Judgment No. HB 44/07
Case No. HC 2351/05
X Ref HC 1154/05; 437/05; 1823/05

ELLINE MOYO

And

BLESSED MOYO

And

JANE MOYO

Versus

CECIL MADONDO N.O.

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 14 JULY 2006 AND 5 APRIL 2007

L Chikwakwa for the applicants
M Nzarayapenga for the respondent

Opposed Matter

NDOU J: The respondent sued the applicants for ejectment in case number HC 437/05. The applicants entered appearance to defend. They filed their plea. On 28 June 2005, the respondent caused application for summary judgment to be issued against the applicants under cover of case number 1154/05. On 13 July 2005 the applicants filed their opposing papers in HC 1154/05. Thereafter the respondent, who was applicant in HC 1154/05 filed his heads of argument and served them on the applicants' legal practitioners of record on the same day. In terms of Order 32 Rule 238(2a) of the Rules of the High Court the applicants were required to file their heads of argument within ten days after the service of respondent's heads of argument. The ten days expired on 15 September 2005 whereupon the applicants had not filed any such heads of arguments. In terms of Rule 238(2b) of the Rules, *supra*, failure to file the heads of argument within ten days of service of the respondent's

[applicant in the main matter] heads of argument resulted in a bar operating against the applicants [respondents in the main case]. Realising that the applicants were barred the respondent [as applicant in HC 1823/05] sought leave to set the matter down as unopposed. Such leave was granted on 6 October 205. This court subsequently granted an order of ejectment by default on 20 October 2005. The current application is directed at the said default judgment. The application in a nutshell seeks the rescission of the said order obtained by default in HC 1154/05. It is trite law that in an application for rescission, there are two essential elements, namely (a) that the party seeking rescission must present a reasonable and acceptable explanation for his/her default, and (b) that on the merits that party has a *bona fide* defence which, *prima facie* carries some prospect of success – *G D Haulage (Pvt) Ltd* v *Munurugwi Bus Services (Pvt) Ltd* 1980 (1) SA 729 (ZR, AD); *Chetty* v *Law Society – Transvaal* 1985(2) SA 756(A); *Songore* v *Olivine Industries (Pvt) Ltd* 1988(2) ZLR 210(S); *Bishi* v *Secretary for Education* 1989(2) ZLR 240 (HC); *Ndebele* v *Ncube* 1992(1) ZLR 288(S); *HPP Studios (Pvt) Ltd* v *ANZ (Pvt) Ltd* 2000(1) ZLR 318 (HC); *Saitis and C* v *Fenlake* [2000] 4 ALL SA 50 (ZH); *Khumalo* v *Mafurirano* HB-11-04 and *Tshuma* v *Dhlamini and Ors* HB-5-07. I propose to consider these factors in turn.

(a) **Explanation for the default**

The applicants have decided to pass the blame on to their erstwhile legal practitioners. Generally, the courts have held that a client is unable to escape the actions of his/her chosen legal practitioner's fault – *Baloyi* v *NSSA* HH-102-95. In *Mubvimbi* v *Maringa & Anor* 1993(2) ZLR 24 (H) it was held that an explanation which attributed the blame to the party's legal practitioners will be treated as non-

compliance or a wilful disdain by the party himself. This will be the case even where the affected party has an arguable case on the merits. In this regard I find the words of CHIDYAUSIKU J (as he then was) in *Bishi* v *Secretary for Education supra,* instructive. On page 243G the learned Judge said:

"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 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(2) ZLR 280 (SC). In that case DUMBUTSHENA CJ at p 284 B, quotes with approval the following remarks of STEYN CJ in *Saloojee & Anor NNO* v *Minister of Community Development* 1965(2) SA 135(A) at 141C-E: 'There is a limit beyond which a litigant cannot escape the result 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. (*C F Hepworths Ltd & Thornloe* v *Clarkson Ltd* 1922 TPD 336; *Kingsborough Town Council* v *Thirwell & Anor* 1957(4) SA 533 (N)."

