GEORGIA PETROLEUM (PVT) LTD
and
ALEC GORE
and
SMILING MUNYARA
and
LIETO RYAN T.R. MUJINGA
and
MASIMBA GANYIWA
versus
NYASHA ZIJENA

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 24 October & 13 November 2024

Opposed application for rescission of judgment

B.D. Ndoro for the applicants
G.T. CHishakwe for respondent

CHILIMBE J

BACKGROUND

[1] On 24 October 2024 after hearing argument, I dismissed the application for rescission of judgment brought by first to fifth applicants and delivered the reasons thereof *ex tempore*. A request was made 7 November 2024 for the reasons in writing which reasons I deliver hereunder; -

THE DISPUTE

[2] This is an application for rescission of a default judgment. The application is brought in terns of 15 (1) of the High Court of Zimbabwe (Commercial Division) Rules SI 123/20 ("the Commercial Court Rules"). The application was timeously filed on 26 June 24 after judgment had been taken on 21 June 2024 in default for failure by present applicants to file their plea within the 7-day period prescribed by rule 12 (1) of the Commercial Court Rules.

[3] The application was opposed by first to fifth applicants. The second applicant represented the first applicant and deposed to the affidavit founding the suit. Third to fifth applicants effectively associated with each other`s defence. In fact, in replying the opposition to their suit, first to fifth applicants all rallied under the banner of one answering affidavit.

[4] The factual background, in brief, is that whilst the details of those dealings or transaction are strongly contested by the applicants, it is common cause the parties did engage over business involving petroleum fuels. In simple terms, respondent`s version is that she paid the first applicant a sum of US$205,011,88 for the supply of 160,000 litres of fuel. The amount was paid in advance and was supposed to be amortised through periodic deliveries of fuel to her by first applicant.

[5] Respondent contends that 1st applicant only managed to deliver 100,000 litres of fuel in breach of the agreement. The parties thereafter restructured the transaction in terms of which the applicants allegedly undertook to pay respondent an amount of US$197,333,59. An acknowledgement of indebtedness was then executed in her favour. It is on the basis of this agreement, that summons were issued and judgment taken as aforesaid.

[6] Respondent attached to her opposing papers, a document on a Georgia Petroleum letterhead titled "Repayment Plan for Nyasha Zijena". The document outlined the arrangements between respondent and first applicant. It detailed breach of such arrangements by first applicant and undertakings to remedy same. The document had 3 schedules A, B and C. Schedule A showed prepayments allegedly received by first applicant against fuel supplied. Schedule B had columns showing profit per litre, amount owed and a running balance. The third Schedule C was a repayment plan.

[7] The applicants distanced themselves from the alleged transaction as well as the document in question. Theirs was a total denial in which no explanation was tendered as to why respondent had targeted them as her counter party in a business transaction.

THE PRINCIPLES GOVERNING APPLICATIONS FOR THE SETTING ASIDE OF DEFAULT JUDGMENT

[8] I shall return to the facts shortly, meanwhile I note that both sides correctly identified and referred to the established principles and authorities that govern the determination of an

application of this nature. A party seeking the rescission of a default judgment must demonstrate good and siufficient cause to have that judgment set aside.

[9] In doing so, the applicant must show that (a) it was not in wilful default, (b) has a good defence and prospect of success on the merits and (c) that the application is bona fides. (See *Deweras Farm v Zimbank* 1998 (1) ZLR 238, *Stockhill v Griffiths* 1992 (1) ZLR 172. In order to establish whether a party has fulfilled the requirement of "good and sufficient cause", the court undertakes a cumulative evaluation of these three pillars where each may be viewed, balanced, complemented or aggravated by the other.

WILFUL DEFAULT

[10] Herein, an examination of the papers suggests that the applicants were properly served with summons. I found their extended protestations that service was effected at a wrong address as outrightly insincere. The fuller explanation as to why service was accepted at a wrong address (and brought to their attention timeously) was only given in the answering affidavit. So too were details regarding the further reasons why the applicants were each unable to file their respective pleas.

[11] The explanation tendered for that failure was that the 1st applicant`s finance manager had resigned and "collected a file which had all the information concerning the issue before this honourable court". I found this explanation most unsatisfactory and I say so for the following reasons; -The details tendered by the applicants- in the founding affidavit-over this development were sketchy. Especially given the fact that it constituted the bedrock explanation for failure to file the plea. The inadequate explanation invites a number of questions; -what was the identity of this ex-employee? On what basis or under what circumstances did he or she collect a file?

[12] Whose file, was it in the first instance? What exactly was this information which the finance manager took away? Did the rest of the applicants not have alternatives, copies or other versions of the information saved on different or accessible devices? And in what manner precisely, were the applicants handicapped in filing their plea? Importantly, what efforts did the applicants make in leaving no stone unturned in seeking to remedy the crisis by retrieving the information? Even more importantly is the fact that fourth and fifth applicants, completely dissociated themselves from the first applicant.

