

Judgment No. HB 129/11
Case No. HC 234/08 & HC 1388/08
X REF HC 2705/07; 338/08; (HB 91/08);
HC 535/08; 156/07

(1) **DAKTYL AUTOMATIVE (PVT) LTD** **HC 234/08**
t/a AUTOZONE

versus

MATABELELAND HAULIRS [HAULIERS] (PVT) LTD

And

BEKITHEMBA LLYOD NKOMO

And

DOWOOD SERVICES (PVT) LTD

And

DAVID LUWO

(2) **MATABELELAND HAULIERS (PVT) LTD** **HC 1388/08**

And

DOWOOD SERVICES (PVT) LTD

And

DAVID LUWO

Versus

DAKTYL AUTOMATIVE (PVT) LTD
t/a AUTOZONE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 7 NOVEMBER 2008 & 15 SEPTEMBER 2011

J Sibanda for the applicant
S S Mazibisa for the respondent

Judgment

NDOU J: Before dealing with these applications I wish to record my apology for the delay in finalization of these matters. Although some of the cross reference files were misplaced for a period of time, the delay is unacceptable and I shoulder some of the blame for not using my notes to reconstruct the record of proceedings when the problem was highlighted. This is the route I have finally decided to follow in order to bring the matter to finality. At least now, save for one, all the files and cross-reference files have been placed before me.

Coming back to the matters, the parties made submissions in respect of both matters under HC 234/08 and HC 1388/08. These matters were consolidated. The understanding is that if on the one hand HC 234/08 is ruled in favour of the applicant, there would be no need to deal with the matter under HC 1388/08. If on the other hand, the application under HC 234/08 is dismissed, only then will I be required to determine the merits of the application under HC 1388/08. I have also heard oral submissions in respect of the latter matter.

(1) HC 234/08

This is an application for dismissal for want of prosecution. The salient facts are the following. The applicant, on 27 November 2007, instituted a court application against the respondents. On 12 December 2007, the respondents filed a notice of opposition accompanied by opposing papers. In terms of Order 32 Rule 236(3)(b) of the High Court Rules 1971 the applicant should have filed an answering affidavit or alternatively should have taken steps to ensure that the matter was set down for hearing within one month from the date that the opposing papers were filed. This application was filed on 13 January 2008. The point *in limine* raised is whether this matter was prematurely set down i.e. before the lapse of the one month stated in the rules.

In terms of section 33 (6) (c) of the Interpretation Act [Chapter 1:10] a month is as it stands in the calendar e.g. 1 December to 31 December 2008. In the circumstances, no month begins from the middle of the month and end in the middle of another. A calendar month runs from the beginning of a month to an end of that month.

Accordingly, this application was prematurely filed. On that basis alone I dismiss the application with costs on a legal practitioner and client scale.

(2) HC 1388/08

This is an application for rescission of the judgment of this court granted in default of the respondents under HC 2507/07. There is a point *in limine* raised that the application for rescission was made out of time and therefore the party applying must first obtain condonation by this court in terms of Order 9 Rule 63 of the Rules. Without such condonation it is argued, that this application is fatally flawed and should be dismissed. Respondent relied on the following cases *Sibanda v Ntini* 2002 (1) ZLR 264 (S); *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd* 1988 (2) ZLR 249 (S) and *Highline Motor Spares (1933) (Pvt) Ltd & Ors v Zimbabwe Corporation Ltd* 2002 (1) ZLR 514 (S). (See also *Theunissen v Payne* 1940 TPD 680 at 685). The facts reveal that the respondent obtained the order in question outside the knowledge of the applicant. The order was served on the applicants on 26 June 2008. The applicants became aware of the order on that date. On 4 July 2008, applicants filed this application. Only six (6) days passed from the date applicants became aware of the judgment to the date that this application was filed. There is, therefore, no merit in the point *in limine* raised and it is dismissed – see Rule 63 (1) which provides –

“(1) A party against whom judgment has been given in default ..., may make a court application, not later than one month after he has had knowledge of the judgment, ...” (Emphasis added)

The facts of this matter are the following. On 21 November, 2008 respondent instituted a court application under case number HC 2507/07 against the applicants seeking the following relief:

- “1. The applicant’s right of refusal entrenched on the agreement of lease dated 30 September 2002 between the applicant and the 1st respondent be and is hereby upheld or declared binding as between the parties.
2. The purported agreement of sale over stand number 9 Preston Street, Belmont, Bulawayo entered on or around 6 October 2006 be and is hereby declared null and void and is set aside.
3. The applicant be and is hereby directed within 30 days to offer stand number 9 Preston Road, Belmont, Bulawayo to the applicant on the same terms and conditions as those to 3rd respondent on or about 6 October 2006. An order that the respondent jointly and severally sign transfer papers at the Registrar of

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Deeds offices for the transfer of stand number 9 Preston Street, Belmont, Bulawayo within 30 days of granting of this order, failing which the Deputy Sheriff, Bulawayo be and is hereby directed to sign all transfer papers or all documents necessary to effect transfer to the applicant.

