ROBSON MAKONI
versus
CBZ BANK LIMITED

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 15 June 2016

Application for rescission of default judgement

S. Simango for applicant
T. Biti for respondent

CHITAKUNYE J: On the 8th March 2016 I dismissed with costs the application for rescission of a default judgement entered against the applicant on 23 July 2015.

These are the reasons for my decision.

The respondent issued summons against the applicant in case no. HC 2524/2015 on the 19th March 2015. The summons was duly served on the applicant on the 30th April 2015. As was expected the applicant entered appearance to defend through his legal practitioners of record Messrs Nyikadzino, Simango & Associates. There was no reference of the legal practitioner handling the matter on that notice of appearance to defend.

The appearance to defend was duly served on respondent's legal practitioners on the 20th May 2015.

Pursuant to the notice of appearance to defend, the respondent then issued a Notice to Plead against the applicant on the 27th May 2015. That Notice was served on Messrs Nyikadzino, Simango & Associates on the 1st June 2015.

Upon receipt of the notice to plead and intention to bar, the applicant did not file any plea or other response with the result that the notice to plead was filed as a bar on the 23rd June 2015. A copy of that bar was served on Messrs Nyikadzino, Simango & Associates on the 25th June 2015.

On the 10th July 2015, the respondent made a chamber application for default judgement. The default judgement was duly granted on the 23rd July 2015.

On the 24th July 2015, a day after the default judgement was granted, the applicant purported to file a Chamber Application for the upliftment of the Bar in terms of r 84 of the High Court Rules 1971 as amended.

Subsequently the present application for the rescission of the default judgement was filed by applicant on the 12 August 2015. The application is opposed.

Rule 63 of the High Court rules 1971 provides that:-

(i) A party against whom judgement 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 judgement, for the judgement to be set aside

(ii) If the Court is satisfied on an application in terms of sub rule (1) that there is good and sufficient cause to do so, the court may set aside the judgement concerned and give leave to defendant to defend or to plaintiff to prosecute his action, on such terms as to costs and otherwise as the Court considers just."

The onus is thus on the applicant to show that there is good and sufficient cause for court to set aside the judgement. In *Stockil* v *Griffiths* 1992 (1) ZLR 172(S) at 173D-F GUBBAY CJ aptly noted that:-

> "The factors which a court will take into account in determining whether an applicant for rescission has discharged the onus of proving "good and sufficient cause", as required to be shown by Rule 63 of the High Court of Zimbabwe Rules 1971, are well established. They have been discussed and applied in many decided cases in this country. See for instance, *Barclays Bank of Zimbabwe Ltd v CC International (Pvt) Ltd* S-16-86(not reported); *Roland and Another v McDonnell* 1986 (2) ZLR 216(S) at 226E-H; *Songore v Olivine Industries (Pvt) Ltd* 1988(2) ZLR210(S) at 211C-F. They are: (i) the reasonableness of the applicant's explanation for the default ;(ii) the bona fides of the application to rescind the judgement; and (iii) the bona fides of the defence on the merits of the case which carries some prospect of success. These factors must be considered not only individually but in conjunction with one another and with the application as a whole."

What emerges from the plethora of cases is that the phrase 'good and sufficient cause' has been interpreted to mean that for one to succeed in an application for rescission of judgement one must satisfy the following factors:

(i) the explanation for the reason for the default must be reasonable;

(ii) the bona fide of the application to rescind the judgement;

(iii) The bona fide of the defence on the merits of the case which has some prospects of success.

In discussing the above elements and what weight to attach to each CHINHENGO J aptly noted in *V Saitis & Company (Pvt) Ltd* v *Fenlake (Pvt)Ltd* 2002(1)ZLR 378(H) at 387F that: -

> "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."

Explanation for the default

In *casu*, the applicant argued that he was not in wilful default. The reason for failure to file a plea was that the notice to plead and intention to bar had no reference for the lawyer who was handling the matter at Nyikadzino, Simango &Associates, hence upon receiving the notice to plead and intention to bar his lawyers did not know which lawyer was seized with the matter. They only came to know that it was a Mr Gwizo when applicant came following up on his case. By that time Mr Gwizo had left the law firm. As a result of this lack of reference his legal practitioners could not respond to the notice to plead.

Mr *Simango*, for the applicant also deposed to an affidavit confirming the lack of reference on the notice to plead and that he inquired with his secretary as to which lawyer was handling the case to no avail. He however does not say he inquired with respondent's legal practitioner. He simply left it at that.

The respondent on the other hand contended that the lack of a reference of the lawyer handling the case emanated from the notice of appearance to defend that applicant, through his legal practitioner, had filed. That appearance to defend has no reference. Counsel for the respondent went on to say that had Mr *Simango* been serious he could easily have contacted the respondent's legal practitioner to inquire on this but he did not. It is thus a lame excuse.

