VIMBAI MANEMO

Versus

ELVIS BASIRA

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 5 NOVEMBER 2021 & 25 NOVEMBER 2021

Application for rescission of judgment

B.C. Dube, for the applicant
C. Nyathi, for the respondent

DUBE-BANDA J: This is an application for recession of judgement in terms of rule 63 of the High Court Rules, 1971.[1] Applicant seeks an order that the default judgment granted by this court on the 5th December 2021 in HC 144/18 be set-aside; that applicant be directed to file her plea in HC 144/18 within ten days of this order; and that respondent be ordered to pay the costs of suit on an attorney and client scale. The application is opposed.

Factual background

This application will be better understood against the background that follows. On the 10 August 2017, the parties entered into an agreement of sale, in terms of which applicant sold her a motor vehicle being a Mercedes Benz C220, registration number ABI 9423. A dispute arose between the parties, on the 8 March 2019, applicant sold the motor vehicle to one Herman Jones. On the 13th September 2019, respondent sued out an amended summons in HC 144/18 against applicant and one Herman Jones. On the 7th October 2019, applicant entered a notice of appearance to defend through Sansole & Senda Legal Practitioners. Applicant did not file a plea within the timeline allowed by the rules of court, and respondent then caused to be issued a Notice to Plead and Intention to Bar and Bar (Notice). Applicant was bared and on the 5th September 2019, this court granted a default judgment couched as follows, that:

[1] This application was filed before the enactment of the High Court Rules, 2021. i.e. when the High Court Rules, 1971 where the applicable rules.

1. The agreement of sale between 1st and 2nd defendants be and is hereby declared to be null and void.
2. The agreement between the plaintiff and 1st defendant remains valid and enforceable.
3. Costs of suit on the ordinary scale.

This is the default judgment that applicant seeks to be set aside. It is against this background that applicant on the 26 July 2019 launched this application seeking the relief mentioned above.

Preliminary point

Mr *Nyathi* counsel for the respondent took a preliminary point and urged the court to withhold its jurisdiction as the applicant had approached the court with dirty hands. It is contended that in terms of the orders in case number HC 144/18 and HC 1050/19 applicant ought to have delivered the motor vehicle to the respondent. It is argued that in case HC 144/18 this court declared the agreement between applicant and Herman Jones null and void, and applicant must then have recovered the vehicle from Jones to whom she had sold and delivered the vehicle. Further it is argued that upon the finalisation of HC 1050/20 applicant ought to have delivered the vehicle to the respondent. It is argued that applicant is in open defiance of the two court orders, and she cannot approach this court for assistance and relief when she is in defiance of the orders of this court. Reference was made to the *Associated Newspapers of Zimbabwe (Pvt) Ltd.* v *Minister of State for Information and Publicity and Another* SC 111/04 judgment.

Per contra applicant contends that the respondent once filed a contempt of court application based on the same facts taken as a preliminary objection in this matter and that application was by consent removed from the roll. It is argued that the agreement of sale with the third party was made on the 8 March 2019, and the order in HC 1050/19 was granted on the 29 August 2019, while the order in HC 144/18 was granted on 5 December 2019, therefore at the time the orders sought to anchor this preliminary objection were granted the vehicle had been sold and delivered to the third party. It is contended that applicant no longer had possession of the vehicle at that stage, and could not have complied with the court orders. Applicant contends that this preliminary objection has no merit and must be refused.

It is important to note that the right to be heard by a court in proceedings that have been properly instituted is a fundamental right that should not be lightly denied to a party. See: *CFI Retail (Private) Limited v Eric Masese Manyika* SC-8-16. The facts before court are that when the orders that respondent seeks to anchor his preliminary objection were granted applicant had already sold and delivered the vehicle to the Herman Jones, she no longer had possession of the vehicle. I also factor into the equation the fact that in matter between the same parties, i.e. *Basira v Munemo* HB 46/18 this court dismissed an urgent application filed by respondent to interdict applicant from disposing of this same vehicle. The court having noted that the application was punctuated by material non-disclosures and falsehoods. The urgent application was dismissed on the 1 March 2018, and applicant sold the vehicle to Herman Jones on the 8 March 2019. At the time the vehicle was sold to Herman Jones, there was no legal impediment to the sale. It is because of these reasons that I take the view that the principle of dirty hands has no application in this matter, it has no merit and is refused.

