ISAAC MAZOLO SIBANDA
and
NKULULEKO SIBANDA
versus
CBZ BANK LIMITED
and
PURITY MILLING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 13 June 2016 & 24 August 2016

Opposed Matter

B Ngwenya, for the applicants
T Guvare, for the 1st respondent
D Atukwa, for the 2nd respondent

MTSHIYA J: This is an opposed application for condonation for late filing of an application for rescission of default judgment.

Rule 63 of the High Court Rules 1971 provides as follows:

"Rule 63. Court may set aside judgment given in default

(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 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.

(3) Unless an applicant for the setting aside of a judgment in terms of this rule proves to the contrary, he shall be presumed to have had knowledge of the judgment within two days after the date therefore. "

It is under the above rule that this application is being brought to set aside a judgment of this court granted in default on 28 May 2014. The judgment read:

"IT IS ORDERED THAT:

1. Defendant shall pay to the plaintiff:-

   a) The sum of $27 810-71.

   b) Interest on the above sum at the rate of 28% per annum reckoned from 1st October 2013 to date of final payment.

   c) Payment of collection commission on the above sums calculated in accordance with By-Law 70 of the Law Society of Zimbabwe By-laws, 1982 and costs of suit on legal practitioner and client scale to the extent that such costs are permitted in proviso (iii) to By Law 70 (2).

   (d) An order declaring the hypothecated immovable property executable namely :- Certain piece of land situate in the District of Hartley called Stand 50 Hunyani Township of Lot 4 of Hunyani Estate 3B measuring 4 546 square metres and held under Deed of Transfer 14499/2002 dated 13th December 2"

In their application, the applicants, through the first applicant, state, in part as follows:

"4. This is an application for condonation where in the applicants seek the court's indulgence to be allowed to apply for rescission of default judgment that was granted against them on 28th of May 2014. The basis upon which the present application is made is that the applicants were not in willful disobedience with the Rules of the Court in failing to make such application within a month. The applicant only became aware of the existence of the order when the time for seeking its rescission had already lapsed."

In the declaration to the summons which led to the default judgment, the first respondent, as plaintiff then, averred, in part as follows:

"11. As at the 30th September 2013, the balance outstanding on the account was the sum of $27 810-71 made up as follows:-

11.1	to capital column K	US$19 403-55
11.2	to cumulative unpaid interest 'J'	US$ 8 131-66
11.3	to cumulative unpaid charges column 'M'	US$ 275-00
11.4	**Total Due**	**US$27 810-21**

12. The 2nd and 3rd defendants each bound themselves as sureties and co-principal debtors to the plaintiff for the payments of all amounts due to the plaintiff by the 1st defendant.

13. As security for the repayment of the debt due to the plaintiff 2nd and 3rd defendant registered a second mortgage bond being No. 2348/2009 hypothecating the immovable property being; certain piece of land situate in the District of Hartley called stand 50 Hunyani Township of Lot 4 of Hunyani Estate 3B measuring 4 546 square metres and held under Deed of Transfer 14499/2002 dated 13th December 2002."

The above forms part of the relevant background information to this application.

Having claimed lack of knowledge of the summons, when issued, the applicants then proceeded with the following averments:

"7. The applicant was not aware of his default and the order against him until the 16th December 2014 when he was served with a notice of sale of his property by the Deputy Sheriff. The Notice of sale is attached hereto as Annexure 'B'.

8. The summons were served on the 2nd respondent and the 2nd respondent did not bring the said summons to the attention of the applicants until after the judgment was already granted.

11.2 A period between 16th of December 2014 and 8th of October 2015 elapsed with me having no true knowledge of the debt. I believed that the debt on which the claim was base was the one I had guaranteed back then in 2009 before I resigned as a director.

11.3 Upon my resignation in 2012, I was of the view that the loach of 2009 had been paid in full and therefore requested that my property seize to be security. See Annexure "C" hereto being my email to 2nd respondent's directors.

11.4. As can be seen from the above email of my resignation, the bank was also notified and a meeting was held at CBZ Selous branch were the 2nd respondent advised the bank to substitute the applicant's property with the 2nd respondent's property. Mr Musanjeya for the 1st respondent promised to do a site visit to verify the location of the property."