I am of the view that the applicant's legal practitioners took a lackadaisical approach to the matter. This is confirmed by the fact that even when it was pointed out that the error was on their part no affidavit was obtained from the secretary or the Mr Gwizo as to what could have happened for the appearance to defend to have no reference and what effort was made to locate the lawyer handling the matter. The applicant's legal practitioner seemed to have taken it as a foregone conclusion that his version will be accepted.

It is pertinent to note that a Notice to plead and intention to bar is clear on the timeframe for defendant to act failure of which a bar will be entered. In *casu*, the notice required the plea to be filed within 5 days from date of service of the notice failure of which a bar will be effected. Mr *Simango*, for the applicant, having been served with such notice on

the 1st of June 2015 virtually took no action in terms of responding to the notice hence the bar was effected on the 23rd June 2015. As already alluded to above a chamber application to uplift the bar was only made on the 24th July 2015 after judgement had been entered. Such tardiness betrays the basic ethos of the legal profession.

A litigant may at times not escape the consequences of their legal practitioner's tardiness.

In *Ndlovu* v *Guardforce Investments (Pvt) Ltd & Others* 2014 (1) ZLR 25(H) @ 25D-F court held that:-

> "Legal practitioners must always be aware that they operate within time limits and in terms of laid down procedures. In applications for rescission of judgement, consequent upon a failure to act timeously, it is the duty of the legal practitioner to give a credible and convincing explanation as to why he failed to act within the time limits. The time has come for legal practitioners to adhere to the time limits set in the Rules. The approach ought to be that the court may only excuse failure to act where the explanation given is credible. A litigant who chooses a legal practitioner to act on his behalf expects the legal practitioner to adhere to time limits set in the rules. The court should decline to exercise its judicial discretion in favour of applicants where the explanation is not credible even where the fault of the legal practitioner will have adverse consequences upon the litigant."

In *Hughber Petroleum (Pvt) Ltd & Another* v *Brent Oil Africa (Pty) Ltd* 2014 (1) ZLR 200(H) at 205D-F MATHONSI J was quite emphatic on the need to put legal practitioners on their guard when he said that:

> "These courts will never accept legal practitioners who elect to conduct their practices tardily and in a chaotic manner to extend such tardiness and chaos to the doorsteps of the court. Courts of law have a duty, not only to conduct their affairs in a dignified and transparent manner in dispensing justice but also to protect their integrity against the machinations of the bad elements in the profession. Legal Practitioners who take the court for granted in this manner run the risk of having costs granted against them *de bonis propiis* in order to discourage egregious departures from proper standards of professional behaviour."

The above sentiments may seem harsh on the legal practitioners but a cursory look at a plethora of cases makes sad reading for the legal profession. Time and again this court has called upon legal practitioners to put their act together and avoid a cavalier approach to their work. Indeed as far back as 1988 in *Kombayi* v *Berkhout* 1988 (1) ZLR 53(S) the court gave such a warning and cited with approval the observation by STEYN CJ in *Saloojee & Another NNO* v *Minister of Community Development* 1952(2) SA135(A) at 141C that:-

> "There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of court. Considerations *ad misericordium* should not be allowed to become an invitation to laxity."

In casu, it is apparent that the predicament applicant finds himself in emanated from the legal practitioners of his choice in failing to include a reference on the appearance to defend. That law firm again failed to act diligently when served with the Notice to plead and intention to bar. As if that was not enough that law firm wishes to blame the respondent's legal practitioner for not providing a reference to enable it to know the legal practitioner handling the matter. In short the law firm wishes to profit from its own ineptitude. This cannot be.

I am of the view that the explanation proffered by applicant's legal practitioner is not credible. Had he been diligent he would not have sat back as the time to file a plea lapsed. The explanation is simply an attempt to cover up an inexcusable tardiness on the party of the legal practitioner.

The applicant's case was also to the effect that the respondent should not have applied for a default judgment as he had filed a request for further particulars on about the 28 May 2015 and these had not yet been furnished. The applicant alleged he filed this request on his own as he had fallen out with his legal practitioner Mr Gwizo. In both the founding affidavit and the answering affidavit applicant does not state when the request for further particulars was served on the respondent. The copy of the request for further particulars attached to the answering affidavit is not clear as to when it was filed with court if at all it was filed. No attempt was made by the applicant's legal practitioner to provide a copy that shows the date when the request was filed at court. Equally no attempt was made to produce proof of service of the same on respondent's legal practitioners.

Taking into account the cavalier attitude displayed by both the applicant and his legal practitioner in this matter it may as well be that the request for further particulars was not properly filed and was never served on the respondent's legal practitioners. Had the request been properly filed the probability is that the judge who was seized with the application for judgement would not have granted judgment.