Merits

This is an application for rescission of judgment anchored on rule 63 of the High Court Rules, 1971. The Rules provide thus:

> ***63. Court may set aside judgment given in default***
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> (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.
> (2) If the court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his action, on such terms as to costs and otherwise as the court considers just.
> (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.

In *Zinondo v CAFCA Ltd.* SC 64 of 2017 the court said in an application for rescission of a default judgment the court must be satisfied that there is good and sufficient cause to rescind the order. In *Makoni v CBZ Bank Limited* HH-357-16, CHITAKUNYE J quoted the

case of *Stockil v Griffiths* 1992 (1) ZLR 172 (S) at 173D-F wherein GUBBAY CJ aptly noted that: -

> The factors which a court will take into account in determining whether an applicant for rescission has discharged the onus of proving "good and sufficient cause", as required to be shown by Rule 63 of the High Court of Zimbabwe Rules 1971, are well established. They have been discussed and applied in many decided cases in this country. See for instance, Barclays Bank of Zimbabwe Ltd v CC International (Pvt) Ltd S-16-86(not reported); Roland and Another v McDonnell 1986 (2) ZLR 216(S) at 226E-H; Songore v Olivine Industries (Pvt) Ltd 1988(2) ZLR210(S) at 211C-F. They are: (i) the reasonableness of the applicant's explanation for the default ;(ii) the bona fides of the application to rescind the judgement; and (iii) the bona fides of the defence on the merits of the case which carries some prospect of success. These factors must be considered not only individually but in conjunction with one another and with the application as a whole.

From this authority and other authorities it is clear that the test of a good and sufficient cause involves the establishment of the following factors: explanation for the default must be reasonable; the *bona fides* of the application to rescind the judgment; the *bona fides* of the defence on the merits of the case and the prospects of success. See: *Deweras Farm (Pvt) Ltd and Ors* v *Zimbabwe Banking Corporation* 1997 (2) ZLR 47 (HC).*G.D; Haulage (Pvt) Ltd.* v *Mumugwi Bus Services (Pvt)* 1979 RLR 447.

I now proceed to consider these requirements in determining whether or not good and sufficient cause has been shown for the rescission of the judgment in HC 144/18.

The explanation for default and *bona fides* of the application to rescind

Applicant avers that her default was due to her erstwhile legal practitioners who did not file a plea until such time that he was served with a Notice to Plead and Intention to Bar. Again the legal practitioner did not file a plea in answer to the Notice, and it is at this stage that respondent was granted a default judgment which is the subject of these proceedings. Applicant avers that the erstwhile legal practitioner indicated that his clerk did not bring the Notice to his attention. Applicant makes the point that her erstwhile legal practitioner was inept and failed to do a good job, and on her part she had done everything possible to defend the matter. She avers that the lack of diligence on the part of her legal practitioner should not be imputed to her.

The erstwhile legal practitioner filed a supporting affidavit. He avers that his firm was served with a copy of the Notice and his secretary did not bring such Notice to his attention. This is the reason he did not file a plea in answer to the Notice. A default judgment was then granted against the applicant.

I take into account that applicant instructed a firm of legal practitioners to prosecute her defense. It is these legal practitioners who failed to execute her instructions resulting a default judgment against her. In *Diocese of Harare v The Church of the Province for Central Africa* SC-9-10 the court laid down a principle that where the legal practitioner is the one who is at fault, he must file an affidavit admitting his errors. In *casu* the legal practitioner filed an affidavit admitting his negligence, in that it is his firm which sat on a Notice and failed to file a plea.

In *Zimbank* v *Masendeke* 1995 (2) ZLR 400 (S) the court in defining the concept of wilful default remarked that wilful default occurs when a party with the full knowledge of the service or set down of the matter, and of the risks attendant upon default, freely takes a decision to refrain from appearing. The court further noted that:

> The wilfulness of a default is seldom, if ever, clear-cut. There is almost always an element of negligence, and the question arises whether it was gross negligence and whether it was so gross as to amount to wilfulness. And in coming to a conclusion there is a certain weighing of the balance between the extent of the negligence and the merits of the defence. See Songore v Olivine Industries (Pvt) Ltd 1988 (2) ZLR 210 (S); Stockil v Griffiths 1992 (1) ZLR 172 (S); and Mdokwani v Shoniwa supra.

