MAJORIE MAKARAU
and
SEBASTIAN MAKARAU
versus
PHILLIP WILLIAM

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 23 May 2017 & 8 June 2017

Opposed application

C Chinyama, for the applicants
Ms *S Nyathi*, for the respondent

MUREMBA J: On 23 May 2017, I delivered an *ex tempore* judgment granting the application for rescission of judgment after hearing the matter. Following a request for the written reasons, I hereby furnish them.

The application was for rescission of a default judgment which was handed down on the 12th of October 2016 in HC 10562/13. The default judgment ordered the respondents and all those claiming occupation through them to vacate from House number 7434 Unit K, Seke Chitungwiza. Apparently, the first applicant is a sister in law to the second respondent.

The first applicant averred the following in her founding affidavit. She was not in wilful default of attending court on that day which happened to be the date for trial. Her legal practitioner erroneously diarised the matter for the 13th of October 2016 instead of the 12th of October 2016. The Applicants and their legal practitioners arrived at court on the 13th of October at 9:15am only to see on the electronic screen that the matter had been set down for 12 October 2016 not 13 October 2016. The applicants and their legal practitioners proceeded to Judge Charewa's clerk to enquire about the matter only to find that a default judgment had been entered against them on the previous day. The first applicant averred that she has a good defence to the respondent's claim in the main matter, because the property in dispute was sold to him (respondent) by one Tracey Mupaya whom she had invited to stay at the property. This property was allocated to the first applicant's late husband, by Chitungwiza Municipality. Tracey Mupaya without the knowledge and consent of the first applicant

misrepresented some information to Chitungwiza Municipality resulting in her obtaining title to the property fraudulently. She then sold the property to the respondent and transferred title to him. What happened resulted in a series of litigation at Chitungwiza Magistrates Court and in this court over the issue of ownership. The reference numbers of those cases are HC 1615/09; HC 11/05; HC 543/05 and HC 2108/10. The Respondent failed to disclose to the court that there was pending litigation regarding ownership of this property, which issue has the effect of suspending proceedings in his case of eviction against the applicants. The respondent was not a *bona fide* purchaser of the property as his predecessor Tracey Muchapaya obtained title fraudulently.

The second applicant who is the brother in law to the first applicant associated himself with the first applicant's founding affidavit.

In the respondent's opposing affidavit, it was averred that the applicants' defence in the matter HC10562/13 was struck out by this court because they did not attend court on the 12th of October 2016 and they also failed to comply with a consent order which was granted by this court in the same matter on 3 October 2016. The consent order required them to file and avail for inspection the discovered documents and to file their summary of witnesses' evidence by 6 October 2016. It was averred that the matter was initially set down for trial on the 3rd of October 2016 for purposes of the parties agreeing on a suitable date for trial. The legal practitioners for both parties checked their diaries, indicated their availability to the court on the 12th of October of 2016 and proceeded to update their diaries accordingly. The fact that the matter was postponed to 12 October 2016 was reiterated to the Applicant's legal practitioner through a letter, dated 3 October 2016. The said letter was attached. It was averred that the applicants deliberately failed to attend court on 12 October 2016 as they had not complied with the consent order of 3 October 2016. The respondent said that their explanation for having misdiarised the trial date was not a reasonable explanation as it was unsubstantiated. The respondent averred that the applicants had not even explained in their application their non-compliance with the consent order of 3 October 2016.

It was averred that the applicants had no *bona fide* defence to the respondent's claim for eviction because the respondent purchased the property in dispute from Tracy Mapaya on 10th of August 2006, after it had been advertised by Sunbeach Properties Pvt Ltd. A copy of the agreement of sale was attached. It was averred that Tracey Mupaya owned the property by virtue of a Deed of Grant No. 5703/2007 issued in her favour by the Minister of Local Government, Public Works and National Housing, the initial owner of the property. It was

