IRENE NDAMBA
versus
HU ZHANG

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 2 July 2013 and 12 June 2014

S. Mupindu, for the applicant
S. Mahuni, for the respondent

ZHOU J: This is an application in terms of order 9 r 63 of the High Court Rules, 1971 for the setting aside of a judgment given in default of the applicant. The order was given in case No. 3979/11 on 5 October 2011. The applicant states that she became aware of the default judgment on 11 November 2011. The instant application was filed on 16 November 2011. The application is opposed by the respondent.

On 4 November 2010 the parties entered into an agreement in terms of which the respondent leased from the applicant premises known as 71 Pendenis Road, Mount Pleasant, Harare for a monthly rental of US$1 500-00. The agreement was reduced to writing. Pursuant to that agreement the respondent paid a sum of US$10 500 representing rent for six months and a good tenancy deposit of US$1 500-00. There is a dispute as regards what transpired after the payment of the above amount. The applicant states that the respondent failed to take occupation of the premises, citing the size of the windows which he was not happy about. On the other hand, the respondent states that the applicant failed to give him peaceful and undisturbed occupation of the premises after he had paid her the six months' rent. What is common cause, though, is that the respondent never took occupation of the premises. Correspondence was exchanged between the parties regarding the failure of the applicant to make the premises available to the respondent for occupation.

In 2011 the respondent instituted proceedings under Case No. HC 3979/11. In that case he prayed for an order to confirm cancellation of the lease agreement and for payment of the sum of US$10 500-00. On 5 October 2011 this court granted a default judgment with

costs against the applicant after she was barred for failing to file her plea. The instant application is for the setting aside of that judgment. In the draft order the applicant also seeks a declaration that the bar effected against her be declared to be null and void.

The applicant was served with the summons in Case No. HC 3979/11 on 9 May 2011. She entered appearance to defend on 19 May 2011. In the notice of appearance to defend the applicant gave her address as c/o Pepita – Fes, No. 69 Central Avenue, Between 6th and 7th Streets, Harare. On 6 July 2011 a notice of intention to bar was served at the given address. It was received on behalf of the applicant by T. Chirere who is described in the Deputy Sheriff's return of service as "Pepita Marketing Secretary". The applicant was subsequently barred for failure to file her plea.

Order 9 r 63 provides that a party against whom a judgment has been given in default may apply to this court for the rescission of that judgment within a period of one month after he has had knowledge of the judgment. If the court is satisfied that there is good and sufficient cause to set aside the default judgment it may grant the application. In considering whether good and sufficient cause has been shown for the court to exercise its discretion in favour of the applicant, the court will take into account the reasonableness of the applicant's explanation for the default, the *bona fides* of the application to rescind, and the *bona fides* of the defence on the merits of the case and whether that defence carries some prospect of success. The above factors are considered not only individually but in conjunction with one another and with the application as a whole. See *Stockil* v *Griffiths* 1992 (1) ZLR 172(S) at 173E-F; *Mdokwani* v *Shoniwa* 1992 (1) ZLR 269(S) at 270C-D. A point made by this court and upheld by the Supreme Court is that while the above factors are relevant the superior courts should not readily and unnecessarily fetter their discretion in determining whether in any particular case good and sufficient cause exists for a default judgment to be set aside. *Deweras Farm (Pvt) Ltd* v *Zimbabwe Banking Corporation Ltd* 1997 (2) ZLR 47(H); *Deweras Farm (Pvt) Ltd & Ors* v *Zimbabwe Banking Corp Ltd* 1998 (1) ZLR 368(S) at 369E-F. But that discretion must, of course, be exercised judicially.

The applicant contests the procedure by which she was barred on the ground that the notice of intention to bar was not endorsed as is required by r 81. The applicant's contention in that respect is not properly founded. The copy of the notice of intention to bar attached to the respondent's opposing affidavit as annexure "H" was clearly signed on 20 July 2011 before it was filed with the registrar.

