MORDECAI PEDZI
versus
LEAST KATSANDE SAVANHU

HIGH COURT OF ZIMBABWE
KATIYO J
HARARE, 14 July 2022 & 27 October 2022

Opposed -Rescission of Judgment

Applicant in Person
A Muchandiona, for the respondent

KATIYO J: The applicant approached this Court seeking an order of rescission of judgment in terms of rule 27 of the new High court rules that was granted by this court on default for failure to plead to the notice to plead served on him. This court after perusing and hearing both parties it gave *ex-temporae* judgment whereupon the application was dismissed. The applicant a self-actor has since noted an appeal to the Supreme Court and has now asked for written reasons for dismissal.

The Respondent issued a summons and declaration of demand against the applicant for his ejectment from number10 Knightsbridge Rd, Highlands Harare and holding over damages at a rate of USD$750 per month. The applicant filed his appearance to defend on 10 of September 2021. Meanwhile Respondent was allegedly said to have made an application to this court on 25 of August 2021 seeking an order to eject the applicant, Mord Micmax Business Consultancy and Services Pvt Ltd and 2 others from the same property. The leasee filed an appearance to defend and the answering affidavit on 7 September 2021. The respondent denies ever instructing any legal practitioner to launch such an application. According to the applicant the moment the summons for ejectment was issued that was the last time he was served with court process save for the current default judgment which he now seeks to rescind.

The Respondent represented by one Kutiwa Juta through a special power of

Attorney is vehemently opposed to the relief sought insisting that the applicant was properly served and therefore was in willful default.

According to papers filed, the summons and declaration were served on 6 September 2021 and the applicant filed and served his appearance to defend on 10 September 2021. From there the applicant did not file his plea within the time limit as permitted by the rules of this court and a notice of intention to bar was served at number 10 Knightsbridge Rd, New Lands Harare in terms of rule15(13)(i) which states that:

> "i. Where any process is to be served, including process in which the only relief claimed, apart from costs, is an order for ejectment from premises or judgment for rent thereof, and
>
> (i) the person upon whom it is to be served prevents service by keeping his or her residence ,place of business or employment ,address for service or registered office closed; or
>
> (ii) the person seeking to effect service of the process is unable ,after diligent search at the residence ,place of business or employment ,address for service or office of the person to be served ,to find that person or a reasonable person referred to in this rule;
>
> it shall be sufficient service to leave a copy of the process in a letter box at or affixed to or nearby the outer or principal door of, or in some other conspicuous position at, the residence ,place of business or employment ,address for service or office ,as the case may be."

The applicant argues that the premises in question are always manned by someone, in particular his wife is always present notwithstanding that there is no supporting affidavit to confirm that position. He further argues that he is not the lease holder at that property but he is only a director in the employment of the lease holder a separate legal entity known as MORD MICMAX BUSINESS CONSUTANCY SERVICES (PVT) Ltd which entered into a lease agreement with Nyamukoho Investments PVT Ltd.

The issues before the court are:

1. whether proper service was effected
2. whether the applicant can be separated from the purported lease holder at the premises
3. whether he was in willful default
4. whether he has prospects of success in the main matter

The applicant argues that he has prospects of success on appeal and therefore should be given a chance to defend his position in court. The Respondent denies knowledge of case HC 4178/21 and insists that never instructed Messrs Musemburi Legal Practice to institute proceedings under case HC4178/21. Meanwhile that case has since been withdrawn after consulting with their legal practitioners. According to the Respondent there has never been any communication regarding that case. Also the applicant attempted to instruct a developer to construct flats at the same premises without the respondent's knowledge and authority as the registered owner of the property. The Respondent suspects the applicant is harboring evil intention on this property and has absolutely no *bonafide* defense to this vindicatory claim.

The applicant seems to approbate and reprobate. He is not very clear as to what he is. He is on one hand hiding behind a company as a director and on the hand he contends that he was not properly served in terms of the rules. It is not clear whether this legal entity has any other employee other than him. If so where are the other employees let alone the reception? From the founding affidavit it is quite clear that there is no any other person at these premises other than the applicant's family. This is a clear case where the applicant is making it difficult for process to be served by hiding behind a company which is none functional or existent. In my view the corporate veil should be pierced and see who is behind. In the case of *Anderson Manja & 98 Ors* v *Sheriff of Zimbabwe and Gurta Mining* AG SC 9/21 the court had to determine whether one of the respondents, as the claimant, could be said to be a different entity from the judgment debtor sufficiently to dismantle the appellants from executing against the mining claim. It was held that the position of the law regarding the separate legal persona principle is well established. It was succinctly articulated by PATEL J, in *Deputy Sheriff Harare* v *Trinpac Investments (Pvt) Ltd & Anor* 2001(1) ZLR at 552 and A-C where the learned judge quoted with approval *Cape Pacific Ltd* v *Labner Controlling Investments (Pvt) Ltd* & Ors 1945(4)SA790 at 803-804.

