EXPOSALES (PVT) LTD
versus
POLY PACKAGING (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 13 May 2013

F.G. Gijima, for the applicant
J. Koto, for the respondent

CIVIL APPLICATION

TAKUVA J: This is an application for rescission of a default judgment issued on 28 April 2011. The back ground is that respondent issued summons on 30 November 2010 in Case No. HC 8728/10 against applicant claiming the sum of $6 369.35 together with interest at the prescribed rate from July 2010 to date of payment in full.

Through its erstwhile Legal Practitioners, applicant entered appearance to defend the action. On 26 January 2011, applicant was served with a Notice to plead through its former legal practitioners *Messrs Bruce Mujeyi, Manokore Attorneys*. Applicant did not file a plea and respondent applied for default judgment which was granted. On 31 May 2011, respondent served a writ of execution on the applicant through the Deputy Sheriff.

Applicant instructed his legal practitioners to apply for rescission of judgment entered in default. Applicant's former legal practitioners ignored this instruction resulting in applicant making an application for condonation for late noting of the application for rescission of judgment granted under Case No. HC 7722/11, judgment No. HH104-2012.

Meanwhile, the Deputy Sheriff attached a Toyota Dyna Truck which was later released after applicant offered its 90 Horse Power Dong Feng tractor in place of the truck. The tractor was sold but the proceeds did not satisfy the debt.

Applicant's application for condonation was granted hence this application. Applicant submitted that it has shown good and sufficient cause in that its application is reasonable and *bona fide*. Further it was argued that applicant's defence on the merits is *bona fide*.

In *Beitbridge Rural District Council* v *Russell Construction Company (Pvt) Ltd* 1998 (2) ZLR 190 (S) it was held that in granting rescission, the court normally considered (a) the applicant's explanation for his default, (b) the applicant's good faith; and (c) the bona fides of his defence on the merits as well as the prospects of success.

In respect of (a), the applicant's explanation is simply that its erstwhile legal practitioners did not act diligently in protecting its interests when they were served with the Notice of Intention to bar on 4 February 2011. Therefore, applicant urges this court not to punish it for the dilatoriness of its erstwhile legal practitioners. This explanation is contained in applicant's co-director one, Chirango's founding affidavit.

While it is true that the fault in *casu* is that of applicant's former legal practitioners who dismally failed to take reasonable and appropriate action to protect applicant's interests, the question is, does that assist the applicant. In *S* v *McNab* 1986 (2) ZLR 280 (S), DUMBUTSHENA CJ considered whether a party should be punished for the negligence of his legal practititioner and had this to say at 284 A-E.

"In my view clients should in such cases suffer for the negligence of their legal practitioners. I share the view expressed by STEYN CJ in *Saloojee & Anor NNO* v *Minister of Community Development Supra* at 141 C when he said:

> "There is a limit beyond which a litigant can not escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To held otherwise, might have a disastrous effect upon the observance of the rules of this court, considerations ad misericordiam should not be allowed to become an invitation to laxity. In fact, this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of this court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are…… 'I have dwelt at length on this point because it is my opinion that laxity on the party of the court in dealing with non-observance of the rules will encourage some legal practitioners to disregard the rules of court to the detriment of the good administration of justice."

It should be noted that in *casu*, the former legal practitioner declined to file a supporting affidavit explaining his failure to act diligently. The question becomes whether the applicant has gone beyond the limit referred to by STEYN CJ above. 'I say so because there are cases where a legal practitioner or litigant can give a reasonable explanation for his failure to act. In *casu*, the applicant's explanation has been confirmed by the former legal

practitioner's reaction when asked to supply a supporting affidavit. In my view even though the applicant's explanation for its failure to act is reasonable, the law is settled that it can not escape the consequences of the lack of diligence on the part of its former lawyers.

