HH 65-2002
HC 5597/2001
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HC 9690/00A

V. SAITIS AND COMPANY (PRIVATE) LIMITED
vs
FENLAKE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHINHENGO J
HARARE 30 January and 24 April 2002

Opposed Application

T. Biti, for the applicant
K. Renzva, for the respondent

CHINHENGO J: This is an application for the rescission of a judgment entered against the applicant at the instance of the respondent. The judgment was entered in default after the applicant failed to oppose an application for summary judgment instituted by the respondent. The application is based on two assertions – that the applicant was not in wilful default of filing a notice of opposition and opposing affidavit to the application for summary judgment and that it has, on the merits, a strong defence to the respondent's claim. As such the applicant prays for the setting aside of the judgment, for leave to defend the respondent's claim and consequently for an order that it should file its notice of opposition and opposing affidavit within ten days from the date of the order which this Court may make in its favour. It also prays for the costs of this application.

The applicant's counsel, Mr *Biti,* has raised a general point of law which I must address at this stage. That point is essentially concerned with the requirements for the setting aside of a judgment entered in default under rule 63 of the High Court Rules. He pointed out that our courts have been ambivalent in their approach to the question of rescission of judgment. He submitted that they have in certain cases adopted what he described as the traditional approach – one that requires the applicant to show that he was not in wilful default or requires him to give a

reasonable explanation for the default. He submitted that the courts have also adopted in other cases what he described as the liberal or modern approach – one where the applicant for rescission need only show that he has "good and sufficient cause" for such rescission.

Rule 63 of the High Court Rules provides as follows –

> "(1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make an 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."
> (**emphasis added**)

Subrule (2) above is clear that a judgment entered in default may be set aside by the court on a showing of good and sufficient cause by the applicant. How then have our courts approached the issue of good and sufficient cause?

In *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S) the approach to rescission of judgment was stated by McNALLY JA at 211E – F as follows:

> "While the courts are inclined to frown upon plaintiffs who "snatch at their judgments" the impression must not be gained that the Rules may be flouted with impunity and that as long as you are only a day or two late rescission will be granted on request. A reason for the delay must be given and it must be an acceptable reason. A defendant who admits that he was negligent in his tardiness may nonetheless be found to merit rescission if he shows *bona fides*. But one who puts forward a "reason" which is an insult to the intelligence of the court may have more difficulty in satisfying the court of his good faith."
> (**emphasis added**)

The learned JUDGE OF APPEAL went on at p 213A – B to say:

> "One is naturally reluctant to reach a decision which would result in the giving of judgment against a person without his being heard, when he protests that he has a valid defence. If I were convinced that the defendant in this case was *bona fide* and had a *prima facie* defence, then I might be unjustified in condemning him for so short a delay, despite the inadequacy of his

> explanation. I turn therefore to consider his defence, and I bear in mind Mr *Carter's* reference to the decision of BEADLE CJ in *Stevenson v Broadley N.O.* 1972 (2) RLR 467 where the learned CHIEF JUSTICE said that in view of the delay of only four or five days "I would not consider that the application should be refused unless I thought the applicant's case was hopeless."
> (**emphasis added**)

It may seem, on a cursory reading of the above passages, that McNALLY JA was laying down a different test for the rescission of a judgment. It may seem that he was laying down (1) that the applicant for rescission must show that he was not in wilful default or that he had an acceptable explanation for his default and (2) that he was *bona fide* and had a *prima facie* defence. The learned judge, however, referred in his judgment at 211C – D to rule 63 of the High Court Rules and adverted to the meaning of "good and sufficient cause" in that rule. He referred to the interpretation given to that clause in *Barclays Bank of Zimbabwe Limited v CC International (Pvt) Ltd & Anor* S-16-86; *Muller v Braes* S-51-86 and *Roland & Anor v McDonnell* 1986 (2) ZLR 216 (S). He was therefore quite alive to the overall requirement of rule 63 that an applicant for rescission must show "good and sufficient cause".

A judgment of a court must be read as a whole:

> "A statement in a judgment of a court of law should not be construed as if it were a provision in a statute. A judgment has to be construed as a whole, and in the light of the facts of the particular case and the issues which were to be determined by the court."

(*Barker McCormac (Pvt) Ltd v Government of Kenya* 1985 (1) ZLR 18 (H) at 23G). Thus when McNALLY JA in the *Songore* case (*supra)* examined the issues of wilful default, *bona fides* and a *prima facie* defence, he was not in fact laying down different considerations for the setting aside of a judgment given in default. He was in fact giving content to the phrase "good and sufficient cause" and, as it were, laying down those factors which may assist the court in arriving at whether "good and sufficient cause" has been shown to exist. At 216A in the *Songore* case *(supra)* the learned judge also said:

> "In my view, the court *a quo* properly concluded that the defendant had failed to show good and sufficient cause. I would dismiss the appeal with costs."

This statement was a confirmation that, whilst the learned judge had examined factors which constitute "good and sufficient cause", he was in fact not laying down any different test for the setting aside of a judgment by default. He was, on the contrary, merely examining the building blocks of "good and sufficient cause".

