ITAI VALERIE PASI
and
WILLOUGHBY'S INVESTMENTS PRIVATE LIMITED
versus
STALAP INVESTMENTS PRIVATE LIMITED
and
ZIMRE HOLDINGS PRIVATE LIMITED
DOUGLAS MAMVURA
RAMSWAY INVESTMENTS PRIVATE LIMITED
CFI HOLDINGS LIMITED

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 26 November & 19 December 2018

Opposed Application

T. Mpofu for the applicants
A. B. C. Chinake for the 1st , 2nd & 4th respondents

ZHOU J: This is an application for the setting aside of the judgment given in default of the applicants in Case No. HC 11164/17. The judgment was given on 15 May 2018. The application is opposed by the first, second and fourth respondents. In addition to contesting the application on the merits the respondents took certain objections *in limine* which the court would need to consider first. However, a consideration of the grounds of objection requires that the background facts be outlined first as they are relevant to the determination of the objections *in limine*. The following are the material facts which underlie this application.

The first applicant is a legal practitioner and partner in the firm of attorneys which represents the applicants herein, Mushoriwa Pasi Corporate Attorneys. She is a director of the sixth respondent. She states that she is the Acting Chairperson of the Board of Directors although that position has been challenged and she was declared to have been unlawfully appointed to that position. The declaration was by order of this court which is the subject of the present application. The second applicant is a shareholder in the sixth respondent. The two applicants together with the sixth respondent herein were the respondents in Case No. HC 11164/17 which is a matter in which

the first, second, third and fourth respondents as the applicants in that matter obtained the following order:

> "1. It be and is hereby declared that:
>
> 1.1 1st respondent did not comply with the Zimbabwe Stock Exchange Listing Rules Section 11 and 16 in calling and holding the requisitioned meeting and that the failure by 1st respondent to comply prejudiced the shareholders of the third respondent. Consequently, requisitioned meeting on 15 November 2015 be and is hereby set aside.
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> 1.2 The 2nd respondent was not lawfully appointed as the chairperson of 3rd respondent for the purposes of the requisitioned Extraordinary General Meeting of 15 November 2017 and consequently she was not able to lawfully preside over the proceedings and therefore the proceedings are hereby declared a nullity.
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> 1.3 2nd respondent acted improperly and in a gross (*sic*) unreasonable and irregular manner in her conduct of the EGM.
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> 1.4 3rd respondent cannot hold Extraordinary General Meetings without complying with the Zimbabwe Stock Exchange Listing Rules or its own Articles of Association.
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> 2. By extension and in the result, the requisitioned Extraordinary Meeting of 15 November 2017 and/or any and all decisions purported to have been made thereat be and are hereby set aside.
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> 3. 1st and 2nd respondents jointly and severally, the one paying the other to be absolved, shall pay the costs associated with this application and the requisitioned Extraordinary General Meeting on a legal practitioner and client scale.
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> 4. A copy of this order shall be served on the Law Society of Zimbabwe by the applicant's legal practitioners for the Law Society of Zimbabwe to take any or such further action as it may wish in respect of the conduct of 2nd respondent in connection with the manner in which she handled the requisitioned Extraordinary General Meeting of 15 November 2017."

The above judgment was given in default of the first and second applicants and the sixth respondent who were cited as the second, first and third respondents respectively in that matter. The circumstances in which the default judgment in HC 11164/17 was given are as follows. The court application in Case No. HC 11164/17 was served upon the applicants on 1 December 2017. The applicants filed their notice of opposition and opposing affidavits on 15 December 2017. On 22 January 2018 the applicants filed an application for dismissal of Case No. HC 11164/17 for want of prosecution under Case No. HC 516/18. The respondents filed their answering affidavit in the main matter, Case No. HC 11164/17, on 2 February 2018 after they had been served with the

application for dismissal for want of prosecution. The record shows that on 6 April 2018 a notice of set down in respect of the main matter was served upon the applicants' legal practitioners at 14:27 hours. Case No. HC 516/18 was heard on 30 April 2018 and judgment therein was reserved. From the affidavits filed in the instant application it is common cause that at the hearing of the application for dismissal for want of prosecution it was brought to the attention of counsel representing the applicants that the main matter had already been set down. But his brief at that time was only in relation to the application for dismissal. On 9 May 2018 the applicants' legal practitioners wrote a letter which was delivered to the respondents' legal practitioners on 10 May 2018 referring to the earlier indication that the main matter had been set down and advised that they had not yet received the notice of set down. They asked to be furnished with a copy of the notice of set down. Another copy of the notice of set down was delivered to applicants' legal practitioners on 10 May 2018. The applicants' case is that both copies of the notice of set down did not come to the attention of the legal practitioner who is dealing with the matter.

