CHRIST EMBASSY ZIMBABWE

versus

CHIDZIVA INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE

CHATUKUTA J

HARARE, 30 September 2010 & 19 January 2011

Opposed Matter

L Mazonde, for the applicant

B Chidziva, for the respondent

CHATUKUTA J: This an application for rescission of a default judgment granted by this court on 28 October 2009 in case No HC 3672/09.

The background to the application is that the respondent entered into an oral lease agreement with a satellite church of the applicant in Mufakose to lease Chidziva Building, Mufakose (the premises). One Stowell Mupanguri, the applicant's Deputy Governor responsible for finance negotiated the agreement on behalf of the applicant. The satellite church took occupation of the premises on 15 November 2008. It failed to pay rent leading to the respondent issuing summons on 14 August 2009 in case No. HC 3672/09. The respondent sought an order for the applicant's eviction from the premises and for arrear rentals in the sum of US$45 000 due from 1 November 2008 to 31 August 2009. The respondent also claimed holding over damages at a rate of US$5 000 per month and costs of suit. The summons was served at the premises on 20 August 2009. The applicant did not defend the suit and hence the default judgment. The order was amended to reflect arrear rentals in the sum of US$30 000.

The applicant alleges that it only became aware of the default judgment on 15 January 2010 when it was served by Deputy Sheriff with a Notice of Seizure and Attachment, Notice of Removal and Writ of Execution at its head offices at corner Bishop Gaul Avenue and Rekai Tangwena Road, Harare. On 20 January 2010, it filed an

urgent chamber application in case number HC 318/10 seeking an order for the stay of execution of the default judgment. The following order was granted by consent:

> "1. The applicant hereby withdraws its present application.
> 2. The applicant shall file an application for rescission of judgment in case No. HC 3672/09 before 1600 hours on 11 February 2010.
> 3. The applicant consents to the amendment of the Defendant's (judgment debtor's) citation to Christ Embassy of Zimbabwe under case No HC 3672/09.
> 4. The property attached by the Deputy Sheriff on 15 February 2010 shall remain under the judicial attachment pending the resolution of the Applicant's application for rescission of judgment.
> 5. Costs shall be in the cause."

The applicant filed the present application in compliance with the above order.

An application for rescission of judgment under *r* 63 of the High Court Rules, 1991 can only be granted where an applicant shows "good and sufficient cause". The words 'good and sufficient cause' have been construed in various judgments in this jurisdiction 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). I will now deal with each of the requirements in turn.

The explanation that has been advanced by the applicant for the default is that the summons was not served at its place of business and therefore it was not aware of the suit. It was further contended that the applicant was not aware that its satellite church was operating from the respondent's premises. I found it difficult to accept the applicant's latter contention that it was not aware that its satellite church was operating from the respondent's premises. It flighted an advertisement in The Herald for a "Super

Sunday Service" to be held at the premises on 15 March 2009. The contact details on that advertisement are those of the applicant's head office at corner Bishop Gaul and Rekai Tangwena Road, Harare. In fact, Pastor Ruth, who is the deponent to the applicant's founding affidavit, attended service at the respondent's premises. She cannot therefore be heard to be saying that she was not aware that the applicant's satellite church was operating from the respondent's premises.

However, the fact that the applicant may have been aware that its satellite church was operating from the respondent's premises does not in my view translate to knowledge that summons were served at the premises. There is no evidence that Mupanguri advised the applicant of the service of the summons. It appears that the respondent was in fact aware that the applicant might not have received the summons because although it served the summons at the respondent's premises, the notice of seizure and attachment was served at the applicant's place of business at corner Bishop Gaul Avenue and Rekai Tangwena. There was no explanation from the respondent why service of the notice of attachment was not at the same address where the summons was served. The fact that the applicant may not have been aware of the summons may therefore be true. It is therefore my view that although the applicant's officials at the satellite church may have been aware of the summons and the set down of the application for default judgment, the head office was in the dark.

Further, it is common cause that an application for rescission of judgment had been filed earlier on 2 November 2009 in case No. HC 5351/09 purportedly on behalf of the applicant by Mupanguri. The respondent opposed the application. However, it is worthy to note that there is no mention of that application in the pleadings filed by both parties in case No. HC 318/10. This is so despite the fact that Mupanguri purported to having been acting not only in his personal capacity but also on behalf of the applicant. He deposed that he was aware that summons had been served at the premises. An appearance to defend was not entered because he had been assured by the respondent's director that the summons were only issued to speed up negotiations between the satellite church and the respondent on the clearance of arrear rentals. He was surprised to be advised on 26 October 2009 by the same director that the matter had been set down on the unopposed roll of 28 October 2009.

It is my view that the respondent's conduct in not referring to the application is a concession that Mupanguri did not have the authority to institute the proceedings on be half of the applicant in case No HC 5351/09. I assume that this explains the respondent's consent to the order directing the applicant to file an application for rescission by close of business on 11 February 2010. If my assumption is correct that the satellite church proceeded to represent the applicant in litigation without authority, then the applicant's explanation for the default is reasonable and the applicant was therefore not in wilful default.