Applicant's founding affidavit and the supporting affidavit deposed by the erstwhile legal practitioner shows that she had always intended to defend the matter. It is for this purpose that she instructed a firm of legal practitioners to prosecute her defence to respondent's claim. Once a litigant instructs a legal practitioner, it becomes the latter's duty to diarise the file in respect of filing pleadings. The erstwhile legal practitioner says the failure to file a plea in answer to the Notice was a result of a mistake of misfiling. My view is that there is an element of negligence in this case, I say so because when a legal practitioner files a notice of appearance to defend, he or she must diarise the file in respect of timelines for filing further pleadings. This

rule of practice was not observed in this case. I do not think it was gross negligence as to amount to wilfulness.

It is clear that the default is attributable to the applicant's erstwhile legal practitioners. The jurisprudence is clear that wilful disdain of the rules of the court by a party's legal practitioner will be treated as non-compliance or wilful disdain by the party himself. See: *Highline Motors spares (1993) (Pvt) Ltd and others v Zimbabwe Corp. Ltd* 2002 (1) ZLR 514(S) *and Blue Bells Enterprises (Pvt) Ltd* 1998(2) ZLR 249(S). I take the view that the applicant's erstwhile legal practitioners did not freely takes a decision to refrain from filing a plea in answer to the Notice. What occurred in this case amounts to ordinary negligence and not gross negligence and therefore does not amount to wilfulness. See: *The Pinnacle Property Holdings (Pvt) Ltd v Municipality of Redcliff* HC 277/14. There is no basis for visiting the sins of the legal practitioner on the applicant. I find the applicant's explanation for the default reasonable in the circumstances of this case, and her application for rescission is *bona fide*.

Prospects of success

It is submitted for the applicant that the parties entered into written agreement of sale, wherein respondent purchased a motor vehicle from the applicant in the sum of USD$28 000.00. It is contended that in terms of the agreement of sale respondent had to pay the full purchase price on or before the 16 November 2017. It is argued that contrary to the terms of the agreement, respondent only paid USD$7 000.00 by 10 November 2017, and he has not paid the purchase price in full. It is contended that the failure to pay the purchase price goes to the root of the agreement of sale. It is submitted that applicant cancelled the agreement of sale with respondent and then sold the vehicle to a third Herman Jones. It is said respondent cannot seek specific performance of an agreement which he has breached. It is submitted that applicant has good prospects of success on the merits in the main case.

Respondent contends that the agreement of sale was varied by extending the period of payment of the purchase price. Again it is argued that applicant frustrated the payment of the balance of the purchase price. It is argued that respondent did not breach the agreement, and it is the applicant who breached such agreement by selling the vehicle to a Herman Jones.

I take the view that on the papers before court, there is no proof that the agreement of sale was varied by extending the period of payment of the purchase price. I also take into account the extant factual findings of this court in *Basira v Munemo* HB 46/18 that respondent was in that application peddling falsehoods that he paid USD$16 550.00, when he had only paid USD$7000.00 at the time he filed that application. My view is that applicant's contention that respondent breached the agreement of sale and as such he has no basis to seek specific performance has merit. On the facts of this case, there seems to be no basis to impeach the agreement of sale of the vehicle between applicant and Herman Jones. It is for these reasons that I find that applicant has good prospects of success on the merits.

The general rule is that the costs follow the result. There is no reason why this court should depart from such rule in this case. The respondent is to pay the applicant's costs on the scale as between party and party.

Disposition

I am satisfied that the applicant has shown good cause for rescission of the order granted in default in case number HC 144/18.

I accordingly order as follows:

1. That the application for rescission of judgment succeeds.
2. That the default judgment granted in HC 144/18 be and is hereby rescinded.
3. That the applicant be and is hereby ordered to file her plea in HC 144/18 within 10 days of this order.
4. Respondent to pay the costs of suit.

Moyo & Nyoni, applicant's legal practitioners
Mutatu, Masamvu & Da Silver Gustavo, respondents' legal practitioners