PETER FREDRICK RENNIE
versus
ELIZABETH KHAKA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 14 February 2018

Opposed application

P C Paul, for the applicant
A Mugandiwa, for the respondent

TSANGA J: Following the decision I made in HC 11586/15 (HH 456/17), the Supreme Court ordered that the matter be referred back to this court for the principles relating to rescission of judgment in terms of Order 9 r 63 to be considered. The background facts are briefly reiterated for context to the applicable principles.

In 2008, the applicant and the respondent had entered into a deed of settlement at a pre-trial conference following issuance of summons for the transfer to the respondent of certain property described as Lot 5 remainder of subdivision "A" of Lichfield of Wilksden Farm together with all its permanent improvements constructed thereupon or alternatively payment of damages. The applicant had not honoured the deed of settlement. In 2012, the respondent had managed to have the deed of settlement registered retrospectively as an order of court, and the Judge before whom the matter was placed had granted it although the time lines for action had passed. It is application for registration as an order of court made under HC 5000/08B which the applicant says he did not receive. Having been in the throes of a bitter divorce, he said he was no longer staying at the address in question, having moved out in 2009. The application was said to have been received by one Winnie Guzuzu who was the domestic helper at the premises. Applicant at the time was now living with his sister at a different address and

his averment was that neither his former wife nor Winnie Guzuzu the domestic helper, brought the application for registration of the deed to his attention. Moreover his gripe at was that by the time the order was registered in 2008, it was well over four years since the agreement was entered into and therefore it was affected by prescription. Following registration of the deed of settlement as an order of the court, and, non-compliance by the applicant, an order of contempt was issued against the applicant leading to his purported knowledge of the registration of the deed and subsequently this application. The guiding principles for rescission which are to be considered conjunctively are well laid out in cases such as *Mazuva* v *Simbi & Ors* 2011 (2) ZLR 319(H); *Moyo and Ors* v *Sibanda & Anor* 2011 (2) ZLR 186. I examine each of the applicable principles contextually below.

The time frame for making the application

Firstly, an application for rescission under Order 9 r 63 of the High Court Rules 1971, must in accordance with r 63 (1), be made within 30 days of knowledge of the judgment, otherwise condonation has to be sought for any late application. Applicant averred that he only got to know on 10 November 2015 of the application for contempt for failure to comply with the order granted by the court on 29 November 2012 that registered the deed. This was when the application for contempt was served on his legal practitioners. It had purportedly been served on his domestic helper some three years earlier without his knowledge. His application for rescission was date stamped 26 November 2015. It was common cause on paper that on 15 October 2015, his legal practitioners had written to the respondent's counsel indicating that they had learnt of an attempt to serve papers on their client and asking what the matter was all about.

Suffice it to reiterate that the deed was registered as an order of court as case number HC 5000/08B and this reference appears clearly on the order of the court registering that deed. Notably, the letter from applicant's legal practitioners cited this reference as reflected in that order, namely HC 5000/8B. The relevant part of the letter dated 15 October 2015 that I am referring to read:

"Re: Elizabeth Khaka and Peter Frederick Rennie Case No. HC 5000/08B"

As such, if both the practitioner and his client knew absolutely nothing about what was being attempted to be served on the applicant, then it boggles the mind how they would have had in their possession the very citation that appears on the order that was the subject matter of

the contempt proceedings. Whilst the writer of that letter feigned ignorance of what the case was about, it is evident that Mr Rennie would certainly have known what the case was about as most likely was the case with his practitioner at the time the letter was penned. Indeed the citation revealed sight of relevant documents. The enquiry as to what the case was about, was merely a "smoke screen and mirrors" tactic, simply because revelation of knowledge of the judgment would have raised the issue of when the applicant got to know of the judgment. This court was not persuaded that the applicant was being truthful when he said that he only got to know about the rescission on 10 November 2015. It would appear the statement was deliberately factored into the enquiry well knowing that rescission is time bound. Applicant clearly needed to make an application for condonation of late filing of the application for rescission as the documents on record indeed suggested that by the time the letter of the 15th was penned he knew very well what the matter was about.

