TREVIGLO SERVICES trading as TADA TEAK AND IRON
versus
EMMERSON GWATIDZO

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 17 March 2013, 4 June 2014

Opposed Application

Mr. *J. Koto,* for applicant
Mr. *A. Chambati,* for respondent

CHIGUMBA J: This is an application for the rescission of a default judgment granted in case number HC 2846/13, against the applicant on 8 February 2013, whereby an arbitral award was registered by this court in terms of Article 35 of the UNCITRAL Model Law, as set out in the schedule to the Arbitration Act [C*ap 7:15*]. The applicant seeks to blame its previous Legal Practitioners for being negligent in failing to carry out its instructions to oppose the registration of the arbitral award. This court must decide whether the allegation of negligence constitutes good and sufficient cause for purposes of meeting the requirements of rescission of default judgment in general, and for purposes of allowing rescission of the judgment which registered an arbitral award in particular. The question of the circumstances in which a court may allow the consequences of a party's legal practitioner's adverse conduct to affect the outcome of litigation, is a vexatious one, which is always dependant on the particulars of each case. "It is the trade of lawyers to question everything, yield nothing, and talk by the hour." Thomas Jefferson ***(1743-1826) Third President of the United States.***

At the hearing of this matter, I dismissed the application for rescission of a judgment in which an arbitral award was registered by this court for purposes of execution, with costs. I gave brief reasons for the judgment, *ex tempore,* as follows*:* "The applicant has failed to establish good and sufficient cause to rescind a default judgment which registered an arbitral award. There are no prospects of success in the main application due to procedural irregularities which remain

unattended. This court has no jurisdiction to inquire into the merits of arbitral awards except as provided for in terms of Article 36 of the Model Law, whose requirements have not been met in the founding affidavit to this application. See *Benson Samudzimu* v *Dairiboard. Holdings Limited* HH 204/10, 2010 (2) ZLR 357".I have now been asked to provide detailed reasons for judgment. These are the reasons.

The background to this matter is that the respondent was employed as a production manager by the applicant in 2010. As part of his probation review, on 19 March 2010, and on 1 April 2010, he accepted that he had made mistakes in the discharge of his duties. On 20 April 2010 he was suspended from duty without pay and benefits, pending a disciplinary hearing, in terms of section 4(a), (f) and (g) of SI 15/2006 (acts of omission inconsistent with the fulfillment of the express or implied conditions of his contract, gross incompetence or inefficiency in the performance of his work, habitual and substantial neglect of his duties). A disciplinary hearing was held on 4 and 10 May 2010, resulting in respondent's dismissal from applicant's employ, with effect from the date of suspension. On 13 March 2012, an arbitrator found respondent's dismissal to be unfair because the applicant had not recorded the disciplinary hearing in writing, and the absence of the record of proceedings rendered the proceedings illegal.

Arbitrator Matsikidze ordered that the respondent be reinstated with full benefits and pay from the date of the unlawful dismissal, or alternatively, for quantification of damages to be done within 14 days of the date of his award, in the event that reinstatement was no longer tenable. On 27 March 2012, applicant appealed to the Labour Court against the decision of the arbitrator. The appeal was dismissed after eight months and for failure to file heads of argument by the applicant. On 16 April 2013, applicant changed Legal Practitioners from Messrs Maganga & Company to his current Legal Practitioners, Messrs Koto & Company. In a letter addressed to the previous Legal Practitioners by the current Legal Practitioners, an allegation was made that due to the negligence of the previous legal practitioners, the appeal had been dismissed, and the quantification of respondent's damages in lieu of reinstatement done in default of appearance by the applicant.

On 29 April 2013, Messrs Mabundu Legal Practitioners responded to the letter addressed to Messrs Maganga & Company on 16 April 2013. Mr. Sangarwe, the previous attorney of

record, disputed the allegation of negligence. He reiterated that Mr. Dave Ashwin, one of applicant's directors, had been:

> "… kept abreast of all the proceedings and the writer actually called him on the phone on two occasions inquiring as to whether we should continue to represent him in this matter. He replied that a Labour consultant, Mr. P. Shawatu was dealing with the matter and as such we should leave everything to him".

Mr. Sangarwe refused to depose to any affidavit that he did not do enough to safeguard the applicant's interests by failing to file heads of argument in the appeal to the Labour Court, by failing to attend the hearing in which damages were quantified, or by failing to apply for rescission of the arbitral award.

