BULCHIMEX GMBH IMPORT-EXPORT CHEMIKALIEN UND PRODUKTE
versus
RAJENDRAKUMAR JOGI
and
THE REGISTRAR OF DEEDS (N.O)
and
THE SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MUNANGATI- MANONGWA J
HARARE, 16 MAY 2024 & 30 AUGUST 2024

Opposed Matter

Adv *T Mpofu,* for the applicant

Adv *D Sanhanga,* for the respondent

MUNANGATI - MANONGWA J: The applicant brought a composite application in terms of r59 (1) as read with r27 and r29 (1) (a) of the High Court Rules, 2021 and alternatively common law seeking the following relief:

- Condonation for non- compliance with the Rules and extension of time within which to file a court application for rescission of default judgment, and
- Rescission of a default judgment granted by this Honourable Court under Case No. HC 2972/17.

The facts of this application revolve around the following synopsis;

The Applicant is a peregrine company duly incorporated in terms of German law. There exist another company incorporated in terms of Zimbabwean law which bears a strikingly identical name to the applicant called Bulchimex Gmbh Import- Export Chemikalien und Produkte (Private) Limited (“hereinunder referred to as Zimbabwean Bulchimex”). Of note is that the name is exactly the same save for the extension or addition of “(Private) Limited. The

applicant purchased from Peter Raymond Barton Development Company immovable property called Stand 295 Northwood Township 2 of Sumben ("the property") measuring 4094 square meters commonly known as No. 116 Twickenham Road, Mount Pleasant, Harare. The property was subsequently registered in the applicant's name on 23 June 2008 under Deed of Transfer No. 5022/08, eight (8) years before the registration of the Zimbabwean Bulchimex. In 2016 the applicant learnt that one Sarah Hwingwiri through the agency of the Zimbabwean Bulchimex, was attempting to dispose of the property. The applicant immediately sprung into action and obtained a provisional order under HC 12074/ 16 interdicting the Zimbabwean Bulchimex and Sarah Hwingwiri from dealing with the property in any way.

Before the provisional order was confirmed, the applicant discovered that the property had purportedly been sold to the first respondent in 2013 who subsequently obtained transfer through a default judgment under HC 2972/17. The applicant filed another urgent chamber application against the Zimbabwean Buchimex, Sarah Hwingwiri and first to third respondents under HC 2012/18 which was consolidated with the confirmation of the provisional order under HC 12074/16. This Honourable court in judgment number HH 213/18 confirmed the provisional order suffice to state that the judgment has been overturned by the Supreme Court.

In 2018, the applicant filed an application for rescission of the default judgment which had been scooped by the first respondent under HC 2972/17. The application was granted by this court as per MUZOFA J on 17 December 2018. The default judgment having been rescinded, the parties proceeded to file their pleadings in terms of the rules. The matter was set down for hearing and a notice of set down was served on the applicant's legal practitioners on 17 August 2021 when the trial was to commence the week beginning of 7 September 2021. Due to the short notice, the applicants successfully applied for postponement of trial to 4 October 2021 as the applicant's witnesses who were travelling from Bulgaria were not given adequate time to make travel arrangements.

On the date of trial, applicant's representative and witnesses were present and ready for trial but unfortunately the matter was removed from the roll by the Judge who highlighted that the applicant's papers were not in order. The applicant in a bid to have their matter heard, facilitated the setting down of the matter again for trial which was to commence on 23 February 2022. The notice of set down was served on the applicant's legal practitioner on 16 February 2022, barely three (3) business days to the hearing date. Due to short notice the applicants wrote two letters to

the Registrar dated 17 February 2022 and 22 February 2022 enquiring on the court's availability for trial and to advice the court that the applicant's witnesses travelling from Bulgaria and South Africa would not be able to attend trial since the witnesses would require 8 to 10 working days to book their flights and meeting the Covid 19 requirements since the pandemic was at its peak during this period. On the date of trial, the move for postponed failed and R56 of the High Court Rules, 2021 was invoked after holding that the applicant was in default of trial.