Another aspect to note is that whilst arguing that he had fallen out with his lawyer, his request for further particulars still has that law firm's address and the applicant went to that law firm to check on the progress of his case. Surely if he had fallen out with the lawyer, and thus opted to act on his own, he would not have used the law firm's address and even gone to check with them on progress for a case he was now handling himself.

I am of the view that applicant is not being candid with court on the circumstances of the request for further particulars.

Accordingly I hereby dismiss this leg of applicant's argument as it is not *bona fide*.

Bona fides of the defence on the merits and the prospects of success

The next issue that exercised my mind was whether the applicant has established that he has a *bona fide* defence to the claim with prospects of success.

In order for a defence to be *bona fide* and to carry some prospects of success it must be credible *ex facie*. A defence based on misrepresentation of facts may not be such a defence.

In *casu*, the applicant in his founding affidavit alleged that he is not indebted to the respondent in the sum of US$258 019-29 but to the sum of US$198 000-00 plus interest at the rate of 12% per annum. In this regard he referred to para 7.1.1 of the loan agreement.

The respondent responded to this assertion in some detail. The respondent indicated that the debt arose from a facility letter the parties signed on the 1st December 2010. The total sum lent in respect of that facility was a sum of US$257,000-00 comprising a rollover of US$175,000-00 from a previous arrangement and an additional US$82,000-00 provided for the 2010/2011 summer cropping season. The respondent went at length in explaining the interest charge and the total debt as reflected in the bank statement after taking into account the *in duplum rule*. The relevant statements were duly attached to the notice of opposition.

In spite of the detailed response, the applicant's answering affidavit remained as scant as it possibly could be. For instance, in para 3 of the answering affidavit applicant stated, *inter alia*, that: -

> "It is not correct that Applicant has no defence on the merits. The applicant is just being honest with the court by acknowledging owing Respondent US$198 000-00 as opposed to US$521 083-41. It is submitted that the Respondent misled court in the summons and declaration. In fact, respondent over claimed by US59 000-00.
> The amount that was rolled over when parties entered into the agreement was US$16 000-00 as opposed to US$175 000-00 which is the reason Respondent did not say anything about that amount. For ease of reference see attached agreement dated 9 July 2009 marked A."

The respondent did not explain how he arrived at the figures he says he owes respondent in terms of the rolled over figure of US$16 000-00, the debt he admits to of US$198 000-00 and the over claimed sum of US$59 000-00. He merely made bald assertions in both the founding affidavit and the answering affidavit despite respondent's clear explanation of its figures.

It is important to note that applicant did not deny signing the facility letter on 1st December 2010. He simply ignored responding to that assertion that he signed that document

and proceeded to say that the debt was in terms of the loan agreement dated 9 July 2009 which he attached 'Marked A'. Even that document does not, *ex facie,* contain the figures he alluded to. The attempt by the applicant to divert attention from the loan agreement respondent sued on to a prior loan agreement can only serve to show that applicant has no defence to the claim at all.

The loan agreement of the 1st December 2010 is in tandem with the figures alluded to by respondent. It shows a rollover sum of US$ 175 000-00 and a summer cropping sum of US$82 000 -00. The total offered was thus US$257 000-00.

It may also be noted that despite being shown that a capital sum of US$258 019.29 was in fact provided as evident from his bank statements and the various withdrawals he made applicant made no specific denial of the same. It was from that sum that the interest of US$258 019-29 (limited by the *in duplum rule)* and charges of US$5,044-83 were derived. These figures totalled US$521 083-41.

The applicant also challenged the interest rate of 28% being claimed. He alleged that the agreed interest rate was 12%. In this regard he referred to para 7.1.1 of the agreement. That paragraph indeed provides for an interest rate of 12% per annum on the facility offered. The applicant somehow opted to ignore paragraph 7.1.2 which provides that:-

> "The Bank reserves the right to give notice at anytime of any alteration in the rates of interest and, thereafter, the Bank shall be entitled to charge such other rate as it may prescribe. If the Borrower continues to avail of the facilities after receipt of the aforesaid notice by not fully repaying the amount due to the Bank, the Borrower shall be deemed to have agreed to the change in interest rate."

The respondent's contention was that the interest rate was altered in terms of para 7.1.2 and applicant agreed in terms of that paragraph.

The applicant's bald assertion in this regard was thus without merit.

It is my view that applicant has no defence on the merits. The purported defences have no prospects of success at all. It is a mere fishing expedition on the part of the applicant.

Accordingly the application is hereby dismissed with costs.

Nyikadzino, Simango & Associates, applicant's legal practitioners
Tendai Biti Law, respondent's legal practitioners