LILIAN MARUVA MASOMBO
versus
PUZZLE BLESSING HLAHLA

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 18 May 2017 & 13 June 2017

Opposed application

T Muzana, for the applicant
S.T Mutema, for the respondent

MUREMBA J: This was an application for rescission of a default judgment which l heard on 18 May 2017 and dismissed with costs. I delivered the judgment *ex tempore* and I have now been requested for the written reasons. These are they.

The two parties are involved in a dispute over an immovable property, namely a house, Stand no. 2992, 39 Crescent, Glen View 2, Harare. The property initially belonged to the applicant and she had title deeds to it. The respondent later bought the property from one Tafadzwa Mavhunga and obtained title deeds to it. Despite this, the applicant has refused to vacate from the property. She argues that Tafadzwa Mavhunga fraudulently obtained title to the property before he sold it to the respondent.

The applicant avers that sometime in 2012 she approached Tafadzwa Mavhunga and asked for a loan of US$5 000.00. She was asked to surrender her title deeds to the property as security for the loan which she did. She was also asked to sign a power of attorney to pass transfer of the property and to sign an agreement of sale which Tafadzwa Mavhunga insisted was solely for security reasons. The applicant was then given the US$5 000.00 at an interest rate of 25% per month. Despite the applicant paying various amounts towards the debt, Tafadzwa Mavhunga clandestinely and fraudulently, without the applicant's consent and knowledge transferred the property into his name. He obtained title deeds and subsequently sold the property

to the respondent who also obtained title deeds to the property. The applicant said on that basis the respondent's title is null and void as it was obtained pursuant to a sale agreement which was null and void.

The respondent avers that the sale agreement and transfer of title which happened between the applicant and Tafadzwa Mavhunga was lawful and not a nullity. The respondent avers that after she had bought the property from Tafadzwa Mavhunga and obtained title, she notified the applicant to vacate the property which she refused to do. This prompted her to issue summons for her eviction in the Magistrates Court on 27 March 2015.

Both parties are agreed on what transpired in the Magistrates Court which is as follows. In her plea to the summons, the applicant filed a counter claim for a *declaratur*, that it be declared that the property was hers, but this counter claim being a *declaratur* was outside the jurisdiction of the Magistrates Court. Consequently, the applicant's legal practitioner, Mr. Solomon Chako applied that the eviction matter be stayed pending the determination of the application for a *declaratur* which he already had instructions to institute in the High Court. On that basis the magistrates' court stayed the eviction matter on 12 May 2015. The founding affidavit that he deposed to stating that he already had instruction to file a *declaratur* in the High Court was attached to the respondent's opposing affidavit.

On 1 July 2015, the applicant had summons for the *declaratur* issued through the same law firm, Mushangwe and Company. Mr. Solomon Chako was still representing the applicant. However, the summons was not served on the respondent or his lawyers. At one time Mr. Mutema met Mr. Chako here at the High Court whilst attending motion court in respect of other matters. Mr. Mutema asked Mr. Chako if his client, the applicant had since filed the application for a *declaratur*. Mr. Chako confirmed and said that he had even served the summons at Mr. Mutema's law firm, but someone had refused to receive same. Mr. Mutema asked Mr. Chako to re-serve the summons since he was the one who was dealing with the matter, but the summons was not reserved. This prompted the respondent to file an application for a *declaratur* herself on 2 November 2015. On 3 November 2015, the respondent's lawyers served the applicant's lawyers, Mushangwe and Company with the application. On the same date they served the applicant with a letter notifying her that they had served the application for a *declaratur* on her legal practitioners.

After being served with the application for a *declaratur* on 3 November 2015, the applicant's legal practitioners received it, kept it and only returned it to respondent's lawyers on 18 November 2015, accompanied by a letter which was saying that although they had authority to represent the applicant in other matters related to the property which was the subject matter of the respondent's application for a *declaratur,* they had not been given specific instructions to respond to the application for the *declaratur*. In that letter it was further said that efforts to get instructions from the applicant with regards the application were futile as they failed to get hold of her.

The *dies inducea* having expired with no notice of opposition filed, the respondent's legal practitioners had the matter set down for 9 December 2015 on the unopposed roll and obtained a default judgment.