Aggrieved, the applicant noted an appeal against the judgment in Case No. HC 2972/17 on the pretext that it was a misdirection for the court *aquo* to hold that applicant was not present yet it was represented by its counsel as required by r24 of the court's rules. The appeal was noted on 16 March 2024 under Case No.SC 122/22 and was heard on 7 February 2023. The appellate court took the view that notwithstanding that the default judgment could have been granted in error or not, the point remains that it is a default judgment and can only be set aside on rescission. Resultantly, the matter was struck off the roll with costs.

On 2 March 2023, the applicant filed under Case No. HC 1405/23 a composite application for condonation and rescission of the default judgment granted in Case No. HC 2972/17 which was opposed by the first respondent. The composite application was subsequently set down for hearing before this Honourable court per CHINAMORA J on 13 July 2023. At the hearing the first respondent took, amongst others, the preliminary point that the application was fatally defective on account of being founded on R7 of the High Court Rules. The preliminary point was upheld with the consent of the applicant and the application was struck off the roll on the same date. It is upon this background that the present application is made.

Submissions by the parties

Vis the application for condonation, the applicant states that it became aware of the judgment sought to be rescinded on 24 February 2022, the very day it was handed down. The applicant states that the delay is not inordinate as it had been involved in multiple court applications in trying to rectify the issue. The delay in filing the present application therefore translates to slightly more than seventeen (17) calendar months as applicant awaited the outcome of an appeal in the Supreme Court was then struck off. It then filed a composite application which also suffered the same fate. The applicant further avers that the judgment is capable of being set aside as it is a misdirection for the court that entered judgment to hold that applicant was in default when it was represented by Advocate Banda and Ms Gurira, the instructing attorney.

The applicant states that there exist good and sufficient cause to set aside the default judgment as the default was not willful as the applicant's representative had to attend trail continuation in the Magistrates Court where he is an accused person which was scheduled for 24 February 2022 under CRB No. 3225/21. The applicant's representative further mixed up the dates resulting in him appearing at the Magistrates Court on 23 February 2022 instead of the 24th of February 2022.

Further on whether there are prospects of success in the main matter, the applicant states that it is able to prove that it never sold its property to either the first respondent or any other person and that it neither resolved to sell the property nor appoint Ivan Kostadinov Panchev and/or Sarah Hwingwiri as agents in the sale of the property making the purported sale in *fraudem legis*. It further states that the expert reports proffered by the Information Technology Expert as well as the Forensic Handwriting Expert will demonstrate that the sale agreement and purported emails between the applicant and the first respondent are patently contrived. It avers that the judgment was erroneously sought and erroneously granted as the court failed to take note of R24 of the High Court Rules and wrongly entered judgement in terms of R56 which was not applicable in this case. The applicant further states that had it been in default, the court could not have acknowledged the application for postponement made by the applicant and that the transcribed record of court does not show that the applicant was called three (3) times and did not appear.

The applicant avers that the respondents will not suffer any prejudice whatsoever which cannot be cured by an appropriate order of costs if the application is granted. It states that should condonation and rescission not be granted, it is the applicant which will suffer irreparable harm resulting in the first respondent benefiting from its own wrongdoing.

The application is opposed. The first respondent states that the application is fatally defective and raised four preliminary points as follows;

- That the application is replete with material non-disclosures and falsehoods.
- That no application for condonation has been made.
- That the application for rescission does not disclose a cause of action.
- That the application is not authentic and therefore no *locus standi* has been established.

Whether the application is replete with material non-disclosures and falsehoods?

