

SHINECOPARS INVESTMENTS (PRIVATE) LTD  
and  
JUSTIN MACHIYA  
versus  
HOSSINY (PVT) LTD

HIGH COURT OF ZIMBABWE  
NDEWERE J  
HARARE, 7 November, 2018 and 11 June, 2020

**Opposed matter**

*F. Mahere*, for the applicant  
*M.S. Hari*, for the respondent

NDEWERE J: An application for rescission was presented before the High Court on 14 November, 201. In the judgment of 1 March, 2017; HC 136/17, the judge dismissed the application and said it was null and void because there was no condonation for the late filing of the application. The respondents appealed against the dismissal, arguing that condonation had been sought and granted by consent in HC 2252/16. On 18 June, 2018 the Supreme Court allowed the appeal with each party paying its own costs. It set aside the High Court judgment in HH 136/17 and remitted the matter to the High Court for adjudication of the rescission application on the merits.

Pursuant to the Supreme Court order, the application was heard on 7 November, 2018 before me.

The following facts were common cause; that the respondent issued summons against the applicants for payment of \$44 800.00, collection commission of \$1172.50 and costs on an attorney and client scale. The summons also required that stand 205/1 Northway, Prospect, Waterfalls held under Deed Number 7882/2002 be declared executable. The summons were issued on 27 June, 2014. The first applicant was served on 4 July, 2014 while the second applicant was served on 18 September, 2014. The first applicant did not enter appearance to defend within the prescribed time and was therefore automatically barred and could no longer be

heard. The second applicant entered appearance to defend timeously, but after making requests for further particulars on 7 October, 2014 and getting a response on 23 October, 2014, he delayed to file a plea. On 24 November, 2014, the respondents filed a Notice of Intention to bar and served it on the second applicant the same day. The notice called upon the second applicant to file its plea within five days; failing which it would be barred.

On 1 December 2014, the second applicant filed a letter of complaint written in terms of Order 21 Rule 140; raising issues which he thought gave rise to an exception and asking the respondent to correct its papers before it pleaded. That letter gave the respondent 10 days to respond. The respondent did not respond. Instead, the respondent applied for a default judgment against both applicants in HC 5310/14 and it was granted on 30 January, 2015 in terms of the claim in the summons. On 16 March, 2015, the respondent, through the Sheriff served a notice of seizure and attachment on the first applicant at its place of business at 10912 High Glen Road. It attached some movable assets and indicated 9 March, 2015 as the date of removal. After finding no property to remove the Sheriff issued a *nulla bona* return and thereafter, the respondent asked the Sheriff to attach stand 205/1 Prospect, Waterfalls. That is when the second applicants applied for rescission of default judgment.

Rule 63 which is the Rule that governs the setting aside of a default judgment provides as follows:

63

- (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.”

The present application was made after one month but condonation to file the application out of time was granted in HC 2252/16 by consent, so the application is properly before the court.

Rule 63 (2) provides as follows:

“(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.”

So the issue for the court to consider is whether there is “good and sufficient cause” to set aside the default judgment. In order to determine “good and sufficient cause” to set aside the

default judgment, the court has to consider the reasons for the default. Why did the applicant default in filing his plea? That is the first hurdle for the court. The second applicant's submissions were that he did not default because he wrote a letter in terms of Order 21 Rule 40 and was waiting for a response to that letter.

Order 21 Rule 140 provides as follows:

“140

(1) Before-

- a) making a court application to strike out any portion of a pleading on any grounds; or
- b) filing any exception to a pleading;
- c) the party complaining of any pleading may state by letter to the other party the nature of his complaint and call upon the other party to amend his pleading so as to remove the cause of complaint.”

In view of the above Rule, the second applicant did well when he wrote the letter on pages 20 to 21 of the record. However, the letter prescribed a time period within which the second applicant expected to get a response. It gave ten days in the last paragraph of the letter. So when the second applicant did not get a response within ten days, why did he not proceed a step further and file the exception? What was the point of prescribing 10 days in writing; if he was not going to follow up on the issue after the 10 days or file his pleadings?

