UNIFREIGHT PROPERTIES
versus
SIMPLY PLASTICS

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 31 March 2015

Opposed Matter

I Musimbe, for the applicant
E Bishi, for the respondent

CHATUKUTA J: This is an application for rescission of a default judgement granted by this court on 2 April 2014 in case number HC9762/13.

The background to the matter is that the respondent issued summons on 15 November 2013 in this court against the applicant in case number HC 9762/13 claiming damages for loss of business. The summons were served on a Mr Njanike (the applicant's accountant) on 28 November 2013. The applicant failed to file an appearance to defend within 10 days of the date of the service of the summons.

Upon realising that it was out of time and barred, the applicant approached its legal practitioners sometime in December 2013. Mr Nyasha Munetsi, applicant's legal practitioner, contacted Mr *Muskwe*, the respondent's legal practitioner seeking the respondent's consent to the upliftment of the bar. The respondent declined to give its consent. It was averred that Mr *Muskwe* advised the applicant's attorney that the respondent had filed an application for default judgment. Mr *Muskwe* further advised Mr *Munetsi* to await the outcome of the application and thereafter apply for rescission of the default judgment.

The application for default judgement was filed on 30 January 2014 as a chamber application. The matter was referred to the unopposed roll on 13 February 2014 as the claim was not liquid. It appears the matter set down on the motion roll of 12 March 2014. Judgement was duly granted on 2 April 2014.

The applicant filed the present application on 12 September 2014. The application was opposed.

The respondent raised a preliminary point that the application was improperly before court as the applicant had not filed an application for condonation for late filing of the application as is required in terms of r 63(1) of the High Court Rules. It was contended that Mr Munetsi was advised by Mr *Muskwe* telephonically sometime in December 2013, that an application for default judgement had been filed. The present application was filed 5 months after judgment was granted and four months out of time.

It was further submitted that the applicant was presumed to have been aware of the judgement within two days of the date of the judgment. The applicant's legal practitioners did not act diligently and follow up on the matter with the Registrar of the High Court before and soon after the judgement was granted. The applicant was therefore barred and should therefore have applied for condonation.

The second preliminary point was that the application for rescission, having been aware, as he alleges, of the judgment on 14 August 2014, should have been set down within 30 days of the date of judgment in line with the decision in *Sibanda* v *Ntini* 2001 ZLR 264.

The applicant submitted in response that it became aware of the judgment on 14 August 2014. The letter dated 18 August 2014 confirming the discussions between Mr Musimbe and Mr Muskwe and Mr Bishi respectively was adequate proof of the date the applicant became aware of the judgment. The presumption in *r* 63(3) did not apply. The application for rescission of the default judgment was therefore filed within the 30 days stipulated in r 63(1).

Regarding the 2nd preliminary point, it was submitted that the decision in *Sibanda* v *Ntini* was overturned by the Supreme Court in *Zuva Petroleum Two (Pvt) Ltd* v *Charles P. Motsi & Anor* Civil Appeal SC 362 of 2013.

Rule 63 (1) of the High Court Rules, 1971 requires a party who has had a judgment given against him in default to make an application for it to be set aside not later than 30 days after he has had knowledge of the judgment. Under r 63 (3), the party is presumed, in the absence of positive proof to the contrary, to have had knowledge of the judgment within two days of its issuance. The party seeking an order for the rescission of the judgment has a duty to adduce evidence to the contrary.

The first issue for determination is, in my view, whether or not the presumption in r 63(3) was adequately rebutted by the applicant in light of the letter of 18 August 2014.

It is trite that whenever a party realises that he/she/it has not complied with a rule of court, he/she/it should, without delay, apply for condonation or upliftment of the bar. (See *Viking Woodwork v Blue Bells Enterprises (Pvt) Ltd* 1998 (2) 249 (S). Whilst the applicant's legal practitioner would want this court to believe that the applicant first became aware of the judgment on 14 August 2014, this is not supported by the events that transpired between December 2013 and 14 August 2014. It is further not supported by what was expected of the applicant and its legal practitioner.

The applicant's counsel was aware as far back as December 2013 that the respondent was seeking a default judgment. Every legal practitioner worth his or her salt should be aware that the motion roll is intended to give expeditious relief to a party seeking a judgment in default. It is further known that the custodian of all court process is the Registrar of the High Court. The respondent's legal practitioners had instructions to obtain judgment on behalf of their client with the obvious intention that the respondent realises the benefits of that judgment. The applicant's legal practitioner equally had instructions from his client to defend the main matter. The instructions were conflicting. Each legal practitioner was therefore expected to act diligently in the interest of his/her client. It was therefore incumbent upon applicant's legal practitioner to pursue the matter with expedition and vigour given the exigencies of the matter. This was not done. The applicant's legal practitioner sought to rely on updates by an adversary, who, as conceded by the applicant, had no legal obligation to update them. The update that was sought would have been easily and expeditiously obtained from the Registrar of the High Court. It is only in the letter of 18 August that the applicant's legal practitioners requested for a copy of the application for default judgment. A copy could have been easily obtained from the Registrar.