The applicant then made an application for rescission of the default judgment on 13 January 2016 which application I heard and dismissed on 18 May 2017. I dismissed the application because I was not satisfied that there was good and sufficient cause to grant the application as is required in terms of r 63 (2) of the High Court Rules, 1971. Factors which determine that there is good and sufficient cause for the court to rescind a default judgment are:

(i) the reasonableness of the applicant's explanation for her default.

(ii) the *bona fides* of the application for rescission.

(a) the *bona fides* of the applicant's defence on the merits and the prospects of success. See *Dewaras Farm (Pvt) Ltd* & Ors v *Zimbabwe Banking Coorperation*1998 (1) ZLR 368 (S).

These factors are examined in conjunction of one another. An unsatisfactory explanation for default may be strengthened by a very strong defence on the merits. *Dupreez* v *Hughes NO* 1957 R & N 706 SR at 709 A – D.

The reasonableness of the applicant's explanation for her default

In casu I was not satisfied that there was a reasonable explanation for the default or for the non-filing of the opposing papers after the applicant's legal practitioners had been served with the application on 3 November 2015. To start with, I found no basis for the applicant's legal

practitioners to receive the application and keep it for 15 days before returning it if they were sincere about their excuse that they had received no specific instructions to handle the matter from the applicant and that they had failed to locate her. Why receive the application in the first place and in the second place why keep the application until after the expiration of the *dies inducea* which expired on 17 November 2015? This appeared to me to have been an after-thought because if it was not, his legal firm would have refused to accept it from the onset or soon after receiving the application, he would have returned it before the expiration of the *dies inducea*.

In any case, the excuse that Mr. Chako had no authority to represent the applicant was meritless. He had been representing the applicant in respect of the same property starting with the eviction proceedings in the magistrates' court. He personally had proceedings stayed pending the filing of proceedings in this court for a *declaratur*. He made submissions that he had received instructions to do so from the applicant. In July 2015 he issued summons for same in this court, but until November 2015, he did not serve it upon the respondent or her legal practitioners. Initially he gave an excuse that someone from the respondent's legal representatives had refused to accept it, but even after being told by Mr. Mutema who represents the respondent to re-serve the summons, he still did not do so. This is what prompted the respondent to then file the *declaratur* herself. In the *declaratur* the respondent wanted an order declaring her to be the owner of the property in dispute, which was just the opposite of what the applicant wanted in her summons for a *declaratur* which was issued on 1 July 2015 from this court, but was never served on the respondent or her legal representatives. I found it illogical for Mr. Chako to then under the circumstances turn around and return the respondent's application saying that he had no instructions from his client to respond to the application. The history of the case shows that he already had authority to deal with the matter. It is the same matter which he had failed to prosecute on behalf of the applicant which he was now claiming not to have authority to handle.

Mr. Chako's averment that he had failed to locate the applicant was puzzling. It is common cause that the applicant still resides at Stand No. 2992 Glen View 2, Harare which is the property in dispute. No explanation was given as to how the applicant could not be located at this address. Not only that, in this day and age of mobile phones it was not explained how the applicant could not be located over the phone. However, surprisingly when eviction proceedings

were taking place in the magistrates' court the applicant could be located by her legal representatives. When applicant issued summons for the *declaratur* in July 2015 which summons she later did not serve on respondent, she did so through her legal representatives. It was only when the application for a *declaratur* was served by the respondent that she could not be located by her legal representatives. I found the explanation incredible and unconvincing.

On the other hand, although the applicant was served with a letter notifying her of the application, she claims to have received it on 27 November 2015. Despite the respondent insisting that she was served on the same day as her legal practitioners, on 3 November 2015, the applicant did not furnish proof to show that she was indeed served on 27 November 2015. It was just her word. She said that upon receiving the letter notifying her of the application she immediately went to see her lawyers about it. This is surprising because all of a sudden she was available yet she is the same person her lawyer Mr. Chako claimed could not locate between 3 November 2015 and 18 November 2015.

With all these factors taken together, I did not find the explanation for the default or the non-filing of opposing papers reasonable.

