

PAUL GARY FRIENDSHIP
versus
JEFFREY DICK

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 4 September 2012

E.W.W, Morris for the applicant
T, Gumbo for the respondent

Opposed applications

ZHOU J: This judgment is in respect of two matters which were argued before me. Case No. HC 12469/11 is an application for the rescission of a judgment given in default of the applicant in Case No. HC 3729/09. Case No. HC12468/11 is an application for condonation of the applicant's failure to file the application for rescission of judgment viz. HC 12469/11 within the time prescribed by the Rules of this Court. After hearing argument from both counsel I dismissed the application for condonation. The effect of that was that there was no application for rescission of judgment properly before the Court, hence Case No. HC 12469/11 must be struck off the roll. I did indicate that my reasons would be given in due course. These are the reasons:

On 6 July 2011 this Court granted a default judgment against the applicant at the instance of the respondent in Case No. HC 3723/09. The judgment was granted in default of the applicant after he was barred for failing to file his plea. The applicant states that he was not aware that default judgment had been given against him until on 13 December 2011 when he discovered that fact from his erstwhile legal practitioners when he was consulting about a different matter. He states that he had previously received notices of attachment but was advised by his then legal practitioners "that they were attending to the matter". The applications for condonation and rescission of judgment were filed on the same date, 15 December 2011. Both applications are opposed by the respondent. I will consider the application for condonation first.

The principles applicable in an application for condonation are settled. In the case of *United Plant Hire (Pty) Ltd v Hills & Ors 1976 (1) SA 717(A) at 720F-G*, the principles are set out as follows:

“It is well established that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefor, the prospects of success... (on the merits), the importance of the case, the respondent’s interest in the finality of his judgment, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.

These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help compensate for prospects of success which are not strong.”

The above principles have been consistently upheld in this jurisdiction. See *Mutizha v Ganda & Others 2009 (1) ZLR 241(S) at 245C-E*; *Maheya v Independent African Church 2007 (2) ZLR 319(S) at 323B-C*; *Forestry Commission v Moyo 1997 (1) ZLR 254(S) at 260D-E*; *Bishi v Secretary for Education 1989 (2) ZLR 240(H) at 242E-243C*.

The applications for rescission and condonation were filed more than five months after the default judgment was granted. The applicant was already out of time by more than four months. That is a considerable delay in the circumstances. It has been held, repeatedly, that if a party fails to seek condonation “as soon as possible, he should give an acceptable explanation, not only for the delay in making the application for the rescission of the default judgment, but also for the delay in seeking condonation”. *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd 1998 (2) ZLR 249(S) at 251D-E*; *Sloojee & Anor NNO v Minister of Community Development 1965 (2) SA 135(A) at 138H*. The applicant attached not a single document in support of the averments in his affidavit. He states that he received notices of attachment but does not state when he received those notices. A copy of a notice of attachment which is attached to the opposing affidavit is dated 9 September 2011 and gives 23 September 2011 as the date of removal. The Deputy Sheriff’s return of service shows that the attachment took place on 13 September 2011. By that date the application for rescission of judgment was already out of time by more than a month. Instead of seeking rescission of the default judgment interpleader proceedings were requested by one Denise Maria Baeta Abrunhosa. Abrunhosa stated in her affidavit that she lived with the applicant as her “partner” and that the attached property belonged to her and not to the applicant. On his part

the applicant did nothing to protect his interest. Almost three months after he was served with the notice of removal the applicant was served with a letter dated 5 December 2011. In that letter the respondent through his legal practitioners threatened to institute proceedings for the sequestration of the applicant's estate. Clearly, that is the threat which moved the applicant to institute the applications for rescission and condonation. The applicant's explanation is that when he was served with a notice of attachment he did nothing because he was advised by his erstwhile legal practitioners that they were attending to the matter. That explanation is false and unacceptable.

Apart from an unsubstantiated assertion that the applicant's erstwhile legal practitioners are to blame no evidence has been tendered to show what the applicant himself did to protect his interests. There is no affidavit from the applicant's erstwhile legal practitioners to support his averments. Indeed, there is not even evidence to show that the erstwhile legal practitioners were confronted by the applicant to explain the allegations of incompetence which are being made against them in the affidavit filed in the instant case. Further, even if the applicant's erstwhile legal practitioners were to blame for the default and the failure to file the application for condonation within a reasonable time the applicant would not escape the consequences of their conduct. There is a welter of authorities in which the principle has been stated that there is a limit beyond which a litigant cannot escape the consequences of his attorney's lack of diligence or the insufficiency of an explanation tendered for a default. In the case of *Beitbridge Rural District Council v Russell Construction Co 1998 (2) ZLR 190(S) at 193A-B*, SANDURA JA said:

“This court has, on a number of occasions, clearly stated that non-compliance with or a wilful disdain of the rules of court by a party's legal practitioner should be treated as non-compliance or a wilful disdain by the party himself.”

See also *Saloojee & Anor NNO v Minister of Community Development supra at 141C-E*; *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd supra at 252H-253C*; *S v McNab 1986 (2) ZLR 280(S) at 284A-E*.

This is a case in which the applicant flagrantly disregarded the requirements of the rules. In such a case, particularly where there is no reasonable and acceptable explanation the indulgence of the court may be refused whatever the merits of the applicant's case may be, even if the blame lies solely on the attorney as is alleged by the applicant. *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd supra at 254D*; *Tshivhase Royal Council & Anor v Tshivhase & Anor, Tshivhase & Anor v Tshivhase & Anor 1992 (4) SA 852(A) at 859E-F*.

On the merits the applicant denies that he is indebted to the respondent. He states that the respondent paid a sum of ZW\$63 700 000.00 into an account held by Across Enterprises with instructions that that amount be converted to United States dollars and be “repatriated” (*sic*) out of the country. He states that he personally made no undertaking to pay the sum which the respondent claimed and was awarded in the default judgment. Again the applicant makes no attempt to attach any document to support his averments. The respondent has stated that the applicant admitted the debt and made promises to settle it. A letter dated 12 May 2010 written by the respondent’s legal practitioners was delivered to the applicant’s former legal practitioners. In that letter the applicant was given thirty days to settle the debt. He did not contest his liability to pay the debt. I do not believe that the applicant has a *bona fide* defence to the respondent’s claim which has prospects of success. The applications for condonation and rescission of judgment were made to stave off or forestall the threatened sequestration proceedings.

Accordingly, the application for condonation has no merit and must fail. The consequence of that is that the application for rescission of judgment equally fails as it cannot properly be before this court in the absence of an order condoning its late filing. The costs must follow the result.

In the result, it is ordered as follows:

1. The application in Case No. HC12468/11 is dismissed.
2. The application in Case No. HC 12469/11 is struck off.
3. The costs in both cases shall be paid by the applicant.

Gill Godlonton & Gerrans, applicant’s legal practitioners

Atherstone & Cook, respondent’s legal practitioners