In fact, there is no indication whatsoever that the applicant's legal practitioner followed up on their alleged numerous inquiries on the progress of the matter with any written communication as would have been expected. The only written confirmation of a telephone discussion between the legal practitioners was on 18 August 2014, after judgment had already been granted. The applicant's legal practitioners waited for the respondent to obtain the default judgment between December 2013 and 2 April 2014 (a period of four months). They waited for a further four months before making their inquiries. There was no legal impediment hindering the applicant from filing an application for the upliftment of the bar as the respondent was not yet in possession of an extant order of the court. It was

claimed in the founding affidavit that the applicant has an in-house team of competent legal advisors. The said competent team equally waited for a total of eight months.

The conduct of the applicant's legal practitioner amounts to utter recklessness. The applicant cannot however escape from his legal practitioner's lack of diligence, more particularly given the averments in the founding affidavit of the prowess of the legal team in the applicant's legal section. (See *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprise* (supra) at 252H-253C and *Saloojee & Anor NNO* v *Minister of Community Development* 1965 (2) SA 135 (A)).

The case of *Friendship* v *Cargo Carriers Limited and Anor* SC 1/2013, cited by the applicant in the supplementary heads or argument, is in my view of no relevance in the present matter. The High Court, in case number HC 3795/11, was not confronted with a similar issue for determination. The facts in that case were clear that the applicant was served with the judgment on 9 November 2011. The judgment had been handed down on 12 October 2011. The Supreme Court's decision is in fact supportive of the proposition that an applicant and its legal practitioners need to be diligent.

In the result, the applicant is presumed to have been aware of the judgment on 4 April 2014. The letter of 18 April 2014 cannot be said to be positive proof that the applicant became aware of the default judgment only on 14 August 2014. It appears that the telephone call of 14 August 2014 and the subsequent letter of 18 August 2014 were intended solely to circumvent the presumption in r 63(3). The applicant has, in my view, failed to rebut the presumption. The applicant should have sought condonation for the late filing of the application for the rescission of the default judgment. The application for rescission is therefore improperly before me.

The second issue is whether or not the import of r 63(1) is that an application for rescission must be filed and set down within 30 days of the date of an applicant becoming aware of a default judgment. It is easier to dispose of this issue as the issue has been the subject of a number of other cases. I am indebted to Mr *Musimbe* for his submissions on the issue and in particular his reference to the case of *Zuva Petroleum (Private) Limited* v *Charles P. Motsi (supra).* I have not had the benefit of the reasons for the order granted in *Zuva Petroleum (Private) Limited* v *Charles P. Motsi (supra)*. However, the order set aside the decision of this court in case number HC 641/13 wherein Zuva Petroleum (Private) Limited had filed an application for the recession of a default judgment granted against it. In

case number HC 641/13, this court had adopted the decision in *Sibanda* v *Ntini (supra)*. The matter was remitted to this court for the determination of the application for rescission on the merits.

Without appearing to be too presumption, it appears the Supreme Court upset its earlier decision in *Sibanda* v *Ntini* not only in the above cited case but also in *Moyo & Ors* v *Sibanda & Ors* 2011 (2) ZLR 186 H. MATHONSI J was confronted with the same issue in that case. CHEDA J had earlier adopted the *Sibanda v Ntini* decision in dismissing an application for rescission of judgment filed in *Moyo & Ors* v *Sibanda & Ors* case number HB 121/09. On appeal, the judgment of CHEDA J was overturned. The matter was remitted to the High Court for determination of the merits of the application. MATHONSI J observed at 191A as follows:

> "While I have not had the benefit of the full judgment of the Supreme Court, the order made suggests an acceptance that the proper interpretation of r 63(1) is that an applicant must file the rescission of judgment application within one month. Where that has been done, there is no need for condonation if the application is not heard within one month."

This is consistent with the decision by SANDURA JA in *Viking Woodwork (Pvt) Ltd* v *Blue Bells enterprise (Pvt) Ltd* 1998 (*supra*). SANDURA JA observed at p 251C that:

> "In terms of s 63 (1), a defendant against whom a default judgment has been granted has a period of one month, from the time he becomes aware of the judgment, within which to file an application for the 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 of all make an application for the 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 as acceptable explanation, not only for the delay in making the application for the judgment, but also for the delay in seeking condonation."

The rational for the decision is aptly captured in *Sai Enterprises (Pvt) Ltd* v *Girole Enterprises (Pvt) Ltd* 2009 (1) ZLR 352. Although NDOU J ruled in line with *Sibanda v Ntini*, he had this is say on p 354A:

> "It is argued that the rules require that all applications have to comply with Order 32 *rr* 226(1), 230, 231, 232 and 234. The pith and marrow of the argument are that there is no way an application of this kind can be filed, heard and determined within a 30 day period. In other words, the periods referred to in Order 32, (*supra*), exceed 30 days. Further, such set down is the province of the Deputy Registrar and the judge allocated the application. In other words, it is agreed that the delay in set down beyond the thirty day period is beyond the applicant's control. The applicant's counsel has put forward an appealing and impressive argument in this regard."

To hold otherwise would result in penalising an applicant for delays that are beyond his control. However, NDOU J's decision cannot be faulted. He was still at the time bound by the decision in *Sibanda v Ntini.* Had the applicant not been barred for late filing of its application for rescission in the present matter, the application for rescission would have been properly before me.

As I have concluded earlier that the application is improperly before me, it is not necessary for me to consider the merits the application for rescission.

The application is accordingly dismissed with costs.

IEG Musimbe and Partners, applicant's legal practitioners
Muskwe and Associates, respondent's legal practitioners