THE PINNACLE PROPERTY HOLDINGS (PVT) LTD
versus
MUNICIPALITY OF REDCLIFF

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 5 June 2014

Advocate Girach, for the applicant
T. Nyamakura, for the respondent

DUBE J: This is an application for rescission of a judgment of MTSHIYA J under HC 2439/11.

The salient facts of this application are as follows. The parties entered into an instalment sale of land for $658 000-00 payable in 6 months. The applicant paid $360 000-00. The respondent subsequently cancelled the agreement of sale on the basis of non-payment of the full purchase price. The applicant issued summons claiming transfer of the land purchased upon payment of the balance of the purchase price or alternatively restitution of monies paid towards the purchase price. The matter was set down for a Pre-Trial Conference on 19 February 2013. The applicant did not turn up at the hearing on time and default judgment was granted against it.

The applicant's explanation for the default is that the matter was diarised by its legal practitioner's secretary for 9:30 am on 19 February 2013. At about 9:15 am on the appointed date, counsel for the applicant received a call from respondent's legal practitioner, Mrs *Matshiya* ,who indicated that she was waiting at court and that the matter was set down for 9 am. Counsel for the applicant consulted with Mr *Hashiti* who had appeared on his behalf on a previous occasion and he confirmed that the matter had been set down for 9 am. He together with Mr *Hashiti* rushed to court. Applicant's representative was already at court. When counsel arrived at the judge's chambers at 9:30 am, the matter had already been dealt with and default judgment granted against the applicant. The applicant maintains that the respondent snatched at a judgment because counsel proceeded and applied for default judgment despite that applicant's counsel was on his way to court. Applicant insists that it

was not in wilful default as the default arose out of error and oversight and not out of the making of the applicant. The applicant submitted that mistakes arising out of misdiarisation of matters do occur and are common. It contended that this was a minor transgression for which the applicant should not be penalised. The applicant avers that it has a *bona fide* defence on the merits as the sale was not properly cancelled and that effectively there was no cancellation of the sale. The applicant argued that the agreement between the parties is still operational.

The respondent argued that the applicant was in wilful default. It refuted allegations that respondent's counsel snatched at a judgment because she telephoned applicant's counsel to inform him of the hearing. Respondent submitted that default judgment was granted because the applicant did not attend resulting in the court directing the parties to be ushered into the judges' chambers for the matter to be dealt with. This was after applicant's counsel had promised to call back and failed to do so as promised. The respondent further submitted that the applicant has no *bona fide* defence on the merits and urged the court to dismiss the application. It submitted that the sale was cancelled for failure to pay the full purchase price and its failure to develop the land and ultimately that it is not entitled to receive transfer of the land. It submitted that the alternative claim has no prospects of success because the respondent was entitled to set off amounts outstanding for rates owed by the applicant against part of the purchase price paid.

An applicant seeking to have a judgment rescinded in terms of order 9 r 63(2) is required to show the existence of "good and sufficient cause" for the rescission. The following are the factors that the court is expected to consider:-

1. the applicant's explanation for the default.

2. the *bona fides* of the application to rescind the judgment.

3. the *bona fides* of the applicant's defence on the merits of the case.

See *Deweras Farm (Pvt) Ltd and Ors* v *Zimbabwe Banking Corporation* 1997 (2) ZLR 47 (HC).*G.D. Haulage (Pvt) Ltd.* v *Mumugwi Bus Services (Pvt)* 1979 RLR 447, *Duprez* v *Hughes R&N* 706 (SR).

The court will consider cumulatively these requirements in determining whether or not good and sufficient cause has been shown for rescission of the judgment.

In considering the explanation for the default, the court is required to consider the reasonableness of the default. In *Zimbank* v *Masendeke* 1995 (2) ZLR 400 (S) the court in defining the concept of wilful default remarked as follows:

> "Wilful default occurs when a party with the full knowledge of the service or set down of the matter, and of the risks attendant upon default, freely takes a decision to refrain from appearing."

The default is attributed to the applicant's legal practitioners who misdiarised the matter. The misdiarisation was simply a mistake. I do not read anything else into the circumstances. The court in *Zimbabwe Banking Corporation* v *Masendeke (supra),* in dealing with mistakes remarked as follows,

> "Here there was a mistake. It was clearly a mistake. Zimbank had no possible reason to allow the claim against it to go by default. No one and in that term includes Mr *Moyo* of Chikumbirike and Associates who acted for Mr Masendeke, could reasonably have thought otherwise"

These sentiments are equally applicable to this case.

Counsel for the applicant conceded that applicant's explanation is reasonable and that misdiarising of matters happens in practice. I am unable to find that the applicant with the full knowledge at the fact that the matter had been set down for 9 am and being aware of the risks attendant upon default, freely took a decision to refrain from attending the Pre-Trial Conference. This assertion is not supported on the facts. The applicant's counsel hurried to court the moment it was advised of the hearing. His client was already at court. Having lodged its claim and pursued it this far, there is nothing to suggest that the applicant had abandoned its claim and would allow its claim to go by default.

