COAL BRICK MINE (PVT) LTD
versus
CHILOTA MINING COMPANY (PVT) LTD

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 21 January 2016 & 10 February 2016

Application for rescission of judgment

T A Dzvetero, for the applicant
T J Muhonde, for the respondent

CHAREWA J: The respondent, by letter of demand dated 26 September 2014, demanded payment of USD564 662.66 comprising:

1. USD307 630.40 in respect of 13,983.20 tonnes of low grade HPS mined by the applicant at respondent's site; and
2. USD257 032-19 in respect of costs to doze over waste left at such site.

On 21 October 2014, the applicant's legal practitioners responded, disputing the doze over costs and requesting for a round table meeting to amicably resolve the matter. No meeting took place and the respondent issued summons against the applicant on 25 November 2015.

The summons was served at the applicant's registered place of business on 27 November 2014, and was received by one Nikki Vlahakis, the applicant's receptionist. On 3 December 2014, the applicant requested for another meeting any time after 5 January 2015.

The respondent replied on 12 December 2014 informing that summons had already been issued and served, and while it was still open to an amicable resolution, advised the applicant to enter appearance failing which default judgment would be requested.

The applicant responded, on 18 December 2014, alleging non-receipt of summons and requesting to be provided with a copy. The applicant's legal practitioners claimed that their assumption of urgency meant that summons ought to have been served on them, and hoped that service elsewhere was not an attempt to snatch a default judgment.

By letter dated 12 January 2015, the respondent took umbrage at the insinuation of attempting to snatch a default judgment when it had openly advised applicant of the issuance and service of summons and advised that applicant should enter appearance. It proceeded to attach to its letter the Deputy Sheriff's return of service, but refused to provide a copy of the summons as "your client already has it and in any event the court record is open for public inspection". It reiterated its intention to seek default judgment in the event that applicant had not filed its appearance to defend.

Suffice it to say that this letter had the case number for the record, and so too did the deputy sheriff's return of service.

Despite the second warning in the letter dated 12 January 2015, the applicant did not enter appearance as advised, nor seek the upliftment of any bar that may have come into effect. Neither did the applicant raise any issue regarding service on Nikki Vlahakis as its receptionist.

Subsequently, the respondent obtained default judgment on 3 March 2015, and proceeded to issue a writ of execution. On attempting to execute at the applicant's registered office, in April 2015, the Deputy Sheriff was referred to 19 Nigel Phillip Road, Eastlea, which happens to be occupied by schools.

The applicant eventually filed this application for rescission of judgment on 4 June 2015.

IN LIMINE

The respondent raised the point *in limine* that, Ms Lindiwe Mpofu, the deponent to the applicant's founding affidavit had no *locus standi* since she was not a director of the applicant and her assertion to that effect was consequently not correct. Therefore the founding affidavit was a nullity and there was thus no application before the court.

The applicant averred that Ms Mpofu had authority to act for it in terms of the resolution of the board of directors. In any event, she was a proxy of Dr Cephas Mandlenkosi Msipa, one of the directors who swore a supporting affidavit to that effect.

I do not think much turns on this as respondent cites no authority that a board of directors is barred from appointing someone, other than a director, to represent a company. Further there was uncontroverted averment that Ms Mpofu held the proxy of Dr Msipa.

As a result, I find respondent's argument to have no merit and shall therefore proceed to deal with the merits of the application.

ON THE MERITS

The question to address is whether the above facts disclose a good and sufficient cause to rescind the judgment granted in default.

It has long been established in our jurisdiction that rescission of judgment is an indulgence granted by the court. For that reason it may not be granted were the default is wilful. See *Du Preez* v *Hughes NO* 1957 R&N 706 (SR).

It is trite that the test for "good and sufficient cause" is

1. The reasonableness of the explanation for the default;
2. Whether applicant has good faith in seeking rescission; and
3. Whether the defence is *bona fide* and there are prospects of success on the merits.