In *Zimbabwe Banking Corp v Masendeke* 1995 (2) ZLR 400 (S) the judge in the court *a quo* had, in an application for the rescission of a judgment, ruled that there had been a wilful default; that no explanation had been offered for that default and that therefore the application for rescission was to be refused regardless of whether there was any defence on the merits. The Supreme Court (per McNALLY JA) found that the judge in the court *a quo* had erred both as to the concept of wilful default and as to the fact that no explanation had been proffered. The court did not directly advert to the requirement of good and sufficient cause as provided in rule 63 and it did not have to do so. It however quoted with approval *Songore's* case (*supra*). It found that the ingredients of "good and sufficient cause" existed, i.e. an acceptable explanation for the default, *bona fides* and a *prima facie* defence. Thus, although the court did not say so in so many words, the reference to *Songore's* case and other authorities and the very fact that the court was seized with an appeal in a case where rescission of judgment was sought, would indicate that what in fact it held was that good and sufficient cause for rescission had been established to its satisfaction.

Mr *Biti* referred to these two cases, *Songore* and *Masendeke* (*supra*), as exemplifying the traditional approach which, in his view, was not only inconsistent with rule 63, but was an approach that was developed from a failure to distinguish between rule 63 of the High Court Rules and Order 30, rules 1 and 2 of the Magistrates Court (Civil) Rules, 1980 (S.I. 290/80). He submitted that, in terms of the Magistrates Court (Civil) Rules, if wilful default was established then, without further ado, rescission would be refused. He referred in this regard to the decisions in *Neuman (Pvt) Ltd v Marks* 1960 R & N 166 (SR); *Gundani v Kanyemba* 1988 (1) ZLR 226 (S) and *Karimazondo v Standard Chartered Bank Zimbabwe* 1995 (2) ZLR 404 (S).

Order 30 of the Magistrates Court (Civil) Rules provides as follows in rules 1 and 2 –

> "1.(1) Any party against whom a default judgment is given may, not later than one month after he has knowledge thereof, apply to the court to rescind or vary such judgment.
>
> (2) An application in terms of subrule (1) shall be on affidavit stating shortly –
>
> (a) the reasons why the applicant did not appear or file his plea; and
>
> (b) the grounds of defence to the action or proceedings in which the judgment was given or of objection to the judgment.
>
> 2.(1) The court may on the hearing of any application in terms of rule 1, unless it is proved that the applicant was in wilful default –
>
> (a) rescind or vary the judgment in question; and
>
> (b) give such directions and extensions of time as necessary for the further conduct of the action or application."

The corresponding provisions in the rules in force prior to 1980 were set out in Order XXIX of those rules and in *Neuman (Pvt) Ltd v Marks* 1960 R & N 166 at 168 MURRAY CJ said –

> "Order XXIX provides for the rescission of default judgment and rule 2 of that Order states that on the hearing of an application to rescind or vary a default judgment the Court may, unless it is proved that the applicant was in wilful default, review and rescind or vary the judgment, and give necessary directions regarding the future conduct of the litigation. The rule, unlike the corresponding Union rule, does not require good cause to be shown. It is indisputable that though the Court has a discretion to rescind in the absence of proof of wilful default (a discretion which the authorities indicate should generally be exercised in the applicant's favour) there is no such discretion, and rescission cannot be directed, if the applicant's default is proved by the respondent to have been wilful. The principal question is therefore whether such proof is present here."

Similar views were expressed in *Gundani*'s case, *supra,* where the Court was also dealing with an appeal against the dismissal of an application in terms of Order 30 for the rescission of a default judgment. At p 228F – G GUBBAY JA said –

> "As I understand the argument of Mr *Rajah,* who appeared for the appellant, it was conceded that if the court *a quo* was correct in finding that the default was wilful this appeal cannot succeed. That concession must undoubtedly be regarded as proper, for the refusal to grant the requisite indulgence in such a

> situation is based on the sound premise that public policy dictates that as far as possible there should be finality in litigation."

In the *Gundani* case *(supra),* the court indeed accepted that if there was wilful default then in terms of rule 1(1) of Order 30 of the Magistrates Court (Civil) Rules a rescission could be refused without further ado. Order 30 rule 1(2) of the Magistrates Court (Civil) Rules requires the applicant to establish two things if he is to succeed in an application for rescission – the reason for default and the grounds of defence or of objection to the judgment. Rule 2(1)(a) of that Order states that, on the hearing of any application for rescission the court may rescind the judgment unless it is proved that the applicant was in wilful default. I do not however read Order 30 of the Magistrates Court (Civil) Rules as laying down that once an applicant for rescission has established that he was not in wilful default then rescission will automatically be granted. Not at all. The applicant must still show that there is good and sufficient cause for rescission. The applicant is required by rule 1(2)(b), as I have shown, to state shortly the grounds of his defence or of objection to the judgment. This is an allusion to "good and sufficient cause". Why else would an applicant, besides giving his explanation for the default, be required to state his grounds of defence or objection? I do not read *Gundani*'s case (*supra*) as rejecting the proposition that in the magistrates court, a party who has shown that he is not in wilful default may on that basis alone obtain rescission even if he cannot show that he has a valid ground of defence or objection to the judgment, i.e. if he cannot overall establish good and sufficient cause for rescission.