The basis of the application before the court, as set out in applicant's founding affidavit, is that the applicant was betrayed by his Legal Practitioners who did nothing to safeguard its interests. The applicant denies being in willful default because it had given its lawyers instructions to defend the matter. The applicant makes reference to Messrs Maganga & Company, and attaches a response from Messrs Mabundu Law Chambers. No explanation is proffered in the founding affidavit. We are left to surmise that the particular lawyer handling the matter had switched law firms. The applicant avers that the lawyer's conduct shows a deliberate course of action meant to prejudice it by failing to appear before the arbitrator who quantified damages. The applicant alleges that its previous lawyer connived with the respondent's lawyer on 8 April 2013 resulting in applicant's property being attached in execution.

The respondent opposed the application for rescission of the judgment which registered the arbitral award, on 10 may 2013. He raised a preliminary point that the applicant was barred in terms of the rules of this court because it failed to file its opposing affidavit to the application for registration of the arbitral award within ten days of the date of service of the application on it, resulting in an automatic bar operating against it. The respondent averred that as long as applicant remained barred, the judgment could not be rescinded because there was no opposition before the court, and no good and sufficient reason to deny the registration of the arbitral award. It is common cause that the application for registration of the arbitral award was served on the applicant on or about 16 July 2013. It is common cause that no opposing affidavit was filed. Order 32 rr233 (1) to (3) provides as follows:

233. Notice of opposition and opposing affidavits

(1)…
(2) …
(3) A respondent who has failed to file a notice of opposition and opposing affidavit in terms of sub rule (1) **shall be barred**. (my underlining for emphasis)

The bar is automatic, and it remains operational unless and until an application to uplift it is made in terms of the rules of this court. No such application has been filed by the applicant. The automatic bar is the bedrock on which this court gave judgment in default of filing opposing papers. For applicant to purge its default, it must apply for the uplifting of the automatic bar which is operating against it in terms of Order 32 rr 233 (3). The preliminary point raised by the respondent must be upheld.

In regards to the merits of the matter, respondent averred that applicant did not give any reasons for its default and failure to file opposing papers to the application to register the arbitral award. Applicant laid the blame at its previous lawyer's door. The court must decide whether such an explanation is adequate, and whether it suffices and fulfils the requirements set out in the rules of this court that govern rescission of judgment in general, and rescission of a judgment which registered an arbitral award, in particular. The question that the court must answer is this; firstly, in what instances may this court decline to register an arbitral award for purposes of execution? Secondly, is the evidence before the court sufficient and cogent to sustain an application to rescind the registration of an arbitral award? It is my suggestion that before examining the law that will enable the court to answer these two questions, the court will look at the provision in its rules that governs rescission of its judgments in general. Order 9 rule 63 of the Rules of the High Court 1971 provides as follows:

> "***63. Court may set aside judgment given in default***
> (1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, **not later than one month after** he has had knowledge of the judgment, for the judgment to be set aside.
> (2) If the court is satisfied on an application in terms of sub rule (1) that there is **good and sufficient cause** to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his action, on such terms as to costs and otherwise as the court considers just". (my underlining for emphasis)

The leading case on the interpretation of r 63 is *Viking Woodwork (Pvt) Ltd* v *Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (SC), *w*here the court gave guidance about its requirements. The head note reads as follows:

> "A defendant against whom a default judgment has been granted has a period of one month from the date he becomes aware of the judgment to apply for rescission of that judgment. If he does not make the application within that period, but wants to make it after the period has expired, he must first 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 rules. 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 rescission, but also for the delay in seeking condonation. There are thus two hurdles to overcome .In the event of flagrant breaches of the rules, the indulgence of condonation may be refused, no matter what the merits of the application are. This applies even where the blame lies solely with the party's legal practitioner,"

A close reading of this case will show that it is a vital requirement or hurdle that an applicant for rescission of default judgment must state the date on which it became aware of the judgment. This averment, which must be contained in the founding affidavit, will bring such an applicant squarely within the ambit of r 63(1). Failure to comply with the one month time limit necessitates an application for condonation of late filing of the application for rescission of default judgment. The second hurdle that an applicant in terms of r 63 must clear is that, an explanation must be given as to why judgment was given in default. If the default was willful, success under r 63 will be elusive, if not impossible. The gist of the applicant's founding affidavit is that, applicant was not in willful default. It had given instructions to its legal practitioners who let it down, betrayed it, or connived with the opposition to its detriment. Does the evidence before the court support these allegations? In my view it does not. There are at least four sets of Legal Practitioners who represented the applicant at various stages of these proceedings, Messrs Sande & Associates, Messrs Maganga & Company, Messrs Mabundu, Messrs Koto & Company. Mr.*Sangarwe,* previously of Messrs Maganga & Co, now of Messrs Mabundu, is indirectly accused, in the applicant's founding affidavit, of negligence, and of failure to carry out applicant's instructions to oppose the quantification of damages and to oppose the registration of the arbitral award. In his letter filed of record, dated 29 April 2013 he strenuously denies any wrongdoing, and alleges that the applicant was being represented by a Labour Consultant, Mr. P. Shawatu. So all we have is unsubstantiated allegations that applicant was not in willful default because his lawyer was negligent. The applicant does not dispute the contents of the letter of 29 April 2013 in its answering affidavit. The court accepts that the allegation that applicant's lawyer was negligent is a bald one, it is unsubstantiated, it has been

challenged and the challenge remains extant, it has not been proved by the applicant that its failure to file opposing papers was due to its lawyer's negligence.