4. An order that the respondents jointly and severally cease to disturb the applicants, use, possession and access to stand number 9 Preston Street, Belmont, Bulawayo,
5. An order that the respondents and the others to be absolved to pay costs of suit on an attorney-client scale.”

The application was properly served. On 12 December 2007 the applicants filed opposing papers, which were served on the respondent's legal practitioners. On 31 January 2008 following the failure by respondent to either file an answering affidavit or to set the matter down for hearing, applicants filed a chamber application in terms of Order 32 Rule 236 (3)(b) of the High Court Rules, for dismissal of the application for want of prosecution. The respondent filed opposing papers under case number HC 234/08 on 8 February 2008. On the same day, respondent filed its heads of argument in respect of case number HC 2507/07. The applicants filed an answering affidavit in case number 234/08 and applied for a date of hearing. In the interim, unbeknown to applicants, respondent after filing heads of argument aforesaid, proceeded to apply through the chamber book to have the matter in case number HC 2507/07 dealt with as unopposed because the applicants had not filed their heads of argument. The chamber application by which the respondent applied for leave to enroll the matter as an unopposed matter was granted by this court on 5 March 2008 under case number HC 535/08. This record was missing from the Registrar's office at time of this application. As alluded to above, that chamber application under case number HC 535/08 was not served on the applicants. On 8 May 2008, respondent enrolled case number HC 2507/07 as an unopposed matter, and was able in the circumstances described above to secure a default judgment. Having obtained the default judgment, respondent did not advise the applicants of that judgment. The respondent disclosed the existence of this order through some fortuitous circumstances in another matter between the parties under case number HC 156/07.

The applicants now apply for an order rescinding the order under case number HC 2507/07 and the application is opposed by the respondent. It is trite that the factors which court takes into account in such applications are:

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- (a) the degree of non-compliance with the Rules;
- (b) the explanation therefor
- (c) prospects of success on the merits
- (d) the importance of the case
- (e) the convenience of the court, and
- (f) the avoidance of unnecessary delay in the administration of justice – *Bishi v Secretary for Education* 1989 (2) ZLR 240 (H) at 243B-C; *V Saitis & Co (Pvt) Ltd v Fenlake (Pvt) Ltd* 2002 (1) ZLR 378 (H) and *Challenge Auto (Pvt) Ltd & Ors v Standard Chartered Bank Zimbabwe Ltd* 2003 (1) ZLR 17 (H) at 19.

In *Songare v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S) at 213A-B, McNALLY JA stated-

“One is naturally reluctant to reach a decision which would result in the giving of judgment against a person without his being heard, when he protests that he has a valid defence.”

The impression must not be gained that the Rules may be flouted with impunity. A reason for the delay must be given and it must be an acceptable reason. As alluded to above, the applicants acted as soon as they became aware of the existence of the default judgment. The explanation for the default is that the application under HC 535/08 was not served on the applicants. When the applicant brought this issue of non-service of the application in case number HC 535/08, the file disappeared from the Registrar’s office. This is an important case as it involves immovable property. It would not be in the interest of justice for the transfer of such immovable property to be based on legal technicality in the face of the missing file case number HC 535/08 at the time of application. There is a bona fide explanation for the default.

There seems to be prospects of success on the merits in that 1st applicant *in casu*, did not sell the property in question. Only shares in shares in the 1st applicants were transferred by previous shareholders to new shareholders. There is an arguable case on whether this constitutes the transfer of the immovable thus granting the respondent the cause of action. Taking into account all the above I am persuaded that the applicants made a case for rescission.

Accordingly, the order granted by this court in case number HC 2507/07 be and is hereby rescinded with costs on the legal practitioner and client scale.

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Cheda & Partners, applicant's legal practitioners in case number HC 234/08 and respondent's legal practitioners in case number HC 1388/08

Messrs Job Sibanda & Associates, respondents' legal practitioners in case number HC 234/08 and applicants' legal practitioners in case number HC 1388/08