COLLEN KWARAMBA
versus
WINSHOP ENTERPRISES (PVT) LTD
and
BLAIR CHRISTINK
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 6 & 14 October 2015

Opposed Application

Ms *Takawira*, for the applicant
T Mpofu, for the 1st & 2nd respondents

MATHONSI J: This is an application for a rescission of a rescission of judgment order granted on 16 September 2014, per Mtshiya J, which squarely answers to the call made by the Supreme Court in *Ndebele* v *Ncube* 1992 (1) ZLR 288 (S) 290 C-E that:

> "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. The time has come to remind the legal profession of the old adage, *vigilanti bus non dormientibus jura subveniunt* – roughly translated; the law will help the vigilant but not the sluggard."

Why would a party approach the court for a rescission of a rescission of judgment order unless proceeding with the main cause is so calamitous that it cannot be contemplated? For one thing such party would have obtained a default judgment which would have been rescinded by the court thereby paving the way for the resolution of the main matter once and for all on the merits. To then spend time, energy and money trying to reverse the process and revert to the default judgment *status quo* is, in my view, a trifle. As it is, considering that this matter is being argued exactly a year after the application was filed, means that another year has been lost in trying to hang onto a default judgment when the merits of the matter would

have been determined by now. Could it be that the applicant sees something in that default judgement which none of us can see?

In HC 6261/08 the current applicant obtained an order in this court on 16 December 2009, per Karwi J (may his soul rest in eternal peace), in terms of which *inter alia* the verbal agreement between him and the first respondent for the sale of Stand 100 Mandara; Harare was declared valid and binding. He was required by that order to pay the balance of the purchase price in the sum of $109 323-73 within 3 years and thereafter take transfer of the property. In HC 6410/13 the current first and second respondents filed a court application seeking a rescission of that earlier order, which application was filed on 7 August 2013. It was served upon the current applicant, respondent therein, on 8 August 2013 meaning that the *dies inducae* within which to oppose the application expired on 26 August 2013.

It was not until 27 August 2013 that the applicant filed opposition, clearly a day out of time but without seeking condonation of the late filing of notice of opposition. That notwithstanding, the respondents filed heads of argument on 31 October 2013 which heads were served on the applicant on 1 November 2013. In terms of r 238 (2a) the applicant had until 15 November 2013 to file his own heads of argument. He did not, and was therefore automatically barred by virtue of the provisions of r 238 (2b) for the second time, he having been barred initially for failure to file opposition timeously.

As it now turns out, at least according to his founding affidavit, the two bars operating against the applicant did not deter his legal practitioner preparing a brief to Advocate Uriri on 23 January 2014, some 3 months later, which the good advocate received on 24 January 2014, with the instructions;

> "1. Kindly prepare heads of arguments in the above matters.
>
> 2. Argue the matters."

As it turns out those instructions were not complied with. In fact no heads of argument were prepared or filed. They have never been prepared and up to now, after 1 year 10 months, no such heads of argument have been generated. One should add that even the bar operating against the applicant in HC 6410/13 for failure to file opposing papers on time still stands, has not been tampered with and no effort whatsoever has been made to have uplifted.

It is against that background that the matter came before Mtshiya J on 16 September 2014. On that date, not only was the applicant's counsel unable to argue the matter by reason that the applicant was barred for failing to file a notice of opposition within the time allowed

by the rules, in terms of r 238 (2b) of the court rules he could not address the court except in making an application for a postponement or the upliftment of the bar because he was barred for failing to file heads of argument.

The applicant's problems did not end there. Although the applicant claims that he had spent a lot of money retaining counsel – he had 3 advocates involved in his matter and 1 instructing legal practitioner – none of them was able to appear before Mtshiya J on his behalf on 16 September 2014. We are not told what had become of his legal practitioner on that date. Advocate Uriri who had received the brief to prepare heads of argument and argue the matter did not attend presumably because he had handed the brief over to Advocate Zhuwarara who had health problems with his wife. He is said to have come to court but left to attend to his personal business before the court sat. Advocate Hashiti had been roped in and is said to have been itching to argue the matter. One wonders how this could be done when heads of argument had not been filed and there was a double bar staring the applicant in the face.