See *Zimbabwe Banking Corporation* v *Masendeke* 1995 (2) ZLR 400(S), *Barclays Bank of Zimbabwe Ltd* v *C International (Pvt) Ltd & Anor* S-16-86 among a plethora of cases which have settled this issue. It is also trite that the three factors of the test must be considered individually and cumulatively in order to find whether or not there is reasonable cause to order rescission of judgment. (See *Stockil* v *Griffiths*1992 (1) ZLR 172 (S).

THE REASONABLENESS OF THE APPLICANT'S EXPLANATION

The applicant claims that it was unaware of the litigation against it as effective service was not effected (See Para(s) 7-10, and 20 of the founding affidavit), and when it did become so aware, it was under the impression that the matter would be resolved amicably.

The respondent disputes this, asserting that summons was properly served on applicant's registered office, where it was received by applicant's receptionist. In addition, respondent on two occasions thereafter warned the applicant of the service of summons and its intention to obtain default judgment should no appearance be entered. At no time during subsequent negotiations did respondent withdraw its avowal to obtain judgment should applicant be in default.

The reasonableness of the failure to act goes to discharge the wilfulness of the default. In other words, where the explanation is objectively reasonable, then a party cannot be held to have been in wilful default. It is an accepted legal principle that the test of wilfulness is as stated by Murray CJ in *Neuman (Pvt) Ltd* v *Marks* 1960 (SA) 170 (SR) at 173 A-D that,

> "….when a defendant with full knowledge of the set down and of the risks attendant on his default, freely takes a decision to refrain from appearing…"

Nevertheless, non-compliance with the rules of court and negligence by a party's representatives have, in our law been equated to wilfulness by the party itself. See *Beitbridge Rural District Council* v *Russell Construction Co (Pvt) Ltd* 1998 (2) ZLR 190(S) at190 and *S* v *McNab* 1986 (2) ZLR 280 (S) at 284A-E.

In casu, the applicant did not deny, on the papers filed of record, that Nikki Vlahakis was its receptionist and was therefore not a responsible person for service of summons. And while claiming to have moved, applicant did not dispute that the address of service was its registered office in terms of the Companies Act. Rather its averment was that service ought to have been effected on its legal practitioners. Yet nowhere on the papers and on questioning by the Court during the hearing, could applicant show that such legal practitioners had authority to receive summons and had communicated this to respondent. Apart from claiming that service ought to have been on its legal practitioners, applicant did not contest the propriety of the service of summons.

I am convinced therefore that the complaint that service was not effected on the legal practitioners is a red herring which I will not dwell on. Clearly the service of the summons was proper, and it can be assumed that applicant was aware of the litigation from the date of such service.

Even assuming that applicant was unaware of service of summons on 27 November 2014, it was clearly aware of the litigation against it on 12 December 2014 (see para 14 of the founding affidavit). By 13 January 2015, when the second warning to enter appearance was received by its legal practitioners, applicant was fully aware of the case file reference and was in a position to uplift the summons from the Registrar as advised and ought to have taken appropriate measures to defend its interests. I am of the further view that applicant acted unreasonably in doing nothing on the belief that there would be an "amicable settlement" in the face of advice to act.

In my view, therefore, the applicant's legal practitioner's failure to enter appearance or apply for upliftment of the bar despite several warnings was not only grossly negligent, but amounted to a wilful disdain of the rules of court as defined in *Beitbridge Rural District Council (supra).* In *John Harris Jones* v *Kim Graham Strong* SC 67/03, Cheda JA had this to say about a party which repeatedly ignored warnings to comply with the rules and file its pleadings:

> "On the merits the appellant does not have a good case either. In each of the two cases he failed to file his pleas, even when threatened with being barred. No proper explanation was given for the failure to enter his pleas.
>
> Even after that, there was still a long and unexplained delay in applying for rescission. His suggestion that he was not aware that default judgments had been entered against him cannot assist him as he was aware that threats had been made to bar him if he did not act accordingly. This shows a deliberate neglect of the rules."

