granted against the applicant.

Although in his opposing papers the applicant insisted that he had in fact sought and obtained default judgment against the applicant subsequent to the grant of the order of 13 May 2015, that has turned out to have been a hoax. In fact to his credit, *Mr Sibanda* again conceded that there was never an approach for default judgment in HC 1698/14 and that the situation remains as at the grant of the order in HC 805/15 dismissing the applicant's plea. So that part of the first respondent's opposition, where he asserted that the applicant had made a wrong application, that of the upliftment of the bar instead of an application for default judgment, was abandoned by the first respondent himself.

In this application the applicant effectively seeks the setting aside of the two court orders, the first one being one granted on 11 February 2015 in HC 165/15 while the second one was granted on 13 May 2015 in HC 805/15. He has explained that the two court orders were granted after he had signed the discovery affidavit which he entrusted to his then legal practitioner for filing. It was through the legal practitioner's astonishing incompetence that it was not filed. When he discovered his fault, the legal practitioner then sought to smuggle the discovery affidavit into the court record by filing it on 23 November 2015 several months after the

applicant was barred, an exercise in futility indeed. As I have already said that explanation for the default has been admitted by the first respondent and is now common cause.
The applicant has insisted that he has a good and *bona fide* defence against the first respondent's claim in HC 1698/14. He states that he purchased the property from the joint estates of the late Gordon Tapson Sibanda and his wife the late Mary Sibanda (DRB 694/08 and DRB 508/09 respectively) duly represented by Precious Sihle Sibanda in her capacity as the executrix dative of the two estates, by virtue of a cession agreement signed in March 2014. Clause 2.5 of that agreement provides that the sale was subject to the seller applying for and obtaining consent to sell by the Assistant Master of the High Court.

After paying the full purchase price of $41 000-00 in terms of the agreement the applicant says that the Assistant Master granted authority to sell to Sibanda in terms of s120 of the Administration of Estates Act [Chapter 6:01] thereby completing the legal requirements for the purchase of property from a deceased estate. He maintains that it is that consent by the Assistant Master as custodian of all deceased estates which ranks his own sale agreement in a better stead than that of the first respondent.

In contradistinction, the first respondent's sale agreement with Sibanda, although signed earlier on 3 August 2010, is not only unenforceable but null and void by reason that it was entered into without the consent of the Assistant Master. It purports to be an agreement of sale between Sibanda and the first respondent at a purchase price of $24000-00 when Sibanda did not own the property. She therefore could not sell what she did not own. The applicant challenges that agreement further on the ground that it does not even state that the parties were selling each other the property.

More importantly, the agreement has been challenged by Sibanda in her plea where she avers that she never signed for the sale of her parents' house but for a loan of $24 000-00 advanced to her by the first respondent on the security of the property that she did not even own.

The first respondent opposes the applicant on the sole ground that the agreement of sale entered into between the applicant and the estates was null and void by reason that at the time

that it was entered into the property in question had already been sold to him by Sibanda. Never mind that Sibanda did not own the house and did not have the Assistant Master's consent to sell in terms of s120. *Mr Sibanda* for the first respondent submitted that allowing the applicant to contest the first respondent's action would be a complete waste of time because he did not plead to the averment made in the first respondent's declaration in HC 1698/14 that the agreement of sale between him and the estates was null and void.

To the extent that the applicant did not deny that averment, *Mr Sibanda* submitted, he is taken to have admitted it as it is a principle of pleading that an averment which is not specifically denied is taken to be admitted. It is because of that fact that the first respondent agreed to place only one issue before me for determination, namely whether the applicant has a *bona fide* defence as would entitle him to be allowed to defend the main action.

In my view consideration of an application of this nature involves the exercise of a discretion by the court, that is, whether to condone what is a failure by the applicant to comply with the rules relating to discovery. Having failed to abide by the rules the applicant is now barred by virtue of a court order made in default. Whichever way one looks at it therefore the application requires consideration of factors for rescission of judgment set out in rule 63 as well. In terms of r63 (2) the court must be satisfied that there is good and sufficient cause before it sets aside a judgment given in default.

As an application for condonation is one for excusing the negligence of the applicant the degree of negligence is an important factor to be considered in deciding whether to grant condonation or not. I am satisfied in this matter that the negligence that led to failure to file the discovery affidavit is attributable to the legal practitioner who represented the applicant then who sat on a signed affidavit without filing it and did not even act on being served with a compelling order.

Although counsel would have wanted this matter to be determined narrowly on the question of the applicant's defence, I am of the view that adopting that approach would be unduly fettering an otherwise very wide discretion bestowed to the court when considering such

application. By saying that I am not, by any means suggesting that the applicant does not have a valid defence to the claim, he certainly does. All I am saying is that it would be an injudicious exercise of discretion not to have regard to the fact that the applicant would not be in this incongruous situation, but for the dilatoriness of his legal practitioner.

In addition, I am also swayed by the fact that all that has happened in this matter is the barring of the applicant. Judgment has not been taken against him. To that extent I associate myself fully with the remarks of MAKARAU JP (as she then was) in *Chimpondah and Another* v *Muvami* 2007 (2) ZLR 326 (H) 328D – E that:

> "It is my further view that, when considering an application for condonation for the late observance of a rule of procedure before default judgment is given in the matter, the court should lean towards granting rather than refusing such application. I am however, not suggesting that, prior to judgment, condonation should be granted for the mere asking. The applicant still has to satisfy the court that there is good cause to excuse the negligence and grant the indulgence."

See also *Ehlers* v *Standard Chartered Bank Zimbabwe Ltd* 2000 (1) ZLR 136 (H); *Kodzwa* v *Secretary For Health and Another* 1999 (1) ZLR 313 (S).

The applicant has not only satisfactorily explained the failure to comply with the rules, he has also shown that he has a very strong case against the first respondent's claim. In light of the fact that judgment has not yet been entered against the applicant, in fact HC 1698/14 remains in limbo presumably because of this application, justice and fairness dictate that the applicant should be allowed to re-enter the fray. That way the dispute between the parties will be fully interrogated, their respective rights weighed properly with the benefit of all the evidence and a definitive decision taken at the end of it all. Good and sufficient cause exists for the setting aside of the orders made against the applicant.

In the result, it is ordered that:

1. The bar against the applicant in HC 1698/14 by reason of failure to effect discovery be and is hereby uplifted.

2. The court orders granted by this Honourable Court under case numbers HC 165/15 and HC 805/15 be and are hereby rescinded.

3. The defendant's plea in HC 1698/14 is hereby reinstated.

4. The applicant is granted leave to file his discovery affidavit, pretrial conference minute and synopsis of evidence in HC 1698/14 within 4 days of the grant of this order.

5. The costs of this application shall be in the main cause.

Calderwood, Bryce Hendrie and partners, applicant's legal practitioners
Messrs Job Sibanda and Associates, 1st respondent's legal practitioners