Judgment No. HB 11/2004
Case No. HCA 97/2003

THOKOZANI KHUMALO

Versus

D S MAFURIRANO

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND NDOU JJ
BULAWAYO 20 JANUARY, SEPTEMBER 2003 & 19 FEBRUARY 2004

Ms Moyo for appellant
V Majoko for respondent

Judgment

NDOU J: The respondent issued summons against the appellant at Bulawayo Provincial Magistrates' Court. The respondent sought an order in the following terms:

"… (a) payment in the sum of $121 500,00
(b) payment on pro-rata basis as hold over damages at the rate of $666,67 per day.
(c) Ejectment of defendant from the premises, and
(d) Costs of suit."

The summons were issued on 30 May 2002 and served on the appellant by the Messenger of Court on 7 June 2002. The appellant, through his legal practitioners did not enter appearance to defend the matter. The appellant instead on 12 June 2002 requested for further particulars. This is the source of the appellant's problem which resulted in these proceedings. This was a major error of judgment which he is now trying to correct through these proceedings. It is trite that in every civil action a defendant who wishes to defend the proceedings must, within the time allowed after the service of summons on him, the *dies induciae*, deliver a notice of intention to defend, either personally or through his legal practitioner – *Visser* v *Visser* 1986 (2) SA 598 (NC), *Express Container Movers CC* v *Mountjoy* 1993 (2) SA 302 (W).

A request for further particulars is a pleading available to the defendant who has entered an appearance to defend. Failure to give notice of intention to defend is an indication that the defendant has no desire to defend the proceedings, and in certain cases will give the plaintiff the right to apply for default judgment. The defendant is entitled to request further particulars for the purpose of pleading.

On the day the request for further particulars was filed on 12 June 2002 the Provincial Magistrate directed a minute to the Clerk of Court in the following terms –

> "The defendant must have entered an appearance to defend before asking for particulars. Please find out."

It appears the appellant did not act in terms of this counsel (i.e. assuming it was brought to his attention). The result was that on 17 June 2002 the respondent applied for a judgment in default of appearance. Judgment was entered in favour of the respondent. A writ of ejectment was subsequently issues. On 15 July 2002 the appellant filed an application for rescission of judgment. His explanation for the default in entering appearance to defend was in the following terms. The summons, he admits, were served on his gardener (the appellant referred to him as "garden boy" in his papers – I am not comfortable with said reference). He admits that the same day that he was served, 7 June 2002 he went to see his legal practitioners with the instructions that they defend the action. In his founding affidavit in the application for rescission he changed his story and said his gardener did not give him the summons on 7 June 2002. In fact he blames his erstwhile gardener for the failure to enter appearance to defend. He says he later discovered that the summons were served on the gardener earlier than 7 June 2002 and the latter only handed him the summons on 7 June 2002. This does not really seems to change much because

whichever version is believed the fact remains that he received the summons on 7 June 2002 and "went to see his legal practitioner on the same day with instruction to defend the action." This was not done resulting in the respondent applying for default judgment on 17 June 2002 i.e. some ten(10) days later. During this period the appellant requested further particulars as alluded above. This was a misguided step as said above bearing in mind that the appellant had not entered appearance to defend the action. So why blame the erstwhile gardener for an error that should be attributable to the appellant and his legal practitioner? In fact on 27 June 2002 the appellant did attempt to enter appearance. Of note is the fact that the appearance is dated in hand, 10 June 2002 some three (3) days after service of summons. In the circumstances it is abundantly clear that the gardener had nothing to do with the appellant's predicament in this regard.

On the merits the appellant's case was that the disputed property was sold by the respondent to one Dinesh Naran. The said sale agreement gave occupation of the disputed property to Dinesh Naran on its execution. He said at the time of the proceedings he was staying in the disputed property in terms of the "say-so" of Dinesh Naran. His case is, therefore, that he cannot be evicted without Dinesh Naran being joined in the proceedings as he claimed rights of occupation through him. It is common cause that the respondent through a written lease agreement leased out the disputed property to the appellant on 22 May 2001. On 30 September 2001 the owner of the disputed property and Dinesh Naran executed a written agreement of sale in respect of the disputed property. The appellant's case is that by operation of law the lease relationship between him and the respondent ceased and was substituted by a new relationship between him and Dinesh Naran. The latter, in his view, became the

new landlord by operation of law. The issue of the cancellation of the sale agreement is ceased with this court in HC 1359-02. According to title the disputed property is registered in the name of respondent and his wife. On 5 September 2002 the court a *quo* dismissed the appellant's application for rescission.

