BENEDICT AMON CHIKWANHA
versus
VICTORIA MUKUNDADZVITI
and
CITY OF HARARE
and
DEPUTY SHERIFF
and
MKWANILA SYLVESTER MATEO

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 22 November 2010 and 1 June 2011

R T Hove, for the applicant
C H Mucheche, for the respondents

MTSHIYA J: I have before me two applications for rescission of default judgments. At the conclusion of the hearing of this matter the parties requested for a consolidation of cases HC 1342/10 and HC 1343/10. This was so because the cases were anchored on the same subject matter and the relief sought was the same. I granted the application for consolidation. In both applications the applicant seeks the setting aside of default judgments.

In case No. HC 1342/10 the applicant seeks the following relief (as amended):

"IT IS ORDERED THAT:

1. The judgment granted to the first respondent in default in case number 3675/08 on 3 December 2008 be and is hereby set aside.

2. The applicant be and is hereby given leave to defend the first respondent's claim.

3. The applicant be and is hereby given leave to file a notice of opposition to the first respondent's court application and to prosecute his opposition.

4. The first respondent be and is hereby ordered to pay the costs of this application on an attorney-client scale if she oppose (*sic*) it".

In case no. HC 1443/10 the applicant seeks the following relief:

"IT IS ORDERED THAT:

1. The judgment granted to the first respondent in default in case number 1281/09 on 25 September 2010 be and is hereby set aside.

2. The applicant be and is hereby given leave to defend the first respondent's claim.

3. The applicant be and is hereby given leave to file a notice of opposition to the first respondent's court application and to prosecute his opposition.

4. The first respondent be and is hereby ordered to pay the costs of this application on an attorney-client scale if she oppose (*sic*) it".

The facts relating to case number HC 1342/10 are these:

In July 2006 the applicant bought the property known as stand number 22 Gwatidzo Street, Mbare, Harare ("the property") from the fourth respondent. The property was ceded to the applicant on 11 July 2006 whereupon he took vacant possession. The applicant does not reside at the property. The property is occupied by tenants.

The papers before me reveal that on 29 June 2006 the first respondent filed an application in this court, namely HC 6217/06 against the fourth, second and third respondents in this matter, seeking the following relief:

"IT IS HEREBY ORDERED THAT:

1. First respondent shall cede the rights, title and interests in Stand No. 22 Gwatidzo, Mbare, Harare to the applicant.

2. That the second respondent shall facilitate the cession of the rights, title and interests of Stand No. 22 Gwatidzo, Mbare, Harare from the first respondent to the applicant.

3. That the third respondent shall sign all the cession papers to facilitate cession of the rights, title and interests in Stand No. 22 Gwatidzo, Mbare, Harare from the second respondent to the applicant in the event that the first respondent has failed to do so within 7 days of service of this order".

Admittedly the above relief, in the abandoned application, had nothing to do with the applicant *in casu*. The record in question shows that the matter, which was postponed *sine die* on 18 July 2007, was never pursued again. It appears the matter was revived in the form of case no HC 3675/08 which was filed, on 14 July 2008. The applicant *in casu* was then joined as a party to the said proceedings. The applicant was, in that case, cited as the second respondent.

On 3 December 2008 (i.e in case No. HC 3675/08), the first respondent obtained a default judgment against the applicant, the fourth respondent and the second respondent. The order granted was in the following terms:-

"1. The first and second respondents be and are hereby ordered to sign all the necessary documents to cede rights and title in stand No. 22 Gwatidzo, Mbare, Harare to the applicant within seven (7) days from the date of granting this order .

2. Should the first and second respondents fail to sign the relevant documents within seven (7) days of this court order, the Deputy Sheriff be and is hereby authorised to sign all the necessary documents to effect cession of the rights and the title in stand No 22 Gwatidzo, Mbare, Harare into the name of the applicant.

3. The third respondent be and is hereby ordered to accept cession documents duly signed by the Deputy Sheriff and effect cession in favour of the applicant.

4. The first respondent shall bear the costs of this application".

The first, second and third respondents referred to in the above order are the applicant, fourth and second respondents in this application. The above order had arisen from the fact that the first respondent *in casu* had claimed that she had purchased the property from the fourth respondent in June 2006. In case no HC 1342/10, the applicant seeks to set aside the above default order on the ground that he was never served with any court process relating to the proceedings that led to the granting of the default judgment. The applicant is arguing that he only became aware of the default judgment on 4 February 2010 when he was given a Notice of Removal.

