JAMES KAMBADZA

versus

ANNA MTETWA

HIGH COURT OF ZIMBABWE

CHATUKUTA J

HARARE, 2 September 2010 & 12 January 2011

Opposed Matter

F. Nyangoni, for the applicant

R. M. Maunganidze, for the respondent

CHATUKUTA J: This is an application in terms of *r* 63 of the Rules of the High Court, 1971 for the rescission of a judgment granted in default on 24 June 2009 in case no HC 1247/07. In addition, the applicant sought for an order that the proceedings of the Pre-trial Conference held on 18 November 2008 and the result thereof be declared null and void and that a date for another Pre-trial Conference be allocated.

The background to the matter is that sometime in May 2003, the parties entered into a contract in terms of which the applicant agreed to construct a house for the respondent on stand No. 6224 Tynwald, Bloomingdate, Harare. The applicant did not complete the construction of the house resulting in the respondent issuing summons for specific performance failing which the applicant would be required to pay damages being the market cost of completing the construction. The applicant defended the matter. After closure of pleadings, the matter was referred for a Pre-trial Conference.

The default judgment emanated from the directives of the court during a Pre-trial Conference which was held on 28 November 2008. Both the parties attended the Pre-trial Conference with their legal practitioners. However, there are divergent contentions as to the directives of the court. The applicant contended that the court directed that the respondent was to file a notice to amend her claim by 18 November 2008 and the applicant his plea by 21 November 2008. Thereafter the matter would proceed to trial.

His legal practitioner also heard that the matter was referred to trial. Both the applicant and his legal practitioner did not hear the judge postponing the Pre-trial Conference to 18 November 2008. The applicant did not therefore attend the Pre-trial Conference on 18 November 2008. His plea was struck off and the matter was referred to the unopposed roll. Default judgment was then issued on 24 June 2009. He became aware of the default judgment on 15 July 2009. He proceeded to file the present application on 21 July 2009.

The respondent contended that the court directed that the Pre-trial Conference be postponed to 18 November 2008. The respondent was to file her notice of amendment by 9 November 2008 and the applicant was to plead before 18 November 2008. She attended the Pre-trial Conference with her legal practitioner on 18 November 2008. The rest of the facts are common cause as to how she obtained the default judgment.

A rescission of judgment under *r* 63 can only be granted where an applicant shows “good and sufficient cause” entitling him to rescission of judgment. The words 'good and sufficient cause' have been construed to mean that the applicant must:

(a) give a reasonable and acceptable explanation for his/her default;

(b) prove that the application for rescission is bona fide and not made with the intention of merely delaying plaintiff's claim; and

(c) show that he/she has a *bona fide* defence to plaintiff's claim.

(see *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210,; *Bishi* v *Secretary for Education* 1989(2) ZLR 240 (HC); *Ndebele* v *Ncube* 1992(1) ZLR 288(S); *Dewera Farm (Pvt) Ld & Ors v Zimbabwe Banking Co-operation* 1997 (2) ZLR 47 (H) *Zimbabwe Banking Corporation Ltd v Masendeke* 1995 (2) ZLR 400 (S) and *Apostolic Faith Mission in Zimbabwe & others v Titus I Murufu* SC 28/03)

In *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 and at 211E-F McNally JA held that:

> “While the courts are inclined to frown on plaintiffs who "snatch at their judgments" the impression must not be gained that the Rules may be flouted with impunity and that as long as you are only a day or two late rescission will be granted on request. A reason for the delay must be given and it must be an acceptable reason. A defendant who admits that he was negligent in his tardiness may nonetheless be found to merit rescission if he shows bona fides. **But one who puts forward a "reason" which is an insult to the**

> **intelligence of the court may have more difficulty in satisfying the court of his good faith**. (own emphasis) (See also *V Saitis & Co (Pvt) Ltd* v *Fenlake (Pvt) Ltd* 2002 (1) ZLR 378 at 381A).

It appears to me that the reason advanced by the applicant is unreasonable under the circumstances and shows lack of bona fide. The court endorsed the results of the PRE-TRIAL CONFERENCE of 28 October as follows:

> "PP 18/11/08 at 9 am
> Pl to file an amendment to the claim by 9/11/08
> Defendant to plead b4 PTC."

