CHARLES VICTOR GURUPIRA
and
AGNES GURUPIRA
versus
THE SHERIFF OF ZIMBABWE N.O
and
MAXWELL CHISVO
and
INTERNATIONAL FINANCE CORPORATION

HIGH COURT OF ZIMBABWE
HUNGWE J:
HARARE, 29 May & 3 September 2008

Mr *S.J. Chihambakwe*, for the applicant
Mr *A. Muchadehama*for 2nd respondent
No appearance for 1st and 3rd respondents

HUNGWE J: This an application for rescission of judgment by default entered against the applicant on 6 September 2004 in HC 7428/03 dismissing an application by the applicants seeking the setting aside of the confirmation of the sale by first respondent of an immovable property.

The facts to this application are complex but may be summarised as follows:-

Agriflora (Pvt) Ltd entered into a loan agreement with third respondent for the sum of US $240 000-00 on 21 January 1997. As directors in Agriflora (Pvt) Ltd the first and second applicants gave security for the due discharge of Agriflora's (Pvt) Ltd indebtedness to third respondent by mortgaging the undeveloped portion of a subdivision of Stand 42 Winchdon Township of Lot D of Borrowdale Estate ("Stand 42"). In the mortgage bond both applicants personally and individually bound themselves as sureties. Agriflora (Pvt) Ltd defaulted in the payment of the principal sum and interest. Third respondent sued. A judgment by consent was duly entered in favour of third respondent in HC 10270/01. On 15 January 2002, third respondent issued summons against both applicants in HC 1544/02 and judgment was entered against the applicants in HC 1544/02 on 26 April 2002. It was pronounced in that order that

judgment was joint and several with that obtained against Agriflora (Pvt) Ltd in HC 10270/2002.

In January 2003 Agriflora (Pvt) Ltd made application, on an urgent basis, to stop the sale of Stand 42 in HC 155/03. It failed. In August 2003 both applicants filed a Court application seeking the setting aside of the sale of Stand 74 ('the homestead') in HC 7428/04. All throughout this litigation applicants were duly represented by a senior legal practitioner. This application was dismissed as their legal practitioner, according to their (applicant's) version did not appear on their behalf at court on 6 September 2004.

This is the matter for which rescission is now being sought. The present application was filed on 7 December 2006. Needless to say the application is opposed.

Applicants seek condonation for the late filing of the application for rescission of judgment entered on 6 September 2004 as well as rescission of that judgment.

In respect of condonation the basis upon which the indulgence of condonation is prayed appear in the penulimate paragraph of the first applicant's founding affidavit. In it he admits that they both knew of the default judgment at the same time it was handed down. He seeks to explain his inaction despite this knowledge by claiming that legal advice at the time was that there was no basis upon which they could obtain rescission of judgment as they had lost the other matters. They decided to negotiate for an out of court settlement with third respondent. He say he 'only knew recently that stand 42 had been transferred to second respondent'. He says the Stand 42 was subdivided into two properties on the advice of the third respondent so that should the need to sell the mortgaged property arise, they would be left with "the homestead" stand.

This last explanation for the delay in seeking condonation earlier than they should have is neatly tied together with the 'good and *bona fide'* defence which they proffer earlier on in the first applicant's affidavit. In paragraph 11 first applicant says he has a good and *bona fide* defence to the third respondent's claims in that 'at all material times Stand 74 "the homestead" was never part of the hypothecation and that the agreement recognised this as fact. He also alleges that at all material times the caveating and sale of Stand 42 was wrongful and unlawful and that at all material times all the respondents knew that Stand 74 "the homestead" did not

exist for the purposes of hypothecation and that third respondents' claim were secure only by the remainder of Stand 42, "the vacant stand".

The first ground put forward in opposition was that applicants ought to fail as they adopted the wrong procedure in placing the application before the court. In view of the lateness of the bringing of the application for rescission the applicants should have proceeded by why of a separate notice of motion seeking condonation for the application for rescission of judgment. The applicants would then have set out separately the reasons why the court should condone the delay in bringing the application. That application would have been dealt with separately. Depending on whether it succeeded, the proper application for rescission would then be heard.

