TAPVICE ENTERPRISES (PVT) LTD
and
WILSON TENDAI DONZWA
and
ESTER FUNGAI DONZWA
and
BELSSING DONZWA
and
LENA DONZWA
and
KUDZAI TIGERE DONZWA
and
TAFADZWA HUGH DONZWA
versus
TETRADE INVESTMENT BANK LIMITED

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 5 December 2019 & 13 March 2020

Application for rescission of judgment Order 9 Rule 63

W Pasipanodya, for the applicants
R. Tsivama, for the respondent

KWENDA J: This is a court application for rescission of judgment. The default judgment was entered against the applicants, in favour of the respondent on the 5th June 2018 in Case No. HC 11371/12 following the failure by the seven applicants to appear for trial. The notice of set down for trial had been duly served at applicants' address for service of record being 3 Bodle Ave, Eastlea, Harare. The applicants aver that their legal practitioners had already relocated to No 1. Union Ave, 3rd Floor, Block 3, Harare in or around the beginning of January, 2018 when the service was effected at their address of service on record. Applicants' lawyers omitted to file a notice of change of address in the matter. Applicant avers that it was up to respondent's lawyer

to amend his/her records when applicants' lawyers circulated a general notice of their change of address to lawyers. In other words, it was not the responsibility of their lawyer but that of all lawyers dealing with cases in which they were involved to pull out all such files ad amend their records. The applicants' attitude is wrong and it is not surprising that there is no supporting affidavit by their lawyer of the viewpoint.

Rule 42C provides as follows

Change of address for service

> "An address for service may be changed by the delivery of notice of a new address for service and thereafter service may be effected in accordance with the order at the new address."

The exigencies of the rule were explained in *Superlit Socredada de Responsabilidada Lda Fibro cemente & Ors* v *Hendricke & Ors* 1956 REN 211 (SR) to be that the address provided for, by or on behalf of a plaintiff or an applicant in terms of the rules as his address for service continues to be his address for service for the purpose of the pleadings he had instituted unless and until he furnishes another address for service. It has therefore incumbent upon the applicants' lawyer to issue a notice of change of address with respect to case no HC 11371/12. The service at the given address on record was therefore proper and sufficient.

On the 23rd April 2018, prior to the date set for trial, respondent's lawyer wrote to applicants' lawyer demanding wasted costs awarded by this court in favour of respondent against applicants earlier in the same matter which ought to be paid before the applicants could be heard at the trial. In the same letter the respondents lawyer advised the applicants counsel that the matter had been set down on the 1st June 2018. Although the date given (1st June 2018) was wrong as a result of a typing error, the letter did inform the applicants that the matter had been set down. The 1st of June being four days before the correct date (5th June 2018) the applicants could have easily ascertained the correct date or even call the respondent's lawyer if they attended court and could not find the matter on the roll. There is confirmation that the letter was received by applicants' lawyers who did not act on the information. The respondent avers that although the date was incorrect this it did alert the applicants that the matter has been set down more than a month before the set down date. Even if they had attended court on the 1st June 2018 they would have been advised of the correct date. They did not attend court on 1 June 2018.

Applicants' lawyers did not act on both the notice of set down. Applicants now argue that because the letter was served at the applicants' lawyer's new address there is no reason why the notice of set down was served at what they say is their previous address. The argument address misses a fundamental reality of practice which is that when dealing with the particular matter, the respondent's counsel had to be guided by the address for service on record. On a balance of probabilities that the applicants lawyer why aware of the set down in case No. HC 1137/12 having been duly served through the Sheriff and notified by letter of the set down beforehand. Had they travelled to court on the first June 2018 and failed to find the matter on the roll that would have left them with four free days to ascertain from the respondent's counsel what the correct date was. In any event applicants' lawyer was deemed to have been served by operation of the law.

For some reason the applicants have failed to attach the order which they want rescinded. There is no explanation why this court should be required to rescind a judgment it has not seen. While this court has the right to peruse all related files, that on its own does not create an obligation on this court to look for a related file and identify the relevant order. A court peruses related files to verify facts and not to identify, fish out and annex supporting documents. This application should have been submitted with all relevant information.

The dispute

In February 2011 the respondent advanced a banking loan facility to the first applicant. Wherein the first applicant borrowed USD 1 840 000 with interest for a period of 120 days. The other applicants stood as surety and co-principal debtors. The applicants offered an immovable property which was accepted by the respondent as security for the repayment of the loan. The applicants failed to repay the loan whereupon the respondent sued. The debt remains due and payable. The respondents have resisted the claim on the basis that they entered into a separate joint venture with a legal entity known as Cerrucon Investments (Pvt) Ltd. They invested the money into that joint venture but performance of the joint venture flopped due to certain breaches committed by Cerrucon Investments. The applicants therefore confess the facility but insist that Cerrucon Investments (Pvt) Ltd should have been joined by respondent in case no HC 11371/18 as co-defendant. The argument is notwithstanding that respondent had no privity of contract with Cerrucon Investments (Pvt) Ltd. I am unable to follow the legal basis for the

defence to the claim. As stated above, the respondent had no privity of contract with Cerruron Investments Pvt Ltd. Accordingly respondent had no cause of action against Cerrucon Investments (Pvt) Ltd. Applicants accept borrowing the money from the respondent for a grain importation business. The decision to undertake the business in partnership with Cerruron Investments (Pvt) Ltd was separate and distinct from the loan agreement. If they lost the money due to malperfomance by Cerrucon Investments (Pvt) Ltd they have not laid a legal basis to transfer their exposure to the respondent. The applicants did not file copies of the pleadings in case No. HC 11371/12 in order to explain what their defence to the claim is. It is clear however that they did not take advantage of the the procedure available to join a third party. (see order 93 of the High Court rules, 1971.[1]

Respondent's claim against applicants is straight forward claim and substantiated by the respondent's written facility letter issued 1 February 2011 which applicants submitted with this application.

This court has the power to set aside any judgment entered in default if satisfied that there is good and sufficient cause. All the circumstances of the case have to be taken into account. In this case the reason for the default was gross negligence by applicants' lawyer of choice. This court could still grant rescission of judgment if the defence on the merits was strong. See *Hockey* N.O v *Rio Zim* and Anor 1939 SR 107. I am unable to decipher anything on the basis of the founding affidavit and documents submitted with it which could constitute a sustainable defence to the claim which remains unsettled for 8 years.

I am therefore not persuaded that there is good and sufficient reason to exercise discretion in favour of the applicants.

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[1] **ORDER 14**
THIRD-PARTYPROCEDURE
93. Grounds on which defendant may apply by notice of motion to join third party in action
Where in any action a defendant who has entered appearance claims as against any person not already a party to the action (in this Order called the third party)—
(*a*) that he is entitled to contribution or indemnity;
(*b*) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or
(*c*) that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant, and should properly be determined, not only as between the plaintiff and the defendant, but as between the plaintiff and the defendant and the third party, or between any or either of them;
the defendant may make a court application to join that person as a third

I order as follows:

The application be and is hereby dismissed with costs.

Manase and Manase, applicants' legal practitioners
Messrs Sawyer & Mkushi, respondent's legal practitioners