It is difficult to understand how the applicant and the respondent and their respective legal practitioners would have heard differently the directive given by the court in their presence. In fact the averments by the applicant and his legal practitioner in their respective affidavits in support of the application insult the intelligence of the court. Both were adamant that the court had in fact indicated that the matter was to proceed to trial upon the filing of the notice of amendment by the respondent and the plea by the defendant. Philip Nyakutombwa, applicant's legal practitioner who was in attendance on 28 October 2008 stated as follows in his supporting affidavit

> "4.5 It was beyond doubt that the option of an out of court settlement was now clearly inconceivable at this stage to the extent that I recall the Honourable Judge stating she would "refer this matter for trial".
>
> 4.6 At this point, I will clearly state that this was the directive I heard and soon thereafter the Honourable Judge dealt with the need before trial date for Respondent (Plaintiff) to file their Amendment to summons as per their request and for Applicant (defendant) to file a plea in response."

The applicant stated as follows in paragraph 17 of the answering affidavit:

> "This is denied. Gross negligence is denied as applicant and his Legal Practitioner have stated that the words heard from the Honourable judge were to the effect that "failing to settle, the matter <u>shall</u> be referred to trial" which was the most prominent feature the Judges (*sic*) ruling, what was endorsed on the record differed from what was heard and understood (human error)."

The import of the averments is that the judge who presided over the PRE-TRIAL CONFERENCE was deceitful. She said one thing and endorsed a totally different thing on the result sheet. Had the applicant been a self actor, he would have been forgiven for

the averments. But the applicant made those averments with the assistance of an officer of the court. The officer of the court himself also implied that the court was deceitful. I find the conduct of the legal practitioner deplorable under the circumstances. He did not only insult the court's intelligence by proffering the unbelievable explanation but he also insulted the court that presided over the Pre-trial Conference by imputing a high degree of dishonesty thereby attacking her integrity.

I further find it to be unreasonable that the applicant's legal practitioner would believe that the matter had been referred to trial before the Pre-trial Conference was concluded with the identification of issues for referral to trial. *Mr Nyangoni* conceded that when the court directed that the respondent amend her summons, the pleadings had been reopened and would have been closed with the applicant filing his plea. He further conceded that the matter would only have been referred to court after the parties had agreed to the issues that would be referred for adjudication at trial. The purpose of a Pre-trial Conference is to afford the parties an opportunity to clearly define issues to be referred to trial so as to expedite or curtail proceedings (see *r* 182 of the High Court Rules). The parties, with the assistance of the court, must be satisfied that the case which the plaintiff seeks to make has been fully and fairly disclosed and the defence raised thereto has properly been pleaded to the extent that is required. The summons in their original form was not sounding in money. It did not disclose the cost of the completing the construction of the respondent's house. The applicant would not have properly defended the claim in the absence of the cost. The parties were agreed that this is the reason why the court had directed that the parties amend their pleadings. It is only then, after the amendments had been filed that the parties would have been able to crystallise the issues for trial. That is trite. It is therefore surprising that Mr Nyakutombwa would have "heard" that the matter was referred to trial before pleadings had been closed and without the parties agreeing on the issues to be determined at trial.

The conduct of Mr Nyakutombwa amounts, in my view to gross negligence. The negligence is further compounded by the attempt to blame the court for the applicant's default. In *Kodzwa v Secretary for Health and* Anor (*supra*) at 317E, SANDURA J cited with approval, STEYN CJ in *Saloojee & Anor v Minister of Community Development* 1965 (2) SA 135 (A) at 141 C-E that:

> "I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this court. Consideration *ad misericordiam* should not be allowed to become an invitation for laxity. In fact, this court has been lately burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of this court was due to negligence on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation for failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship." (See also *Kombayi v Berkhout* 1988 (1) ZLR 53 (SC), *Ndebele* v *Ncube* (supra) and *Masama v Borehole Drilling (Pvt) Ltd* 1993 (1) ZLR 116 (SC)).

I share the same sentiments and am of the view that the applicant cannot, under the circumstances, escape the results of his legal practitioner's lack of diligence and the unreasonableness of the explanation tendered for the default.