Regarding the application for rescission the second respondent avers that the explanation put forward for the inordinate delay is unacceptable. He also points to the failure by the applicants to secure an affidavit from Mr Muskwe setting out the circumstances leading to his renouncing agency and subsequent default of appearance by the client. This, second respondent says, would clear the air on whether such a senior legal practitioner could have left his clients in the lurch, so to speak, as to result in a judgment being entered by default.

Further, and in any event, the applicants knew as far back as 2002 and at least when they filed application in HC 7428/03, that their immovable property were imperil by two orders of court but did nothing about it. On their own version having discovered that judgment by default had been entered by them in 2003 they only took away their files from Mr Muskwe and sat on them.

They did not immediately seek to overturn the judgment. They instead sought to negotiate with third respondent. They were satisfied with the legal advice proferred by their legal practitioner. Even when they consulted their legal practitioner of record, their instructions were to negotiate with third respondent. They did not seek immediately the rescission of default judgment, a course still open to them if the circumstances of the default they give is true.

In the premises second respondent urged this court to reject their pleas and dismiss the application.

I am not here dealing with a routine application for rescission of judgment in terms of the Rules. This is a common law application for rescission. Erasmus in Superior Court Practice at B1 – 306 says:-

> "At common law a judgment can be set aside on the grounds of fraud, *justus* error (on rare occasions) in certain exceptional circumstances when new documents have been discovered, and also where judgment had been granted by default".

There is no question of fraud. As to *justus* error, it is a difficult ground to establish in the circumstance of this case. In *Muchechesi v Field* NO 1997(2) 199@ p192G-193A. it was held that ' *justus* error' must be an error by the court, induced by a non-fraudulent misrepresentation to the court by the party obtaining the judgment.

See also *Deary v Deary* 1971(1) SA 227(C) @ 230 C – E; *Mukundadzviti v Mutasa* 1990(1) ZLR 342 (H) @ 345 E.

In respect of the application for condonation, Counsel for the applicant referred me the principles set out by Hebstein and Van Winsen's The Civil Practice of the Supreme Court in South Africa 4th Ed @ pp 897 to 898 where it is stated:

> "Condonation of the non observance of the rules is by no means a mere formality. It is for the applicant to satisfy the court that there is sufficient cause to excuse him from compliance …. The factors usually weighted by the court in considering an application for condonation ……. include the degree of non-compliance, no explanation for it, the importance of the case, the prospects of success, the respondent's interests in the finality of the judgment, the convenience of the court and the unnecessary delay in the administration of justice".

In *Kodzwa v Secretary for Health & Another* 1999(1) ZLR 313 (S) @ 315 E SANDURA JA stated that:

> "It is, therefore, well established that the court has discretion to grant condonation when the principles of justice and fair play demand it and when the reasons for non-compliance with the rules have been explained by the applicant to the satisfaction of the court".
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> See also *Sibanda v Ntini* 2002(1) ZLR 264 @ 267 B.

It seems to me that this being an application for rescission being brought in terms of the common law, the consideration set out by *McNALLY JA* in Mchechesi's case apply.

Firstly I do not find that applicant has made out a case for *justus* error. There is nothing on the papers which show that the judgment in HC 7428/03 was a result of a non fraudulent

misrepresentation induced by any of the respondents resulting in the grant of judgment sought to be rescinded. Nor can it be in any way argued that the attachment of the stand 74 is a result of an error of interpreting the bond entered into by the applicants. In any event, the applicants have not shown that they are entitled to the condonation for their delay in filing the application for rescission.

It seems to me that this application ought to have been bought separately by the applicants firstly as one for condonation. Depending on their success they would have embarked on the main application in which they seek the present relief. As matters stand I am not satisfied that the applicants are entitled to the indulgence of condonation which they make as an afterthought. Even if I were wrong in holding that the application for condonation is made here as an afterthought, I still would have been unable to grant them the main relief that they seek on the present papers because I am not satisfied that a reasonable explanation for the delay in bringing the application has been made by the applicants.

They were satisfied with the matters as they stood after the legal practitioner of choice advised them of the position. I am satisfied that this is not a matter in which, taking into account all the factors set out by the authorities cited above, the court should grant the indulgency of rescission.

In the event therefore both the application for condonation for the late filing of the application for rescission fails and the application for rescission fail with costs.

Chihambakwe, Mutizwa & Partners, applicants' legal practitioners
Mbidzo, Muchadehama & Makoni, 2nd respondent's legal practitioners