HB 79-16
HC 541-16
XREF HC 523-16
XREF HC 1319-15

PREMIER SERVICES MEDICAL AID SOCIETY
versus
FAIRMIND CLINICAL LABORATORIES

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 9 MARCH AND 10 MARCH 2016

Urgent Chamber Application

L. Nkomo for the applicant
Ms *H. Moyo* for the respondent

MATHONSI J: The applicant, a medical aid society whose business it is to cover its members when they seek medical services from medical doctors and medical institutions, consented to judgment in the sum of $155 268-10 in favour of the respondent by virtue of a deed of settlement signed by the parties which was to be paid within seven days from 16 February 2016, which is the date the consent order was granted by this court, per TAKUVA J.

The respondent had instituted summons action against the applicant in HC 1319/15 which the applicant, through its current legal practitioners had defended. On 6 August 2015 the applicant's legal practitioners signed a deed of settlement in terms of which the applicant admitted liability in the sum of $305 268-10 of which $150 000-00 had already been paid leaving a balance of $155 268-10 which it undertook to pay in monthly instalments of $50 000-00 commencing on 31 July 2015. For good measure, the legal practitioners in question committed the applicant to payment of a further $1000-00 in legal costs. In the event of a default, the deed of settlement was to be made a court order to be executed.

Alleging default, the respondent sought judgment in terms of the deed of settlement, and an order was then made aforesaid. It is that court order which the applicant would like to have rescinded in terms of rule 56 of the High Court of Zimbabwe Rules, 1971 in its application filed as HC 523/16. In that application, the applicant alleges that after receiving the summons, it instructed its legal practitioners to settle the matter. The practice is that when a settlement is reached the applicant is advised to enable it to check and approve the settlement against its records of what is owed.

In this case the lawyers did not advise the applicant of the settlement until they had signed the deed of settlement. When the admission of liability was made, the respondent was not owed the admitted amount but only $1076-60 which was paid when the reconciliation was made around October/November 2015.

Although the reconciliation was made with the respondent, which remained silent for some time, the respondent still went ahead and moved for judgment on the basis of the deed of settlement signed in August 2015. The applicant says it was surprised to receive the court order on 22 February 2016, at a time when it owed the respondent only $2922-60.

The applicant has then sought to have the consent order rescinded aforesaid. It has also submitted this urgent application for a stay of execution, to wit:

"TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. That pending the determination of an application to set aside an order by consent in HC 523/16 respondent is hereby interdicted from initiating or proceeding with the process of executing the court order in HC 1319/15.
2. The respondent is to pay costs of suit.

INTERIM RELIEF GRANTED

That pending the determination of this matter, the applicant is granted the following relief:

1. The respondent be and is hereby interdicted from initiating and proceeding with the execution and attachment of applicant's property pursuant to the court order in HC 1319/15.
2. If attachment has already been done, such attachment is hereby stayed. If applicant's property has already been removed, the removed property is to be restored back to applicant forthwith."

The deponent of the founding affidavit, Cosmas Mukwesha who is the Group Legal and Corporate Affairs Executive says that while the deed of settlement claimed that at the time of its signing the applicant owed $305268-10, only a sum of $714-70 was owing and it was duly paid on 13 August 2015. This occurred as a result of the admitted oversight of the applicant's legal practitioners. The respondent had based its claim on its submitted claim forms which did not

take into account the payments that had been made by the applicant. Having discovered the mistake the applicant has moved quickly to rectify it by seeking a rescission of judgment.

The application is opposed by the respondent. In her opposing affidavit, Roselyn Mugodhi, the applicant's managing director take issue with the urgency of the application and is of the view that this is self-created urgency. This is because the applicant was aware of the respondent's intention to pursue the matter to finality but did not do anything until "after execution was to be levied."

I do not agree. A matter is urgent if, when the need to act arises, the matter cannot wait. Self-created urgency is that urgency which stems of a deliberate inaction until the hour of reckoning. In this matter the respondent has not levied any execution. In fact no writ of execution has been issued. The applicant acted upon receipt of the court order on 22 February by filing this application on 2 March 2016. It is my view that there can be no question of self-created urgency in this matter because the applicant acted upon notice of the judgment and before it could even be executed.

On the merits of the matter, Mugodhi stated that there was no mistake in the settlement of the matter as the applicant and its legal practitioners "were in absolute communication." Unfortunately she does not show how she arrives at the conclusion and has not produced any proof of the communication as would discredit the assertion by the applicant that there was a mistake.