I turn now to the bona fides of the applicant's defence to the respondent's claim. The applicant contended in his plea that the contract between the parties was on a fix and supply basis. The respondent was required to pay the amount for the construction of the property in "bulk". It is assumed that the bulk payment was payment of 75% of the cost of construction as indicated in the letter dated 16 May 2003, which letter constitutes the agreement between the parties. The applicant appears to have been satisfied with manner in which the respondent had been making her payments as reflected in the letter dated 27 October 2003. In that letter he expressed satisfaction at the progress that had been made with the financial support of the respondent. He certainly would not have expressed satisfaction at the progress he had made had the respondent not been making timeous payments.

In fact the respondent appears to have been up to date with her payments because the applicant refunded her a sum of $3 000 000. The applicant conceded in his answering affidavit that the final cost of construction was $21 200 000. The respondent had paid a total of $24 200 000. It is therefore understandable that the respondent would have believed that she had discharged her obligations when she received the refund of $3 000

000 being the difference between the cost of construction of $21 200 000 and the total amount of $24 200 000 that she had paid to the applicant.

The applicant explained that the refund was made because the $3 000 000 was not adequate to complete the roofing of the house. He however could not explain why it was necessary to make a refund instead of retaining the amount and requesting the respondent to pay the balance. It appears this would have been the best course of action to take given the alleged changes in the cost of the roofing given the then hyperinflationary environment. The only inescapable conclusion for the refund appears to be that the respondent had in fact discharged her obligations.

If I am correct in concluding that the respondent had discharged her obligations under the contract, it follows that the applicant does not have a *bona fide* defence to the respondent's claim. I am bolstered in my conclusion by the letter dated 17 July 2007 and written by the applicant to the respondent during the negotiations conducted in order to reach an amicable settlement of the respondent's claim. In the letter, the applicant's legal practitioners wrote:

> "(a) Our client acknowledges the undue difficulties and hardships this case may bring upon both parties and **is therefore willing to accept fault on his part**.
> (b) **After accepting fault**, there is need to map a strategy way (*sic*) forward to bring the matter to a finality (*sic*)." (own emphasis)

It appears the reason why the applicant wanted a settlement was because of the hardships that would be occasioned in completing the construction without any further financial assistance from the respondent given the then hyperinflationary environment. He was however accepting blame for the delays in completing the construction. I believe the acceptance of fault was in view of the fact that the respondent had paid the full cost for the construction and had in fact received a refund.

The applicant also contended that he had a *bona fide* defence to the claim on the basis that the amendment of summons by the respondent was a nullity. The nullity is said to be premised on the fact that the applicant did not consent to the amendment and in the absence of the consent, the applicant did not file an application for an order to amend the

summons. The applicant relies on the decisions in *ZFC Ltd v Taylor* 1999 (1) ZLR 308 and *UDC Ltd v Shamva Flora (Pvt) Ltd* 2000 (2) ZLR 210.

The respondent contended that the applicant is estopped from denying having consented to the amendment because it pleaded to the notice amendment.

The decision in *ZFC Ltd v Taylor* is distinguishable from the present matter. In that case, the plaintiff was applying for default judgment. He proceeded to file the notice of amendment after the defendant had been barred. The notice of amendment was not served on the defendant. That is the reason why GILLESPIE J referred to the notice of amendment as unilateral and therefore unprocedural. The decision in *UDC Ltd v Shamva Flora (Pvt) Ltd*, is also distinguishable. The defendant, upon service of the notice of amendment, had requested for further documents to enable it to make a decision on how to respond to the pleading. The plaintiff assumed that the request for the documents was a refusal to give its consent to the amendment hence the application before that court.

In the present case, as rightly submitted by the respondent, the applicant did not raise any issues with the notice of amendment. He proceeded to plead to the plaintiff's amended summons and declaration. It appears to me that the applicant cannot now turn around and deny having consented to the amendment. What was he pleading to if he had not consented to the notice of amendment? It is my view that the applicant is precluded by its own conduct from denying that it had consented to the amendment. I therefore do not believe that this constitutes a *bona fide* defence to the plaintiff's claim.

In the result, the application is dismissed with costs.

Hute & Partners, applicant's legal practitioners

Messrs Chihambakwe, Mutizwa & Partners, respondent's legal practitioners