A final judgment, being *res judicata*, is not easily set aside, but the court will do so on various grounds, such as fraud, discovery of new documents, error or procedural irregularity. The court has power to rescind a judgment obtained on default of appearance provided that sufficient cause for rescission has been shown. In principle two essential elements are: (1) that the party seeking relief must present a reasonable and acceptable explanation for his default and (2) that on the merits that party has a *bona fide* defence which, prima facie, carries some prospect of success –

The Civil Practice of the Supreme Court of South Africa by L de Villiers Van Winsen AC Cilliers and C Loots 4th Ed at page 690-1; *Chetty* v *Law Society, Transvaal* 1985 (2) SA 756 (A); *Nyingwa* v *Moolman NO* 1993 (2) SA 508 (Tk); *Songore* v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S); *Bishi* v *Secretary for Education* 1989 (2) ZLR 240 (HC); *HPP Studios (Pvt) Ltd* v *Associated Newspapers of Zimbabwe (Pvt) Ltd* 2000 (1) ZLR 318 (HC) and *Saitis and C* v *Fenlake* [2002] 4 ALL SA 50. In *casu* the appellant instituted the rescission proceedings in the court a quo in terms of section 3a of the Magistrates' Court Act [Chapter 7:10] which reads:

> "39 Rescission and alteration of judgment
> (1) In civil cases the court may-
> (a) rescind or vary any judgment which was granted by it in the absence of the party against whom it was granted;
> (b) rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or by mistake common to the parties;
> (c) correct patent errors in any judgment in respect of which no appeal is pending.

2. The powers given in subsection (1) may only be exercised after notice by the applicant to the other party and any exercise of such powers shall be subject to appeal."

The Magistrates' Court Civil Rules 1980 are also relevant. Order 10, rules 1 and 2 provide:

"1. Method of entering appearance
A defendant intending to defend, shall, within –
(a) seven days after service of the summons if he resides within the jurisdiction of the court from which the summons was issued;
(b) fourteen days after service of the summons if he does not reside within the jurisdiction of the court from which the summons was issued;
or within the period limited by the summons. Whichever is the longer, enter an appearance to defend by delivery of a memorandum in writing that he intends to defend.

2. Late appearance effective if no application for default judgment made
Notwithstanding anything contained in rule 1, an appearance to defend, even though entered after the expiry of the period mentioned in rule 1, shall nevertheless be effective if a request for default judgment has not been made." (emphasis added)

Order 10 rule 2 does not apply here as the default was granted 10 days before the attempted late filing of appearance to defend (default judgment was granted on 17 June 2002 and the notice of appearance to defend was only filed on 27 June 2002)

In the circumstances, the applicant's late notice became ineffective because the respondent had got in first with his request for judgment. That is my understanding of rules 1 and 2 of order 10 – *Epol (Edms) Bpk* v *Landdros; Vryburg en andere* 198 (1) SA 821 (NC) and *The Civil Practice of the Magistrates' Court in South Africa* – by H J Erasmus and De Van Logerenberg (8th ED) Vol II. The rules at page 70. Order 30 rule I(1) and (2) provides:

"1. Application for rescission or variation of default judgment
(1) Any party against whom a default judgment is given may, not later than one month after he has knowledge thereof, apply to the court to rescind or vary such judgment.

(2) Any application in terms of subrule (1) shall be an affidavit stating shortly –
(a) the reasons why the applicant did not appear or file his plea; and
(b) the grounds of defence to the action or proceedings in which the judgment was given or of objection to the judgment."

The provisions of default judgment in the Magistrates' Court are not the same as in the High Court Rules 1971. Order 9 rule 63(2) provides-

"2. If a court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do so, the court may set side the judgment concerned and give leave to the defendant to defend …" (emphasis added)

The highlighted specific requirement is not there in order 30 rule 1 of the Magistrates' Court rules. What is required by the latter rule is that there must be a satisfactory explanation of why the applicant was in default and a reasonable defence on the merits. When considering the cases referred to above dealing with rescission one has to bear this in mind because the court *a quo* could only have acted pursuant to the provisions of order 30 rule 1 of the Magistrates' Court (Civil) Rules.

Coming to the merits of the application I propose to deal with issues raised under heading excised from order 30 rule 1 of the Magistrates' Court Civil Rules.

