STEVEN SHONHIWA
and
BLUE OYESTER ENGINEERING (PRIVATE) LIMITED
versus
TOR-EKA (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 3 June 2014

Opposed Application

T. L. Mapuranga, for the applicants
S. Simango, for the respondent

ZHOU J: This is an application for condonation of late filing of an application for the setting aside of a judgment given in default of the applicants by this Court. The judgment was given on 20 February 2013 in Case No. HC 392/13. After hearing submissions from both counsel I dismissed the application with costs on an attorney-client scale on 3 June 2014. I gave brief reasons and indicated that my full reasons would be availed upon request by either of the parties. The applicants have noted an appeal against the order given in HC 5898/13, and require the full reasons. These are the reasons for the order.

On 17 January 2013 the respondent instituted proceedings by way of summons against the two applicants claiming payment of a sum of US$54 465.59, interests on that amount at a rate of 30% per annum and costs of suit on the legal practitioner and client scale. The proceedings were instituted under Case No. HC 392/13. The summons was served upon the applicants who failed to enter appearance to defend. On 20 February 2013 this Court granted a default in favour of the respondent against the applicants in terms of the summons. Pursuant to that judgment a writ of execution was issued. On 15 March 2013 the applicants' goods were attached in execution of the judgment. The applicants responded to the execution by instituting an application for rescission of the default judgment on 21 March 2013. On the same day they filed an application for stay of execution under a certificate of urgency. The urgent application for stay of execution of the judgment pending determination of the application for the setting aside of the default judgment was granted on 27 March 2013. The

applicants did nothing after that. On 13 May 2013 the respondent filed a document headed "Consent Paper" signed on its behalf by its legal practitioners signifying its consent to the rescission of the default judgment given in HC 392/13. Even that attitude on the part of the respondent did not propel the applicants into action.

On 28 May 2013 the respondent filed a notice of set down for the registrar to enrol the matter on the unopposed roll on 5 June 2013. On 5 June 2013 the respondent's legal practitioner was in attendance at court. The applicants' legal practitioner is said to have come to court but left before the matter was heard, having requested the respondent's legal practitioner to pray for the order to be granted setting aside the default judgment. That strange arrangement did not produce the desired results, as, apparently, the respondent's legal practitioner was unable to address the queries raised by the Court. The application for rescission of judgment was therefore dismissed. The applicants did not act until on 18 July 2013 when they filed the instant application seeking condonation of the late filing of yet another application for rescission of judgment. The application *in casu* was filed in response to the visit by the Sheriff to remove the attached goods. The applicant states that the attached goods have since been sold.

The factors which this court will take into account in considering an application of this nature are settled. In the case of *United Plant Hire (Pty) Ltd* v *Hills & Ors* 1976 (1) SA 717(A) at 720F-G, the applicable principles are set out in the following terms:

> "It is well established, that in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefor, the prospects of success on . . .(the merits), the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.
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> > These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help compensate for prospects of success which are not strong."

The above principles have stood the test of time and have been consistently applied in this jurisdiction. See *Maheya* v *Independent African Church* 2007 (2) ZLR 319(S) at 323B-C; *Mutizhe* v *Ganda & Ors* 2009 (1) ZLR 241(S) at 245C-E; *Bishi* v *Secretary for Education* 1989 (2) ZLR 240(H) at 242E-243C.

The applicants have a consistent history of defaulting and seeking indulgence in this case. Having been served with the summons and declaration they failed to enter appearance to defend. A default judgment was granted against them following that default. The

applicants only reacted upon being served with a notice of attachment and removal of the goods attached, by filing an application for rescission of the default judgment on 21 March, 2013, some six days after they became aware of the judgment. The applicants did not seek to pursue the application for rescission of judgment even though it was not opposed. The notice of the application clearly shows that that application would have been invalid, as it was not even in Form 29 or in any other acceptable form. See *Zimbabwe Open University* v *Mazombwe* 2009 (1) ZLR 101(H). But that aside, for more than two months the applicants took no action to ensure that their application was finalised. Even the gesture by the respondent to show that the relief being sought was being consented to was not sufficient to persuade the applicants to set down the matter. When the matter was eventually set down by the respondent's legal practitioners on the unopposed roll the applicants and their legal practitioners did not attend the hearing, choosing to instruct opposing counsel to represent their interests. The fact that no affidavit by the applicants' erstwhile legal practitioners was filed to challenge the version by the respondent leaves the latter's version of events unchallenged, it being a trite principle of law that what is not denied in affidavits must be taken to be admitted. See *Chihwayi Enterprises (Pvt) Ltd* v *Atish Investments (Pvt) Ltd* 2007 (2) ZLR 89(S) at 93E-F; *Fawcett Security Ops (Pvt) Ltd* v *Director of Customs & Excise & Ors* 1993 (2) ZLR 121(S) at 127F; *Shumba & Anor* v *ZEC & Anor* 2008 (2) ZLR 65(S) at 70G-H. Despite their knowledge that the matter had been placed on the unopposed roll for 5 June 2013 the applicants made no effort to check on whether the rescission they were seeking had been granted. Instead, they waited until they were reminded of the case by the visit by the Sheriff to enforce the judgment. The explanations given by the applicants for seeking condonation are unacceptable, and certainly do not constitute a reasonable explanation.