averred that the respondent verified ownership of this property with Chitungwiza Municipality before purchasing it. After purchasing the property the respondent took occupation and proceeded to rent out the house. He only became aware of the applicant's claim to the property when his tenants were evicted on 4 May 2007, pursuant to a writ issued against Tracey Mupaya under HC542/05. The respondent attempted to evict the applicants under case no.88/09 in the Magistrates court but the matter was dismissed. Respondent averred that he is not related to Tracey Mupaya as averred. There are no pending court cases between the applicants and the respondent before this court regarding ownership of this property. No such papers were ever served on him. The respondent only became aware of the matters referred to in the applicants' founding affidavit except HC542/05 when the applicants filed their discovery affidavit in HC10562/13. Upon seeking to inspect the said pending files at the civil registry of this court the respondent failed to locate them except the file for HC1615/09 in which the applicants were seeking an order cancelling his title deeds, but even then the summons in that matter had not been served on him. It was averred that the applicant attempted to snatch at a judgment from the respondent in that matter, but failed because this court queried the service of the summons which had been effected at the property in dispute when in fact his tenants had already been evicted therefrom. It was averred that the respondent not having been served with any papers by the applicants it cannot be said that there are pending cases over ownership of the property between the parties. It was further averred that the applicants have never owned the property in question and were thus seeking merely to prolong their unlawful stay and occupation of the property. The applicants are not paying utility bills even though they continue to occupy the property in question. It was averred that the applicants have no ownership rights to this property and the respondent prayed that the application for rescission of default judgement be dismissed with costs on legal practitioner and client scale.

In the first applicant's answering affidavit the following averments were made. It was denied that the default judgment was granted due to non-compliance with a court order and nonetheless the discovered documents were public documents which were in the custody of the Registrar of the High Court and Clerk of Court Chitungwiza. The first applicant averred that non-compliance with the court order of 3 October 2016 would not have stopped her from attending court on the trial date as she had a good explanation for having failed to acquire the discovered documents. It was said that some of the documents required were not easy to come by because they are from matters emanating from as far back as 2005, and the first

applicant's legal practitioners wrote to the Resident Magistrate seeking assistance. The first applicant now has the required documents in her possession. The first applicant insisted that the court date was wrongly diarised probably due to the fact that the trial had been set for two days, the 12th and the 13th of October 2016 hence the parties appeared before the court on the next day. It was averred that because the file was voluminous the first applicant's legal practitioners did not see the letter reminding them about the court date, being 12 October 2016.

The first applicant averred that the respondent's Deed of Transfer No.5545/2008 is tainted with fraud. She said that although the respondent holds title to the property it is just *prima facie* proof of ownership but it is not absolute proof. The property in question belonged to first applicant under a rent to buy agreement with Chitungwiza Municipality. The first applicant insisted that the respondent was well aware of the matter under HC1615/09 and case number 7057/08 because he was a party to these proceedings. As for the other cases the documents are sitting with registrar of this court. The first applicant disputed having attempted to snatch at a judgement and averred that the substantive query that was raised by the court was that of citation of the parties. It was averred that this matter was already *res judicata* as it was dealt with by this court in HC543/05. She averred that case No 1615/09 was still *lis pendenis.* The first applicant insisted that she was as good as the owner because back then, title deeds were hard to come by and a certificate of tenancy was as good as a title deed. The first applicant averred that the issue of non-payment of utility bills was not the issue before the court. The first applicant prayed that the application be granted. The second applicant associated himself with the answering affidavit of the first applicant.

There was nothing to show that CHAREHWA J granted the default judgment because the applicants had not complied with the consent order of 3 October 2016. What was apparent was that the default judgment was granted because the applicants had not attended trial on 12 October 2016. After hearing argument I was inclined to grant the application for rescission because I was satisfied that there was good and sufficient cause to do so as is required by r 63 (2) of the High Court Rules, 1971. This was irrespective of the fact that the respondent took issue with the fact that the applicants' counsel had not filed a supporting affidavit to their case. Whilst it would have been necessary, I did not consider its omission fatal to the applicants' case as everything that happened on 13 October 2016 was fully explained by the applicants who had come to court with their lawyer. What constitutes good and sufficient cause are the following factors: the reasonableness of the applicant's explanation for the

default; the bona fides of the application to rescind the judgment and the bona fides of the defence on the merits of the case and whether the defence carries some prospects of success[1]. No single factor is decisive but all of them are considered and examined together[2]. In *casu* I considered that the facts did not show that the applicants were in wilful default when they failed to attend court on 12 October 2016. They had defended their case up to the trial stage. Initially the trial had been set down for 3 October 2016 and the applicants together with their lawyer turned up for court. Indications were that they had even attended the pre-trial conference. The explanation given for the non-attendance on 12 October 2016 was that they had misdiarised the trial date for 13 October 2016 which actually was supposed to be the second date for trial. The trial had been set down for two days. It was not disputed that on 13 October 2016 they turned up for the trial together with their lawyer and discovered that a default judgment had been entered the previous day. Considering the history of the case that was chronicled, it was apparent that this was the first time the applicants had defaulted court, having attended the pre-trial conference and on the initial trial date the matter had been set down for. With this, on a balance of probabilities, I found the explanation for the default on 12 October 2016 reasonable. Misdiarising is a common mistake in the life of legal practitioners[3].