As regards applicant's good faith, my view is that it is not acting in bad faith. I say so for the simple reason that when applicant was made aware of what respondent referred to as an outstanding debt, it was honest enough to indicate that from its business dealings with respondent there was a real possibility that it owed respondent some money although the figures were not readily ascertainable. Therefore, the purpose of the application is not to delay proceedings.

The last requirement namely, the *bona fides* of the applicant's defence on the merits as well as its prospects of success can be assessed from the system used by the parties in calculating the debt. In para(s) 5.5 – 5.6 of applicant's founding affidavit it is stated;

> "5.5 the nature of the transactions between the parties was that the respondent would supply goods for resale in applicant's shop. The respondent would then invoice the applicant once the parties agree on the prices and those goods that are not agreed on would be returned to the respondent and those goods agreed would be paid immediately or even prior to invoicing. See examples at Annexure "J1 to J6."
>
> 5.6 The applicant is not aware of any outstanding invoices and certainly not any goods received notes. The respondent issued summons in Case No. HC 8728/11 claiming the amount on the basis of the goods received notes which applicant has no knowledge of. In the chamber application made by the respondent seeking default judgment the respondent annexed certain invoices marked pp 8 – 13 of the chamber application in support of the claim. All the invoices annexed according to the applicant's records, were paid in full in the normal course of doing business between the parties, as shown at Annexures "K1" to "K2". (my emphasis)

In dealing with this point, respondent submitted as follows;

> "(ix) It is pertinent to note that no serious attempt has been made by the applicant to dispute the figures shown but what it does is to attack the manner in which some annexures are presented. Applicant, however does not want to comment on Annexure "OE" which is a clear summary on one page of the number of metres supplied, value there of and amounts paid as well as shortfall……
> (x).....
> (xi) In short, after admitting that indeed parties had business transactions totalling US$ 21059-49, how much is applicant saying it paid? This should determine its prospects of success. (my emphasis).

From the above, it is quite evident that the dispute is on the extent of applicant's indebtedness if any. Respondent has compiled Annexure "OE" on page 47 of the record. This is a summary which is challenged by applicant. The basis of the challenge is that the invoices attached by the respondent to support its application which culminated in a default judgment had been fully paid. Respondent admits that the amount they are claiming has been arrived at through a process of reconciling delivery notes and goods received notes together with payment vouchers. See para 17 of the respondent's opposing affidavit wherein it is stated:

> "17 what would then happen is that after receiving goods, applicant would sell them. After selling, applicant would provide details of the sales to respondent who would then prepare a tax invoice as attached to applicant's application and respondent would receive such payment reflected on the invoice. I would want to emphasise that the invoices were guided only by the information of sales as provided by applicant, not goods delivered. Thus, there was no invoice in respect of goods not yet sold whose only evidence remained the delivery notes and or the goods received notes."(my emphasis)

In the same affidavit in para 25 it is stated;

> "25 If it is accepted that the payment vouchers were in respect of items that would have been sold by applicant by then, in the absence of any claim to the effect that applicant exhausted all consignment stock in its custody on the day of the last payment or returned items that had not yet been sold by then, then it is an un escapable (*sic*) conclusion that there are some items that remained in stock. It is in respect of those items that the respondent's claim was based."

It is quite evident from these para(s) that respondent's claim is based on a number of assumptions. For this reason, a one sided reconciliation or calculation of the debt arising from this rather complex system can not possibly reveal an accurate figure. Herein lies the *bona fides* of applicant's defence on the merits as well as the prospects of success.

In terms of Rule 63 (1) (2) of this court's rules, a court may set aside a judgment given in default where there is good and sufficient cause to do so. The rule states;

> "(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 subr (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."

For reasons set out in this judgment, I am satisfied that there is good and sufficient cause to set aside the default judgment. In the result, it is ordered that:-

1. Default judgment entered against the applicant in case No. HC 8728/10 be and is hereby rescinded.

2. Costs shall be in the cause

Gijima and Associates, applicant's legal practitioners
Koto and Company, defendant's legal practitioners.