It is therefore axiomatic that where the applicant for rescission of a default judgment given in the magistrates court establishes that there was no wilful default on his part, then the court may, not shall, rescind or vary the judgment in question. Subrule (2)(b) of rule 1 of Order 30 requires that the application for rescission must state the grounds of defence to the action or proceedings. Clearly, that means that the court must have regard to the grounds so stated in determining whether or not to rescind the default judgment. To my mind, that requires the court to decide whether

or not there is "good and sufficient cause" to do so. Therefore, the applicant must establish that he is *bona fide* and has a *prima facie* defence.

Another case cited by Mr *Biti* in support of his submission that in the magistrates court the showing of wilful default alone is sufficient to defeat an application for rescission of judgment is the *Karimazondo* case (*supra*). This submission is correct because the court was dealing with an appeal from a judgment in the magistrates court. But again, I do not read that decision as laying down any proposition that if the applicant has shown that he was not in wilful default then he obtains a rescission automatically. In that judgment, at 408D and 412B, very clear reference is made to the requirement that "good and sufficient cause" is the general test in rescission applications. McNALLY JA at 408D adopted this view when he said:

> "Even if the default were, despite the absence of any claim in that regard, to be seen as the default only of the attorney and not of the appellants, then still no good cause has been shown for the rescission of judgment."

The requirements of *bona fides* and a *prima facie* case, together with that of wilful default, are but just factors which go to show that the establishment of "good and sufficient cause" is the real test in these matters. Statements such as "Wilful default disqualifies an applicant from obtaining rescission of judgment" appearing at 407E of *Karimazondo's* case (*supra*) must not be construed out of context. To correctly appreciate their meaning, the judgment must be read as a whole, having regard to the facts of the case and the issues which were to be determined by the Court (*Barker McCormac supra*).

I do not therefore agree with Mr *Biti* that the test in the Magistrates Court for rescission of judgment has been "superimposed" on High Court applications under rule 63, resulting in what he referred to as the "strict test" that ,"if the explanation for default is not acceptable then one does not embark on the second inquiry and the application is dismissed". *Shinga Express (Pvt) Ltd v Hubert Davies (Pvt) Ltd* 1989 (2) ZLR 45 (H) was cited by Mr *Biti* in support of his submission that what he called the

"strict test" was superimposed on High Court applications for rescission. I do not agree. The *Shinga Express* case (*supra)* was concerned with rescission of a default judgment in terms of the common law. BLACKIE J, the judge concerned in that case, referred to *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) where the requirement of a reasonable and acceptable explanation for the default and the *bona fides* of the defence which *prima facie* carries some prospect of success were, correctly in my view, referred to as "two essential elements of sufficient cause" for rescission of a judgment entered in default. BLACKIE J went on to consider whether "sufficient cause" had been shown. It seems to me that for the proposition he made Mr *Biti* must have relied on the following statement by BLACKIE J in the *Shinga Express* case *(supra)* at 51D – E:

> "In the light of that finding it is unnecessary to make any findings or to consider any arguments relating to the applicant's prospects of success. The applicant must establish both a reasonable explanation and a *bona fide* defence. If one of the two requirements are not met, the applicant has not shown "sufficient cause". *Chetty's* case *supra* at 765A – F and 767J – 768C."

To my mind BLACKIE J was not saying that the test for "good and sufficient cause" or "sufficient cause" was "wilful default" alone. He was in fact simply stating that if one fails to establish the existence of an essential element of "sufficient cause" then he is unlikely, and does usually fail, to establish "sufficient cause".

The conclusion I have come to is that the test for rescission of judgment whether in the High Court (under rule 63) or the Magistrates Court (under Order 30) (unless it is a refusal of rescission because wilful default exists) is but one: the applicant has to establish good and sufficient cause or, simply put, sufficient cause for the relief he seeks. That this is so, and has always been so, is evident from McNALLY JA's words in *Deweras Farm (Pvt) Ltd & Ors v Zimbabwe Banking Corporation* 1998 (1) ZLR 368 (S) where at 369G he said:

> "While it may generally be true to say that when there is wilful default there will usually not be good and sufficient cause, I believe we restrict ourselves improperly if we lay down a fixed rule that where there is wilful default there is no room for good and sufficient cause."

I would, at this stage, point out that the provisions of rule 63 are very widely cast in so far as the classes of default judgment that are covered. It provides that an application under that rule may be made by any party against whom judgment has been given in default, "whether under these rules or under any other law". Section 3(3) of the Interpretation Act [*Chapter 1:01*] provides that in every enactment the use of the word "law" means "any enactment and the common law of Zimbabwe. Therefore, if judgment is granted in default under the common law or under any enactment other than the Magistrates Court Act [*Chapter 7:10*], then an application for rescission thereof must be made in terms of rule 63. My reason for excluding default judgments granted under the Magistrates Court Act or rules made thereunder from the ambit of rule 63 is because of s 2(1)(a) of the Interpretation Act. That provides that the provisions of the Interpretation Act extend and apply to every enactment, except in so far as such provisions are inconsistent with the intention or object of such enactment. As the Magistrates Court (Civil) Rules provide in Order 30 for applications for rescission of a judgment granted in default by a magistrates court, clearly it would be inconsistent to apply the provisions of rule 63 to the same class of default judgments.

