

PETER VALENTINE
versus
MYDALE INTERNATIONAL MARKETING (PVT) LTD
and
GOLDEN RWAYI

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, September 12, 2017 and May 10, 2018

Opposed Application

S T Mutema, for the applicant
F. Mahere, for the 2nd respondent.

CHITAKUNYE J. This is an application for the rescission of a default judgment entered by this court against the applicant on the 14th March 2017 in HC 669/16. That order was to the effect that:-

1. 1st respondent be sentenced to 24 months imprisonment of which 12 months is suspended for good behaviour, effective 12 months.
2. 1st respondent to pay costs on attorney and client scale.

The application is opposed by the second respondent.

On the date of the hearing applicant raised a point *in limine* on the *locus standi* of second respondent and the fact that applicant had not been served personally with the application for contempt of court that led to the default judgment.

The second respondent's counsel on the other hand also raised a point *in limine* alleging that as the applicant had not attached the default judgment in question, there was no cause of action.

After counsel had made their respective submissions I indicated that they must proceed with arguments on the main matter and my decision of the points *in limine* will be in the main judgement.

I took the above decision based on the circumstances of the case which in my view makes for sad reading in the administration of justice.

The applicant and the second respondent are virtually involved in a battle for directorship of first respondent. This battle has had its twists and turns all pointing to an acrimonious relationship between the two parties.

It is common cause that on the 24th April 2013, the respondents obtained an order by default in HC 2470/13 in which applicant and Francis Katsande were interdicted from holding themselves out as representatives of the first respondent, Mydale International Marketing (Pvt) Ltd.

It is this order that respondents upon seeing that applicant and Francis Katsande were not complying with approached this court on the 25th January 2016 with an application for contempt of court. The respondents sought an order that:-

1. 1st and 2nd respondents be sentenced to 24 months imprisonment of which 12 months is suspended for good behaviour, effective 12 months each.
2. 1st and 2nd respondents pay costs on attorney and client scale.

Prior to that matter, in HC1687/10, in an order dated 20th June 2012, first respondent represented by the said F Katsande as instructed by applicant had obtained judgement in its favour. That order included, *inter alia*, a directive that Venturas and Samukange, legal practitioners, surrender a sum of \$28 500-00 to the registrar of the High Court who would in turn release the money to the applicant (1st respondent in this case) upon appropriate proof of the directorship of the applicant.

In that regard clause 5 of HC 1687/10 provided that:-

“The Registrar of the High Court be and is hereby directed to release to the Applicant the said amount in paragraph 4 hereof upon appropriate proof of the directorship of the Applicant.”

After the 24 April 2013 judgement, F Katsande continued to represent first respondent as instructed by applicant in matters pertaining to the recovery of the \$28 500-00.

In furtherance of the directive in clause 5 in HC1687/10 on 20 April 2016 the Registrar of the High Court wrote a letter to the Registrar of Companies seeking assistance in ascertaining the directors of first respondent.

In his response of the 28 April 2016, the Registrar of Companies indicated that according to his records the current directors of first respondent (MYDALE International Marketing P/L Company) were Alison Alan Leslie and Valentine Peter. In this regard the company's CR14 was duly attached. As far as records at the company's registry are concerned therefore applicant is a director of the first respondent.

The sum in question was subsequently released to F Katsande Legal practitioners in their capacity as Mydale International Marketing P/L's legal practitioners.

It is in that regard that applicant, though interdicted, continued to give instructions to Katsande & Partners to represent first respondent in these courts.

In the meantime on 25th January 2016 the 2nd respondent filed the contempt of court application against applicant and Francis Katsande. In his application as reflected in HC 669/16 he sought civil imprisonment of the applicant and Francis Katsande in the terms alluded to above. This is the application which was granted in default of applicant on the 14th March 2017. Francis Katsande attended the hearing as party to the matter and not representative of applicant.

The applicant alleged that he received a notice of set down of the application for contempt through his gardener on the date the hearing was to take place. He duly attended court albeit ill prepared. The notice of set down showed that the hearing was to be before MANGOTA J. When he got to court he found out that the matter was in fact to be heard before TAGU J. When the contempt of court proceedings commenced in Court J he raised issue with the manner in which service of the process had been done and that he had only learnt at court that it was an application for contempt of court. He indicated that he needed time to respond to the application. As he had not had time to prepare for the hearing he sought court's indulgence to enable him to respond to the application.

As a consequence court adjourned and, to his understanding, court was to resume at 3.30 pm in the same court room on the same date.

He thus went away and hurriedly prepared his notice of opposition and returned to the same court room at about 3: 30pm. He waited and as no court official came he approached the presiding judge's clerk to inquire on the matter. It was then that he was advised that the matter had in fact been heard in the judge's chambers and, as he was in default, a default order for him to be imprisoned for 100 days had been granted.