There was nothing throughout the submissions by the second applicant which indicated that they followed up on the matter in any manner whatsoever. It is clear from the record that the second applicant wrote that letter and thereafter, he and his legal practitioners went to slumber, only to awaken when the immovable property was attached. As stated by MCNALLY J.A. in *Ndebele v Ncube*, 1992 (1) ZLR 288 at 290; the law helps the diligent; not the sluggard. The letter provided for in Rule 140 was never meant to “stay” the proceedings indefinitely. The notice of intention to bar had given five days; the letter added another 10 days. Surely after that period stated in his own letter the second applicant should have filed his pleading.

While it may have been inappropriate for the respondent to ignore the letter written in terms of the rules of court, the fact that second applicant himself gave a time line for a response means that when that period expired, he should have followed up on the matter or filed his plea.

In my view, the second applicant's conduct in not pleading after the expiry of the 10 days he had given himself amounts to a willful failure to plead. He knew his own ten days grace period had expired, without a response, but he chose to ignore the matter.

The other issue for the court to consider is whether the second applicant has a defence to the claim because there would be no point in rescinding a judgment when the applicant has no defence to the main claim anyway.

Contrary to the second applicant's submissions, there is a contract of sale dated 17 July 2013 from pages 56 to 62 of the record. Under the title "Background", clause B says "the customer wishes to purchase certain of the goods supplied by the supplier, details of which are set out in schedule 1 (the goods) and the supplier is willing to sell such goods to the customer on the Terms of this contract".

Even in the Heads of Argument, the second applicant admitted a sale contract. He conceded a sale contract in paragraph 17:1 of the Heads of Arguments, only to contradict himself in paragraph 18 by saying the goods were never sold to it.

Clause 4 of the contract between the parties is about payment. It says the price for the goods shall be payable within sixty (60) days of the supplier's delivery or as otherwise agreed in writing between the parties.

In clause 4.5.4, Stand 205/1 Northway Prospect, Waterfalls, was offered as Security.

So the respondent had a good written sale contract which the second applicant has not disputed. The disputed issues he mentioned verbally were at variance with the written contract which he did not dispute. Apart from his bare assertions; there is no proof of what he was mentioning orally as being the agreement between the parties.

On page 53 to 55, there is an Acknowledgement of Debt signed by the second applicant where he admitted the debt and gave an undertaking to pay it. He went further and bound himself as surety and co-principal debtor and ceded 205/1 Northway, Prospect as security.

During oral submissions, he cited a Joint Venture Agreement, as being what was agreed upon after customers had allegedly said the respondent's goods were substandard. Yet a reading on the Joint Venture Agreement from page 64 shows that this was a separate arrangement. In paragraph 2 of the Joint Venture Agreement, the purpose is given, which was to establish a retail business for the benefit of both parties. That is entirely different from the sale contract. In paragraph 5, the Joint Venture Agreement provided for sharing of profits at 75% for respondent and 25% to applicants, something which is non-existent in the sale agreement.

In paragraph 10, the Joint Venture Agreement says the terms and conditions “set forth herein constitute the entire agreement between the parties. There are no written or oral undertakings directly or indirectly related to this agreement that are not set forth herein.” So clearly, that joint venture agreement, signed in December, 2013 was a stand alone agreement which had no connection with the sale agreement of July, 2013.

The second applicant said customers had rejected respondents’ goods supplied through the sale contract. He made just a bare averment of this issue, without any substantiation by the customers themselves to the court. If it was true that customers had rejected the goods why did he not attach supporting affidavits from the customers themselves to support his contention? Bare assertions are not enough in such contested situations.

Taking the above factors cumulatively, the court did not find “good and sufficient cause” to set aside the default judgment in HC 5310/14.

On the issue of costs, my view is that the respondents’ justified a higher scale in their written submissions. Clearly, the application had no merit and was mounted just to delay payment.

Consequently, it is ordered that;

1. The application for rescission of the default judgment in HC 5310/14 be and is hereby dismissed.
2. The applicant shall pay the respondent’s costs on an attorney and client scale.

*Messrs Muzangaza Mandaza & Tomana, applicant’s legal practitioners*  
*C. Nhemwa & Associates, respondent’s legal practitioners*