

ENOCK GOVHA
versus
ASHANTI GOLDFIELDS ZIMBABWE LIMITED
t/a FREDA REBECCA MINE AND ANOR

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 1 and 15 February 2012

Opposed Application

G.C. Manyurureni, for applicant
T. Magwaliba, for 1st respondent
2nd respondent in default

MATHONSI J: This is an application for rescission of a judgment of this court entered in default in favour of the first respondent on 26 June 2008 in terms of which the eviction of the applicant and those claiming occupation through him from premises known as 1495 Chiwaridzo Township Bindura was ordered together with costs of suit.

On 4 February 2008 the first respondent issued summons out of this court in case number HC 642/08 alleging that the house in question had been leased to the applicant by written lease agreement signed by the parties on 20 December 2003 which lease could be terminated by the first respondent in the event that the applicant left employment with the first respondent. The first respondent further averred that the applicant's employment having been terminated on 31` March 2007, a point which is now hotly disputed by the applicant who claims having retired from the first respondent's employ in October 2005, the lease had been terminated. The first respondent then sought an order for eviction as a consequence of the applicant's failure to vacate the house following such termination.

According to the Deputy Sheriff's (second respondent herein) return of service filed of record in that matter, the summons was "served on defendant Enock Govha" on 29 February 2008. On 12 May 2008 the first respondent submitted an application for default judgment which was granted on 26 June 2008 aforesaid. In due course a writ of ejectment was issued and the applicant's eviction was sought.

It is that default judgment which the applicant seeks to have rescinded arguing that he was not in wilful default as he was never served with the summons. The applicant has cited the Deputy Sheriff in this application as second respondent and attacked his return of service as being “false and misleading” given that on the day the second respondent alleges he served the summons personally upon him, he (the applicant) was enjoying the fruits of his retirement in his communal home, he having relocated there in January 2006 following his retirement either in October or December 2005. It is not clear when, as he mentions 2 different months in 2005 as his retirement date.

It is not clear whether this application was served upon the second respondent as no proof of such service was filed. What is clear though is that the second respondent has not challenged the serious allegations made against him regarding service of the summons. His failure to do so may be due to the fact that he did not have notice of the application.

The applicant states in his founding affidavit that he only became aware of the existence of the default judgment when the second respondent sought to evict his daughter from the house on 1 November 2008. He goes on to say that he should be allowed to contest the eviction because he bought the house from the first respondent and he paid the full purchase price. In support of that claim, he has filed documents showing that the first respondent, as employer, offered houses to its employees, including the applicant. Those documents also show that the housing units were valued, their values determined and what each employee was expected to pay as the purchase price assessed and agreed.

The applicant also submitted his payslip showing that deductions were made by the first respondent from his salary under the caption “rent to buy”. The same payslip also reflects the balance after each deduction of the said “rent to buy” showing that the amount charged was being progressively reduced. In addition, he filed receipts issued by the first respondent for further lump sum payments marked “payment of House 1495”.

For that reason the applicant is of the firm view that, having paid the full purchase price for the house, he cannot be evicted from it and has prospects of success on the merits.

The first respondent strongly opposes the application on the basis that the applicant has not shown good and sufficient reasons for the rescission of the judgment entered in default. It has been argued on behalf of the first respondent that, as the owner of the house with title, it is entitled to vindicate against the applicant and that there was never an agreement of sale between the parties involving the house in question.

Mr *Magwaliba* for the first respondent insisted that the relationship between the parties was governed by the written lease agreement signed in December 2003, which document the applicant says only recorded the financial arrangement between the parties for the conveyance to the first respondent of the purchase price. He vehemently argued that in terms of that lease agreement the applicant would only be eligible for consideration to purchase the house at the expiration of 60 months from the date of the signing of that lease agreement.

Regrettably, Mr *Magwaliba*, did not explain what governed the relationship between the parties before the lease agreement of 29 December 2003 was signed. He took the view that as the applicant retired in March 2007 before the 60 month period had expired he was not eligible to purchase the house and the first respondent was entitled to reclaim it.

There is a dispute as to when the applicant retired and 2 different letters purporting to inform him of his resignation have been produced. The first respondent produced a letter dated 14 November 2007 recording the applicant as having resigned on 31 March 2007. Mr *Manyerureni* for the applicant insists that letter is a recent fabrication by the first respondent and has produced a letter written by the applicant's Human Resources Manager M. Nyamadzawo on 22 June 2005 giving the applicant notice of his retirement on 31 December 2005. The first respondent has not explained the circumstances under which that letter was written if the applicant had not resigned.

Rule 63 of the High Court of Zimbabwe Rules, 1971 provides:-

- “(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”.

