

FIDELITY LIFE FINANCIAL SERVICES (PVT) LTD
and
DAVIDSON KANOKANGA
versus
CHAMPION CONSTRUCTORS (PVT) LTD
and
ELIZABETH CHIDAVAENZI
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 16 March 2017 & 26 April 2017

Opposed Matter

K Kachambwa, for the applicant
T Zhangazha, for the respondent

MATANDA-MOYO J: On 4 July 2016 the applicants failed to attend court at 0900 hours, resulting in the court granting default judgement in HC 12306/15 in the following;

- “1. That the judgement debt capital sums and interest owing to the first respondent from the first applicant and the second applicant in terms of judgments HC 2572/11, HC 2004/11, HC 2005/11 and HC 2005/11 be and are hereby declared settled in full.
2. That the plan of distribution by the fourth respondent in respect of the sales in execution against the applicant’s properties stand numbers 1 039, 1 015, 1 013 and 1 011 of Midlands Township of Hilton of Subdivision A of Waterfalls all situate in the district of Salisbury, which sales realised sums totaling US\$60 000-00 be and is hereby set aside.
3. That the first and second respondent are jointly and severally liable to reimburse to the first applicant the sum of \$13 192-63 within 10 days of this order, with interest at the prescribed rate from the date of service of this court application to the date of payment in full, the one paying the other to be absolved.
4. That the first and second respondents are jointly and severally liable to the applicants costs herein on a legal practitioner – client scale, the one paying the other to be absolved.”

The applicants approached this court for the rescission of the above judgement.

The applicants arrived at court at 1000 hours on the same date the matter was set down for hearing for the parties on the time. It is their explanation that when the matter was postponed to 4 July 2016, the court had engaged counsels. The advocate appearing for the applicants had informed the court that he would be appearing in the Supreme Court on 4 July 2016 at 0930.

After deliberating whether to sit before or after 9:30am the applicants' counsels confused the timing and diarised 1000 am instead of 0900am. The applicants had always defended that matter and they submitted that the non-appearance was not willful.

The applicants submitted that they have prospects of success on the merits firstly due to the fact that the second applicant as a legal practitioner of the applicant could not be sued. The second applicant acted as an agent of the first applicant. The default judgement entered burdened the legal practitioner with liability to pay back \$13 000-00.

It is the applicant's contention that what is in issue are taxed costs and collection commission arising from over seven different cases. In one of the cases the issue of capital sum and interest is still outstanding.

The applicants also submitted that they have prospects of success in challenging the amended distribution plan presented by the Sheriff. The Sheriff had no right to provide a new plan of distribution like he did. He was only directed by the court to account for \$27 000-00 he had allocated as legal costs. It is the applicant's arguments that once Sheriff provided the initial plan of distribution he became *functus officio*. The fresh report he provided was therefor null and void. In any case the applicants averred that they intend to challenge the Sheriff's reports as it contained some untruths in it. The report suggests that both parties made representations before the compiling of the report. A look at the report shows that only representations from the respondents were considered. The report copied verbatim submissions by the respondent. No reasons were advance by the Sheriff on his failure to consider the applicants; submissions.

According to the report by the Sheriff the issue of collection commission was left the court. The applicants have a good case on that, the applicant could not be ordered to reimburse to the respondents certain amounts whilst that issue of collection commission is still pending and has not been determined. The applicants also submitted that the Sheriff's report referred to other cases not subject of the matter. The applicants prayed for an order rescinding the default order.

The respondents opposed the order sought on the basis that the default by the applicants was wilful. Counsel for the respondent produced text messages and phone calls entries made to the second applicant on the day. It was his evidence that default judgement was only granted around 0940 hours after attempts to locate the applicants had failed. The respondents averred that the judge was very clear that the matter would proceed at 0900 hours as she was engaged in the trial court at 1000 hours on the same date.

On the merits the respondents argued that the applicants had no prospects of success. They did not however dispute the issue that the collection commission remains a dispute between the parties. They however, insisted the contents of the Sheriff's report could not be faulted.

This application has been brought in terms of r 63 of the High Court Rules, 1971. It provides:

- “(1) A party against whom judgement has been given in default, whether under these rules or under any other law, may make a court application for the judgement to be set aside.
- (2) If the court is satisfied on an application in terms of sub rule (1) that there is good and sufficient cause to do so, the court may set aside the judgement concerned

In determining an application for rescission of judgement the court normally considers the following:

- a) the explanation for the default
- b) the *bona fides* of the applicant and
- c) the prospects of success on the merits.

See *Zvinavashe v Ndlovu* SC 40/06. Rescission cannot be granted where the applicant was in willful default and fails to show a *prima facie* defence. The court ultimately has a discretion whether to grant rescission or not. The court is also not limited to the three requirements above in exercising its discretions. It may also look at the prejudice which may be caused to parties. If it is in the interest of justice to rescind the judgment the court may do so.

The applicants' explanation as provided above is reasonable. The applicants did turn up at court at 1000hrs on the day of set down. That in itself bolsters their explanation that they diarized the matter for 1000hrs. It is also a fact that the Advocate representing the applicants on that day was engaged in the Supreme Court at 0930hrs. I am satisfied that the explanation is reasonable. The explanation shows that the non appearance by the applicants does not amount to

willful default. The applicants filed an application for rescission within three days of the order being granted. The applicants did not waste time, an indication that they are interested in defending their interests in the main matter. The respondents have not seriously challenged the bona fides of applicants.

Let me proceed to look at applicants' prospects of success. The applicants in HC 12306/15 are challenging the distribution plan by the Sheriff under SS97/13. The applicants contend that the respondents still owes the first applicant taxed costs and collection commission. In the Sheriff's distribution plan provided to court upon request, the Sheriff has conceded that he has not dealt with the issue of collection commission. He left such issue to the court for determination. That concession by the Sheriff bolsters the applicants' claim that collection commission is still owing.

The respondents on the other hand argued that this matter involves calculations. Failure by the applicants to provide some calculations of what is owed to them is fatal to their case. For that proposition they referred me to *Deweras farm (Pvt) Ltd & Ors v Zimbabwe Banking Corporation Ltd* 1998 (1) ZLR 368 (S). The present case is however distinguishable from the above case in the above matter the applicants owed the bank. The appellants (*supra*) failed to even acknowledge judgment in the figure it had earlier on admitted owing. Subsequently it wanted rescission on the whole amount without presenting figures on establishing how much it owed. In the matter in *casu* Justice TSANGA directed the Sheriff to provide a breakdown of how \$27 000-00 was distributed. The parties had presented certain arguments. What was to happen on the day was to interrogate the figures as presented by the Sheriff. In any case, the admission made by the respondents that the issue of collection commission was referred for determination by court is an admission that there are prospects of success in the main matter.

Accordingly I order as follows:

- 1) The default judgment granted in case No. HC 12306/15 on 4 July 2016 be and is hereby rescinded.
- 2) That the 1st and 2nd respondents bear costs of application.

Kanokanga and Partners, applicant's legal practitioners
Chinogwenya & Zhangazha, 1st & 2nd respondent's legal practitioners