The applicant also later discovered that on 20 May 2009 the first respondent *in casu* had in case no. HC 1281/09 obtained a default judgment against the applicant and fourth respondent. The order therein provided as follows:-

"1. The first respondent and second respondent and all those who claim occupation through them of house No 22 Gwatidzo, Mbare, Harare be and are hereby ordered to vacate the premises within forty eight hours (48 hours) of being served with this order, failing which the Deputy Sheriff, Harare, be and is hereby authorized to eject them from house No 22 Gwatidzo, Mbare Harare.

2. The first and second respondents shall pay the costs of suit".

The first and second respondents referred to in the above order are fourth respondent and applicant *in casu.*

It is the above order that the applicant, through case No HC 1343/10 seeks to have set aside. The grounds for seeking to have the order set aside are exactly the same as those given in case No. HC 1342/10.

In her opposing affidavit to the relief sought in case no HC 1342/10, the first respondent raises two points *in limine*. She states as follows:-

"APPLICANT IS BARRED

3. I am advised by my legal practitioners, whose advise I embrace, that the applicant is barred from approaching this Honourable Court with an application for Rescission of Judgment. The same is out of time, according to the provisions of the esteemed Rules of this Honourable Court, in particular **order 9, Rule 63(1), (2) and (£) of the High Court Rules, 1971 (**as amended).

4. The present order was granted on 3 December 2008. It is common cause that the required time has lapsed and a period in excess of one year four months has passed. Applicant ought to have and must make an application for Condonation for late filing of the present application. Its assertion that it got to know of an order granted in 2008 early this year is just unacceptable and such an excuse which is false cannot be used to trample and undermine the Rules of this Court.

DRAFT ORDER FATALLY DEFECTIVE

5. It is common cause that this is an application for Rescission of Judgment and that has been captioned in the Draft Order. Surprisingly applicant wants to his four birds with one stone. Applicant wants the court to grant him leave to defend its case, leave to file opposing papers, leave to facilitate cession regarding **Stand No. 22 Gwatidzo, Mbare Harare** coupled with eviction in the same groove. I am advised that applicant cannot seek all those reliefs basing on a mere application for Rescission. Applications for facilitation of cession and eviction cannot be clustered in one application. That alone makes the Court Application and Draft Order defective in the circumstances.

It is humbly submitted that the application to set aside the judgment of the 3rd December 2008 must be dismissed on the basis of the points raised *in limine* without labouring this Honourable Court to deal with the merits".

In response to the above points *in limine* the applicant argues as follows:-

"AD PARAGRAPH 3 AND 4

This is denied.
I am advised by my legal practitioners of record that in terms of the Rules of the High Court my Application for Rescission of Judgment should be filed within one month after I become aware of the judgment. In this particular case, the judgment was a Default Judgment. I was not aware of the judgment until I was given the Notice of Ejectment on the evening of the 4th February 2010. Through my legal practitioners of record I was able to confirm that at no time prior to the service of the Notice of Ejectment, did the Deputy Sheriff serve the Court Order. The most important factor is the date on which I became aware of the judgment and not the date the Order was

granted. The 30 days must be calculated from the date of awareness, not the date the Order was granted.

I am reliably advised by my legal practitioners of record that it is not necessary to file an Application for Condonation, as my Application was filed within the time allowed by the Rules of this Honourable Court.

It is not correct that a time of one year four months has passed. The effective date is from the date I became aware of the judgment which was on the eve of the 4th of February 2010.

AD PARAGRAPH 5

This is denied.

I am reliably advised by my legal practitioners of record that there is no attempt on my part to kill three birds with one stone. The Draft Order is not fatally defective as it merely sets out clearly the relief I require. I have applied for the judgment to be set aside and if set aside the effect means that automatically I have leave to defend the claim and file my Notice of Opposition. There is no claim for eviction in the Draft Order. There is a Draft Order to set aside the judgment which means if it is set aside then there must be a return to the *statue quo* prevailing before the judgment was granted. This is all that is applied for in the Court Application".

In the heads of argument, filed on behalf of the first respondent, it was submitted that, given the fact that the application was filed out of time, the applicant should have sought condonation in terms of r 63 of the High Court Rules, 1971 which provides as follows:

"(1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside

(2) If the court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his action, on such terms as to costs and otherwise as the court considers just.

(3) Unless an applicant for the setting aside of a judgment in terms of this rule proves to the contrary, he shall be presumed to have had knowledge of the judgment within two days after the date thereof."

It was argued that there was no condonation granted by the court for the application to be filed out side the period given in the above rule. That being the case, it was submitted, the application was a nullity.