Subrule (2) of rule 63 was interpreted succinctly in the seminal case of *Stockill v Griffiths* 1992 (1) ZLR 172(S) at 173 D-F as follows:-

“The factors which a court will take into account in determining whether an applicant for rescission has discharged the onus of proving ‘good and sufficient cause’ as required to be shown by r 63 of the High Court of Zimbabwe Rules, 1971 are well established. They have been discussed and applied in many decided cases in this

country. See for instance, *Barclays Bank of Zimbabwe Ltd v C C International (Pvt) Ltd* S-16-86 (not yet reported); *Roland and Anor v Donnell* 1986(2) ZLR 216(S) at 226 E-H. *Songore v Olivine Industries (Pvt) Ltd* 1988(2) ZLR 210(S) at 211 C-F.

They are:

- (i) The reasonableness of the applicant's explanation for the default.
- (ii) The *bona fides* of the application to rescind the judgment; and
- (iii) The *bona fides* of the defence on the merits of the case which carries some prospects of success.

These factors must be considered not only individually but in conjunction with one another and with the application as a whole

(The underlining is mine).

The explanation given by the applicant for failure to respond to the summons is not convincing especially as it does not appear that the second respondent, who claims to have served the summons personally on the applicant, has been served for him to responded to the accusations levelled against him. I agree with Mr *Magwaliba*, who relies on the authority of *Gundani v Kanyemba* 1988(1) ZLR 226(S) that the second respondent's return of service is *prima facie* proof of service and can only be rebutted by concrete evidence being placed before the court.

However, that is not the only factor to be considered in deciding whether the applicant for rescission of judgment has discharge the onus of showing "good and sufficient cause" for the rescission. I had occasion in *Mazuva v Simbi and Ors* HB 155/11, a matter in which an applicant for rescission had not given a good explanation for failure to act, to comment at p 4 of the cyclostyled judgment that even in such a situation such applicant can still discharge the onus if all the factors are taken together. In that matter I stated:-

"While the explanation for the first respondent's failure to respond to the application in HC 905/10 is what MAKARAU JP (as she then was) referred to in *Mwanyisa v Jumbo & Ors* HH 3-10 as "a dog's breakfast", if the factors to be taken into account in deciding a rescission of judgment application as set out in *Stockill v Griffiths* (*supra*) are taken in conjunction with one another, the applicant has discharged the onus of proving 'good and sufficient cause' for the rescission of the judgment entered on 1 July 2010. It simply cannot stand".

Here is a company which avails to its employees an opportunity to purchase houses they are leasing from it. It signs an understanding with the employees' representatives which has, appended to it, a list of beneficiaries which list sets out the value of each housing unit and the monthly instalment to be paid by each beneficiary, the applicant included. It goes on to deduct the equivalent of such instalment from the applicant's salary clearly stating that it is

rent to buy the house and to also show the balance outstanding after such deduction. The same instalment is reflected on a written lease agreement.

It must be understood that in an application of this nature the applicant is not required to prove his case but merely to show a *bona fide* defence carrying prospects of success.

Mr Magwaliba referred me to the case of *Ashanti Goldfields Zimbabwe Ltd v Clement Kovi S-7/09* (unreported) in which the Supreme Court ruled that the agreement signed between the first respondent and its employees on 1 December 2003, which the applicant relies upon, was not a sale. That issue was considered by MAKARAU JP (as she then was) in

1. *Antonio v Ashanti Goldfields Zimbabwe Ltd & Anor*
2. *Mujati v Ashanti Goldfields Zimbabwe Ltd & Anor*
3. *Ashanti Goldfields Zimbabwe Ltd v Bonde* 2009(2) ZLR 371 (H) which matters involved the same arguments as *in casu*. She distinguished that case and concluded at 385 F-G as follows:-

“ I am bound by all decisions of the Supreme Court on points of law. Where however, the facts that were placed before the Supreme Court are different from the facts before me, I believe I am at liberty to interpret those facts in light of the law handed down by the Supreme Court. The doctrine of *share decisis* applies to points of law and not to factual disputes”.

I find myself in agreement with that postulation. I am not aware, if that judgment has been challenged but until such time that it is overturned I am entitled to use it as I am persuaded by it.

Following the guidance given in *Stockill v Griffiths (supra)*, to consider the factors not only individually but in conjunction with one another and with the application as a whole, I am of the view that the applicant has discharged the onus resting on him to show ‘good and sufficient cause’ for the rescission of the default judgment. Justice demands that the issues raised ought to be interrogated fully in a trial and that the applicant should not be shut out, as it were, on the technicality of default judgment.

In the result, I make the following order; that

1. The default judgment entered on 26 June 2008 be and is hereby rescinded.
2. The applicant should file his notice of appearance to defend in HC 642/08 within ten (10) days of the date of this order.
3. The costs of this application shall be costs in the main action.

Manyurureni & Company, applicant's legal practitioners
Magwaliba & Kwirira 1st respondent's legal practitioners