The first respondent states that the applicant made the exact application as the application herein under Case No. HC 1405/23 seeking the same relief after which the deponent to the founding affidavit made certain averments which were false. The falsehoods are found on the following pages:

- Page 8 at paragraph 25;
- Page 9 at paragraph 32;
- Page 10 at paragraph 40;
- Page 10 at paragraph 43;
- Page 12 at paragraph 50;
- Page 13 at paragraph 56.3.

The first respondent avers that the same deponent apart from failing to explain those falsehoods in this application, makes further material non disclosures, misrepresentations and false averments. The examples given are that, the applicant purchased the property from one Peter Raymond Barton yet the title deed attached on page 93 clearly shows that the property was sold by Balkan Bulgarian Airlines (in Liquidation). Further the deponent described the property as a block of flats yet the property is a three bedroomed single story house. The first respondent further averred that the deponent misrepresented what transpired on the date of hearing when the default judgment was granted and ultimately the grounds of appeal were filed. It was argued that applicant's counsel conceded at the trial of this matter that a default judgment could be granted given that the representative of the applicant was not in attendance at court.

It mantains that the applicant persisted with its fatally defective appeal despite having agreed that r56 was applicable.The persistence was inspite of advice by the first respondent through a letter that the route of an appeal was not applicable in the circumstances. The first respondent mantains that the applicant failed to disclose that after the first rescission was granted, the matter was set down on three separate occasions and on two of those, applicant sought and was granted postponements. It avers that the applicant fails to disclose that the appeal was struck off with costs on a punitive scale on the basis that the applicant persisted after having been duly advised by the first respondent of the hopelessness of noting an appeal against a default judgment.

The respondent accuses the applicant of deliberately exaggerating in its founding papers that the property is worth in excess of US $500 000 yet the property is currently worth between

US$200 000 and US$300 000. The said respondent submitted that due to the material inconsistencies and non disclosures, the application ought to be dismissed.

The applicant contended that there is nothing in its papers to suggest that the present application is predicated on falsehoods and material non-disclosures and submitted that the preliminary point ought to be dismissed.

For clarity purposes, a material falsehood is a statement made which has a natural tendency to mislead the court thereby affecting the decision to be made by the court. Such a statement has the capability of influencing the court to reach a certain decision.

A close analysis of the aforementioned averments made by the first respondent shows that there exists no material falsehoods and non-disclosures which has a bearing on the present suit. Upon scrutinizing the Deed of Transfer, it is apparent that the property was bought by the applicant at a price of $105 358 200.00 from Balkan Bulgaria Airlines but the property was previously registered in favour of Peter Raymond Barton. Mistaken identity of the seller cannot qualify to be a material falsehood. The improvements on the property are not and naturally would not be in the title deed. Thus the reference to a block of flats would not be fatal to the proceedings although diligence is aways called for. That the legal description of the property is correct is what matters.In any case these issues would not have a bearing on this matter where the requirements for the granting of a rescission of judgment are otherwise spelt out.

Further the court notes that applicant admits that it adopted a wrong procedure by noting an appeal instead of seeking condonation. On that same note, the applicant's failure to disclose reason for dismissal of their application on appeal as well as discrepancies in the price of the property is not fatal. This preliminary point therefore lacks merit and is dismissed.

The second preliminary point raised by the 1st respondent is that the applicant's entire affidavit does not contain averments which specifically relate to an application for condonation as everything is 'jumbled together in a haphazard fashion'. This respondent contended that the applicant states that it has made an application for condonation on the face of its application and averred at paragraph 8.1 of the founding affidavit that the relief sought is for condonation for non-compliance with the rules of court and an extension of time within which to file a court application for rescission of judgment and provides no further information.

An examination of the applicant's papers shows that paragraphs 8.1 and 9 of the founding affidavit are clear that this is an application for condonation for non-compliance with the rules

and extension of time. Pages 8, 9 and 10 of the applicant's affidavit contain averments justifying an application for condonation. That being the case, this preliminary point fails.

