REJOICE SIBANDA **APPLICANT**

AND

ESTATE LATE C KARPUL **RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 12 JULY 2011 AND 14 JULY 2011

Applicant in person
Mr J. T Tsvangirai for respondent

Opposed Application

MATHONSI J: In Case No. HC 1951/09 the Respondent issued summons against the applicant seeking, among other things, the cancellation of a lease agreement and the eviction of the respondent and all those claiming through her from premises known as No. 12 Celrose Flats 3rd Avenue and J. Tongogara Street, Bulawayo.

The basis for that was that the applicant had neglected to pay rentals in terms of a rent order issued by the Rent Board resulting in her falling in arrears and that she was subletting the premises without the respondents consent in breach of the lease agreement between the parties.

The applicant, then represented by *Cheda and partners* of Bulawayo, contested that action and in her plea filed of record, other than making a bare denial that she was subletting the premises, she only raised procedural objections which did not address the merits of the matter. In particular, she did not deny that she was in rent arrears.

When the matter was set down for pre-trial conference on 16 November 2010, the applicant and her legal practitioner defaulted despite being served with a notice to attend on 5 November 2010. As a result, her defence was struck out and respondent was granted leave to set down the matter on the unopposed roll for finalisation. This, the respondent did on 13

January 2011, almost two months after the applicant's defence was struck out. The applicant had done absolutely nothing about her default at the pre-trial conference.

On 13 January 2011 default judgment was granted for the cancellation of the lease agreement, eviction of the applicant, payment of arrear rentals and costs of suit. That notwithstanding, it was not until 16 February 2011, more than one month after judgment was entered that applicant filed her application for rescission of judgment under case number HC 436/11.

On that same date, she filed an urgent application in case number 450/11 for a stay of execution pending the hearing of the rescission of judgment application. A provisional order was granted in her favour to that effect on 17 February 2011. Both applications have been opposed by the respondent and were consolidated for purposes of argument.

The applicant, who appeared in person, argued that she was not in wilful default because her then legal practitioners' *Cheda and partners* had written a letter to her advising her of the pre-trial conference set for 16 November 2010 but their letter had not been posted to her. She said, she "could not get a satisfactory answer as to why" this was so. It is for that reason that she was unable to attend court.

The applicant has not proffered any explanation why her legal practitioner also defaulted at the pre-trial conference.

Regarding the merits of the matter she submitted that she should not be evicted because she is a family person who has nowhere else to go. She stated that she was being discriminated by the agent of the landlord, Knight Frank, on tribal grounds. She conceded that she was in rent arrears but said that this was occasioned by the refusal of Knight Frank to accept her tender of monthly rentals in the sum of US$55-00 in terms of the rent order as they insisted on her paying US$70-00 per month.

She argued that she had been forced to pay the rentals into the trust account of her own legal practitioners in the hope that they would forward the money to the respondent. She produced an acknowledgement of receipt issued by *Cheda and partners* showing that she had been refunded a sum of US$270-00 on 16 February 2011 when they ceased to act on her

behalf. She also produced two receipts issued by Knight Frank for US$105-00 on 30 May 2011 and 6 July 2011.

Given that these documents were issued long after the eviction summons was issued on 24 November 2009 nothing turns from them as they do not show that applicant was not in arrears when litigation commenced.

Against that is the correspondence between applicant's then legal practitioners *Cheda and partners* and respondent's legal practitioners showing that applicant admitted liability to pay the rental of US$55-00 per month as far back as March 2010. She was advised that the arrears should be paid to *Danziger and partners*, respondent's legal practitioners. She did not pay anything despite at one stage offering to clear the arrears in 14 days time from 18 March 2010.

Regarding the claim that the applicant was subletting the premises, respondent filed a document signed by one Lungile Ndlovu which reads in part as follows:

> "TO WHOM IT MAY CONCERN
> FLAT 12 CELROSE MANSIONS
> We the following students are subleasing the flat from Rejoice Sibanda
> (a) Lungile Ndlovu signed
> Signature
> (b) Anitah Ncube Not signed
> Signature
> As students we are paying R700 or US$70-00.
> We agree to vacate premises on the 31st August 2009"

The applicant countered this by producing notes written by Lungile Ndlovu and Anitah Ncube disowning the above document. Anitah Ncube claimed that she had started staying at the flat because the applicant was her aunt but she was not subleasing. Lungile Ndlovu said she was invited by Anitah Ncube who was related to the applicant. Surprisingly, in her oral submissions in court, the applicant claimed that it was Lungile Ndlovu who was her niece.

Clearly therefore the applicant was not being truthful and did not disprove the claim that she was subletting.

In terms of rule 63(2) of the High Court of Zimbabwe Rules, 1971, a party seeking rescission of a judgment given in default must show that there is "good and sufficient cause", to do so. The factors which a court will take into account in determining whether an applicant for rescission has discharged that onus are the reasonableness of the Applicant's explanation for the default, the bona fides of the application to rescind the judgment and the bona fides of the defence on the merits. These factors must be considered in conjunction with one another and with the application as a whole. *Stockill v Griffiths* 1992(2) ZLR 172 (S) at 173 D – F. *Roland and Another v McDonnell* 1986(2) ZLR216(S) at 226 E-H. *Songere v Olivine Industries (Pvt) Ltd* 1988(2) ZLR 210(S) at 211 C – F; *Howera v Mudzingwa and others* HB 123/10.

In my view, not only has the applicant failed to give a good explanation for the default, she has also dismally failed to show any bona fide defence to the claim. She hopelessly breached the lease agreement and cannot come back asking for the indulgency of a rescission of judgment. This is a classic case of an abuse of process by a litigant who has shown no shame whatsoever even after being caught subletting the premises. Her conduct deserves to be visited with costs at an enhanced scale.

The application for rescission of judgment cannot succeed. As the provisional order staying execution had been granted to allow her to prosecute the rescission of judgment application, it follows that it must be discharged.

In the result, I make the following order:

(1) The application for rescission of judgment in Case No. HC 436/11 is hereby dismissed.

(2) The application in Case No. HC 450/11 is hereby dismissed and the provisional order discharged.

(3) The applicant shall bear the costs on an attorney and client scale.

Messrs Danziger and partners, respondent' legal practitioners