I am not persuaded that respondent's counsel snatched at a judgment. If she had desired to do that she would not have advised applicant's counsel of the hearing. It is unclear how the matter ended up being dealt with before applicant arrived. The indications are that it is the court that directed that the parties be ushered into the judge's chambers and let the matter proceed, resulting in the default.

This default is attributable to the applicant's legal practitioners. Case authority is clear that wilful disdain of the rules of the court by a party's legal practitioner will be treated as

non-compliance or wilful disdain by the party himself. See *Saloojee & Anor* v *Minister of Community Development 1965 (2) SA 135*. I have not found that the applicant's legal practitioners freely took a decision not to attend the Pre- Trial Conference. The court has also considered that the misdiarisation arises out of an administrative error which amounts to ordinary negligence and not gross negligence and therefore does not amount to wilfulness. There is no basis for visiting the sins of the legal practitioner on the client. I find the applicant's explanation for the default reasonable and understandable.

I am satisfied that the applicant is *bona fide* when it avers that it is genuinely pursuing this matter and wants to see it to finality. The applicant immediately noted an application for rescission of judgment and within 7 days of the default order. Applicant's counsel rushed to court the moment he was advised that he was required at court. This sort of conduct is not consistent with someone who is acquiescing to judgment.

The respondent claims transfer of the land to it upon payment of the full purchase price in the main claim. Termination of instalment sales is governed by s 8 of the Contractual Penalties Act [*Cap 8: 04*] which reads as follows:

> "8(1) No seller under an instalment sale of land may, on account of any breach of contract by the purchaser—
> (*a*) enforce a penalty stipulation or a provision for the accelerated payment of the purchase price; or
> (*b*) terminate the contract; or
> (*c*) institute any proceedings for damages;
> unless he has given notice in terms of subsection (2) and the period of the notice has expired without the breach being remedied, rectified or discontinued, as the case may be.
> (2) Notice for the purposes of subsection (1) shall—
> (*a*) be given in writing to the purchaser; and
> (*b*) advise the purchaser of the breach concerned; and
> (*c*) call upon the purchaser to remedy, rectify or desist from continuing, as the case may be, the breach
> concerned within a reasonable period specified in the notice, which period shall not be less than—
> (i) the period fixed for the purpose in the instalment sale of the land concerned; or
> (ii) thirty days;
> whichever is the longer period".

Subsection 8 (2) (c) requires a seller to call upon the purchaser to remedy the breach within a reasonable period specified in the notice which shall not be less than thirty days. The applicant maintained that the respondent failed to comply with mandatory provisions of s 8 (2) (c) in that it cancelled the sale with immediate effect. That the applicant was not given an opportunity to remedy the breach. The respondent argued that the requirement is not mandatory and further that it had substantially complied with the requirements of s 8.

No notice to remedy the breach was given in terms of the act. It appears to me that the cancellation of the sale may not have been done in accordance with the law. My view is that the requirement to give notice which should not be less than 30 days is mandatory because of the use of the word "shall". I have misgivings about suggestions by the respondent that the applicant was given in excess of 4 months to remedy the breach. I am not convinced that the letters written to applicant a few months before the cancellation constitute notice to remedy the breach and that the respondent substantially complied with s8. The notice to remedy the breach is required to be part of the notice of cancellation. Communication to the applicant that he was in breach and demands made for payment before the notice of cancellation do not suffice for purposes of s 8. Section 8 prescribes what should be contained in the notice. The notice falls far short of that. The claim for cancellation is linked to the right to take transfer of the property. Once the cancelation is declared irregular, the applicant would be entitled to transfer of the land upon payment of the full purchase price. The claim for specific performance is therefore likely to succeed.

The respondent has refused to reimburse half the purchase price paid and costs incurred in surveying the land. That is the subject of the alternative claim. The respondent initially claimed that it was entitled to set off the amount owed to the applicant against what the applicant owes in outstanding rates. Respondent's counsel conceded that no counterclaim had been filed and the defence of set off was not specially pleaded and is therefore not available to it. No basis has been laid for holding onto half the purchase price and other costs claimed. There seems to be no merit in that claim.

I am satisfied that the applicant has shown "good and sufficient cause" for rescission of judgment.

In the result it is ordered as follows:-

1. The application for rescission of judgment is allowed.
2. The judgment granted by MTSHIYA J under HC 3439/10 be and is hereby set aside.
3. Costs shall be in the cause.

Mhishi Legal Practice, Applicant's Attorneys
Mtetwa and Nyambirai, Respondent's Attorneys