JOCKSTAR INVESTMENTS (PRIVATE) LIMITED
versus
CHIPO MUZIRWA

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 29 February & 10 May 2024

Opposed Court Application

Ms *R Mabwe*, for the applicant
Mr *T Chabveka*, for the respondent

MUCHAWA J: This is an application for rescission of a default judgment made in terms of r 29 of the High Court Rules, 2021.

The brief background to this matter is that the applicant and the respondent entered into an agreement of sale of Stand Number 2654 of Zizalisari Lot 4 Bannockburn Township Harare. The material terms of the agreement were that the respondent would pay the purchase price of US$17 000. She also had to pay a development fee in the amount of US$6 500.

A clause provided that the stand size, shape and number of the stand might be changed. The applicant undertook to tender transfer of the stand after all the conditions in the agreement had been met.

The respondent duly paid the amounts due and the applicant issued a certificate of compliance in 2018.

On 30 June 2022 the applicant issued summons against the respondent under case number HC 4309/22 alleging that though the respondent had duly paid what was due in terms of the agreement, there was now a variation in the stand size from 2015 square meters due to the Surveyor General's work, to 2002 square metres. It was further alleged that respondent had refused to accept the adjustment to the stand size and the applicant had duly informed her that they were proceeding to cancel the agreement. It was prayed that the court should confirm cancellation of the agreement of sale between the parties and the applicant elected to refund the amount by the respondent.

The respondent entered appearance to defend on 7 July 2023 and requested further particulars on 20 July 2022. The particulars were only availed on 23 September 2022. A

request for further and better particulars was made on 29 September 2022 and these were availed on 10 November 2022.

On 13 February 2023, the respondent filed a claim in reconvention in which an order was sought compelling applicant to execute all documents required and necessary to pass the rights, title and interest in Stand Number 2654 of Zizalisari Lot 4 Bannockburn Township, Harare. This was served on the applicant on 29 June 2023. On 9 August 2023 a notice to plead and intention to bar was filed and the bar was effected on 22 August 2023.

Thereafter the respondent filed an application for dismissal for want of prosecution which was deemed abandoned in terms of r 18(8) and (9) which requires one to pay security of costs within five days.

An application for default judgment was subsequently filed. The applicant purportedly filed its plea to the claim in reconvention on 28 September 2023 in the face of an effective bar. Resultantly, on 1 November 2023 default judgment was granted in favour of the respondent in terms of the prayer in the claim in reconvention. It was ordered that the applicant should execute all documents required and necessary to pass the respondent's rights and interests held by the applicant in respect of Stand Number 2654 of Zizalisari Lot 4, Bannockburn Township, Harare, amongst other things. This is the default order which is sought to be rescinded.

> "The draft order prayed for is to the following effect:
> a) Application be and is hereby granted.
> b) The order under case number HC 4309/22 be and is hereby rescinded.
> c) The matter under case number HC 4309/22 shall proceed on the normal roll in terms of the High Court Rules, 2021.
> d) The respondent be and is hereby ordered to pay costs on a higher scale."

Points *In Limine*

The respondent raised three points *in limine* in her notice of opposition as follows:

1) Non joinder
2) Use of wrong form, and
3) No cause of action

On non-joinder, it was averred that though the applicant avers that the property belongs to another person, that person had not been joined to the proceedings and the application was therefore defective.

I dismissed this point *in limine* on the basis of the applicant's argument that the application for rescission cannot at this point include parties who are not included in the main

action. These are consequential proceedings. In any event r 32(11) provides that no cause or matter shall be defeated by non-joinder.

On the allegation that there is no cause of action, it was the respondent's case that the alleged cancellation of the agreement of sale is null and void as it was never served on the respondent and falls foul of the rules of the Contractual Penalties Act [*Chapter 8:04.*]. It is also alleged that in terms of clause 6.5 of the agreement of sale, the respondent had already accepted the changes to the stand size by appending her signature to the sale agreement. It was prayed that the application should be dismissed on this basis.

Ms *Mabwe* submitted that the matter before this court is not one for cancellation of the agreement of sale but for rescission of judgment. It was further averred that the validity or invalidity or invalidity of the cancellation was never determined by the court which granted the default judgment.

I agree that the matter before me was one for rescission of judgment and the issue raised had indeed not been dealt with by the court. I dismissed this point too and indicated that the issue can be best canvassed in addressing the prospects of success in this matter.