It was probably upon such realisation that the erstwhile advocate's enthusiasm quickly waned and he also beat a hasty retreat. That way when the matter was called, there was no one who appeared for the applicant but counsel for the respondents was still magnanimous enough to try and have the matter stood down to sometime latter which the judge understandable could not accede to. He promptly granted the order for rescission of judgment as the application was clearly unopposed despite the applicant being aware not only of the application, but also of the set down.

It is that order for rescission of judgment which the applicant now desires to have rescinded on the ground that he was not in wilful default. No attempt however is made to state whether he has a *bona fide* defence to the first application for rescission of judgment. The application comes aboard the founding affidavit of Advocate Tawanda Zhuwarara who says that prior to his involvement the applicant had, through his legal practitioner, briefed Advocate Uriri. We know of course that this was on 24 January 2014. We also know that when Advocate Uriri was engaged the applicant had long been barred firstly for failure to file opposition on time and secondly for failure to file heads of argument on time. In fact the brief was sent 2 months late.

As if that was not enough, according to Zhuwarara, the brief was only passed on to him "mid –August 2014" in order for him to take a fresh look at the matter and possibly draw up the heads of argument. It means therefore that Advocate Uriri had sat on the brief for more

than 6 months without preparing heads of argument, if Zhuwarara is to be believed, when the applicant's heads had been served on 1 November 2013. The involvement of Zhuwarara therefore came 9 months late.

There must have been something cynical about the preparation of those heads of argument or lack of it because Zhuwarara also did not prepare the heads of argument. He says he only realised that he had done nothing when Advocate Uriri "made a follow up of the matter on 10 September 2014" clearly a month later and days before the set down date. Still no heads of argument were prepared as Zhuwarara busied himself with trying to negotiate a settlement, an attempt which he was only able to undertake on 15 September 2014, a day before the court date.

It is on those facts that the applicant urges me to rescind the judgment in an application made in terms of r 63 of the High Court Rules, 1971. In terms of r 63 (2), the court may set aside a judgment given in default where there is "good and sufficient cause" to do so. The factors which the court will take into account in determining good and sufficient cause have been discussed in a line of cases which include: *Roland & Anor* v *Mc Donell* 1986 (2) ZLR 216 (S); *Sangore* v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210; *Barclays Bank of Zimbabwe Ltd* v *CC International Ltd* S-16-86; *Stockhill* v *Griffiths* 1992 (1) ZLR 172 (S). They are:

1. The reasonableness of the applicant's explanation for the default
2. The *bona fides* of the application to rescind the judgment,
3. The *bona fides* of the defence on the merits; and
4. The prospects of success of that defence.

Those factors must be considered in conjunction with one another and with the application as a whole.

In my view this application fails on all fronts. In fact the conduct of the applicant throughout has been such a serious affront of the rules of court, a lamentable disdain of the rules and a lack of seriousness bordering on contempt. One really wonders how a party that has conducted himself, by his own conduct and that of his host of legal representatives, would want the court to exercise its discretion in his favour. Rules of court are there to regulate the practice and procedure of court and therefore must be adhered to. They are the court's tools fashioned for its own use: *Nxasana* v *Minister of Justice & Anor* 1976 (3) SA 744.

Non compliance with the rules of court will be condone upon good cause being shown by the applicant and there must at all times, be a reasonable and acceptable explanation given by the applicant for failure to adhere to the rules: *Makaruse* v *Hide & Skin Collectors (Pvt) Ltd* 1996 (2) ZLR 60 (S); *General Accident Assurance Co SA Ltd* v *Zampelli* 1998 (4) SA 407 (C) 411 C-D.

Here is a party that was served with a court application calling upon him to file opposition within 10 days. It failed to comply and chose to file opposition at its own time. It was served with heads of argument through its legal practitioners who knew pretty well of the imperatives of failure to comply with r 238 (2a). Again it failed to file heads of argument within the time allowed by the rules. With disdain, it has not filed heads of argument at all and has not bothered to have the double bar staring it in the face, uplifted.