Considering that the applicants had not defaulted at pre-trial conference and on 3 October 2016 when the matter was initially set down for trial I was prompted to give the applicants' explanation for their default on 12 October 2016 the benefit of the doubt. I was not satisfied that they freely took a decision not to appear, moreso considering that the trial had been set down for two consecutive days and they turned up for court on the next day at 9:15am. It was very probable that it was a genuine mistake of misdiarising. If gross negligence is revealed as the reason for the default, rescission must not be granted[4], but *in casu* that was not shown to be the case. In any case the fact that a party fails to give a reasonable explanation for the default, the reasonableness or otherwise of the explanation for the default is not the sole decisive factor in deciding whether or not to grant the application for rescission. The court is not mandated to place too much emphasis on one factor as these factors are not treated in isolation of each other, or individually. An unsatisfactory explanation for default may be strengthened by a very strong defence on the merits whilst a

[1] Stockil v Griffiths 1992 (1) ZLR 172 (S).
[2] Registrar General v Tsvangirai 2003 (2) ZLR 110 (H) @114F-G.
[3] Sixth Century Contractions v ZETDC HH85/14.
[4] Deweras Farm (Pvt) Ltd v Zimbabwe Banking Corporation 1998 (1) ZLR 368 (S).

satisfactory explanation for defaulting may cause the court not to scrutinise too closely the defence on the merits[5]. The court can still make a finding that there is good and sufficient cause to grant the application in view of the other factors: the bona fides of the application and the bona fides of the defence on the merits. *In casu* even if it is argued that the explanation for default was unreasonable, I would still maintain that there was good and sufficient cause to grant rescission in view of the fact that the application for rescission was promptly made and that the applicants had a *bona fide* defence to the merits of the case and their defence carried some prospects of success.

I took note that the application for rescission was made on 21 October 2016, 8 days after the default judgment had been granted. It was thus promptly filed and I concluded that the application for rescission was made *bona fide*. In *Stevenson v Broadly NO* 1972 (2) RLR 467 Beadle CJ said that in view of the delay of only four or five days he would not consider that the application should be refused unless he thought that the applicant's case was hopeless. In the present matter I did not think that the applicants delayed in filing their application and that their case was utterly hopeless as I will demonstrate below.

It appeared to me that the applicants had a *bona fide* defence to the merits of the case and their defence carried some prospects of success. They averred that the house in issue was obtained from the Municipality of Chitungwiza by the first applicant's late husband. Tracey Mupaya a relative who was staying at the house upon the invitation of the first applicant made some misrepresentations to Chitungwiza Municipality and fraudulently obtained title to the property and then sold it to the respondent who now has title. It is a fact that the respondent has title to the property, but despite that I took note of the fact that despite being a holder of that title, the first applicant managed to evict his tenants from that property as far back as 2007 after he had taken occupation of the property from Tracey Mupaya. Tracey Mupaya had already taken title of that property, but still the first applicant managed to sue her, got an eviction order under HC 542/05 and evicted the respondent's tenants because they were claiming occupation through her. Over and above that, the respondent admitted in his own words that he once sued the applicant for eviction at Chitungwiza Magistrates Court under 88/09 but his claim was dismissed. He attached the court order which showed that the matter was dismissed on the basis of a point *in limine* on 30 April 2009, but there was no proof of what the point *in limine* was all about. The fact that the first applicant succeeded in

[5] Du Preez v Hughes NO 1957 R & N 706 (SR) @709 A-D.

evicting Tracey Mupaya as far back as 2007 and has been in occupation of the property ever since coupled with the fact that the respondent once attempted to evict the applicant in 2009 and failed to do so up until 2013 when he reinstituted eviction proceedings in this court made me conclude that the applicants have a *bona fide* defence on the merits and that the defence carries some prospects of success. This made me decide that this is a matter which is best resolved by being fully ventilated at trial with the parties being given a full opportunity to present their cases and evidence. It being a matter involving an immovable property and which has caused litigation between the first applicant and Tracey Mupaya and the first applicant and the respondent, I decided that it was only fair that the matter be disposed of through a determination on the merits than through a default judgment.

In view of the foregoing I granted the application for rescission of the default judgment.

Chinyama & Partners, applicant's legal practitioners
Costa & Madzonga, respondent's legal practitioners