I therefore do not, with respect, agree entirely with GILLESPIE J's conclusion in *Deweras Farm (Pvt) Ltd v Zimbabwe Banking Corp* 1997 (2) ZLR 47 (H) which he reached after analysing several cases. GILLESPIE J said that some of those cases contain "apparently clear statements that wilful default necessarily involves a refusal of rescission". He himself said that *du Preez v Hughes N.O.* 1957 R & N 706 (SR), *Arab v Arab* 1976 (2) RLR 166 (A); *Mvaami (Pvt) Ltd v Standard Finance Ltd* 1976 (2) RLR 257 (G); *G.D.Haulage (Pvt) Ltd v Mumurgwi Bus Services (Pvt) Ltd* 1979 RLR 447 (A); *Munhira v Phiri* S-52-84 and *Gollub v Trotter* HB 95-82 did not, in substance, lay down any such proposition. If he was correct that the other cases which he referred to did lay down that proposition, I would venture to say that those cases, unless they were concerned with Order 30 of the Magistrates Court (Civil) Rules, were wrongly decided in so far as the situation under the High Court Rules is concerned, because

they would not be in accord with the many cases I have referred to. I am of the view that the test for rescission has always been that the applicant must establish good and sufficient cause. Those cases where it may have been suggested that wilful default alone was sufficient to refuse rescission were not against the established test. They were really a finding that because "wilful default" is an essential element for rescission, a failure to establish it meant, on the facts in issue, that it was not possible to establish good and sufficient cause anyway. I have also said that in my view, even the Magistrates Court (Civil) Rules require that "good and sufficient cause" should be established for rescission to be granted, although for it to be refused the existence of wilful default will suffice. There is therefore no traditional or modern approach to speak about as set out by Mr *Biti* in his heads of argument. The test has always been, and remains, that of establishing good and sufficient cause if an applicant is to be granted a rescission of a judgment entered against him in default. And that is the test which I will apply in this case. And I do not agree, as submitted by Mr *Biti,* that "the modern approach lays more emphasis on the defence than on the explanation for default". That is not my understanding of *Deweras* case *supra* (per McNALLY JA). Each element of the test of good and sufficient cause may be decisive on its own in any particular case but that does not mean that it becomes the only element or that the court has lost regard of the other elements of establishing good and sufficient cause.

The facts of the present case are as follows. A summons and later, in fact much later, a declaration was issued and served by the respondent on the applicant. In that suit the respondent claimed the payment of arrear rentals and service charges amounting to $755 237 in respect of the applicant's occupation on lease of certain premises known as Shop No. G1A, Stand 1829 Travel Plaza, Mazowe Street, Harare. The rental charges included an amount which the respondent had levied for the positioning of a container by the applicant on the said premises. The respondent also claimed for the applicant's eviction from the premises and for interest at the rate of 30% per annum which had accrued on the arrears as well as for the costs of suit.

The applicant entered an appearance to defend and, on three occasions, requested for further particulars and for further and better particulars. The summons had been issued on 7 September 2000 and the declaration was filed on 2 March 2001 after the three requests for particulars had been made. After it filed its declaration the respondent applied for summary judgment. GOWORA J granted the following order in default –

> "1. That summary judgment be and is hereby entered against the Respondent company in the sum of $755 237,00 together with interest thereon at the rate of 30% *per annum* from the 31st day of July, 2000, up to date of full payment.
>
> 2. That the Respondent and all persons claiming occupation through it shall vacate the premises known as Shop No. G1A on stand 1819A Travel Plaza, 29 Mazowe Street, Harare, failing which the Deputy Sheriff is hereby authorised to within seven (7) days of service of this order take all the necessary steps to remove them from the premises.
>
> 3. That the respondent company pays costs of suit."

Whilst the pleadings were being filed in this matter the parties entered into some discussions and written communication between themselves and without involving their legal practitioners. The discussions resulted in the applicant paying off most of the money claimed by the respondent except for a sum in respect of the monthly charges for the container positioned at the respondent's premises which it was agreed was to be further negotiated upon between the parties. When summary judgment was granted against the applicant because it did not oppose the application (and this is not in dispute), the respondent's monetary claim had been settled in that no moneys were due to the respondent at that stage. But summary judgment was granted in respect of the whole claim made by the respondent in its summons and declaration, that is to say, judgment in default was entered for the payment by the applicant of $755 237 plus interest at 30% per annum from 31 July 2000 to the date of payment and costs of suit and for the applicant's eviction from the premises.