Mugodhi insisted that the amount owing as at 25 September 2015 is simply the balance taking into account payments made in terms of the deed of settlement. She made reference to four letters written by *T. Bhatasara* between 2 June 2015 and 14 July 2015 as pointing to the fact that there was communication between attorney and client and to rule out the existence of a mistaken in consenting to judgment. Again it is unfortunate that the letters in question were addressed to *Sansole and Senda*, the legal practitioners of the respondent and not the applicant. They were not even copied to the applicant. They therefore do no disprove the claim by the applicant that the settlement was reached without consulting it or that there was a mistake.

The respondent insisted that the applicant "is bound by the sins and omissions of its legal practitioner", and should not be allowed to resile from the deed of settlement. It has no prospects of success in its application for rescission of judgment. This may well be so but then I am not being asked to determine the merits of the application that has been made in terms of rule 56. I have been asked to stay execution to facilitate the safe prosecution of that application.

Ms *Moyo* for the respondent submitted that the application for rescission of judgment which is sought to be prosecuted has been brought in terms of the wrong rule, r56 and seeks to rescind the judgment without setting aside the impugned deed of settlement. It should have been made in terms of r63 (1) of this court's rules. The draft order also does not seek to set as aside the deed of settlement. For that reason as the application is defective and does not advance the applicant's case in any way the application for stay of execution must also be dismissed. I do not agree.

The judgment that is sought to be rescinded was entered in terms of the deed of settlement clause (e) of which provides:

> "In the event of default of payment of the monthly instalments and later than the 10th of the following month of default, the deed will become an order of court which can be executed upon."

It was in terms of that clause that the respondent sought judgment and the judge granted it after initially querying whether the applicant had defaulted and was advised through an affidavit sworn to on 8 February 2016 by Roseline Sururu of the respondent that no payments had been received by the respondent. Therefore the judgment was granted by consent and can only be set aside in terms of r56 and not r63 (1) which speaks to a default judgment.

Regarding the draft order, I agree with Mr *Nkomo* for the applicant that if granted the order will enable the applicant to file a plea. As to whether the respondent will be allowed to cling onto the deed of settlement, which for all intents and purposes would amount to a withdrawal of an admission, will be determined by the court at the trial. I therefore reject that argument.

The applicant only seeks from me interim protection. Interim relief is granted on the mere showing of a *prima facie* case.

See *Kuvarega* v *Registrar General and Another* 1998 (1) ZLR 188 (H) 193 A – B.

In terms of r 56 a judgment given by consent may be set aside by the court and leave granted to the defendant to defend such action on "good and sufficient cause" being shown. It is stated in the headnote of *Roland and Another* v *McDonnell* 1986 (2) ZLR 216 (S) that:

> "A judgment given by consent may be set aside on good and sufficient cause, 'good and sufficient cause' in this context is to be determined according to the same principles by which it is to be determined in an application to set aside a judgment given by default. Moreover, a party will not normally be permitted to fight over again a battle which has been fought unless, there has been a significant change in circumstances or the party has become aware of facts which he could not reasonably have known or found out in the first encounter."

See also *Masulani* v *Masulani and Others* 2003 (1) ZLR 491 (H) 495A.

It has been stated that the same principles applied in determining good and sufficient cause within the meaning of r63 also apply to an application in terms of r56. See *Nyemba* v *CBZ Bank and Others* HH 255/114; *Roland and Another* v *McDonnell*, *supra; Washaya* v *Washaya* 1989 (2) ZLR 195 (H) 199F.

While I am not sitting at the moment to determine the application for rescission of judgment, it is necessary to take a peek at that application in order to see whether it has merit as to entitle the applicant to the remedy of an interdict for stay of execution. This is because, as I have said, the applicant still has to satisfy the requirements for the grant of an interdict which include the establishment of a *prima facie* right. This court will not grant a stay of execution merely at the asking or just because any application for rescission has been made even when it is frivolous or vexatious. It will only grant a stay pending the determination of such an application when the application n is arguable.

The applicant and its legal practitioners may have conducted their case in a tardy and far from satisfactory manner resulting in the legal practitioners consenting to judgment. The fact however remains that to the extent that the liability of the applicant to the respondent was always fluid (the respondent was reducing the debt monthly), the applicant has an arguable case. There is an explanation for the mix up and an injustice will occur if it is not ventilated properly.

I am therefore satisfied that the applicant has made a case for the relief sought.

Accordingly the provisional order is granted in terms of the draft order.

Mupanga Bhatasara C/o Dube-Tachiona & Tsvangirai, applicant's legal practitioners
Sansole and Senda, respondent's legal practitioners