PRINCE JAMBO NKOMAZANA

Versus

CONCILIA LUPONDO

And

BULAWAYO CITY COUNCIL

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 30 SEPTEMBER 2011 AND 19 JANUARY 2012

G Nyoni for the applicant
L. Nkomo for 1st respondent

Opposed Application

NDOU J: The applicant seeks rescission of an order of this court granted against him in favour of the 1st respondent. The order was granted on 10 March 2011 under case number HC 205/11. Under case number 205/11 the 1st respondent instituted proceedings through summons against the applicant seeking the transfer of stand number 70250/2 New Lobengula to herself from the applicant. The applicant entered an appearance to defend, but did so outside the prescribed time specified in the High Court Rules, 1971. The 1st respondent then proceeded to make an application for default judgment as the applicant had been barred automatically, which application was granted on 10 March 2011. Pursuant to the above, the applicant then made this application for rescission of judgment. The 1st respondent opposed is opposed to the application. This application is made in terms of Rule 63 of the High Court Rules. The applicant has to show before the indulgence of rescission is granted, that he has sufficient cause for the indulgence. The applicant has not shown any good and sufficient cause for the court to rescind the judgment. The reason that he proffers for not having filed his appearance to defend on time is that the respondent's lawyers knew that the matter was defended and as such they should have informed his lawyers that he should file the plea. The applicant cannot expect for the respondent to litigate and defend on his behalf. His lawyers are the ones who were supposed to file his defence and they failed to do so. In the circumstances the applicant does not have an acceptable reasonable explanation. In any event, applicant's legal practitioners were advised of the late filing of the appearance to defend and they ignored this. The letter reads:

"The above matter refers.

Please take note that your client's appearance to defend was filed out of time and as such your clients are barred.

Further what exactly are your client's defence, when they know that they sold the said property to the plaintiff, we wonder!!

We advise that we are proceeding to set this matter down as your clients are barred.

Be well advised …"

This letter was written to the applicant's erstwhile legal practitioners on 16 February 2011. The applicant's legal practitioners did nothing until the 10th March 2011 when the order under HC 205/11 was granted. The applicant's legal practitioners should have known the next step to take. The letter was delivered to the address provided in the appearance to defend. The applicant does not say exactly how his erstwhile legal practitioner let him down. In fact he tries to defend him and blame the respondent's legal practitioners. I am, therefore, unable to assess his erstwhile legal practitioner's moral blameworthiness. He has not even sought an affidavit from the erstwhile legal practitioner explaining why he did not regularize the appearance to defendant by seeking condonation – *Independence Mining (Pvt) Ltd* v *Soko* S-188-93; *Cobra and the Wildcat (Pvt) Ltd* v *Tundu Distributors (Pvt) Ltd* 1990(1) ZLR 133 (H) and Chall*enge Auto (Pvt) Ltd* v *Standard Chartered Bank Zimbabwe Ltd* 2003 (1) ZLR 17 (H).

The applicant was informed of the non-compliance with the Rules in the abovementioned letter. About a month later he had not done anything to seek the court's indulgence to condone the non-timeous filing of the appearance to defend. His explanation, as alluded to above, is not reasonable. His case on the merits is not convincing. He was sued together with his maternal aunt Sepelong Nyathi. They were both represented by the same legal practitioner when they attempted to file the appearance to defend. Yet in this application he states that the said aunt committed a fraud by forging his signature and other contractual documents. The respondent bought the disputed property and paid for it. Assuming what he is saying now is part of the instructions given to his erstwhile legal practitioner I wonder how the latter would have proceeded to represent both of them. The explanation for the dilatoriness lacks *bona fides*. The applicant's case is weak on the merits. The convenience of the court demands that there be finality in this matter. The case of *Ndebele* v *Ncube* 1992 (1) ZLR 288 (SC) is instructive on the penalization of a party for the negligence of lawyers and a failure to follow or to comply with court rules. At 290C-E, McNALLY JA, has this to say –

> "It is a policy of law that there should be finality in litigation. On the other 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 lawyers, have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for 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."

See also *Songare* v *Olivine Industries (Pvt) Ltd* 1988(2) ZLR 210 (S) at 213A-B and 211E-F; *Bish*i v *Secretary for Education* 1989(2) ZLR 240 (H) at 243B-C and *V. Saitis & Co (Pvt) Ltd* v *Fenlake (Pvt) Ltd* 2002 (1) ZLR 378(H). *In casu* this application is devoid of merit and is accordingly dismissed with costs.

Moyo & Nyoni, applicant's legal practitioners
Cheda & Partners, respondent's legal practitioners