The applicants, however, confirm that once they became aware of the execution process, they paid US$22 000.00. They then suggest that the payment related to the original loan of 2009. The guarantee the applicants signed in 2009 exists. The guarantee is supported by a mortgage bond which was never cancelled.

In response to the applicants' claim, the first respondent, in part, states:

"8. **Ad para 5**

This is denied. The applicants were aware of the summons and the 2nd respondent brought the summons to the attention of the applicants. Before the summons were issued on the 5th February 2014 our legal practitioners Messrs Muvirimi Law Chambers wrote a letter to Messrs Chambati, Mataka and Makonese to enquire if they had the mandate to receive summons on behalf of purity Milling Company and its directors. See Annexure B attached hereto. It our humble view that the Applicants were advised about the issuing of the summons by their erstwhile legal practitioners Messrs Chambati, Mataka and Makonese. Further in the mortgage bond that was registered to secure the debt for the 1st respondent, CBZ Bank Limited the Applicants chose the following address as *domiciliumcitandi* Stand 19378 Seke Industries, Chitungwiza, this appears on page 7 of the mortgage bond attached hereto and marked Annexure C. It is confirmed that he summons and declarations were served address chosen by the applicants, see return of service attached hereto and marked Annexure D. In light of the above we are of the view that there was proper service of the summons upon the applicants and the applicants were legally advised by their legal practitioners that is why they proceeded to make payment see the attached letter marked Annexure E from their erstwhile legal practitioners advising that their clients had paid $22 000. There is no basis for applicants to allege that he summons were never brought to their attention when both the applicants and the 2nd respondent were represented by the same legal practitioners.

15. **Ad para 11.6**

This is vehemently disputed. It is submitted that the 2nd respondent approached the 1st respondent and was offered a loan facility for the sum of $20 000-00 on the 15th December 2011. As security for the loan and the 2nd respondent offered the security already held by the bank which is the unlimited guaranteed by the applicants and also the mortgage bond registered in 2009 under Mortgage Bond No. 2348/09 for $45 000-00 in the name of the applicants. The security held is stated in clause 8.4. of Annexure H of the loan facility."

The above averments are supported by the second respondent who, in the opposing affidavit says:

"**Ad para 5 – 9**

5. This is denied, the summons where properly served on the 1st defendant and the now then applicants at the address provided by the then defendants being stand number 19378 Seke industries Chitungwiza.

6. The applicant and 2nd defendant plainly knew of the summons and did not enter appearance to defend because they had no defence to the claim.

7. The applicants and 2nd defendant even approached he 1st defendant in an attempt to persuade the parties to settle out of court, which settlement failed to yield results. I attach hereto Annexure 'A' being a letter explaining the move taken by the then defendants which clearly shows that the applicants knew of the summons by the 1st defendant, which letter was directed to this Honourable court after an issue of service was raised as a query by the court."

Given the clear background to this matter, I believe a quick application of the law to the clear factual position will lead to an early disposal.

I am indebted to the applicants, who, in their Heads of argument, correctly capture the law relating to condonation as applied for herein. They quote from Herbabstein and Van Winsen's *The Civil Practice of the Supreme Court of South Africa* 4th ed as follows:

> "Condonation of the non-observance of the rules is by no means a mere formality. It is for the applicant to satisfy the court that there is sufficient cause to excuse him from compliance….. The court's power to grant relief should not be exercised arbitrarily and upon the mere asking, but with proper judicial discretion and upon sufficient and satisfactory grounds being shown by the applicant. In the determination whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides in which the court will endeavor to reach a conclusion that will be in the best interests of justice. The factors usually weighed by the courts in considering applications for condonation……. include the degree of non-compliance, the explanation for it, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice……."