The bona fides of the applicant's defence on the merits

Although the applicant said that Tafadzwa Mavhunga defrauded her of her property, she did not rebut the averments that were made by the respondent with regards to what transpired between her and Tafadzwa Mavhunga which resulted in the transfer of the property to Tafadzwa Mavhunga. The respondent provided an agreement of sale which the applicant and Tafadzwa Mavhunga entered into on 31 April 2011 wherein it is indicated that the applicant sold the property to Tafadzwa Mavhunga for US$20 000.00. It has a clause which says this agreement constitutes the entire agreement between the parties. It also states that the purchase price was paid in cash in full before the signing of the agreement. The respondent also attached a power of attorney signed by the applicant on 15 October 2012 (more than a year after the date the agreement of sale) authorising Tichaona Govere of Govere Law Chambers (Tafadzwa Mavhunga's Lawyers) to appear before the Registrar of Deeds and transfer Stand 2992 Glen View 2, Harare to Tafadzwa Mavhunga. The respondent also produced a declaration by the seller which the applicant signed on 15 October 2012, declaring that she sold her house to Tafadzwa

Mavhunga and that she was paid the purchase price in full. The capital gains tax clearance certificate from ZIMRA was also attached which shows that the applicant appeared at ZIMRA, was interviewed and paid the capital gains tax before the property was transferred. It was averred that if she had not sold the property she would not have confirmed that to ZIMRA before the issuance of the capital gains tax clearance certificate. The respondent also attached the Rate Clearance Certificate from the City of Harare which was issued on 15 October 2012 in favour of the applicant showing that all rates had been cleared.

Despite all these documents having been attached to the respondent's opposing affidavit the applicant did not seek to rebut any of them in her answering affidavit. The only issue that she responded to was the issue to do with the reasonableness of the explanation for the default or non-filing of the notice of opposition. She did not seek to explain how Tafadzwa Mavhunga committed the fraud in transferring the property in view of all the documents she had signed (the agreement of sale, the power of attorney and the declaration by seller) and those that she had caused to be produced (the capital gains tax clearance certificate and the rates clearance certificate). In any case the applicant in her founding affidavit did aver that she signed the agreement of sale, power of attorney to pass transfer and the seller's declaration. With these admissions by the applicant it was difficult to understand or know how Tafadzwa Mavhunga defrauded her of her property in the absence of an explanation of how the fraud was perpetrated. The applicant did not even dispute that she went to ZIMRA for an interview *vis a vis* the issuance of the capital gains tax clearance certificate.

Besides, although the applicant made the averment that she was defrauded of her property pursuant to a loan that she had obtained from Tafadzwa Mavhunga she did not adduce any evidence of that loan agreement, not even the receipts to support that she had repaid the money as she said. She did not explain anything about having receipts or lack of them. It was just her word that she entered into a loan agreement and that she repaid various amounts without an indication of how much she paid back and whether or not she was issued with any receipts.

In November 2014, the respondent obtained title deeds to the property. There is no explanation why the applicant took no action about it. When the respondent asked her to vacate from the premises, she took no action until she was served with eviction summons in March 2015. That is when she made a counter claim for a *declaratur* and asked for stay of the eviction

proceedings whilst she filed proceedings for a *declaratur* in this court. Although she went on to issue summons for the *declaratur* on 1 July 2015, by November 2015 the summons had not been served on the respondent resulting in the respondent making the application for a *declaratur* herself. So despite having the knowledge that she had been defrauded of her property the applicant was very relaxed about it. She never took the initiative to claim her property back and reverse the alleged illegal transfers that had been done by Tafadzwa Mavhunga.

With all these factors, I was not satisfied that the applicant has a *bona fide* defence to the merits of the respondent's case and has prospects of success.

The bona fides of the application for rescission

The lackadaisical approach the applicant took in dealing with this matter right from the time she learnt that she had been defrauded of her property up to the time the respondent applied for a *declaratur* did not satisfy me that the application for rescission was being made *bona fide*. It appeared to me that she was doing it just to prolong her stay at the property since the more the case delays in being finalised, the better for her as her stay at this property is extended. She does not suffer any prejudice at all.

Conclusion

The explanation for the default was not reasonable, the application for rescission was not *bona fide* and the defence of the applicant on the merits was not shown to be *bona fide* and to carry any prospects of success. It is for these reasons that l dismissed the application for rescission of the default judgment with costs.

Mushangwe & Company, applicant's legal practitioners
Stansilous & Associates, respondent's legal practitioners