The two elements of an application for rescission of judgment – wilful default and the existence of *bona fide* defence which has some prospect of success – are relied upon by the applicant in this application – to show that there is a "good and sufficient cause" to rescind the judgment. I will deal with each element separately.

1. Wilful default

The applicant averred that before the summary judgment application was made, it entered into discussions with the respondent's director, Barry Deacon. The applicant said that it did not believe that the respondent had any legal basis to take it to court. On 8 March 2001 the applicant sent a letter to the respondent in which it pointed out that the service charges were arbitrarily levied and that the charges in respect of the container had not been agreed upon. Significantly, in that letter the applicant conceded that "services have fallen into arrears during our period of conflict and will be paid at the rate of $50 000 per month with effect from March 2001 in addition to the monthly service charges raised by your office of +/-$23 000".

In respect of the container charges, the applicant complained that the charges at $20 000 were too high and arbitrary. It offered to pay $10 000 per month for the positioning of the container with effect from January 2001 and not retrospectively from the date of positioning the container or the date indicated in the respondent's letter of 1 November 2000. The offer in respect of the container charges was made on a without prejudice basis.

The applicant averred that, as a result of the discussions which it believed had resolved all the issues in dispute, it instructed its legal practitioners not to pursue its defence of the application for summary judgment. It averred that Barry Deacon had assured it that there was no need for the matter to proceed to court as all the issues had been settled except for the container charges which were to be negotiated between the parties. The applicant said that it insisted that Barry Deacon should confirm the results of the negotiation in writing. This, it said, resulted in a letter by the respondent dated 17 April 2001. The applicant said that by 1 April 2001 the

charges for the container had been reduced to $10 000. It said that it believed that the matter had been finalised and that it was no longer necessary to pursue the summary judgment application because, by its letter of 17 April, the respondent had acknowledged that all the arrears had been cleared and that therefore the rentals were up to date.

The applicant said that the summary judgment application was nonetheless proceeded with by the respondent who then obtained judgment on 9 May 2001. The applicant's position is that, because it believed that the matter had been settled, it cannot therefore be held to have wilfully defaulted in opposing the application for summary judgment.

The respondent averred that the discussions between the parties commenced just before the summary judgment application was lodged and that the subject matter of those discussions was how the applicant was to liquidate its indebtedness to the respondent. It averred that on 2, 12, 15 and 17 April 2001 the applicant paid various sums which cleared the arrears, except the arrears/amounts with respect to the container, which were to be the subject of separate negotiations. The several payments came to $600 000. The respondent sent a letter to the applicant on 17 April 2001 in which it stated:

> "This letter serves to advise you that following receipt today of $200 000 in payment for outstanding Rentals and Operating Costs due on Shop G1A, these arrears are now settled to date. The ZESA bill as you are aware is due upon receipt of our monthly statement. Charges for the storage container are still outstanding and a settlement for this must be reached by Monday 23 April 2001."

The respondent said that this letter was not in response to the applicant's letter of 8 March but a response to the several payments which were effected by the applicant and which had settled the arrears. It was to confirm the settlement of rental and service charges and to record that negotiations were to continue on container charges because the applicant had said they were too high. The respondent denied that it, or its Barry Deacon, gave the applicant any assurance other than that it

would not pursue its monetary claim. It averred that the issue of interest and costs and eviction were not discussed at all and, as far as the respondent was concerned, they remained live for pursuit in the litigation. In the respondent's view, the applicant was mistaken to instruct its legal practitioners not to defend the application for summary judgment because that application involved other matters which had not been discussed or agreed upon by the parties.

The respondent averred that the applicant was wrong that the respondent had no legal basis for its claims in the summons and declaration or for that matter in the application for summary judgment. It averred that the applicant had been in arrears until he paid the sum of $600 000 in April 2001 and that it had remained liable to the respondent for costs, interest and for eviction after that payment. The respondent said that it had resolved to exercise its rights in terms of clause 24(1) of the lease agreement which provided –

> "That in the event that the Lessee fails to pay the rent or any other sum of money due by it to the lessor on due date then without derogating from any other rights or remedies which the Lessor may have either in terms hereof or at common law, the Lessor may at its option cancel this agreement without further notice to the Lessee and evict the Lessee from the leased premises forthwith."

It said that the claim for eviction did not fall away merely because the applicant had paid the arrears claimed in the summons and declaration. The respondent admitted that the applicant was not in wilful default on its monetary claim and the claim for the container charges as at the date of the judgment. The former had been satisfied by payment and the latter were still to be negotiated. It however contended that the applicant was in wilful default in respect of the claim for eviction, costs and interests because no discussion or assurances had been given in respect of them. "Wilful default" has been interpreted in several cases, among them *Songore, Shinga Express, Masendeke, Mvaami* and *du Preez* (all cited above). In *Masendeke*'s case McNALLY JA said:

> "Wilful default occurs where a party, with the full knowledge of the service or set down of the matter, and of the risks attendant upon default, freely takes

> the decision to refrain from appearing: *Neuman (Pvt) Ltd v Marks* 1960 R & N 166 (SR) at 169; 1960 (2) SA 170 (SR) at 173; *Simbi v Simbi* S-164-90 at p 6; *Mdokwani v Shoniwa* 1992 (1) ZLR 269 (S) at 271."

