Judgment No. HB 6/07
Case No. HC 434/05
X-Ref HC 3668/04 & HC 1115/04

RONALD ITAI CHAHWANDA

Versus

SIZALOBUHLE ANGEL DUBE

And

MUNICIPALITY OF BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 18 NOVEMBER 2005 & 11 JANUARY 2007

Ms A Masawi, for applicant
T Moyo, for 1st respondent

Opposed Application

NDOU J: This is an application for condonation of the late filing of an application for rescission of a judgment granted against the applicant in his absence. The salient facts are that the judgment that the applicant seeks to rescind was granted on 13 January 2005. The applicant's case is that he became aware of it on 12 February 2005. This application was filed on 9 March 2005, after the judgment had been executed. The Deputy Sheriff had executed the judgment earlier on the same day. It seems that this application was in response to that.

1. Is this court *functus officio?*

The 1st respondent has raised a point *in limine* that after such execution, this court is now *functus officio*. It is common cause that the execution was done before this application was filed and that the applicant did not seek a stay of execution. It is, therefore, common cause that the disputed property has suffered the execution of a valid court order which had not been appealed against or subjected to review at the time of execution.

Further, the applicant did not apply to set aside the writ – *Modeley* v *Zeemand & Ors* 198(4) SA 639 (A) and Order 40 Rule 327 of the High Court Rules, 1971. The question is whether this

court is now *functus officio.* We are dealing here with an order granted by default by this court and executed. The judgment was not given on the merits, so it cannot be final. It is a general principle of our land that once a court has duly pronounced a final judgment, it has itself no authority to correct, alter or supplement it. The court becomes *functus officio*, its jurisdiction in the case having been fully and finally exercised its authority over the subject matter ceases – *West Rand Estates Ltd* v *New Zealand Insurance Co Ltd* 1926 AD 173 at 176; *Firestone SA (Pty) Ltd* v *Gentiruco AG* 1977(4) SA 298(A) and *Sayprint Textiles (Pvt) Ltd & Anor* v *Girdlestone* 1984 (2) SA 572 (ZH). There are, however, a few exceptions to this general rule e.g. the rule does not apply to interlocutory orders or corrections made pursuant to the provisions of the Rules of this court. Ms *Masawi* for the applicant, has argued that since the judgment was granted by default, it is not final. In other words, it is argued that this court has not fully and finally exercised its jurisdiction in the matter: it still enjoys its inherent power to supplement, clarify or correct its own judgment. My understanding of Mr *Moyo's* argument is that he does not contend that the order made on account of the default of the applicant is final. He is saying that final or not the order has been executed upon by the Deputy Sheriff resulting in the property transferred into the names of the 1st respondent. In other words, once such order is executed upon, this court becomes *functus officio.* I think this argument would make sense where the order executed was a final one. As this court has not fully and finally exercised its authority on the matter, mere execution will not render

this court *functus officio*. On this basis the point *in limine* raised by the 1st respondent must fail.

2. Application for rescission

It is trite that this 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 bona fide defence which *prima facie*, carried some prospect of success – *Chetty* v *Law Society Transvaal* 1985(2) SA 756 (A); *Sangore* v *Olivine Industries (Pvt) Ltd* 1988(2) ZLR 210 (S); *Bishi* v *Secretary for Education* 1989(2) ZLR 240 (HC); *HPP Studio (Pvt) Ltd* v *Associate Newspapers of Zimbabwe (Pvt) Ltd* 2000(1) ZLR 318 (HC); *Saitis and C* v *Fenlake* [2000] 4 ALL SA 50 (ZH); *Ndebele* v *Ncube* 1992(1) ZLR 288 (S); *G D Haulage (Pvt) Ltd* v *Mununugwi Bus Services (Pvt) Ltd* 1980(1) SA 729 (ZR AD) and *Khumalo* v *Mafurirano* HB-11-04. I propose to consider these two elements in turn.

2.1 Failure to file opposing papers on time: The default

The applicant concedes that he was in default by three days. This is not an inordinate delay *per se*. His explanation is that he was financially handicapped. That may be so, but he never bothered to approach the Registrar of this court to explain his predicament nor did he approach the 1st respondent's legal practitioner. Instead, he chose to go to a relative whom he knew to be a non-qualified legal advisor. This resulted in the delay. The explanation for the default is overall, not reasonable. But I would be reluctant to dismiss the application for that sole reason unless if I opine that the applicant's case is hopeless on the merits – *Stevenson* v *Broadly N O* 1972 (2)

RLR 467. I will therefore consider the second element with this in mind - see also *Challenge Auto (Pvt) Ltd and Ors* v *Standard Chartered Bank Zim Ltd* HH-221-02.

2.2 Defence on the merits

The applicant's case on the merits is hopeless. He has failed to show a *bona fide* defence. He relies on the rescission or cancellation of the agreement of sale between the parties. From the terms of the agreement it is clear that this is an instalment agreement of sale of land i.e. there are over three instalments. There is a statutory requirement that the agreement (and novation) must be in writing in terms of section 7 of the Contractual Penalties Act [8:04]. Further, section

8 regulates the regime of the rescission of such instalment agreements. Even from his own founding affidavit, the applicant has failed to comply with the requirements of section 8. In other words, the applicant if he perceived any breach by the 1st respondent, must have delivered to 1st respondent a notice calling upon the 1st respondent to rectify the breach within 30 days failing which the cancellation would follow. It is clear from the papers that no such notice was given of any breach. In any event it is clear from the papers that the applicant was willing to accept the purchase price until 10 May 2004. In any event the papers clearly show that the subsequent decision not to sell was not informed by a breach of the agreement by the 1st respondent. On the contrary, it was as a result of the problems that applicant encountered at the Housing Office of the 2nd respondent. In fact, the legal dispute between the applicant and a 3rd party was resolved through the assistance given to the applicant by the 1st respondent. 1st respondent footed the legal bills for the litigation. The 1st respondent also paid one Mr Mapani and City of Bulawayo on behalf of the applicant. She tendered the balance and the applicant declined to accept it. On the merits, the applicant's case is

hopeless. Taking the facts on the two elements into account, the application has to fail. This application was motivated by greed more than anything else. The applicant wants to pull out of the agreement as he has realised he can make more money now. The matter is of great importance to the 1st respondent who purchased the property and also funded the litigation on the removal of incumberments on the property. By accepting the payment of the instalments outside the stipulated dates, the applicant waived his right to rescind on the agreement on the basis of late payment – *Matimba* v *Salisubry Municipality* 1965(3) SA 513 (SR; AD) and *The Mud-Man Empire (Pvt) Ltd t/a Blue Chip Agencies* v *Nechironga & Ors* HH-128-03. Besides, the applicant's right to resile from the agreement does not arise merely by virtue of the fact that 1st respondent has failed to carry out an obligation under the contract. In addition, it is an essential requirement that 1st respondent must be placed in *mora* and the *mora* must relate to a

vital or important term of the agreement – *Sweet* v *Ragerguhara* 1978(1) SA 131 (D); *Oatorian Properties (Pty) Ltd* v *Maroun* 1973 (3) SA 779 (A) and *Mud-Man Empire* case *supra*. This is not the case here.

Accordingly, I find that the applicant failed to establish a case for rescission and I dismiss the application with costs.

Masawi & Assocaites, applicant's legal practitioners
Hwalima, Moyo & Associaties,1st respondent's legal practitioners