The third point *in limine* was that the applicant used the wrong form. It was averred there is no proper application before the court as the applicant used a wrong form instead of the prescribed form 23 in terms of r 59(1) of the High Court Rules, 2021. The form is alleged to be defective as it does not alert the respondent on the time frame within which to file its opposition.

The applicant conceded that indeed an incomplete form had been used due to an oversight by its legal practitioners. It was averred that the respondent had not suffered any real prejudice as they filed their notice of opposition in time. The applicant accepts that it should have used form 23.

Rule 58(13) was pointed to as guiding how the court should proceed. In terms of sub para (d) one should show prejudice. The use of wrong form was said not to be a basis for dismissing a matter.

The applicant prayed for the court to condone its non-adherence to filing in form 23. I indulged the applicant and dismissed this point too.

<u>The Law on Rescission of Judgment</u>

The factors to be considered in an application for rescission of judgment are well settled. In *Stockil* v *Griffiths* 1992 (1) ZLR 172 (SC) these were listed as:

i) the reasonableness of the applicant's explanation for 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 each other.

In *Songore* v *Olivine Industries* 1988 (2) ZLR 210 this was put differently – a default judgment may be set aside for good and sufficient cause. An acceptable reason must be given for the delay on the defendant's part.

I turn to consider each of these factors, in turn, below.

The reasonableness of the applicant's explanation for default

The applicant in explaining the reason for late filing of the plea in reconvention says that upon receipt of the notice to plead, it sought to obtain the complete file relating to the case for comprehensive case management. The nature of this matter was said to involve multiple properties owned by the applicant and the records had to be thoroughly reviewed in order to refresh its memory and ensure accurate and informed legal representation.

Furthermore the applicant refers to the complexity and magnitude of this case as necessitating a meticulous examination of the relevant documents and records. This is given as the primary reason for what is termed a slight delay in filing the plea.

Ms *Mabwe* submitted that if regard is had to the fact that the notice to plead was filed on 9 August 2023 and the bar effected on 22 August 2023 and the plea filed on 28 September, there is only a two month delay which is not inordinate even if one takes it as 3 months as per the respondent.

The respondent submitted that the applicant was served with the respondent's plea and claim in reconvention on 13 February 2023 and because there was no proof of service he was served again with a copy of the same on 29 June 2023. The respondent is alleged to have failed to respond to same till 28 September 2023 when a bar had been effected against it.

The applicant is averred not to have actively sought the upliftment of bar before both Justice MUSITHU who removed the matter from the roll on the basis that the application was not in the correct form despite being given an opportunity to address the court.

Justice MHURI is said to have declined the request for removal of bar on account of the applicant's failure to utilise the several opportunities already before it which it had not utilised.

In *Songore* v *Olivine Industries* (*supra*), it was held that one who puts up a reason which is an insult to the intelligence of the court may have difficulties. I believe this is what the applicant has done. It was the applicant which lodged the main action on 30 June 2022 seeking confirmation of the cancellation of the agreement of sale and tendering a refund. The respondent simply filed a counterclaim based on the same agreement of sale and on the contrary she sought that the applicant be compelled to transfer rights, title and interests to her.

How then could that file suddenly become part of the many files and documents of the many properties which the applicant held? What case management was the applicant undertaking? How does this matter involve the other many properties? What review was to be conducted and whose memory needed refreshing since the applicant had filed the main claim with a very clear recollection of issues? What is therefore the complexity and magnitude of this case referred to?

The applicant was legally represented at all times and it was the duty of the legal practitioner to properly advise his client regarding the law as well as the procedure. See *Base Minerals Zimbabwe (Pvt) Ltd* & *Anor* v *Chiroswa Minerals (Pvt) Ltd* & *Ors* HH 21/16.

The applicant has failed to proffer a reasonable explanation for the default.

The *bona fides* of the application to rescind the default judgment and prospects of success

The applicant submitted that this matter is extremely significant to it as it is involved in the real estate business and duly exercised its right to cancel the contract in question on 20 April 2018. Thereafter, it is claimed that it regained possession of the land and proceeded to dispose of it. The ordering of performance in such circumstances is said to be unjust.

It is averred that the court did not consider that the respondent’s claim had prescribed.

On another note it is alleged that the court presided over by Justice MHURI erred by disregarding the oral application for upliftment of bar made on 1 November 2023 and therefore the default judgment was erroneously granted.

Furthermore, it is averred that the court should have taken note of the fact that the main matter was pending at pre-trial conference stage.

The court was urged to re-evaluate and rectify the error by acknowledging the importance of the oral application for upliftment of bar and the underlying circumstances of the case. In other words, the court was asked to reconsider the oral application for upliftment of bar.