The first objection taken on behalf of the respondents is that the sixth respondent did not file opposing papers in the main Case and that the papers filed on its behalf *in casu* do not constitute a valid notice of opposition because they are not signed on its behalf by a legal practitioner. The papers filed on behalf of the sixth respondent in the present matter do not purport to be opposing papers. The affidavit filed under cover of a "notice of filing" was deposed to by one Panganayi Hare who is the Company Secretary for the sixth respondent. He merely places on record the sixth respondent's election to abide by the decision of the court. The affidavit is of no consequence. The objection to it is equally academic and of no consequence and is dismissed for that reason.

The second point taken pertains to the *locus standi* of the applicant in the main case. This point is of no relevance to the present application. Its taking does not assist the court in resolving the present application or any part of it. For that reason, it is dismissed.

The third objection *in limine* is to the representation of the applicants by their legal practitioner in this application as well as in Case No. HC 11164/17. I will consider the objection in the context of the instant application for the setting aside of a judgment given in default but hope that the observations made herein will assist the concerned legal practitioners going forward. The basis upon which the objection is taken is that Messrs Mushoriwa Pasi Corporate Attorneys are precluded from representing the applicants by reason of the first applicant being a partner in

that law firm and for the reason that her Chairmanship of the sixth respondent is being contested. It was submitted on behalf of the respondents that the first respondent is advancing her interests as well as those of the second applicant which are in conflict with the interests of the sixth respondent. It is common cause that the second applicant, first respondent, second respondent and third respondent are shareholders in the sixth respondent. The first applicant's firm of attorneys represents some parties in Case No. HC 11164/17 and HC 4838/18. In HC 11164/17 the first applicant's law firm represents the second applicant as well. The respondents submit that the involvement of the first applicant and his law firm in these cases is prejudicial to the other shareholders.

This court can prevent a legal practitioner from acting where a conflict of interest arises. In the case of *Watson v Gilson Enterprises & Ors* 1997 (2) ZLR 318(H) at 324E-F, GILLESPIE J said:

> "This court has previously held that it will in the appropriate case take action to prevent the appearance in a matter of a legal practitioner where that appearance gives rise to a conflict of interest. In particular, such a conflict may be shown to have arisen when in the course of acting for one party that legal practitioner may have received confidential instructions which may be of use to a future opponent should the same legal practitioner purport subsequently to act for that opponent."

See also *Bernmac Engineering (Pvt) Ltd v Angelique Enterprises (Pvt) Ltd* 1988 (2) ZLR 52 (H) at 55G and 58A.

The list of cases in which conflict of interest might arise in relation to a legal practitioner can never be exhaustive. It is also undesirable to attempt to draw up such an exhaustive list. Apart from the instance pointed out above, conflict might arise where a legal practitioner acts for parties with conflicting interests, *Towers v Chitapa* 1996 (2) ZLR 261(H); where a former client of a legal practitioner is involved in litigation against present clients of the same legal practitioners or where the partner in a law firm cannot act for a client because of a conflict of interests and another partner or lawyer in the same law firm acts for that very same client, *Pertsilis v Calcaterra & Anor* 1999 (1) ZLR 70 (H) at 74B-75F, also *Longhurst NO v Lee & Ors* 2006 (1) ZLR 367(H), *Mutanga* v *Mutanga* 2004 (1) ZLR 475(H), *Base Minerals Zimbabwe (Pvt) Ltd & Anor* v *Chiroswa Minerals* 2016 (1) ZLR 78(H) where the legal practitioner had not only acted for the affected company but had been a director of that company before; where the same legal practitioner or counsel seeks to appear for a labour officer or other decision maker and either of the parties to the dispute to which

the decision relates, *Blue Ribbon Foods Ltd* v *Dube NO & Anor* 1993 (2) ZLR 146(S); where the opposing legal practitioner had acted as arbitrator in a matter between the parties and in that course acquired information which could be used to the detriment or prejudice of that other party, compare *Dobrock Holdings (Pvt) Ltd* v *Turner & Sons (Pvt) Ltd & Ors; Turner & Sons (Pvt) Ltd* v *Zambezi Paddle Steamer (Pvt) Ltd & Anor* 2006 (2) ZLR 353. Each case must be decided on its own facts.

