CBZ BANK LIMITED
versus
HOME SWEET HOME (PVT) LTD
and
WELLINGTON MURAMBA
and
RUWA MURAMBA

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 4 June 2019 & 12 June 2019

Opposed Application

T Chivale, for the applicant
W Muramba, for the 1st respondent
In person 2nd & 3rd respondents

MATHONSI J: This is an application made in terms of r 236 (3) of the High Court Rules, 1971 for the dismissal of an application for rescission of judgment in case number HC 11640/15 filed by the three respondents out of this court on 18 February 2015, for want of prosecution the respondents having failed to file an answering affidavit or to set the matter down within the time allowed by the rules. The application is opposed by the respondents who have filed a lot of extraneous papers and made a lot of arguments which have nothing to do with the issues at hand in an application of this nature. In fact it would be fair to say that the parties have travelled a long winding journey over the past 4 ½ years but going nowhere.

On 5 June 2014, this court granted default judgment in favour of the applicant against the first respondent (as first defendant) in case number HC 9196/13 in the sum of US$83 572.97 together with interest and costs of suit in respect of an outstanding loan. On 15 October 2014, again this court granted default judgment against the second and third respondents (as second and

third defendant therein) for the same amount jointly and severally. It is those 2 court orders which the respondents sought to have rescinded in their application filed as HC 1509/15, an application they filed through the medium of Gill, Godlonton & Gerrans legal practitioners.

On 5 March 2015 the applicant filed a notice of opposition and opposing affidavit in that application insisting that the respondents had been in willful default and did not have a valid defence to the applicant's claim in the main action. In breach of r 236 (3) of this court's rules, the respondents did not file an answering affidavit to the opposition, neither did they seek to have the matter set down for argument. A courteous reminder through a letter written by the applicant's legal practitioners on 30 July 2015 did not attract any positive response. Instead the respondents' legal practitioners renounced agency on 17 August 2015 more than 2 weeks after being reminded to prosecute the application.

On 27 November 2015, more than 8 months after filing opposition to the application, the applicant filed this application for dismissal of the application for want of prosecution. The respondents opposed the application. In voluminous opposing papers containing very little relevant material they sought to justify their failure to prosecute their application timeously. The second respondent stated in his opposing affidavit that there was a delay when they made an application for condonation, for which no case number was given, seeking leave to file their application for rescission out of time. The only application for condonation for which the respondents gave a case number is HC 10758/16 which does not explain the delay at all.

It is an application they initially filed on 24 October 2016 before refilling it in amended form on 13 February 2017. They were asking for condonation to file a rescission of judgment application out of time in respect of an order granted in default by this court on 29 January 2016 in the present application. The court had allowed the application in default when the respondents had filed opposition. The condonation was granted on 22 March 2017 while the default judgment itself was rescinded on 31 July 2017. Clearly therefore their excursion in that regard cannot explain their failure to prosecute their application in 2015 which application is sought to be dismissed in this application.

Muramba also stated that further delay occurred when they pursued an urgent application, which had been filed simultaneously with the rescission of judgment application on 18 February 2015, for a stay of execution. That application was not successful but was removed from the roll

when their legal practitioners pursued an out of court settlement which led to the release of their property placed under judicial attachment. I am unable to see how that activity would have anything to do with the delay in pursuing the rescission of judgment application which was the main reason why a stay of execution was sought.

The third explanation proferred for the delay by the respondents is that they stopped pursuing the application while they engaged in negotiations with the applicant in order to agree on the exact amount owed to the applicant. They were disputing the amount awarded to the applicant in the court orders. In that regard they held a meeting with the applicant on 5 March 2015 but failed to resolve the dispute. I can only observe that 5 March 2015 is the same date that the applicant filed its opposition to the respondents' rescission of judgment application. It is from that date that the time for filing an answering affidavit or setting the matter down for hearing was reckoned. The respondents therefore had the full period of one month from the date the negotiations failed during which to comply with the rules. They did not.