He thereafter sought advice after which he filed this application for rescission and for leave to file a supplementary affidavit if rescission is granted within 12 days of the date of the order. In order to avert incarceration he also made an urgent chamber application for stay of execution of the default order. That application was granted hence he was not arrested. The second respondent opposed the application. He contended that the applicant was in wilful default and had no prospects of success on the main application.

Upon perusal of the papers filed of record I was of the view that the circumstances and gravity of the matter did not warrant the determination of the rights and interests of the parties on such technical aspects as the omission to attach the default order. This is a matter involving personal liberty which liberty should be jealously guarded and not be sacrificed on technical errors or omissions. In my view, the parties were clear as to which order had been granted in default and so the fact that the order itself was not attached, through an error of omission by applicant's legal practitioner, should not prejudice an applicant who upon learning of the default order swiftly and diligently instructed lawyers to protect his rights. It was for the lawyer to ensure the procedural requirements were met. This court should not allow such ineptitude of a legal practitioner to visit a litigant especially where personal liberty is at stake. (See s 49 of the Constitution)

It was my view that in such matters court should lean in favour of personal liberty and the settling of the real issues as between the parties. If applicant has to be sent to prison for contempt this must only be after he has been given opportune time to defend himself. It is thus appropriate that the merits or demerits of the application be determined. This is unlike a case where it can be said that the respondent did not understand the order being complained about. From his opposing papers the second respondent is very clear on the order at hand and its contents. He is aware of the order he obtained and which has been stayed pending the determination of this application. That is the substance of this application. It is important that we deal with the substance. Thus second respondent should not hide behind applicant's failure to attach the order in question.

As regards the applicant's point *in limine* that second respondent has no *locus standi* to represent first respondent, it is applicant who cited second respondent and so second respondent is entitled to respond to the application. It is also the second respondent who obtained the warrant for applicant's civil imprisonment and it is only logical that he be a party to this application. I am of the view that the issue of second respondent's *locus standi* to represent first respondent in the main matter is an issue to be decided in that application.

The main issue before me is whether or not the default order of the 14 March 2017 should be rescinded or not. The onus is on the applicant to show that there is good and sufficient cause for this court to rescind that default order.

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

- (1) "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

- (2) 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.”

In *Zimbabwe Banking Corp. Ltd v Masendeke* 1995(2) ZLR 400(S) McNALLY had earlier opined that:-

“Wilful default occurs when a party freely takes a decision to refrain from appearing with full knowledge of the service or set down of the matter.”

In *Deweras Farm (Pvt) Ltd & Ors v Zimbabwe Banking Corp Ltd* 1998 (1) ZLR 368(S) at 369 E – H; 370A MCNALLY JA pronounced as follows on “good and sufficient cause” where the aspect of wilful default is raised:

“While it may generally be true to say that when there is wilful default there will usually not be good and sufficient cause, I believe we fetter our discretion improperly if we lay down a fixed rule that when there is wilful default there is no room for good and sufficient cause. I favour the definition of wilful default offered by KING J in *Maujean t/a Audio Video Agencies v Standard Bank of South Africa Ltd* 1994 (3) SA 801 (C) at 803 H-I:

‘More specifically, in the context of a default judgment, ‘wilful’ connotes deliberateness in the sense of knowledge of the action and of its consequences, i.e its legal consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation, for this conduct might be.’

See also *Morkel v ABSA Bank Ltd & Anor* 1996 (1) SA 899 (C). But it is precisely in the ‘motivation’ mentioned in that passage that one might find ‘good and sufficient cause.’ I respectfully agree with the *dicta* of INNES J in the oft-cited case of *Cairns Executors v Goarn* 1912 AD 181 at 186 *passim*. In particular, His Lordship said:

‘It would be quite impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of indulgence. Any attempt to do so would merely hamper the exercise of a discretion which the Rules have purposely made very extensive and which it is highly desirable not to abridge’”.

In casu, it is common cause that applicant had attended the morning session. It was the afternoon session that he did not attend. His explanation was that he understood the time for resumption as 3:30 pm and he indeed came at that time. The second respondent on the other hand contended that the time for resumption was 2:30pm. He did not, however, dispute that applicant in fact came at 3:30 pm.

It is my view that it is not uncommon for parties to a matter to misunderstand the time a matter has been stood down to. In as far as the efforts applicant said he took upon returning to court cannot be refuted it is only fair and just that he be given a benefit of the doubt and accept that he may indeed have mistaken the time for 3:30 pm hence his attendance at that time.

I am thus of the view that his explanation in the circumstances of this case, more so as a self actor at the time is reasonable. It cannot be said with any seriousness that applicant deliberately absconded from attending court when he knew his liberty was at stake. The probability is that he misunderstood the time for resumption. Had it been a deliberate default he surely would not have turned up at 3 30pm when in all probability he would have been handing himself for imprisonment. In fact the impression one gets from the litany of cases to

which the parties have appeared before this court over is that applicant was intent on fighting for what he believed to be his rights and those of first respondent.