In addition it was pointed out that the main claim under HC 4309/22 is at pre-trial conference stage and if the default judgment is allowed to stand, this might lead to conflicting judgments. For this argument Ms *Mabwe* referred to the cases of *Scotfin Ltd* v *Hewilt & Ors* 1999 (2) ZLR 65 (HC) and *Mauritz Marai's Bouers (Pty) Ltd* v *Carizette (Pty) Ltd* 1986 (4) SA 439 (0).

It was prayed that the application be granted with an amended order as to costs, that each party bears its own costs.

The respondent argued that this application is an attempt by the applicant to plunge her into litigation which is an abuse of court process meant to cover its own apathetic attitude towards the matter. The applicant is alleged to have failed to prosecute its own matter leading to the filing of an application for dismissal for want of prosecution which was deemed abandoned.

It is pointed out that the applicant continuously failed to show up for round table engagements up to 18 September 2023 despite the respondent's counsel even attending at their offices.

The respondent denies that the purported cancellation was ever served on her. She says she lives in the United States of America and was never notified of the cancellation. The cancellation is alleged to fall foul of s 8 of the Contractual Penalties Act as she was never given 30 days to remedy the alleged breach.

Regarding the change in the stand size, the respondent pointed to clause 6.5 of the agreement of sale, which states as follows:

> "the purchaser accepts that the property stand size, shape and number may be changed by statutory authorities in which case he further accepts that the seller will allocate a new stand number. If there is material difference in stand size, as a result of the mentioned change, then the seller will adjust the price proportionally to change in the area."

It is contended that by appending her signature to the agreement, the respondent showed that she accepted that the stand size might change and was not opposed to the adjustment.

On prescription, the respondent avers that she only finished making payments later and not on the date of signing the agreement in 2011. She says she was only issued with the payment clearance certificate on 6 April 2018 and the applicant had not fully complied with the subdivision regulations so as to effect transfer. She claims to have first known of the adjustment to sizes on 4 July 2022 upon service of summons.

Furthermore, it is contended that there is no bar to the applicant complying with the default order as the property is still registered in its name.

Regarding removal of the bar, it is stated that the applicant failed to make the application for upliftment of bar timeously before MHURI J as it did so after the court had delivered its verdict.

It appears to me that the applicant's prospects of success on the merits are slim. Without proof of having cancelled the agreement of sale and duly served same on the respondent and also having complied with the Contractual Penalties Act regarding giving the giving of 30 days to remedy the breach, this appears to be shaky ground intended to be relied on.

The alleged ground of prescription which is reckoning the time from 2011 which is the date of signing the agreement is overlooking the trite position that:

> "Generally a debt becomes due when the cause of action arises. See *Mukahlera* v *Clerk of Parliament & Ors* where the court relied on the case of *Dube* v *Banana* 1998 (2) ZLR 92 (H), in which it was held that:
>
> > '…… the cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed.'"

In Mukahlera (*supra*), this is further explained that:

> "The "cause of action" in relation to a claim is "the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in a claim."

The applicant *in casu* must show that by 2011, the respondent had duly paid off the purchase price, that it had fulfilled the subdivision regulations so as to be in a position to transfer. This will be a tall order for the applicant given the facts of this matter.

Even more damaging to the applicant's case is the allegation that the respondent resisted the change in size of the stand. This is ludicrous as there is an express clause in the agreement providing for that and the respondent already signed the agreement. The only difference in the stand sizes is only 13 square metres.

It is certainly not for this court to sit and consider whether the default judgment granted by MHURI J was granted erroneously. On the one hand the applicant says their application for upliftment of bar should have been considered and the respondent, on the other, says the applicant made the application when the court had already pronounced its verdict. What kind of procedure would allow me to indulge the applicant and "reconsider the oral application for upliftment of bar" at this stage? I cannot think of any.

Even though generally, the attitude of the courts is that both the claim and counterclaim should be adjudicated upon *pari passu* in order to obviate the potential danger of arriving at conflicting findings if the court proceeds piecemeal, I consider this matter to be one of the exceptional ones. This is because the applicant has failed to establish any good and sufficient cause for the rescission of the default judgment in issue.

<u>Disposition</u>

There being no reasonable explanation for the default, the application to rescind the default judgment not being *bona fide*, and there being no prospects of success on the merits, the application for rescission of judgment be and is hereby dismissed with costs.

Jiti Law Chambers, applicant's legal practitioners
Rungwandi & Company, respondent's legal practitioners