[13] Which necessarily suggests that fourth and fifth applicants ought not have been unaffected (and deterred) in their obligation to file their respective pleas. On what basis then did they fail to do so, since theirs has been an emphatic dissociation from first applicant?

[14] Even the answering affidavit which improperly introduced new facts and new evidence (according to the well-established legal position that an applicant`s case is made in its founding affidavit and that an answering affidavit ought not introduce new matters) failed to proffer those reasons. (See *Muchini v Adams* 2013 (1) ZLR 67). I am not convinced that that the constraint cited by the applicants suffices as a reasonable explanation as to why parties who were fully aware of their duty to file a plea in terms of the rules permitted the dies to lapse without attending to the requisite requirement placed upon them.

[15] The standard or conduct expected of a party faced with an obligation under the rules of court has been well articulated by the case authorities. A party cannot simply choose to ignore such obligation, well knowing what is required of it as well as the likely consequences of default. (See *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises* (Pvt) Ltd 1998 (2) ZLR 249.)

[16] In considering the explanation tendered by the applicants for their default, the nature of the claim; - amounting to almost one fifth of a million US dollars, and money which none of the parties owed, become important. There is no demonstration of best or even desperate endeavours to suggest that the applicants indeed made every effort to comply with the rules.

PROSPECTS OF SUCCESS

[17] The applicants, (especially first to third applicants) strenuously denied having concluded the fuel financing and purchase transaction as alleged by respondent. They attacked instead, the document proffered by respondent as an acknowledgement executed in favour of respondent. It was the applicants` contention in that regard that the document did not meet the requirements of such document. The respondent`s argument via her counsel was that the document represented a written contract which detailed the background and undertakings of the parties. It met the requirements of a valid contract and set out the parties' respective rights and obligations.

[18] Second applicant deposed to the founding affidavit and also represented first applicant as its General Manager. He however did not explain why he appended his signature to a document of no import. The document is clear in its purpose. It records transactions between parties

engaged in business. It then detailed the breach as well as arrangements to remedy same by present applicants. The total denial on the part of first to fifth applicants is not apparent in the letter dated 9 October 2023 addressed by second applicant on behalf of first applicant in response to the letter of demand from respondent`s legal practitioners. I found the complete denial by the applicants of any dealings with respondent smacking of mala fides. I find no robust gainsay to counter the document that was tendered as setting out the parties` undertakings.

[19] I also note that respondent had, in her declaration, alleged indebtedness on the part of all the applicants. The second to fifth applicants did not elect to counter this averment by pleading, as part of their defence to the claim, the doctrine of separate personality in their defence. I will presume that such is unavailable to them. Belatedly, the answering affidavit sought to introduce inadmissible facts and evidence regarding the status of 4th and 5th applicants as non directors of 1st applicant. Clearly such cannot avail them as the information, as noted above, was improperly brought before the court.

BONA FIDES

[20] The aforegoing conclusions point to the absence of bona fides in this application. The reasons for default were perforated with inconsistencies, the defence laden with vagueness and the attempt to demonstrate bona fides negated by the discernible thread of parties making up their case as it progressed. As such, I find no good and sufficient cause to revisit the previous order of this court and the application will be refused.

COSTS

[21] The respondent in support of her prayer for costs on a higher scale contended that the applicants were abusing the court process, lacked a plausible defence and were bent on delaying her access to the fruits of judgment. The facts before the court proffer the basis upon which admonitory costs are herein sought.

[22] In considering that prayer, I am duty bound to consider the established principles governing the issuance of punitive costs at the scale of legal practitioner and client (see *Dongo v Naik & 5 Ors* SC 52-20 which cited *Karengwa v Mpofu* HB 56-15 with approval). Such costs should only be levied in extraordinary circumstances. These included where a court expresses its displeasure by chastising errant litigants bent on abusing the court process.

[23] We have before us an attempt by the applicants to have the judgment entered by this court against them in default set aside. Respondent rose to resist that endeavour and successfully so. The process was neither protracted, complex nor demonstrably costly beyond the ordinary for applicant. In that regard, I believe that costs on the ordinary scale should assuage the respondent and chastise the applicants accordingly.

DISPOSITION

It is hereby ordered that; -

1. The application for rescission of default judgment be and is hereby dismissed with costs to be borne by the applicants jointly or severally, the one paying and the others being absolved.

Macharaga Law Chambers – first to fifth applicants` legal practitioners.
Marufu Attorneys-respondent`s legal practitioners.

[CHILIMBE J___13/11/24]