In paragraph 13 of the founding affidavit, applicant states that it was shocked when it was served with a notice of seizure on 8 April 2013. Presumably that is the date when the applicant became aware of the judgment. My reading of *Viking Woodwork Supra* is that an applicant for rescission of default judgment is required to state expressly, the date on which it became aware of the judgment. This enables such an applicant to expressly bring itself within the ambit of r 63. See also *Theunissen* v *Payne 1940 TPD 680, CIR* v *Burger* 1956 (4) SA 446 (A), *Saloojee & Anor* v *Minister of Community Development* 1965(2) SA 135 @ 138H, *Tshivhase Royal Council* v *Tshivhase & Anor* 1992 (4) SA 853 (A), *Ntini* v *Sibanda* SC 74/02, 2002 ZLR (1) @ 266, , *SAI Enterprises* v *Girdle Enterprises (Pvt) Ltd* 2009(1) ZLR 352,

The applicant before me did not do so. It did not jump the first hurdle under r 63. The application before me was filed on 8 May 2013. No explanation was given as to why the notice of seizure only came to the applicant's attention on 8 April when it had been served on applicant on 5 April 2013. The applicant's attempts to lay the blame at its lawyer's door have not found favour with me because of the paucity of evidence before the court to support that contention. Even if these excuses had found favour with the court, it has been held by a more superior court in S v *McNab 1986* (2) ZLR 280 (S) at 284A-D, that;

> "I share the view expressed by STEYN CJ in *Saloojee & Anor NO* v *Minister of Community Development supra* at 141C-E when he said:
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> "There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations ad misericordiam should not be allowed to become an invitation to laxity. In fact this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are. *(Cf Hepworths Ltd v Thornloe & Clarkson Ltd 1922 TPD 336; Kingsborough Town Council v Thirlwell & Anor 1957 (4) SA 533 (N).)"*

The second hurdle to bring an ordinary applicant for default judgment within the ambit of r 63 is an averment of good and sufficient cause and sufficient evidence to support the averment.

In the leading case of *Deweras Farm (Pvt) Ltd & Ors* v *Zimbabwe Banking Corp Ltd* 1998 (1) ZLR 368 (SC) the phrase good and sufficient cause has been held to mean

> "…that the High Court Rules require only ``good and sufficient cause" as the basis of rescission of judgment. This gives the court a wide discretion and it is not possible to provide an exhaustive definition of what constitutes sufficient cause to justify the grant of indulgence. Even where there has been willful default there may still sometimes be good and sufficient cause for granting rescission. The good and sufficient cause, for instance, might arise from the motive behind the default". See also *Cairns Executors v Gaarn 1912 AD 181 at 186, Roland & Anor v McDonnell 1986 (2) ZLR 216 (S), Stockil v Griffiths 1992 (1) ZLR 172 (SC)* where the court stated that:
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> "The factors which are taken into account in deciding whether a default judgment should be rescinded are
> (i) the reasonableness of the applicant's explanation for the default;
> (ii) the bona fides of the application to rescind the judgment; and
> (iii) the bona fides of the defence on the merits of the case and whether that defence carries some prospect of success".

In the exercise of the wide discretion that reposes in a court in terms of r 63, it is my view that not enough has been placed before the court to support a finding that there is good and sufficient cause to rescind the judgment that is being challenged. The applicant's disingenuous attempt to blame its Legal Practitioner has been rejected by the court for lack of evidence to support it. It can therefore not be a reasonable explanation if it is not sustainable. The applicant appears to be motivated by a desire to put off the evil day and avoid paying its dues to the respondent. Its application for rescission of judgment is not bona fide, especially in light of the fact that it took eight months to prosecute its appeal before the Labour Court, and that the appeal was dismissed for want of prosecution. Lastly on the question of whether applicant's defence on the merits carries some prospects of success, the court has reservations about applicant's willingness to have the merits of the matter ventilated. There are some outstanding procedural hurdles that applicant must jump before the matter can be set down for determination of its merits before the Labour Court. An application for condonation of late filing of heads of argument must be filed and determined in applicant's favour. An application for reinstatement of the appeal will then have to be filed and determined, again in applicant's favour. Only then can the matter be heard on merit. The applicant has not shown the court on the papers before it, the effort that it is making if any, to attend to jump these procedural hurdles. In a nutshell, based on

the papers filed of record, applicant has failed to establish the requirements that are necessary to entitle it to rescission of judgment in terms of the rules of this court

