SITMORE TRADING LTD
and
TALKMORE KWARAMBA
and
VIOLA DZIIKE
versus
NMB BANK LTD

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 3 December 2016 and 27 January 2016

OPPOSED MATTER

Ms *M Ngongoni*, for the 1st plaintiff
Ms *D Ndawana*, for the defendant

MUNANGATI-MANONGWA J: An application to set aside a judgment entered into by consent on 28 January 2013 before Mavangira J (as she then was), was brought before me on 3 December 2015. I duly granted the following order:

"1. Application be and is hereby dismissed.
2. The first applicant to pay costs."

Applicants having requested for reasons, I hereby furnish same.

The background facts of this matter are as follows: The respondent (then plaintiff) issued summons against the applicants (then defendants) under case number HC2574/11 in the year 2011 seeking payment of US$80 000-00 being the capital, and other amounts constituted of interest and bank charges bringing the total to US$90 162-37. The claim arose from a loan facility granted to the first applicant. The second and third applicants bound themselves as sureties and co-principal debtors to respondent for first applicant's due and faithful performance of its obligations to respondent. The matter was defended up to pretrial conference stage. At that stage a compromise was reached and on 28 September 2013 the parties' legal representatives appeared before Justice Mavangira and the following order was granted:

"IT IS ORDERED THAT

1. Defendants jointly and severally the one paying the other to be absolved pay to plaintiff the sum of US$28255.52 in 12 equal installments, the first installment to be paid on or before the 31st November 2012 and successive payments to be paid on or before the last day of each successive month.
2. Defendants pay plaintiff's costs of suit in the sum of US$2900-00 together with 15% VAT thereon."

In pursuant of the order the Respondent has over the years been executing upon the applicants' property and on 9 March 2015 an immovable property belonging to third applicant was sold through an auction. The record shows that the third respondent objected to the confirmation of the sale which objection was dismissed by the Sheriff of the High Court on 20 May 2015. On 23 July 2015 this application was filed wherein the applicants seek to resile from the consent order granted on 23 September 2011. The application is premised on r 56 High Court Rules 1971 which rule provides as follows:

> "A judgment given by consent under these rules may be set aside by the court and leave may be given to the defendant to defend, or to plaintiff to prosecute his action. Such leave shall only be given on good and sufficient cause and upon such terms as to costs and otherwise as the court deems just."

The applicants gave an array of reasons for seeking to have the judgment set aside. The first applicant through its representative the second applicant has indicated that it entered into this consent because of duress, that judgment was granted because of a mistake common to both parties, that it was misrepresented to him that he would not suffer any prejudice if he was to consent to judgment. Further, that respondent fraudulently overcharged interest prejudicing first applicant to the tune of US$48 000-00. Another ground which was proffered was that the judgment of 28 January 2013 was of no force and effect as there was no plaintiff it being alleged that Sitmore Trading (Private) Limited was cited as the plaintiff rather than Sitmore Enterprises (Private) Limited.

The application was vehemently opposed by the respondent whose legal practitioner maintained that the applicants had failed to establish good and sufficient cause entitling them to the setting aside of the order. Respondent maintained in its opposing affidavit that the applicants who were duly represented freely compromised and consented to the consent order, there was no common mistake between the parties,

no pressure was made to bear on the applicants as there was always the risk of the property being sold for failure to service the debt. The respondent further disputed the averment that the third applicant was not the right plaintiff as this defence was only being raised now when it has never been an issue in the parties relationship. The respondent argued that the facility letter, the minutes of directors of first and third applicants had described the first applicant interchangeably as Sitmore Trading (Private) Limited and Sitmore Enterprises. When the summons and indeed the consent paper cited the first applicant as Sitmore Trading no issue arose until at this juncture more than 2 (two) years after the granting of the order. On the issue of interest, the respondent argued that the first applicant's assertion was not supported by any evidence, what had been placed before the court from the Interest Research Bureau being inadequate and flawed information which was not acceptable in its form nor informative.

The issue therefore that the court had to decide on is what constitutes "good and sufficient cause" and whether the applicants had satisfied the requirements thereof.

It is trite that a consent judgment or order can be resiled from whether in terms of r 56 or the common law. It must be noted that the plaintiff cannot arbitrarily resile or withdraw from a consent which has been placed before a court. However, that consent may be set aside upon establishing good and sufficient cause.

In considering this matter before me, I hasten to highlight that this matter is different from the *Washaya* v *Washaya* 1989 (2) ZLR 195 (H) scenario where the legal practitioner had consented to a judgment anticipating that applicant was going to endorse the decision. In this particular case the applicants have not alleged that their legal practitioner acted without their mandate and participation in entering into the consent.