In its heads of argument, the first respondent, relying on *KM Auctions (Pvt) Ltd* v *Adanesh Samuel and Another* SC 15/12, also correctly spells out the main factors required for condonation as embodied in the above passage. It listed the factors as follows:-

"(i) the degree of non-compliance
(ii) the explanation for it
(iii) the importance of the case
(iv) the prospects of success
(v) the respondent's interest in the finality of the case
(vi) the convenience of the courts
(vii) the avoidance of unnecessary delay in the administration of justice"

In *casu* the applicants admit that they did not comply with r 63 of the High Court Rules 1971 and hence this application. The judgment to be rescinded was granted on 28 May 2014 and served at chosen address of service on 5 May, 2014. As it turns out, prior to granting the default judgment, the court was at pains to ensure that service of summons was properly effected. Indeed, documents herein confirm that summons and declaration were served at the applicants' chosen addresses namely, stand 19378 Seke Industries Chitungwiza. Furthermore, the then legal practitioners of the applicants were fully aware of the pending court action.

On 5 February 2014, Messrs Chambati & Mataka Attorneys acknowledged receipt of the following communication from the first respondent's legal practitioners:

> "**Re: CBZ BANK LIMITED VERSUS PURITY MILLING COMPANY (PVT) LTD**
>
> We make reference to the above matter.
>
> Kindly advise us if you have the mandate to receive summons on behalf of Purity Milling Company and its directors.
>
> We expect to receive your response within five (5) days from the day of receipt of this letter. Should we not receive your response we shall proceed to serve the summons at 19378, Seke Industries, Chitungwiza which is the address chosen as the *domicillium citandi et executandi.*
>
> Yours faithfully."

The above was never disputed and the above indicates where service was eventually effected.

It is also important to note that, following the default judgment, the available security for the loan, namely, "a certain piece of land situate in the District of Hartley called Stand 50 Hunyani Township of Lot 4 of Hunyani Estate 3B measuring 4 546 square metres held under Deed of Transfer 14499/2002 dated 13th December 2002" was attached. The attachment took place on 20 November 2014. The applicants and second respondent, after the attachment of the property, quickly went into negotiations with the first respondent. That resulted in a stay of execution because the parties had agreed to a payment arrangement, which was, however, not placed before the court.

Following the payment arrangement, the applicants then effected a payment of US$22 000.00. I want to believe that the payment related to the outstanding amount on the loan as at

November 2014 when the property was attached. Given the date of attachment, it can never be true that the applicants only knew of the default judgment on 16 December 2014. That cannot be because they embarked on negotiations in order to avoid the sale of the attached property.

Contrary to r 63, this application was only filed on 12 October 2015.

Having satisfied myself that service of summons was properly effected on the applicants, a fact that the second respondent confirms, it means:

a) There was an inexcusable deliberate failure by the applicants to file an appearance to defend after being served with summons and declaration on 5 May 2014; and
b) There was also, upon knowing of the default judgment through the attachment of the property on 20 November 2014, wilful failure to take timeous action against the default judgment (i.e applying to set it aside).

The above observations, (a) and (b), speak to a high degree of non-compliance with the rules. The explanation given for the degree of non-compliance is not reasonable enough to move this court to use its discretion in favour of the applicants.

On prospects of success, my finding is that, as long as the mortgage bond was not cancelled, the security offered by the applicants remained in place. If indeed the first applicant was serious, he would have taken steps to deal with the situation soon after his purported resignation as a director. It is not enough to say to the first respondent: "I have resigned and you should find another security for the balance of the loan." The existing security is the one that was accepted by the first respondent. It can only be varied or cancelled with the consent of the first respondent. That never happened.

I do not deny the fact that this is a very important case. The first respondent is owed money and the applicants stand to lose a valuable property. However, it is clear to me that the applicants, after having been trusted clients of the first responded, have not conducted themselves honourably. They have not told the truth about the case. They knew fully well that they guaranteed a continuing facility and therefore for them to deny arrangements made in 2011, without having caused the cancellation of the mortgage bond, cannot assist them. They remain guarantors.

Accordingly, applying the accepted principles of law relating to condonation, the only conclusion I can arrive at in *casu* is that the application cannot succeed.

I therefore order as follows

1. The application for condonation be and is hereby dismissed; and
2. The applicants shall pay costs.

Chinawa Law Chambers, applicants' legal practitioners
Muvirimi law Chambers, 1st respondent's legal practitioners
Sando & Atukwa, 2nd respondent's legal practitioners