Reasons why the appellant did not file appearance to defend: order 30 rule 1(a)

The reasons for the appellant's failure to file notice of appearance to defend timeously must be stated in the affidavit because it is relevant to the question whether or not his default was wilful – *Brown* v *Chapman* 1928 TPD 320. The attempt to enter appearance in this case was thirteen days out of time. He blames his erstwhile gardener for not giving him the summons on time. I have already highlighted the futility of such an explanation. He attempted to move the date of service backwards in order to place the blame of the gardener. He was obviously trying to mislead the court in this regard. In addition to the facts already highlighted it should be noted that

the certificate of service by the Messenger of Court clearly shows that the service was effected at 12h02 on 7 June 2002. It is not clear why the appellant was being untruthful on such an obvious issue. I find this so-called explanation totally unsatisfactory. In this regard I would borrow the words of McNALLY JA in *Songore* v *Olivine Industries (Pvt) Ltd supra* at 212G-H where the learned Judge of Appeal observed:

> "If these passages were drafted by a legal practitioner then I would suggest that he was failing in his duty to the court and to the client. The court should not be asked to believe this kind of nonsense, and the client should be told that a candid and comprehensible explanation is required if he is to obtain the indulgence he seeks." (emphasis added)

This kind of explanation is an insult to the intelligence of the court. It must be borne in mind that a defendant who admits that he was negligent in his tardiness may nonetheless be found to merit rescission if he shows *bona fides* – *Songore* v *Olivine Industries (Pvt) Ltd supra*, at 211E-F. But one who puts forward a "reason" which is an insult to the intelligence of the court may have more difficulty in satisfying the court of his good faith. As alluded to above the legal practitioners involved were aware of the *dies induci*e. Instead of entering appearance to defend they filed a "Request for further particulars" well within the *dies induciae*. The legal practitioners chose the wrong procedure and it is nonsensical to try and conceal this obvious fact by blaming a dismissed gardener of the appellant. The legal practitioner was instructed to defend the action on the day of the service, he or she only reacted three days by filing the wrong process. What has the gardener to do with all this. How was the court *a quo* expected to react to a litigant who was seeking its indulgence lacking in *bona fides*. The appellant sought to cover for his errant legal practitioner by blaming his erstwhile gardener. The "lack of diligence" that he referred to in his

founding affidavit was on the part of his legal practitioner and not his erstwhile gardener as he stated in his affidavit. Unfortunately for the appellant even a belated shift o blame from his erstwhile gardener to the legal practitioner might not necessarily have solved his dilemma. I find the words of CHIDYAUSIKU J (as he then was) in *Bishi* v *Secretary for Education (supra)* instructive. On page 243G-244F the learned judge said:-

> "Considering the above, can it be said there is a good explanation or reason for the inordinate delay in this case? The delay was almost entirely caused by the applicant's legal practitioner. Courts are very reluctant to visit the client with sins of his legal practitioner but there has to be a limit beyond which the court will not go. This was the view expressed by no lesser authority than our Supreme Court in the not so recent case of *S* v *McNab* 1986 (Z) ZLR 280 (SC) In that case DUMBUTSHENA CJ at p 284B, quotes with approval the following remarks of STEYN CJ in *Saloojee & Ano NNO* v *Minister of Community Development* 965 (2) SA 135 (A) at 141 EE:
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> "There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this court has lately been burdened with an undue and increasing number of applications for condonations in which the failure to comply with the rules of this court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are. (*CF Hepworths Ltd & Thornloe and Clarkson Ltd* 1922 TPD 336; *Kingsborough Town Council* v *Thirwell & Anor* 1957 (4) SA 533 (N)."

The learned Chief Justice, after quoting the above passage, went on to say at p 284E:

> "I have dwelt at length on this point because it is my opinion that laxity on part of the court in dealing with non-observance of the rules will encourage some legal practitioners to disregard the rules of court to the detriment of the good administration of justice."

In the present case the legal practitioners involved were aware of the *dies induciae*… The reason advanced for this delay is that Mr Mutzuris was too busy to attend to the application. In my view, to grant condonation in the circumstances of this case would be creating a dangerous precedent. It is easy for a legal practitioner to plead pressure of work to cover up for lack of a clear disdain of the rules."

