WESTERN TRANSPORT (PVT) LTD Applicant

versus

STELLA KATSAMBE 1st Respondent

and

DEPUTY SHERIFF 2nd Respondent

HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 22 FEBRUARY AND 14 MARCH 2002

A H Denbury for the applicant
T Ndlovu for the respondent

Opposed Application

KAMOCHA J: In this application the applicant company seeks condonation of the late filing of the application for rescission of a default judgment granted by this court on 29 November 2001.

In brief, what happened was this. On 5 October, 2001 Mrs Stella Katsambe who is now the respondent issued summons claiming payment of the sum of three million dollars ($3 000 000,00) being loss of support damages arising out of the death of her husband negligently caused by defendant's employee in the course and scope of his employment with the defendant which amount plaintiff and her four minor children born out of her marriage to her late husband, expected to benefit from his income. The defendant was alleged to have refused or neglected to pay the said amount despite demand.

She also claimed interest a tempore morae calculated from the date of demand which was 23 July 2001 to the date of final payment.

Summons was served on the defendant, which is now the applicant, on 10 October, 2001. No appearance to defend was entered resulting in the plaintiff

enrolling the matter as an unopposed court application and was granted a judgment on

29 November, 2001. The following day she obtained a writ of execution. Three days

later i.e. 4 December a notice of execution and attachment was given to the defendant

by the Deputy Sheriff who then attached two of the defendant's vehicles. At the very

least the defendant company should have applied for rescission by 4 January 2002.

But Western Transport (Pvt) Ltd which was the defendant in that matter filed

this application on 18 January 2002. The explanation for failure to apply for

rescission of judgment within a month and for not entering appearance to defend was

as follows.

The explanation appears in the affidavit of Mr Tommy Ndlovu who is the

manager of the Claims Department at the applicant company. His duty inter alia is to

liaise on regular basis with the applicant's insurance brokers in relation to third party

claims when such claims arise.

During the first week of August, 2001 he received a letter of demand dated 23

July 2001 from the 1st respondent's lawyers. The letter of demand related to an

accident which had occurred in October 1999. Ndlovu held discussions with other

managerial members of staff regarding the letter of demand. A view was held that the

driver of the company had been cleared of any wrong doing. It was then suggested

that Ndlovu should check with the police to establish whether or not that was the

position.

He then went to the Bulawayo Traffic Police where at first he was advised that

indeed the docket relating to the matter had been closed since the matter had been

treated as a sudden death. It was only after he had produced the letter of demand to

the police that he was told that the matter had been re-opened and the applicant's

driver would face a charge of culpable homicide. He then requested for a police

report but was advised to return on a latter date to collect the report.

At that stage the brokers of the applicant were Sedgwick Insurance Brokers

(Private) Limited. Ndlovu obtained a standard form letter from Sedgwick addressed

to the police requesting for a police report. He presented the letter to the police on 31

August 2001. The police completed the form and stamped it.

That police report introduced considerable confusion into the matter. To a

small extent confusion was introduced by stating in the report that the applicant's

insurance company was NICOZ. It turned out that NICOZ was not the insurer of the

vehicle at the relevant time. It was however, established that the applicant's insurer at

the time of the accident in 1999 was Standard Fire and General Insurance Company

("SFG). Ndlovu only managed to establish this in early October 2001.

More and considerable delay was caused by the number of the vehicle given

by the police in their report. They gave the registration number of the vehicle as

491-367N. Great confusion set into the matter. A claim form had been submitted

through the applicant's new brokers - UDC Glenrand ("UDC") for onward

transmission to the insurer i.e. SFG. The registration number of the vehicle given in

the police report was wrong. It was given as 491-367N instead of 496-307W. As

would be expected the claim by the applicant was rejected due to the wrong

registration number of the vehicle. Ndlovu had to investigate the matter afresh by

finally going back to the police where he eventually establish that the police officer

who had compiled the report entered wrong information on it.

While these investigations were taking place summons was issued on 5

October 2001 and served on the applicant on 10 October 2001. Ndlovu forwarded the

summons to the applicant's insurers on the same day. A Mr Kim Ngwenya, who

works for UDC, confirmed in his supporting affidavit that it was the usual practice for

the insured to pass on such legal process to insurers as it was they who may eventually

be ultimately responsible for payment. It was the insurer who usually took steps to

protect their interests and those of the insured. They even engaged their own legal

practitioners when the need arose. However, in the particular case the insurer did not

take the necessary step to enter appearance to defend. The confusion regarding the

registration number of the vehicle still reigned. The second police report put letter

"N" at the end of the registration number of the vehicle instead of the letter "W".

This was only clarified on or about 21 November 2001.

Before the insurer and its insured could have the matter sorted out the

respondent applied for and was granted a default judgment on 29 November 2001

which culminated in the notice of execution on 4 December 2001. Ndlovu forwarded

the documents to his insurers on 5 December 2001. The insurer did engage the

services of its legal practitioners who eventually declined to act on behalf of the

applicant. The result was that the applicant had to engage its own legal practitioners

to remedy the situation.

The legal practitioners were engaged on 21 December 2001 at lunch time

when the law firm was due to close for its Christmas recess until 2 January 2002. The

legal practitioner concerned had instructed his secretary to leave the file prominently

on his desk for his attention on his return to office on 3 January 2002. However, the

secretary inadvertently placed the file in a filing cabinet instead of on the legal

practitioner's desk.

The legal practitioner did not return to work on 3 January 2002 because he was

sick. He only managed to be in the office the next day - 4 January 2002 a Friday. It

was only on the following Wednesday 9 January 2002 that it was discovered that the

file relating to the case had been filed through inadvertence. Thereafter the legal

practitioner began to prepare the papers pertaining to this application and also those

relating to the application for rescission. He then filed this application on 18 January

2002.

The respondent submitted that there was a flagrant breach of the Rules of

Court coupled with an unacceptable explanation for the period of delay. She went on

to conclude that at best the applicant's attitude could be described as casual. The

respondent's assertions are simply not true in the light of the above explanation. I

find that the above detailed explanation given on behalf of the applicant is quite

acceptable and is hereby accepted.

Turning to the prospects of success of the applicant's application for rescission

of judgment, it seems to me that the prospects are good according to the papers filed

of record. For instance the explanation given for the applicant's failure to enter

appearance to defend was that the practice was that the insurers on receipt of

summons would normally take steps of their own through their legal practitioners to

ensure that the proceedings were defended. In short the applicant genuinely believed

that its insurers were going to do that. To that extent, therefore, it cannot be said the

applicant had a flagrant disregard of the Rules of Court.

As far as the costs are concerned I hold the view that this is a proper case

where the applicant should bear the costs. The applicant is seeking an indulgence

which in my view the respondent was entitled to oppose. The applicant did not

engage in dialogue with the respondent after receiving (a) the letter of demand, and (b)

the summons. Hence when no appearance to defend was entered, the respondent went

ahead and obtained a default judgment. She cannot be said to have "snatched at a

judgment". In the result the applicant shall pay the costs of this application dispite its

success.

Having accepted the applicant's explanation for failure to act timeously and

having found that there are good prospects of success I would accordingly grant

condonation and issue an order in terms of the draft as amended.

Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners
Cheda & Partners, 1st respondent's legal practitioners