The same interpretation was quite aptly stated in *Maujean t/a Audio Video Agencies v Standard Bank of South Africa Ltd* 1994 (3) SA 801 at 803 (H) where KING J said:

> "More specifically in the context of a default judgment "wilful" connotes deliberateness in the sense that a knowledge of the action and its consequences, i.e. its legal consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation for this conduct might be. See in this connection *Kouligas & Spanoudis Properties (Pty) Ltd v Boland Bank Bpk* 1987 (2) SA 414 (D) at 417 and authorities there cited. In other words the additional element of perverseness or obstinacy is not required."

These authorities do not, in my view, include in the meaning of "wilful" a mistaken belief that the action may not require the applicant to defend the action. That belief must of course be genuine or *bona fide* and must be established as a matter of fact. So where a party, deliberately and with full knowledge of the legal consequences of the default, refrains from defending the action because he genuinely believes that such defence is not called for, as where he believes that the respondent's claim is either ill-founded in law or that he has discharged his obligation giving rise to the claim, his refraining from defending the action cannot be wilful within the meaning of the word "wilful" as given to it in the cases I have cited – see *Neuman supra* at 168G.

In this case it is quite clear that the respondent claimed payment of the arrears in respect of rent and service charges as well as the eviction of the respondent and interest and costs. The claim for eviction was predicated on the fact that the applicant was in arrears with respect to the rentals and the other charges. Clause 24(1) of the Lease Agreement which the respondent relied on for the eviction claim predicated such a claim, not on the fact that the applicant was in arrears in respect of the rental or other charges, but on the cancellation of the agreement of lease. In its

summons and declaration the respondent did not allege or aver that it had cancelled the lease agreement. It did not seek the cancellation of the lease agreement or confirmation that the lease agreement had been cancelled. That left the issue of eviction limply hanging onto, or dependent upon, the issue of the rentals and other charges being in arrears. The respondent pleaded its case in a faulty manner with the result that, once the bedrock of the claim for eviction was removed or fell away, that claim could not remain alive. It could not stand on its own. Its substratum – the claim for rentals (and not cancellation of the lease agreement) - had been removed. Thus when the applicant instructed its legal practitioners not to defend the summary judgment application, it not only believed that there was no longer any reason to do so, but it was also correct that the respondent no longer had a legal basis for seeking rescission of the judgment and in particular its eviction. Even if the applicant was mistaken in its belief, (which I find to be otherwise) it still could not be held to have been in wilful default because there was no legal basis for the respondent to proceed and obtain judgment either for the monetary claim or for eviction. To me the dispute of fact as to whether the discussions encompassed the issues of eviction, costs and interest would be irrelevant to my disposition of the matter, because even if those discussions had taken place and the respondent had not given any assurances relative thereto and the applicant could be adjudged to have been in wilful default, with the substratum of the claim for eviction having been removed, the applicant must obtain the relief which it seeks in this application. But for what it is worth, it must be mentioned that the claim for the unpaid rentals having been settled there was no basis for the respondent to seek judgment. Eviction was available only if the plaintiff pleaded cancellation of the lease agreement. The only reason why judgment was obtained, and this is admitted by the respondent, is that the respondent failed to communicate with its legal practitioners and advise them that no money was owing to it from the applicant. The evidence clearly establishes that the rentals for the shop for January 1999 and June and July 2000 had been paid by 14 July 2000, well before the summons was issued in September 2000. The evidence also shows that when the

application for summary judgment was granted on 9 May 2001, there was no money due by the applicant to the respondent. This was acknowledged by the respondent in its letter of 17 April 2001. The evidence also shows that the applicant was disputing the service/operating costs and the charges for the container. That was the reason that he refused to pay them. These charges (operating costs and charges of the container) were either not liquidated (as provided in clause 6 of the lease agreement for operating costs) or else no agreement had been reached in respect of the container charges. It was unlikely that the respondent would have succeeded in its claim as framed. It had no proper foundation for it.

2. Defence on the merits

This brings me to a consideration of the other main element of "good and sufficient cause" – a *bona fide* defence which *prima facie* carries some prospect of success. I have already dealt somewhat with the applicant's defence on the merits. The summons issued on 7 September claimed -

> "payment of a total sum of $755 237 being arrears for the month of January 1999 to the 31st July 2000 in respect of shop No. G1A which is leased by the Plaintiff to the Defendant which amount is now due and payable."

The cause of action was clearly one for arrear rentals for the period January 1999 to July 2000. The respondent's declaration which, as I have said, was only filed on 20 March 2001, some six months later, made the following claim:

"Payment of a total sum of	$755 237,00
made up as follows:	
Arrear rental for March 1999	$ 71 000,00
Arrear rentals for June & July at $85 000 a month	$170 000,00
Arrear charges for operating costs 1999 and 2000	$333 837,00
9 months arrear charges for the container at $20 000	$180 000,00
Total	$755 237,00"

The causes of action in the summons and the declaration are different, but in terms of R115 of the Rules of this Court a claim made in the summons may be altered, modified or extended by a declaration and such summons shall be deemed to have been amended by such declaration. In this case therefore, when the summary judgment application was heard the claim had been altered or modified by the declaration. Mr *Biti* raised the point that it is inappropriate to grant summary judgment in default where the summons and declaration are different in their definition of the cause of action. I will return to deal with this point when I address generally the question when it is inappropriate to grant an application for summary judgment in default.