As regards the explanation for the default, the applicant states as follows:

> "I was never served nor did I have sight of the notice to plead with intention to bar. The notice to plead with intention to bar was served at number 69 Central Avenue, Harare and not on me personally but on one T. Chirere whom I do not know and whom I never gave authority to receive such important documents on my behalf and whom (*sic*) in turn never notified me after having received the notice to plead with intention to bar"

The applicant's statement that she was never served with the notice of intention to bar is false. The notice was properly served at her given address for service. Applicant is mistaken in thinking that there was need for personal service of the notice. The applicant made no effort to produce an affidavit from T. Chirere who received the notice on her behalf. That person is recorded in the Deputy Sheriff's return of service as secretary at Pepita Marketing, the applicant's chosen address for service. She should have established who that person is and what he or she did with the notice if indeed the pleading was not handed over to her. The applicant took a casual approach to the matter and took comfort in sheltering behind the assertion that she does not know T. Chirere. That explanation is thoroughly inadequate and inherently unconvincing. Further, the applicant does not explain what prompted her legal practitioners who had not even assumed agency in the matter to make "follow ups with the High Court" if she genuinely believed that all that was required at that stage was the filing of her plea. The natural thing to do was for her or her legal practitioners to check at her given address for service for any documents which might have been served. This was particularly so given that the notice of intention to bar was served upon her more than one and a half months after she had entered appearance to defend. She suggests that she wanted to file her plea some six months after she had entered appearance to defend. The draft plea which is annexed to her founding affidavit marked "A" is dated 9 November 2011. That is unacceptable as an explanation for her default.

This, in my view, is a case in which the applicant with knowledge of the action and the legal consequences of failing to defend the matter deliberately, consciously and freely took the decision to refrain from filing her plea. See *Zimbabwe Banking Corporation* v *Masendeke* 1995 (2) ZLR 400(S) at 402D; *Deweras Farm (Pvt) Ltd & Ors* v *Zimbabwe Banking Corporation Ltd* 1998 (1) ZLR 368(S) at 369F-G.

The applicant's defence on the merits is that the respondent refused to take occupation of the premises citing the sizes of some windows. That is disputed by the respondent who states that the applicant failed to give him occupation of the house because she wanted to first

secure alternative accommodation for herself. A letter was addressed to her by the respondent's legal practitioners dated 8 December 2010 complaining that she had breached the lease agreement by not making the premises available for occupation by the respondent. There is a response to that letter from Shaka Legacy Executors who were acting on her behalf. The applicant vehemently denies that she gave Shaka Legacy Executors the mandate to represent her. There is absolutely no explanation as to how Shaka Legacy Executors would have become involved in the matter without instructions from the applicant. The applicant has not obtained an affidavit from that organisation to confirm her assertions. The applicant makes no attempt to explain what happened to the letter of 8 December 2010 which was received on her behalf by Tichaona Chape, a gardener at her premises. She does not explain how that letter ended up in the hands of Shaka Legacy Executors. From the letter written on behalf of the applicant on 31 January 2011 she was offering to refund the amount paid to her by the respondent. That offer is inconsistent with her contention that she is entitled to keep the money. There is, therefore, no *bona fide* defence to the respondent's claim against her.

I do not believe, too, that this application is made with the *bona fide* intent to seek the setting aside of the order. The conduct of the applicant, of denying the service of the notice of intention to bar at her address for service and of denying that she authorised Shaka Legacy Executors to represent her without obtaining affidavits from those involved with the firm of executors makes the applicant's assertions spurious.

The issue of the involvement of an organisation by the name Shaka Legacy Executors in the matter has exercised my mind, as it appears that it is conducting itself like a firm of legal practitioners. In the premises, I will direct that a copy of this judgment be given to the Secretary of the Law Society of Zimbabwe for an investigation to be undertaken into the precise nature of the business of Shaka Legacy Executors.

In all the circumstances, the applicant has failed to establish good and sufficient cause for this court to set aside the default judgment given against her in Case No. HC 3979/11. I do not believe, though, that the prayer for costs on an attorney-client scale made by the respondent is justifiable on the facts of this case. There are no unusual or special facts in the instant case which justify a punitive order of costs.

In the result, it is ordered as follows:

1. The application is dismissed with costs.

2. The Registrar is directed to forward a copy of this judgment to the Secretary of the Law Society of Zimbabwe for the latter to investigate whether the organisation known as Shaka Legacy Executors is not operating its business in contravention of the provisions of the Legal Practitioners Act [*Cap 27:07*]

Mupindu & Mugiya Law Chambers, applicant's legal practitioners
Musendekwa – Mtisi, respondent's legal practitioners