SIXTH CENTURY CONTRACTION (PVT) LIMITED
versus
ZIMBABWE ELECTRICITY TRANSMISSION COMPANY (PVT) LIMITED

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 17 September 2013 and 28 February 2014

Opposed Matter

K. Musimwa, for the applicant
V. Muza, for the respondent

DUBE J: This is an application for rescission of a default order granted by HUNGWE J on the 30th of November 2012.

The brief facts leading to the granting of the default judgment are as follows. The applicant filed a claim for damages for breach of contract. At the pre-trial stage, the judge directed the parties to file a joint PTC minute and postponed the matter to 30 November 2012 at 11:30 am. The applicant and its legal practitioner failed to turn up at the appointed time resulting in default judgment being granted against it.

The applicant's explanation for the default is that the applicant's legal practitioner misdiarised the time and attended court 15 minutes late. The applicant avers that its default was not wilful and was as a result of a mistake made by applicant's counsel. The applicant maintains that it has advanced a reasonable explanation for the default.

The applicant asserts that its application for rescission of judgment is *bona fide*. It submitted that it has not filed the application merely to delay proceedings but to ensure that the matter is dealt with on the merits. That the applicant has nothing to gain by delaying these proceedings. Instead, a delay in the finalisation of the main matter is prejudicial to the applicant as it continues to be deprived of money that is lawfully due to it. The applicant maintained that the application was launched with the bona fide intention of ensuring that this matter is dispensed with on the merits. The applicant's position is that it has good prospects of success on the merits of the main matter on the basis that it carried out some civil works on

behalf of the respondent and is entitled to payment. That this fact is not denied and the services have not been paid for.

The respondent is opposed to the application on the basis that the applicant has not established "good and sufficient cause" for seeking rescission of judgement .That the respondent's explanation for the default is unreasonable and unjustifiable in that when the matter was postponed both the applicant and its legal practitioners were present in the judges chambers. The respondent contends that both the applicant and its legal practitioner could not have "misdiarised" the time for the pre-trial conference. The respondent submitted that if the legal practitioner misdiarised the time, then his client should have reminded him of the correct time. The respondent disputes that the applicant and his practitioner attended 15 minutes late and that if that was the case the respondent and his legal practitioner would have seen them.' The respondent denies that it was about to put forward a payment proposal. Respondent denies that it snatched at a judgment.

The respondent submitted on the merits, that the applicant does not have prospects of success in the main matter in that the applicant's claim is a futile attempt to get money from the respondent unjustifiably. That the applicant's claim is baseless and that although the parties had a contract, the parties mutually agreed to suspend the contract and there can be no breach. The respondent further contends that the agreement by the parties to new terms novated the parties' original contract and further that the debt in respect of the work that was already done has prescribed. That even if rescission of judgment is granted, the applicant does not have prospects of success regarding that defence.

This is an application brought in terms of r 63. The factors that the court is required to consider in an application of this nature are as follows.

(a) The applicant's explanation for the default

(b) The bona fides of the applicant's case on the merits.

(c) The bona fides of the applicant to rescind the judgment.

See *G.D. Haulage (Pvt) LTd* v *Mumugwi Bus Services (Pvt)* 1979 RLR 447, *Duprez* v *Hughes R&N* 706 (SR).

The onus in an application of this nature is on the applicant to show the existence of good and sufficient cause for rescission of the judgement. The court in considering the factors outlined above is required to consider them cumulatively.

Applicant's explanation is that its legal representative attended court at 11:50 due to misdiarisation of the time. He was under the impression that the matter had been set down for

12pm. Respondent's counsel insists that the applicant and his legal representative did not arrive at that time as he would have seen the applicant's representative and his client. Respondent does not state when it left court after the session. It was accepted that the applicant turned up the late. It must be accepted that mistakes such as these are common. It is unlikely that client had a diary and diarised the matter. In practice, it is usually the legal practitioner who diarises the matter. Most default judgments we deal with involve lawyers turning up late due to misdiarisation of times. It is a common mistake. As remarked in *Zimbabwe Banking Corporation* v *Masendeke* 1995 (2) ZLR 417 (S) @ 420E'

. "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 include Mr Moyo of Chikumbirike and Associates who acted for Mr Masendeke, could reasonably have thought otherwise"

I am persuaded that this default arose as a result of misdiarisation. I am persuaded to so find because the applicant and his client turned up later. Although the applicant did not file a supporting affidavit from the judges clerk to support its version and the fact that it later turned up, the respondent did not deny that it turned up later. Its only contention is that the applicants and its legal practitioner did not turn up at the time they mention because he did not see them. I am not convinced that the applicant intended to abandon its claim, especially the claim for work performed. I am satisfied that applicant's explanation is reasonable.

It also appears to the court that the applicant is bona fide when it says that it does intend to pursue the main matter. Default judgement was granted on 30 November 2012. By 13 December 2013 it had filed its application for rescission of judgement. It appears that applicant is genuinely pursuing this matter.

Coming to the merits of the main matter. The respondent contends that this matter has prescribed and that allowing the applicant to proceed to the main matter will serve no useful purpose. The facts of this matter are that the applicant won a tender to construct substations for the respondent in 2003.The parties entered into a contract but due to financial challenges, parties reportedly agreed to suspend the contract. The applicant avers that sometime in 2010, the respondent breached the contract when it engaged another contractor. Summons were issued in July 2012. If the cause of action arose in 2010, the claim cannot have prescribed. The respondent's position is that applicant's claim with respect to the work claimed is the one that has prescribed. The applicant still claims damages for breach of contract and that claim has still not prescribed.

The respondents further contend that there was no breach of the contract as the parties agreed to suspend the contract. Further that the contract was novated by virtue of an agreement to new terms by the parties. The applicant claims that it carried out some work on behalf of the respondent before the contract was terminated and it has not been paid for such work. Based on the facts before the court, it is clear that the applicant is entitled to payment for work performed. It has merit with regards that part of the claim. Whether the contract was novated is a dispute that the trial court will be required to enquire into. Even if the court finds against the applicant over the novation issue, I am satisfied that the applicant has an arguable case over its claim for work performed. The court has considered cumulatively all the circumstances of this case as well as the legal requirements or factors to be considered in an application such as this. I am satisfied that the applicant has shown good cause for rescission of the order granted in default.

In the result it is ordered as follows.

1. Default judgement entered in case No HC 7150\50 on 30 November 2012 be and is hereby rescinded.
2. Costs shall be in the cause.

Musimwa & Associates, plaintiff's legal practitioners
Muza & Nyapadi, defendant's legal practitioners