> "It is undoubtedly a salutary principle that our courts should not lightly disregard a company's separate personality, but should strive to give effect to and uphold it. To do

> otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach to it. But where fraud, dishonesty or other improper conduct is found to be present, other considerations will come into play. The need to preserve the separate corporate identity in such circumstances would have to be balanced against policy considerations which arise in favour of piercing the corporate veil—-And a court would then be entitled to look to substance rather than form in order to arrive at the true facts, and if there is a misuse of corporate personality, to disregard it and attribute liability where it should rightly lie. Each case would obviously have to be considered on its own merit."

The Respondent denies existence of a lease and challenged the applicant to produce one which was never the case. From the circumstances of this case it is quite clear that it is the Applicant and his family who use these premises to the exclusion of any other person all in the name of a company which doesn't exist. This is purely designed to frustrate the Respondent from repossessing her lawfully owned property. Assuming there is a valid lease agreement between the so called company and Nyamukoho Investments wasn't it a simple task of demonstrating so. There is no lease to talk about. On the issue of service of process raised this court did not find anything amiss as it was served in terms of the rules.

Generally courts do not refuse a party a rescission of judgment unless the party has totally failed to demonstrate a good and sufficient cause. In *Songoro* v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S) a three-pronged enquiry was conducted by the court of appeal in assessing whether or not" a good and sufficient cause" existed for the rescission of the judgment to be granted. In that case for good and sufficient cause to be found to exist, the court held that the following must be satisfied that:

i. that the applicant's default was not willful, and
ii. that the applicant has *bona fide defense, and*
iii. that the applicant has prospects of success in the prosecution of the cause in the main matter.

The court however further held that these three considerations are neither exhaustive nor decisive and the court has a very wide discretion as to the manner in which it will consider giving the applicant leave to proceed. The above factors are considered not only individually, but in conjunction with one another and with the application as a

whole. **Willful** in *R* v *Tosela* 1942 EDL175 at 176**,** the following observation was made by Lansdown JP

> "…..in general apart from the particular context an act is willful which Is deliberate or intentional and not occasioned by ignorance, inadvertence ,accident ,physical disability or like causes: not only is knowledge present, but violation is brought into activity".

In *Zimbabwe Banking Corp Ltd* v *Masendeke 1995(2) ZLR400 (SC***)** it was stated that:

> "willful default occurs when a Party freely takes a decision to refrain from appearing with full knowledge of the service set down of the matter. Where there is negligence to the default the court will examine whether the negligence is so gross as to amount to willfulness. In coming to its conclusion, there is certain weighing of the balance between the extent of negligence and the merits of the defense."

In *Ndokwani* v *Shoniwa* 1992 (1) ZLR 269 (S) at 274 C it was held that the facts alleged and the defense tendered, must show that the defense is being advanced in good faith and not merely for the purpose of frustrating enforcement of the judgment……."

As stated to above the applicant doesn't want to come out in the open as to his true identity at the premises in question. Court process was issued at the same premises as alluded to the above. He either saw the process and decided to ignore on the belief that the Respondent would deal with so called company where liability would be attached. As stated the court has already made a finding that the so called company does not exist outside the applicant. There is an allegation that he had instructed a land developer to construct some flats without the knowledge of the Respondent. This submission was not contradicted thereby confirming why he ignored the process. It was meant to frustrate the enforcement of the judgment. Having made a finding that the applicant cannot be separated from the so company in question it is therefore that no matter how the respondent would try to serve him none would ever accept the process. The applicant is quite aware as to who the registered owner of the property is and for him to succeed it is a mammoth task. He has no prospects of success on the main matter. There is nothing to show he still have *locus standi* to this property. There is no plausible argument he can offer at the main trial. Individuals should learn to leave with grace. This is case where applicant has designed a strategy to frustrate process serving so as

to dodge effective service. This was a willful default which was meant to frustrate the respondent and go forever in that way. The law should protect those who abide by the law and the rules. This is a suitable case in my view where rescission should be denied. Having perused and listening to both sides I am not persuaded this is a suitable case for granting the relief sought.

I therefore order as follows:

1. The application for rescission of judgment be and is hereby dismissed
2. No order as to costs.

Danziger &Partners, respondent's legal practitioners