RASTON CHINYAMUNYAMU
and
PTA PROPERTIES (PRIVATE) LIMITED
and
PROBITY MULTI AGENTS (PRIVATE) LIMITED
versus
CEN MICHAEL’S INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 11 March 2014 and 21 May 2014

Opposed matter

J. Dondo, for the applicants
K. Gama, for the respondents

NDEWERE J: The respondent, a former tenant, issued summons for the refund of money he paid to the former landlord as good will, deposit and damages for loss of profit on 14 December, 2012.

The applicants filed an appearance to defend on 21 December, 2012.

On 16 January, 2013, the respondent (as plaintiff in main matter), filed a notice of intention to bar. It was served on applicant’s legal practitioners on the same day. The plea should have been filed within 5 days from date of service, which was 16 January, 2013. No plea was filed.

On 24 January, 2013, the respondents proceeded to bar the applicants since no plea had been filed by then.

The applicants proceeded to file a plea and a counter claim on 25 January, 2013 after they had already been barred.

On 28 January, 2013, the respondents advised applicants that since they believed that the applicant had no *bona fide* defence, they would not consent to upliftment of the bar but instead, they would apply for default judgement.

The applicants replied on 30 January, 2013, reiterating that they had a good defence and that they would apply for rescission of any default judgement. The last sentence of their letter said;

"In the meanwhile, we are filing a chamber application for upliftment of bar."

Despite the undertaking given by the applicants on 30 January, 2013, to apply for upliftment of bar the applicants did nothing about the bar until the respondent applied for default judgement in May, 2013. Judgement was obtained on 15 May, 2013. Still the applicants did nothing until respondent proceeded to execute the judgement on 22 August 2013. Only then did the applicants react formally and approach the court for relief.

On 28 August, 2013, the applicants filed an application for rescission of the default judgement.

In the founding affidavit of Raston Chinyamunyamu in para 2, the applicants admitted that respondent was evicted and admitted receiving money from respondent for good will and receipting it although they said the money was for another person. They said the delay in filing the plea was caused by the sudden illness of the clerk who was supposed to file the plea and counter-claim.

In terms of r 63 of the High Court Rules, the High Court can set aside a judgement given in default if the court is satisfied that "there is good and sufficient cause to do so." Good and sufficient cause has been explained in previous decided cases to mean the *bona fides* of the application and the reasonableness of the applicant's explanation for the default and the prospects of success on the merits of the case.

The applicant' explanation for the default in the founding affidavit is that the clerk who ought to have served the papers suddenly got a bout of diarrhoea. In his supporting affidavit, the clerk says he fell sick on his way to the High Court to file the plea.

> "So severe was the diarrhoea that I could not come to work on 24 January, 2013. I only managed to file the plea and counterclaim on 25 January, 2013."

There is however, no affidavit from a medical doctor to confirm that indeed the clerk had a sudden bout of diarrhoea on 23 January and 24 January. If the diarrhoea was so severe, one would expect that immediate medical attention was sought and proof of that medical attendance by a doctor should have been filed in court.

In the absence of such proof, the court has no basis to accept the assertion by the applicant that the plea was not filed on time because of a sudden illness.

In the answering affidavit, the applicants bring in new allegations of the negligence of its former legal practitioners. There is no supporting affidavit from the former legal practitioners confirming that they acted negligently. As correctly pointed out in *Cobra and Wild Cat (Pvt) Ltd* v *Tundu Distributors (Pvt) Ltd* 1990 (1) ZLR 133;

> "The applicants cannot expect the explanation for the delays, which involves an allegation of a gross dereliction of duty, to be accepted in the absence of affidavits from the attorneys."

> "............ failure to do so on the part of the applicant .... must inevitably lead the court to draw the necessary inference that the applicant is not being truthful."

The fact that the founding affidavit is silent about the alleged negligence of the legal practitioners and that the allegation surfaces for the first time in the answering affidavit is another reason why the allegation cannot be taken as truthful. The case of *Director of Hospital Services* v *Ministry* 1971 (1) SA 626 referred to by respondent's counsel, is a case in point. In that case, it was held that an applicant must stand or fall by his petition and the facts alleged therein,

> "........ It is not permissible to make out new grounds for the application in the replying affidavit....."

> In *N Magwiza* v *Ziumbe NO and Anor* 2000 (2) ZLR 489 (SC), the court said,

> "It is well established that in application proceedings the cause of action should be fully set out in the founding affidavit and that new matters should not be raised in an answering affidavit...."

It is clear from the above that both explanations for the delay in filing the plea have not been confirmed by evidence, leaving the court without any reasonable explanation for the failure to file the plea on time.

On prospects of success, the applicants have admitted to the eviction and it is common cause that there was no court order to evict the respondent. The first applicant has also admitted receiving the goodwill deposit and issuing receipts for it in his name. He says he did so on behalf of another. He however, does not bother to even provide the name and other particulars for his so called principal; he refers to him merely as a "Chinese national" in his court papers. The court cannot take this assertion seriously. The first applicant's allegation that he received the money for a Chinese national is therefore rejected. The court's finding is that he received it on his own behalf and on behalf of the other applicants.

On loss of earnings, the court noted that proof of the lost earnings was availed to the adjudicating court, before the damages were awarded.

In view of the factors outlined above, the court is left without any legal basis to grant the applicants the rescission of judgement they seek. Accordingly, the application for rescission of judgement is dismissed, with costs.

Dondo and Partners, applicants' legal practitioners
Gama and Partners, respondent's legal practitioners