The third preliminary point raised is that the application for rescission does not disclose a cause of action. In justifying its preliminary point, the first respondent argued that the applicant has founded its motion on two separate and distinct causes of action without pleading in the alternative. The applicant in response avers that since it is a composite application, when the applicant dealt with the prospects of success it relates to both the application for condonation and the substance of application for rescission. The applicant maintained that it would be superfluous to file separate affidavits dealing with condonation and rescission. For this argument, the applicant relied on the cases of *Chomurenga & Another v Telecel SC* 86/14 and *ZACC v Mangwiro & Another* SC 11/22.

The law on what constitutes a cause of action is settled. The applicant drew the court's attention to pages 9,10,11 and 12 specifically para 68.1, 68.4, 68.6, and 68.9 of the applicant's founding papers which contain averments upon which the relief being sought is premised on. For completeness, paragraphs 65 and 66 of the applicant's affidavit state as follows;

> **65**. "The default judgment is likely to be set aside on the basis of good prospects of success. It is also likely that the applicant will succeed in proving that the sale was a sham.
>
> **66**. Further, to show that this matter is triable, the first respondent is in possession of expert witness evidence, a hand-writing specialist report opinion on the authenticity, or otherwise, of the documents in issue".

The aforementioned paragraphs show that the applicant having denied signing the documents which the first respondent relies on in challenging the applicant's right to the property, has pleaded facts which if proven, point to prospects of success. The court is cognizant of the typographical error in para 66 of the applicant's founding affidavit, wherein the applicant refers to the respondent instead of itself. That being the case, this preliminary point falls away.

Vis the third preliminary point raised, the first respondent contends that the application is fatally defective because the applicant relies on separate causes of action without pleading in the alternative, namely Rules 27 and 29 of the High Court Rules. The applicant argued that an applicant who relies on both Rules 27 and 29 is not obliged to plead them in the alternative. The applicant avers that this court has the power to *mero motu* invoke R29 where it is clear from the papers that default judgment was granted in error despite the application having been made in

terms of R27. Reliance was placed on the case of *Barbosa De Sa* v *Barbosa de Sa* SC 34/16 and *The Gospel of Church International* 1932 SC 8/14.

A closer reading of the applicant's papers shows that it pleaded and proved the requirements of both r27 and r29 of the High Court Rules. Apparently this case is unique in as much as facts thereto would cover instances under both rules. There being no law that specifically prohibits an applicant to rely on both rules, it is legally competent that an applicant be specific as to the exact rule its application is premised on. In essence, whilst facts may fit both instances covered by both rules, a litigant ought to rely on the rule best suited to fit the facts. Although both rules have different requirements, they both relate to setting aside of a judgment that was granted in the absence of either an interested or affected party. The intended objective in making an application on either of the aforementioned rules is the same, that is rescission of a judgment. Henceforth pleading on both rules and not in the alternative does not on its own render the application fatally defective.

Lastly the first respondent contented that the application is not authentic and the applicant lacks *locus standi* based on the following grounds;

- That the addresses provided for by the applicant on the founding papers is different from that stated on the Board Resolution that appointed the deponent to the founding affidavit.
- That the Board Resolution signed by Deylan Tsanov Totem on the 18th of January 2021 states that Deylan Tsanov Totem is the Managing Director and sole director of the applicant yet the resolution signed by Mr Plamen Borkov Paraskevov states that he is the managing director.
- That Plamen Borkov Paraskevov states in his resolution that the deponent Boris Borislav is an employee of the applicant yet the financial report attached by the applicant states that the applicant does not have any employees. On the other hand, Deylan Tsanov Totem describes the deponent to the plaintiff's affidavit not as an employee but as a representative of the applicant.
- That the deponent to the founding affidavit does not know from whom the property was purchased from and describes the property in contention as a block of flats.