With respect to the order sought, the first respondent argued that it was improper for the applicant to seek to obtain the following reliefs in one application (order)

1. Rescission
2. Leave to defend the respondent's claim
3. Leave to file notice of opposition to first respondents application; and
4. Cession of property.

It was the first respondent's view that separate applications for each relief should have been made.

In response to arguments in support of the points *in limine* the applicant submitted that he only became aware of the default judgment on 4 February 2011 when a notice of ejectment was served on his nephews who in turn alerted him. He does not reside at the property.

The applicant submitted that the application for rescission was filed within a month upon him having had knowledge of the judgment. That, he argued, was in accordance with he court rules.

The applicant went on to correctly submit that "the effective date from which one month must be calculated as set out in the rules is the date when he became aware of the judgment and not the date the judgment was granted". The judgment was granted on 3 December 2008. The applicant submitted that he only became aware of the judgment on 4 February 2010 whereupon he filed this application for rescission on 5 March 2010. It was therefore argued that there was no need to apply for condonation as submitted by the first respondent. The first respondent, it was argued, had not produced enough evidence to show that the applicant had prior knowledge of the judgment.(i.e. before 4 February 2010).

On the relief sought, the applicant, without seeking to amend his draft order, argued that all he wanted was rescission of the default judgment of 3 December 2008 and the court's leave to file a notice of opposition. He submitted that if the court agreed to set aside the default judgment the parties would revert to the original position prevailing before the default judgment. The applicant gave the same arguments on these issues with respect to case No. HC 1343/10.

For reasons I shall give here below, I am unable to unphold the points *in limine* raised by the first respondent.

As I have already indicated, what is before me are two consolidated applications for rescission of default judgments. The grounds for the applications in both cases are more or less

the same and so are the grounds for opposing the applications. It is settled that in an application for rescission the applicant must:

- give a reasonable explanation for the default
- establish *bona fides* of the defence on the merits
- show prospects of success.

There are several cases that can be cited to support the above position of our law (See *Stockil v Griffiths* 1992(1) ZLR 172(5)).

In *casu* the applicant has argued that he only became aware of the court process on 4 February 2010 because he does not reside at the property. The property is rented. There is, in my view, a possibility that the tenants at the property did not take the matter seriously and only reacted when they were being evicted.

It must also be borne in mind, notwithstanding transfer of the property to the first respondent, the applicant has produced evidence showing that up to February 2010 he was still receiving rates bills from the second respondent (i.e. City of Harare). That being the case, it appears there was nothing to put the applicant on enquiry regarding the status of his ownership of the property. He would therefore not have known of the transfer to the first respondent. I am therefore convinced that the applicant only became aware of the court processes on 4 February 2010 where upon he took immediate action, including the filing of an urgent chamber application. The important date is the date the applicant became aware of the default judgment he seeks to set aside. Consequently *in casu,* the issue of condonation would not arise.

Furthermore, given the fact that there is evidence that the applicant had indeed already received transfer on 11 July 2006 from the fourth respondent, it will be necessary to properly establish how the first respondent came into the equation. The papers before me show that the first respondent's last payment for the purchase of the property was 22 July 2006. The property was, at that date, already in the hands of the applicant. It may also be worth noting that in the abandoned case, HC 6217/06, where the applicant was not a party, the fourth respondent was opposing the first respondent's application in her bid to have the property transferred to her. Reasons for that opposition would need interrogation.

In view of the foregoing, I am unable to confidently rule that the applicant has no prospects of success if granted the opportunity to be heard.

Whereas the applicant's draft order indicates various steps that may or should flow from the rescission of the default judgments, I believe it is the prerogative of this court to determine what further appropriate relief should be granted to the applicant (i.e. in the event of setting aside the default judgments). I would therefore not read much in the applicant's draft order so as to render it un-procedural.

All in all my finding is that the applications in the consolidated matters should succeed.

I accordingly order as follows:

(A) (i) The default judgment granted in favour of the first respondent in case Number HC 3675/08 be and is hereby set aside.

(ii) The applicant be and is hereby granted leave to file a notice of opposition to the first defendant's claim within 14 days from the date of this order.

(B) (i) The default judgment granted in favour of the first respondent in case number HC 1281/09 be and is hereby set aside.

(ii) The applicant be and is hereby granted leave to file a notice of opposition to the first defendant's claim within 14 days from the date of this order.

(C) (i) Each party shall bear its own costs (i.e. in both HC1342/10 and HC 1343/10)

Hove & Associates, applicant's legal practitioners
Matsikidze & Mucheche, 1st respondent's legal practitioners