Having found that the applicant does not qualify for rescission of default judgment in terms of the rules of this court, it is now time to consider whether the provisions of the Model Law contained in the schedule to the Arbitration Act. Article 35 of the Model can provide applicant with any relief. Section 35 law provides as follows:

> "(1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the *High Court*, shall be enforced subject to the provisions of this article and of article 36."

So, in order to register an arbitral award as an order of this court for purposes of enforcement, all this court has to do is to check if article 35 has been complied with, as well as article 36. The two articles should be read together. The court notes that there appears to be a distinction between a labour based arbitral award and any other arbitral award, when it comes to the question of which court to approach, for purposes of challenging the merits of the arbitral award. The registration of a Labour Arbitral award is done in terms of s 98(14) and (15) of the Labour Act [*Cap 28:01*]. The respondent correctly in my view, contended that an Arbitral award which has not been set aside in terms of Article 33 or Article 36 or in respect of which execution has not been stayed must be registered as a matter of course. He relied on the case of Greenland v *Zimbabwe Community Health International Research Project* HH-93-13*,* .as authority for that proposition where the court stated that, at p 3,

> "where an award is not stayed or suspended in terms of section 92E (3) of the Labour Act, the court will, as a matter of principle, register the award unless there are grounds as provided for in Article 36 of the Model law contained in the Arbitration Act…"

It is trite that an appeal to the Labour court, against the merits of a decision does not suspend the operation of the decision appealed against. See *Gaylord Baudi* v *Kenmark Builders (Private) Limited* HH-4-12*, Elvis Ndlovu* v *Higher Learning Centre* HB -86-10*, Net-One Cellular (Pvt) Ltd* v *Net-One Employees & Anor* 2005 (1) ZLR 275*, DHL International Ltd* v *Clive Madzikanda* HH-51-10*, Benson Samudzimu* v *Dairibord Holdings* HH-204-10, 2010 (2) ZLR 357 where the court stated @ p 360 that:

> "…the Labour Act takes precedence over the Arbitration Act…the intention of the legislature was to have all labour matters initiated and resolved to finality in terms of the Labour Act ".

In my view, the applicant's remedy was to apply to have the operation of the arbitral award suspended pending determination of the appeal process. Once the arbitral award had been registered applicant was at liberty to apply to have execution stayed, again pending determination of its appeal to the Labour Court. The applicant would be entitled as part of the appeal process, to challenge the arbitrators computation of damages. Armed with an order which would have been duly ventilated by the Labour Court on merit and in regard to the quantum of damages, applicant ought to have approached this court in terms of r 449 of the rules of this court to correct the arbitral award in regards to the quantum of damages. All of these remedies lie with the Labour Court, which trumps the Arbitration Act in the circumstances of this case, where the arbitral award emanated or is based on a labour dispute.

The applicant is guilty of failure to act timeously in seeking the appropriate remedies provided by the Labour Act. The applicant is guilty of flitting from one Legal Practitioner to another like a bee that flits from flower to flower in the never ending search for the right pollen to improve the quality of its honey. In this case, applicant must accept the blame for the resultant multiplicity of actions which it instituted, in the wrong fora, with no relief in sight. This court is not at liberty to rescind a default judgment in which it registered an arbitral award based on labour issues, just because the appeal to the Labour court against the arbitrator's decision has been dismissed for want of prosecution. This court is not at liberty to substitute its discretion for that of the Labour Court when it comes to a determination of the merits of an arbitral award based on labour issues. As long as the arbitral award is not set aside by the Labour court, and it remains extant, it is registrable by this court.

In conclusion, I find that Applicant has failed to meet the requirements of rescission of judgment in terms of r 63 of the rules of this court. It would be incompetent for this court to grant the relief that the applicant is seeking, which relief must be preceded by a ventilation of the merits of the appeal to the Labour court. It is regrettable that the applicant has chosen to submit itself to the dangers of conflicting legal advice as a result of constantly changing its legal representatives. This is a very simple labour matter that ought to have been conclusively disposed of, in the right court. For these reasons, the application for rescission of the judgment in which an arbitral award was registered as an order of this court is dismissed, with costs.

Koto & Company, applicant's legal practitioners
Chambati & Mataka Attorneys, respondent's legal practitioners