In *Georgias & Another* v *Standard Chartered Finance Zimbabwe Ltd* 1998(2)ZLR 488 (SC) the Supreme Court held that in determining what constitutes "good and sufficient cause" the same principles as are applicable to the granting of the indulgence of rescission of a judgment given by default are applied. The Court went further to state at p 494 that:

> "The adoption of those principles to an application to rescind a judgment given by consent enjoins the Court to have regard to:
> (a) the reasonableness of the explanation proffered by the applicant of the circumstances in which the consent judgment was entered;

(b) the bona fides of the application for rescission;
(c) the bona fides of the defence on the merits of the case which prima facie carries some prospect of success; a balance of probability need not be established."

I now turn to the consideration of these factors:

1. <u>The reasonableness of the explanation on the circumstances in which the consent judgment was entered.</u>

As alluded to before, various reasons were proffered by applicants. First applicant in the affidavit filed by second applicant indicated that it consented to the order due to duress. No evidence has been proffered to establish that duress. In fact Ms *Ngongoni* the applicants' legal practitioner, when asked by the court to explain the nature of the undue influence or refer the court to where duress is cited, she conceded that a mistake could have been made in referring to the defense as duress. The affidavit filed on behalf of the first applicant by the second applicant states as follows on p 23:

> "It was unfortunate that I was made to sign under duress the order by consent after being threatened with the disposal of my immovable property by the respondent."

Suffice to say the applicants were at all times represented even on the day the consent judgment was entered and no complaint was placed before their legal practitioners nor any complaint raised by their legal practitioners against the respondent. In any case, property had been sold before. Apart from the bald averment no evidence was placed before the court that pointed towards duress, how, and at what stage it was applied.

Applicant referred to the fact that a judgment was granted because of a mistake common to both parties, which averment or allegation meant that the application would fall under a different rule altogether that is r 449. There was absolutely no explanation on the alleged common mistake that characterized the minds of both parties. No wonder the respondent contested the same as there is no evidence of such. The mistake itself was not stated. If it were the applicants who were mistaken then they could have raised and provided evidence proving the defence of justice error. Even if it were to be so, the fact that the applicants could have been mistaken in entering into a consent judgment does not on its own amount to justice error, more is required as the defence goes through the same rigorous enquiry.

The first applicant's other reason for seeking the rescission is misrepresentation, it being alleged that it was misrepresented to him that first applicant will not suffer any prejudice if it were to agree to the Consent Order. Again, there is no evidence as to who made the misrepresentation, applicants being duly legally represented and there being no full explanation or expansion on the allegation. Above all this, one would have expected that the legal practitioner who sat in those proceedings should have availed an affidavit indicating the circumstances if at all it is alleged that the order was improperly granted. The allegations by first applicant become and remain bald averments.

The fifth reason proffered was that the consent judgment "was also informed by the representation and understanding that respondent was charging lawful interest which has turned out to be incorrect." Looking at the allegation that the interest was usurious, reference was made to a document prepared by the Interest Research Bureau. This document is not informative at all, it does not indicate how the interest was re-calculated and as the respondent argued, which argument I identify with, does not take into account that the capital was susceptible of constant variation whether downwards or upwards in which case the applicable rule would have been the general rule that interest ceases to accrue when it gets equal to the amount of capital currently outstanding. It is buffling how the first applicant could allege that he entered into the consent agreement misinformed on this aspect.

Looking at all the factors , the court finds that the applicant was indecisive or certainly was not sure under which rule it was bringing this particular application. Certainly requirements for the setting aside of a judgment under r 56 are not the same as those envisaged under r 449. That irrespective, the explanations given by the applicants pertaining to the circumstances leading to the granting of the consent order are not in my view reasonable. Nonetheless as this is not the only weighing factor it is imperative to look at the other factors as full consideration of all the factors has to be made in totality.

The *bona fides* of the application for rescission

Rule 56 does not prescribe timelines within which an application of this nature may be brought up. However, the court takes note that this application is coming 30

months after the granting of the order. The court cannot ignore the nature and extent of the delay as same is a factor to be taken into account as per the Georgias case. Apart from the principle on finality to litigation, this factor points to whether indeed the applicant genuinely intends to seek redress given the period that lapsed between the granting of the order and the seeking of the rescission. Further, the application is coming after the throwing out of an objection to confirmation of the sale of third applicant's house by the Sheriff in May 2015. There is no good faith in this application. The fact that the first applicant has raised different explanations regarding the granting of the order clearly shows a litigant on a fishing expedition trying to change positions as much as possible in the hope of getting a catch. The application is in my view coming as a last minute attempt to avoid the inevitable and not a *bona fide* intention to have a judgment rescinded.

