GOLDEN REEF MINING (PRIVATE) LIMITED
and
FERBIT INVESTMENTS (PRIVATE) LIMITED
versus
MNJIYA CONSULTING ENGINEERS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 20 July and 5 August 2015

Opposed Application

Advocate *E Matinenga*, for applicants
Professor *L Madhuku*, for respondent

TAGU J: This is an application for the rescission of default judgment obtained by the respondent on 2 February 2015 against the applicants. The application is being made in terms of r 63 of the High Court Rules 1971. The applicants claimed to have become aware of the default judgment on 27 February 2015.

The circumstances are that the second applicant Ferbit Investments (Pvt) Ltd (hereinafter referred to as FI) is a subsidiary of the first applicant Golden Reef Mining (Pvt) Ltd (hereinafter referred to as GRM) in whose name some chrome claims are registered. On 11 March 2011 both applicants and the respondent Mnjiya Consulting Engineers (Pvt) Ltd (hereinafter referred to as MCE, entered into, and signed an agreement, the terms of which MCE offered to acquire 40 per cent of the Ferbit Chrome Projects. The offer was based on the initial proposal which was to the effect that MCE pays a total of US$400.000 being equivalent to 40 per cent of the projects with both parties contributing pro-rata to shareholding towards project development. Subsequently, and on 26 June 2013 the applicants and the respondent entered into, and signed a second Joint Venture Agreement (JVA). The relevant provisions in the second Joint Venture agreement were that GRM was to transfer all the other mineral rights relating to Chrome Mining Project only to FI by 31 December 2013. Further, MCE was to be entitled to a 40 per cent shareholding in terms of the provisions of

clause 4.2. Clause 4.2 stipulated that Ferbit Investments was to facilitate the transfer of shares equivalent to 40 per cent of the issued share capital to MCE within 30 days of the signing of the joint venture agreement. The 40 per cent issued share capital to be issued to MCE was on the basis of a contribution of $400 000 (Four hundred thousand United States dollars) that had been paid.

It is common cause that by the agreement of 26 June 2013, the respondent obtained 40 per cent shareholding in the second applicant at the price of $400 000-00. Whilst the agreement was being implemented and the agreed mining operations were underway, the Government of Zimbabwe, according to the applicants, issued a directive that Chrome would only be exported in refined and beneficiated form and not as unrefined ore. The second applicant having been capacitated only to operate as a mining entity was no longer able to export its unprocessed chrome ore as a result of the impossibility created by the Government Directive and consequently its business came to a halt.

On 11 December 2014 the respondent, represented by Mundia and Mudhara Legal Practitioners, issued summons against the applicants under Case No. HC 11024/14. The respondent, as plaintiff, claimed payment from the applicants (as defendants), in the sum of US$ 415 616-66 plus interest thereon at the prescribed rate with effect from 1 May 2014 and Costs of suit on the scale of legal practitioner and client. Applicants' address for service of the summons was cited as 15 Harrow Avenue, Avondale Harare. The return of service filed of record stated that "copy of summons and plaintiff's declaration served by affixing to outer black gate after unsuccessful diligent search". On 7 January 2015 the applicants had not entered their appearance to defend. On 2 February 2015 this court granted the order sought in default in the absence of the applicants. Subsequently, on 27 February 2015 the Deputy Sheriff of the High Court seized and attached equipment stationed at the first applicant's mining site. That is the date the applicants became aware of the default judgment, hence proceeded to make this application for rescission of the default judgment.

The applicants are now arguing that the judgment entered against them is entirely incorrect and should be rescinded on the basis that-

(1) They did not see the summons. They claimed that their Head Office is at 16 Kenilworth Road, Newlands, Harare, and that the summons should have been served at that address which was also known by the respondent. That the cause of action for the summons in HC 11024/14 does not arise from an agreement entered between the

second applicant and the respondent, which JVA provides second applicant's *domicilum citandi et executandi* as 15 Harrow Avenue, Avondale Harare.

(2) That there was no agreement to pay the respondent an amount of US$ 415 616.66, and that even if the proposal made by the applicants to pay the respondent the debt was to be taken as an agreement, the debt which the respondent claimed is not yet due.

All the parties were in agreement that in order for an application for rescission of default judgment to succeed, the applicants ought to demonstrate that there is good and sufficient cause to do so. See Order 9 r 63 (2) of the High Court Rules 1971.