The first respondent further argued that because of the aforementioned contradictory state of affairs which the applicant failed to address, it raises the question whether the applicant is

actually in existence and whether it is genuinely aware that it is in litigation or it is that some rouge elements of the company seek to obtain an illicit benefit in the name of the applicant. The applicant submitted that the application is authentic and has *locus standi* to institute the application. The applicant argued that the first respondent cannot approbate and reprobate. He cannot maintain that he obtained a default judgment against the applicant who was duly served with a notice of set down for trial and on the other hand, and at the same time contend that the same applicant is not the one litigating.

The law on this this legal issue is settled. Where the legal standing of a deponent to an affidavit is challenged, the deponent has to prove that he is property authorized to act as such. The court is guided by the sentiments in *Dube v Premier Service Medical Aid Society & Another* SC 32/2022 where it was ruled that;

> "A person who represents a legal entity, when challenged, must show that he is duly authorized to represent the entity. His mere claim that by virtue of the position he holds in such an entity is not sufficient. He must produce a resolution of the board of that entity which confirms that the board is indeed aware of the proceedings and that it has given such a person the authority to act in the stead of the entity. I stress that the need to produce such proof is necessary only in those cases where the authority of the deponent is put in issue. This represents the current state of the law in this country."

Arguments advanced by the respondent on the discrepancies of the position that the deponent holds in the applicant, discrepancies on the address and identification of the property are immaterial. Going by the case of *Dube supra*, the appointment of the deponent through a resolution to act in a representative capacity for the applicant is sufficient. Such appointment conferred legal authority upon the deponent to act as such. The filing of the resolution suffices to draw a conclusion that the applicant is aware of these proceedings. As for its existence, the applicant proffered its Articles of Association which is a charter document that establishes the legal existence of a company. This preliminary point is dismissed for lack of merit.

Given the aforegoing, this matter will be decided on merits.

On merits

The applicant cited r7 of the High Court Rules and submitted that this application is one of the instances where a departure from the Rules is necessary in order to meet the ends of justice so as to allow the applicant to enjoy its right to defend the first respondent's claim in Case No. HC 2972/17. The first respondent however contended that this application is an ongoing abuse of

court process since the applicant willfully failed to use the first opportunity after being granted rescission of default judgment.

It is trite that in an application for condonation, a court considers, among other things, the length of the delay, the reasonableness of the explanation for it, the prospects of success, and the need for finality in litigation.

In seeking condonation the applicant avers that the delay is inordinate as the cumulative delay in filling the present application translate to seventeen (17) calendar months wherein the matter was before the Supreme court and came back to this court again. The applicant indicated that it held a genuine belief that it was a misdirection for the court to have entered a default judgment given that the proceedings before it were a nullity on account of defective set down hence it had taken the appeal route. It submitted that no prejudice will be suffered by the first respondent which cannot be cured by an appropriate order of costs.

On the prospects of success in the main matter, the applicant states that there are good prospects of success. It draws the court's attention to r29 and states that the judgment was erroneously sought and erroneously granted on the basis that the Notice of set down did not afford the appellant the minimum five days' notice of trial as prescribed by r54 (8). That being the case it mantains that the court fell into error by entering default judgment in circumstances where a notice of set down is invalid for want of compliance with a peremptory provision of the Court's Rules. Further it states that it was legally incompetent for the court to enter a default judgment as a party who is represented by Counsel is not and cannot be in default as per the dictates of R24. The applicant further stated that the evidence it has will prove that it never sold its property nor assigned any person to dispose the property in question hence the prospects of success are high. The applicant maintain that there is need for the court to grant it an opportunity to present its case given the solid evidence to be presented by expert witnesses who will challenge the purported sale documents.