As if no bar existed, that party had the cheek to instruct counsel to prepare heads of argument 2 months after it was served with those of the applicant and still saw nothing wrong with that. Even when counsel did not produce heads of argument for 8 months, that party saw nothing wrong. More importantly no explanation is given for such conduct and for the inordinate delay that occurred, meaning that the application fails the first inquiry relating to the reasonableness of the explanation for the default.

It also fails on the *bona fides* of the request for rescission. A party that does not do anything at all to prosecute a defence cannot come to court without any explanation for that failure and expect to succeed. More importantly, the order sought to be rescinded was not a final order. As pointed out by Mr *Mpofu* for the respondents it was interlocutory in nature. It was not the end of the world for the applicant who still had a chance, in the main cause to redeem himself. There can be no *bona fides* in an application of that nature.

I have stated that the founding affidavit does not attempt to set out any defence. For that reason the application fails to relate to the last 2 factors for consideration in an application of this nature namely the *bona fides* of the defence on the merits and its prospects of success. I am aware that the applicant attempted to raise a defence in the answering affidavit but that does not help him at all. This is because in our law, an application stands or falls on its founding affidavit. See *Mobile Zimbabwe (Pvt) Ltd* v *Travel Forum (Pvt) Ltd* 1990 (1) ZLR 67 (H) at 70; *Muchini* v *Adams S-47-13*.

That point is eminently stated by Makarau JP (as she then was) in *Hiltunen* v *Hiltunen* 2008 (2) ZLR 296 (H) 301 B where she remarked:

> "It is trite that in application proceedings, it is to the founding affidavit that the court will look to for the cause of action being alleged by the applicant and the evidence that the applicant has to sustain such a cause of action. Hence, as has been said in numerous cases before, an applicant must stand or fall by his founding affidavit and the facts alleged therein because those are the facts which the respondent is called upon either to affirm or deny. See *Magwiza* v *Ziumbe NO & Another* 2000 (2) ZLR 489 (S) at 492 D-F."

Having failed to relate what defence he has, the applicant could not come back after the respondents had answered to the application to try and raise a defence knowing fully well that the respondents would have no other opportunity to respond to those facts.

I therefore come to the conclusion that the applicant has not shown "good and sufficient cause" for the rescission of the order made on 16 September 2014. Even if the blame may lie with the applicant's team of legal practitioners, that does not help him at all. This is because there is a limit within which a litigant can escape the dilatoriness of his legal practitioner. This matter was handled with such tardiness for an extended period of time that the applicant himself should shoulder the blame. He should have followed up his case as it was not enough to leave everything to his team without even checking what they were doing for a year.

Mr *Mpofu* made the extra points that it is doubtful whether an order granting rescission and therefore allowing the parties to deal with the main matter can be rescinded. He relied on the authorities discussing interlocutory orders which are generally not appealable and therefore should not be rescinded: *Jesse* v *Chioza* 1996 (1) ZLR 341 (S); *Gillespies Monumental Works (Pvt) Ltd* v *Zimbabwe Granite Quarries (Pvt) Ltd* 1997 (2) ZLR 436 (H); *Dobrok* v *Turner & Sons (Pvt) Ltd and Others* 2008 (2) ZLR 153.

I have concluded that the application fails on the ground that good and sufficient cause for rescission has not been established. It is therefore not necessary to discuss that issue as well as the jurisdictional issue of whether I can grant relief which would have the effect of overturning findings made by Mtshiya J on the reasons of the applicant's default and the request for an indulgence that was made to him which he declined. See *City of Mutare* v *Mawoyo* 1995 (1) ZLR 258 (H).

The degree of default that I have alluded to above and the amount of tardiness exhibited in this matter coupled with the audacity to still come to this court seeking rescission on extremely flimsy grounds has to be punished with an order for costs on a punitive scale.

In the result, it is ordered that:

1. The application is hereby dismissed.
2. The applicant shall bear the costs on a legal practitioner and client scale.

Takawira Law Chambers, applicant's legal practitioners
Gill Godlonton & Gerrans, respondents' legal practitioners