Judgment No. 60/2004
Case No. HC 678/01
X-Ref HC 1231/03

ROBERT L GARRET

Versus

CHARLES MICHAEL STEVENS

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 26 MARCH AND 20 MAY 2004

Ms P Dube for applicant
Adv T Cherry for respondent

Judgment

CHEDA J: This is an application for rescission of judgement. On 26 March 2004 this matter was argued before me and at the end of the arguments I dismissed the application with costs and I undertook to give my reasons later. These are my reasons.

The facts of this case in brief, are that respondent who was then the plaintiff in the main action applied for a pre-trial conference date which was given to him being 9 June 2003 at 9am. Applicant, then defendant was informed by notice which was duly served on Coghlan & Welsh who are the correspondent legal practitioners, in particular a Mr Smithwick on 23 May 2003. On 9 June 2003 at 9am neither applicant nor his legal practitioner were in attendance at the pre-trial conference. Consequently, a default judgment was entered in favour of respondent.

It is trite law that a party seeking a rescission of judgment must show a good cause for his failure to have availed himself when he was so required to do so. A good cause is a must as is clearly stated in *Marias* v *Standard Credit Corporation Ltd* 2002 (4) SA 892/W) by COETZEE J, when he said that:-

1. The party seeking relief must present a reasonable and acceptable explanation for his default.
2. That on the merits, such party has a *bona fide* defence, which *prima facie* carries some prospects of success.

Mr *Smithwick* deposed to an affidavit wherein he explained what transpired in this matter, namely that:

1. the inefficiency of his internal filing system
2. the new employee who was on probation
3. the general stay-away which totally paralysed his firm, and
4. that he was extremely ill led to his failure to attend the pre-trial conference.

These explanations are, with respect, very lame indeed. He stated that the notice was brought to his attention a day or 2 later and sent it to his instructing legal practitioner by facsmile. The question is why did he not follow it up either by letter or at least by telephone?

The issue of a new employee also sounds hallow. The fact that he had a new employee, the more reason why he should have taken extra care in handling clients matters.

He also brings the issue of a stay-away. Respondent has urged the court to dismiss this argument on the basis that it was illegal. I agree with the respondent in his argument that the court cannot be seen to bless an illegal activity. Mr *Smithwick* ought to have known that he cannot rely on an illegality.

The other reason he gives is that he was indisposed to use his words,

> "Over the weekend of 7th/8th June 2003 I developed a cold or flu. In fact, I should not have gone to work on Monday 9 June but did so because the previous week had been lost to the stay-away and needed to see what was happening. In that state I was not able to properly look after my practice and

> as I say I should not have been at work that day. By and large I had to keep away from people so as not to infect them as well."
>
> He goes further in paragraph 9,
>
> "By the afternoon of 9 June I realised that the pre-trial conference in the main action had been scheduled and had probably been held but I had not heard from my instructing legal practitioner, …"

If indeed he was "extremely ill" there is no reason why he should have come to work on 9 June. This to me is far from the truth. As stated above a party seeking relief must present a reasonable and acceptable explanation. Looking at Mr *Smithwick*'s explanation of his conduct, I find it unreasonable and totally unacceptable. The lethargy with which he handled this matter borders on negligence. He was in fact inept in handling this matter. I have no alternative but to reject his explanation.

The second requirement is that applicant must prove that he has a *bona fide* defence which carries some prospects of success. There is nothing filed in the papers before me which shows that there is such defence. In paragraph 13 of his affidavit he stated, "As to the defence, I respectfully refer this honourable court to the pleadings where a defence is clearly established."

Again the "not-so-kin-attitude" comes into play. While it was desirable for Mr *Smithwick* to depose to an affidavit I find it strange that the applicant has not deposed to one himself. It is my opinion that he should have done so himself instead of a legal practitioner who I believe has no knowledge of the matter more so that he refers to himself as "post box". The two elements referred to above must be met failing which the application for rescission must fail.

I find that applicant has failed to show a good cause in this application and the application is accordingly dismissed

Messrs Coghlan & Welsh applicant's legal practitioners
Y A Mukadam & Associates respondent's legal practitioners