Judgment No. HB 137/2003
Case No. HC 1942/02
X-ref 1817/01, 2050/02, 820/02

EPHRAIM TAKARWISA MUKANGA

Versus

RUMBIDZAI CHIGIGA

And

CITY OF BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 19 SEPTEMBER 2003 & 29 JANUARY 2004

Applicant in person
Masuku for 1st respondent

Judgment

CHIWESHE J: The applicant seeks condonation of his late filing of his application for rescission of judgment entered against him in case number 820/02, an order rescinding that default judgment and costs of suit.

The applicant appeared in person his legal practitioners having renounced agency. It is for this reason that his application for condonation for late filing of his application for rescission was granted.

I now deal with the merits of the application for rescission of judgment. It is now trite that for an applicant to succeed in matters such as the present application he must show that there is good and sufficient cause for granting rescission of judgment. In considering whether there is such good and sufficient cause the court must have regard to three factors, namely, the reasonableness of the applicant's explanation for the default, the *bona fides* of the application itself and whether there is a *bona fide* defence on the merits. (See *Stockfill* v *Griffiths* ZLR 1992 (1) 288)

Applying the above criteria to the facts of this matter it appears to me that the applicant cannot succeed. The default judgment sought to be rescinded was granted by KAMOCHA J on 29 May 2002 in the following terms:

> "(a) An order compelling 1st defendant to transfer his right, title and interest in stand 46542, Matshobana, Bulawayo upon payment of $143 000,00 by plaintiff.
> (b) In the event of non-compliance with paragraph one, an order authorising the Deputy Sheriff to sign all the relevant documents to effect cession of the stand from 1st defendant to plaintiff.
> (c) An order of eviction
> (d) Costs of suit."

The default judgment was entered consequent upon the applicant's failure to enter appearance to defend summons issued in case number HC 820/02. Service of the summons had been effected by the Deputy Sheriff on 15 April 2002 on one Mrs Ndlovu, "a responsible person and a lodger of the said defendant … found present at the place of residence of the said defendant, namely, 69 Matshobana, Bulawayo."

The applicant's explanation for the default is that he never saw the summons and that none of his lodgers including the Ndlovus had brought it to his attention. He said that he sold his house and went to his rural home in Masvingo. He had last been in Bulawayo on 30 May 2001. He had left the house in the custody of one Emmanuel Ndlovu and his family who were lodgers. They have since left the premises and he does not know their whereabouts. He first became aware of the existence of the judgment on 14 July 2002 on his return to Bulawayo. By then a writ of execution had been issued. He had come to Bulawayo to collect rent from the lodgers. He immediately handed the matter over to his legal practitioners who were unable to proceed as he had not put them in funds. He acknowledges that he had entered into an agreement to sell his house to the 1st respondent for the sum of $260 000,00. Of this

amount he had received $117 000,00. The balance of $143 000,00 was to be paid in instalments at the rate of $5 000,00 per month beginning 31 March 2001.

On 31 March 2001 he had come to Bulawayo to collect the first instalment. He says the 1st respondent did not have the money. He returned at the end of April 2001 again the first respondent did not have the money. It was then that he instituted legal action in June 2001 seeking cancellation of the agreement. He says that as at 30 July 2002 the matter was still pending before this court.

The applicant's version of events is most improbable. This is an appropriate case in which the court must take a robust view of the facts and find in favour of the 1st respondent.

Firstly, the applicant has not filed any supporting affidavit from Mrs Ndlovu or any of his lodgers regarding the fate of the summons served upon them. The applicant says he is unable to locate Mrs Ndlovu and company who have since left his house. He does not disclose the circumstances under which the Ndlovus (his tenants for months) vacated the premises without warning and without leaving a forwarding address or any message with the neighbours.

Secondly, the Deputy Sheriff's eviction report indicates that both Mrs Ndlovu and Emmanuel Ndlovu were among the persons evicted from the house on 25 July 2002. It is therefore clear that Mrs Ndlovu remained at the house until 25 July 2002. The applicant on his own admission became aware of the existence of the judgment and the writ of execution on 14 July 2002 when he came to Bulawayo. At that time the lodgers including Mrs Ndlovu were still at the house. It is unlikely that the applicant did not visit the premises then moreso as he avers that he had immediately

given instructions to his legal practitioners and then waited for five days to receive their response. All that time he must have been in Bulawayo.

Thirdly, the applicant must in all probability have been collecting the monthly rentals from the lodgers. For that reason the chances are that he was in Bulawayo more often than he is prepared to admit. He would on those occasions have been handed the summons by his lodgers. Further he has not denied that one Desmond (his son) was staying at the house at the time. Surely Desmond would have advised the applicant of such an important development.

Fourthly, the 1st respondent avers that the applicant visited him in April 2002 to discuss the issue of the house. Summons had been issued on 15 April 2002. The 1st respondent said the question of the court proceeding was discussed and the applicant had requested that the matter be withdrawn in favour of an out of court settlement. By implication the applicant was by then aware that summons had been served. The 1st respondent's averments in this regard taken together with other factors discussed above, have a ring of truth.

I am satisfied in the circumstances that the applicant's explanation for his default lacks reasonableness. Indeed the explanation is palpably false.

On the merits the applicant's claim under case number HC 1817/01 in which he sought cancellation of the agreement of sale was dismissed for want of prosecution. An order to that effect was granted on 25 March 2002. It is therefore not true as claimed by applicant that that matter is still pending before this court.

The agreement required the applicant to transfer the property as soon as the sum of $71 500,00 had been paid. In that regard the applicant issued a power of attorney in favour of the 1st respondent to manage and transact the affairs of the house

on his behalf. However the applicant has neither effected transfer nor has he given the 1st respondent vacant possession.

The applicant avers that the 1st respondent has not paid the monthly instalments due on the balance of the purchase price. The 1st respondent does not deny that. She says the applicant's wife indicated a lump sum would be preferred as they needed the money to build their rural home. First respondent had agreed to that request. However neither the applicant nor his wife came to collect the lump sum as agreed. The amount has been deposited into the 1st respondent's legal practitioners' trust account. It is available to satisfy the balance of the purchase price.

In the circumstance I hod that the applicant has no bona fide defence to the 1st respondent's claim in case number HC-820/02. For that reason the application to rescind the default judgment entered against the applicant in that case is frivolous and vexatious.

Accordingly it is ordered that the application be and is hereby dismissed with costs.

Messrs Ben Baron & Partners 1st respondent's legal practitioners