The applicant averred that at the time that summary judgment was granted it had paid whatever amount was owing by it to the respondent. Of the several amounts claimed in the summons, the amounts in respect of the rentals for February and March 1999 had been paid (see Annexure "C" to opposing affidavit); the arrears for June and July 2000 had also been paid (see Annexure "D" to opposing affidavit); the operating costs for 1999 and 2000 were still outstanding but they were not sufficiently liquid to warrant the entering of judgment for a specific sum; the arrears in respect of the container were not agreed upon because the agreement for the monthly charge was only reached subsequently. I shall not be detained by having to make a finding as to whether or not the applicant had paid the amount claimed in the summons because the respondent admitted that the applicant had paid all the amounts due: In paragraphs 9 and 10 of the opposing affidavit the respondent stated:

> "9. Save to admit that the applicant was not in wilful default in respect of the claim for $755 237 since part of it had been paid and the other part was still the subject of negotiations, it is disputed that the applicant was not in wilful default in respect of the other claims. No discussion was entered into in respect of them and no assurance was made that they would not be pursued.
>
> 10. It is admitted that the sum of $755 237 was made up as stated. It is also admitted that the March rental was paid … It is admitted that at the

> time the Declaration was filed, the June and July rental had been paid on 14 July 2001 as indicated by the applicant. However this fact was regrettably not brought to the attention of our Legal Practitioners to enable them to abandon the claim for that amount and to pursue the claim for service charges, the container and eviction only."

In paragraph 14 of the opposing affidavit the applicant makes the concession that the judgment entered in default should be varied by omitting the amount in respect of the container "since same was settled and negotiated before the date of judgment only that respondent's legal practitioners were not made aware of the settlement". It proceeded to state in the same paragraph that –

> "… the order of interest, eviction and costs should remain intact as they were all properly sought and properly obtained. The applicant was in breach of clause 3.2 and clause 6 of the Lease Agreement by failing times without number to pay rentals in advance on or before the first day of each month and by failing to pay its share of the operating costs as agreed. Respondent was rightly entitled to evict the applicant in terms of clause 24:1 of the Agreement."

The respondent has conceded that the court should rescind the judgment in respect of the entire monetary claim in the sum of $755 237 but not in respect of the claim for interest, costs and eviction. The justification it puts forward for such a proposition is that the applicant was entitled to bring the dispute to court because of the applicant's refusal to pay the operating costs and because the sums in respect of rent and the container attracted interest charges for as long as they remained unpaid. So even if the applicant had paid the arrear rentals and the operating costs by the time judgment was entered, and even if it is admitted that a compromise was reached in respect of the container charges, the applicant remained liable to pay the costs and interest. The applicant's argument against the respondent's contention in respect of the operating costs was that those costs were not sufficiently liquid to found the claim. I am satisfied that the operating costs were not liquid enough to justify their payment. The respondent claimed payment from the applicant on the basis of estimated expenditure for the years 1999 and 2000. No actuals were submitted to the applicant. In terms of clause 6.2 of the lease agreement, the applicant was required to

pay monthly a share of the operating costs being 7.85% of the overall operating costs for each month. These costs covered the costs of cleaning, maintenance, external maintenance, rates and taxes, common area, electricity and lighting, ablution upkeep, water supply, staff costs and security and other costs relating to the communal area. It seems to me that in terms of this clause the applicant was entitled to receive from the respondent a bill reflecting his share of the operating costs. That kind of bill, it was admitted by the respondent, was not furnished until the applicant formally requested for it by the letter of 8 Mach 2001. I am satisfied that for purposes of an application for rescission of judgment the applicant's defence in respect of the operating costs has a reasonable prospect of success. The same goes for his defence in respect of the respondent's claim for the container charges – some agreement as to the appropriate charge (from $20 000 to $10 000 per month) was only reached after further negotiations. The amounts relating to these claims must therefore fall away at this stage because they are dependent on a finding that the claims for operating costs and for the container were properly made.