From the authorities cited by both parties, it is trite that the factors which are taken into account in deciding whether a default judgment should be rescinded are-

(i) The reasonableness of the applicant's explanation for the default,

(ii) The bona fides of the application to rescind the judgment, and;

(iii) The bona fides of the defence on the merits of the case and whether that defence carries some prospects of success. See *Chihwayi Enterprises (Pvt) Ltd* v *Atish Investments (Pvt) Ltd* 2007 (2) ZLR 89 (S) at 95A; *Deweras Farm (Pvt) Ltd* v *Zimbabwe Banking Corp Ltd* 1998 (1) ZLR 368 (S) at 369 D; *Beitbridge Rural District Council* v *Russell Construction Co.* 1998 (2) ZLR 190 (S) at 192 D – E; *Sixth Century Construction (Pvt) Ltd* v *Zimbabwe Electricity Transmission Company (Pvt) Ltd* HH 85/ 14 and *GD Haulage (Pvt) Ltd* v *Mumugwi Bus Services (Pvt) Ltd* 1979 RLR 447.

In this case the two issues to be decided are (a) the reasonableness of the applicants' explanation for the default and (b) the bona fides of the defence on the merits.

A. THE REASONABLENESS OF THE DEFAULT

The sole issue to be decided is whether or not 15 Harrow Avenue, Avondale Harare was the proper address for service in *casu*. Advocate *Matinenga* for the applicants argued that a letter of demand written by Jambo Legal Practice which is annexure 'C' was addressed at 16 Kenilworth Road, Newlands, Harare, but the summons was served at 15 Hallow Avenue, Avondale, Harare, hence it can be argued that there was no proper service. While Advocate *Matinenga* conceded that para 14.1.2. of the JVA puts *the domocilium citandi et executandi*

of the applicants as 15 Hallow, Avenue, Avondale, the service was defective because the summons was put by the gate and it was blown away by the wind. He further, argued that in terms of paragraph 14.4.2. of the JVA the summons should have been handed over to a responsible person. Advocate *Matinenga,* therefore, submitted that the applicants were not in wilful default. He referred the court to the case of *Zimbank* v *Masendeke* 1995 (2) ZLR 400 (S) where the court in defining the concept of wilful default remarked as follows:

> "Wilful default occurs when a party with 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."

In his heads of argument Professor *Madhuku* said that it is trite that where a defendant had chosen a *domicilium citandi et execu*tandi, service at that address is good and proper service. See *Downey* v *Downey* (1899) 16 SC 475; Robinson v Sarif 1946 WLD 25. Professor *Madhuku* further, said that the applicants chose 15 Hallow, Avenue, Avondale, Harare, as their *domicilium citandi et executandi*. He further, submitted that even though the place chosen is a vacant piece of land, service at a *domicilium citandi et executandi* is good and proper service. He referred the court for this proposition to the case of *I'ons* v *Freeman & Frock* 1916 WLD 64.

As I stated above the applicants and the respondent signed two agreements which are filed of record. The two agreements relate to the 40 per cent shares acquired by the respondent. The dispute between the applicants and the respondent is centred on the refund that the respondent made in acquiring the 40 per cent shares. No other agreement has been filed in this case. The first agreement dated 11 March 2011 does not have any clause relating to the *domicilium citandi et executandi* of the parties. Other than the correspondences that exchanged hands between the applicants' legal practitioners and the respondent's legal practitioners which bear the address 16 Kenilworth Road, Newlands Harare, there is no written proof that the parties at any stage agreed to use that address as *domocilium sitandi et executandi* for the applicants. The only agreement that bears the *domicilium citandi et executandi* for the parties is the Joint Venture Agreement (JVA) dated 26 March 2013. For the avoidance of doubt I quote the relevant paragraphs which read as follows:

"14. DOMICILIUM CITANDI ET EXECUTANDI AND JURISDICTION.
14.1 Each party chooses the following physical address, postal address, electronic mail address, telefax number and telephone number as *domocilium citandi et executandi* for all purposes under this agreement, whether in respect of court process, notices or other documents or communications of whatever nature, and in the event of change each party shall inform the company and the other shareholders annually at the annual general meeting of its chosen *domocilium citandi et executandi*.