Further, in *Ndebele* v *Ncube* 1992(1) ZLR 288(S) McNALLY JA considered whether a party should be penalised for the negligence of his legal practitioner and had this to say at 290C-E:

"It is the policy of the law that there should be finality in litigation. On the one hand, one does not want to do injustice to litigants. But it must be observed that in recent years applications for rescission, for condonation for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer, have rocketed in numbers. We are bombarded with excuses of failure to act. We are beginning to hear more appeals for charity than justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re-argued until the costs far exceed the capital amount in dispute. The time has come to remind the legal profession

of the old adage *vigilantibus non dormientibus jura subveniunt*, roughly translated, the law will help the vigilant but not the sluggard"

In casu, the applicants blame their erstwhile legal practitioner's negligence for their failure to file heads of argument. They have however, not invited their erstwhile legal practitioners to comment on such failure or as to facts for which he is being blamed. No attempt whatsoever was made to get him comment, this is wrong – *Challenge Auto (Pvt) Ltd and Ors* v *Standard Chartered Bank Zimbabwe Ltd* HH-221-02. Looking at the facts I am satisfied that there is no reasonable explanation for the failure to file heads of argument. I turn now to consider whether the applicant had a *bona fide* defence to the respondent's claim:

Defence on merits

The applicants do not aver in their founding affidavit a good *prima facie* defence to the respondent's claim so as to warrant or justify the rescission of judgment. All that they say in the founding affidavit is;

"6. I submit that we have a prima facie defence to the respondent's claim. I wish to adhere to the defence that I filed in our plea and notice of opposition. I therefore pray that it be incorporated into this application."

This is a less than ideal way of compiling a founding affidavit. A litigant who is applying for the court's indulgence must be seen to be serious with his/her application. Be that as it may, I am prepared to incorporate the applicants' defence as outlined in their plea. Their defence is scant and very difficult to follow. It is so brief that I propose to cite verbatim in full as follows:

"**Ad Paragraph 6-8**

The immovable property cannot be sold at the behest of the deceased's girlfriend who was the deceased's wife. The immovable property was

registered in the name of the deceased by the defendants' parents as a family property, and was not the deceased's own to dispose of."

This was further amplified in the applicants'opposing affidavit in HC 1154/05 in the following terms:

"Ad Paragraph 6

I and the other respondents have just cause to reside at the property. The immovable property that was registered in the name of the late Cliffe Ndlovu is a family house, and it was so registered as a result of a family agreement …

4.1 …
4.2 ….
4.3 ….
4.4 …

I am very interested to hear what Sibongile Ndlovu will say about her whereabouts in 1984, when we agreed as a family to have the house registered in the name of the late Cliffe

Ndlovu. She was not there, and since she was not married even customarily to the late Cliffe Ndlovu."

The respondent was given authority by the Assistant Master to sell above-mentioned disputed property (which forms part of the estate of the late Cliffe Ndlovu) by private treaty. The applicant seems to have conducted himself lawfully in terms of the provisions of section 120 of the Administration of Estates Act [Chapter 6:01]. The applicants have resided at the property . They have resisted and continue to resist eviction from the property. They have on divers occasions refused entry to would-be buyers of the property forcing the respondent, as duly appointed executor, to resort to court action for their eviction. The property is registered in the sole name of the late Cliffe Ndlovu. For all intents and purposes, ownership of immovable property can only be acquired by transfer of ownership, such transfer being registered in the Deeds Office – *Mavhundise* v *UDC Ltd and Ors* 2001(2) ZLR 337(H). Registration of transfer of immovable property is the equivalent of delivery of movables.

Additionally, section 14 of the Deeds Registry Act [Chapter 20:05] provides that ownership of land can only be conveyed by means of a deed of transfer – see also *Machiva* v *CBZ Ltd and Anor* 2000 (1) ZLR 302(H). It is trite law that such registration in the deeds registry is a matter of substance and not mere form – *Takapfuma* v *Takapfuma* 1994(2) ZLR 103(S) at 105H-106A; *Charamba* v *Charamba and Another* HB-31-05 and *Tshuma* v *Dhlamini and Ors* HB-5-07. With all this in mind, it, therefore, follows that the registration of the immovable property in the name of the late Cliffe Ndlovu is a clear proof of its ownership and as such the property forms part of the estate of late Cliffe Ndlovu. The respondent, having been appointed Executor Dative, is entitled to lawfully proceed with the property in terms of section 120, *supra*. If the applicants are not happy with respondent's appointment as Executor Dative there is provision in the Act dealing with his removal. Equally, if they want to lodge a claim against the estate there is provision in the Act. They cannot prevent the Executor from performing his statutory duties under dubious allegations

that the property is "family house". What is family house? What legal rights are they claiming from the classification of the property as "family house" A *bona fide* defence should be based on law and not a streetwise concept like "family house". The applicants should have clearly outlined the source of their rights in terms of the law. They did not make any such averments.

For these reasons, I am of the view that the applicants do not have a *bona fide* defence to the respondent's claim and they have also failed to show good and sufficient cause for the rescission of the default judgment. The application is accordingly dismissed with costs.

Sansole & Senda, applicants' legal practitioners
Dube & Partners, respondent's legal practitioners