NYASHA TINARWO
and
TALENT TINARWO
versus
CLEMENCE NDAMBA
and
PASCA CHIPINDA

HIGH COURT OF ZIMBABWE
TSANGA & MAXWELL JJ
HARARE, 26 May & 24 August 2022

Civil Appeal

D Mukanga, for appellant
CT Tinarwo, for Respondent

TSANGA J: On 26 June 2022 we dismissed the appellants appeal against the refusal by the lower court of rescission for default judgment on the basis that none of the material requirements for rescission had been met by the appellants. The delay was inordinate, the explanation for the delay was unsatisfactory and the prospects of succeeds on the merits were in our view nil.

The background facts against which rescission had been refused by the lower court were these. The appellants and the respondent went onto a joint venture to operate a college. Irreconcilable differences arose rendering it impossible to continue operating the college together. The respondents issued summons for their share of assets from the partnership, a contribution made towards buying a stand and a specified amount as good will. The appellants failed to attend trial on 15 October 2018 and a default judgment was granted to the effect that the partnership between the parties was dissolved. The appellant, as defendants, were also ordered to hand over the registration certificate for the college. They were also awarded $700.00 being their joint contribution towards the purchase of stand 184 Stoneridge, Waterfalls Harare. Further, they were

to be paid $1 300.00 towards the good will of the College and $250.00 being the value of their joint share of assets. Costs of suit were on an attorney client scale. They had been legally represented but their lawyers did not attend. They said they only got to hear of the default judgment a year later. The lower court dismissed their application for rescission. The court found they were in wilful default. The lower court's reasoning was that a party has a duty to follow up with their lawyer and that there had been no explanation by their lawyers for non-appearance. The court found their explanation neither reasonable nor plausible and court found them to have been in wilful default. On prospects of success in the main matter, they had raised the issue of their share in the college having been undervalued. On the undervalued share in the college, the court found that there was no proof provided that their share was undervalued.

They had also raised the issue of non-joinder of the Ministry of Education which the court said was not defective as their interest was said to be administrative and had nothing to do with issues in the main matter.

Their grounds of appeal to the High Court were as follows:

1. Court *a quo* erred in law and fact in dismissing an application for rescission of default judgment in circumstances where it was clear that the appellant was not in willful default
2. Court erred in law by concluding that the appellant had not prospects of success in the main matter
3. The court erred at law by overlooking issue of non-joinder raised by the appellants

Appellants had sought that the appeal succeeds and that the order of the court below be substituted with an order that the application for rescission of default judgment under 16730/18 succeeds with costs on a higher scale.

SUBMISSIONS

The gist of Appellant's submissions was that the magistrate ignored the letter on p 69 of the record where the lawyers said they did not attend because they did not receive the notice of set down. They also submitted that there was no audited report to show their share in the business.

Respondents on the other hand had argued that there was no affidavit from erstwhile legal practitioners speaking to what happened and that a letter was not enough. As regards the absence of an audit report the onus was said to lie on the appellants to have shown that their share was undervalued. On joinder, this was said to be not necessary because the court could still determine the issue without the Ministry.

As regards the absence of willful default we agreed with the respondent that there ought to have been a sworn statement from the erstwhile legal practitioner regarding failure to see the notice. See *Challenge Auto (Pvt) Ltd* v *Standard Chartered Bank Zimbabwe Ltd* 2003 (1) ZLR 17 (H) on the need for an affidavit where applicants blame their erst while legal practitioners for dilatoriness. The appellants had been served with a notice of set down for the pretrial conference and therefore they could not just have left the issue thereafter for their erstwhile lawyers to attend to as they claimed without making any follow up or enquiry regarding the trial. The letter on page 69 of the record was inadequate as an explanation. It merely stated that the lawyers attended the pretrial conference and did not receive the notice of set down for trial and hence were unaware of the trial date. An affidavit would therefore have been necessary to counter the proof on record that the notice of set down had in fact been served on 8 October 2018 at 11.57 hours on N Gerede a responsible person in the employ of the appellant's erstwhile legal practitioners. Without detail as to what happened the lower court or this appeal court was not in a position to find otherwise than that there was willful default by the lawyers on behalf of their client in the face of what was on record. See *Mubvumi* v *Maringa & Anor* 1993(2) ZLR 24 (H); *Kombayi v Berkout* 1988 (1) ZLR SC 53 at p 54; *Beitbridge Rural District Council v Russell Construction Co. Pvt Ltd 1998 (2) ZLR 190* on attributing noncompliance to a party's legal practitioner.

Furthermore the delay of one year was undoubtedly inordinate. Lumping all the blame on the lawyer was unreasonable for the reason that a client has a duty to follow up their case with a lawyer.

On prospects of success on the basis that their share was undervalued and that there was no audited report, again we agreed that the onus was on the appellant to provide these and yet nothing had been placed before the magistrate in the application for rescission to show the likelihood of prospects of success. If their share was undervalued one would indeed have expected

that upon application for rescission the applicants would strongly argue prospects of success based on some cogent proof of such undervaluation. This they did not do. The law is clear that courts will not grant rescission in the face of evidence that there are no prospects of success. *Sibanda* v *Ntini* 2002(1) ZLR 264.

The non-joinder of the Ministry of Education was also clearly a non-issue as the Ministry had nothing to do with the dispute between the parties. We accordingly found no error on the part of the magistrate in denying the application for rescission.

It was for these reasons that we dismissed the appeal with costs.

MAXWELL :……Agrees

Macharaga Law Chambers, legal practitioners for appellant
Zimudzi & Associates, legal practitioners for respondent