In applications of this nature, the period or extent of delay alone is not decisive and cannot lead to dismissal of an application. This position is captured in *Chiweza & Anor v Mangwana & Ors* HH 168-17 where DUBE J remarked as follows;

> "The court is required to consider the requirements for an application for condonation cumulatively and weigh them against each other. The application for condonation is not decided on one exclusive factor. The existence of strong prospects of success may compensate for any

> inadequate explanation given for the delay. Where the applicant proffers a good explanation for the delay this may serve to compensate for weak prospects of success in the main matter. Good prospects of success and a short delay, albeit with an unsatisfactory explanation, may lead to granting of the application. The court dealing with the application has a wide discretion which it must exercise judicially after considering all the circumstances of the case. The factors are not to be individually considered, but cumulatively considered with the strong making up for the weak. The court should endeavor [*sic*] to be fair to all the parties involved."

Considering all the requirements cumulatively and weighing them against each other, this court finds that an acceptable explanation for breach of the rules of this court has been provided. The applicant showed zeal in trying to prosecute its case resulting in a delay to seek condonation. In as much as there is need for finality to litigation, the court will not close doors to a litigant who has shown that their case has good prospects of success and denying such litigant an opportunity to present its case will amount to great injustice. More so, when there is no prejudice to be suffered by the other litigant which prejudice cannot be cured by an order for costs. In that regard the court will grant the application for condonation.

In the application for rescission of default judgment, the court was placed in a difficult position of analyzing two different rules and determining the applicable rule as regards the circumstances. Given the circumstances, r27 of the High Court Rules is most appropriate in this case. The aforementioned rule allows the court to set aside a judgment if there is good and sufficient cause to do so. (see *Rydale Ridge Park (Private) Limited v Muridzo NO* SC17/23).

The court finds that there is good and sufficient cause to set aside the default judgment. The court accepts the applicant's representative's explanation that he got mixed up with dates for the two different cases he had to attend, ending up in the Magistrate Court instead of the High Court. The applicant can therefore not be said to have been in wilful default. The court notes that the notice of set down was unreasonably short given that the rest of the witnesses where known from the initial court appearance that they were coming from Bulgaria and South Africa respectively. Three days notice was and could not have been sufficient moreso when travelling was limited due to covid restrictions.

The applicant has a *bona fide* defence to the first respondent's claim. It provided *prima facie* evidence through an attached forensic report and intends to call a forensic document examiner to demonstrate that it never approved nor sold its property to the first respondent or any

other person qualifying the sale as fraudulent. The applicant should be given an opportunity to present its case which in court's opinion carries prospects of success. The forensic report proferred in evidence *prima facie* supports the applicant's claim that it never signed documents that the first respondent alleges it signed. The court identifies with the applicant's contention that if this application succeeds, the first respondent will not suffer any harm as opposed to the applicant whom if denied the opportunity to prove its case, stands to lose a valuable property. At the end of the day, justice should be seen to be done as the court is obliged to be fair to all parties. The application for rescission has prospects of success as the applicant was not in willful default and its application is *bona fide*. Given the aforegoing the court finds that there is just and sufficient cause to set aside the default judgment.

As regards costs, the applicant pleaded that there be no costs unless the composite application is opposed. Granting of costs is at the discretion of the court. The first respondent's actions ought not be penalized as its opposition to the application is not vexatious. Suffice that, even if the applicant had sought costs, same were not going to be awarded given the manner in which the matter was handled from the beginning. Research skills and diligence are attributes which legal practitioners should possess for them to adequately, effectively and properly advise litigants in pursuit of justice.

Accordingly, the following order is granted:

1. The application for condonation for non-compliance with the High Court Rules, 2021 and extension of time within which to file an application for rescission of default judgment be and hereby granted.
2. The application for rescission of judgment filed on 11 August 2023 be and is hereby deemed to be properly before the court.
3. The application for rescission of the default judgment handed down by this Honourable Court on 24th February 2022 under Case No. HC 2972/17 be and is hereby granted.
4. Each party to bear its own costs.

MUNANGATI – MANONGWA J: .....

MESSRS SINYORO AND PARTNERS, applicant's legal practitioners.
RUBAYA- CHINUWO LAW CHAMBERS, first respondent's legal practitioners.