The applicant raised two main issues regarding whether or not it has a *bona fide* defence to the claim and therefore the application for rescission is not intended to harass the respondent and delay the inevitable. It firstly contended that it was wrongly cited in case No. HC 3672/09. It was cited as Christ Embassy Church instead of Christ Embassy, Zimbabwe. It stated that there is no such entity simply referred to as Christ Embassy Church in Zimbabwe. I am perplexed at the submission made by the applicants in view of paragraph 3 of the order in case No HC 318/10. The applicant consented to the amendment of its citation in that case to reflect its proper name. It is not clear on what basis it persists in arguing that it was not properly cited when it consented to the amendment. It appears to me that the applicant was accepting that it was one and the same as Christ Embassy Church and that the satellite church did not have a separate persona from the applicant. It is therefore my view that the defence does not have any merit.

The second defence was that the parties never agreed to a monthly rental of US$5 000 claimed and awarded to the respondent. It was contended that the applicant had offered to pay a rental of US$200 per month. The respondent argued that the rental was US$5 000 as reflected by a handwritten endorsement on a letter dated 8 August 2008 written to it by the applicant.

It is apparent from the communication between the parties that the applicant was labouring under the impression that the rental was US$2 000 per month (and not the US$200 referred to in the applicant's heads of argument). In a letter dated 8 October 2008 written by Mupanguri, the applicant offered a monthly rental of US$2 000. In another letter dated 25 August 2009 by one Mathew Kanganwayi, the applicant offered to

settle the arrear rentals in the sum of US16 000 by way of two instalments of US$8 000 each payable on 15 September 2009 and on 7 October 2009. Thereafter the applicant would pay a monthly rental of US$2 000. The last paragraph of the letter is further informative. It reads:

> "We would have loved to accompany this letter with $2 000 (USD) as payment for this month's rental, but we saw it wise to invest the $2 000 (USD) into the business ventures stated above so as to be able to raise the required finances to settle the arrears of $16 000 (USD) and create solid and stable sources of finances towards the rentals of the building in subsequent months."

The letter referred to two meetings held between the representatives of the satellite church and the respondent's legal representative, Mr Chidziva prior to the letter on 13 and 19 August 2009. The letter commences with an offer to settle a total of US$16 000 arrears. The amount tallies with rentals for 8 months starting from November 2008 when the respondent took occupation of the premises up to August 2009 when the letter was written. The meetings alluded to in the letter dated 25 August 2009 were held well after that endorsement on the letter of 8 October 2008. Both letters were filed by the respondent. There is no other letter from the respondent disputing the amounts reflected in the two letters let alone denying the purported nature and discussions of the meetings held between the parties on 12 and 19 August 2009.

The above communication was not placed before the court in case No. HC 3672/09. Of concern is the fact that the respondents were well aware of the communication and the meetings held to resolve the impasse yet these were not brought to the attention of the court. The respondent relied in its application to a letter of demand dated 9 July 2009 stating that the rental was US$5 000 per month. The applicant did not bring to the attention of the court that subsequent to the letter of demand, there were two meeting held on 12 and 19 August and the letter dated 25 August 2009 which states a different monthly rental of US$2 000. *Mr Chidziva*, should have, as an officer of the court, brought the information to the attention of the court. It appears that he had been the respondent's legal practitioner throughout the negotiations at the meetings held on 12 and 19 august 2009. I find *Mr Chidziva'*s conduct to be injudicious under the circumstances and borders on unethical conduct. I believe that had the court been made

aware by the respondent of the meetings and contents of the letter, it may not have granted order.

The letter was only produced in the present case to show that the applicant was not being truthful when it says that the parties had agreed to a rental of US$200 per month. Unfortunately for the respondent, the letter is a double edged sword. It also shows that the parties had not agreed to a monthly rental of US$5 000. I shall not venture to hazard an explanation as to why the respondent withheld from the court such vital information then and only produced it in the present case.

It therefore appears to me that the applicant has prospects of success in so far as the arrear rental due and the holding over damages are concerned. I am therefore of the view that it is equitable under the circumstances that rescission be granted.

It would however be remiss of me if I do not comment on the attempt by the applicant to mislead the court that the rental was US$200 as opposed to US$2 000. *Mr Mazonde* strenuously argued that the rental was US$200. The applicant being a church is supposed to be above reproach. Such misleading averments are therefore not expected of it. I also found *Mr Mazonde*'s conduct to be deplorable given that he was advancing a position not supported by the pleadings and the evidence filed of record. In fact he had difficulties in justifying the contention that the rental was US$200 in view of the letters referred to above that were written on behalf of applicant by officers at the satellite church. I only disregarded the averments as they were factual and had not been specifically pleaded either in the founding affidavit or the answering affidavit. They only appeared in the applicant's heads of argument.

In the result, it is ordered that:

1. The judgment entered on 28 October 2009 in case No HC 3672/09 be and is hereby rescinded.
2. The respondent shall pay the costs of this application.

Chibune & Associates, applicant's legal practitioners
Kantor & Immerman, respondent's legal practitioners