The *bona fides* of the defence on the merits which carries some prospect of success.

The applicant argued that the interest charged was usurious and hence the claim was tainted with an illegality. As has been alluded to before no satisfactory evidence was placed before the court. An annexure being a letter from the Interest Research Bureau addressed to the first applicant was attached. This document was not accompanied by any affidavit nor an explanation of the basis upon which it is alleged that interest was either usurious as claimed or overcharged, what rates were applied, how the over-charging occurred. This defence does not strike me as *bona fide* let alone as having any prospects of success on a *prima facie* basis given the totality of the evidence.

The applicants raised the defence that the US$80 000-00 was not due in the first place as respondent did not provide the funds. Against this defence is the first applicant's compromise where in a claim of US$90 000-00 a lesser sum is agreed to and it is only when execution is carried out in 2015 that such an issue is raised. The first applicant did not have to agree to anything having defended the matter to the pre-trial conference stage and having the benefit of legal counsel. Unlike in the *Washaya* case cited (*supra*) the first applicant does not attribute the consent judgment to his legal counsel acting without instructions.

A further defence advanced was that Sitmore Trading is not the correct plaintiff therefore the consent order was of no force and effect as the debtor is Sitmore Enterprises Private Limited. If it were not for the circumstances pertaining to this case that would have been a *bona fide* defence. However a facility letter signed on 4 June 2010 by the applicants' representative which enabled the release of the funds is clearly headed "Sitmore Trading (Private) Limited." Not only that, when a resolution was made to enable the signing of documents on behalf of the applicant, the resolution (emanating from the applicant itself) was clearly headed " Extracts from the Minutes of a meeting of the board of Directors of Sitmore Trading (Private) Limited Company." The document was duly signed or countersigned by the deponent of the affidavit filed as the founding affidavit for the first applicant which was signed by the second applicant.

It is clear from the documents on record that Sitmore Trading (Private) Limited was transacting on behalf of Sitmore Enterprises (Private) Limited and from the documents this is interchangeable. One would wonder why the first applicant would provide a resolution in the name of a company and continue to access funds in the name of a company that is Sitmore Trading (Private) Limited and then seek to resile from the commitments thereof by saying that Sitmore Enterprises (Private) Limited should have been cited when the benefits were enjoyed under Sitmore Trading (Private) Limited. Even third applicant who provided further security for the loan stated in her affidavit filed in an attempt to have the sale of her property set aside, that "Sitmore Trading (Private) Limited and Talkmore Kwaramba are the judgment debtors in a debt owed to NMB Bank Limited."

I cannot but agree with sentiments expressed by Mathonsi J in the case *African Banking Corp of Zimbabwe* v *PWC Motors (Pvt) Ltd & Others* 2013 (1) ZLR 376 (H) , where he stated as follows:

> "I find it utterly deplorable that business people are very quick to receive money from banks undertaking to repay on certain terms. When they have expended the money and enjoyed the benefits they cry foul when the lender demands its dues. We cannot allow a situation where business people grab loans and then refuse to pay. As they say, the time to pay the piper has come."

The above captures what has become common among citizens, inclusive of companies, that they enjoy facilities, receive loans and when it comes to pay back time there is reluctance to pay. Such characterises this particular matter.

I conclude that the application is not *bona fide*. The explanation proffered by the first applicant regarding the circumstances surrounding the granting of the consent judgment is not reasonable. Even the defense on the merits itself is not *bona fide*. The given the facts of the matter.

The court therefore is not satisfied that good and sufficient grounds have been proffered for it to be able to rescind the consent judgment of Mavangira J of 28 January 2013 as would have been possible under r 56 had the requirements been met.

The respondent had applied that costs be on a client and attorney basis so as to indicate or to put across the displeasure of this court regarding the conduct of the first applicant by instituting this particular application. In dismissing the application I ordered first applicant to pay ordinary costs. I took the view that first applicant may have been influenced by the purported finding by the Interest Research Bureau that he had been prejudiced to the tune of US$48 000-00 by way of interest. Certainly, that figure is considerable if it were to be accepted that the first applicant had been overcharged to that extent. That in itself would have prompted first applicant to act. Although the case turned out to be hopeless I considered that granting costs on a higher scale would have been drastic, more so, when it is clear that there was no application by the rest of the applicants.

It is therefore due to the foregoing furnished reasons that I dismissed the application with costs.

Muhonde Attorneys, applicant's legal practitioners
Gill, Godlonton & Gerrans, respondent' legal practitioners