Good and sufficient cause

Secondly, an application for rescission, assuming it is timeously made, will be granted if there is good and sufficient cause, taking into account the reasonableness of the explanation for the default. The applicant's explanation for not reacting to the court process that resulted in the application for contempt was that he never received notification of the application to register the deed in 2012. He put the blame on the failure of the domestic helper to bring the court papers to his attention. This is a tired and often condescending explanation that the courts hear time and time again where all blame is heaped on the stereotypical dowdy domestic helper who is without enough wits or literacy skills to recognise the significance of passing on correspondence to an employer. In any event, the crucial point is that in terms of the rules the court, papers were served on a responsible person at an address that the applicant clearly knew about. As highlighted in *Smethwick Trading (Pvt) Ltd* v *Mangwende & Another* HH 603/14, even the affixing of process at a place of residence business or employment in terms of r 40 is equally regarded as sufficient service, let alone service on a responsible person at those premises.

Service, *in casu* was effected upon a person who was still in the applicant's employ and at his onetime matrimonial home, even if he had moved out. Applicant stated himself that the said Winnie was receiving her wages from him through the gardener and later through a labour consultant whom applicant himself engaged. He offered no explanation as to what

arrangements he put in place to receive all his mail once he left the matrimonial home in 2009. Chances are that if he appointed middle persons to represent him, the gardener in particular, he also most likely had a way of receiving correspondence that came to that address for his attention through his chosen conduit of communication. This court was satisfied that in all probability, he received the documents and continued with his chosen mode of "business as usual" and simply imagined that the problem which he had clearly failed to address would go away if he ignored it long enough".

The bona fides of the application

Thirdly, the *bona fides* of the application to rescind the judgment must also be considered. The *bona fides* of this application need to be examined against the backdrop of the case as a whole. Despite having sold property to the respondent, the applicant had never delivered it, necessitating the respondent dragging him to court to seek specific performance. A deed of settlement had been entered into which again was never obeyed even though he had signed the deed freely and voluntarily. His intentions to fulfil his side of the bargain remained in practice suspect.

Merits of the case

Finally, the *bona fides* on the merits of the case must also be considered. On the merits of the case, the application was premised on the point that when the order registering the deed was granted, the deed of settlement was more than four years old. Furthermore, the argument was that the settlement reached in 2008 had become prescribed by the time the order was granted. A deed of settlement being an order between the parties, it is not an order of court unless registered as such.

The respondent had two standpoints regarding prescription. The first, which was not persuasive, was that the deed automatically became an order of the court because the Judge at the pre-trial endorsed the deed. The second standpoint was that the chamber application to register the deed was made in 2010 and as such interrupted prescription even though the application was only finally granted in 2012. Why it took the chamber application two years to be dealt with was not addressed. The fact that the order was registered when the time frames were known to judge who registered it, effectively insisting that applicant honours his undertaking, affects the *bona fides* of the merits of the case. Applicant himself averred in his

answering affidavit that he had every intention of honouring the deed of settlement even through buying another property for the respondent since the Old Mutual shares he was supposed to have bought for the respondent as per deed of settlement had gone up in price. The only thing that stood in his path was that he lost contact with the respondent's son. It boggles the mind how prescription then becomes such a centre point to what he had agreed to do and intended to do.

Furthermore, since in an application for rescission it is all the factors that must be looked at conjunctively, it was this court's finding that the application for rescission was not made in time and condonation for late filing ought to have been sought. Equally, the application was essentially lacking in merit not just for the reasons I have outlined herein but also those I captured in HH 456/17 regarding settlement agreements.

The application for rescission is accordingly dismissed with costs.

Wintertons, applicant's legal practitioners
Kantor & Immerman, respondent's legal practitioners