I agree with the respondent that the issue here is whether summons was properly served on applicant and whether the applicant was aware of it. In both respects, I find in the affirmative. Consequently, I am of the view that the applicant's explanation is unreasonable and it was therefore in wilful default.

THE *BONA FIDES* OF THE APPLICATION FOR RESCISSION

I notice that both in its founding affidavit and in its heads of argument, the applicant makes no effort to convince the court of the *bona fides* of its application. In truth, applicant would have been hard pressed to do so in view of the fact that it does not dispute that it mined ore from respondent's claim which it did not pay for, and that it did not doze over the waste despite claiming to have the equipment to do so.

Further, apart from advancing that it was "under the impression that no litigation had been instituted and the matter was going to be resolved amicably", (See para 20.2 of founding affidavit) applicant advances no reason why, when repeatedly warned to enter appearance, it failed to do so.

I am therefore of the view that, as the record clearly shows, applicant was untruthful when it contended that it was unaware of the existence of litigation.

Default judgment was eventually obtained on 3 March 2015, almost three months after applicant had been made aware of the litigation. I find that this, coupled with the several warnings given to applicant, shows that the allegation that respondent snatched at a default judgment is clearly spurious.

The first attempt to serve a writ of execution, which applicant averted by claiming to have moved office was on 14 April 2015. It was only when further evasion failed and attachment effected on 3 June 2015 that applicant then made this application on 4 June 2015.

I am therefore persuaded of the lack of *bona fides* of this application and that applicant merely seeks to delay the day of reckoning.

WHETHER APPLICANT HAS A *BONA FIDE* DEFENCE ON THE MERITS

In order to merit rescission, applicant must be able to show that *prima facie*, he has a good defence on the merits or that he has good prospects of success. (See *Francis Paketh* v *Yananai Chibonda* SC 6/03).

The applicant does not deny that it mined and dumped waste on the respondent's site. (See the letter dated 21 October 2014). Neither does it deny that 13,983.20 of low grade HPS had to be paid for. (See para 26.1 of the founding affidavit). What it denied was that it should pay for dozing over waste as there was

> "…no agreement between applicant and respondent covering the dozing of the alleged waste."(see para 25 of the founding affidavit).

Further the applicant asserted that there was no reason why it should pay for dozing over costs when it has the machinery and capacity to do so itself.

I would have been prepared to grant rescission of judgment on the ground that this is a *prima facie* defence to the claim for dozing over costs. However, I take note that despite having the equipment and capacity as alleged, the applicant made no attempt to doze over its waste. It seems to me that the respondent was clearly within its rights to either demand that the applicant should do so, or that respondent carries out the dozing over itself and claim for the costs from applicant. In either case, the liability of the applicant for dozing over its waste cannot and is not disputed.

Consequently, I am not persuaded that the applicant has a *bona fide* defence to the respondent's claim for dozing over costs.

Cumulatively therefore, I find that this application has only been made to delay the day of reckoning and that *prima facie* there is no good and sufficient cause to warrant rescission of the judgment granted by Mathonsi J on 3 March 2015.

COSTS

The respondent prayed for the court to "crack the whip and grant or invoke such a sterner and exceptional measure" of ordering costs against applicant on the higher scale. It argued that the applicant's conduct was "neglectful or improper", and further that the applicant's

defence to the respondent's claim on the merits is so frivolous and vexatious as to amount to an abuse of process, particularly since applicant was "negligent and acted in a reckless manner".

No doubt, this position is also coloured by respondent's indignation at being accused of *mala fides* and "scandalously snatching a default judgment".

The applicant made no meaningful submissions in response.

Following upon my findings that the applicant acted with gross negligence and wilful disregard of the rules, relied on falsehoods to found its application and cast unwarranted aspersions on the respondent's legal practitioners, I am persuaded that this is a case where costs on the higher scale are appropriate.

DISPOSITION

In the event, it is ordered that:

1. The application for rescission of judgment be and is hereby dismissed with costs on a legal practitioner and client scale.

Antonio & Dzvetero, applicant's legal practitioners
Muhonde Attorneys, respondent's legal practitioners