14.1.1. MCE Chooses: 167 – 14th Road
Noordwyk, Midrand
1685
Whitby Manor Office Estate
MCE House
South Africa

14.1.2 FI Chooses 15 Harrow Avenue
Avondale
Harare
Zimbabwe
14. 2…….
14.3 Any Party may between annual general meetings by notice to all other Parties change the particulars of their chosen *domocilium citandi et executandi* to another physical address, postal address, electronic mail address, telefax number and telephone number, provided that the change shall only become effective vis-à-vis the other Parties on the 7th business day from the deemed receipt of the notice by the addressees"

In *casu*, no written notice was ever given by the applicants to the respondent that they had changed their address or more particularly their *domicilium citandi et executandi* from 15 Harrow Avenue, Avondale to 16 Kenilworth Road, Newlands, Harare. In my view 15 Harrow Avenue, Avondale, Harare, remained for all intents and purposes the applicants chosen *domicilium citandi et executandi*, hence service at that address was good and proper service. I agree with Professor *Madhuku* that even service on a vacant piece of land is proper service as long as that has been chosen as the address of service. In the current case even service by affixing the summons on the closed door or gate at the chosen address after a diligent search is proper service. The applicants therefore, failed to give a valid explanation for the default.

B. <u>THE BONA FIDES OF THE DEFENCE ON THE MERITS</u>

Advocate *Matinenga* submitted that since the acknowledgment of debt that was prepared by the respondent was not signed by the applicants, liability was not admitted. On the other hand Professor *Madhuku* submitted that acceptance of liability was not dependant on the signing of the acknowledgment of debt. His argument was that the applicants had earlier admitted liability and were proposing repayment plans.

A perusal of the record shows that on the 24th April 2014 MCE through one E.F. Mugwagwa wrote a letter addressed to one Mr Thomas Gono, a representative of the applicants, which letter was to the effect that the parties had earlier met on 17 March 2014 at 16 Kenilworth Road, Newlands to deliberate on the settlement between MCE and GRM. In the letter a figure of US$ 427 616-66 was worked out which amount was to be paid to the respondent. However, the respondent, and on 26 August 2014, proceeded to draft and sign an acknowledgment of debt in an amount of US$ 415 616-00. The acknowledgment of debt directed to GRM had certain terms of repayment. The applicants did not sign this acknowledgment of debt. In fact the applicants, and on 20 May 2014 proceeded through Mr Thomas Gono to write a letter to the respondent wherein the applicants made proposals on how they were going to repay the respondent. This proposal made by the applicants was not responded to by the respondent. Advocate *Matinenga* submitted that because the respondent did not respond to the applicants' proposal, the proposal was revoked.

I therefore agree with Professor *Madhuku* that the applicants at one time admitted liability. The letter written by the applicants to the respondent is clear and unambiguous. It reads as follows:

> **"Attention: Mr Mkhabele and Mr Mugwagwa,**
> **RE: Ferbit Chrome Project: MCE Investment Repayment Plan- Draft Proposal**
> I present to you, in good faith the following draft repayment plan of the investment of $415 616 made by MCE into the Ferbit Chrome project. I must hasten to extend my company's sincerest apology in the dealing with the matter. It was due to unforeseen circumstances.
>
> The repayment plan below is guided by GRM's current unfavourable financial position in Zimbabwe coupled by adverse government policies affecting the chrome industry. It is hoped that an improved economic climate and sound economic growth driven policies will assist Golden Reef Mining (Pvt) Ltd, attract funding that will enable it to repay your investment (MCE) quicker. Like any other business we need to payback through proceeds coming off-Ferbit Chrome Mining company.
>
> At this moment in time, we propose a safe and realistic repayment spread over three years with a tentative start date of 1st October 2014 as the start of the 1st year.
>
> Year 1 $ 115 616
> Year 2 $ 150 000
> Year 3 $ 150 000.
>
> Please be advised that the start date is dependent on outcomes from several fund raising avenues that GRM is pursuing and the repayment through each particular year will be random.
> GRM is amenable to your suggestions should it not look favourable. I must however add this cautionary note that, it may be unwise to try and sell off the assets at this moment in time as the market is largely subdued. GRM will strenuously continue to search for funds for the repayment plan. This is a priority matter that we would like resolved as quickly as possible.

I trust that our position and the reasons advanced hitherto are unambiguous.
Yours sincerely

Thomas Gono"

Indeed the applicant's offer to repay was and is unambiguous. They never denied liability but were offering a repayment plan that was, for reasons not explained, not responded to by the respondent. The question is was this offer revoked? I do not think so. If it was revoked the applicants could have done so in writing. There is no proof that the offer was revoked other than Advocate *Matinenga*'s mere say so. The applicants do not have good prospects of success in the main matter.

In the circumstances, the application for rescission of default judgment granted by this court on 2 February 2015 is dismissed with costs.

Thompson Stevenson & Associates, c/o Coghlan Welsh & Guest, applicants' legal practitioners
Mundia & Mudhara, respondent's legal practitioners