Finally the respondents placed the blame on the applicant's legal practitioners for their failure to prosecute their application on time. According to them, the legal practitioners in question caused the delay by filing a notice of opposition on 5 March 2015 the very day that a meeting to settle the dispute was convened and thereafter they abandoned the spirit of negotiations communicating that decision in a letter of 30 March 2015. After that letter those legal practitioners stopped responding to correspondence from the applicant's legal practitioners. I am unable to see how these claims can pass for a reasonable explanation for the respondents' failure to act from 5 March 2015 when opposition to their application was filed right up to 27 November 2015 when this application was filed. If anything, all the respondents have given are lame excuses.

It is not even like they did not have the benefit of legal counsel. At that time they were still represented by their erstwhile lawyers, who only renounced urgency on 17 August 2015. Given that a reminder was sent to them on 30 July 2015, 4 months before this application was filed and 3 months after the time to act had expired, the respondents must be taken to have known the consequences of their failure to act.

> In terms of r 236 (3):
> "Where the respondent has filed a notice of opposition and an opposing affidavit and, within one month thereafter the applicant has neither filed an answering affidavit nor set the matter down for hearing, the respondent, on notice to the applicant, may either-
> (a) set the matter down for hearing in terms of rule 223; or

> (b) make a chamber application to dismiss the matter for want of prosecution, and the judge may order the matter to be dismissed with costs or make such other order on such other terms as he thinks fit."

Clearly the respondent in the position of the present applicant has a discretion reposed by r 236 (3) to either set matter down or to seek its dismissal for want of prosecution. In this case the applicant elected to seek an order dismissing the application for want of prosecution. There being an obvious failure to comply with the rules, the issue for determination is whether the respondents have rendered a reasonable explanation for the failure to comply with the rules which explanation can motivate this court to turn down the application for dismissal. Before determining that issue, I have to deal with a point taken by Mr Muramba in *limine*.

Mr Muramba submitted that the application is fatally defective by reason of non-compliance with r 241 (1) of the High court Rules. Relying on the authority of *Marick Trading (Pvt) Ltd* v *Old Mutual Life Assurance Company Zimbabwe Ltd and Anor* 2015 (2) ZLR 343 (H) Mr Muramba submitted that while the chamber application had to be served on the respondents by virtue of r 236 (3) providing for notice to be given, the applicant did not give a *dies inducae* among other rights due to the respondents as contained in Form 29.

The proviso to r 241 (1) states that a chamber application to be served on an interested party must be in Form 29 with appropriate modifications. That Form is in essence the one used in court applications. In my view the importance of that proviso is that it bestows upon interested parties the right to be served with the chamber application in order to decide whether to oppose it or not. Where the applicant has complied with the requirement for service and accorded the interested parties service and the opportunity to contest the application there is adequate compliance with that provision. In fact in the present matter the respondents were served with the application and allowed to file opposition, which they did.

It has been stated that the rules of court are provided to assist the court in its role of dispensing justice and to provide litigants with guidance on how to approach the court. The rules were never designed as a bulwark against access to justice even though litigants are required to comply with them. I subscribe to the remarks of BECK J in *Scottish Rhodesian Ltd* v *Honiball 1973* (2) SA 247 (R) that:

> "Rules of court are not laws of the Medes and Persian and in suitable cases the court will not suffer sensible arrangements between the parties to be sacrificed on the alter of slavish obedience to the letter of the rules ……"

In *Nxasan* v *Minister of Justice and Anor* 1976 (3) SA 74 at 81 the court made the crucial point which I fully associate with that:

> "The rules after all are the court tools fashioned for its own use. They are more flexible and more easily adapt to meet particular needs than a statute can ever be."

Here is a case where the relevant rule in terms of which the application is made requires that it be made "on notice" to all interested persons. The applicant did give that notice to all the interested persons who are in court having suffered no prejudice. To insist on a particular Form being used, just for printing purposes, is a slavish obedience not useful to either the court or the parties. It is to worry more about form than substance.