I would have no difficulty in coming to the conclusion that there would be a conflict of interest on the part of Messrs Mushoriwa Pasi Corporate Attorneys in relation to the main case, HC 11164/17 if that case was before me. The first applicant is a party whose Chairmanship is being contested and allegations of impropriety are being made against her. It is inconceivable that her law firm would represent her without relying on certain information which she obtained in the course of her directorship of the sixth respondent and in her interaction with the other directors and shareholders who are involved in the dispute. The representation of the second applicant in a dispute involving the other shareholders of the sixth respondent equally presents a situation of conflict of interest for the first applicant's law firm. The first applicant and her law firm cannot be acting fairly when they represent one shareholder against the other shareholders in a dispute pertaining to a company in which the applicant also claims to be the chairperson of the Board of Directors.

The approach to the instant application could be slightly different albeit some aspects of the conflict do afflict it, especially insofar as the question of prospects of success in the main matter must be considered when assessing the *bona fides* of the applicants' case on the merits. I do not believe, though, that it would be just to order the legal practitioners to stop representing the applicants at this juncture because the factors which are relevant to the determination of good and sufficient cause for the purposes of r 63 (2) of the High Court Rules, 1971 will not involve an inquiry into information which could be prejudicial to the respondents. The reasonableness of the explanation for the default is assessed by reference to the conduct of the applicants and the legal practitioners alone, as is the case with the *bona fides* of the application to rescind. In relation to the *bona fides* of the applicants' defence in the main case the inquiry is limited to whether the applicants have raised a defence or defences which warrant investigation. Whatever confidential information was received by the applicant or her law firm is of very little influence in this matter which is only an application for the rescission of a default judgment. I am therefore prepared to

deal with this matter on the merits notwithstanding the aspects of it which would make it inappropriate for the first applicant's law firm to continue to act for one or some of the parties to the dispute over or concerning the sixth respondent. The objection to the involvement of Mushoriwa Pasi Corporate Attorneys is therefore dismissed. However, I would urge Mushoriwa Pasi Corporate Attorneys to seriously introspect in relation to their involvement in the main matter as well as any dispute involving the shareholders of the sixth respondent.

The last objection *in limine* is that the first applicant has no personal knowledge of the facts surrounding the Annual General Meeting of the sixth respondent which was held in 2015. The submission is therefore that her evidence pertaining to that meeting is inadmissible hearsay evidence. For the purposes of this application the events pertaining to that meeting are of no relevance. Indeed, the dispute is about the meeting of 2017 at which the first applicant was appointed to Chair the Board. Her evidence on that meeting is clearly not hearsay. The objection is accordingly dismissed.

On the merits, the applicants must show on a balance of probabilities that there is good and sufficient cause for the default judgment to be set aside, see r 63(2) of the *High Court Rules, 1971*. In determining whether good and sufficient cause has been shown the court will take into account (a) the reasonableness of the explanation for the default, (b) the *bona fides* of the application to rescind the default judgment, and (c) the *bona fides* of the defence on the merits which carries some prospect of success. The authorities show that "these factors must be considered not only individually but in conjunction with one another and with the application as a whole", *stockil* v *Griffiths* 1992 (1) ZLR 172(S) at 173D-F; *Mdokwani* v *Shoniwa* 1992 (1) ZLR 269 (S) at 270B-D. The applicants *in case* did not become aware of the date of the hearing until after default judgment had been granted.