Although the explanation is characterised by unsatisfactory features one has to guard against reaching a decision which would result in the giving of judgment against the appellant without him being heard, when he protests that he has a valid defence. In light of the default highlighted above the application should not be lightly dismissed on account of the inadequacy of his explanation. I associate myself with the observation by BEADLE CJ in *Stevenson* v *Broadly NO* 1972 (2) RLR 467 that "I would not consider that the application should be refused unless I thought the applicant's case is hopeless." Further McNALLY JA also commented as follows in *Songore* v *Olivine Industries (Pvt) Ltd supra* at page 213A-

> "One is naturally reluctant to reach a decision which would result in the giving of judgment against a person without his being heard, when he protests that he has a valid defence. If I were convinced that the defendant in this case was *bona fide* and had a prima facie defence, then I might be unjustified in condemning him for so short a delay despite the inadequacy of his explanation."

It is for this reason that I feel that appellant's defence be considered as well.

Grounds of defence to the action: Defence on merits: order 30 rule 1(b)

On the merits the appellant's case is the disputed property, was sold by the respondent's wife to one Dinesh Naran on 30 September 2001. From that date his case is that he is staying "on the say so of Mr Naran". He opined that by operation of law, Dinesh Naran is the now landlord notwithstanding the fact that the property has

not been transferred into the latter's name. I have already alluded to the dispute over the agreement of sale. The appellant has given detailed evidence to show that the sale agreement was not cancelled. I do not think he is entitled to go to details on the merits of case in HC-1359-02. It is trite that a lessor need not have any title to the property to the property at all. The respondent's lack of title does not, in the absence of an express or implied provision on the point in the leave agreement, affect the validity of the lease – Grotius 3..19.5; *Frye's (Pty) Ltd* v *Ries* 1957 (3) SA 575 (A); *Cilliers NO* v *Kuhn* 1975 (3) SA 881 (NC); *Shell Rhodesia (Pvt) Ltd* v *Eliasov NO* 1979 (3) SA 915 (R); *Boompet Investments (Pty) Ltd and Ano* v *Paarde kraal Concession Store (Pty) Ltd* 1990 (1) SA 347 (A) and *The Law of Sale and Lease* 2nd Ed by AJ Kerr at 230-233.

The appellant, as a tenant, is not in position to dispute the title person from he derives his right of occupation, the respondent – *The Law of Contract in South Africa* (1983) RH Christie at 405-6; *Salisbury Gold Mining Co* v *Klipriviersberg Estates and Gold Mining Co* 1893 H 186; *Loxton* v *Le Hunie* 1905 (22) SC 577. All that the respondent was obliged to do once the parties had concluded the lease, was to give the appellant the use and enjoyment which he had promised to give. The respondent fulfilled this obligation and therefore the appellant, as lessee is not entitled to question the lessor's (respondent's) lack of title and is bound to perform his own obligations. In the *Salisbury Gold Mining Co* case *supra*, at 190 KOTZE CJ stated-

> "Any person can let to another something which belongs to a third party, and it is not open to the lessee to raise the defence that he has discovered that … the property leased belongs to another person, where, for instance, he is during the currency of the lease, sued for the payment of the stipulated rent."

In *Clark* v *Nourse Mines Ltd* 1910 TS 512 at 520-1 SOLOMON J stated:

> "It seems to me that the rule [that a lessee cannot dispute the lessor's title] may be based upon one or other of two very simple grounds. The first is, that the lessor having performed his part of the contract and having placed the lessee in undisturbed possession of the property is entitled to claim that the lessee should also perform his part of the contract and should pay him the rent which he agreed to pay for the use and enjoyment of the premises. The second ground is, that the lessee having had the undisturbed enjoyment of the premises under the lease, and having thus had all for which he contracted, it would be against good faith for him to set up the case that the lessor had no right to let him the property."

See also *Hillock and Ano* v *Hilsage Investments (Pty) Ltd* 1975 (1) SA 508 (E) at 516 and *Ebrahim* v *Pretoria Stadsraad* 1980 (4) SA 10(T) at 14B-C.

Ms *Moyo*, for the appellant, placed reliance on the judgment of SAMATTA J in *Barker McCormac (Pvt) Ltd* v *Government of Kenya* 1985 (1) ZLR 18 (HC). With respect, this case does not deal the relevance of the lessor's title to the leased property. The lease agreement between the appellant and the respondent does not expressly provide that the lessor's title is relevant to the leased property. This cannot be inferred from the terms of the lease either. In the circumstances the applicant is not entitled to question to lessor's lack of title. In the circumstances the appellant's grounds of defence to the action is without merit.

The court *a quo*, therefore arrived at a correct determination. The appeal is accordingly dismissed with costs.

Cheda J ……. I agree

Messrs Sibusiso Ndlovu appellant's legal practitioners
Majoko & Majoko respondent's legal practitioners