MARTIN SIBINDI
versus
MONICA HOPE SIBINDI
and
TATENDA MONMART SIBINDI

I89CD HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 9 March 2020 & 21 May 2020

Court Application

Applicant in person
W Kasimoto, for the 1st & 2nd respondents

MANZUNZU J: This is a court application in which the applicant seeks the rescission of a judgment granted in his default. Respondents raised a preliminary point at the hearing that the application was filed out of time without seeking condonation.

On that basis the respondents sought for the dismissal of the application with costs.

The brief history of the matter is that the respondents sought an interdict against the applicant in an application filed on 25 July 20217 under HC 6820/17.

The applicant was served personally with that application on 10 September 2017. Applicant did not oppose the application but instead on 14 September 2017 responded to the application by filing a notice of consent to judgment accompanied with an affidavit confirming his consent to judgment as *per* deed of settlement.

The respondents then proceeded to set the matter down on the unopposed roll for 1 November 2017 and accordingly, in default of the applicant, obtained judgment.

The following order was obtained against the applicant who was the first respondent;

"IT IS ORDERED THAT

1. The first respondent be and is hereby interdicted, prohibited and restrained from dealing in, or in any way selling, encumbering or otherwise alienating the assets of MARTMON SIBINDI TRUST, being,
   1.1 Certain: piece of land situate in the district of Salisbury
   Called: Remainder of Lot 12 of Tynwald

Measuring: 30.5172 Hectares

Held under Deed of Transfer No. 4209/87

And

1.2 Certain: piece of land situate in the district of Salisbury

Called: Stand 475 Tynwald Township 15 of Lot 13A Tynwald

Measuring 798 hectares.

Held under Deed of Transfer No. 2326/86

And

1.3 Certain: piece of land situate in the district Salisbury

Called: Lot 1 of Lot 14 of Tynwald

Measuring: 16.1883 hectares

Held under Deed of Transfer No. 5356/88.

without the consent of applicants.

2. The first respondent be and is hereby prohibited, interdicted and restrained from further contracting with any developers, persons or entities concerning the assets of the Martom Sibindi Trust being

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without the consent of applicants.

3. The first respondent be and is hereby interdicted, prohibited and restrained from unilaterally amending the provisions of the deed of trust of the Martom Sibindi Trust.

4. The first respondent shall surrender to applicants or their legal practitioners or other agents, any and all documents, agreements of sale, drawings, designs, subdivision permits memoranda and similar technical, commercial and or contractual documents in his possession or the possession of its agents to enable the applicants to *inter alia*;
   1.1 carry out a full proper evaluation of the assets and liabilities of Martom Sibindi Trust, and how they arose;
   1.2 identify the debtors and creditors of Martom Sibindi Trust, including all 3rd parties to whom first respondent may have sold or otherwise alienated the immovable properties of the trust.
   1.3 Do a technical evaluation of the designs, drawings, permits and like diagrams relevant to developing the land.
5. Should the first respondent fail, neglect or otherwise refuse to avail to applicant any of the documents, listed above then the Sheriff or the High Court be and is hereby authorised, directed and empowered to seize all such documents and given them to applicant.
6. The second respondent be and is hereby interdicted, prohibited and restrained from transferring any of the properties listed herein without applicant's consent, or without an order of court granted against applicants and first respondent authorising such transfer.
7. The costs of this application shall be borne by first respondent personally, the scale of legal practitioner and client."

It is this order which the applicant now seeks to have set aside in an application filed on 17 July 2018. The application is brought in terms of r 63 (1) of the rules of this court which provides that:

> "(1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside."

Judgement sought to be rescinded was granted on 1 November 2017 and present application was filed on 17 July 2018 way after the 30 days stipulated in subrule (1) of r 63. However, r 63 (3) provides that:

> "(3) Unless an applicant for the setting aside of a judgment in terms of this rule proves to the contrary, he shall be presumed to have had knowledge of the judgment within two days after the date thereof."

The catch words in both subsection (1) and (3) of r 63 in the computation of time is "have had knowledge."

This means computation of time starts from the date when the defaulting party has knowledge of the judgment.

But for the avoidance of doubt subrule (3) creates a presumption that the defaulting party is presumed to have knowledge of the judgment within two days after the date of the judgment. This is a rebuttable presumption with the onus on the applicant to prove to the contrary. The onus is discharged on a balance of probabilities.

The question is, has the applicant discharged that onus.

According to the applicant, he filed his consent to judgment on 14 September 2017and did nothing and sat back. He said he only got to know of the judgment on 10 July 2018 in another matter when it was referred to in the heads of argument. The question is why would the applicant, given the implications of the interdict being sought, decide to sit back without checking the results of his consent to judgment. He also blames the respondents for not serving him with the order but there is no such obligation from the rules. Although with no obligation, the respondents took the trouble to have the order of 1 November 2017 published in the newspaper on 19 and 20 April 2018.

Whether or not the applicant has discharged the onus on him depends on the circumstances of each case. It is not enough for the applicant to merely say he got to know of the default judgment when it was alluded to in heads of argument in another case 10 months after filing a consent to judgment. He took a sluggard approach towards litigation. The respondents took the trouble to inform the whole world of this order, applicant included. Applicant has not explained why he took no further action after filing a consent to judgment. Was he not interested to know the outcome of the case to which he was consenting to judgment or he took the attitude of "whatever the outcome I must not be concerned." Applicant is not a new visitor in these courts despite him being a self-actor. The parties have become regular litigants in this court.

Given the circumstances of this case, the applicant has failed to discharge the onus upon him. The application was filed out of time with the result that the same is improperly before the court. The result is that the application be struck off the roll.

IT IS ORDERED THAT:

The application be and is hereby struck off the roll with costs.

Mandizha & Company, 1st & 2nd respondents' legal practitioners