What remains is the issue of eviction and any costs associated with it. It not in dispute that the respondent did not seek for the cancellation of the lease agreement. The summons and the declaration do not make such a claim. I have already stated that the claim for eviction was predicated on the failure to pay the various sums making up the claim for $755 237. The claim for eviction was not predicated on cancellation of the lease agreement. I have already said that once the foundation of the claim for eviction fell away, then it was not correct for the respondent to proceed to obtain judgment against the applicant, whether for the monetary claim or for eviction, interest and costs. It must be apparent that the respondent's case was badly pleaded from the outset. A lessor who seeks eviction must allege a breach of the contract and that the contract was cancelled. In *casu* the breach alleged is non-payment of certain amounts for rental and other charges. But those amounts were paid before judgment was obtained. The claim for eviction was not based, as required by clause 24:1 of the lease agreement, on cancellation of the lease

agreement. A lessor must allege and prove his right to cancellation – see *Goldberg v Buytendag Broerdery Beleggings (Edms) Bpk* 1980 (4) SA 775 (A) and *Ver Elst v Sabena Belgian Airlines* 1983 (3) SA 637 (A). He must allege and prove cancellation – see *Britz v Coetzee* 1967 (3) SA 570 (T) and *Swart v Vosloo* 1965 (1) SA 100 (A). Without having cancelled the lease agreement as required by clause 24:1 thereof, I do not see how the respondent would be entitled to an eviction order. Clause 24:1 of the lease agreement excludes any implication that if the rental is in arrears, then the respondent automatically becomes entitled to evict the applicant. The said clause 24:1 requires a cancellation of the lease agreement as a prerequisite for eviction. In my view the applicant seems to have a defence to the plaintiff's claim which is *prima facie* valid and which has a good prospect of success at the trial.

Having considered the main elements of good and sufficient cause, as I have done, I have no doubt at all that the relief sought by the applicant should be granted. It has established to my satisfaction that it has good and sufficient cause for rescission.

Before concluding this judgment, I think it is necessary to address the point raised by Mr *Biti* that summary judgment should not have been granted in default. I think that a judge before whom such an application is brought must analyse very closely the pleadings filed of record. In this case it was clear that the claim for the operating costs and for the container charges were not sufficiently liquid. The summons and the declaration, as well as the further particulars sought, should have alerted the court to the deficiencies in the respondent's application for summary judgment. The lease agreement was attached to the application and clause 6 thereof should have alerted the court to the need to ascertain whether or not the claim for operating costs was liquid enough to entitle the respondent to judgment. Clause 24:1 of the lease agreement should also have alerted the court to the need to ascertain whether cancellation had been alleged and proved, which it had not. I think that even where an application for summary judgment is unopposed, the court must scrutinise the pleadings to satisfy itself that such a judgment is warranted because Order 10

Rule 64(2) of the Rules of this court requires the applicant for summary judgment to swear positively to the facts set out in his founding affidavit and to verify the cause of action and the amount claimed. Although, in terms of rule 234, a respondent who fails to file a notice of opposition and an opposing affidavit shall be barred, which means that the matter becomes unopposed, I think that in an application for summary judgment which is not defended, the court has greater latitude to refuse judgment where the founding affidavit does not accord with rule 64 of the Rules of this court. In my view, summary judgment must be refused, even when the application is not opposed, where the applicant does not verify the cause of action or the amount claimed. Any statement by the applicant that he verifies the cause of action and the amount claimed should not be accepted at face value. It should accord with the pleadings filed of record. Returning to Mr *Biti*'s point about the summons and the declaration being different in their identification of the cause of action as a basis for refusing summary judgment in an undefended case, I think that that on its own is not correct. As I have already said, rule 115 cures any defects that may exist in the summons by providing that a declaration filed later shall be deemed to have amended the summons. As such, therefore, there would be no merit in the argument by Mr *Biti*. I think that in this case summary judgment should not have been granted even though the application was not opposed.

In an application for rescission, the normal rule that costs follow the event does not apply. The applicant, by his conduct, has put himself in a position where he has to seek the indulgence of the court. Therefore it is only right that he should bear the costs of the application. The fact that the respondent has opposed the application and his opposition has not been successful, does not automatically mean that he should pay the applicant's costs. Where the court has to establish whether there is good and sufficient cause to justify the grant of the application, it is not unreasonable for the respondent to put forward its side of the case. In the *Masendeke* case, *supra,* the judge in the court *a quo* had refused an application for rescission. The Supreme Court decided that he had been wrong to do so and set aside his order and

substituted an order setting aside the default judgment and ordering that the applicant pay Masendeke's costs on an opposed basis. At 403C McNALLY JA said –

> "We were in no doubt that the appeal should succeed with costs, but we were in more difficulty about the costs of the application for rescission. We may have been over generous in allowing Mr Masendeke his costs. On the other hand, it is difficult to say that he should not have opposed the application when in the event the learned judge found his opposition to be not only reasonable but compelling."

In this case, I feel that having regard to its conduct, the respondent should not have opposed the application. Therefore I am satisfied that the applicant should be awarded its costs on an opposed basis. Had I not so found, then I would have either made no order as to costs or else ordered that the applicant pay the costs.

In the result I make the following order.

1. That the judgment entered against the applicant on 9 May 2001 in Case No. HC 9690/2000A be and is hereby set aside.

2. That the applicant be and is hereby granted leave to defend the respondent's claim in Case No. HC 9690/200A and shall file its Notice of Opposition and Opposing Affidavit within 10 days from the date of this order.

3. That the respondent shall pay the costs of this application

Messrs Wilmot & Bennett, applicant's legal practitioners.

Tizirai-Chapwanya & Mabukwa, respondent's legal practitioners.