The next issue is that of prospects of success.

The applicant alleged that the contempt of court application was not served on him at all. What he received was a notice of set down. In such circumstances he ought to have been personally served with the application itself. It is trite that a party to contempt proceedings must be personally served. In *Mydale International (Pvt) Ltd v Dr Rob Kelly* HH 4/10 GOWORA J (as she then was) aptly stated that:

“It would seem to have escaped the attention of the learned counsel for the applicant that a party against whom an order for contempt is sought must not only be personally cited but that process for such citation must be personally served on the respondent.”

In *casu*, the applicant alleged that he was not served with the application. The second respondent in disputing this stated that applicant was served with the application in the same way he was served with the notice of set down, which was via his gardener. By implication second respondent conceded that no personal service was effected.

It may also be noted that whilst the judgement by BERE J upon which the contempt was premised interdicted applicant and F Katsande from representing first respondent, when these same interdicted parties appeared before CHAREWA J in *F M Katsande Legal Practitioners v Mydale International* HH 225/17, contesting over monies due to first respondent, the learned judge's sentiments were to the effect that applicant was entitled to represent first respondent and so F Katsande could not use the judgment in HC 2470/13 to refuse to pay on the basis that applicant was interdicted from representing 1st respondent. In this regard the learned judge opined that:

“The issue of *locus standi* was peremptorily dealt with in the last paragraph of p 4 of my judgement dated 8 June 2016. Had the Registrar of the High Court, after carrying out the investigations ordered by the Court, established that Peter Valentine was not a director of the Respondent entitled to represent it, then he would not have released the trust funds to applicants. After all applicants' own authority to receive the funds was derived from Peter Valentine's instructions for and on behalf of the respondent. In other words, if Peter Valentine had no authority to act for respondent, then applicant also had no authority to act for respondent and receive its trust funds. The applicant cannot seek to have its cake and eat it too.”

In her prior judgment in *Mydale International Marketing (PVT) Ltd v Katsande Legal Practitioners and another* HC 5800/16 p4 the leaned judge had stated that:

“In para 4, of their undated letter aforesaid, the respondents referred to HC2470/13 and HC 2453/16 as further reasons for refusing to release the trust funds. Clearly HC 2470/13 is not helpful to the respondents, as apart from interdicting Mr. Valentine from holding himself

as a representative of the applicants; it also interdicted the respondents from acting for applicant. to my mind, the fact that the Registrar did pay out the \$ 28 500 respondents' Trust Account obviously meant that he had ascertained that Mr. Valentine properly represented the applicant and also that the respondents were the duly authorised legal practitioners of the applicant in HC1049/09 duly empowered to receive the money.”

The above sentiments were buttressed by the fact that the investigations by the Registrar of the High Court as directed by this court in HC1687/10, had revealed that in terms of the CR14 kept at the Registrar of Companies records Peter Valentine was one of the Directors of the first respondent. That situation has apparently not changed to date.

Though the second respondent contended that he is the rightful Director of first respondent, he did not produce any proof of his directorship or even authority from first respondent to represent it. The applicant, on the other hand, tendered what he said was a resignation letter of second respondent and Company Board Resolution appointing applicant to represent first respondent in the High Court labour disputes and other legal disputes.

I am of the view that the totality of what applicant has used since 2009 to assert his position as director and as the person authorised to represent first respondent cannot be ignored as no other person has tendered contrary documents or evidence. I am of the view that the apparent conflict in the view taken of applicant's *locus standi* is one that requires the parties involved to fully ventilate their respective positions for a most appropriate determination to be made.

On the basis of the above discourse, I am of the view that applicant has shown that he has some prospects of success in the main matter.

As regards his defence to the contempt proceedings the applicant also alluded to the fact that the court order second respondent was relying on was overtaken by subsequent orders from this same court that recognised him as a representative of the first respondent. This would be a point of contention in the main matter.

In as far as it was not disputed that applicant only learnt at court that the matter he had been invited to court for was one of contempt of court, it follows that he was not given adequate time to prepare his response. He asserted that he only had about 4 hours before returning to court to respond to the application. In the absence of evidence that he had been properly served with the application in good time in terms of the rules, I am inclined to grant him leave to file a supplementary affidavit as the one he filed was prepared hurriedly to meet the courts timeline of resuming the hearing in the afternoon of the same day.

Accordingly I am of the view that the applicant has shown good and sufficient cause for the rescission of the default judgement entered against him on the 14th March 2017 in HC669/16

Accordingly it is hereby ordered that:

1. The default judgement granted in HC 669/16 of the 14 March 2017 be and is hereby rescinded.
2. The applicant is hereby granted leave to file a supplementary affidavit in HC669/16 within 12 days of the date of this order.
3. The 2nd respondent shall bear costs of suit on the ordinary scale.

Stansilous & Associates, Applicant's legal practitioners
Venturas and Samukange, Respondents' legal practitioners