There is an element of carelessness in the manner that the notice of set down was handled at the offices of the applicants' legal practitioners. It is understandable that in the course of business documents do get lost or misplaced in the offices of the attorneys but when the same mistake recurs in respect of the same notice of set down then that shows disorder in the office. The fact, however, is that the legal practitioner who was handling the matter on behalf of the applicant did not see the notice of set down. He has thus explained his predicament insofar as his failure to know the exact date on which the matter was set down is concerned. Therefore, the

careless handling of the documents notwithstanding, there is no evidence to show that the applicants' legal practitioner with the full knowledge of the set down freely took a deliberate decision to refrain from defending the matter, see *Zimbabwe Banking Corporation v Masendeke* 1995 (2) ZLR 400(S) at 402D; *Neuman (Pvt) Ltd* v *Marks* 1960 (2) SA 170(SR) at 173; *Mdokwani* v *Shoniwa, supra,* at 271B-C. The letters written by the applicants' legal practitioners trying to follow-up on the issue of the notice of set down show that they intended to prosecute their clients' case. The record shows that they had taken the initiative to apply for the dismissal of the main application for want of prosecution which application was subsequently dismissed. Their carelessness in not telephoning the respondents' legal practitioners or checking with the record at the registrar's office is not conduct that would constitute wilful disdain of the rules of court which would justify penalising the applicants for that, compare *Beitbridge Rural District Council* v *Russell Construction Co* 1998 (2) ZLR 190(S) at 193A-G. Indeed, when they became aware of the default judgment on the same day that it was granted they wrote a letter to the respondents' legal practitioners on 15 May 2018 and explained their clients' default. I am therefore satisfied that the applicants' legal practitioners gave a reasonable explanation for their failure to attend court on 15 May 2018 when the default judgment was granted.

As regards the *bona fides* of the defence on the merits this court must be satisfied that the applicants have set out a case which on the face of it cannot be rejected out of hand and warrants investigation, *Mdokwani* v *Shoniwa (supra)* at 274C. Case No. HC 11164/17 raises the question of whether there was a failure to comply with the sections 11 and 16 of the Listing Rules of the Zimbabwe Stock Exchange in the calling and holding of the disputed meeting and the effect of the alleged failure to comply with the said provisions of those rules. The applicants' case is that the meeting was properly called and conducted pursuant to a request by one of the shareholders of the sixth respondent. The applicant also point to the requirement to approach the relevant Committee of the Zimbabwe Stock Exchange as the domestic remedy which should have been pursued by the respondents to resolve any complaint regarding a failure to comply with the Listing Rules. There is also the question of whether the first applicant was properly appointed to chair the proceedings of the Board. Not only did the respondents challenge her appointment; they went further to impute upon her misconduct which would justify the involvement of the Law Society of Zimbabwe. The question of whether the manner in which the first applicant conducted herself in relation to the

meeting is one that impacts upon her suitability to be a legal practitioner is one that is serious and ought to be dealt with after the first applicant has been heard. She was clearly not acting as a legal practitioner when she handled that meeting. This means that the court will be called upon to look at whether it is conduct outside the course of practising law that would constitute misconduct. On the facts alleged she has a strong case to challenge the involvement of the Law Society of Zimbabwe in that matter. Even if she acted contrary to the rules of the Zimbabwe Stock Exchange as alleged that alone is not dishonourable conduct or conduct that would bring the profession into disrepute. The main case thus raises important questions of law which must be properly ventilated in a full hearing. I therefore conclude that the applicants' case on the merits is *bona fide* and has prospects of success.

In considering the *bona fides* of the application to rescind the court looks at the totality of the circumstances, including the conduct of the applicants in relation to the dispute in which the default judgment was granted. The applicants had always shown an inclination to enforce their rights as shown by the fact that at some point they sought dismissal of the main application for want of prosecution. Even as they defaulted by failing to attend the hearing, there was consistent communication with the respondents' legal practitioners to attempt to establish the exact date on which the matter was set down for argument. As soon as they discovered that default judgment had been granted the applicants through their legal practitioners communicated their situation to the respondents and instituted the instant application within the period prescribed by the rules of court. The matters which they raise in opposition to the main application are genuine.

Having regard to the facts and circumstances of this case, I am convinced that the applicants have succeeded in showing good and sufficient cause for the default judgment to be rescinded.

In the result, IT IS ORDERED THAT:

1. The judgment given in default of the applicants in Case No. HC 11164/17 on 15 May 2018 be and is hereby set aside.
2. Costs are to be in the cause in Case No. HC 11164/17.

Mushoriwa Pasi Corporate Attorney, applicants' legal practitioners
Kantor & Immerman, 1st, 2nd & 4th respondents' legal practitioners