The default judgment in respect of which an application for condonation is being sought to have it set aside was given on 20 February 2013. Even if it was to be accepted that the applicants only became aware of that judgment on 15 March 2013, the instant application was filed some four months later. By that time the applicant was out of time by more than three months. That delay, particularly when regard is had to the conduct of the applicants as explained above, is inordinate and inexcusable.

While it is clear from the above facts that both the applicants and their erstwhile legal practitioners were less than diligent in their conduct, the applicants must bear the brunt of their legal practitioners' lack of diligence. There is a limit beyond which a litigant cannot escape the consequences of his legal practitioners' lack of diligence. In *S* v *McNab* 1986 (2)

ZLR 280(S) at 284A-E, DUMBUTSHENA CJ quoted the following passage by STEYN CJ in *Saloojee & Anor NNO* v *Minister of Community Development* 1965 (2) SA 135(A) at 141C-E:

> "There is a limit beyond which a litigant cannot escape the results 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."

Later in the case of *Ndebele* v *Ncube* 1992 (1) ZLR 288(S) at 290C-E the Supreme Court said:

> "It is the policy of the law that there should be finality in litigation. On the other hand, one does not want to do injustice to litigants. But it must be observed that in recent years applications for rescission, for condonation, for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer, have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re-argued until the costs far exceed the capital amount in dispute.
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> The time has come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subvenient* – roughly translated, the law will help the vigilant but not the sluggard."

See also *Beitbridge Rural District Council* v *Russell Construction Co (Pvt) Ltd* 1998 (2) ZLR 190(S) at 193B-G; *Bishi* v *Secretary for Education supra* at 244A-D.

This, to me, is an appropriate case for imputing upon the applicants the consequences of the non-compliance with the Rules by their legal practitioners. As pointed above, the applicants themselves are not entirely innocent. The initial default is solely attributable to them. Also, there is nothing to show that even in the subsequent breaches of the Rules the applicants took any action to protect their interests. The structured omission to obtain an explanation from the erstwhile legal practitioner regarding the applicants' default at the hearing of the unopposed application for rescission of judgment on 5 June 2013 severely undermines any plea of innocence on the part of the applicants.

The courts have held that in cases of flagrant breaches of the Rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the matter may be, and that this applies even where the blame lies solely with the legal practitioner. See *Viking Woodwork (Pvt) Ltd* v *Blue Bells Enterprises*

(Pvt) Ltd 1998 (2) ZLR 249(S) at 254D, citing with approval the remarks from the case of *Tshivhase Royal Council & Anor* v *Tshivhase & Anor ; Tshivhase & Anor* v *Tshivhase & Anor* 1992 (4) SA 852(A) at 859E-F. The court in granting the default judgment did not merely rubberstamp the respondent's claim as set out in the summons, but applied its mind to it and satisfied itself that that claim was properly founded. I do not believe that the applicants' prospects of success have been sufficiently established to justify an infraction into the principle of finality in litigation.

This matter was argued almost one and a half years after the default judgment had been granted. Also, at the time that the applicants instituted the present application the process of execution had been completed, and the goods attached had already been sold. There are no sound grounds to undo those completed processes. The matter must be brought to finality in order to protect the integrity and efficacy of court proceedings.

As regards the question of costs, the conduct of the applicant and its erstwhile legal practitioners was highly reprehensible. Given that the applicants were the parties who were craving for the indulgence of this court they should have acted expeditiously in prosecuting their now dismissed application for rescission of judgment, particularly after the indications from the respondent that the latter was consenting to the rescission in order to expedite the finalisation of the matter. The applicants did not do that. The matter had to be set down on their behalf by the respondent. Even after the respondent had enrolled the matter on the unopposed roll the applicants defaulted on the date of the hearing, and took no action until the Sheriff attended at their premises to execute the judgment. The punitive order of costs is, in my view justified by the above facts which establish a reckless disregard of the rules of Court on the part of the applicants. See *Zimbabwe Online (Pvt) Ltd* v *Telecontract (Pvt) Ltd* 2012 (1) ZLR 197(H) at 200G-201C. The respondent has been made to incur expenses by the conduct of the applicants, and must be reimbursed those expenses in full.

For the above reasons, the applicants' application was dismissed with costs on an attorney-client scale, the applicants' liability to pay the costs being joint and several, the one paying the other to be absolved.

Chihambakwe Mutizwa & Partners, applicants' legal practitioners
Nyikadzino & Simango, respondent's legal practitioners