I am aware that MAFUSIRE J took a very strict view *Marick Trading (Pvt) Ltd*, *supra* that if a chamber application is to be served on the respondent a failure to comply with r 241 (1) should be fatal to the application. With respect it is a view which I do not share. In my view, as long as the factor of giving notice to the respondents has been complied with and the respondents have not been prejudiced by the failure to reproduce Form 29 in the chamber application, no useful purpose would be served by rejecting the application on that technicality. It occurs to me that doing so would be to worry more about form than substance, the latter being that the respondents should be served with the application and accorded an opportunity to oppose the application. I am therefore inclined to depart from the approach in *Marick Trading (Pvt) Ltd*, *supra*. I dismiss the point *in limine*.

On the merits of the matter, the applicant has shown that the respondents failed to comply with the rules relating to prosecution of their application. The applicant, as I have said, is entitled to elect to seek a dismissal of the application for want of prosecution. On the other hand, in order to defeat the application the respondents are required to give a reasonable explanation for the delay or the failure to comply with the rules.

Indeed it is settled in our jurisdiction that where a party has fallen foul of the rules, generally they are required to purge the default by seeking condonation. If condonation has not been sought for failure to abide by the rules, the offending party must give an acceptable explanation, not just for the delay, but also for the delay in seeking condonation. Authorities make it clear that what calls for some acceptable explanation is both the failure to abide by the rules and the failure to seek condonation for it. See *Viking Woodworks (Pvt) Ltd* v *Blue Bells Enterprises*

(Pvt) Ltd 1998 (2) ZLR 249 (S) at 251 C-D; *Maheya* v *Independent African Church* 2007 (2) ZLR 319 (S) at 323 B-C; *Saloojee & AnorNNO* v *Minister of Community Development* 1965 (2) SA 135 (A) at 138 H.

I stand by what I stated in *Agricultural Bank of Zimbabwe Limited* v *Chasi & Ors* HH 111-19 that in order to defeat an application for dismissal of an application for want of prosecution, the respondent must render an acceptable and reasonable explanation for the failure to file an answering affidavit or to motive the set down of the application and that r 236 (3) gives the court the discretion to either grant the application with costs or make any other order it deems fit. The court cannot exercise its discretion in favour of the respondent if not satisfied with the explanation for failure to act timeously.

In that case I made the point that rules of court are there to be complied with which is why they are published in advance for the benefit of the litigating public. The overriding consideration for the court considering the explanation given for the delay is to exercise the discretion in such a manner as to give effect to the intention of the law giver. There is no doubt that the intention in enacting r 236 (3) is to ensure that matters are brought to court expeditiously. See the remarks of CHINHENGO J in *Scotfin Ltd* v *Mtetwa* 2001 (1) ZLR 249 (H) at 250 C-D.

The respondents in this case have not given a reasonable and acceptable explanation for their failure to comply with the rules. Their main excuse that the delay was caused by the need to negotiate a settlement is as unreasonable as it is disingenuous. Surely if the applicant filed opposition to their application on 5 March 2015, the very day that negotiations failed and its legal practitioners were consistently unco-operative thereafter, this was the more reason why the respondents needed to vigorously pursue their application. They did not. They were pretty much aware that the applicant was clutching judgment entered in its favour, it had refused to yield during the meeting held on 5 March 2015 and thereafter its legal practitioners were not responding to correspondence only remembering to warn them on 30 July 2015 to prosecute the application in terms of the rules. Still the respondents were unmoved. I can only exercise my discretion against the respondents and in favour of the applicant.

Accordingly it is ordered that:

1. The 1st, 2nd and 3rd respondents' application for rescission of judgment filed as HC 1509/15 is hereby dismissed for want of prosecution.

2. The 1st, 2nd and 3rd respondents shall pay the costs of suit jointly and severally, the one paying the others to be absolved.

V Nyemba & Associates, applicant's legal practitioners

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